IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUDHA ISMAIL JAM, *et al.*, Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	Civil Action No. 15-cv-00612 (JDB)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION[1]

For generations, traditional fisherfolk have lived on and fished from small spits of sand on the Gujarat coast. Budha Ismail Jam has fished at the Tragadi "bunder" (fishing harbor) for the last 17 years. Catching, drying and selling a variety of fish, he and his extended family were able to scratch out a subsistence living. Nearby, in the town of Navinal, farmers like Ranubha Jadeja used well-water to grow dates, coconuts, cotton, wheat and other crops. But in recent years, the fish stocks have crashed. Salt-water has contaminated many of the wells in Navinal, including Mr. Jadeja's. These Plaintiffs' livelihoods, and many of their neighbors', have been destroyed by the environmental damage wrought by the Tata Mundra Ultra Mega coal-fired power plant ("the Plant" or "the Project"), funded by the International Finance Corporation ("IFC").

The Plant could not have been built without the IFC, the World Bank Group's ("WBG") private lending arm. The IFC funded the Plant even though, from the planning stages, it knew or at least should have known, that the Plant risked precisely the harms local people like Plaintiffs Jam and Jadeja have suffered.

Like a private bank, IFC lends to private parties. But its mission is poverty reduction, and its first principle is to "do no harm" to people or the environment. The IFC therefore retains substantial control over a project's environmental and social performance. But with respect to the Tata Mundra Project, the IFC's own internal compliance mechanism, the Compliance Advisor/Ombudsman ("CAO"), found that the IFC abandoned its own lodestar: the Project has destroyed the meager livelihoods of local people like Mr. Jam and devastated the local environment. And rather than helping those it harmed and is chartered to aid and protect, the IFC essentially told the Project's neighbors to go pound sand. It ignored the CAO's findings and recommendations. And then, having rejected the only complaint process it recognizes, IFC asserts here that it – unlike

[1] Plaintiffs request oral argument on this motion.

any foreign government – is absolutely immune and therefore above the law.

The IFC is not immune. It claims that the International Organizations Immunities Act ("IOIA") entitles it to the same immunity foreign states had in 1945. But by 1945, the Supreme Court had rejected absolute immunity. Instead, states received immunity *only* where the State Department ("DOS") suggested it, or, if DOS was silent, where political branch policy required it.

Under the 1945 standard, there is no immunity here. DOS has not suggested immunity and has explicitly rejected the notion that organizations like the IFC are absolutely immune. The IFC does not dispute that it was engaged in commercial activity, not a governmental act. And as DOS announced in 1952, there is no immunity for commercial acts. DOS has also been clear that this "restrictive theory" of immunity applies to international organizations; their immunity must be determined under the Foreign Sovereign Immunities Act ("FSIA"). If the IOIA enshrines the immunity of 1945, deference to the political branches requires that the IFC is not immune.

In fact, however, the IOIA does not preserve the 1945 approach to immunity that the political branches rejected decades ago in enacting the FSIA. The Supreme Court has made clear that a cardinal principle in interpreting a sovereign immunity statute is that immunity must be determined as of the time of the suit. That principle applies to the IOIA. The result is the same as under the 1945 approach: the IOIA incorporates the FSIA, and the IFC is not immune.

Regardless, the IFC has waived any immunity it might have. Under the IFC's express waiver and D.C. Circuit precedent, waiver is found whenever it is in IFC's long-term organizational interest. This is particularly so where the IFC needs the trust of an outside party, which is the case with the host communities here; the IFC cannot proceed without community support. So the IFC must assure communities that, when it says its projects will do no harm, its word is good. But a community, armed with the knowledge that the IFC may, as here, ignore its own standards, reject the recommendations of the CAO, and declare itself immune from suit, would have little reason to

trust the IFC. Such communities would likely resist any potentially harmful IFC-funded project. These circumstances – where the IFC needs the trust of a third party but likely cannot get it without the possibility of suit – are precisely those in which the D.C. Circuit has found waiver.

The IFC itself recognized when it created the CAO that outside accountability is in the IFC's best interests. But given the CAO's strict institutional limits, including the fact that it cannot compel the IFC to take any steps in response to its findings, and the CAO's demonstrated inability to provide redress, the accountability that the IFC concedes that it needs to fulfil its mission can only be provided by courts. And waiver is particularly warranted because Plaintiffs seek to vindicate the *IFC*'s chartered objective not to harm the environment or local people, and its own standards. Permitting the very people the IFC was established to help, and whose support the IFC needs, to vindicate rights that the IFC requires itself to protect provides obvious benefits to the IFC.

The IFC has not meet its threshold burden to show that India is an available and adequate forum, as required for *forum non conveniens* dismissal. It has not submitted to jurisdiction in India or otherwise shown it can be sued there. Nor are there any absent parties indispensable to this case. Joint tortfeasors are not indispensable parties.

Last, Plaintiffs have adequately pled the elements of their claims. There is no special immunity rule for tortfeasors who cause harm through lending. A defendant can be negligent in as many ways as there are varieties of human folly. And the IFC was no ordinary lender. It is liable not just for negligently funding this risky project, but also because it retained responsibility for and control over the environmental performance of the project, and then failed to exercise its authority.

STATEMENT OF FACTS

I. The Tata Mundra Project has substantially harmed these Plaintiffs.

Plaintiffs are impoverished people who farm or fish near the Tata Mundra Power Plant, Machimar Adhikar Sangharsh Sangathan (Association for the Struggle for Fisherworkers' Rights)

("MASS"), an organization of local fisherfolk, and the village of Navinal. Compl. ¶¶ 6, 13-15, 24. The Plant has severely harmed Plaintiffs and their neighbors. The individual Plaintiffs can no longer sustain their livelihoods, and face increasing health risks.

Budha Ismail Jam, Kashubhai Manjalia and Sidik Kasam Jam are traditional fishermen who live and fish with their families for most of the year on Tragadi and Kotadi bunders, adjacent to the Plant. Compl. ¶ 23. Since the Plant was built, the fish catch has plummeted, and so accordingly has their already meager incomes. *Id.* ¶¶ 76, 183, 214, 227, 235-37. Entire species of fish have largely disappeared. *Id.* ¶ 83. The severe decline in the fish catch is largely the result of hot water from the Plant's cooling system, which has substantially altered the marine environment close to the shore. *Id.* ¶¶ 7, 76, 83, 89, 183. Fishermen are forced to go further out to sea to try their luck. *Id.* ¶ 77. For those who fished on foot, fishing has become virtually impossible. *Id.* ¶¶ 78, 216, 238.

The IFC knew about these risks; it identified the cooling system and its impacts on the marine environment as critical issues, *id.* ¶¶ 48-50, and reviewed the system's modeling projection. *Id.* ¶ 85. The Plant's once-through cooling system, which is inappropriate for its size, *id.* ¶¶ 34, 164, dumps huge amounts of hot and possibly chemically-laden water into the ocean through a man-made river, at a rate of up to 630,000 cubic meters per hour, at temperatures above those allowed by the Loan Agreement, *id.* ¶¶ 37-38, 83, 90, directly next to Tragadi bunder. *Id.* ¶ 40. This water is up to 5°C (9°F) above the maximum sea surface temperature in the Gulf of Kutch. *Id.* ¶¶ 86-87.

Construction of the Plant, and especially the cooling system's intake and outfall channels, has resulted in the loss to the bunder communities of significant land previously used for homes and economic activity and serious economic harm to these poor fishing communities. *Id.* ¶¶ 78-80.

Although the Plant's environmental clearance required lining of the intake channel to prevent saltwater intrusion into groundwater, this had not been done as of 2013, and leakage has caused increasing groundwater salinity. Compl. ¶¶ 36, 110, 185. The increased salinity has rendered

many wells unsuitable for drinking – drinking water must now be purchased from outside, *id.* ¶¶ 111-112, 115 – as well as for irrigation. *Id.* ¶¶ 8, 112. Farmers in Navinal, including Mr. Jadeja, have been forced to stop growing many crops, or rely only on less-valuable crops they can grow during the short monsoon season, when irrigation is not required. *Id.* ¶¶ 8, 113-114.

The Plant exceeds air pollution limits, and has significantly degraded local air quality. *Id.* ¶¶ 10, 99-101. The Plaint's air quality monitoring board is often turned off or broken. *Id.* ¶ 102. Coal dust and fly ash and other coal combustion byproducts escape from the Plant and its uncovered coal storage yards, ash ponds, and 9-mile-long, partially covered coal conveyor belt from the port. *Id.* ¶¶ 9, 32-33, 105, 243. Residents increasingly suffer from respiratory problems. *Id.* ¶¶ 10, 103-104, 109, 243. Coal dust and fly ash regularly cover homes and property, damage crops, contaminate fish that bunder residents have laid out to dry, and harm the health of nearby residents. *Id.* ¶¶ 106-109.

The loss of resources and productive agricultural lands has made it impossible for many people to practice their traditional livelihoods of fishing, animal husbandry, salt-panning and agriculture. *Id.* ¶¶ 11, 114. Farm laborers no longer have farms to work on, and many have been forced to leave their families for extended periods to find work elsewhere. *Id.* ¶¶ 8, 114.

II. The IFC's mission includes a commitment to protect the environment and local people.

The IFC lends to companies, not governments. It only invests in projects where there would otherwise be insufficient private capital. DE 10-8 (Articles of Agreement, Art. III §3(i)); Compl. ¶ 46. Its "mission is to fight poverty." Ex. 2[2] ¶ 8 (IFC 2012 Sustainability Policy); Compl. ¶ 203. "Central" to IFC's mission is its "intent to 'do no harm' to people and the environment[.]" Ex. 3 ¶ 8 (IFC 2006 Sustainability Policy); Ex. 2 ¶ 9; Compl. ¶ 203. "Environmental and social issues are among the most critical components of the [IFC's] mission." DE 10-9 at 1 (CAO Terms of

[2] Unless otherwise noted, all exhibits are to the Declaration of Richard Herz, filed herewith.

Reference (TOR)). IFC is "committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process," and that "natural resources" are managed "sustainably." Ex. 3 ¶ 8; Ex. 2 ¶ 9; Compl. ¶ 204. Thus, the IFC's "triple bottom line" approach measures not just "profit" but also "people" and "planet." Ex. 6 at 13 (CAO, *A Review of the IFC's Safeguard Policies* (2003)).

To ensure its investments promote its mission, the IFC's "Sustainability Framework" lays out policies that define the social and environmental duties of the IFC and its clients. Compl. ¶¶ 45, 117. This includes the IFC's Social and Environmental Sustainability Policy, which "defines IFC's responsibilities in supporting project performance," DE 10-12 at 83 (CAO 2014 Annual Report); Compl. ¶ 117, and "outline[s] the outcomes that IFC must achieve." Ex. 7 at 3 (IFC Environmental & Social Review Procedures (ESRP) Manual (2007)); Compl. ¶ 117. By adhering to this Policy, IFC seeks to "enhance the . . . accountability of its actions," "help clients manage their environmental and social risks and impacts and improve their performance," and "enhance positive development outcomes." Ex. 2 ¶ 7 (2012 Sustainability Policy). According to Prof. David Hunter, who the IFC cites, this policy is "viewed as critical to promoting IFC's development mission." Hunter Decl. ¶ 9.

The Framework also includes the Performance Standards on Environmental and Social Sustainability, which define the clients' responsibilities and the "requirements for receiving and retaining IFC support." Compl. ¶ 117; DE 10-12 at 83. *See* Ex. 4 (2006 Performance Standards); Ex. 5 (2012 Performance Standards). The Performance Standards are binding on the clients, but the IFC also has an affirmative obligation to ensure from the outset that the projects it funds are capable of complying with the Performance Standards and operated in a manner consistent with them. *See* Ex. 3 ¶¶ 2, 5, 17, 26 (2006 Sustainability Policy); Ex. 2 ¶ 22, 28 (2012 Sustainability Policy); Compl. ¶¶ 117, 126, 131, 135. The IFC also takes on obligations to monitor and supervise environmental and social compliance throughout the duration of the investment, and to take remedial action in the

event of a breach of the Performance Standards and other environmental and social commitments. Ex. 3 ¶¶ 11, 20, 26; Ex. 2 ¶¶ 7, 24, 30, 45; Compl. ¶¶ 117, 136-138.

The IFC has also established an internal complaint mechanism, the CAO, which considers complaints by those harmed by IFC projects and reviews the IFC's compliance with its social and environmental obligations. Compl. ¶ 141. The CAO was created to promote the IFC's development mission by "ensur[ing] that projects are environmentally and socially sound." Hunter Decl. ¶ 13 (quoting CAO TOR). The CAO came about in response to "a sense of frustration on the [WBG] in the 1990s with existing IFC procedures for dealing with conflicts within projects." Ex. 8 at 14 (*The CAO at 10, Annual Report FY2010 and Review FY2000–10* (2010)). Both civil society and IFC's own Board pushed for an accountability mechanism. *Id.*; Hunter Decl. ¶ 13. The IFC recognized that "the internal organization, however strong and independent, should be subject to *outside scrutiny*." DE 10-9 at 1 (CAO TOR) (emphasis added).

The IFC's credibility depends on accountability. The CAO was intended to help "build[] a credible and responsive structure to ensure that projects are environmentally and socially sound[,]" and to ensure the IFC has "[c]learly established and enforced policies, procedures and guidelines." DE 10-9 at 1 (CAO TOR).[3] As WBG President Jim Yong Kim recently explained, "[r]obust implementation of these standards is the only way we can guarantee that project outcomes are consistent with our overarching goal, and that those who host our projects – local communities – do not bear an undue burden of risk." DE 10-12 at 2 (CAO 2014 Annual Report, Forward from WBG President). Communities are "genuine partners in development," Ex. 8 (*CAO at 10*), and their "participation and partnership" are "essential." DE 10-12 at 2. Being seen as credible and legitimate by not only clients and shareholders, but also by affected communities was accordingly an important

[3] *Accord* Ex. 8 at 32 (*CAO at 10*) (recognizing the IFC needs "credible mechanisms that can provide the independent oversight and verification necessary to ensure that [the IFC] meet[s its] publicly stated standards and commitments").

aspect of the CAO. *Id.;* Ex. 8.

Thus, the "complaints of people affected by projects financed or insured by IFC" must be "addressed in a manner that is fair, constructive and objective." DE 10-9 at 2 (CAO TOR). The CAO's creation "reflected the IFC's view that providing rights and remedies to communities is necessary for the successful fulfillment of its development mission." Hunter Decl. ¶ 13; *see also id.* ¶ 9 (IFC has recognized that "the right to remedy, including compensation, furthers its development mission"). Strong, enforced environmental and social policies are thus critical to IFC's mission. *See* Hunter Decl. ¶ 10.

III. The IFC provided keystone funding to the Tata Mundra Project despite knowing the project's risks to local people and the environment.

The IFC provided $450 million to Coastal Gujarat Power Limited ("CGPL") to develop the 4,150 mega-watt coal-fired Tata Mundra Power Plant. Compl. ¶¶ 2, 56. Without the IFC's funding, the Project could not have gone forward. *Id.* ¶¶ 2, 57-59.

The IFC knew of the foreseeable harms described above. The IFC classified the proposed Plant as a "category A" project; *i.e.* it had "potential significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented." DE 10-18 at 9 (CAO Tata Mundra Audit Report); Compl. ¶¶ 48, 129. IFC recognized from the outset that the Project would substantially harm the environment and local communities if sufficient steps were not taken to address critical issues. Compl. ¶¶ 4, 48, 164; DE 10-18 at 15 (Audit Report). These issues included selection of an appropriate cooling system, the large volume of seawater intake, impacts on the marine environment and fish, cumulative air quality impacts of the Project and a nearby power plant, the adequacy of the air pollution control measures; and restoration of livelihoods. Compl. ¶¶ 4, 48; DE 10-18 at 15; Ex. 9 (IFC Summary of Proposed Investment). The IFC also noted that "improper mitigation or insufficient community engagement" could trigger "unacceptable environmental impacts." Compl. ¶¶ 4, 48; DE 10-18 at 15. The harms Plaintiffs have suffered were both foreseeable and largely

foreseen by the IFC. Compl. ¶ 4.

The IFC told its Board of Directors that it would add value to this project by requiring adherence to stricter standards than the national requirements – including the IFC air emission limits and Performance Standards – and thus would improve the Project's environmental and social performance. *See* DE 10-18 at 35-36 (Audit Report); Compl. ¶¶ 172, 173. The Board approved the investment and the Loan Agreement was executed in April 2008. Compl. ¶ 56.

Before Board approval, IFC interviewed community members to assess support for the project. Compl. ¶¶ 54-55; DE 10-18 at 21 (Audit Report). Because it was a "category A" project, the IFC was required to assure the Board that there was "Broad Community Support" (BCS) for the proposed project from potentially affected communities. Ex. 3 ¶ 20 (2006 Sustainability Policy); Ex. 7, Annex 3.5 (ESRP Manual (2007)); Compl. ¶¶ 130, 207; *see also* DE 10-18 at 21. But local fishing communities had been raising concerns since 2006. Compl. ¶ 50; DE 10-18 at 17 n.9. And although bunder fisherfolk had been identified as "project affected," the IFC did not consider whether there was BCS in these communities. Compl. ¶ 162; DE-18 at 20-22.

Despite knowing that unacceptable environmental harms were likely, the IFC approved the Project's funding without taking reasonable steps to prevent these harms. Compl. ¶¶ 5, 163. For example, IFC knew an appropriate cooling system was critical to avoiding harm, but approved the loan before the system's design was finalized. *Id.* ¶¶ 4, 164-65. It later approved a flawed design and location for the intake and outfall channels and allowed them to be built without proper assessment of impacts and without adequate preventive and mitigation measures. *Id.* ¶¶ 167-70. And when the foreseeable harms materialized, the IFC failed to enforce loan provisions requiring CGPL to remediate harm and prevent further injury to Plaintiffs and the environment. *Id.* ¶¶ 5, 163, 169, 175.

The IFC knew, or should have known, of the impacts the Plaintiffs were suffering and which they still endure. In addition to its pre-commitment visits, IFC made at least *nine* "supervision

visits" to the Plant after committing to the project. *See* DE 10-18 at 41, 42 (Audit Report).

The Loan Agreement contains "standard provisions requiring adherence to Environmental and Social Requirements," DE 10-18 at 40 (Audit Report), which includes applicable environmental law, the Performance Standards, and IFC's 2007 Environmental Health and Safety (EHS) Guidelines. DE 10-5 Schedule 1 at 13-14. The agreement also requires compliance with the project-specific Environmental and Social Action Plan (ESAP), which identifies measures the client must take in order to mitigate and prevent harm to local communities and the environment and ensuring compliance with the Performance Standards. *Id.*; Ex. 10 (ESAP); DE 10-18 at 16.

The Loan Agreement makes compliance with these and other environmental and social requirements binding contractual obligations, which the IFC has authority to enforce. *See, e.g.* DE 10-5 Schedule 1 at 13-14; DE 10-6 Schedule 1 at 91-92, 104, 123; *see also* DE 10-18 at 23 (Audit Report). CGPL must report regularly on compliance with these requirements. *See e.g.* DE 10-6 Schedule 1 at 114. And the Agreement stipulates that all loan disbursements are conditioned on CGPL meeting IFC's standards to IFC's satisfaction. *Id.* at 76, 86; *see also id.* at 123. These provisions, which gave the IFC a central role in the Plant's environmental performance, were specifically intended to protect the Plaintiffs, other Class members, and the environment. The conditions went unmet, but IFC continued with disbursements.

The IFC did more than set standards for the project; it retains substantial authority to actively manage the project, including to change CGPL's board of directors and senior management. DE 10-6 Schedule 1 at 94. The IFC has overall control of the Project's environmental and social impacts. For example, any changes to the binding Environmental Management Plan require IFC approval. *Id.* at 104. CGPL is required to quarterly report any environmental and social issues, including any remedial steps "in form and substance satisfactory to the" IFC. *Id.* at 114. And the IFC also has the right to conduct its own assessments of the Project's environmental and social

compliance and require corrective action. *Id.* at 91-92. Failure to comply with the environmental and social conditions can result in default. *Id.* at 123.

IV. The CAO found that, with respect to Tata Mundra, IFC violated its own standards.

In June, 2011, Plaintiff MASS filed a complaint with the CAO about Tata Mundra's impacts on fishing communities. Compl. ¶¶ 149, 151. This complaint alleged that IFC had failed to ensure that the risks and impacts it identified were prevented, mitigated, and/or remedied, and failed to adequately consider other risks and impacts at all. *See id.* ¶ 151; DE 10-13 (MASS Complaint). It alleged that the IFC had failed to ensure the project complied with the Performance Standards in numerous respects and described harmful impacts on the marine environment and fish populations, health impacts from airborne pollution, and displacement, among others injuries. *See id.*

The complaint was referred to the CAO compliance function in 2012, which conducted an appraisal and concluded that the majority of the allegations "merit[ed] further inquiry" and a full audit was needed. DE 10-16 at 14 (Appraisal Report); Compl. ¶ 150.

The CAO visited the site in February 2013 – when construction was incomplete and the plant was operating at partial capacity – and in October 2013 released its Audit Report, Compl. ¶ 153. The report found "evidence that validate[d] key aspects of the MASS complaint." DE 10-18 (Audit Report) at 3; *see generally* Compl. ¶ 154. CAO concluded that the IFC had failed to meet its social and environmental obligations, and in key respects had failed to "meet the due diligence requirements set out in the Sustainability Policy." DE 10-18 at 29. Other findings included the IFC's failure to ensure "pre-project consultation requirements were met" in relation to directly affected fishing communities, *id.* at 21, and to ensure the risks and impacts of the Project on them – especially Kotadi and Tragadi bunders – were adequately considered. *Id.* at 19, 21, 22. The CAO rejected the IFC's view that impacts had been minimal, *id.* at 37-38, noting, for example, evidence that households on the bunders had been physically and economically displaced. *Id.* at 38-39.

CAO found significant shortcomings in IFC's review and supervision of the Project's impacts on the airshed. Compl. ¶ 154(d). IFC should have classified the airshed as "degraded" and subject to stricter emission limits. Compl. ¶ 154(g); DE 10-18 at 35-36. The IFC's treatment of air quality standards was "noncompliant" and "at odds" with its "stated rationale for its involvement in the project . . . namely, improved [environmental and social] performance" through "more stringent" standards. DE 10-18 at 35-36; Compl. ¶ 173.

CAO also found that the IFC's review of the marine impact assessments was not commensurate with the risks to the ecosystem and fishing communities' livelihoods. Compl. ¶ 154(d) & (f); DE 10-18 at 29. The IFC did not ensure that the outfall channel's heated discharge would comply with the 3°C limit required by the EHS Guidelines and the Loan Agreement, despite modeling projections that showed significant risks. Compl. ¶¶ 154(e), 164, 168; DE 10-18 at 29. And the IFC failed to adequately assess and require mitigation of cumulative risks and impacts of the Project and the nearby Mundra Port and Adani Power Plant. Compl. ¶ 154(h); DE 10-18 at 46.

The IFC rejected most of the CAO's findings. Compl. ¶ 155; DE 10-19 ¶¶ 7-9 (IFC Response to Audit Report). It subsequently pointed to CGPL's "Action Plan" which consisted of a list of studies that CGPL is conducting, or "committed to" undertake. DE 10-20. At no point did the IFC commit to take any responsive action in light of the CAO findings. *See id.*

In its first monitoring report in January 2015, the CAO found that the IFC had failed to effectively respond to *any* of the CAO's findings. Compl. ¶ 156; DE 10-21 at 5, 22 (CAO Monitoring Report). The IFC, for example, did not address displacement of fishing communities and land acquisition issues, DE 10-21 at 15-16, nor did it address the findings of non-compliance with air pollution and thermal effluent standards. *Id.* at 17-18, 19; *see also* Compl. ¶ 156. Instead, the IFC had focused only on the "commissioning of technical studies" and "corporate social responsibility measures implemented by the client." DE 10-21 at 22 (Monitoring Report). CAO

noted "the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts." *Id.* at 5, 15, 22; Compl. ¶ 156.

The IFC responded to the Monitoring Report with a brief statement that only noted the studies outlined in CGPL's Action Plan and that more time was needed before they would be completed. DE 10-22 at 1 (IFC Response to Monitoring Report).

V. The CAO lacks the power to ensure a remedy to those harmed by IFC projects.

The CAO was designed to have three distinct functions: (1) Dispute Resolution, to address concerns between client and community; (2) Compliance, to ensure that IFC is following its own standards; and (3) Advisory, to provide IFC with general guidance. DE 10-10 at 4-5 (CAO Operational Guidelines); Hunter Decl. ¶¶ 16, 17, 19, 24. The CAO's functions are strictly limited. It admits that it is not a "legal enforcement mechanism" nor "a substitute for international court systems or court systems in host countries." DE 10-10 at 4 (Op. Guidelines); Compl. ¶ 202.

Dispute Resolution is voluntary, and usually only between the client and community; the CAO cannot compel the IFC to participate and the IFC rarely does. Hunter Decl. ¶ 17; Genovese Decl. ¶¶ 15-16. IFC's actions and compliance with its standards are handled through Compliance, not Dispute Resolution. DE 10-10 at 4-5 (Op. Guidelines). The IFC has "never provided any significant financial support or other remedy to affected communities as a result of any agreement reached through the CAO process." Hunter Decl. ¶ 17. IFC's absence "limits the dispute resolution process as an effective means for local communities" to seek redress. *Id.*

Compliance is similarly limited. The CAO can make a "finding of non-compliance" and issue recommendations (as it did here), but it has no remedial or enforcement powers; it cannot compel the IFC to provide remedies to affected communities or to take any other measures. Hunter Decl. ¶¶ 21-22, 25; Genovese Decl. ¶¶ 13, 15; Compl. ¶¶ 146, 202. The CAO can only keep an audit "open" and "monitor" the situation "until actions taken by IFC[ ] assure CAO that IFC[ ] is

addressing the noncompliance." DE 10-10 at 25 (Op. Guidelines); *see also* Compl. ¶ 202; Hunter Decl. ¶ 21. The IFC's response is "completely discretionary." Hunter Decl. ¶ 22. As experts and participants in CAO processes agree, the CAO "does not operate, nor was it ever intended to operate, as a substitute for the vindication of affected parties' legal rights in a court of law." Hunter Decl. ¶ 25; *accord id.* ¶¶ 10, 12, 15; Genovese Decl. ¶ 30; Fields Decl. ¶ 24.

ARGUMENT

I. The IFC is not immune from this suit.

Under the IOIA, the IFC is entitled only to "the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). Whether judged by 1945 standards or today's, foreign nations would not be immune from this sort of suit, and so neither is the IFC. Regardless, the IFC lacks immunity where it "expressly waive[s] [its] immunity." *Id.* The IFC's Articles of Agreement, as interpreted by the D.C. Circuit, contain an express waiver that applies here.

A. The IOIA does not immunize the IFC.

In *Atkinson v. Inter-American Development Bank*, the D.C. Circuit held that the IOIA's "same immunity" language refers to immunity as it existed in 1945, when the IOIA was passed. 156 F.3d 1335, 1340-41 (D.C. Cir. 1998). In 1945, immunity was not absolute. Instead, immunity was granted, or not, based on the will of the political branches. Both DOS and Congress have rejected the absolute immunity that the IFC claims. In any case, *Atkinson*'s conclusion that the IOIA enshrines anachronistic immunity principles cannot withstand recent Supreme Court authority.

1. Under the "immunity . . . enjoyed by foreign governments" when the IOIA was passed, the IFC is not immune.

a. In 1945, courts deferred to the judgment of the political branches.

The Supreme Court, citing the leading cases extant when the IOIA was passed, concluded that courts in that era "'deferred to the decisions of the political branches – in particular, those of

the Executive Branch – on whether to take jurisdiction' over particular actions against foreign sovereigns." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (quoting *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486 (1983) (citing *Ex parte Peru,* 318 U.S. 578, 586-590 (1943); *Republic of Mexico v. Hoffman,* 324 U.S. 30, 33-36 (1945))). The Court reaffirmed that conclusion just last term. *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct 2250, 2255 (2014).

Specifically, a foreign sovereign could request a "suggestion of immunity" from the Department of State. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). If DOS granted it, the court would find immunity. *Id.* at 311-312 (citing *Ex parte Peru*, 318 U.S. at 588). If the foreign sovereign did not seek a suggestion or DOS remained silent, the court would "'decide for itself,'" *id.* at 311 (quoting *Ex parte Peru*, 318 U.S. at 587), based on the political branches' views. Courts determined "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 312 (quoting *Hoffman*, 324 U.S. at 36 (1945)) (brackets in *Samantar*). This meant that immunity was granted where DOS policy warranted, but also that immunity was *denied* where there was no such policy. *Hoffman*, 324 U.S. at 35-36. Courts would not "allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35.

In *Hoffman*, decided less than a year before the IOIA passed, the Supreme Court rejected Mexico's claim to immunity. 324 U.S. at 38. The State Department did not suggest immunity, so the Court held that it must decide "in conformity" with immunity principles DOS had previously accepted. *Id.* at 34-35. It noted that DOS had not previously recognized immunity in like circumstances, and held that "[w]e can only conclude that it is the national policy not to extend [such] immunity." *Id.* at 36-38. Where the government had not recognized an immunity, it was the Court's "duty" not to recognize an immunity. *Id.* at 35 & n.1, 38.[4]

[4] In *Curran v. New York*, 77 N.Y.S.2d 206, 209, 191 Misc. 229, 231-32 (N.Y. Sup. Ct. 1947), the court held that an international organization was immune under the IOIA, not because of any absolute immunity, but because the Court was "bound" to follow the State Department's suggestion of immunity.

The IFC ignores all of this. It claims that it is automatically immune because immunity in 1945 was "absolute." Def. IFC's Memorandum of Law in Support of its Motion to Dismiss (MTD), DE 10-1 at 8, 19-20. But that conflicts with at least six Supreme Court cases describing immunity in 1945: *Hoffman*, *Peru*, *Verlinden*, *Altmann, NML Capital* and *Samantar*. The IFC relies solely on D.C. Circuit caselaw, primarily *Atkinson*. MTD at 19-20. If *Atkinson* did hold that immunity was (and is) absolute, that holding has been superseded by the later decisions in *Altmann, NML Capital* and *Samantar*, which clearly hold otherwise.[5] No D.C. Circuit case has considered this post-*Atkinson* authority and nonetheless found immunity in 1945 to be absolute. If immunity under the IOIA is as it was in 1945, it must be determined by deferring to the policies of the political branches.

b. Deference to both Congress' and the Executive's policy requires that organizations are not immune for their commercial activity.

The State Department has not requested immunity here. So under the 1945 rule, the Court must look to Congressional and Executive policy. Both branches have concluded that immunity is restrictive, not absolute, and that it does not extend to commercial acts such as those here.

Since 1952, when DOS adopted the "Tate Letter," the "restrictive theory" of sovereign immunity has been the "official policy of our Government." *Alfred Dunhill of London, Inc., v. Republic of Cuba*, 425 U.S. 682, 698 (1976) (opinion of White, J.). Under that policy, immunity shields only a foreign nation's public acts, not its commercial acts. *NML Capital*, 134 S. Ct at 2255. Congress

[5] *Atkinson* stated that in 1945, "foreign sovereigns enjoyed — contingent only upon the State Department's making an immunity request to the court — 'virtually absolute immunity.'" 156 F.3d at 1340 (quoting *Verlinden*, 461 U.S. at 486). That would not provide absolute immunity here, because the State Department has not requested it. The decision later simply declares, incorrectly, that in 1945, immunity was absolute. *Id.* at 1341. But *Verlinden*'s "virtually absolute immunity" quote was about *The Schooner Exchange* v. *M'Faddon,* 7 Cranch 116 (1812); *Verlinden* noted that under *Peru* and *Hoffman*, courts deferred to the political branches. 461 U.S. at 486. Thus, "the notion that foreign governments necessarily enjoyed absolute immunity in 1945 is contravened by [*Verlinden*]." *OSS Nokalva v. European Space Agency*, 617 F.3d 756 at 762 n.4 (3d Cir. 2010) (citing 461 U.S. at 486). The IFC also cites *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 279 (D.C. Cir. 2014), and *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.,* 264 F. App'x 13, 15 (D.C. Cir. 2008), MTD at 19-20, but those cases assumed immunity is "absolute" without analyzing immunity in 1945 or the Supreme Court cases showing such immunity was not absolute.

codified that policy in 1976 in the FSIA. *Altmann*, 541 U.S. at 691.

Thus, courts applying the immunity available to states in 1945 – the rule of deference to the political branches – must defer to the FSIA, not because the FSIA is the statutory framework that now controls sovereign immunity, but because it reflects the political branches' policy. *Altmann* requires such deference. There, the Court, in holding that the FSIA applies to acts that occurred before its passage, reasoned that since courts "[t]hroughout history" have deferred to the political branches' decisions, it was appropriate "to defer to the most recent such decision – namely, the FSIA." 541 U.S. at 696. *Altmann*'s holding that deference to the political branches requires deference to the FSIA applies equally here.[6]

State Department policy also compels the conclusion that the FSIA applies. The case for denying immunity here is stronger than it was in IOIA-era cases like *Hoffman*. There, immunity was denied because DOS had not *accepted* it; here DOS has *explicitly rejected* the immunity the IFC claims, by adopting the restrictive theory of immunity. And it has specifically noted that the restrictive theory should apply to organizations like the IFC.

In 1977, DOS refused to suggest immunity for the OAS in *Dupree Associates v. OAS* and *Broadbent v. Orfile*, explaining that it no longer did so for international organizations. Ex. 11 (Letter from Detlev F. Vagts, Office of the Legal Adviser, Dep't of State, to Robert M. Carswell, Jr., Organization of American States (March 24, 1977)). The State Department noted that "[t]o change that practice in the face of the [FSIA] seems inappropriate, especially since the [IOIA] links the two types of immunities." *Id.*

Subsequently, the United States asked the D.C. Circuit to apply the FSIA to such suits,

[6] The IFC quotes *Atkinson*'s holding that "[t]he [FSIA] is 'beside the point' because it does not reflect any direct focus by Congress upon the meaning of the earlier enafcted provisions of the IOIA." MTD at 8 (quoting 156 F.3d at 1341-42) (internal quotation omitted). But under the rule of deference to the political branches, the question is not, as in *Atkinson*, whether the FSIA directly amends the IOIA, but whether the FSIA reflects political branch policy. It surely does.

stating that there is "no question that since the passage . . . of the [FSIA] international organizations are now fully subject to suit in American courts for their [private acts]." Ex. 12 (Br. *Amicus Curiae* of the United States in *Broadbent v. Organization of American States*, No. 79-1465 at 6-10 (D.C. Cir. 1978) ("U.S. *Broadbent amicus*"). Indeed, the United States noted that the point of the FSIA was to "depoliticize[]" immunity; to end the role of DOS in making binding immunity determinations. *Id.* at 7; *accord Altmann*, 541 U.S. at 690-91. Thus, in passing the FSIA, Congress concluded that making such determinations is not the DOS's proper function. And the Executive announced in *Broadbent* that it did not want any such role in determining the immunity of international organizations.

The United States also agreed with Congress' conclusion, in the FSIA, that states are not immune for their commercial acts. U.S. *Broadbent amicus* at 7. Such immunity had been rejected "by most members of the international community." *Id.* at 9-10 (citing *Dunhill*, 425 U.S. at 695-706 (opinion of White, J.)). Since the United States could think of "no reason" international organizations should be entitled to an immunity that states lack, it explicitly rejected the notion that IOIA immunity is absolute. *Id.* at 10. The State Department reiterated this policy in 1980, when it advised the Equal Employment Opportunity Commission that: "By virtue of the FSIA . . . *international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities*."[7]

Deference to the political branches requires deference to this *current* policy. The question is not what immunity the State Department would have granted in 1945.[8] Trying to figure out what the Department would have thought seventy years ago about a particular case would be just "rarified

[7] *OSS Nokalva, Inc.*, 617 F.3d at 763-64 (3d Cir. 2010) (quoting Letter from Roberts B. Owen, Legal Adviser, State Department, to Leroy D. Clark, General Counsel, Equal Employment Opportunity Commission (June 24, 1980) (emphasis and ellipses in *OSS Nokalva*), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law,* 74 Am. J. Int'l L. 917, 917-18 (1980)).

[8] Prior to the 1952 Tate Letter, the State Department "typically" requested immunity in suits against friendly states. *NML Capital, Ltd.*, 134 S.Ct. at 2255. On the other hand, it had "long been the [State Department's] view" that foreign sovereign immunity should not be available for commercial activity. *E.g. United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929), and the Department, at least at times, asserted as much to courts considering immunity. *E.g. id.*; *The Pesaro*, 277 F. 473, 480 n.3 (S.D.N.Y. 1921).

historical speculation." *Altmann*, 541 U.S. at 713 (Breyer, J., concurring). More importantly, courts deferred to the political branches to get a contemporary *political* judgment. *Hoffman*, 324 U.S. at 35-36 (holding that "guiding principle" in assessing immunity was to avoid embarrassing Executive by reaching determinations contrary to Executive policy); *Altmann*, 541 U.S. at 696 (holding "immunity reflects current political realities and relationships").

In sum, after *Altmann*, *NML Capital* and *Samantar*, *Atkinson*'s holding that the immunity is to be determined as it was in 1945 requires this Court to defer to the political branches. And the political branches have concluded that restrictive immunity is the law of the United States, and that the IOIA incorporates it. International organizations are not immune for their commercial acts.

2. *Atkinson*'s conclusion that immunity is to be determined as it was in 1945 cannot withstand subsequent Supreme Court authority.

Plaintiffs thus far have assumed that the IOIA adopts the law of foreign sovereign immunity as it existed in 1945. But it does not. Recent Supreme Court precedent undermines *Atkinson* and shows that the IOIA must be read to incorporate changes to the law of sovereign immunity.

A statute's plain language controls. *Atkinson* stated that the IOIA "provides no express guidance on whether Congress intended to incorporate . . . subsequent changes" to immunity law. 156 F.3d at 1341. That is no longer tenable. The IOIA states its reference to sovereign immunity in the present tense: the "same immunity . . . as *is* enjoyed."[9] Subsequent to *Atkinson*, the Supreme Court clarified that a term "expressed in the present tense," such as a corporation's status under the FSIA as a foreign government's instrumentality, is applied as of the time of suit. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). This "plain text" interpretation, *id.*, controls here, and should end the inquiry.

Even if the plain language were not so clear, the Court's approach to immunity also indicates

[9] "Same" means "same." It does not mean "same as of the date of this Act," language Congress could have included if it wished. *See OSS Nokalva*, 617 F.3d at 764.

that current sovereign immunity law applies. *Dole* applied "the longstanding principle" that jurisdiction "depends upon the state of things at the time of the [suit]." *Id.* Similarly, *Altmann*, in holding that the FSIA applies to cases filed after the law was passed, even if the conduct occurred before, relied on the fact that sovereign immunity has "[t]hroughout history" been determined by "current political realities and relationships" as expressed by the political branches. 541 U.S. at 696; *accord id.* at 708-09 (Breyer, J., concurring) (noting immunity "traditionally. . . is about a defendant's *status* at the time of suit"). Since the Supreme Court adopted the principle that sovereign immunity is determined under the law when the suit was filed, and since that principle applied in 1945, it applies equally to the IOIA.[10] IOIA immunity is determined by current sovereign immunity law – the FSIA.

3. The restrictive theory does not permit immunity here.

The IFC does not dispute that if the FSIA or the restrictive theory it embodies applies, there is no immunity here. Nor does IFC dispute that its acts are commercial activity for which the restrictive theory and thus the FSIA do not provide immunity. 28 U.S.C. § 1605(a)(2); Compl. ¶¶ 193-99. Since the restrictive theory applies, the IFC is not immune.

B. The IFC has waived immunity.

There is no immunity where the organization has expressly waived it. *See Mendaro v. World Bank*, 717 F.2d 610, 613-14 (D.C. Cir. 1983); 22 U.S.C. § 288a(b). The IFC's Articles of Agreement have an express immunity waiver. *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 838-39 (D.C. Cir. 2009).[11] The "broad language" of the IFC's waiver "contain[s] no exceptions for different types of suit." *Id.* at 839-40. The D.C. Circuit has "read a qualifier into it," *id.* at 839, the "corresponding benefit" test.

[10] *Nyambal*, 772 F.3d at 279 and *Inversora Murten,* 264 F. App'x at 15, followed *Atkinson*, but neither considered *Altmann* or *Dole*. The Third Circuit rejected *Atkinson* on a number of grounds, including that DOS, which played a key role in drafting the IOIA, believes that it incorporates the FSIA. *OSS Nokalva*, 617 F.3d at 764.
[11] That waiver provides: "Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities." Art. VI, § 3, (May 25, 1955) 7 U.S.T. 2197, 264 U.N.T.S. 117.

Under that test, the IFC is not immune, because it would have to subject itself to suit by this type of plaintiff if it hopes to achieve its chartered objectives.

1. The IFC has waived immunity wherever the type of suit provides the IFC a corresponding benefit.

The IFC has waived immunity in cases where it receives "a corresponding benefit which would further the organization's goals," *i.e.* when immunity would "hinder the organization from conducting its activities." *Mendaro*, 717 F.2d at 617. The question is "whether a waiver of immunity to allow this *type* of suit, by this *type* of plaintiff, would benefit the organization over the long term." *Osseiran*, 552 F.3d at 840.[12] The inquiry "focus[es] on the nature of the parties' relationship rather than the nature of the contested transaction" and "the reasons why the [IFC] would waive immunity for this type of suit." *Vila v. Inter-Am. Investor Corp.*, 570 F.3d 274, 281 (D.C. Cir. 2009).

The nature of the parties' relationship is critical. The D.C. Circuit "distin[guishes] between external activities and . . . internal management." *Id.* at 281. There is no waiver for suits arising out of "internal administrative affairs," like employment disputes. *Mendaro*, 717 F.2d at 620. But the IFC *waives* immunity for "actions relating to its external activities." *Id.* at 621. The D.C. Circuit noted that "parties may hesitate to do business with an entity insulated from judicial process; promises founded on good faith alone are worth less than obligations enforceable in court." *Vila*, 570 F.3d at 279. There would be benefit from, and thus waiver for, suits involving a host of external relationships: independent consultants, *id.* at 276, debtors, creditors, and even telephone companies and sellers of office supplies. *Mendaro*, 717 F.2d at 618.

[12] Plaintiffs preserve for appeal the issue of whether the corresponding benefits test is correct. It unduly narrows the plain meaning of the IFC's waiver. *See Lutcher S.A. Celulose e Papel v. Inter-American Dev. Bank,* 382 F.2d 454, 457 (D.C. Cir. 1967) (holding drafters "must have been aware that they were waiving immunity in broad terms"); *Osseiran,* 552 F.3d at 839 ("Although the waiver provision contained no exceptions for different types of suit, [*Mendaro*] read a qualifier into it."). And it conflicts with the internationally accepted "functional necessity" doctrine, which includes a presumption *against* immunity unless the organization needs it to achieve its objectives, not a presumption of *immunity* unless the organization needs *waiver*.

Osseiran, for example, held that the IFC waived immunity. Relying on the IFC's charter provision that it "seek to . . . sell[] its investments," the D.C. Circuit permitted a suit concerning IFC's alleged representations to a frustrated potential purchaser because waiver "might help attract prospective investors by reinforcing expectations of fair play." 552 F.3d at 837, 840 (quoting Articles of Agreement of the IFC, art. 6, § 3(vi)). Since the IFC had identified "no unique countervailing costs," the waiver's "broad language" controlled and the IFC was not immune. *Id.* at 840.

Plaintiffs need not *prove* this type of suit will benefit the IFC. *Osseiran* found a corresponding benefit without citing any evidence, noting only that parties "may" hesitate to deal with an entity that cannot be sued and that the "potential benefit" of increased expectations of fair play was sufficient. 552 F.3d at 840; *accord Vila*, 570 F.3d at 281-82.

2. Suits like this one further the IFC's mission.

Plaintiffs' claims easily meet the "corresponding benefit" test. They arise out of the IFC's *external* activities and relationships with host communities. And those relationships are essential to the IFC's ability to conduct its mission. The IFC could not function without credible policies and promises to local people that it will not destroy their environment and livelihoods. These relationships and promises are even more important than others that have merited waiver; the IFC cannot claim its promise to protect host communities matter less than a promise to pay Staples.

Waiver for this type of suit provides critical benefits to the IFC over the long term. *First*, the IFC needs local communities to believe its promises and support its projects; it requires "broad community support" for a project such as Tata Mundra. Just as parties may hesitate to do business with the IFC if they could not enforce the IFC's promises in court, *e.g. Vila,* 570 F.3d at 280; *Osseiran*, 552 F.3d at 840, local communities may hesitate to host a potentially harmful project if they know that the IFC can ignore its own promises and policies and they will have no recourse. Indeed, they have every reason to fight such projects tooth and nail, and communities can, through ordinary

political and legal means, delay or block projects they oppose.

The IFC points to the CAO, MTD at 11, but CAO processes are inadequate. The IFC's "mandate . . . and public trust demand" that it "meet the highest [accountability] standards." DE 10-12 at 2. If the CAO is the only relief mechanism, the IFC comes nowhere close. The CAO was not intended to replace courts; the IFC concedes the CAO is not a court, nor a legal enforcement mechanism. MTD at 6. The CAO cannot compel the IFC to do anything. *Supra* SOF § V. Even when the CAO sides with complainants, they may be left without remedy if the IFC chooses not to respond. Genovese Decl. ¶ 17; Hunter Decl. ¶ 22. The CAO's "limited mandate prevents it from fulfilling its mission to hold the IFC accountable" and to ensure the "environmental and social outcomes of [its] projects are consistent with" its "mission and policy objectives." Genovese Decl. ¶ 11; *see also* Watters Decl. ¶ 15. "[T]he CAO can only signal when and how far the IFC[ ] is falling short of its obligations, but can do nothing to ensure that it meets them." Genovese Decl. ¶ 13.

The experiences of affected communities from around the world confirms that host communities cannot rely on the CAO to provide redress. *E.g.* Fields Decl. ¶ 22 ("the CAO process failed to produce either a negotiated outcome or a compliance investigation."); Bird Decl. ¶¶ 21, 28 (CAO "ha[s] provided no avenue for redress of damages;" IFC has "undertaken no measures aimed at insuring reparations" despite CAO's findings of non-compliance); Genovese Decl. ¶ 29 ("Despite the CAO's best efforts to persuade IFC to meet its responsibilities . . . it was unable to do so."); *id.* ¶¶ 19-30; Watters Decl. ¶ 10 (after multiple rounds in the CAO, community representatives "were convinced that working with the CAO was not in the interest of the community and that it did not have an intent to hear the community's concerns, which were repeatedly ignored."); *id.* ¶¶ 8-15; *see also* Hunter Decl. ¶¶ 22, 25. The point is not that victims can never benefit from CAO involvement. Some do. *See* Genovese Decl. ¶¶ 1.e., 16, 23. But the CAO does not replace a court.

Indeed, *these* communities went to the CAO. And the CAO found the IFC out of

compliance with its obligations. *Supra* SOF § IV. The IFC rejected the CAO's findings, and has taken no remedial steps. *Id.* The IFC's claim that that "the CAO process already provides Plaintiffs with an alternative means of recourse" is wrong. MTD at 11-12.[13]

Given the experiences of these communities and others, people potentially affected by IFC projects are unlikely to believe the IFC's assurances that it will "do no harm" or that the CAO will provide an effective relief mechanism. Such communities may hesitate to engage with the IFC if the only available recourse is the CAO, which IFC may summarily ignore. *E.g.* Watters Decl. ¶ 15.

This type of action provides the IFC with the very benefits that it ascribed to the creation of the CAO; only here, those benefits are real, not illusory. The CAO was created in light of the IFC's inability to address complaints, to provide the IFC credibility and ensure its projects are environmentally sound and its policies enforced. *Supra* SOF § II. But given the IFC's willingness to ignore the CAO, the CAO cannot meet these goals. The IFC's *reasons* for creating the CAO show that another avenue for accountability is needed. The IFC needs to assure host communities that its word is good, and since, as in *Vila* and *Osseiran*, the IFC's word alone is not enough, this is precisely the kind of case in which the D.C. Circuit has found waiver.

Second, creating the CAO was critical to maintaining IFC donor support, which required "the establishment of effective citizen-based accountability mechanisms." Hunter Decl. ¶ 11. Major government donors like the U.S. have emphasized that the IFC must effectively respond to the findings and recommendations of its accountability mechanism. *See* Compl. ¶¶ 210-11.[14]

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[13] Victims may choose the CAO's dispute resolution process or a compliance investigation. Genovese Decl. ¶ 14. Here complainants requested compliance. *See* DE 10-16 at 8 (Appraisal Report); MTD at 5-6. Prior meetings with the company had achieved nothing and dispute resolution usually only involves the company (and only if it consents). SOF § IV. IFC rarely participates, and the CAO cannot force it to. SOF § V. Dispute resolution "is not an adequate process through which the IFC can be held accountable." Genovese Decl. ¶ 16. In any event, since the complaint has already gone to compliance, the matter cannot go to dispute resolution unless an entirely new complaint is filed. *See* Hunter Decl ¶ 23; Fields ¶ 25; Genovese ¶ 14.

[14] IFC misconstrues Plaintiffs' reason for citing the 2014 Consolidated Appropriations Act. *See* MTD at 17-18. Congress believes meaningful remedies, including "just compensation," are essential; failure to provide

Third, although waiver in *Vila* and *Osseiran* would help the IFC carry out its mission, here, Plaintiffs seek to *directly* vindicate the IFC's core mission. Environmental and social issues are a central part of that mission. SOF § II; *see also* Fields Decl. ¶ 23 ("Without accountability in [the Maple Energy] case, the IFC not only failed to alleviate poverty, but caused the Communities increased marginalization and ongoing suffering."). Here, IFC managers violated the IFC's first, "do no harm" principle. But the "corresponding benefit" test asks whether suit furthers the *IFC*'s interests, not its managers'. It is in the IFC's interests to waive immunity for this type of suit precisely *because* the IFC's managers may ignore IFC's commitments.[15]

Plaintiffs' corresponding benefit allegations are not conclusory. MTD at 12-13. The Complaint alleges in sufficient detail, for example, that meaningful avenues for redress are critical to ensuring IFC can obtain needed community support, and that where, as here, the IFC failed to uphold its standards, its goals of reducing poverty while avoiding harm are best met by allowing redress for those injured. Compl. ¶¶ 12, 200-08. Plaintiffs support their allegations of the IFC's benefits with the IFC's own policies and statements and numerous declarations.[16]

IFC now claims that it is "perfectly capable" of enforcing its own policies, MTD at 13, but when it established the CAO, it recognized the need for "outside scrutiny." SOF § II. In any event, IFC management failed to enforce IFC policies here, and nothing – except access to courts – will prevent management from doing so again. Where the IFC violates its own policies, providing victims, whose trust the IFC requires, a viable forum furthers the IFC's mission.

This does not necessarily mean that the IFC has waived immunity for all environmental

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such remedies belies the IFC's "commitment" to its government shareholders "to meet the highest standards of…accountability[,]" DE 10-12 at 2 (CAO Annual Report), and thus could threaten critical donor support.

[15] This binding pre-commitment to core values is no different than one standard reason given for why, in a democracy, we tolerate a Constitution through which previous generations constrain current majoritarian decision-making. Just as it was in our Nation's long-term interests to lash our democracy to the mast in order to enshrine fundamental values, so too is it in IFC's.

[16] If the Complaint is in any way inadequate, Plaintiffs seek leave to amend.

claims where the IFC has violated its own policies. But where, as here, IFC disregards a CAO compliance report, an enforceable remedy provides the IFC an institutional benefit – the same benefit the CAO was supposed to provide – of assuring host communities there is some means of redress against the IFC and enforcing the IFC's own core principles.

3. The IFC's own arguments highlight why waiver is appropriate here.

The supposed "cost" the IFC claims actually *benefits* the IFC. It argues that a suit for environmental harms would make it less willing to fund development projects, because such a suit would be a "disruptive interference" with its lending practices. MTD at 11 (quoting *Atkinson*, 156 F.3d at 1338). What nonsense. The IFC's mandate is not to provide loans irrespective of the environmental and human toll. *Supra* SOF § II. "[C]ompliance with rules, standards, policies, and laws is fundamental to [the IFC]." Ex. 8 at 32 (*CAO at 10*). As the World Bank's President emphasized, ensuring IFC projects are aligned with its "core commitment to sustainable development" requires "[r]obust implementation" of IFC environmental policies. DE 10-12 at 2.

Accordingly, this suit supports, not "disrupts," the IFC's mission. The IFC's own "do no harm" mandate is *more* restrictive than the ordinary tort standards at bar. And unlike internal employment disputes or garnishment proceedings, what the IFC calls "devastating administrative costs," MTD at 11 (quoting *Atkinson*, 156 F.3d at 1338), are just the "costs" to the IFC of implementing its mission. That is no "cost." Encouraging IFC's management to do what the IFC already requires benefits the IFC.

Nor is this suit "interference." The IFC's official position is that it *needs* "community participation and partnership." *Supra* SOF § II. But now, by asserting that victims may complain only to the CAO – which the IFC can ignore at its whim – IFC management says that it will account for community concerns only if it feels like it. Such hubris is at odds with the IFC's mission and policy.

The IFC argues that businesses in developing nations "frequently struggle" to follow "sound environmental practices." MTD at 11. Perhaps so, but funding projects or partners that cannot protect the environment violates IFC's mission and policy. Not every potential IFC partner is unable to protect the environment; not every potential IFC project requires environmental destruction. The IFC's mission requires it to choose projects and partners that follow IFC policy and obey the law.

The IFC also ignores its own control over its projects' social and environmental performance. It regularly includes binding environmental and social obligations in its contracts, as it did here, and supervises compliance over the life of the loan. *Supra* SOF §§ II, III.; Compl. ¶¶ 122, 128. Indeed, IFC's mission includes "[s]etting standards" for environmental and social risks. Compl. ¶ 125. And the IFC's justification for funding *this* project – as it often is – was that it would improve the project's environmental and social performance because its requirements were "more stringent" than India's. DE 10-18 at 35-36 (Audit Report); SOF § III. The Loan Agreement requires CGPL to comply not only with IFC standards, but also applicable law. SOF § III. This eviscerates IFC's claim that ensuring compliance with the law would impose on IFC some new and "devastating" administrative burden. MTD at 11. In suggesting that it is just the helpless victim of an imperfect world, the IFC ignores its own mandate and leverage to *improve* environmental protection.

The fact that the IFC contractually binds its partners to protect the environment and supervises their compliance also refutes IFC's arguments that Plaintiffs seek to turn it into a project manager and that potential liability would require it to violate its Articles of Agreement by "managing" enterprises in which it invests. MTD at 10-11. Potential liability could only change the IFC's role if the IFC never intended to enforce the contractual provisions it regularly requires.[17]

As in *Osseiran*, the IFC "identifies no unique countervailing costs like [the interference with

[17] And IFC protects itself from liability to third parties through the Loan Agreement, which provides for full indemnification, *see* DE 10-6 Schedule 1 at 132, including with respect to environmental harms. *Id.* at 131.

employment policies] in *Mendaro*." 552 F.3d at 840 (citing 717 F.2d at 618). Sovereign immunity is not intended to promote or protect lawlessness. *See Altmann*, 541 U.S. at 696. Management's expressed desire to skirt the law and the IFC's own environmental policies give local communities yet more basis to distrust the IFC. And it confirms that the IFC as an institution benefits from suits that enforce the IFC's core principles and provide host communities with a means of redress.

4. The IFC's various attempts to rewrite the "corresponding benefit" test should be rejected.

The "corresponding benefit" test considers whether this particular type of case would benefit the IFC as an institution, including whether outside parties with whom the IFC needs to engage will do so if the IFC cannot be sued. *Vila*, 570 F.3d at 279; *Osseiran*, 552 F.3d at 840. The IFC proposes four new bright-line rules that would radically limit that practical, fact-specific test, none of which reflects D.C. Circuit law.

First, the IFC suggests that the mere existence of an internal grievance mechanism, no matter how inadequate, means that the corresponding benefit from suit is minimal. MTD at 12. But the D.C. Circuit has never held that a fundamentally flawed procedure bars waiver. The question of whether communities and others will trust it without the possibility of suit is context-specific.

The IFC misconstrues *Atkinson*. The passage it cites was narrowly tailored to the dispute at issue: "In *Mendaro,* we deemed the benefit of attracting talented employees by virtue of permitting suits by employees to be minimal given that employees already could invoke an internal grievance mechanism." *Atkinson*, 156 F.3d at 1338 (analyzing 717 F.2d at 617). The IFC tries to turn this statement into a general rule through selective quotation, deleting all reference to the employment context. MTD at 12. But *Atkinson* explicitly contrasted employee suits with those by persons outside the organization. 156 F.3d at 1338. And there is no indication that the administrative tribunals referenced in *Mendaro* could be cast aside in the way that the IFC cast aside the CAO's findings. *See Broadbent v. Organization of American States*, 628 F.2d 27, 35-36 (D.C. Cir. 1980) (noting that OAS

tribunal could order reinstatement or indemnity). The IFC's suggestion that an ineffective grievance procedure, for parties external to the IFC, precludes a finding of a corresponding benefit as a matter of law finds no support in *Atkinson* or *Mendaro.*

Indeed, *Vila* rejected the organization's argument that waiver for claims by independent consultants did not benefit it because it provided an alternative means of redress. 570 F.3d at 281; *accord Lutcher S.A. Celulose e Papel v. Inter-American Dev. Bank*, 382 F.2d 454, 460 (D.C. Cir. 1967) (holding "the existence of binding and exclusive arbitration procedure is irrelevant").[18]

IFC argues that the CAO was created to provide accountability without waiving immunity, citing Prof. Hunter. MTD at 12. But he notes that the CAO was established because "good development outcomes required the participation of affected communities." Hunter Decl. ¶¶ 10-11; SOF § II. Waiver "was not a significant topic of discussion," and while potential immunity "provided an implicit backdrop for the political discussions," CAO's creation "was not dependent on any particular view of . . . immunity." *Id.* ¶¶ 11, 15. As the CAO admits, it is not "a substitute for international court systems or court systems in host countries." DE 10-10 at 4; *accord* Hunter Decl. ¶¶ 10, 15 25; SOF § V. And regardless of the original discussions, "experience with the CAO… confirms" it is "no substitute for access to judicial processes." Hunter Decl. ¶ 12.

The mere existence of a grievance procedure that the IFC can ignore at its whim does not close the "accountability gap." It provides no basis for parties to trust the IFC and does not provide the benefits that the IFC itself attributed to it.

Second, IFC purports to derive – from a single district court decision pre-dating *Vila* and *Osseiran* – a new test that would bar waiver whenever a plaintiff seeks to vindicate objectives the

[18] *Vila* concluded that "the merits of the IIC's approach for contracted consultants is beside the point." *Id.* Even if *Vila* meant only that the mechanism was irrelevant in that case because the plaintiff was not a contracted employee and therefore could not use it, a mechanism that the organization does not provide is on equal footing with one the organization has ignored. The CAO process is no defense to waiver.

organization *could* pursue on its own. MTD at 13 (citing *Atl. Tele-Network Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 132 (D.D.C. 2003)). That is not the law. IFC "offers no response to *Osseiran*'s observation that expectations of fair play are relevant to whether parties would hesitate to do business with an international organization." *Vila*, 570 F.3d at 281. In both *Vila* and *Osseiran*, the organization *could* have provided redress on its own. But that was not enough, because third-parties might not engage with the organization unless it *had* to submit to suit. So too here.

Third, the IFC seeks to limit the D.C. Circuit's test by asserting that claims by parties "injured . . . by an organization's borrowers" are automatically excluded from waiver. MTD at 13-14. That misconstrues the claims here. Plaintiffs' allegations, which must be taken as true, *Vila*, 570 F.3d at 281, are that the IFC is *directly* liable for its own negligence in funding the Project despite knowing that it would likely result in precisely the harms Plaintiffs have suffered, *e.g.* Compl. ¶¶ 3-5, 160, 179, 187, and in negligently failing to exercise its supervisory authority. *Id.* ¶¶ 175, 190-91, 303-06.

Regardless, there is no rule barring waiver where a person is directly harmed by an IFC partner. The D.C. Circuit has never purported to limit in advance which types of claims involving the IFC's external relations further its mission. On the contrary, the very passage the IFC quotes made clear that waiver is *not* limited to "debtors, creditors, bondholders," but also includes "those *other* potential plaintiffs to whom the [organization] would have to subject itself to suit in order to achieve its chartered objectives." MTD at 13-14 (quoting *Mendaro*, 717 F.2d at 615) (emphasis added). And the D.C. Circuit has broadly held that the IFC's waiver provision was "intended to abrogate the [IFC's] immunity to actions relating to its external activities." *Mendaro*, 717 F.2d at 621.

The IFC cites *Mendaro* and *Atkinson*, MTD at 13-14, but this case is nothing like those. The former dealt with an employee, and the latter garnishment; as *Osseiran* noted, both dealt with "internal affairs." 552 F.3d at 839. Neither involved the kind of critical *external* relationship at issue here. The IFC's relationship with local people is like its relations with its contractors and other

outside parties whose trust the IFC needs; relations about which the D.C, Circuit has found waiver.

The other cases the IFC cites also involved plaintiffs and claims totally different from those here. *Banco de Seguros del Estado v. Int'l Fin. Corp.* addressed claims by a bank that had deposits in another bank that was part-owned by the IFC. 1:06-CV-2427, 2007 WL 2746808 at 2 (S.D.N.Y. Sept. 20, 2007). In *Atlantic Tele-Network*, a telephone company that had allegedly been promised an exclusive license by Guyana sought to sue an international organization that was to lend money to Guyana to build a competing network. 251 F. Supp. 2d at 128. And, as noted, the court applied an inapposite standard. Similarly, in *Inversora Murten*, a party that obtained a default judgment learned that Nigeria had awarded contracts to the judgment debtor for projects financed by the World Bank, and sought to enforce a writ of attachment against the World Bank. 264 Fed. App'x at 14. The court held that the non-wage garnishment proceedings provided no more benefit to the Bank than did the wage garnishment proceedings in *Atkinson*. *Id.* at 15; *see also Vila*, 570 F.3d at 281 (holding *Inversora Murten* does not bar waiver for claims involving external activities). Since those cases are nothing like this one, they provide no insight into whether the type of claims here further the IFC's mission.[19] The IFC's attempt to cobble together – from these completely different, fact-based cases – a bright-line rule that would extend so far as to exclude the claims here is meritless.

Indeed, *Banco de Seguros* considered whether the specific type of claims at issue furthered one of the IFC's specific chartered objectives. 2007 WL 2746808 at 5; *accord Inversora Murten*, 264 Fed. App'x at 15 (considering the benefits and costs of the specific type of claim). That is precisely the case-specific inquiry the IFC seeks to avoid.

The IFC's related suggestion that the IFC and the Plaintiffs must have a "direct commercial

[19] The IFC now claims that it "had no relationship with the plaintiffs." MTD at 14. But these are the very people the IFC is chartered to help and obligated to protect. Indeed, the IFC was required to ensure community support, *supra* SOF § III, although it failed to meet that requirement, Compl. ¶¶ 154(b), 162. And the IFC itself recognizes the benefits of providing victims like Plaintiffs here access to the CAO, although it can only reap those benefits if it waives immunity.

relationship involving [IFC's] investments" is also wrong. MTD at 15. Claims by a telephone provider do not involve an organization's investments. *See Mendaro*, 717 F.2d at 618. While the Court has found waiver in cases involving a direct commercial relationship, *e.g.*, *Osseiran*, 552 F.3d at 840-41, it has never *limited* waiver in that way. Nor is there any reason to create such a limit. The IFC's relations with the people it is chartered to help and protect are critical to its mission. The IFC sees communities as "genuine partners," *supra* SOF § II, and recognizes that "environmental and social performance matter as much financial return." DE 10-11 at 4 (Beyond Compliance).

Fourth, the IFC asks this Court to create a new rule requiring deference to the litigation position IFC management has taken to defeat a suit it finds inconvenient. MTD at 15. But whether an organization's invocation of immunity "would interfere with its mission" is "for the federal judiciary to decide." *Osseiran,* 552 F.3d at 840. This Court must assess the IFC's institutional interests by reference to its mission and policies, as the D.C. Circuit has uniformly done. In *Vila*, the D.C. Circuit rejected an organization's claim that waiver would not provide a corresponding benefit and afforded its objections no deference. 570 F.3d at 281. So too in *Osseiran*. 552 F.3d at 840. Indeed, the D.C. Circuit explicitly noted that *Mendaro* and *Atkinson* had not "considered the organization's view conclusive." *Id.* And while *Osseiran* did not foreclose the possibility of deference – it was not argued in that case, *see id.* – the IFC provides no basis to create a new deference rule here.

IFC argues "[b]y analogy" to the deference afforded to federal administrative agencies, MTD at 15-16, but that is based on a "presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court." *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) (internal punctuation omitted). There is no such presumption here, and that separation of powers issue is hardly "analogous." An agency's interpretation of a law is a far cry from an entity's management's self-interested claim that the organization is immune. The IFC cites no case providing *that* sort of deference, even to an agency.

Where, as here, management has violated core IFC policies, the interests of the IFC and its managers are not aligned. If the managers believe that following the IFC's mission impedes their lending priorities, that just confirms that suits like this one are necessary to protect the IFC.

II. Defendants fail to meet their *forum non conveniens* burden.

A. The IFC has not shown it can be sued in India; India is an unavailable forum.

The IFC has not meet its threshold *forum non conveniens* burden to show that India is an available and adequate forum. *See El-Fadl v. Cent. Bank of Jordan* 75 F.3d 668, 677 (D.C. Cir. 1996). The defendant must be subject to suit in the foreign forum. *See Rundquist v. Vapiano SE,* 798 F. Supp. 2d 102, 133 (D.D.C. 2011); *Piper Aircraft Co. v. Reyno*, 454 U.S 235, 255 n.22 (1981). The IFC has not shown it is subject to jurisdiction in India, nor has it stipulated to jurisdiction or service of process or to waive any immunity it *might* enjoy in India. Indeed Plaintiffs asked the IFC several times whether it would submit to jurisdiction and why it believes there is jurisdiction in India, and the IFC's counsel refused to answer. Herz Decl. ¶¶ 2-7.

The Shroff Declaration does not fill the gap. A defendant must "provide enough information to enable the District Court to evaluate the alternative forum." *El-Fadl*, 75 F.3d at 677. But Shroff merely states conclusorily that India "possesses jurisdiction over the whole controversy," DE 12 at ¶ 20; he "does not address the question of whether the actual Defendant in this case [ ] could be sued . . . ." *Shaw v. Marriott Intern., Inc.*, 474 F. Supp. 2d 141, 145 (D.D.C. 2007). This Court has required a defendant to show that the foreign court would have jurisdiction over the particular suit and that sovereign immunity would not bar the claim. *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 28, 31 (D.D.C. 2008); *Croseus EMTR Master Fund L.P. v. Federative Rep. of Brazil*, 212 F. Supp. 2d 30, 38 (D.D.C. 2002). The IFC has not shown India is an available forum here.

The IFC's argument also fails because it has not shown that Plaintiffs' claims are timely in the National Green Tribunal (NGT), the only Indian forum that the IFC points to as viable. DE 12.

¶¶ 33, 38. A forum is inadequate if it provides no remedy, *see Piper*, 454 U.S. at 254, and thus is inadequate if the claims would be barred by a statute of limitations. *Park v. Didden*, 695 F.2d 626, 633 n.17 (D.C. Cir. 1982); *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 340 (D.D.C. 2007). The NGT Act imposes strict time limitations, where a claim could be barred within as little as six months of the cause of action arising. Dutta Decl. ¶ 8.[20] The applicable time limitation would likely be highly contested, *id.* ¶ 10, and the IFC fails to show that the Plaintiffs' claims would not be time-barred. Thus, what according to the IFC is the *only* forum in India may not be available at all.[21]

B. The private and public interest factors are in equipoise or favor Plaintiffs.

Since the IFC has not met its threshold burden, there is no reason to balance private and public interests. *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005). Given this, Plaintiffs do not respond fully to these arguments.[22] Regardless, it is clear that the IFC cannot overcome the "substantial presumption" favoring Plaintiffs' chosen forum. *See MBI Grp., Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 571 (D.C. Cir. 2010).

The IFC has not shown that more relevant evidence is in India. Evidence is there, but a great deal is here. What the IFC knew when it funded the Project will be based on IFC documents and its employees' testimony. The IFC says that evaluating its involvement "will turn heavily" on the nine supervision visits its representatives made, but does not claim they are in India. MTD at 25.

Likewise, the IFC has not shown that it has assets in India or agreed to satisfy an Indian judgment. Accordingly, Plaintiffs may have to enforce an Indian judgment here. Such a two-forum litigation would waste judicial resources, serve the public interest of neither the United States nor

[20] The NGT limitations period is procedural and applies in the NGT only. Dutta Decl. ¶ 13. It is thus irrelevant to the timeliness of those claims here.

[21] Moreover, the IFC could not cure the NGT limitations problem through stipulation because the NGT Act does not recognize extension by agreement. *Id.* ¶ 16.

[22] The IFC should not be permitted to sandbag Plaintiffs by submitting to jurisdiction in India or waiving any immunity in India on reply. *MBI Grp.*, 616 F.3d at 575 (courts "generally deem arguments made only in reply briefs to be forfeited"). But if the Court allows the IFC to do so, Plaintiffs seek leave to address those new facts and address fully the private and public interests.

India, and can hardly be considered "convenient." It counsels against dismissal. *See Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1231-32 (9th Cir. 2011); *Lexington Ins. Co. v. Forrest*, 263 F. Supp. 2d 986, 995 (E.D. Pa. 2003).

Finally, as to the public interest factors, the IFC cites the NGT as evidence that India is committed "to provide an expeditious and expert remedy against environmental violations," MTD at 27, but the IFC has not shown that forum is available. And while the IFC claims that litigating in India will obviate conflict of laws problems, they have not shown that Indian and D.C. law conflict. MTD at 27-28. Accordingly, this Court would apply D.C. law. *Infra* § IV(A).

III. The absent parties are, at best, joint tortfeasors and are not required; even if they were, equity would permit the case to proceed without them.

The IFC asserts that this case should be dismissed because CGPL, Adani and even the Republic of India are absent but indispensable parties. MTD at 29. IFC is wrong. The absent parties are, at best, joint tortfeasors. It is "error to label joint tortfeasors as indispensable parties." *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Id.* This is so "because joint and several liability permits the plaintiff to recover full relief from any one of the responsible parties." *Cronin v. Adam A. Weschler & Son, Inc.*, 904 F. Supp.2d 37, 41 (D.D.C. 2012).[23]

The IFC argues only that "complete relief" cannot be provided because the "primary participants are absent." MTD at 30-31. But the IFC does not deny that it can provide the relief Plaintiffs seek or claim that such relief is inadequate. The D.C. Circuit has rejected the notion that the mere fact that an absent party is a "primary participant" is sufficient to invoke Rule 19, holding

[23] The IFC has not shown that CGPL could not be impled. CGPL has contacts with the United States, such as repaying the loan to an account in New York; analyzing these contacts would require discovery from the IFC. CGPL has accepted that England is not the only proper forum since it waived any venue challenge. DE 10-5 § 8.02. The Republic of India is not a required party for the additional reason that if it were, by IFC's logic, the EPA would be a required party in any domestic pollution case.

IFC's theory is inconsistent with the language of the Rule. *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1121 (D.C. Cir. 1991). In so doing, the Court refused to follow *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir. 1985), upon which the IFC relies. *Id.* And this Court, citing *Temple*, has found that a terrorist organization was not a required party in a case involving liability for supporting that organization, even though the terrorist group was undoubtedly the "primary" cause of the harm. *Owens v. Rep. of Sudan*, 374 F. Supp. 2d 1, 29 n. 30 (D.D.C. 2005).[24]

Nor can IFC meet the second step of the Rule 19 analysis, because even if the absent parties were "required," equity requires that action should proceed. *See* Fed. R. Civ. P. 19(b); *Cronin*, 904 F. Supp. 2d at 41. The IFC has not identified any substantial prejudice to it or the absent parties if the action goes forward; but Plaintiffs do not have an adequate alternative remedy.

First, the IFC claims that Plaintiffs will face no prejudice because India is a better forum. MTD at 33. A court must "consider whether there is any assurance that the plaintiff, if dismissed, could *sue effectively* in another forum where better joinder would be possible." *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1499 n.12 (D.C. Cir. 1995). A statute of limitations bar weighs against Rule 19 dismissal. *Park*, 695 F.2d at 633. The IFC has not shown it can be sued in India. *Supra* § II.

Second, the IFC claims an interest in avoiding "sole responsibility" for the conduct of absent parties. MTD at 33. But the IFC is being held responsible for its own conduct. And, as the IFC admits, if Plaintiffs prevail, the IFC can seek contribution from absent parties. *Id.*; DE 10-6 Schedule 1 at 131-132; *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 51 (D.D.C. 2003). Courts have rejected

[24] Even if, as IFC erroneously claims, *Pyramid* did not reject the "primary participant" theory, it conflicts with *Temple*. Regardless, none of the IFC's cases would require a different result here. In *Freeman*, the plaintiff was trying to hold a parent company liable for the *subsidiary*'s conduct. 754 F.2d at 559. Here, Plaintiffs are holding the IFC liable for the *IFC's* conduct. *B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18 (1st Cir. 2008), was not a tort but a contract case, and specific performance could not be done without the absent party. Here, the IFC can provide full relief. Finally, *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843 (11th Cir. 1999), was about whether the absent parties' interests (which were "more significant" than those of a typical joint tortfeasor) would be impaired. Here, the IFC has not even invoked any absent parties' interests.

the IFC's claim that its potential right to contribution renders the absent party a "required" party. *Cronin*, 904 F. Supp. 2d at 41.[25]

Third, the IFC concedes that a judgment here will not bind the absent parties. MTD at 33. But the "mere possibility" that a decision would be "persuasive" in a subsequent action against a non-party is insufficient to establish that an absent party's interests will be prejudiced. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.,* 11 F.3d 399, 409, 411 (3d Cir.1993); *Hite v. Leeds Weld Equity Partners, IV*, LP, 429 F. Supp. 2d 110, 116 (D.D.C. 2006). This Court has recognized this principle. *Azamar v. Stern,* 662 F. Supp. 2d 166, 177 (D.D.C 2009) (The "mere claim that a non-party has acted illegally is insufficient to create an 'interest' in the non-party") (quoting *Hite*, 429 F. Supp. 2d at 116). The IFC's lax proposed standard would apply to every joint tortfeasor and conflicts with the well-accepted principle that a plaintiff need not join every joint tortfeasor.

The IFC's Rule 19 motion must be denied.

IV. Plaintiffs have adequately alleged negligence, third-party beneficiary and nuisance.

A. D.C. law or Indian law, not federal law or English law, applies here.

For the most part, the IFC does not expressly address choice-of-law, but assumes federal choice-of-law principles apply, *see* MTD at 35, and that English law applies the Loan Agreement. Neither is correct. While the D.C. Circuit does not appear to have squarely addressed this issue, the Court should apply the choice-of-law principles of D.C., the forum here. IOIA cases arise under federal law due to 22 U.S.C. § 282f, but they do not create substantive federal claims. *See, e.g., Osseiran v. Int'l Fin. Corp.*, 498 F. Supp. 2d 139, 147 (D.D.C. 2007) (applying D.C. law to claims

[25] The IFC references their interest in avoiding multiple or inconsistent obligations. MTD at 33. But they fail to show how this would occur. No absent party has any interest in Plaintiffs' recovery; the IFC could not be on the hook to Plaintiffs and an absent party for the same interest. *See Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) ("Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident."); *Janney,* 11 F.3d at 412 (fact that defendant "may bear the whole loss if it is found liable" is not double liability.).

against IFC). Analyzing the similar FSIA, the D.C. Circuit held that courts should apply "the forum state's choice-of-law principles, rather than constructing a set of federal common law principles." *Oveissi v. Islamic Republic of Iran,* 573 F.3d 835, 841 (D.C. Cir. 2009). When state or foreign law governs the substantive claims, there is no reason to use federal choice of law principles.

For the tort claims, the IFC cites cases applying various states' laws, as well as some federal common law and Indian law cases. MTD at 37-40. Plaintiffs agree that the choice-of-law determination need not be made at this stage; nonetheless, either D.C. law or Indian law applies, and to the extent that no material conflict has been shown, D.C. law may be applied. *See, e.g., Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr.*, 24 F. Supp. 2d 66, 72 & n.6 (D.D.C. 1998) (applying D.C. law where the defendant failed to carry its burden "to demonstrate that a true conflict exists between the laws of the competing jurisdictions, a threshold issue in choice of law analysis").

For the Loan Agreement, the IFC points to the contractual choice of English law. MTD at 35. But D.C. law honors contractual choice-of-law provisions only if "there is some reasonable relationship with the state specified." *Norris v. Norris*, 419 A.2d 982, 984 (D.C. 1980). The Agreement is between a D.C. lender and an Indian borrower, to use D.C. funds to finance a project in India; it has nothing to do with England. English law does not apply. And, because the IFC has not argued that Indian law governs to the contract, and has not shown a conflict with Indian law, the Court should apply the law of D.C., the forum. *Shapiro, Lifshitz & Schram,* 24 F. Supp. 2d at 72 & n.6.

B. Defendant's citation of Indian law is unreliable.

The IFC's proof of Indian law, where they do rely on it, is manifestly inadequate, and the IFC failed to provide the sources on which their expert, Mr. Shroff, relies.[26] The likely reason is

[26] Those materials are superior sources. India is a common-law country where statutes and most court decisions are in English. Where primary sources are available, there is less reason to rely on expert conjecture. *See, e.g., Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 629 (7th Cir. 2010). Counsel for Plaintiffs asked the IFC to provide these sources for the benefit of the Court, but they refused. Herz Decl. ¶¶ 2, 4, 5

apparent upon review of the cases; the majority are irrelevant, concerning, for example, patent or taxation. *See* DE 12 ¶¶ 25, 27, 28. And Mr. Shroff makes statements that are not supported by the cases cited. For example, he cites nuisance cases of marginal relevance, *id.* ¶¶ 56-58, 60-61, before concluding that "based on the judgment, a lender would not be liable under these circumstances." *Id.* ¶ 62. But none of these cases involves lenders or discusses liability theories. As to trespass, based on a single case under common law – which concerns eviction of occupants – Mr. Shroff concludes that a lender can have no liability. *Id.* ¶¶ 64-65. These conclusions are not worthy of credit.

C. There is no rule of lender immunity from tort liability; the IFC is liable for its negligence and for causing a trespass.

The IFC *does not dispute* that the elements of negligence and trespass are adequately alleged (and does not challenge Plaintiffs' negligent supervision claim at all). Instead, it suggests lenders have a special immunity from ordinary tort law whereby a plaintiff must show that the lender totally controlled the borrower. MTD at 37-38. The IFC's cases say no such thing. And the IFC is far more than a lender; it not only provided the keystone loan knowing that the Project posed substantial risks, it also exercises supervisory control over the Project. *Supra* SOF § III. Under these facts, the IFC is liable under ordinary tort principles.

The IFC cites cases in which plaintiffs invoked the "instrumentality" theory of liability,[27] but that is distinct from ordinary tort liability. Unlike in the IFC's cases, Plaintiffs' tort claims allege the IFC is liable for its *own* participation in tortious conduct. "Instrumentality," by contrast, is "akin to the piercing of the corporate veil"; in the lender context, it asks whether a lender is *vicariously* liable to other creditors for the *borrower's* debts because it so dominates the borrower that they are really one entity. *FAMM Steel, Inc.*, 571 F.3d at 104-05. A plaintiff need not pierce the corporate veil to hold a

[27] *E.g.*, *FAMM Steel, Inc. v. Sovereign Bank*, 571 F.3d 93, 104 (1st Cir. 2009); *Krivo Indus. Supply Co. v. Nat'l Distillers & Chem Corp.*, 483 F.2d 1098, 1101-02 (5th Cir. 1973); *Indus. Tech. Ventures LP v. Pleasant T. Rowland Revocable Trust*, 688 F. Supp. 2d 229 (W.D.N.Y. 2010).

defendant liable for *participating* in a corporation's torts.[28] Likewise, Plaintiffs need not prove instrumentality. The same is true under Indian law; lenders do not enjoy special immunity from tort liability, and they need not control the borrower to be liable. Rai Decl. ¶¶ 18, 21.

Regardless, the IFC was no ordinary lender; it had a central role in the plant's environmental performance. The IFC requires that CGPL meet strict environmental and social criteria and report regularly on those issues, and IFC has the right and duty to supervise compliance and manage the Project if CGPL fails to comply. SOF § III. And IFC's funding disbursements are conditioned on CGPL meeting its social and environmental obligations to the IFC's satisfaction. *Id.* Those criteria were specifically included to benefit people like the Plaintiffs, SOF §§ II, III, and take the IFC far outside the ordinary role of a lender.[29]

1. The IFC was negligent.

In D.C., duties of care for negligence are determined by a "foreseeability of harm test." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 794-95 (D.C. 2011). This includes a duty to avoid aiding harms created by third parties.[30] A person breaches his duty when he fails to take action that a reasonable person would have taken to avoid foreseeable harms. *See* Restatement (Second) of Torts §§ 282-83 (1965); *Sinai v. Polinger Co.*, 498 A.2d 520, 528-32 (D.C. 1985). Indian negligence law is

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[28] *Childs v. Purll*, 882 A.2d 227, 239-40 (D.C. 2005); *Jordan (Bermuda) Inv. Co., Ltd. v. Hunter Green Inv. Ltd*, No. 00 CIV 9214 (RWS), 2003 WL 1751780, at *8 (S.D.N.Y. Apr. 1, 2003) (collecting cases); *United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998).

[29] Courts recognize that a lender can be liable for financing a project that creates foreseeable harms. *See e.g.*, *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 865 (1968). While some courts have required more than an arms-length financing arrangement, the loan agreement here is anything but that. The IFC does not deny that the sort of factors a court considers are easily met here. *See id.* at 865-66.

In any event, the IFC is also liable for aiding and abetting CGPL's negligent conduct. *See* Restatement (Second) of Torts § 876, Cmt. (If the assistance is a substantial factor in the tort, the one giving it is a tortfeasor, including where tort is merely a negligent act); *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) ("a secondary defendant could substantially aid a negligent action"). The IFC's keystone loan and failure to exercise its supervisory power was substantial assistance and encouragement, and the IFC knew that the Project created unreasonable and unmitigated risks. This is enough to hold them liable.

[30] *See e.g.*, Restatement (Third) of Torts: Phys. & Emot. Harm § 19 (2010) (defendant's conduct can lack reasonable care insofar as it foreseeably permits the improper conduct of a third party).

similar. A lender can be liable if it ignores the foreseeable harms of its financed projects. Rai Decl. ¶ 15. Contrary to Mr. Shroff, no Indian court has suggested that lenders owe no duty of care, and "the Supreme Court of India has repeatedly cautioned against limiting the concept of duty of care." *Id.* ¶¶ 13, 18. Mr. Shroff relies, primarily, on a case which held that "causation was too remote and it was difficult to foresee that a tree would fall on someone." DE 12 ¶ 53. But here, the IFC *actually foresaw* the risks that materialized. *Supra* SOF §§ I, III.

The project's risks to Plaintiffs, including the Plant's failure to meet social and environmental standards, was foreseeable when the IFC made the loan and was known to the IFC when it disbursed the funds. *Id.* It was unreasonable for the IFC to fund the Project with that knowledge. With every disbursement, IFC accepted the worsening social and environmental risks and harms. The IFC was negligent not just for providing indispensable funding to a Project it knew created substantial risks to Plaintiffs, but for failing to adequately supervise the Plant and mitigate those risks despite its promises and contractual authority to do so.[31]

2. The IFC contributed to the trespass on Plaintiffs' lands.

A trespass is any "unauthorized entry onto property that results in interference with the property owner's possessory interest." *Sarete, Inc. v. 1344 U St. Ltd. P'Ship*, 871 A.2d 480, 490 (D.C. 2005) (internal citations omitted). A person that "causes a thing or third person to enter is subject to liability to the possessor . . . ." Restatement (Second) of Torts § 165 (1965); *see also id.* § 158.[32] Indian law does not conflict with D.C. law on trespass. A defendant is liable for trespass "by doing an act affecting the sole possession of the plaintiff in each case without justification." Rai Decl. ¶ 46. The

[31] Moreover, the IFC undertakes to "help clients manage their environmental and social risks and impacts," and its involvement was necessary to improve performance. SOF § II. One who provides services to protect a third person is liable to that person where he fails to exercise reasonable care. Restatement (Second) of Torts §324A(c).

[32] It is well-recognized that a person can aid and abet or be held liable for contributing to a third party's trespass. *E.g.*, *Helsel v. Morcom*, 219 Mich. App. 14, 22-23 (1996); *Robinson v. Spittler*, 191 Okla. 278, 129 P.2d 181, 184 (1942); *Martin v. Buffaloe*, 128 N.C. 305, 38 S.E. 902, 902 (1901). Though Plaintiffs have not found DC law directly speaking to this question, there is no reason to suspect that it would depart from the norm.

IFC does not contest that it caused, or was a substantial factor in causing, a trespass by causing particulate matter and salt-water to intrude on Plaintiffs' lands. It is liable for the resulting harms.

D. Plaintiffs have stated a claim for nuisance.

The IFC argues that DC law does not recognize nuisance without an underlying tort such as negligence, MTD at 39, but Plaintiffs have adequately pled negligence. Defendant also claims that it cannot be liable without the ability to control the plant and thus abate the nuisance. MTD at 40. There is no such requirement, but the IFC *did* have control.

D.C. law requires substantial participation in a nuisance, not control. D.C. "follow[s] the Restatement (Second) of Torts." *Nnadili v. Chevron U.S.A. Inc.*, 435 F. Supp. 2d 93, 99 (D.D.C. 2006). Under Restatement Section 834, one is liable for a nuisance "not only when he carries on the activity but also when he *participates to a substantial extent in carrying it on*." (Emphasis added.) For example, in *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 121 (2d Cir. 2013), the Second Circuit, citing Section 834, held a manufacturer liable for pollution from gas stations it did not control. Moreover, the ordinary "substantial factor test . . . is part of the District's law of negligence." *Bederson v. United States*, 935 F. Supp. 2d 48, 80 (D.D.C. 2013) (internal citations omitted). That test was adopted from the Restatement (Second) of Torts § 431. *See Claytor v. Owens-Corning Fiberglas Corp.*, 662 A.2d 1374, 1381 (D.C. 1995). Thus substantial participation is sufficient.

Similarly, Indian law does not require control. "Causation" could include "significant contribution that facilitated the completion of the acts that caused the nuisance." Rai. Decl. ¶ 28. The cases Mr. Shroff cites do not address causation or control. *Id.* ¶ 44. No Indian case excludes lenders from nuisance liability. *Id.* ¶ 45.

The IFC mischaracterizes *District of Columbia v. Beretta, U.S.A., Corp.*, an inapposite case about the purported liability of gun manufacturers for crimes committed by others – *not* harmful conduct in which the defendant participated. MTD at 40 (citing 872 A.2d 633 (D.C. 2005)). First, *Beretta* dealt

with only public nuisance claims, seeking injunction and abatement. These were brought by the District, not private individuals. 872 A.2d at 639. But Plaintiffs plead both public and private nuisance, seeking damages as well as injunctive relief.

Second, *Beretta* was decided on its facts. It rejected the nuisance claim in that case because it would "greatly dilute[]," *id.* at 646-47, the heightened foreseeability requirement for intervening *criminal* acts; *id.* at 641-43, and rested on "limitless notions of duty and foreseeability," given "the sheer number of ways in which firearms, despite any reasonable precautions manufacturers can be expected to take, may reach the hands of criminal wrongdoers." *Id.* at 643.

The IFC latches onto a quotation in *Beretta,* MTD at 40, rejecting nuisance liability for a variety of reasons, including "inability . . . to control the nuisance," which cited an Eighth Circuit case with a parenthetical quotation regarding "control of the instrumentality." 872 A.2d at 648 (quoting *Tioga Pub. Sch. Dist. #15 v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993)). But it is not a holding of *Beretta*.[33] And the court agreed with cases "validating public nuisance claims" which "involved specific harm directly attributable to defendant or defendant's activity." *Id.* at 647 (internal citations omitted). Plaintiffs have alleged specific harms, which are directly attributable to IFC's supervisory role over the actions which caused those very harms. *Supra* SOF § III, IV.

In any event, it matters little whether there is some control requirement, because the IFC exercised substantial control. *Supra* SOF § III. The IFC suggests that it must have been present or had "the constructive equivalent of physical presence at the project." MTD at 40. It had both. IFC conducted numerous appraisal and supervision visits regarding environmental and social issues. Compl. ¶¶ 54-55, 62-63, 66, 68, 130, 137; SOF§ III. The Loan Agreement requires IFC oversight. And IFC has promised to "remain[] actively engaged with CGPL to ensure implementation of the

[33] And *Tioga*, like *Baretta* and unlike here, was about whether a manufacturer could be held liable for nuisance after the sale of its product. 984 F.2d at 920.

action plan[,]" DE 10-22 at 2, and to "exercise its rights and remedies, as appropriate" if CPGL is not in compliance. Ex. 2 ¶ 24 (2012 Sustainability Policy). This regular reporting, conditional disbursement, and oversight is an expression of IFC's presence and substantial participation, and, although unnecessary, is further evidence of IFC's control. It is easily sufficient for nuisance liability.

As the IFC's own case recognizes, a defendant need not have the ability to abate the nuisance. *Acosta Orellana v. CropLife Int'l,* 711 F. Supp. 2d 81, 101 n.20 (D.D.C. 2010). The ability to abate would not impact Plaintiffs' damages claims. Restatement (Second) of Torts § 822, comment d (distinguishing claims for damages and injunction). Regardless, the IFC need only have the ability to decrease or moderate the pollution in order to show the ability to abate. *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1124 (D.C. Cir. 1988). The IFC's contractual ability to control the pollution demonstrates that control.

E. The Loan Agreement's disclaimer of rights does not preclude third-party beneficiaries.

Plaintiffs' third-party beneficiary claim requires that they have suffered harm from a breach of Loan Agreement provisions that reflect an intent to benefit the Plaintiffs. *See, e.g.,* Restatement (Second) of Contracts § 302. The Agreement requires compliance with numerous environmental and social requirements, *supra* SOF § III, whose purpose is to protect third parties like Plaintiffs. *Id.* § II; *see* Restatement (Second) of Contracts § 302 cmt d. illustration 10 (where contract includes promise to remove waste to protect landowner downstream, landowner is an intended beneficiary).

The IFC does not dispute that the Loan Agreement reflects the intent to benefit Plaintiffs, or that it has been breached; it argues only that there is a disclaimer of third-party rights that controls under English law. MTD at 35-36. But D.C. law applies. *Supra* § IV.A. Under D.C. law, third-party beneficiaries may sue on contracts for their benefit, *see Aetna Casualty & Surety Co. v. Kemp Smith Co.*, 208 A.2d 737, 738-89 (D.C. 1965), but D.C. has not expressly addressed the situation in

which – as here – a provision suggests an intent to exclude third-party rights but other provisions show an intent to benefit third parties. While some U.S. jurisdictions may exclude third-party beneficiaries, *see* MTD at 36, that is not the best rule, and there is no evidence that D.C. would follow it. In *Martin Marietta Materials, Inc. v. Redland Genstar, Inc.*, the court considered a contract that "expressly states that [it] is not intended to confer third-party beneficiary rights" but that also "provides a clear intended benefit" to certain parties. No. JFM-99-42, 1999 U.S. Dist. LEXIS 23431 *11-12 (D. Md. Aug. 8, 1999). The court held that the more specific benefit clause prevails over the more general disclaimer clause, and that third-party beneficiary rights were actionable. *Id.* at *12. Other cases are in accord.[34] Here, the Loan Agreement provisions that reflect a specific intent to benefit third parties take precedence for the same reason.

CONCLUSION

The IFC seeks an immunity all three branches of Government have rejected, and which undermines its own mission. In causing Plaintiffs' injuries, management ignored the IFC's own environmental and social policies. And it likewise asks this to Court to ignore the ordinary rules and create new special defenses regarding *forum non conveniens*, Rule 19 and garden-variety torts. Impunity and special treatment do the IFC no favors. It has repeatedly recognized that accountability is in its own best interests. Defendant's motion should be denied.

Dated: September 18, 2015

Respectfully submitted,

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[34] *See, e.g.*, *Versico, Inc. v. Engineered Fabrics Corp.*, 238 Ga. App. 837, 839 (1999); *Lapping v. HM Health Servs.*, No. 2004-T-0011, 2005 WL 407588, at *4 (Ohio Ct. App. Feb. 18, 2005); *In re Express Scripts, Inc., PBM Litig.*, No. 4:05-MD-01672 SNL, 2008 WL 2952787, at *8 (E.D. Mo. July 30, 2008). Indeed, even *Pennsylvania State Emps. Credit Union v. Fifth Third Bank*, 398 F. Supp. 2d 317 (M.D. Pa. 2005), on which the IFC relies, MTD at 36, takes pains to distinguish *Martin Marietta* on its facts, rather than disagree with the result there. *See* 398 F. Supp. 2d at 325.

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