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 RENEWED MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION[1]

This case returns to this Court on remand from the U.S. Supreme Court, which rejected Defendant International Finance Corporation's (IFC) claim to absolute immunity from suit. *Jam v. Int'l Finance Corp. ("Jam II"),* 139 S. Ct. 759 (2019). The Supreme Court held that under the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288a(b), IFC enjoys only the more limited immunity foreign states receive under the Foreign Sovereign Immunities Act, and thus may be sued for its commercial acts.

When IFC thought it had absolute immunity, it acted like it. Plaintiffs sued IFC for providing funding indispensable for the construction of the Tata Mundra Ultra Mega coal-fired power plant ("the Plant" or "the Project"), despite knowing the Plant would harm the very people IFC is supposed to protect. In so doing, IFC, flouted its own mission and policies, which are designed to serve and protect people like Plaintiffs, as well as ordinary legal standards.

The Plant could not have been built without IFC. And because IFC's institutional mission requires that it "do no harm" to people or the environment, IFC retained substantial control over the Project. But the Project has devastated local families' livelihoods and threatened their health. The fish stocks that fishermen like Plaintiffs Budha Ismail Jam and his family depend on have plummeted and salt-water has polluted the groundwater, leaving farmers like Plaintiff Ranubha Jadeja unable to irrigate and grow crops on their land.

Although the Supreme Court rejected IFC's claim to absolute immunity, IFC again claims this Court cannot touch it, no matter how reckless and destructive its acts. But IFC's new immunity argument is no more persuasive than its old one. Under the IOIA, IFC, like a foreign state, has no immunity from claims based on commercial activity in the United States. Since IFC's financing was clearly commercial and indisputably occurred in the United States, IFC is not immune. Like any

[1] Plaintiffs request oral argument on this motion.

private bank, IFC lent money to a private party at market rates. Under clear Supreme Court authority, since the loan and IFC's failure to enforce its provisions are acts a private party could undertake, they are commercial, not governmental. And IFC's tortious acts of approving the loan and failing to enforce the agreement were made at its headquarters here in D.C.

IFC insists that Plaintiffs' claims *against IFC* are really "based upon" the acts of others in India, but in fact, the claims are based on *IFC's* own tortious conduct. Sovereign immunity cannot depend on the acts of a non-sovereign; it turns on the nature of the sovereign's acts. IFC's contrary argument conflicts with Supreme Court precedent, the D.C. Circuit's decision in *Jam v. Int'l Finance Corp.* ("*Jam I*"), 860 F.3d 703 (D.C. Cir. 2017), and other Circuits' caselaw, all of which consider the *sovereign*'s acts, and determine the claim's "gravamen" by reference to *plaintiff's* liability theory.

While IFC does not dispute that the loan is commercial activity, it argues the decisions about whether to enforce provisions designed to protect Plaintiffs in that loan agreement somehow are not commercial. But that would not change the fact that IFC can be held liable for negligently making this commercial loan. Regardless, deciding whether to enforce a commercial contract is not an exercise of sovereign authority.

Even if the IOIA provided immunity, IFC's Articles waive it. The international agreement establishing IFC makes clear IFC can be sued, as the D.C. Circuit held. And while later D.C. Circuit caselaw purports to limit the text's plain language, the Supreme Court held in *Jam II* that courts cannot deviate from the plain text of immunity provisions. 139 S. Ct at 769.

IFC's other arguments for dismissal are also meritless. No absent parties are indispensable. The absent parties IFC identifies are, at most, joint tortfeasors, and the Supreme Court has long held that joint tortfeasors are not indispensable parties.

Plaintiffs have adequately pled the elements of their claims. There is no special immunity for tortfeasors who cause harm through lending. A defendant can be negligent in as many ways as there

are varieties of carelessness. And IFC was no ordinary lender. It is liable not just for negligently funding this risky project, but also because it participated in the plant's design and construction, and after retaining responsibility for and control over the Plant's environmental performance, it failed to exercise its authority.

IFC seeks *forum non conveniens* dismissal, but cannot meet its threshold burden to show that India is an available and adequate forum. IFC fails to mention that in India, unlike here, it is immune from suit. It has not submitted to jurisdiction in India or otherwise shown it can be sued there.

STATEMENT OF FACTS[2]

This case arises out of IFC's irresponsible and negligent conduct in enabling and funding a commercial power plant that has destroyed the local environment and severely harmed Plaintiffs, their families, and their neighbors. IFC provided the critical funding for the Project, without which it could not have gone forward, despite knowing the unreasonable risks it posed to Plaintiffs. And it has failed at every step to mitigate that harm. IFC's conduct runs counter to its development mission, its own standards and conditions for involvement, and obligations to people like Plaintiffs.

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

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, 46, 57-59.

IFC foresaw the harms to Plaintiffs described below. IFC classified the proposed plant as a "category A" project; *i.e.* meaning it had "potential significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented." *Id.* ¶ 48; D.E. 40-19 at 9. IFC recognized from the outset that the Project would substantially harm the environment and local communities if

[2] Plaintiffs incorporate by reference the fuller discussion of the Complaint and evidence at D.E. 22 at 3-14.

sufficient steps were not taken to address critical issues. Compl. ¶¶ 4, 48, 164; D.E. 40-19 at 15. In particular, IFC identified selection of an appropriate cooling system, the volume of seawater intake, impacts on the marine environment and fish, cumulative air quality impacts, adequacy of the air pollution control measures, and restoration of livelihoods, among other critical issues. Compl. ¶¶ 4, 48; D.E. 40-19 at 15. IFC noted that "improper mitigation or insufficient community engagement" could trigger "unacceptable environmental impacts." Compl. ¶¶ 4, 48; D.E. 40-19 at 15.

The Loan Agreement was executed in April 2008. *Id.* ¶ 56. Decisions as to whether to finance the Project, and under what conditions, including, but not limited to the ultimate decision by the Board of Directors to approve the loan, were made at IFC headquarters in Washington, D.C. Compl. ¶ 197. *See also id.* ¶ 196 (Board of Directors "review and decide" on proposed IFC investments from D.C. headquarters).

Prior to IFC's Board's approval, IFC told its Board that it would add value to this Project by requiring adherence to stricter standards than the national requirements – including IFC's Performance Standards on Environmental and Social Sustainability (*see infra* SOF § *IV.*) and stricter air emissions limits – and thus would improve the Project's environmental and social performance. Compl. ¶¶ 172, 173; D.E. 40-19 at 35-36.

Despite knowing that unacceptable harms were likely, IFC approved funding without taking reasonable steps to prevent these harms. *Id.* ¶¶ 5, 163. For example, despite recognizing an appropriate cooling system was critical to avoiding severe impacts, *id.* ¶¶ 48-50, IFC approved the loan before the system's design was finalized. *Id.* ¶¶ 4, 164-65. It later approved and/or ratified a flawed design and location for the intake and outfall channels and allowed them to be built without proper assessment of impacts or adequate preventive measures. *Id.* ¶¶ 167-70, 184. When the foreseeable harms materialized, 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.

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

Plaintiffs are fishermen and farmers who earn their livelihoods near the Tata Plant, Machimar Adhikar Sangharsh Sangathan (Association for the Struggle for Fisherworkers' Rights) ("MASS"), an organization of local fishworkers, and the village of Navinal. Compl. ¶¶ 6, 13-15, 24. The harms Plaintiffs have suffered were foreseeable to, and largely foreseen by, IFC. *Id.* ¶ 4.

Plaintiffs Budha Ismail Jam, Kashubhai Manjalia and Sidik Kasam Jam are traditional fishermen who live and fish with their families on Tragadi and Kotadi bunders (fishing harbors), adjacent to the Plant. *Id.* ¶ 23. Since the Plant was built, the fish catch has plummeted, and so has their incomes. *Id.* ¶¶ 76, 183, 214, 227, 235-37. Fishermen are forced to go further out to sea to try their luck, and fishing from shore has become virtually pointless. *Id.* ¶¶ 77-78, 216, 238.

The severe decline in the fish catch and disappearance of some species entirely is largely the result of the Plant's cooling system, which has substantially altered the marine environment. *Id.* ¶¶ 7, 76, 83. The once-through system is inappropriate for the Plant's size, *id.* ¶¶ 34, 164, and dumps huge amounts of hot and possibly chemically-laden water into the sea, directly next to Tragadi bunder, through a man-made river, at a rate of up to 630,000 cubic meters per hour. *Id.* ¶¶ 37, 40, 83.

Although the Plant's environmental clearance required lining of the intake channel, this was not done, resulting in saltwater intrusion into the groundwater. *Id.* ¶¶ 36, 110, 185. This has ruined many wells previously used for irrigation or drinking; drinking water must be purchased elsewhere, and 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. *Id.* ¶¶ 8, 111-15.

The Plant exceeds both Indian and IFC air pollution limits, and has significantly degraded local air quality. *Id.* ¶¶ 10, 99-101. The 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. Dust and ash regularly cover homes and property, damage crops, contaminate fish that bunder residents have laid out to dry, and health problems, particularly respiratory problems, are on the rise. *Id.* ¶¶ 10, 103-104, 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.

III. IFC provided a market-rate loan to a private corporation to enable the construction of a private enterprise and exercised substantial control over all stages of the project.

IFC provided a market-based loan to CGPL, a private corporation, to build a private enterprise. *See* Compl. ¶ 194; D.E. 40-4 at 8 Art III, §3.03(c).[3] Like the Board's approval of the loan and conditions, other critical decisions, including to disburse funds, and regarding IFC's responses to allegations of harm caused by the Project – including Plaintiffs injuries – were decided, directed and/or approved from the headquarters in Washington, D.C. Compl. ¶ 199. Pursuant to the Loan Agreement, IFC exercises substantial control over the Project throughout the life of its loan.

The Loan Agreement requires adherence to "Environmental and Social Requirements," which are defined to include not just applicable environmental laws and regulations, but also IFC's Environmental and Social Performance Standards, and IFC's Environmental Health and Safety Guidelines, among others. D.E. 40-4 Schedule 1 at 13-14. The Agreement requires compliance with the project-specific Environmental and Social Action Plan (ESAP), which identifies measures CGPL must take in order to mitigate and prevent harm to local communities and the environment and ensure compliance with the Performance Standards. *Id.* Schedule 1 at 14; D.E. 40-19 at 16.

[3] *See also e.g.* IFC, Information Statement, (Oct. 11, 2018) at 2, http://documents.worldbank.org/curated/en/751901544072249470/pdf/132684-IFC-FY18-Information-Statement-PUBLIC.pdf ("IFC charges market-based rates for its loans").

Compliance with these and other environmental and social requirements are binding contractual conditions and obligations, which IFC has authority to enforce. *See, e.g.* D.E. 40-4 Schedule 1 at 13-14, 91-92 (Sec. 5.1(i)), 104 (Sec. 5.2(z) & (aa)), 123 (Sec. 6.1(x)); *see also* D.E. 40-19 at 23. CGPL must report regularly to IFC on compliance with these requirements and on any adverse impacts and remedial steps taken. D.E. 40-4 Schedule 1 at 76 (Sec. 4.1(i)), 86 (Sec. 4.2(q)), 114 (Sec. 5.5(v)). All loan disbursements are conditioned on CGPL meeting these requirements. *Id.* Schedule 1 at 76 (Sec. 4.1(i)), 86-87 (Sec. 4.2(q)); *see also id.* at 123 (Sec. 6.1(x)). Although the conditions went unmet, IFC continued with disbursements.

Any changes to the binding Environmental Management Plan, which governs environmental mitigation and monitoring measures (among other things) during the construction and operations phases, require IFC approval. *Id.* Schedule 1 at 104 (Sec. 5.2(z)). IFC has the right to conduct its own assessments of the Project's environmental and social compliance and IFC can compel CGPL to take corrective action. *Id.* Schedule 1 at 91-92 (Sec. 5.1(i)). Failure to comply with the environmental and social conditions of the loan can result in default. *Id.* at 123 (Section 6.1 (x)).

These provisions, which give IFC a central role in the Project's environmental performance, were specifically intended to protect Plaintiffs, other Class members, and the environment. The Loan Agreement explicitly notes measures that need to be taken for the local population whose health and livelihood would be affected, and requires steps to be taken in order to protect the rights of these affected people. D.E. 40-4 Schedule 1 at 5, 13, 37, 43, 104 (Sec. 5.2(z)).

IFC does more than set standards for the Project; it also retained substantial authority to actively manage the project, including to change CGPL's board of directors and senior management. D.E. 40-4 Schedule 1 at 94 (Sec. 5.1(w)(i),(ii)). Disbursement of the loan is contingent on IFC's approval of the Project's construction plan, schedule and budget. D.E. 40-4 Schedule 1 at 7-8, 74 (Sec. 4.1(b)), 80 (Sec. 4.1(u)). IFC also had the ability to approve the contractors responsible for

construction, *id.* Schedule 1 at 81 (Section 4.1(w)), 94 (Sec. 5.1(w)(ii)), and CGPL must set up a "project management committee" to supervise all stages of the Project, including construction, whose members are "satisfactory" to IFC. D.E. 40-4 Schedule 1 at 81 (Sec. 4.1(x)), 94 (Sec. 5.1 (w)(iii)). IFC retained the right to access and inspect the project site and records. *Id.* Schedule 1 at 90 (Section 5.1(f)(i)). And in addition to its ability to require corrective action, IFC has the power to appoint consultants or advisors for the Project, including an Environmental and Social Consultant, and failure to comply with the "observations" of IFC consultants can result in default. *Id.* Schedule 1 at 8-9, 124 (Sec. 6.1(aa)), 137 (Sec. 8.15). These and other terms give IFC overall control of the Project's environmental and social impacts.

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

IFC only provides loans to private corporations, not governments, and only invests in projects where there would otherwise be insufficient private capital. Compl. ¶ 46. *See also* D.E. 40-9 (Articles of Agreement, Art. III §3(i)). According to IFC, its "mission is to fight poverty." Ex. 1[4] ¶ 8 (2012 Sustainability Policy); Compl. ¶ 203. "Central" to IFC's mission is its "intent to 'do no harm' to people and the environment[.]" Ex. 2 ¶ 8 (2006 Sustainability Policy); Ex. 1 ¶ 9; Compl. ¶ 203.

To ensure its investments promote its mission, IFC's "Sustainability Framework" lays out policies that define the social and environmental duties of IFC and its clients. Compl. ¶¶ 45, 117. This includes IFC's Social and Environmental Sustainability Policy, which "defines IFC's responsibilities in supporting project performance," D.E. 40-13 at 83, in order to "enhance the . . . accountability of its actions," and "help clients manage their environmental and social risks and impacts and improve their performance." Ex. 1 ¶ 7. This policy is "viewed as critical to promoting IFC's development mission." D.E. 22-8 ¶ 9.

The Framework also includes the Performance Standards on Environmental and Social

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

Sustainability, *see* Ex. 3, which define the clients' "responsibilities" and the "requirements for receiving and retaining IFC support." D.E. 40-13 at 83; Compl. ¶ 117. The Performance Standards are binding on the client, but 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. Compl. ¶¶ 117, 126, 131, 135; Ex. 2 ¶¶ 2, 5, 17, 26; Ex. 1 ¶ 22, 28. This includes certain heightened requirements that apply to proposed projects categorized as "category A" due to higher risks, such as ensuring "Broad Community Support" from potentially affected communities. Compl. ¶¶ 130, 207; Ex. 2 ¶ 20. IFC also takes on obligations to supervise compliance throughout the duration of IFC's investment, and to take remedial action in the event of a breach of the Performance Standards or other environmental and social requirements. Compl. ¶¶ 117, 136-138; Ex. 2 ¶¶ 11, 20, 26; Ex. 1 ¶¶ 7, 24, 30, 45.

IFC has an internal complaint mechanism, the Compliance Advisor Ombudsman (CAO), which can receive complaints and review IFC's compliance with its social and environmental obligations. Compl. ¶ 141. The CAO was created to promote IFC's development mission by "ensur[ing] that projects are environmentally and socially sound." D.E. 40-10 at 1; D.E. 22-8 ¶ 13. IFC recognized that its credibility depends on accountability; "the internal organization … should be subject to *outside scrutiny*." D.E. 40-10 at 1 (emphasis added). "Robust implementation" of IFC's policies and standards "is the only way [IFC] can guarantee that project outcomes are consistent with [its] overarching goal, and that those who host our projects – local communities – do not bear an undue burden of risk." D.E. 40-13 at 2. *Accord* Compl. ¶ 204. "[C]ommunity participation and partnership" are "essential" to IFC's ability to provide "deliver positive outcomes…." D.E. 40-13 at 2-3. Thus, IFC recognizes that the "complaints of people affected by projects financed or insured by IFC… have to be addressed in a manner that is fair, constructive and objective." D.E. 40-10 at 1. 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." D.E. 22-8 ¶ 13. *See also* D.E. 22 at 5-8 (discussing IFC's mission and CAO's purpose).

V. IFC's own compliance office found that, with respect to Tata Mundra, IFC violated its own standards; but it lacks the authority to provide redress.

"CAO's authority is limited." D.E. 10-7 ¶ 16. It is not a "legal enforcement mechanism," nor a substitute for courts D.E. 40-11 at 4; Compl. ¶ 202. *Accord* D.E. 40-1 at 8 (CAO "is not a claims tribunal"). Its Dispute Resolution function, which seeks to resolve issues between the client and community, is entirely voluntary. D.E. 40-11 at 4; D.E. 22-8 ¶ 17. The CAO cannot compel IFC to participate and IFC rarely does. DE 22-8 ¶ 17. IFC's absence "limits" the effectiveness of the dispute resolution process as a means for seeking redress, *id.* ¶ 18; indeed, 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." *Id.* ¶ 17.

Investigation of IFC's actions and its compliance with its policies, standards, and conditions for involvement, are handled through Compliance, not Dispute Resolution. D.E. 40-11 at 4-5. But Compliance is similarly limited; while CAO can make findings of non-compliance and issue recommendations to IFC, it has "no authority to compel IFC to take any steps in response to its reports.". D.E. 22-8 ¶¶ 21. *See also* Compl. ¶¶ 146, 202. 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." DE 22-8 ¶ 25; *accord id.* ¶¶ 10, 12, 15; D.E. 22-4 ¶ 30; D.E. 22-3 ¶ 24.

Prompted by a complaint filed by Plaintiff MASS, the CAO Compliance Office investigated this Project, and in 2013, released its Audit Report, finding "evidence that validate[d] key aspects" of the complaint. D.E. 40-19 at 3. *See* Compl. ¶ 154. The CAO concluded that IFC had failed to meet its social and environmental obligations and due diligence requirements, D.E. 40-19 at 29, and failed to ensure "pre-project consultation requirements were met" in relation to directly affected fishing

communities, *id.* at 21, including that the risks to them were adequately considered. *Id.* at 19, 21, 22. Among other findings, the CAO also found significant shortcomings in IFC's review of marine impacts, found IFC failed to ensure the thermal discharge would comply with specified limits, Compl. ¶ 154(d)-(f); D.E. 40-19 at 29, and noted IFC's treatment of air quality standards was both "noncompliant" and "at odds" with its "stated rationale for its involvement in the project . . . namely, improved [environmental and social] performance" through "more stringent" standards. D.E. 40-19 at 35-36. The CAO rejected IFC's view that impacts had been minimal. *Id.* at 37-38.

IFC responding by rejecting most of the findings. Compl. ¶ 155; D.E. 40-20 ¶¶ 7-9. It subsequently pointed to a list of studies it said CGPL was conducting, or "committed to" undertake, D.E. 40-21, but at no point did IFC commit to take responsive action. In its first monitoring report, in January 2015, the CAO found that IFC had failed to effectively respond to *any* of its findings. Compl. ¶ 156; D.E. 40-22 at 5, 22. The report noted "the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts." *Id.* at 5, 22; Compl. ¶ 156. In its second monitoring report, in February 2017, the CAO found that IFC had not adequately address any of the areas of non-compliance and again emphasized "an outstanding need for a[n]… expressly remedial approach." D.E. 40-24 at 7. IFC still has not addressed that need.

ARGUMENT

I. IFC is not immune from this suit.

The IOIA provides *only* the "same immunity from suit. . . as is enjoyed by foreign governments," and an organization "may expressly waive [its] immunity." 22 U.S.C. § 288a(b). Under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1605(a)(2), IFC is not immune for its commercial acts here, and IFC's charter expressly waives immunity.

A. IFC is not immune because it is being sued for its commercial acts.

In rejecting IFC's absolute immunity argument, the Supreme Court found IFC enjoys only

the "limited" immunity "foreign governments currently enjoy" and is thus not immune from suits "based upon" its commercial activity in the United States. *Jam II*, 139 S. Ct. at 765, 772. *See also* 28 U.S.C. §1605(a)(2). Where a state engages in the type of act a private party could, regardless of motive, the act is commercial. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). IFC's tortious conduct here – its lending to a private corporation and associated acts – is clearly commercial. Indeed, in *Jam I*, the D.C. Circuit noted that under the commercial activities doctrine, IFC "would *never* retain immunity since its operations are *solely* 'commercial.'" 860 F.3d at 707 (emphasis original). And IFC's tortious conduct occurred right here in the United States. Since Plaintiffs' claims are "based upon" those commercial acts in the U.S, IFC is not immune.

Having had their best immunity argument rejected by the Supreme Court, IFC trots out the second string: two arguments that the commercial activity exception does not apply that they did not even bother to raise before.[5] Both impermissibly seek to redefine Plaintiffs' claims and both lack merit. First, IFC argues that Plaintiffs' claims *against IFC* for IFC's own tortious acts are actually based on the acts of third parties in India, not IFC's. D.E. 40-1 at 11-15. But whether a sovereign is immune depends on the nature of the sovereign's acts, not those of a third party. Plaintiffs' claims here are "based upon" IFC's *own* negligence and tortious conduct. Second, IFC insists that Plaintiffs' claims are really about "IFC's post-execution" activities, not IFC's negligent decision to fund the Project, and asserts such conduct was akin to regulation. *Id.* at 18. But IFC has no authority to regulate like a sovereign. Because IFC acted just as a private party could, its acts are commercial.

[5] Indeed, IFC argued virtually the opposite, suggesting the court should not hold, as the Supreme Court ultimately did, that IFC has only restrictive immunity because that would open the floodgates, implying, as the D.C. Circuit later concluded, *Jam I*, 860 F.3d at 707, its conduct would be deemed commercial. *See, e.g.* Br. of Def.-Appellee at 14, *Jam v. IFC,* No. 16-7051 (Dec. 21, 2016)(arguing Plaintiffs' interpretation of IOIA would "invite a flood of suits").

1. The gravamen of Plaintiffs' claims is *Defendant*'s acts; without them Plaintiffs would have no claim against IFC.

The "'based upon' inquiry" requires courts to "identify the particular conduct on which the plaintiff's action is 'based,'" *i.e.* its "gravamen." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015); *accord Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). Although IFC tries to shift focus away from its own acts, IFC's conduct is what matters, for two independent reasons.

First, the touchstone of the inquiry must be the conduct of the sovereign that has been sued because a foreign state is only immune from suit for "*its* sovereign" acts, not its "commercial" ones. *Nelson*, 507 U.S. at 359-60 (emphasis added); *accord Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 199 (2007) (courts consider the "acts . . . of [the] state"); *Weltover*, 504 U.S. at 614 (issue is whether the "actions that the foreign state performs" are commercial). It makes no sense to provide or deny immunity to a sovereign based on the nature or location of someone else's conduct.

As the D.C. Circuit noted *in this case*, the issue is whether *IFC's loan* is commercial activity, recognizing that it is. *Jam I*, 860 F.3d at 707 (IFC would never retain immunity under the FSIA). Other Circuits also reject IFC's notion that the "gravamen" of the claim may be the acts of anyone other than the sovereign defendant. The First Circuit held the "inquiry [ ] turn[s] on the particular actions that the foreign state performs as opposed to the specific actions performed by the party with whom the foreign state contracted." *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 16-17 (1st Cir. 2013) (internal quotes omitted). And the Fifth Circuit held that the "analysis must focus on the named defendant's acts which are the basis of the action and not on [another entity's] separate acts." *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108-09 (5th Cir. 1985) (internal quotes omitted). *Callejo* is particularly persuasive, since the Supreme Court relied on it in *Nelson*, 507 U.S. at 357, and *OBB,* 136 S. Ct. at 395.[6]

[6] Other cases analogous to Plaintiffs' further refute IFC's argument. *See e.g., Woods Hole Oceanographic Inst. v. ATS Specialized, Inc.*, Civ. No. 17-12301, 2019 U.S. Dist. LEXIS 46133, at *22-24 (D. Mass.

IFC would extend *OBB* and *Nelson* far beyond their "limited" reach. *OBB*, 136 S. Ct. at 397 n.2 (citing *Nelson*, 507 U.S. at 358 n.4). *See* D.E. 40-1 at 14. Neither suggest the gravamen is determined by reference to the conduct of anyone other than the sovereign itself. In both, the question was which of the sovereign *defendant*'s acts counted: in *OBB*, a personal injury claim against a State railway was "based upon" *defendant's* management of the railway abroad, not *defendants'* sale of a ticket in the U.S. through a travel agent, 136 S. Ct at 396; in *Nelson*, plaintiff's torture claim against Saudi Arabia was based on *defendant's* torture, a non-commercial act, not the commercial act of hiring plaintiff. 507 U.S. at 361-63. Thus, *OBB* turned on the fact that the *defendant*'s negligence occurred abroad, and *Nelson* on the fact that *defendant's* tortious act was not commercial. This case is nothing like those: *IFC*'s tortious conduct, in particular its decision to make the loan, occurred in the U.S., and that conduct was commercial. *See* SOF §§ I, III. The contrast with *OBB* could hardly be starker: there, the sovereign had virtually no physical presence in the U.S. and did virtually nothing here.

IFC's position that the Court should *not* look to the sovereign's acts would produce absurd results. If, for example, the situation were somewhat reversed – a sovereign engages in non-commercial acts *abroad*, in conjunction with a non-sovereign that engages in injurious commercial activities *in the United States* – then under IFC's position, the claim *could* be based on commercial activity in the United States, and the sovereign might not be immune, even though it engaged in no commercial activity here or anywhere else. That would upend the commercial activity exception.[7]

Feb. 5, 2019) (applying *OBB* and holding claim for damage to plaintiff's submarine was based on contract loaning it to defendant, *not* acts of third party that resulted in the harm; "focus" of the "inquiry [is] on the activities carried on by *the foreign state* upon which the civil action is based") (emphasis added and internal quotes omitted), *adopted in relevant part* 2019 U.S. Dist. LEXIS 45565, at *3-4 (D. Mass. Mar. 20, 2019); *Crystallex Int'l Corp. v. Venezuela*, 251 F. Supp. 3d 758, 766-67 (D. Del. 2017), *rev'd on other grounds*, 879 F.3d 79 (3d Cir. 2018) (determining claim's gravamen by reference to the sovereign *defendant*'s acts, even though fraudulent transfer was undertaken by another entity).

[7] IFC's focus on third parties' acts might also exclude joint tortfeasor or aiding and abetting liability claims against sovereigns, contrary to the FSIA's express indication that it did *not* limit substantive liability. 28 U.S.C. § 1606 (states "shall be liable … to the same extent as a private individual").

Second, even if a court could look to a non-sovereign's act to determine sovereign immunity, it still must look to the claim as pled. Acts are the "basis" if they involve "elements of a claim that, if proven, would entitle the plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357; *accord OBB*, 136 S. Ct. at 395-96. Plaintiffs' claim is that IFC's own commercial acts are tortious.[8] If Plaintiffs did not plead IFC's tortious acts, they would have no claim against IFC; therefore, IFC's acts are the gravamen of these claims.

Put another way, Plaintiffs' theory is that IFC is liable for *its* acts and negligence. *Infra* § III.B. The various elements of *these* claims center on *IFC*'s conduct and *mens rea*. *See Crystallex*, 251 F. Supp. 3d at 766 (gravamen of fraudulent transfer claim was defendants' intent, as there would be no claim without it). The gravamen of a negligence claim is that *defendant* acted without due care, including without regard for unreasonable risk of injury due to the foreseeable conduct of another. Restatement (Second) of Torts §§ 302, 302B & cmt. e(H). Thus, the "basis" of the claim is what *IFC* knew and did.[9] The Supreme Court's focus on the claim's elements under plaintiffs' liability theory is fatal to IFC's argument.

Indeed, the D.C. Circuit found, in a case like this one where the authorization of a contract was "central to [plaintiff's] theory of the case," that since the state announced the authorization in the U.S., the facts suggest the commercial activity exception was met. *Nanko Shipping, USA v. Alcoa,*

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[8] Plaintiffs' Complaint made clear, from the first paragraph, that they are suing IFC based on IFC's own actions: "The IFC financed the Tata Mundra Plant and enabled its construction, despite knowing that the coal-fired power plant would cause significant harm to surrounding communities, and failed to mitigate that harm." Compl. ¶ 1; *see also id.* at ¶¶ 176, 187.

[9] IFC can also be held liable on an aiding and abetting theory, for knowing, substantial assistance to a breach of duty, including negligence. *See* Restatement (Second) Torts § 876 & cmt. d (liability). "[T]he gravamen of an aiding and abetting claim, is that the *alleged aider and abettor*" provided such assistance. *Overseas Private Inv. Corp. v. Industria de Pesca, N.A.*, 920 F. Supp. 207, 210 (D.D.C. 1996) (emphasis added); *accord Aziz v. Alcolac, Inc.*, 658 F.3d 388, 394 (4th Cir. 2011) ("gravamen" of claim for abetting chemical weapon attack was defendant's sale of chemical). An abettor "is himself a tortfeasor." Restatement (Second) Torts § 876 & cmt. d.

Inc., 850 F.3d 461, 466 (D.C. Cir. 2017). This Court too has applied the "elements" test, by reference to claims pled in the complaint. *Croesus EMTR Master Fund L.P. v. Federative Rep. of Brazil,* 212 F. Supp. 2d 30, 34-35 (D.D.C. 2002). And *Merlini v. Canada*, 926 F.3d 21, 29 (1st Cir. 2019), rejected a gambit exactly like IFC's. The U.S. as *amicus* sought to redefine plaintiff's workplace injury claim against Canada as based on a non-party coworker's negligence. The court was having none of it; it determined the basis of plaintiff's claim against Canada, as an employer, by looking to its elements.

IFC tries to deny, contrary to *OBB* and *Nelson*, that the elements of the claim are the inquiry's lodestar. D.E. 40-1 at 12. To do so, it plucks language from *OBB* about courts not performing an "element-by-element analysis," but that passage rejected a *one*-element test. 136 S. Ct. at 396. "[N]othing in [*OBB*]" requires a court to conduct its analysis "independent of the plaintiff's actual claim." *Merlini*, 926 F.3d at 30 (citing *El-Hadad v. U.A.E.*, 496 F.3d 658, 663 (D.C. Cir. 2007)).

Thus IFC is wrong when it insists that the gravamen can only be the "acts that actually injured" plaintiff. D.E. 40-1 at 12-13 (quoting *OBB*, 136 S. Ct. at 396). *OBB* noted those acts were the gravamen in *Nelson*; *OBB* did not adopt a general rule that one particular element is required, at odds with its own "elements" test. 136 S. Ct. at 395-96.[10] Regardless, the Court must look to the *sovereign defendant*'s acts; IFC's acts in the United States *are* IFC's acts "that actually injured" Plaintiffs. IFC's actions here, like the employment in *Merlini*, are the gravamen because they "did not simply 'le[ad] to' the injury that [plaintiff] received; it provides the legal basis for the only cause of action that [plaintiff] has against [defendant]." *Id.* (quoting and distinguishing *Nelson*, 507 U.S. at 358).

IFC's relevant conduct and its *mens rea* occurred in the United States. IFC cannot argue that *every* element of the claim must be commercial activity in the U.S.; *Nelson* expressly noted that was *not* its holding. 507 U.S. at 358 n.4. Requiring the injury (or the tort itself) to occur in the United States

[10] *Merlini* overstated *OBB* when it suggested *OBB* found courts must look to "where the boy got his fingers pinched." 926 F.3d at 30 (quoting *OBB,* 136 S. Ct. at 397). *OBB* was careful to make clear that this observation was true "in this case," 136 S. Ct. at 397, confirming there is no general rule.

would ignore Congress' choice of different language in the commercial activity exception and the FSIA's domestic, noncommercial tort exception. While the former must only be "based upon" commercial activity in the U.S., 28 U.S.C. § 1605(a)(3), the latter covers injuries "occurring in the United States." § 1605(a)(5). The domestic tort exception requires that the "entire tort" occur here, but the commercial activities exception does not. *Doe v. Ethiopia*, 851 F.3d 7, 11-12 (D.C. Cir. 2017). IFC suggests the same "entire tort" requirement be applied to the commercial activity exception, even though it sets a lower bar.

Thus, Plaintiffs are not trying to "evade" the noncommercial tort exception. D.E. 40-1 at 15. That exception permits suit for torts in the U.S. when there is *no* commercial activity involved. 28 U.S.C. § 1605(a)(5). But where, as here, the tortious act is commercial, the commercial activity exception applies.[11] This follows from the text. "Commercial activity" is not defined to exclude tortious acts. 28 U.S.C. § 1603(d). And the noncommercial torts exception, 28 U.S.C. § 1605(a)(5), applies to cases "not otherwise encompassed in" the commercial activity exception, which would make no sense if commercial activity could not be tortious. *Merlini,* 926 F.3d at 27 (fact that commercial activity exception applies precludes application of noncommercial tort exception).

Plaintiffs' focus on *Defendant's* acts is not "artful pleading." D.E. 40-1 at 15. Plaintiffs are not pleading their claim that IFC was negligent as something else, like the failure to warn claim in *OBB*. *Contra id.* (citing 136 S.Ct. at 396). Quite the contrary; it is IFC that seeks to re-characterize Plaintiffs' theory that IFC is liable for its own negligence. The fact that Plaintiffs pled the only claims they

[11] *E.g. Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1544 n.13 (11th Cir. 1993) (fact that Plaintiff sued for personal injuries "does not belie the commercial nature" of the act or require court to apply "noncommercial torts" exception) (collecting cases); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir. 1980) (overturning decision that negligence was not "commercial activity, but rather a tortious [sic] act," holding claim *was* based on commercial act); *Merlini*, 926 F.3d at 27 (finding Canada could be sued for personal injury under commercial activity exception). Indeed, if tort claims must be brought under the non-commercial tort exception, the claims in *Nelson* and *OBB* would have been dismissed on those grounds, without need to consider the questions the Court addressed.

could bring against IFC proves there was no artful pleading. *Merlini*, 926 F.3d at 30.[12]

IFC's suggestion that *Jam II* recognized Plaintiffs' claims do not satisfy *OBB*, D.E. 40-1 at 1, 14, is false. The Court stated the Solicitor General's position, it did not *adopt* it. *Jam II*, 139 S. Ct. at 772. The issue was not even at bar. The only question was whether IOIA and FSIA immunity are co-extensive. *Jam v. Int'l Fin. Corp.*, 138 S. Ct. 2026 (2018); Pet. for a Writ of Cert., *Jam v. Int'l Fin. Corp.*, No. 17-1011, 2018 WL 509826 (Jan. 19, 2018).[13]

This Court's decision in *Nnaka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17 (D.D.C. 2017), confirms that the gravamen is determined by reference to *defendant's* acts and the claims as *plaintiffs* frame them. There, Nnaka had brought a suit on Nigeria's behalf, under an alleged agreement with Nigeria. *Id.* at 23. But after Nigeria told the United States that Nnaka did not represent it, the United States moved to strike Nnaka's claims, which this Court did. *Id.* at 23-24. Nnaka sued Nigeria, and this Court held that the gravamen of that claim was that Nigeria wronged Nnaka when it told the U.S. that he did not represent it. *Id.* at 29. Under IFC's position, this Court was wrong; the gravamen would have been the United States' motion to strike Nnaka's claims (or this Court's dismissal), since that is what directly harmed plaintiff. In *Nnaka*, the last act that harmed plaintiff was committed by a non-party, but the gravamen of plaintiff's claims was defendant's own tortious acts. So too here.

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[12] IFC's cases support Plaintiffs. *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009), affirms that the court's focus is *plaintiffs*' theory of the case. *Id.* at 380. In *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1290 (3d Cir. 1993), unlike here, the loan was not a negligent cause of the harm. *Rubin* supports Plaintiffs since, elsewhere, it looked to the elements of the claim; it held that tort claims for causing a fire were not "based upon" the commercial act of forming subsidiaries because plaintiffs would not need to prove those acts. *Id.* at 1289. Here, IFC's commercial acts *are* the tortious acts Plaintiffs must prove.

[13] The Solicitor General's view on the interpretation of a statute administered by the courts is not entitled to any special weight. *Cf. Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring). Indeed, the point of the FSIA was to make immunity a purely *judicial* decision. *See Republic of Aus. v. Altmann*, 541 U.S. 677, 690-91 (2004). In *Merlini*, the First Circuit flatly rejected the government's opinion as to what constituted the basis of the claim. 926 F.3d at 29.

2. There is nothing peculiarly sovereign about IFC's acts.

IFC's assertion that its acts were not commercial, D.E. 40-1 at 15-18, again tries to rewrite the Complaint. IFC pretends Plaintiffs' claims are based solely on IFC's failure to enforce the loan contract, not on the loan itself. *Id.* at 16. That is wrong. But even if it were right, IFC's failure to enforce a commercial contract is a commercial act.

The D.C. Circuit found in *Jam I* that IFC's operations are entirely commercial. 860 F.3d at 707. Indeed, IFC told the Supreme Court that IFC is "not [a] sovereign bod[y] . . . and [it] cannot take sovereign acts." Br. for Respondent at 58, *Jam v. Int'l Fin. Corp.,* No. 17-1011 (U.S. Sept. 10, 2018). Instead, IFC "employ[s] traditional financial tools." *Id.* And IFC recognized that "[i]f courts focus on the financial tools employed," rather than its allegedly non-commercial motives – as courts must – "they may conclude that those activities are commercial." *Id.*

If an act is the type a private party can engage in, no matter the motive, the act is commercial. *Weltover*, 504 U.S. at 614. IFC loaned money to a private entity, at market-based interest rates, to build a private enterprise. SOF § III. Since IFC entered the lending market as a private actor would, its loan and related acts were commercial. Indeed, IFC does not dispute that the loan is a commercial act. Nor could it. *See e.g. Cruz v. United States*, 387 F. Supp. 2d 1057, 1063 (N.D.Cal. 2005) (acts "indistinguishable from [those] of a private bank" are commercial).[14]

In suggesting the claims are based on its failure to enforce the contract, IFC ignores the many allegations that IFC is liable for *funding* the project. The Complaint's very first reason why IFC is liable is that the Project "would not have gone forward without IFC funding, and thus the harm to the Plaintiffs would not have occurred without IFC funding." Compl. ¶ 176. Similar allegations

[14] IFC suggests IFC's supervision occurred in India. DE 40-1 at 16 n.7. But while IFC may have gathered information there, it made its *decisions* in the U.S. *E.g.* Compl. ¶¶ 56, 195-98, 199.

abound.[15] And IFC is also responsible for other tortious acts, separate from its failure to enforce the contract, including its active role in "determining the [Project's] scope," *id.* ¶ 178, and its "substantial control" over design, construction and operation of the facilities and "the preventive and mitigation measures required and actually taken." *Id.* ¶ 186; *accord id.* ¶¶ 295, 300. IFC does not and cannot argue this involvement in a commercial plant is a sovereign act.[16]

To be sure, IFC's contract provided it the means to prevent or mitigate harms its loan unleashed. *See* SOF § III. IFC's failure to take that opportunity by enforcing the contract is an additional reason IFC is liable. But IFC's loan caused the harm. Regardless, this Court need not parse how much of IFC's liability is based on its failure to enforce the contract because the failure to enforce and mitigate the harms of a commercial act are activities in which a private party could engage; IFC "d[id] not exercise powers peculiar to sovereigns," and its conduct therefore is commercial. *Weltover*, 504 U.S. at 614.

Both parts of IFC's contrary argument are unconvincing. Its "first" assertion – that the loan agreement did not require IFC to enforce its Performance Standards enshrined in that contract and that therefore its failure to do so is a sovereign act – is a non-sequitur. Even assuming the contract did not require IFC enforce the contract to mitigate Plaintiffs' injuries, IFC is still liable for failing to mitigate Plaintiffs' injuries. *See* § III.B.1 (citing Restatement (Second) of Torts § 321.) [17] IFC's failure to mitigate is not a sovereign act. Parties to commercial contracts decide whether to enforce such contracts all the time; these decisions are in no way peculiarly sovereign.

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[15] *Id.* ¶ 1 ("IFC financed the Tata Mundra Plant and enabled its construction, despite knowing that the coal-fired power plant would cause significant harm to surrounding communities."); *id.* ¶ 301 (plaintiffs were harmed "[a]s a direct and proximate result of Defendant's funding and other conduct"). *See also id.* ¶¶ 3, 5, 46, 58, 59, 186, 187, 295, 300, 301.

[16] Plaintiffs need not attribute CGPL's acts to IFC. D.E. 40-1 at 16. The gravamen is IFC's acts.

[17] *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994), did not suggest acts must fall within contracts to be "commercial." Indeed, it did not consider whether an act was commercial at all; it considered whether an act had a direct effect in the U.S. *Id.*

It makes no difference whether the failure to mitigate was the product of an "internal" decision, D.E. 40-1 at 17 (citing D.E. 31 at 9); whether a decision is "internal" may matter for *waiver* of immunity, but it says nothing about whether it is commercial. IFC's *only* "support" for its claim that internal decisions are not commercial is a cite to *Jam I*. *Id.* (citing 860 F.3d at 707). That is a bold play, given that the very passage they cite found that under the commercial activities exception, IFC is "*never*" immune because its acts are "*solely*" commercial. *Jam I,* 860 F.3d at 707 (emphasis in original).[18] Regardless, liability for failure to mitigate is based on the failure to mitigate, irrespective of whether that was an omission or an affirmative decision, and no matter how such a decision was reached or why. Indeed, IFC could characterize every action as the product of some "internal" decision, including their loans which are obviously commercial. Since private parties can, and do, decide whether to enforce contracts, internal or not, it cannot be "sovereign."

IFC's "second" assertion fares no better. While IFC does not dispute that the loan is a commercial act, it claims that its alleged attempts – under the loan agreement – to supervise CGPL and enforce IFC's Performance Standards are somehow sovereign "regulatory enforcement," rather than action on the private contract. D.E. 40-1 at 18. That would be irrelevant if true, because IFC is not being sued for enforcing the contract. IFC *failed* to enforce its standards; inaction is not regulation. But more importantly, IFC provides private loans, under negotiated terms and conditions, just as private banks do. It does not "regulate" CGPL or anyone else.

Where a sovereign "acts, not as regulator of a market, but in the manner of a private player within it," its actions are "commercial." *Weltover*, 504 U.S. at 614. IFC is a player in the market, it did not, and has no authority to, regulate any market. IFC's only argument for how it "regulates" is that

[18] IFC quotes *Jam I*'s observation that "there is a superficial similarity" between the commercial activity test and the test for waiver of immunity to suggest they are the same, D.E. 40-1 at 17 (quoting 860 F.3d at 707), but the passage explicitly says they are *different*: the commercial activities test is "necessarily broader," and provides IFC no immunity. 860 F.3d at 707.

it "uses the E&S Standards to shape development projects in the private market towards environmentally sustainable goals, serving a quintessentially public concern." D.E. 40-1 at 18. But "shap[ing]" individual projects through specific contract terms is not regulating a market. Like any other market actor, outside of its contract rights, IFC cannot compel anyone to do anything.

IFC's suggestion that its allegedly public purpose transforms its enforcement of private contract provisions into regulation, *id.,* is foreclosed by the FSIA's text. Whether an act is commercial is determined by its "nature," *not* its "purpose." 28 U.S.C. § 1603(d). "[I]t is irrelevant *why* [a sovereign] participated in [a commercial] market in the manner of a private actor; it matters only that it did so." *Weltover*, 504 U.S. at 617 (emphasis original). Even if it does so to "fulfill[ ] uniquely sovereign objectives," that does not support immunity. *Id.* at 614. The D.C. Circuit has "warned against" IFC's "strategy of 'describing the act in question as intertwined with its purpose.'" *Nnaka*, 238 F. Supp. 3d at 28 (quoting *Cicippio v. Islamic Rep. of Iran*, 30 F.3d 164, 167 (D.C. Cir. 1994)). This Court must "reject[] any argument that rests on the foreign state's *reasons* for undertaking the activity." *El-Hadad*, 496 F.3d at 668 (emphasis in original).

IFC's own cases only further distinguish IFC's conduct here from regulation by a sovereign. In *In re Aluminum Warehousing Antitrust Litigation*, No. 13-md-2481, 2014 U.S. Dist. LEXIS 119074 (S.D.N.Y. Aug. 25, 2014), the defendant London Metal Exchange (LME) *provided* a market for trading metals, *id.* at *26-27, and was "charged by statute with performing the decidedly public function of" *regulating* that market. *Id.* at *51-52; *see also id.* at *29-30, 37-38, 60. The LME rules at issue played "a vital and necessary role in enabling LME to regulate the aluminum market." *Id.* at *60. There is nothing like that here. IFC lends money *within* a market for loans; since it does not and cannot regulate that market, its loan contract is clearly not fulfilling a regulatory function.

IFC's reliance on *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek (Persero)*, 600 F.3d 171, 177-78 (2d Cir. 2010), which arose out of the wrongful administration of Indonesia's government-

run health insurance program, is equally misplaced. The state-owned default insurer did not compete in the market, and it monitored compliance with "governmental mandate[s]"; this "do[es] not equate to [the conduct] of an independent actor in the private marketplace." *Id.* Here, IFC did *not* promulgate or monitor any regulatory mandates, and it clearly *was* acting in the private market.

IFC's commercial loan, and failure to enforce the loan agreement, were commercial acts.

B. IFC has waived any immunity from suit it might have.

Even if the commercial activity exception did not apply, IFC has waived immunity by the text of its Articles of Agreement, and because suits like this one are in IFC's institutional interests.

1. The plain terms of the IFC's charter waives immunity here.

IFC's Articles of Agreement explicitly waive immunity from suits except by member states, stating "[a]ctions may be brought against the Corporation." D.E. 40-9, Art. VI, § 3. This plain text waives immunity "broad[ly]." *Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 457-58 (D.C. Cir. 1967) (addressing identical provision); *see also Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 839-40 (D.C. Cir. 2009) ("broad language" of IFC's waiver "contain[s] no exceptions for different types of suit"); *Jam I*, 860 F.3d at 706 ("read literally," IFC's waiver is "categorical"). Indeed, IFC previously claimed the *same* waiver provision would provide jurisdiction over IFC in India. D.E. 23 at 16. Plaintiffs agree with IFC when it said its waiver provision *should* be read to mean what it says.[19]

After *Lutcher*, *Mendaro v. World Bank* "read a qualifier into" Section 3, requiring a "corresponding benefit" before waiver is found, *Osseiran*, 552 F.3d at 839-40 (citing *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983)), but *Mendaro* is inconsistent with *Jam II*. First, the Supreme Court held that courts cannot substitute their analysis of the purpose of immunity for the plain text; doing so "gets the inquiry backward" since the drafter's purpose is generally "expressed by the

[19] The Indian law under which IFC had argued that the waiver provision in its Articles provided jurisdiction is no longer determinative; in 2016, India extended complete immunity from suit to IFC, thus there is no jurisdiction in India. *See infra* IV.A.

ordinary meaning of the words used." *Jam II,* 139 S. Ct. at 769 (internal quotation omitted). But in announcing the corresponding benefits test as a prerequisite to finding waiver, *Mendaro* looked past the waiver provision's text to what it believed to be immunity's "underlying purposes," 717 F.2d at 615, precisely what *Jam II* forbids.[20]

Second, *Mendaro* assumed the waiver provision waived what would otherwise be static, *absolute* immunity under the IOIA, to permit claims arising out of "business relations" where the other party would not contract with the organization absent waiver. *Jam I*, 860 F.3d at 707 & n.4. But *Jam II*'s holding that the IOIA immunity is not absolute, it evolves with sovereign immunity, refutes that assumption, and makes waiver in commercial contract cases unnecessary, given the commercial activities exception. The framers of IFC's Articles must have had something else in mind: a broad waiver, exactly what they said.

Ignoring text, IFC suggests, but does not argue, its Articles somehow *create* immunity. D.E. 40-1 at 21-22. *Jam II* forecloses the argument IFC tries to sandbag; it noted that if an organization "would be impaired by restrictive immunity, [its] charter can always specify a different level of immunity," and "many" do, but "IFC's own charter does not state that the IFC is absolutely immune from suit." 139 S. Ct. at 771-72.[21] IFC's Articles are clear where they intend to reserve

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[20] *Mendaro* assumed the drafters were careless – that the plain language would result in "inadvertent" waiver, and that waiver in cases without a corresponding benefit was "less likely to have been intended" – and explicitly made this assumption the starting point for reading the provision. 717 F.2d at 617. *Contra. Lutcher,* 382 F.2d at 457 (describing the same language as a "deliberate choice" by its "drafters," who "must have been aware that they were waiving immunity in broad terms"). *Mendaro*'s approach is plainly untenable after *Jam II.*

[21] *Nyambal v. International Monetary Fund* suggested the IMF's Articles create immunity because they expressly *reserve* it. 772 F.3d 277, 281 (D.C. Cir. 2014) (noting IMF's Articles say it "shall enjoy immunity from every form of judicial process"). *Jam II* contrasted IFC's Articles with those organizations that provide greater immunity than the IOIA, citing IMF. 139 S. Ct. at 771-72; *accord Mendaro*, 717 F.2d at 618 n.53 (IMF "reserve[d]" immunity while a provision identical to IFC's "expressly subject[s] it to judicial process"). IFC's Articles do not implicitly grant immunity other charters set forth explicitly. *Lutcher*, 382 F.2d at 459.

privileges and immunities. *E.g.* Art. VI, § 9 ("shall be immune from all taxation"); *id.* § 4 ("Property …shall be immune from search"). Section 3 is a "waiver" that "limit[s]" immunity. *Mendaro*, 717 F.2d at 613-14, 618 n.54 (addressing identical provision). Words mean what they say; "actions may be brought" cannot be read to mean IFC is immune from suit, it means IFC may be sued.

2. IFC waived its immunity since this case furthers IFC's goals.

As the D.C. Circuit recognized, Plaintiffs' claims *would* benefit IFC by holding it to its mission and allowing it to gain communities' trust. *Jam I*, 860 F.3d at 707-08; *see also* D.E. 22 at 20-28 (explaining the benefits in detail). Plaintiffs do not ask the Court to revisit this issue, but preserve for appeal their argument that, even under the "corresponding benefit" test, IFC has waived immunity.

IFC requires "broad community support" for high-risk projects such as this one, s*upra* SOF § IV, so it needs communities to believe its promises. *See Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 280 (D.C. Cir. 2009) (test satisfied where organization needs third party's trust). This need for third-party trust supports waiver where, for example, an organization fails to pay for electricity. *Mendaro*, 717 F.2d at 618. Plaintiffs' "ability to enforce the requirement that the IFC protect surrounding communities is as central to the IFC's mission as a commercial partner's ability to enforce the requirement that the IFC pay its electricity bill." *Jam I*, 860 F.3d at 708. Absent waiver, IFC management may continue to ignore IFC's commitments, further undermining the institution.

Suits like this one will not stymie IFC's operations. D.E. 40-1 at 19. IFC has waived immunity for suits by creditors, and "there is no reason to believe suits by creditors are less harassing . . . than are other kinds of suits." *Lutcher,* 382 F.2d at 459. IFC will simply have to avoid hurting those it is supposed to help.

As IFC notes, despite finding this case would benefit IFC, *Jam I* held no suits can be heard arising out of the IFC's "core operations." 860 F.3d at 708. That conflicts with *Mendaro*'s holding that suits can be brought by "debtors [and] creditors," as well as "other" claims that help an

organization achieve its mission. 717 F.2d at 615. In any event, this suit cannot impede IFC's "discretion," because management has no discretion to disregard its own policies. Management's failure to follow IFC policy and the law, not amenability to suit, is what endangers IFC's mission.

II. The absent parties are not required; even if they were, equity permits the case to proceed without them.

IFC must show that (1) an absentee's presence is "required" under Rule 19(a), (2) they cannot be feasibly joined, and (3) suit cannot proceed "in equity and good conscience" without them under Rule 19(b). *See e.g. Azamar v. Stern,* 662 F. Supp. 2d 166, 176 (D.D.C. 2009). IFC asserts that CGPL, Adani and even the Republic of India are absent but indispensable parties. D.E. 40-1 at 22. But IFC has not shown that they "required" under Rule 19(a), nor that dismissal would be equitable.

A. The absentees are at best joint tortfeasors and are not required under Rule 19(a).

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).

IFC argues only that "complete relief" cannot be provided because "IFC itself would have claims against the absent parties" if found liable. D.E. 40-1 at 23. But that is always true of joint tortfeasors. The "complete relief provision of Rule 19 relates to those persons *already parties* and does not concern any subsequent relief via contribution or indemnification for which the absent party might later be responsible." *16th & K Hotel, LP, v. Commonwealth Land Title Ins. Co.,* 276 F.R.D. 8, 15 (D.D.C. 2008)(internal quotations omitted)(emphasis added). It is sufficient that a court can award "meaningful relief as between the parties" before it. *Alto v. Black,* 738 F.3d 1111, 1126 (9th Cir. 2013); *Doe v. Exxon Mobil Corp.,* 69 F. Supp. 3d 75, 100-01 (D.D.C. 2014). "[W]here liability is joint and several among multiple parties, a court may grant complete relief with respect to any one of

them." *Gen. Refractories Co. v. First State Ins. Co.,* 500 F.3d 306, 314 (3d Cir. 2007). *Accord Cronin,* 904 F. Supp. 2d at 41 (D.D.C. 2012). IFC does not deny that it can provide the relief Plaintiffs seek or claim such relief is inadequate. A damages remedy against IFC would be "meaningful." *Exxon*, 69 F. Supp. 3d at 100-01.[22]

IFC suggests an absentee that played an "active" role in the harmful conduct is an exception to the rule that joint tortfeasors are not required, D.E. 40-1 at 23, but the D.C. Circuit has rejected that notion. It held that the mere fact an absent party was an active – or "primary participant" – is insufficient, noting IFC's theory is inconsistent with Rule 19's language. *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1121 (D.C. Cir. 1991); *accord Exxon*, 69 F. Supp. 3d at 101 ("active participant" theory "does not prevail in this Circuit"). The D.C. Circuit refused to follow *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir. 1985), which IFC cites. *Pyramid,* 924 F.2d at 1120-21. And this Court has found that a terrorist organization was not a required party in a case involving liability for supporting that organization, even though the terrorists were an "active" and even "primary" cause of the harm. *Owens v. Rep. of Sudan*, 374 F. Supp. 2d 1, 29 n.30 (D.D.C. 2005).

Regardless, the out-of-circuit cases IFC cites, D.E. 40-1 at 23, are inapposite. Neither *Freeman,* 754 F.2d at 559, nor *B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18 (1st Cir. 2008), even involved joint tortfeasors. And *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 847-48 (11th Cir. 1999), turned on the absent party's unique interests, which were "more significant than those of a routine joint tortfeasor"; it could have its government appointment revoked. *Laker* did not suggest that every "active participant" is required; it recognized joint tortfeasors need not be

[22] Previously, IFC impermissibly argued for the first time on reply that the injunctive relief sought made absent parties required, D.E. 23 at 20, but it abandons that argument here. That was wise. *See Exxon*, 69 F. Supp. 3d at 100-01 (rejecting that argument); D.E. 27-1 at 7-8 (refuting that argument). The injunctive relief Plaintiffs seek requires no other parties; it asks only that IFC exercise any contract rights or control they have. *See e.g.* Compl. ¶ 343. By not raising the argument, IFC has forfeited it. *MBI Grp.* Inc. v. Credit Foncier du Cameroun, 616 F.3d 568, 575 (D.C. Cir. 2010).

joined. *Id.* Here, no absent party has "claim[ed] an interest" in this case, *Primax Recoveries Inc v. Lee,* 260 F. Supp. 2d 43, 51 (D.D.C. 2003); IFC has not invoked *any* absent parties' interests, let alone identified a "legally protected interest" that would be impaired in their absence. *See Lopez v. Council on American-Islamic Rels. Action Network, Inc.,* 741 F. Supp. 2d 222, 231-232 (D.D.C. 2010); *Azamar*, 662 F. Supp. 2d at 177. *See also infra* § II.B.[23] IFC has failed to show any parties are required.

B. Even if the absent parties are "required," the action should still proceed.

Since IFC has failed to satisfy Rule 19(a), the second step of the Rule 19 inquiry is unnecessary. *E.g. Cronin,* 904 F. Supp. 2d at 41. But even if the absent parties were "required," equity demands that the action proceed. *See id.* IFC has not identified any substantial prejudice to it or any absent party if the action goes forward and Plaintiffs do not have an adequate alternative remedy. Accordingly, dismissal would result in impunity and would not be consistent with "equity and good conscience." Fed. R. Civ. P. 19(b).

First, courts must "consider whether . . . 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). There is no assurance that is so here; IFC has not shown it can be sued in India, or that the claims are timely there. *Infra* §VI.A; *Park v. Didden*, 695 F.2d 626, 633 n.17 (D.C. Cir. 1982) (statute of limitations bar weighs against Rule 19 dismissal). IFC also suggests "considerations of consistency and efficiency indicate" that this action should be "brought instead in a foreign court," D.E. 40-1 at 26, but that argument fails for the same reasons.

Second, IFC's claimed interest in avoiding "sole responsibility" for liability it may share with absent parties is a red herring. D.E. 40-1 at 26. As IFC admits, if Plaintiffs prevail, IFC can seek

[23] The Republic of India is not a required party for the additional reason that IFC's only basis for asserting it should be joined is that it regulated CGPL. IFC cites no caselaw supporting the surprising claim that a government regulator is a required party in a tort action. By that logic the U.S. EPA would be a required party in all sorts of domestic pollution cases.

contribution from absent parties. *Id.*; D.E. 40-4 Schedule 1 at 132 (Sec. 8.4(b)). A potential right to contribution from an absentee does not prejudice the defendant.[24] IFC alleges a "risk of incurring multiple or inconsistent obligations," D.E. 40-1 at 26, but fails to show how this would occur. "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." *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998). IFC points to no court order a decision here could conflict with. And since IFC does not suggest the absent parties have any interest in Plaintiffs' recovery, it could not be on the hook to Plaintiffs and an absent party for the same interest.

Third, IFC vaguely asserts that the absent parties have an "interest in being present," yet concedes that a judgment here will not bind them. D.E. 40-1 at 26. Contrary to the out-of-circuit cases IFC cites, *id.,* the D.C. Circuit has squarely held that the fact that a decision "might set a persuasive precedent in any potential future action" is insufficient to establish that an absent party's interests will be impaired or prejudiced. *Nanko Shipping,* 850 F.3d at 465 (internal quotations omitted). *Accord, e.g. Janney,* 11 F.3d at 411; *Azamar,* 662 F. Supp. 2d at 177.[25] Regardless, even the cases IFC cites do not help it; since it has identified no legally protected interests of any absentee that would be impaired, *supra* § II.A., IFC has not met its burden. *Citadel Inv. Grp., L.L.C. v. Citadel Capital Co.,* 699 F. Supp. 2d 303, 317 (D.D.C. 2010).[26]

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[24] *E.g. Cronin*, 904 F. Supp. 2d at 41; *Garner v. Behrman Bros. IV, LLC,* 260 F. Supp. 3d 369, 381 (S.D.N.Y. 2017). *Accord Primax,* 260 F. Supp. 2d at 51 (prejudice to defendant from burden of filing separate claim is "minimal and insufficient to justify dismissal"); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.,* 11 F.3d 399, 412 (3d Cir. 1993) (that defendant "may bear the whole loss if it is found liable" is "a common result of joint and several liability and should not be equated with prejudice").

[25] IFC also dropped and therefore waived the argument it previously argued for the first time on reply that CGPL's interest would be affected because the Court might need to interpret the loan agreement, D.E. 23 at 21, which also has been rejected. *See e.g. Exxon*, 69 F. Supp. 3d at 101.

[26] Even if there were a risk of prejudice to any parties, however, the Court can "shap[e] the relief" as needed to accommodate these interests. Fed. R. Civ. P. 19(b)(2). *See also Exxon,* 69 F. Supp. 3d at 100-01 ("key" issue is not relief *sought* in complaint, but whether the Court can "craft meaningful relief" as between parties to the suit, including awarding damages in lieu of injunctive relief).

A decision under Rule 19 "*not* to decide" a case is a power to be exercised only "[i]n rare instances." *Nanko Shipping,* 850 F.3d at 465 (emphasis original) (quotations omitted). No such circumstances exist here. IFC's Rule 19 motion must be denied.

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

IFC repeatedly misstates Indian and D.C. law. Under both Indian and D.C. law, properly construed, Plaintiffs state negligence, trespass, nuisance and third-party beneficiary claims.

In fact, however, the motion to dismiss stage is generally an inappropriate time to decide what law applies, as factual development is often needed to properly address choice of law. *Jones v. Lattimer*, 29 F. Supp. 3d 5, 10 n. 3 (D.D.C. 2014). IFC does not conduct any choice of law analysis, arguing instead under both Indian and D.C. law. Thus, if the Court were to decide IFC's Rule 12(b)(6) arguments despite the prematurity and lack of argument as to what law controls, it should only dismiss if Plaintiffs' claims are barred by *both* Indian and D.C. law. *Graboff v. The Collern Firm*, C.A. No. 10-1710, 2010 U.S. Dist. LEXIS 118732 at *21-22 (E.D. Pa. Nov. 5, 2010). Alternatively, under D.C. choice of law principles, to the extent IFC does not show a true conflict between D.C. and foreign law, D.C. law applies. *Geico v. Fetisoff*, 958 F.2d 1137, 1141 (D.C. Cir. 1992); *Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr.*, 24 F. Supp. 2d 66, 72 n.6 (D.D.C. 1998).

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

IFC's proof of Indian law is manifestly inadequate. The majority of the cases Ms. Rasgotra cites are irrelevant, concerning, for example, patent or taxation. *See* D.E. 41-1 ¶¶ 25, 28. And she makes statements her cases do not support. For example, she cites nuisance cases of marginal relevance, *id.* ¶¶ 77-79, 82-83, before concluding that "a lender would not be liable," *id.* ¶ 84. But none of these cases involve lenders, discuss liability theories, or substantively address causation. *See* Declaration of Ritin Rai (2019) ("Rai Decl.") ¶¶ 50-55. As to trespass, she concludes that a lender can have no liability based on a single case that concerns eviction, D.E. 41-1 ¶¶ 86-87, and does not

discuss lender liability at all. *See* Rai Decl. ¶ 62. These conclusions are not worthy of credit.

B. IFC is liable for its negligence and for causing a trespass.

IFC *does not dispute* that Plaintiffs adequately allege the elements of negligence and trespass (and does not challenge Plaintiffs' negligent supervision claim at all). IFC's arguments that there are special rules precluding liability here are meritless.

1. IFC was negligent.

Under D.C. negligence law, if the injury was "'reasonably foreseeable' to the defendant, then courts will usually conclude that the defendant owed the plaintiff a duty to avoid causing that injury." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011). 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); thus, "anyone who does an affirmative act is under a duty" to exercise reasonable care "to protect [others] against an unreasonable risk of harm." Restatement (Second) of Torts, § 302, comment a. This includes a duty to avoid harms created by third parties. *See e.g.*, *id.* § 449 ("If the likelihood that a third person may act in a particular manner is the hazard … which makes the actor negligent, such an act … does not prevent the actor from being liable for harm caused thereby"). A person breaches his duty when he fails to take action that a reasonable person would have taken to avoid foreseeable harms. *See id.* §§ 282-83 (1965); *Sinai v. Polinger Co.*, 498 A.2d 520, 528-32 (D.C. 1985). Additionally, one who creates a dangerous situation thereafter owes a duty to exercise reasonable care to *prevent* harm. Restatement (Second) of Torts § 321.

Indian negligence law is similar. An individual owes "a duty of care not to create a source of danger" to others "he could reasonable foresee would be potentially affected by such danger." Rai Decl. ¶ 24. Thus, a lender can be liable if it ignores the foreseeable harms of its financed projects. *Id.* ¶ 25. Where injuries have been caused by the combined negligence of multiple tortfeasors, liability is joint and several, and "the plaintiff is entitled to sue all or any of the negligent persons." *Id.* ¶ 30

(quoting *Khenyei v. New India Assurance Co Ltd & Ors.*, (2015) 9 SCC 273, ¶ 7).

IFC was negligent under either D.C. or Indian law. Despite knowing the Project posed unreasonable risks to Plaintiffs, IFC took the affirmative act of providing indispensable funding. SOF § I. And with every disbursement, IFC accepted the worsening social and environmental risks and harms. *Id.* § III. IFC was also actively involved in Project design and management, including, for example, approval of construction plans. *Id.* After directly participating in the creation of these substantial risks to Plaintiffs, IFC failed to adequately supervise the Project and mitigate those risks despite its promises and contractual authority to do so.[27] Those facts easily establish negligence.

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

A trespass is any unauthorized entry onto property that interferes with the owner's possessory interest. *Sarete, Inc. v. 1344 U St. Ltd. P'Ship*, 871 A.2d 480, 490 (D.C. 2005). 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. Similarly, Indian law holds a defendant liable for "affecting [plaintiffs'] sole possession . . . without justification." Rai Decl. ¶ 57. IFC does not contest that it caused, or was a substantial factor in causing, a trespass by causing ash and salt-water to intrude on Plaintiffs' lands. It is liable for the resulting harms.

3. There is no special rule of lender immunity from ordinary tort liability.

IFC suggests lenders have a special immunity from tort law whereby a plaintiff must show total control of the borrower. D.E. 40-1 at 30-33. IFC's cases say no such thing. And IFC is far more than a lender; it not only provided the loan knowing that the Project posed substantial risks, it also exercised supervisory control over the Project. SOF § III. Under these facts, IFC is liable.

[27] Moreover, IFC undertakes to "help clients manage their environmental and social risks and impacts," SOF § IV, and its involvement was necessary to improve performance, *id.* § I. One who provides services to protect a third person is liable to them where he fails to exercise reasonable care. Restatement (Second) of Torts § 324A(c). *See also Long v. District of Columbia*, 820 F.2d 409, 418-19 (D.C. Cir. 1987) (applying § 324A).

Under ordinary tort principles, 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) (cited with approval in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1076 n. 24 (D.C. Cir. 1970)). While some courts have required more than an arms-length financing arrangement, the loan agreement here is anything but that. IFC does not deny that the sort of factors a court considers are easily met here. *See Connor,* 69 Cal. 2d at 865-66.

IFC was no ordinary lender; it had a central role in the design and construction, including approval of the construction plan, budget, and contractors, and has substantial authority to actively manage the Project, including to change CGPL's board and senior management. SOF § III. It also has substantial control over environmental performance, including by requiring compliance with, and regular reporting on, strict environmental and social criteria as conditions for each disbursement and the ability to compel remedial action. *Id.* These commitments to benefit Plaintiffs and such oversight authority takes IFC far outside the ordinary role of a lender.

IFC is also liable for aiding and abetting CGPL's conduct. *See* Restatement (Second) of Torts § 876, Cmt. d (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").[28] Providing funding can constitute aiding and abetting another's torts. *E.g. Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432-34 (E.D.N.Y. 2013) (finding jury could conclude that funds bank sent terrorist group was a "substantial reason" group could perpetrate terrorist acts); *In re Chiquita Brands Int'l, Inc. Alien Tort*

[28] It is also 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). Courts in D.C., including this one, have similarly recognized aiding and abetting liability for torts generally. *See e.g.*, *Halberstam*, 705 F.2d 472; *Bassi v. Patten*, No. 07-1277 2008 U.S. Dist. LEXIS 95500 (D.D.C. Nov. 12, 2008) (applying aiding and abetting liability analysis from *Halberstam*); *Kurd v. Republic of Turkey*, 374 F. Supp. 3d 37, 48-52 (D.D.C. 2019).

Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1338-39 (S.D. Fla. 2011) (denying motion to dismiss where defendant funded terrorist organization). IFC's keystone loan, approval of aspects of the project, and failure to exercise its supervisory power was substantial assistance, and IFC knew that the Project created unreasonable and unmitigated risks. This is enough to hold them liable.

IFC cites cases in which plaintiffs invoked "instrumentality" liability, D.E. 40-1 at 31, but that is distinct from ordinary tort liability. Plaintiffs allege IFC is *directly* liable for its *own* 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 for the *borrower's* debts because it so dominates the borrower that they are really one entity. *FAMM Steel, Inc. v. Sovereign Bank,* 571 F.3d 93 at 104-05 (1st Cir. 2009). A plaintiff need not pierce the corporate veil to hold a defendant liable for *participating* in a corporation's torts. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998); *Childs v. Purll*, 882 A.2d 227, 239-40 (D.C. 2005). IFC's own cases acknowledge that while the instrumentality theory *can* be used to hold lenders liable, lenders are separately liable for their own tortious conduct. *E.g., Indus. Tech. Ventures LP v. Pleasant T. Rowland Revocable Trust*, 688 F. Supp. 2d 229 (W.D.N.Y. 2010); *FAMM Steel*, 571 F.3d at 105-107. *Accord Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973) (noting that the only question presented was the "narrow rule" of instrumentality, no other claims were raised). Plaintiffs need not prove instrumentality.

The same is true under Indian law; lenders enjoy no special immunity from tort liability and they need not control the borrower to be liable. Rai Decl. ¶¶ 31, 64. No Indian court has suggested – and Ms. Rasgotra cites no cases suggesting – that lenders owe no duty of care. *Id.* ¶¶ 23-27. Instead "the Supreme Court of India has repeatedly cautioned against limiting the concept of duty of care." *Id.* ¶ 22. Ms. Rasgotra relies on a case where the court found no liability for the Reserve Bank of India for issuing a license to a deficient bank. D.E. 41-1 ¶ 71. But that case had nothing to do with

lender liability, and the court did not discuss, much less foreclose it. Rai Decl. ¶ 31.[29] Similarly, Ms. Rasgotra cites no case holding lenders cannot be liable for trespass. *Id.* ¶¶ 62-63.

4. IFC's financing and supervision of the Tata Mundra Plant is the source of Plaintiffs' injuries.

According to IFC, Plaintiffs allege that "the Adani Power Plant caused much of the harm" and this "undercut[s]" IFC's liability, D.E. 40-1 at 32, but that is false. Plaintiffs allege that the Tata Plant—and IFC's enabling financing and supervision of it—is the source of their injuries. For example, Plaintiffs identify the Tata Plant as the source of dust, ash and other air pollution, and the super-heated and possibly contaminated discharged seawater. Compl. ¶¶ 31-32, 182, 184. Although the plants share an intake channel, the Tata Plant's less efficient cooling system uses significantly more water than the Adani plant, and it discharges this heated water through its outfall channel, damaging the aquatic ecosystem. *Id.* ¶¶ 34-35.

Even if Adani contributed to the harm, that would not absolve IFC. There is no dispute the Tata Plant harmed Plaintiffs, and as discussed, IFC is liable for its own acts leading to Plaintiffs' injuries. *See e.g., Halberstam,* 705 F.2d at 478. Moreover, the Adani Plant's presence is part of what made IFC negligent. IFC knew from the beginning that it needed to consider the Project's close proximity to the Adani Plant in evaluating the risk to and impacts on local communities; IFC specifically cited *the Adani Plant* among the issues justifying the Tata Project's high-risk classification. Compl. ¶ 48. And the CAO found that IFC *did not sufficiently assess* the Project's cumulative impact given its proximity to the Adani plant. *Id.* ¶¶ 152, 154(h). Far from undercutting IFC's liability, the existence of the Adani Plant further demonstrates that IFC unreasonably disregarded the significant risks to Plaintiffs when it decided to fund and keep funding the Tata Plant.

[29] The only other common law negligence case Ms. Rasgotra cites involved a falling tree, and the court did not find the defendant liable as the "causation was too remote and it was difficult to foresee that a tree would fall on someone." D.E. 41-1 ¶ 69. But here, IFC *actually foresaw* the risks that materialized. *Supra* SOF § I.

C. Plaintiffs have stated a claim for nuisance.

IFC's claim that under DC law, nuisance requires an underlying tort such as negligence, D.E. 40-1 at 34, is irrelevant; Plaintiffs have adequately pled negligence and other underlying torts.

Regardless, D.C. courts have recognized both public and private nuisance without relying on another underlying tort. *See e.g.*, *Beatty v. Wash. Metro. Area Transit Auth.*, 860 F.2d 1117, 1122 (D.C. Cir. 1988) (allowing independent claim for nuisance); *Wood v. Neuman*, 979 A.2d 64 (D.C. 2009) (collecting cases on "actionable private nuisance"); *B&W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879 (D.C. 1982) (evaluating the independent torts of private and public nuisance); *Carrigan v. Purkhiser*, 466 A.2d 1243 (D.C. 1983); *District of Columbia v. Totten*, 5 F.2d 374 (D.C. 1925). Given that D.C. courts have elsewhere required an underlying tort, the D.C. Court of Appeals has stated that "whether private nuisance is recognized as an independent tort … must be resolved by the en banc court." *Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 168 n. 5 (D.C. 2013). Thus *Beatty* should control.

IFC also argues that it cannot be liable without the ability to control the plant and thus abate the nuisance. D.E. 40-1 at 34. There is no such requirement, but IFC *did* have control. *Supra* SOF § III. D.C. law requires only substantial participation in a nuisance, not control. Under Restatement § 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."[30] For example, the Second Circuit, citing Section 834, held a manufacturer liable for pollution from gas stations it did not control; it was enough that the manufacturer knew its product was likely to spill and affect others' property. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 121 (2d Cir. 2013). 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 Majeska v. District of Columbia,* 812 A.2d 948, 951 (D.C.

[30] The question of substantial participation is for the trier of fact. *Id.*, cmt. d.

2002). Thus substantial participation is sufficient.

Similarly, Indian law does not require control. Indian law recognizes that "multiple defendants may be liable for a particular act of nuisance." Rai Decl. ¶ 47. "Causation" could include "significant contribution that facilitated the completion of the acts that caused the nuisance." *Id.* ¶ 39. The cases Ms. Rasgotra cites do not address causation or control. *Id.* ¶ 55. No Indian case excludes lenders from nuisance liability. *Id.* ¶ 56.

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. D.E. 40-1 at 34 (citing 872 A.2d 633 (D.C. 2005)). First, *Beretta* dealt with only public nuisance claims, seeking injunction and abatement. 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 found the nuisance claim in that case would "greatly dilute[]," *id.* at 647, the heightened foreseeability requirement for intervening *criminal* acts, 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 43. There are no unforeseeable criminal acts here; the IFC specifically foresaw how its acts would cause these exact injuries to Plaintiffs, yet chose continue financing this Project without taking precautionary measures. *Supra* SOF §§ I, III.

IFC latches onto a quotation in *Beretta,* D.E. 40-1 at 34, that lists the "inability . . . to control the nuisance" among a variety of reasons courts have rejected nuisance liability for gun manufacturers. 872 A.2d at 648.[31] But the court agreed with cases "validating public nuisance claims" which "involved specific harm directly attributable to defendant or defendant's activity." *Id.*

[31] Unlike here, *Beretta* and the case it cites, *Tioga Pub. Sch. Dist. #15 v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993), were about whether a manufacturer could be liable for nuisance after it sold its product.

at 647 (internal citations omitted). Plaintiffs have alleged specific harms, which are directly attributable to IFC's financing and supervising the Plant. *Supra* SOF §§ I, II.

IFC additionally suggests that it must have been present or had "the constructive equivalent of physical presence," D.E. 40-1 at 34, relying on *Beretta*, 872 A.2d at 648-649, and *Acosta Orellana v. CropLife Int'l,* 711 F. Supp. 2d 81, 103 (D.D.C. 2010). But *Beretta* does not discuss any such alleged requirement. 872 A.2d at 648-649. And *Acosta Orellana* was discussing a requirement that the nuisance must originate from another's property, relying on *Daily v. Exxon Corp.*, 930 F. Supp. 1 (D.D.C. 1996) and *Rosenblatt v. Exxon Co., U.S.A.*, 642 A.2d 180 (Md. 1994), which both concerned plaintiffs who tried to bring nuisance claims for pollution that originated on *their own property*. The nuisance here does arise on land adjacent to the Plaintiffs', *supra* SOF § II, and IFC is liable for their role in contributing to the creation of that nuisance. Restatement (Second) of Torts, § 834.

The *Acosta Orellana* plaintiffs only alleged that defendants "promoted" the use a toxic fungicide, but did not manufacture or use it. 711 F. Supp. 2d at 86-87. The Court found plaintiffs failed to plausibly plead *causation* for private nuisance, as they did not allege defendants owned or controlled land adjacent plaintiffs', *or engaged in any act that created the nuisance*. *Id.* at 103. But here, IFC's funding, involvement in and control over the Project caused a nuisance. *Supra* SOF §§ I, III.

In any event, it matters little whether there is some control or constructive equivalent of physical presence required, because IFC had both. It exercises substantial control, including through approval of design and construction, the ability to change CGPL's directors and management, oversight of environmental and social compliance, and its ability to compel corrective action. SOF § III. And IFC has promised to "remain[] actively engaged with CGPL to ensure implementation of the action plan[,]" D.E. 40-23 at 2. This oversight and management is an expression of IFC's equivalence of presence, substantial participation and control. It is easily sufficient.

As IFC's own case recognizes, a defendant need not have the ability to abate the nuisance.

Acosta Orellana, 711 F. Supp. 2d at 101 n.20. Even if that were required, "abatable" means only the ability to decrease the nuisance. *Beatty,* 860 F.2d at 1124. IFC's contractual rights provide IFC that ability. Regardless, the lack of ability to abate would not impact Plaintiffs' damages claims. Restatement (Second) of Torts § 822, cmt d (distinguishing damages and injunction).

D. Plaintiffs are intended third party beneficiaries of the Loan Agreement.

Plaintiffs have third-party beneficiary claims because they have suffered harm from a breach of Loan Agreement provisions that reflect an intent to benefit them. *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 people like Plaintiffs. *Id.* §§ III, IV; *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). IFC points to the contractual choice of English law, and argues that a disclaimer of third-party rights controls under English law. D.E. 40-1 at 27-28. But D.C. law applies.

D.C. law only honors choice-of-law provisions if "there is some reasonable relationship with the state specified." *Norris v. Norris*, 419 A.2d 982, 984 (D.C. 1980).[32] This Agreement, between a D.C. lender and an Indian borrower, to use D.C. funds, has nothing to do with England. That IFC has an office in England and the United Kingdom is a member, D.E. 40-1 at 28, does not create a reasonable relationship between *this contract* and England. Nearly every country is an IFC member, and IFC has offices in roughly 100 countries.[33] D.C. is IFC's headquarters and principal place of

[32] IFC asserts that a reasonable relationship with *one* party is sufficient, DE 40-1 at 28, but its sources do not support its claim. *Song Fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 61 (D.D.C. 2014) merely re-states the general D.C. rule, with no mention of one party's relationship, and Restatement (Second) of Conflict of Laws § 187(2)(a)), specifically says the choice of law clause will *not* be honored when "the chosen state has no substantial relationship to *the parties* or the transaction." (emphasis added).

[33] *See* IFC, About IFC: Where we Work, https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/Where+We+Work (last accessed Aug. 20, 2019).

business, and where IFC approved the loan. *See e.g.*, *Sandza v. Barclays Bank PLC*, 151 F. Supp. 3d 94, 103-104 (D.D.C. 2015) (reasonable relationship exists where chosen jurisdiction is *party's principal place of business*). And while IFC alleges that "it regularly does business there," D.E. 40-1 at 28, it does not claim this business relates to this Agreement. English law does not apply. And, since IFC has not argued that Indian law governs the contract or shown a conflict with Indian law, the Court should apply D.C. law. *Shapiro, Lifshitz & Schram,* 24 F. Supp. 2d at 72 n.6.

Under D.C. law, intended third-party beneficiaries may sue on contracts for their benefit. *See Aetna Casualty & Surety Co. v. Kemp Smith Co.*, 208 A.2d 737, 738-39 (D.C. 1965). Even where contracts have express disclaimers of third party beneficiary rights, courts have still found that intended third party beneficiaries may sue to enforce these contracts. 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.[34] Here, the provisions that reflect a specific intent to benefit third parties take precedence for the same reason.

IFC relies on *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.,* 944 A.2d 1055 (D.C. 2008), but that case applied a presumption that members of the public are *not* intended beneficiaries of government contracts. *Id.* at 1065, 1067. Unlike a general benefit to the public as a part of governmental activity, IFC foresaw that the Project would harm Plaintiffs and explicitly contracted to mitigate those harms. The Agreement refers to vulnerable populations the Project would hurt and

[34] *Accord*, *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); *Barba v. Vill. of Bensenville*, 29 N.E.3d 1187, 1194-1195 (Ill. App. Ct. 2d Dist. 2015). Indeed, *Pennsylvania State Emps. Credit Union v. Fifth Third Bank*, 398 F. Supp. 2d 317, 325 (M.D. Pa. 2005), on which the IFC relies, D.E. 40-1 at 29, distinguishes *Martin Marietta* on its facts, rather than disagree with the result there.

who require assistance or compensation. SOF § III. And it explicitly integrates policy documents and laws whose primary purpose is to protect Plaintiffs, including IFC Performance Standards, which include extensive requirements for consultation with affected communities, and set out IFC's supervisory role over environmental and social impacts. *Id.* § III, IV. As a condition of disbursement, CGPL must certify that it is in compliance with these Requirements. D.E. 40-4 Schedule 1 at 86-7 (Sec. 4.2(q)). The point of these affirmative obligations to supervise and take remedial action was to protect people like Plaintiffs. Since IFC's policy documents establish its duty to Plaintiffs, and those documents are integrated into the contract, the contract includes that duty.

Indeed, "a disclaimer [of third party beneficiary rights] may be disregarded where it conflicts with the contract's fundamental purpose." *In re Express Scripts, Inc., PBM Litig.*, No. 4:05-MD-01672 SNL, 2008 WL 2952787, at *31-32 (E.D. Mo. July 30, 2008). Protecting third parties from environmental and social harm is a core component of IFC's mission and IFC's purpose – and only reason for entering these loan agreements – is to fight poverty. SOF § IV. IFC entered this contract with the express purpose of benefitting people like Plaintiffs, not further impoverishing them.

IV. Defendant fails to meet its *forum non conveniens* burden.

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

IFC has not met its threshold *forum non conveniens* burden to show that India is an available and adequate forum. *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). Yet IFC provides no reason to believe it can be sued there, and neglects to mention that it is actually immune from suit in India. Since IFC has not shown it is subject to jurisdiction, has not stipulated to jurisdiction or service of process, and has not waived immunity, it has not shown India is an available forum.

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) (expert showed "neither sovereign immunity nor … statute of limitations… would bar plaintiffs' claims") *aff'd* 616 F.3d 568 (D.C. Cir. 2010); *Croesus,* 212 F. Supp. 2d at 38 (expert showed, and plaintiffs did not dispute, that defendant "would be unable to claim sovereign immunity"). *Accord Azima v. RAK Inv. Auth.,* 305 F. Supp. 3d 149, 173-74 (D.D.C. 2018) (dismissal not warranted where defendant likely enjoyed, and had not waived, sovereign immunity), *rev'd on other grounds,* 926 F.3d 870, 876 (D.C. Cir. 2019). IFC has shown neither.

Indian law appears to provide IFC *complete* immunity from suit. In 2016, India extended the United Nations (Privileges and Immunities) Act of 1947 ("UN Act") to IFC. Rai Decl. ¶ 12. The Act provides IFC "immunity from every form of legal process," *id.,* "unless IFC expressly waives its immunity in any particular case," *id.* ¶ 13. IFC gives no reason to believe it would not be immune nor has it provided the necessary waiver. Indeed, IFC vociferously asserts immunity, and repeatedly states that it "has not waived its immunity as to Plaintiffs' claims," D.E. 40-1 at 1; *id.* at 10, 19, 43.[35]

That is not all. IFC cites no Indian case finding personal jurisdiction over IFC, no Indian case finding subject matter jurisdiction over IFC, indeed, no Indian case that has *ever* proceeded against IFC, even before the recent extension of the UN Act-immunity to IFC.

Ms. Rasgotra does not address these failings. Unlike in *MBI* and *Croesus*, she merely states without support that India "possesses jurisdiction over the whole controversy." D.E. 41-1 at ¶ 20. And Ms. Rasgotra admits she did not opine on jurisdiction *over IFC. Id.* at ¶ 38. She says nothing

[35] IFC previously suggested it might be subject to suit under a provision in the International Finance Corporation (Status, Immunities and Privileges) Act that is identical to its Articles' waiver provision, D.E. 23 at 16, while simultaneously arguing the *exact same* language immunized IFC from suit in the U.S.*, id.* at 6-8. In its new opening brief, at least, IFC does not repeat its claim that the same words mean opposite things in India and here. Thus, IFC has waived its only previous jurisdiction argument and IFC has been granted greater immunities in the interim. *See* Rai Decl. ¶ 13.

about the new immunity law, and otherwise "does not address … 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).[36]

IFC's cases finding India to be an adequate forum, D.E. 40-1 at 36, confirm its failure to satisfy its threshold burden. In all but one, defendants consented to jurisdiction.[37] In the other, jurisdiction was obvious, as the plaintiff had already sued the defendant in India. *Chigurupati v. Daiichi Sankyo Co.*, 480 F. App'x 672, 674 (3d Cir. 2012). By contrast, as with any forum, courts refuse to find India to be an available alternative where, the defendant fails to show it can be sued there.[38]

IFC also has not shown that Plaintiffs' claims are timely in the National Green Tribunal (NGT), the only Indian forum IFC claims is viable. D.E. 40-1 at 36-37. A forum is inadequate if the claims would be barred by a statute of limitations. *Park*, 695 F.2d at 633 n.17; *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 340 (D.D.C. 2007). IFC therefore bears a "heavy burden of showing that the statute of limitations in the alternative forum would *not* bar the asserted claims." *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.,* 246 F. Supp. 3d 52, 74-75 (D.D.C. 2017) (emphasis original, quotation marks omitted). They cannot meet it.

The NGT Act imposes strict time limits. Claims could be barred within as little as six

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[36] Despite numerous opportunities to clarify jurisdiction IFC has repeatedly obfuscated. *See e.g.* D.E. 27 at 2. When the D.C. Circuit asked whether IFC would assert immunity in India, IFC responded: "in particular cases IFC might claim immunity or might not." Oral Argument Audio, *Jam v. Int'l Finance Corp.,* No. 16-7051, beginning at 48:12 (argued Feb. 6, 2017), https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201702.

[37] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 198, 203-204 (2d Cir. 1987); *Advanta Corp. v. Dialogic Corp.*, No. 05-2895, 2006 U.S. Dist. LEXIS 28214, *11 (N.D. Cal. May 2, 2006); *Neo Sack, Ltd. v. Vinmar Impex, Inc.*, 810 F. Supp. 829, 831-33 (S.D. Tex. 1993); *Ramakrishna v. Besser Co.*, 172 F. Supp. 2d 926, 930 (E.D. Mich. 2001).

[38] *See, e.g.*, *Deb v. Sirva, Inc.*, 832 F.3d 800, 811-13 (7th Cir. 2016); *Arçelik A.Ş v. E. I. du Pont de Nemours & Co.,* No. 15-961-LPS, 2018 U.S. Dist. LEXIS 45728, at *25 (D. Del. Mar. 20, 2018); *OKS Grp., LLC v. Axtria Inc.*, No. 15-1922, 2015 U.S. Dist. LEXIS 174393, at *7-8 (D.N.J. Dec. 15, 2015); *Chemiti v. Kaja,* No. 13-cv-00360-LTB, 2013 U.S. Dist. LEXIS 157009, at *12-13 (D. Colo. Nov. 1, 2013); *Synygy, Inc. v. ZS Assocs.,* No. 08-2355, 2009 U.S. App. LEXIS 11777, at *5 (3d Cir. June 1, 2009).

months from when the cause of action first arises. D.E. 22-2 ¶¶ 8, 11. Even if a five year period applied to Plaintiffs' claims, which is not clear, it runs from when the cause for relief "first arose." Declaration of Shibani Ghosh ¶¶ 23-24. The NGT cannot extend either limitation period beyond 60 extra days. *Id.* ¶¶ 20-22. Nor can IFC cure the problem; the NGT Act does not recognize extension by consent. D.E. 22-2 ¶ 16.[39] IFC fails to meet its "heavy burden" to show Plaintiffs' claims would not be time-barred in IFC's chosen forum.

Because IFC has failed to provide certainty that India would not "deny [Plaintiffs] access to its judicial system," dismissal would be improper. *El-Fadl,* 75 F.3d at 678-69.

B. There is no reason to consider the private and public interest factors, but regardless, they are in equipoise or favor Plaintiffs.

Since 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). Thus, Plaintiffs do not respond fully to these arguments.[40] Regardless, it is clear that IFC cannot overcome the "substantial presumption" favoring Plaintiffs' chosen forum. *See MBI Grp.*, 616 F.3d at 571.

IFC has not shown that more relevant evidence is in India. A great deal is here, and given modern technology, the location of documents is "less important." *Lans v. Adduci Mastriani & Schaumberg L.L.P.,* 786 F. Supp. 2d 240, 294-95 (D.D.C. 2011). IFC is headquartered here, it made its loan decisions here, and committed the acts that render it liable here. Evidence regarding what IFC knew when it funded the Project and what it did in relation to the Project, including IFC documents and its employees' testimony, is here. IFC says that evaluating its involvement "will turn heavily" on the supervision visits it made, but those supervisors and the relevant documents are almost certainly

[39] The NGT limitations period is procedural and applies in the NGT only. D.E. 22-2 ¶ 13.

[40] IFC previously sought to make new (still insufficient) arguments on reply. *See* D.E. 27 at 2-3. IFC should not be permitted to sandbag Plaintiffs, including by submitting to jurisdiction or waiving immunity in India on reply. *MBI Grp.,* 616 F.3d at 575. But if the Court allows IFC to do so, Plaintiffs seek leave to address any new facts and address more fully the private and public interests.

here, and IFC does not suggest otherwise. D.E. 40-1 at 40. By failing to "specifically identify … any evidentiary problems they would encounter," or any witnesses that would be unwilling to testify, if the case continues in D.C., IFC falls far short of its burden. *Lans,* 786 F. Supp. 2d at 295.

Likewise, IFC has not shown it has assets in India or agreed to satisfy an Indian judgment. Thus, Plaintiffs may have to enforce an Indian judgment here. Such a two-forum litigation would waste judicial resources, serve neither forum's public interest, and cannot 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, IFC cites the NGT as evidence that India is committed "to provide an expeditious and expert remedy against environmental violations," D.E. 40-1 at 42, but IFC has not shown that forum is available.[41] IFC claims, citing its expert, that the NGT is "deeply familiar with the subject matter of this case," but the expert did not suggest that the NGT knows anything about this case. *Id.* at 41 (citing Rasgotra Aff. ¶ 43). And while IFC says that litigating in India will obviate conflict of laws problems, *id.*, they have not shown that Indian and D.C. law conflict. Accordingly, this Court would apply D.C. law. *Infra* § III. D.C. has a "strong interest" in providing a forum for redress of injuries caused by organizations, like IFC, that make D.C. their home. *Shi v. New Mighty United States Tr.,* 918 F.3d 944, 952-53 (D.C. Cir. 2019). *See also e.g. Anderson v. AMTRAK*, 2018 D.C. Super. LEXIS 7, *7 (D.C. Sept. 7, 2018).

CONCLUSION

IFC is not above the law. It is not entitled to immunity for its commercial acts. And it is not entitled to defenses at odds with the ordinary rules governing Rule 19, garden-variety torts and *forum non conveniens*. IFC's motion should be denied.

[41] Notably, the NGT has significant vacancies, seriously impairing its ability to dispense justice. Ghosh Decl. ¶ 26(c).

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Respectfully submitted,

/s/ Richard L. Herz

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