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. 1:15-CV-00612-JDB

DEFENDANT INTERNATIONAL FINANCE CORPORATION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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July 1, 2015

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INTRODUCTION

This case involves the alleged environmental impact of a power plant in Gujarat, India. The named plaintiffs and any potential class members are all Indian. The power plant is owned and operated by an Indian company. The impacts complained of all occurred in India. All of the alleged damages occurred in India.

There are no U.S. parties, regulatory agencies, or other U.S. actors involved. The sole U.S. touch-point of this entire case is that one minority lender to the project company is an international organization, International Finance Corporation ("IFC"), which happens to be head-quartered in Washington, but with which Plaintiffs have no legal relationship. Given the identity of the parties and the locus of the claims, this Court should dismiss this action in its entirety with prejudice for the following reasons.

First, IFC is entitled to absolute immunity under the International Organizations Immunities Act ("IOIA"). IFC's absolute immunity is limited only by IFC's own waiver of it, and IFC would not waive — and has not waived — its immunity as to these types of plaintiffs for these types of claims.

Second, the complaint should be dismissed in its entirety on grounds of *forum non conveniens.* To the extent Plaintiffs' claims are viable, Indian courts provide appropriate fora for their resolution. All of the conduct and all of the alleged harm occurred in India and Indian courts provide an adequate alternative forum. In fact, in 2010 India established a specialized tribunal — the National Green Tribunal — to handle precisely these types of claims related to environmental issues. All of the liability, causation, and damages evidence is located in India, including all of the material witnesses — none of whom is subject to this Court's compulsory process. Finally, India has a strong interest in deciding these local issues in India; at the same

time, Plaintiffs should not impose on the U.S. court the burden and expense of resolving these wholly foreign issues.

Third, Plaintiffs have failed to join at least three indispensable parties to this suit, *i.e.*, the power plant owner/operator, the owner/operator of an adjacent power plant, and the Government of India. Plaintiffs allege that each of these entities has a significant role — far more significant than IFC's involvement as a minority lender — in the claimed damages. Without these essential parties, this Court cannot fairly and adequately adjudicate Plaintiffs' claims.

Finally, for each of the several causes of action listed in the Complaint, Plaintiffs have failed to adequately plead a cause of action under Rule 12(b)(6).

Included with IFC's motion are the following submissions:

- The Affidavit of Cyril Shroff, dated July 1, 2015, addressing the availability of the Indian courts to hear the Plaintiffs' claims and the viability of the Plaintiffs' claims under Indian law ("Shroff Aff.");
- The Declaration of Karim Suratgar, dated July 1, 2015, addressing the English law applicable to claims for breach of contract raised by purported third-party beneficiaries ("Suratgar Decl."); and
- The Declaration of Fady M. Zeidan, dated July 1, 2015, describing the functions of the Office of the Compliance Advisor/Ombudsman ("CAO") and the complaint submitted to CAO by Plaintiff MASS in connection with the Tata Mundra power project ("Zeidan Decl.").

BACKGROUND

I. IFC IS A PUBLIC INSTITUTION THAT HAS BEEN SPECIFICALLY DESIGNATED AS AN "INTERNATIONAL ORGANIZATION" UNDER U.S. LAW

IFC is a public international organization established in 1956 by international agreement in the form of its Articles of Agreement ("IFC Articles of Agreement"), which governs its operations. The Articles of Agreement are codified at 7 U.S.T. 2197. *See* Zeidan Decl. Exh. 1. IFC is owned by 184 member countries, including the United States and the Republic of India, who collectively determine its policies. IFC provides loans, equity, and advisory services to stimulate private sector investment in developing countries. *See* Zeidan Decl. Exh. 1, arts. I, III.

To join IFC, a country must be a member of the World Bank, have signed IFC's Articles of Agreement, and have deposited with the World Bank Group's Corporate Secretariat an Instrument of Acceptance of IFC's Articles of Agreement. *See* Zeidan Decl. Exh. 1, IFC Articles of Agreement, arts. II(1), IX(2).

The United States was a founding member of IFC, and Congress authorized the President to accept membership for the United States in IFC. *See* 22 U.S.C. § 282 (2012). Pursuant to the International Organizations Immunities Act of 1945, 22 U.S.C. § 288, the President, by Executive Order, "designate[d] [IFC] as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the said International Organizations Immunities Act." Exec. Order No. 10680, 21 Fed. Reg. 7647 (Oct. 2, 1956). IFC is thereby immune from almost all forms of judicial process and lawsuits, as discussed herein.

In fiscal year 2014, IFC invested more than $22 billion in 599 projects in 98 developing countries. IFC's committed portfolio for its own account was $51.7 billion and it held $15.2 billion for participants in loan syndications.

II. THE COMPLAINT CONCERNS ALLEGED ACTIVITIES IN GUJARAT, INDIA

The Complaint describes the construction and operations of a power plant in Gujarat, India. The power plant is owned and operated by Coastal Gujarat Power Limited ("CGPL"), a subsidiary of Tata Power, an Indian power company. The power plant project had several sources of financing, one of which was IFC which, as a minority lender, loaned $450 million to CGPL. The total cost of the project was estimated to be $4.14 billion. Compl. ¶ 47.

After conducting several site visits and completing its internal assessment of the project, in April 2008 IFC approved the loan and distributed funds to CGPL. The project was approved by the Government of India. Compl. ¶ 28.

Plaintiffs are (i) residents and citizens of Gujarat, India, (ii) a non-profit organization located in Gujarat, India, (iii) and a local governmental entity located in Gujarat, India. According to the Complaint, each of these plaintiffs (and their families) has been damaged in their employment, health, livelihood, or property based on the construction and operation of the power plant. Plaintiffs allege that the plant's construction and operations have (i) adversely affected the fish catch in the waters adjacent to the power plant, (ii) fouled with coal dust Plaintiffs' food supply, (iii) caused various health problems among the local population, (iv) contaminated the ground water, (v) increased the time and expense of catching fish, and (vi) negatively affected the crop yields in the adjacent area. Compl. ¶¶ 76, 107, 109, 111, 247.

III. THE COMPLIANCE ADVISOR OMBUDSMAN OFFICE DOES NOT CREATE ACTIONABLE LEGAL OBLIGATIONS FOR IFC

In June 2011, one of Plaintiffs filed a complaint with the Compliance Advisor Ombudsman ("CAO"). Zeidan Decl. ¶ 64. The CAO complaint identified the same issues with the construction activities and future operation of the power plant as Plaintiffs identified in the Complaint. *Compare* Zeidan Decl. Exh. 6 *with* Compl. ¶¶ 74-115.

The CAO is an independent oversight mechanism for IFC. Zeidan Decl. ¶¶ 16-20. It responds to complaints from project-affected communities with the goal of enhancing social and environmental outcomes. *Id.* As explained by Mr. Fady M. Zeidan, the CAO process is a "problem-solving grievance mechanism" designed by IFC to serve a dispute-resolution function and to ensure that all projects comply with the "policies, standards, guidelines, procedures, and conditions for IFC involvement." *Id.* ¶¶ 15, 19. Any individuals or communities "who believe they are affected, or potentially affected, by the environmental and/or social impacts" of an IFC project may participate in the CAO process. *Id.* ¶ 24.

The CAO is one of many "accountability mechanisms" established by international organizations, such as IFC or the World Bank, to "provide local people with an opportunity to seek oversight of the institution's compliance with applicable environmental and social policies" against the background of such organizations' "immunity from national judicial proceedings." David B. Hunter, *International Law and Public Participation in Policy-Making at the International Financial Institutions*, *in* INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 199, 231-32 (D. Bradlow & D. Hunter, eds. 2010); *see also* Zeidan Decl. ¶¶ 11-12.

The CAO's first response to complaints from affected communities is for CAO to screen the complaint and conduct an assessment. *See* Zeidan Decl. ¶¶ 26-32. In January 2012, the CAO issued an assessment report in which it concluded that the parties, *i.e.*, Plaintiff MASS and CGPL, would benefit from the collaborative dispute-resolution process provided by the CAO. *Id.* ¶¶ 65-66. The dispute-resolution tools suggested by the CAO ranged from "information sharing, to a review of company documentation by mutually agreed independent experts, to participatory monitoring." *Id.* ¶ 65. The CAO stated that "these tools may have been helpful in

addressing concerns expressed by the fisher folk regarding the medium and long term impacts of plant operations on marine life and their fish stock." *Id.*

Specifically, CAO stated that CGPL and Plaintiff MASS "could work together to identify who among the bandar's users may not have been adequately compensated and may require additional assistance or compensation. Open dialogue between the company and the fisher folk could equally help enhance benefits, such as provision of health services or schooling for the fishing communities." *Id.* According to the CAO, Plaintiff MASS and CGPL both recognized that "part of the threat to the livelihoods of the wider Mundra coast's fisher folk stems from sources beyond Tata Power in the wider industrialization of the coast, and thus cannot be resolved by the company and community alone." *Id.*

Despite the CAO dispute-resolution team's efforts and recommendation, Plaintiff MASS "decided against a collaborative process and requested that the complaint be transferred to CAO's compliance function." *Id.* ¶ 66. The CAO's compliance function focuses on whether IFC has complied with its environmental and social policies. *Id.* ¶¶ 19, 22. CAO has no authority with respect to judicial processes, and it is neither a court of appeal nor a legal enforcement mechanism. *Id.* ¶¶ 16-17.

In July 2012, CAO issued an appraisal report for the audit of IFC. *Id.* ¶ 69. In the report, the CAO noted that "the coastline around Mundra is undergoing a rapid industrial transformation" involving the CGPL power plant and "the development of the Adani Group's Mundra Port and Special Economic Zone . . . ." *Id.*

In October 2012, in accordance with CAO's operational guidelines, CAO developed Terms of Reference for an audit of IFC's environmental and social performance with respect to the CGPL project. *Id.* ¶ 70. In August 2013, CAO issued an audit report. *Id.* ¶ 71. In it, CAO

found that IFC was out of compliance with some of its internal policies. *Id*. In September 2013, IFC responded to the CAO's audit. *Id.* ¶ 72. In November 2013, IFC issued a statement regarding the audit which included a 10-point action plan to work cooperatively with CGPL and the Gujarat fishing communities to address their concerns. *Id.* ¶ 73.

On January 14, 2015, CAO issued its first monitoring report. *Id.* ¶ 74. CAO decided to keep the audit open for monitoring. *Id.* On January 20, 2015, IFC responded to the monitoring report. *Id.* ¶ 75. In the response, IFC "agree[d] with CAO's decision to continue its monitoring of the Project through November 2015, as at this stage the key studies that form part of the action plan have not yet been completed." *Id.* The CAO monitoring continues to this day and is a matter of public record. *Id.* ¶ 76.

This lawsuit is effectively an attempt to boot-strap its complaint with CAO and CAO's monitoring activities into a civil action in a United States court.

ARGUMENT

I. THE COURT MUST DISMISS THE COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Complaint must be dismissed in its entirety because the Court lacks subject-matter jurisdiction over Plaintiffs' claims. An international organization's immunity under the IOIA limits this Court's subject-matter jurisdiction. *See Weinstock v. Asian Dev. Bank*, Civ. Action No. 05-174(RMC), 2005 WL 1902858, at *2-3 (D.D.C. July 13, 2005) (Collyer, J.) ("It is well established that statutes like the IOIA that grant immunity to foreign nations and international organizations limit the District Court's jurisdiction over parties that are entitled to such protection." (citing *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340-42 (D.C. Cir. 1998)).

Under the IOIA, "[i]nternational organizations . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b) (2012). In the IOIA context, the "immunity enjoyed by foreign sovereigns" does not refer to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), but rather to the absolute immunity enjoyed by foreign sovereigns in 1945. *See Atkinson*, 156 F.3d at 1341-42 (D.C. Cir. 1998) ("The [FSIA] is 'beside the point' because it does not 'reflect any direct focus by Congress upon the meaning of the earlier enacted provisions' of the IOIA." (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998))). In 1956, IFC was designated by the President as an international organization and thus enjoys all privileges and immunities conferred by the IOIA. *See* 22 U.S.C. § 288a; Exec. Order No. 10680, 21 Fed. Reg. 7647 (Oct. 2, 1956).

IFC's immunity under the IOIA is subject to only two limitations: (1) express waiver as set forth in its Articles of Agreement or a contract; and (2) abrogation by the political branches of the U.S. Government. *See Mendaro v. World Bank*, 717 F.2d 610, 613 (D.C. Cir. 1983). Neither of these two exceptions is applicable to Plaintiffs' claims. Moreover, contrary to Plaintiffs' assertion, there is no "commercial activity" exception to IFC's immunity. *See Atkinson*, 156 F.3d at 1341-42 (D.C. Cir. 1998).

A. IFC Has Not Waived Its Immunity To Plaintiffs' Claims

This Court lacks subject-matter jurisdiction over Plaintiffs' claims because IFC has not waived its immunity to such claims. No such waiver is found in IFC's Articles of Agreement or any relevant contract. In fact, the Loan Agreement between CGPL and IFC ("IFC Loan Agreement") expressly provides that the contracting parties did not intend to provide third

parties, such as Plaintiffs, with any right to bring claims under the parties' agreement. *See* Suratgar Decl. ¶¶ 8-17 & Exh. 1, Schedule 1 at 136.

1. Plaintiffs' Claims Do Not Fall Within Article VI, Section 3, Of IFC's Articles Of Agreement

Plaintiffs' action should be dismissed because it is not covered by the limited waiver of immunity set forth in Article VI, Section 3, of IFC's Articles of Agreement. In relevant part, this section provides that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office . . . ." Zeidan Decl. Exh. 1, art. VI, Section 3. The D.C. Circuit has addressed nearly identical provisions in actions against IFC and other international organizations. *See, e.g.*, *Atkinson*, 156 F.3d at 1338 (addressing an identical provision in the Articles of Agreement of the Inter-American Development Bank); *Mendaro*, 717 F.2d at 614-15 (addressing an identical provision in the Articles of Agreement of the World Bank); *Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 457-58 (D.C. Cir. 1967) (addressing the Articles of Agreement of the Inter-American Development Bank). The immunities of these other international organizations and IFC's immunity are virtually indistinguishable. *See Lutcher*, 382 F.2d at 457-58; *Banco de Seguros del Estado v. Int'l Fin. Corp.*, 1:06-CV-2427, 2007 WL 2746808, at *5 n.7 (S.D.N.Y. Sept. 20, 2007).

In considering precisely the same waiver language as in the present case, the D.C. Circuit has consistently held that any "facially broad waiver of immunity contained in [an international organization's] Articles of Agreement must be narrowly read in light of both national and international law governing the immunity of international organizations." *Mendaro*, 717 F.2d at 611; *see also Atkinson*, 156 F.3d at 1337-38. On this basis, an international organization's "immunity should be construed as *not waived* unless the particular type of suit would *further* the

[international organization's] objectives." *Atkinson*, 156 F.3d at 1338 (emphasis in the original); *see also Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*, 264 Fed. App'x 13, 15 (D.C. Cir. 2008) (applying *Atkinson* to interpret the World Bank's Articles of Agreement in a lawsuit brought by third-party judgment creditors of member nations' contractors); *Weinstock*, 2005 WL 1902858, at *3-4 (applying *Atkinson* to interpret the Asian Development Bank's Articles of Agreement). These waivers therefore apply only to the claims of "debtors, creditors, bondholders, and those other potential plaintiffs to whom the [international organization] *would have to subject itself* to suit in order to achieve its chartered objectives." *Mendaro*, 717 F.2d at 615 (emphasis added); *Atkinson*, 156 F.3d at 1338. Because Plaintiffs' claims are not referenced in the waiver language and would in no way further IFC's objectives (in fact, they would severely hamper them), they must be dismissed.

Plaintiffs attempt to shoehorn their claims into IFC's narrow immunity waiver by suggesting that "[l]iability for the IFC's role in the Tata Mundra Project is consistent with and supports the IFC's mission and purpose." Compl. ¶ 200. According to Plaintiffs, this lawsuit would further IFC's organizational objectives, which allegedly include a commitment to ensure "that the environment is not degraded . . . and that renewable natural resources are managed sustainably." Compl. ¶ 204. Plaintiffs further suggest that liability for environmental harm caused by loan recipients would help IFC to ensure community support for IFC's lending projects, because "[o]btaining community support requires that communities have reason to trust that the IFC will follow through with promises and representations made . . . ." Compl. ¶ 208.

Plaintiffs' interpretation of IFC's limited waiver is incorrect. Such an interpretation essentially seeks to transform IFC and other international organizations from lenders into project managers, and thus poses a grave threat to the critical lending assistance provided by

international organizations to developing economies. It would be potentially "'fatal to the public service'" provided by IFC and other such organizations. *See Atkinson*, 156 F.3d at 1338 (quoting *Buchanan v. Alexander*, 45 U.S. 20 (1846)). This Court should reject Plaintiffs' interpretation of IFC's limited waiver for at least four reasons.

First, such an interpretation would significantly undermine IFC's objective of providing lending assistance to developing countries. "In particular, IFC would be less willing to invest in projects that might otherwise have a high development impact," including "transformational projects in less-developed areas, which in turn would negatively affect the poorest of the poor." Zeidan Decl. ¶¶ 66-67. Liability for the torts of borrowers "would expose [IFC] to disruptive interference with its [lending] practices" based on the environmental regulations and tort laws applicable within "each of its member countries, which would imply devastating administrative costs." *See Atkinson*, 156 F.3d at 1338 (analyzing *Mendaro*, 717 F.2d at 617-19). Such liability would have a considerable chilling effect on IFC's capacity and willingness to lend money to business entities in developing countries, which frequently struggle to conduct industrial activity in accordance with sound environmental practices. *See* Zeidan Decl. ¶ 63. Indeed, taking the necessary steps to protect itself from liability to third parties would likely compel IFC to intrude on the internal governance of borrowers in direct contravention of its Articles of Agreement, which prohibit IFC from "assum[ing] responsibility for managing any enterprise in which it has invested." *See Banco de Seguros*, 2007 WL 2746808, at *5 n.8; Zeidan Decl. Exh. 1, art. III(3)(iv).

Second, there are no "corresponding benefit[s]" associated with IFC waiving its immunity to Plaintiffs' claims, because the CAO process already provides Plaintiffs with an alternative means of recourse. *See Atkinson*, 156 F.3d at 1338; *Mendaro*, 717 F.2d at 617.

Where an international organization provides access to dispute resolution by way of "an internal grievance mechanism" as an alternative to civil litigation in the district courts, the D.C. Circuit considers any additional "benefit . . . of permitting suits by [aggrieved parties] to be minimal." *Atkinson*, 156 F.3d at 1338 (analyzing *Mendaro*, 717 F.2d at 617).

In the present case, any individuals or communities purporting to be affected adversely by one of IFC's borrowers may pursue a form of dispute resolution through the CAO process. Zeidan Decl. ¶ 8 ("In FY2014 alone, CAO addressed 54 cases, 49 of which were filed either by community members directly or with the assistance of an outside organization."). Indeed, international organizations have frequently established "accountability mechanisms" such as the CAO process precisely for the purpose of closing the "accountability gap" without waiving their immunity from civil lawsuits. *See* David B. Hunter, *International Law and Public Participation in Policy-Making at the International Financial Institutions*, *in* INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 199, 231-32 (D. Bradlow & D. Hunter, eds. 2010); Suzuki & Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 206 (2005-2006) ("[T]he absence of access to effective remedies stemming from an [international organization's] immunity from local jurisdiction is the essential reason for the establishment of the accountability mechanism as an internal mechanism, independent of local jurisdictions in which the [international organization] remain[s] immune."). IFC's objectives thus would not be served by the type of lawsuit that Plaintiffs now seek to bring.

Although Plaintiffs offer conclusory statements regarding supposed additional "benefits" to IFC arising from *Plaintiffs'* attempt to enforce *IFC's* own polices outside the CAO process (Compl. ¶¶ 200-08), this Court should give no weight to these assertions. "[U]nsupported

conclusory allegations are 'not entitled to be assumed true'" when considering whether a complaint should withstand a motion to dismiss. *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1052 (D.C. Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Plaintiffs have offered no facts to support these conclusory statements; moreover, IFC is perfectly capable of enforcing its own contracts, as well as its own environmental and social policies. *See* Zeidan Decl. ¶¶ 20-23 ("These measures are designed to improve the IFC's own environmental and social requirements and performance as they apply to the borrower, all in furtherance of getting results in the pursuit of the IFC's development mission and objectives."); *see also Atlantic Tele-Network Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 132 (D.D.C. 2003) (Jackson, J.) (rejecting a proposed waiver of an international organization's immunity where a lawsuit was motivated by "objectives [that] the [international organization] *can well pursue on its own without help from private litigants*") (emphasis added).

To paraphrase Judge Jackson, were this suit to be allowed, virtually any citizen with an environmental grievance against a debtor entity could challenge an IFC loan to that entity without any "corresponding benefit" accruing thereby to IFC whatsoever. *Id.* Plaintiffs assert that allowing these claims by third parties would assist "[t]he IFC's mission to fight poverty" while "carry[ing] out investment and advisory activities . . . [and] 'do[ing] no harm' to people and the environment." Compl. ¶ 203. Just like the Inter-American Development Bank, however, IFC can — and does — pursue these objectives through the CAO process without the need for interference from these Plaintiffs. *See Atl. Tele-Network*, 251 F. Supp. 2d at 132.

Third, courts have routinely dismissed the suggestion that third parties who might have been injured by an international organization's borrowers and contractual counterparties fall within the limited category of "debtors, creditors, bondholders, and those other potential

plaintiffs to whom the [international organization] *would have to subject itself to suit* in order to achieve its chartered objectives." *See Mendaro*, 717 F.2d at 615 (emphasis added); *Atkinson*, 156 F.3d at 1338. The court's reasoning in *Banco de Seguros del Estado v. Int'l Fin. Corp.*, is instructive. 1:06-CV-2427, 2007 WL 2746808 (S.D.N.Y. Sept. 20, 2007). There, plaintiffs had no legal relationship with IFC; instead, they were depositors and noteholders of a bank in which IFC held an interest. *See id.* at *5. The plaintiffs' claims, which, as here, included claims of negligence and negligent supervision, were based on theories of vicarious liability with which they attempted to hold IFC liable for the actions of a third party. *Id.* at **2, 5 (quoting *Mendaro*, 717 F.2d at 615). The court found that the plaintiffs were not "the type of other potential plaintiffs to whom IFC would have to subject itself to suit in order to achieve its chartered objectives." *Id.*

As here, IFC had no relationship with the plaintiffs. *Id.* As here, plaintiffs attempted to enforce an agreement to which they were not a party. *Id.* at *6. As here, plaintiffs attempted to enforce IFC's *own policies* against it. *Id.* at *5-6. The Court held that IFC's limited waiver "was not meant to be interpreted so broadly as to permit claims by such tenuously related parties as these Plaintiffs." *Id.* at *6. The Court also found that allowing third-party claims "might actually interfere with IFC's functions." *Id.* at *5 n.8.

Other courts have reached similar conclusions. In *Atlantic Tele-Network*, the court rejected the notion that a waiver of immunity contemplated a third party's lawsuit to satisfy debts owed by a loan recipient. 251 F. Supp. 2d at 132. In *Inversora Murten*, the court rejected an enforcement action brought by a third-party judgment creditor of an international organization's contractor. 264 Fed. App'x at 15-16. And in *Atkinson*, the court rejected a wage garnishment action brought by a third party based on the debts of an international organization's employee.

156 F.3d at 1338. Only in cases where IFC had a direct commercial relationship involving its investments have courts found there to be a corresponding benefit to IFC. *See, e.g., Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840-41 (D.C. Cir. 2009). This case is clearly distinguishable and is akin to *Mendaro* or *Banco de Seguros*, where immunity was upheld. *See Mendaro*, 717 F.2d at 618; *Banco de Seguros*, 2007 WL 2746808, at *5-6.

As these cases collectively demonstrate, the limited waivers set forth in international organizations' charters do not contemplate waiver of immunity to third parties, who fall outside the category of "debtors, creditors, bondholders, and those other potential plaintiffs to whom the [international organization] would have to subject itself to suit in order to achieve its chartered objectives." *See Mendaro*, 717 F.2d at 611; *Atkinson*, 156 F.3d at 1338.

Finally, IFC's own interpretation of the scope of the waiver set forth under Article VI, Section 3, of its Articles of Agreement is entitled to judicial deference. As the D.C. Circuit explained in *Mendaro*, "under international law . . . 'an international organization is entitled to . . . such immunity from the jurisdiction of a member state as [is] necessary *for the fulfillment of the purposes of the organization* . . . .'" 717 F.2d at 615 (emphasis added; internal quotation marks and citation omitted); *see also Chiriboga v. Int'l Bank for Reconstr. and Dev.*, 616 F. Supp. 963, 966 (D.D.C. 1985) (same); Restatement (Third) of Foreign Relations Law of the United States § 467(1) (1987) (same). Much like an administrative agency within the federal system, IFC is itself "in the best position" to identify the necessary means of fulfilling its functions. *See Gonzales v. Oregon*, 546 U.S. 243, 266-67 (2006) (explaining the rationale behind judicial deference to administrative agencies' interpretations of their own rules); *Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S. 144, 152-53 (1991) ("Because the

Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question.").

By analogy, an international organization's understanding of the relationship between its own objectives and its own waivers of immunity should therefore be afforded substantial weight. As explained by Mr. Zeidan: "Potential legal causes of action or purported waivers of immunity flowing from the activities of the CAO would have a severe chilling effect on CAO's and IFC's effectiveness without providing any corresponding benefit to IFC." Zeidan Decl. ¶ 62. Based on his experience working with both IFC clients and affected communities through the CAO process, Mr. Zeidan observes that "[i]f the results of a CAO investigation could potentially form the basis for a legal cause of action against IFC or its clients, IFC's clients would be far less willing to work with CAO and IFC in a cooperative manner." *Id.* ¶ 61. This view is entitled to deference. *See Gonzales*, 546 U.S. at 266-67; *Martin*, 499 U.S. at 152-53. Because an international organization's "immunity should be construed as *not waived* unless the particular type of suit would further the [international organization's] objectives," the international organization's views on the nature of its own objectives thus must inform the interpretation of any purported waiver by this Court. *See Atkinson*, 156 F.3d at 1338; *Mendaro*, 717 F.2d at 615.

Accordingly, because Plaintiffs are not the type of persons, and their claims are not the type of claims, for which IFC has waived its absolute immunity, IFC remains immune from suit in this matter, and should be dismissed under the IOIA.

2. The Loan Agreement Between Coastal Gujarat Power Limited And IFC Does Not Waive IFC's Immunity

Plaintiffs have not pointed to any other potential waivers of IFC's immunity. Importantly, the Loan Agreement between CGPL and IFC ("IFC Loan Agreement"), which Plaintiffs identify as the source of IFC's "duty to monitor and supervise . . . the client's

compliance with environmental and social obligations," contains no such waiver. *See* Compl. ¶ 136; Suratgar Decl. Exh. 1. No *implicit* waiver would be effective under the statutory scheme established by Congress, which requires that international organizations are immune "except to the extent that such organizations *may expressly waive their immunity* . . . by the terms of any contract." 22 U.S.C. § 288a(b) (emphasis added); *Atkinson*, 156 F.3d at 1338; *Mendaro*, 717 F.2d at 615.

In fact, rather than expressly waiving IFC's immunity to the claims of third parties, such as Plaintiffs, the IFC Loan Agreement expressly provides under Section 8.10 of its Common Terms Schedule that third parties shall have "no rights, including under the Contract (Rights of Third Parties) Act 1999 under English Law, to enforce any term" of the IFC Loan Agreement. Suratgar Decl. ¶ 8 & Exh. 1, Schedule 1 at 136. This provision is enforceable under English law, as it would be under the law of many jurisdictions in the United States. *See* Suratgar Decl. ¶¶ 9-15; *see also* Restatement (Second) of Contracts, Section 302 (1981) (recognizing liability to third-party beneficiaries "[u]nless otherwise agreed between promisor and promisee"); *In re TJX Companies Retail Sec. Breach Litig.*, 524 F. Supp. 2d 83, 88 (D. Mass. 2007) ("[C]ontracting parties should be able to control who may sue on the contract."); *Pa. State Emps. Credit Union v. Fifth Third Bank*, 398 F. Supp. 2d 317, 324-25 (M.D. Pa. 2005) (same).

This provision of the IFC's Common Terms Schedule thus establishes even more plainly that Plaintiffs are not the type of persons, and their claims are not the type of claims, for which IFC would seek to waive its absolute statutory immunity under the IOIA. Accordingly, Plaintiffs have failed to establish any waiver of IFC's immunity by which their lawsuit could proceed.

B. Neither Congress Nor The President Has Abrogated IFC's Immunity

Plaintiffs also imply that the political branches have abrogated IFC's immunity by the enactment of Section 7029 of the 2014 Consolidated Appropriations Act. *See* Compl. ¶¶ 210-11.

Although IFC's immunity under the IOIA may indeed be "modified, conditioned, or revoked" by Congress or the President as a matter of federal law, *see Mendaro*, 717 F.2d at 613, such an action would be contrary to the United States' explicit commitment under Article VI, Section 10, of the IFC Articles of Agreement to "mak[e] effective in terms of its own law" IFC's jurisdictional immunities. Zeidan Decl. Exh. 1, art. VI(10). Any such abrogation of an explicit commitment made by the United States in an international agreement must be expressed in a clear and plain statement "to ensure that Congress—and the President—have considered the consequences" for the United States' foreign relations. *See Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 58 n.2 (D.C. Cir. 2011) (*Roeder II*) (quoting *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237-38 (D.C. Cir. 2003) (*Roeder I*)).

IFC's Articles of Agreement constitute an international agreement with binding effect on the United States under international law. *See Toll v. Moreno*, 458 U.S. 1, 14-15 & n.21 (1982); *Int'l Fin. Corp. v. GDK Systems, Inc.*, 711 F. Supp. 15, 18 (D.D.C. 1989); *see also* Restatement (Third) of Foreign Relations Law § 221 (1987). Under settled precedent, a treaty or international agreement can be abrogated by a subsequent federal statute only when the political branches' intent to abrogate the United States' international commitment is expressed in a "clear statement." *See Roeder II*, 646 F.3d at 58 n.2; *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) ("The combination of the last-in-time rule and the canon against abrogation has produced a straightforward practice: Courts apply a statute according to its terms even if the statute conflicts with a prior treaty (the last-in-time rule), but where fairly possible, courts tend to construe an *ambiguous* statute not to conflict with a prior treaty (the canon against abrogation).").

Section 7029 of the 2014 Consolidated Appropriations Act contains no such "clear statement." Indeed, there is no reference in Section 7029 — or anywhere in the 2014 Consolidated Appropriations Act — to the jurisdictional immunities conferred under the IOIA. *See* Pub. L. 113-76, 128 Stat. 5. To the extent that Section 7029 expresses a policy that international financial institutions should create their own "accountability mechanisms" for "violations of human rights" and "equitable economic growth," it is clear that responsibility for promoting this policy is committed solely to "the Secretary of the Treasury," acting through "the United States executive director of each international financial institution." *See id.*, Section 7029. There is no suggestion whatsoever that Congress intended for these policies to be judicially enforceable against the international financial institutions by Plaintiffs or by any other parties. The requisite clear and plain statement is therefore lacking. *See Roeder II*, 646 F.3d at 58 n.2; *Fund for Animals*, 472 F.3d at 879.

C. There Is No "Commercial Activity" Exception To IFC's Absolute Immunity

Plaintiffs' attempt to plead a "commercial activity" exception to IFC's absolute immunity is also misplaced. Plaintiffs assert that their claims fall within a third purported exception to IFC's absolute immunity for "foreseeable injuries to third parties caused by [IFC's] commercial activity carried out from the United States." Compl. ¶ 193. No such exception exists under the IOIA. As several courts have held, the IOIA confers upon international organizations the same "absolute immunity" that was enjoyed by foreign sovereigns at the time of the statute's enactment in 1945. *See, e.g.*, *Atkinson*, 156 F.3d at 1341 (D.C. Cir. 1998); *see also Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014) ("[I]nternational organizations enjoy . . . immunity from suit and every form of judicial process . . . except to the extent that such organizations . . . expressly waive their immunity." (internal citations and quotation marks omitted)); *Inversora*, 264 Fed. App'x at 15 ("Because the immunity conferred upon international

organizations by the IOIA is absolute, it does not contain an exception for commercial activity . . . .”). Plaintiffs’ attempt to invoke this purported exception must therefore be rejected.

II. THIS COURT MUST DISMISS THE COMPLAINT UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*

Because the complained-of conduct and all of the alleged harm occurred in India, this Court must also dismiss the Complaint in its entirety under the doctrine of *forum non conveniens*. *See MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 27 (D.D.C. 2008) (Bates, J.) (“‘[A] district court has discretion to respond at once to a defendant’s *forum non conveniens* plea, and need not . . . first . . . resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) . . . .’” (quoting *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007)).

A court may dismiss a suit for *forum non conveniens* if a defendant identifies an available, adequate alternative forum that, upon weighing certain factors, is the preferred location for the suit. *See MBI Group, Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 571 (D.C. Cir. 2010). Where, as here, none of the plaintiffs are U.S. residents, their choice of the United States as a forum deserves less deference. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) (finding that “[w]hen the home forum has been chosen it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable”.).

Because the Indian courts are an available and adequate forum, and because both the private and public interest factors weigh heavily in favor of the Indian courts as the proper forum, this Court must dismiss the Complaint in its entirety.

A. The Indian Courts Provide An Alternative Forum For Plaintiffs' Lawsuit

The Indian courts provide a proper forum for the claims asserted in the Complaint. In the first step of the *forum non conveniens* analysis, this Court must determine whether there is "an alternative forum that is both available and adequate" to hear Plaintiffs' claims. *See MBI*, 616 F.3d at 571. Federal courts have routinely concluded that Indian courts provide an adequate forum for the litigation of claims.

As the Second Circuit observed in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, the Indian judiciary is "a developed, independent and progressive one" that has "competently dealt with complex technological issues." 809 F.2d 195, 198-99 (2d Cir. 1987). Moreover, "[t]he tort law of India, which is derived from common law and British precedent, was . . . suitable for resolution of legal issues arising in cases involving highly complex technology." *Id.* Similar conclusions have been reached in numerous cases. *Chigurupati v. Daiichi Sankyo Co.*, CA No. 10-5495 (D.N.J. Aug. 8, 2011), *aff'd* 480 F. App'x 672 (3d Cir. May 17, 2012) ("[T]he District Court did not abuse its discretion in concluding that India was an adequate alternative forum."); *Advanta Corp. v. Dialogic Corp.*, No. 05-2895, 2006 WL 1156385, at *5 (N.D. Cal. May 2, 2006) (finding that India is an adequate forum despite the plaintiff's allegations and dismissing for *forum non conveniens*); *Ramakrishna v. Besser Co.*, 172 F. Supp. 2d 926, 931 (E.D. Mich. 2001) (same); *Neo Sack, Ltd. v. Vinmar Impex, Inc.*, 810 F. Supp. 829 (S.D. Tex. 1993) (same); *Maganlal & Co. v. M.G. Chemical Co., Inc.*, No. 88 Civ. 4896 (MJL), 1990 WL 200621 (S.D.N.Y. 1990) (same).

Mr. Cyril Shroff, who is a qualified expert on Indian law and the Indian judicial system, confirms these courts' analyses. As Mr. Shroff explains, the Indian courts provide an available, adequate alternative forum, with a well-developed and independent judiciary that is well-suited to addressing complex legal and technical issues. *See* Shroff Aff. ¶¶ 21-28. In particular, a

specialized forum known as the National Green Tribunal, which the Indian Government established in 2010, is available to "hear[] all cases relating to environmental protection . . . including enforcement of any legal right relating to the environment." *Id.* ¶ 33. The National Green Tribunal is staffed with "judicial members and experts from scientific and technical disciplines," and can seek the assistance of court-appointed "technical expert[s] with specialized knowledge and experience on a case-by-case basis." *Id.* ¶ 39. The National Green Tribunal also is directed by statute to follow "internationally recognized environmental principles of sustainable development, the polluter-pays principle and the precautionary principle in rendering any decision." *Id.* ¶ 46. Accordingly, by virtue of its technical expertise and particularized knowledge regarding environmental harms, India's National Green Tribunal is not only an *adequate* alternative forum — in many ways it is actually the *superior* forum for adjudicating the specific types of claims brought by the Plaintiffs in this case.

Moreover, the National Green Tribunal will be able to adjudicate the Plaintiffs' claims more expeditiously than would this Court. As Mr. Shroff explains, the National Green Tribunal was designed specifically by the Government of India to ensure "'effective and expeditious disposal of cases,'" and is statutorily mandated to "dispose of cases within six months from the date of filing." *Id.* ¶ 36 (quoting The National Green Tribunal Act, 2010 (No. 19 of 2010) Preamble & §§ 18-19). Mr. Shroff also cites empirical data from the World Wildlife Fund, which confirms that the National Green Tribunal is presently handling hundreds of cases each year. *Id.* ¶ 37 (citing World Wildlife Fund, Statistical Representation of the National Green Tribunal (2015)). The speed and efficiency with which the National Green Tribunal would be able to address Plaintiffs' claims is to be contrasted with environmental class action litigation in the United States, which has been known to drag on for a decade or more. The litigation of the

1989 *Exxon Valdez* incident, for example, took twenty years to resolve. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476-82 (2008) (describing the four-phase class action proceedings in which the defendant's liability and compensation were assessed over a twenty-year period). The National Green Tribunal also is committed to "Accessible Environmental Justice," permits "any representative body or organization to file an application for relief," and exempts "economically weak persons or their representative organizations from filing the prescribed court fee." Shroff Aff. ¶ 47. All of the putative class members described in the Complaint would thus be able to participate meaningfully in the litigation.

Finally, whether or not the National Green Tribunal or other Indian courts can provide each of the procedural or substantive advantages available in the United States — such as a class action mechanism or particular causes of action — is irrelevant to the *forum non conveniens* analysis. It is well established that the absence of a class action mechanism does not render a foreign forum "inadequate." *See Aguinda v. Texaco Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) ("[T]he unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." (quoting *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993)); *Gas Plant Disaster at Bhopal, India*, 809 F.2d at 199; *In re Lloyd's Am. Trust Fund Litig.*, 954 F. Supp. 656, 673 (S.D.N.Y. 1997); *see also Beamon v. Brown*, 125 F.3d 965, 969-70 (6th Cir. 1997). Similarly, as the Supreme Court held in *Reyno*, "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." 454 U.S. at 247; *see also MBI*, 558 F. Supp. 2d at 30; *Poole v. Brown*, 706 F. Supp. 74, 75 n.5 (D.D.C. 1989).

Accordingly, this Court should conclude that Indian courts are an adequate alternative forum.

B. The Private Interest Factors Weigh Strongly In Favor Of Dismissal

The second step in the *forum non conveniens* analysis is to weigh the private interest factors. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). These private interests include "ease of access to sources of proof," "availability of compulsory process for attendance of unwilling" witnesses, "the cost of obtaining attendance of willing" witnesses, the "possibility of view of premises" by the court if needed, and "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* Here, all five of the private interest factors weigh heavily in favor of dismissal.

First, as in *Gas Plant Disaster at Bhopal, India*, 809 F.2d at 199-200, the vast majority of material witnesses and documents bearing on causation, liability, and alleged damages is located solely in India. *See* Compl. ¶ 6 (describing plaintiffs as "impoverished fishing communities and local farmers"); *id.* ¶¶ 7-11 (describing alleged harm to the marine ecosystem, groundwater, property, and air quality in Gujarat, India) ; *id.* ¶¶ 13-15 (identifying Plaintiffs as (1) citizens and residents of Gujarat, India, (2) a non-profit in Gujarat, India, and (3) a local government entity in Gujarat, India) ; *id.* ¶¶ 28-30 (describing the Tata Mundra plant's proximity to another coal-fired plant which is not the subject of this lawsuit); *id.* ¶¶ 54-55 (describing IFC's activities in India); *id.* ¶¶ 62-68 (describing IFC's visits to the project and alterations to the design of the plant, all in India), 74-82 (describing alleged harm to Kotadi residents); *id.* ¶¶ 147-59 (describing IFC's alleged conduct in India) ; *id.* ¶¶ 212-77 (describing alleged harm to Plaintiffs, all in India).

In particular, the allegedly negligent "[c]onstruction of the intake and outfall channels" at the Tata Mundra plant, the alleged "[t]hermal pollution from the outfall channel," the alleged "chemical pollution from the outfall channel," the alleged "collapse of the fish stocks," the alleged "obstruct[ion of] access to cattle grazing land and traditional fishing grounds," the alleged "air quality around the Tata Mundra Plant," the alleged "increase in health problems"

and particularly "respiratory problems" experienced by local communities, the alleged "[s]ea water . . . leach[ing] into the soil and into the groundwater," and the alleged "loss of resources and productive agricultural lands" could only be proven or disproven by evidence and witnesses located in India. *See* Compl. ¶¶ 74, 76, 90, 94, 99, 103, 110, 114. Evaluating IFC's actual involvement in the Tata Mundra plant's operations will turn heavily on the nine alleged "supervision visits" made by IFC representatives to the site of the Tata Mundra Project between 2008 and 2012. *See* Compl. ¶¶ 62-68.

Indeed, according to Plaintiffs, in order to make any assessment of the environmental situation, the CAO was required to visit the site multiple times. *See* Compl. ¶ 149. To gather admissible proof and witness testimony relating to Plaintiffs' allegations, the parties would similarly be obliged to conduct considerable evidentiary discovery in India at incalculable expense.

Second, none of the material witnesses is subject to compulsory process. India is far beyond the 100-mile subpoena power exercised by this Court. *See* Fed. R. Civ. P. 45(c)(1)(A).

Third, the costs of bringing willing witnesses from Gujarat, India to Washington would be expensive. Beyond the travel costs, the witnesses will require Gujarati-English interpreters in order to present live testimony before this Court. Conversely, there is no comparable burden in conducting the matter in India. Plaintiffs identify no material witnesses residing in Washington. Even if some exist and would need to appear in-person before the Indian court, far fewer witnesses from the United States would need to travel to India than vice versa.

Fourth, site visits for a "view of premises" by the Court either at the Tata Mundra Plant or the numerous allegedly polluted areas of Gujarat would likewise be expensive and difficult. *See MBI*, 616 F.3d at 576 (citing *Gilbert*, 330 U.S. at 508).

Finally, "all other practical problems that make trial of a case easy, expeditious and inexpensive" weigh heavily in favor of India's National Green Tribunal as the proper forum. Besides being located in the same country as the Tata Mundra plant, the Plaintiffs, and all of the potential class members, the National Green Tribunal is directed by statute to ensure "'effective and expeditious disposal of cases,'" and "dispose of cases finally within six months from the date of filing." Shroff Aff. ¶ 36 (quoting The National Green Tribunal Act, 2010 (No. 19 of 2010) Preamble & §§ 18-19). The National Green Tribunal also is staffed with "judicial members and experts from scientific and technical disciplines," who are deeply familiar with the subject matter of this case. *Id.* ¶ 39. The National Green Tribunal thus will be able to focus quickly and effectively on the critical issues in Plaintiffs' case, whereas a U.S. court would be obliged to spend considerable time familiarizing itself both with the subject matter of the case and with the geographic, social, and environmental factors affecting this particular community in Gujarat, India. The Indian court system, moreover, is far better able to accommodate the particular local languages that are likely spoken by the fact witnesses and alleged victims in the present case, including Hindi, Gujarati, and Kutchi. *Id.* ¶ 45. Because such languages are not widely spoken in the United States, a U.S. court would have considerable difficulties understanding the testimony of witnesses, and translation costs would impose an additional burden on the parties.

For all of the foregoing reasons, India is the proper forum for this case.

C. The Public Interest Factors Weigh Strongly in Favor of Dismissal

The public interest factors point to the same result. These factors include the "local interest in having localized controversies decided at home"; the possibility of holding the trial in a forum "at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself"; and avoiding the imposition of jury duty on "people of a community which has no relation to the litigation" and

other "administrative difficulties" that flow from foreign litigation congesting local courts. *MBI*, 616 F.3d at 576 (citing *Gilbert*, 330 U.S. at 508-09); *Croesus EMTR Master Fund L.P. v. Federative Republic of Brazil*, 212 F. Supp. 2d 30, 39 (D.D.C. 2002).

In this case, all of the public interest factors likewise weigh in favor of litigation in the Indian courts. Just as in *Gas Plant Disaster at Bhopal, India*, "all relevant events occurred in India. The victims . . . are citizens of India and located there. The witnesses are almost entirely Indian citizens. The Union of India has a greater interest than does the United States in facilitating the trial and adjudication of the victims' claims. . . . India has a stronger countervailing interest in adjudicating the claims in its courts according to its standards rather than having American values and standards of care imposed upon it." *See* 809 F.2d at 201. Indeed, the enactment of the National Green Tribunal Act in 2010 demonstrates that "India's commitment to provide an expeditious and expert remedy against environmental violations" has remained strong during the subsequent decades. Shroff Aff. ¶ 34. Moreover, unlike in *Gas Plant Disaster at Bhopal, India*, where the defendant was a U.S. corporation, the party primarily responsible for the alleged tortious conduct in the present case is itself an Indian company, CGPL. Compl. ¶¶ 27-115. Moreover, Plaintiffs have alleged violations of the Indian National Ambient Air Quality Standards (NAAQS), a regulatory framework which India undoubtedly has a greater interest in enforcing. *See* Compl. ¶¶ 10, 99-100, 174. The first factor, India's own local interest in resolving this dispute, thus weighs heavily in favor of dismissal.

The second factor, the prospect of "unnecessary problems in conflict of laws, or in the application of foreign law," *see Reyno*, 454 U.S. at 241 n.6 (citing *Gilbert*, 330 U.S. at 509), likewise weighs in favor of dismissal. Plaintiffs themselves acknowledge uncertainty regarding the conflict-of-law analysis in their Complaint, invoking "the laws of the District of Columbia,

United States federal common law, Indian law, and the laws of any other jurisdiction that might apply." Compl. ¶ 192. This uncertainty, when added to the potential applicability of Indian law, weighs heavily in favor of litigation in India.

The third factor is irrelevant, because like sovereigns, international organizations are immune from trial by jury. The fourth factor clearly weighs in favor of dismissal. *See Reyno*, 454 U.S. at 241 n.6 (citing *Gilbert*, 330 U.S. at 509). By any measure, the class action proposed by Plaintiffs would be a long, drawn-out dispute. As noted above, class actions over environmental harm have been known to stretch out for decades. *See Exxon Shipping Co.*, 554 U.S. at 476. Burdening this Court with a case of this size and complexity would be particularly unfair, given that all of the alleged harm purportedly occurred on the other side of the world in a foreign country with its own functioning judicial system. Accordingly, the relevant public interest factors weigh heavily in favor of dismissal of this case.

* * * * *

To summarize, the Indian courts provide an adequate and available alternative forum, and the private and public interest factors all weigh heavily in favor of litigation in India; therefore, the result should be identical to that reached in numerous other class actions based on allegations of industrial activity causing environmental injury abroad. *See Aguinda v. Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002); *Gas Plant Disaster at Bhopal, India*, 809 F.2d at 201; *Flores v. So. Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002); *Torres v. So. Peru Copper Corp.*, 965 F. Supp. 899 (S.D. Tex. 1996), *aff'd* 113 F.3d 540 (5th Cir. 1997); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). That is, this case must be dismissed in its entirety based on *forum non conveniens*.

III. THIS COURT MUST DISMISS THE COMPLAINT FOR FAILURE TO JOIN INDISPENSABLE THIRD PARTIES

Under Rule 19, an absent party is indispensable if without it (1) "complete relief" cannot be accorded among those already parties, or (2) the absent party "claims an interest relating to the subject of the action and is so situated that disposing of the action in [that party's] absence may" either "(i) as a practical matter impair or impede [that] person's ability to protect the interest or (ii) leave [the remaining] part[ies] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19. If the absent party is indispensable, the Court must determine whether it can proceed without the indispensable party "in equity and good conscience." *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997); *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 50-51 (D.D.C. 2003).

A. Three Necessary Parties Are Currently Absent From This Case

The Complaint describes three parties who, when compared with IFC's role in the Tata Mundra project, had substantially more direct involvement in the Tata Mundra plant's operations. First, the coal-fired power plants operated by CGPL and Adani were the source of all the alleged pollution which purportedly has injured Plaintiffs. *See* Compl. ¶¶ 74-115. Another party, the Government of India, also had supervisory and regulatory responsibilities with respect to the environmental practices of CGPL and Adani, much as Plaintiffs allege IFC had supervisory and monitoring responsibilities. *See id.* ¶¶ 28, 64-67 ("The Tata Mundra Project obtained its initial environmental clearance from the Government of India in March 2007. . . . In January 2009, clearance was obtained from the government for the shared intake channel. . . . In March 2010, CGPL received regulatory clearance for the new outfall channel location. . . . In April 2011, CGPL received an amendment to its environmental clearance allowing it to increase

the Plant from 4,000 MW to 4,150 MW and to change from a rail system to a conveyor system for coal transport, among other changes."). Although Plaintiffs have brought a claim for negligent supervision only against IFC, it is clear from the Complaint that the Government of India possessed "the express authority to supervise and monitor the Plant's operation to determine compliance with the environmental and social conditions" and "prohibit and control and/or regulate CGPL so as to prevent the acts and omissions from occurring." *See* Compl. ¶¶ 302-06.

These parties are necessary because, in their absence, "complete relief" cannot be accorded among those already parties. Fed. R. Civ. P. 19(a)(1); *Cherokee Nation*, 117 F.3d at 1496 n.8; *Primax Recoveries*, 260 F. Supp. 2d at 50-51. Should the Court find IFC liable, IFC itself would have claims against the absent parties. Absent parties are deemed "necessary" within the meaning of Rule 19(a)(1) when, as here, their alleged conduct is central to the plaintiffs' causes of action. While not all joint tortfeasors are indispensable parties under Rule 19, dismissal is proper where the alleged joint tortfeasor was an "active participant" in the harmful conduct attributed to the defendant. *See B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18, 27 (1st Cir. 2008) ("Given that Kellogg Caribbean was a central player—perhaps even the primary actor—in the alleged breach, the practical course here . . . is to proceed in a forum where the absentee may be joined."); *Laker Airways, Inc. v. British Airways*, PLC, 182 F.3d 843 (11th Cir. 1999) ("According to Laker's complaint, ACL would certainly be considered an active participant in the allegations. We determine, therefore, that ACL is a necessary party and should be joined, if feasible."); *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir. 1985) ("First Commercial is clearly a person 'to be joined if feasible' under Rule 19(a) . . . . First Commercial was more than an active participant in the conversion

alleged by the Freemans'; it was the primary participant."). While some district courts have found otherwise, the D.C. Circuit has never rejected this interpretation of Rule 19. *See, e.g., Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1121 (D.C. Cir. 1991) (noting only that the "'primary participant' theory" cannot circumvent "Rule 19's checklist of possible risks of non-joinder," but not rejecting the theory as unsound). In the present case, CGPL, Adani Power, and the Government of India all played a more active and direct role in the operations of the Tata Mundra plant, and thus are necessary parties in the present case.

B. This Court Lacks Jurisdiction To Join The Absent Parties To This Case

From the information provided in the Complaint, it appears that the three absent parties are not subject to the jurisdiction of this Court. CGPL and Adani are both Indian companies. Compl. ¶¶ 29, 42. When CGPL contracted with IFC, it did so in a loan governed by English law containing a forum selection clause identifying English courts as the preferred forum. *See* Suratgar Decl., Exh. 1, § 8.02(a)(i). It thus made no contact with the United States or District of Columbia, and thus had no reason to anticipate being haled into this Court. *See GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000) ("[T]he defendant's conduct and connection with the forum state [must be] such that he should reasonably anticipate being haled into court there.").

Adani, moreover, is not even alleged to have done any business with IFC, with any entity located in the United States or the District of Columbia, or to have purposefully availed itself of the benefits and privileges of conducting any activities in this country. *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 109-13 (1987) (finding a lack of personal jurisdiction where the plaintiffs had "not demonstrated any action by [the defendant] to purposefully avail itself of the [relevant] market"). There thus is no indication that either CGPL or Adani have the requisite minimum contacts with the United States or the District of Columbia necessary to

support personal jurisdiction. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509 (D.C. Cir. 2002).

Finally, the Government of India is a sovereign entity, which cannot be subjected to this Court's jurisdiction absent its own waiver of immunity or another exception set forth in the Foreign Sovereign Immunities Act ("FSIA"). *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) ("[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court."). Under established precedent, where a foreign sovereign is a required party for the purposes of Rule 19, and such party is not subject to any exception to the immunities under the FSIA, the case must be dismissed. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) ("A case may not proceed when a required-entity sovereign is not amenable to suit."); *TJGEM LLC v. Republic of Ghana*, 26 F. Supp. 3d 1, 7 (D.C. Cir. 2013) (same).

C. The Absent Parties Are Indispensable To This Case

When, as is the case here, the joinder of necessary parties under Rule 19(a) is impossible for lack of jurisdiction, the Court must finally determine "whether, in equity and good conscience the action should proceed among the existing parties, or should be dismissed." Fed. R. Civ. P. 19(b). In *Provident Tradesmens Bank & Trust Co. v. Patterson*, the Supreme Court ruled that "Rule 19(b) suggests four 'interests' that must be examined in each case to determine" whether to dismiss an action:

> First, the plaintiff has an interest in having a forum. . . . Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. . . . Third, there is the interest of the outsider whom it would have been desirable to join. . . . Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

390 U.S. 102, 109-111 (1968). Here, these factors indicate that this action cannot proceed without the absent parties.

First, Plaintiffs' interest in having a forum is protected even in the case of dismissal. The Supreme Court has noted that "the strength of this interest obviously depends upon whether a satisfactory alternative forum exists." *Provident Tradesmens Bank*, 390 U.S. at 109. Here, a satisfactory — indeed, superior — alternative forum exists in India. India would be a superior forum because the vast majority of material witnesses and documents bearing on causation, liability, and alleged damages is located solely in India. *See supra*, § II.

Second, IFC clearly "wish[es] to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability" that it may share with the absent parties. *Provident Tradesmens Bank*, 390 U.S. at 110. IFC's interest in avoiding sole responsibility for the harmful acts of absent parties is self-evident. In addition, as discussed in the Rule 19(a)(2) analysis, the absence of such parties subjects IFC to the risk of incurring multiple or inconsistent obligations. Should the Court find it potentially liable, IFC would assert claims against the absent parties, including, *inter alia*, to recover contribution from those parties.

Third, the interests of the absent outsiders further point toward dismissal of Plaintiffs' actions. IFC is unlikely to protect the absent parties' interests to the extent that they are inconsistent with its own. And, while a judgment in their absence will not have binding legal effect on them, it is in the absent parties' interests to be present when Plaintiffs' claims are adjudicated. *See B. Fernandez & Hnos*, 516 F.3d at 24 ("Even if . . . [the absent party] would not be legally bound [by the prior ruling], an adverse ruling would be a persuasive precedent in a subsequent proceeding, and would weaken . . . [the absent party's] bargaining position for settlement purposes" (quoting *Acton Co. of Mass. v. Bachman Foods, Inc.*, 668 F.2d 76, 78 (1st

Cir. 1982))); *NLRB v. Doug Neal Mgmt. Co.*, 620 F.2d 1133, 1139 (6th Cir. 1980) ("It is not necessary that an absent person would be bound by the judgment in a technical sense. It is enough that as a practical matter his rights will be affected."); *see also Provident Tradesmens Bank*, 390 U.S. at 110 (noting the effects that a judgment can have on nonparties, even without res judicata).

Fourth, the final Rule 19(b) factor strongly supports a finding that the actions must be dismissed. As with Plaintiffs' interest in having an appropriate forum, considerations of consistency and efficiency indicate that these actions should be dismissed and brought instead in a foreign court, likely in the courts of India. Because the non-joined parties were active participants in the conduct at the center of Plaintiffs' claims, a trial in their absence—in a jurisdiction with little or no connection to the parties, events, and evidence at issue—would unnecessarily burden this Court and prolong the litigation.

IV. THIS COURT MUST DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER RULE 12(b)(6)

Finally, each of Plaintiffs' claims must be dismissed for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The allegations in the Complaint have failed to establish any "plausible scenario" in which Plaintiffs are entitled to relief. *See Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007)). "A complaint is plausible on its face 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Smith v. District of Columbia*, 674 F. Supp. 2d 209, 211 (D.D.C. 2009) (Bates, J.) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). To withstand challenge under Rule 12(b)(6), Plaintiffs must provide "more than labels and

conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555-56.

A. Plaintiffs Have Failed To State A Claim For Breach Of Contract

Plaintiffs' claim for breach of contract ("Count VII") fails because the parties to the IFC Loan Agreement have expressly excluded all liability to third-party beneficiaries under the applicable English statute: the Contracts (Rights of Third Parties) Act of 1999. *See* Suratgar Decl. ¶¶ 8-17 & Exh. 1, Schedule 1 at 136. As noted above, Plaintiffs have brought a claim against IFC for violating the "contract that contained the terms and conditions of IFC's loan to CGPL to develop the Tata Mundra Project" as alleged "third-party beneficiaries" of the IFC Loan Agreement. *See* Compl. ¶¶ 325-32. The IFC Loan Agreement contains a choice-of-law clause identifying English law as applicable. *See* Suratgar Decl. ¶ 6 & Exh. 1 at 17 (under Section 8.02(a), providing that the IFC Loan Agreement "is governed by and shall be construed in accordance with the laws of England"). Such provisions should be enforced unless the application of the clause would violate the "strong public policy of the forum in which suit is brought." *Milanovich v. Costa Crociere, SpA*, 954 F.2d 763, 768 (D.C. Cir. 1992) (quoting *The Bremen*, 407 U.S. 1, 15 (1972)); *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 36 n.13 (D.D.C. 2013) ("Precedent from this Circuit and others favors application of the law that the parties to a contract agreed would apply.").

The Loan Agreement provides that "[a] Person who is not a party to the Senior Loan Agreement has *no rights*, including under the Contract (Rights of Third Parties) Act 1999 under English Law, to enforce any term of the Senior Loan Agreement." Suratgar Decl. ¶¶ 8-17 & Exh. 1, Schedule 1 at 136 (emphasis added). This term is enforceable under English law. Specifically, under the Contract (Rights of Third Parties) Act 1999, third parties to a contract lack any right to "enforce a term of the contract . . . if on a proper construction of the contract it

appears that the parties did not intend the term to be enforceable by the third party." *Id.* ¶ 12 (quoting Contract (Rights of Third Parties) Act 1999 §§ 1-2. As explained by Mr. Suratgar, English law thus permits the contracting parties to "exclude any liability to [a] third party that [they] might otherwise have had" under that contract by including express "wording to this effect." *Id.* ¶ 15 (citation omitted). The effect of such a clause in the present case, as Mr. Suratgar opines, is to prevent any recovery under the IFC Loan Agreement based on the third-party beneficiary theory advanced by Plaintiffs. Suratgar Decl. ¶¶ 15-17.

Application of English law would not violate "the strong public policy of the forum" in the present case. *See Milanovich*, 954 F.2d at 768 (quoting *The Bremen*, 407 U.S. at 15). Indeed, many jurisdictions within the United States also recognize the right of contracting parties to exclude all liability to third-party beneficiaries. *See, e.g.*, Restatement (Second) of Contracts, Section 302 (1981) (recognizing liability to third-party beneficiaries "[u]nless otherwise agreed between promisor and promisee"); *In re TJX Cos. Retail Sec. Breach Litig.*, 524 F. Supp. 2d 83, 88 (D. Mass. 2007) ("[C]ontracting parties should be able to control who may sue on the contract."); *Pennsylvania State Emps. Credit Union v. Fifth Third Bank*, 398 F. Supp. 2d 317, 324 (M.D. Pa. 2005) (same). D.C. courts have also applied the relevant section of the Restatement (Second) to interpret the obligations owed to alleged third-party beneficiaries. *See, e.g., Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064-65 (D.C. 2008) (applying Section 302 to determine whether a party was an intended third-party beneficiary or an incidental third-party beneficiary to a contract).

Accordingly, because the plain language of the Loan Agreement protects IFC from any contractual liability to Plaintiffs under English law, Plaintiffs' claim for breach of contract must necessarily be dismissed under Rule 12(b)(6).

B. Plaintiffs Have Failed To State A Claim For "Lender Liability" With Respect To Their Non-Contractual Claims

Plaintiffs' non-contractual claims likewise fail because the Complaint does not allege sufficient facts to establish IFC's liability as a *lender* for the actions of the *borrower*. Although Plaintiffs have pled that IFC "is intimately involved in and has substantial control over the decisions" of CGPL, *see* Compl. ¶ 116, Plaintiffs have manifestly failed to plead facts showing that IFC controlled and dominated the activities of CGPL to the extent necessary for lender liability.

Several jurisdictions recognize that lenders may be held liable for the actions of borrowers only where they have "'assumed *actual, participatory and total control* of the debtor.'" *FAMM Steel, Inc. v. Sovereign Bank*, 571 F.3d 93, 104-05 (1st Cir. 2009) (quoting *Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.*, 483 F.2d 1098, 1105 (5th Cir. 1973)) (emphasis added); *Indus. Tech. Venture v. Pleasant T. Rowland Revocable Trust*, 688 F. Supp. 2d 229, 239 (W.D.N.Y. 2010); *Nat'l Westminster Bank USA v. Century Healthcare Corp.*, 885 F. Supp. 601, 603 (S.D.N.Y. 1995) (same); *see also* MATTHEW BENDER, LENDER LIABILITY LAW AND LITIGATION, Vol. 1-1 § 1.03(3)(e). Absent the *actual exercise of control and dominance*, however, a lender cannot be held liable for the actions of a borrower. "[E]ven when the creditor takes an active part in the management of the debtor corporation, this is not by itself sufficient . . . . '[T]he subservient corporation [must] in reality ha[ve] *no separate, independent existence of its own*.'" *FAMM Steel*, 571 F.3d at 104-05 (quoting *Krivo*, 483 F.2d at 1105) (emphasis added); *Valdes v. Leisure Res. Grp., Inc.*, 810 F.2d 1345, 1355 (5th Cir. 1987) (finding as a matter of law that even a lender's "veto power" over "each and every one of [the borrower's] business expenditures . . . does not amount to domination or control").

Plaintiffs have not pled that IFC actually exercised such control and dominance over CGPL. *See generally* Compl. Whereas Plaintiffs allege that IFC acted unlawfully by sitting on the sidelines, there can be no lender liability unless the lender "'assumed *actual, participatory and total control* of the debtor.'" *FAMM Steel*, 571 F.3d at 104 (quoting *Krivo*, 483 F.2d at 1105) (emphasis added); *Indus. Tech. Venture*, 688 F. Supp. 2d at 239; *Nat'l Westminster Bank USA*, 885 F. Supp. at 603 (same). Even if taken as true, Plaintiffs' allegations do not give rise to IFC's liability for the actions of CGPL.

For its part, Indian law imposes an even stricter standard. Under Indian law, there is "no legal basis for asserting these claims against a lender, such as IFC, to an allegedly offending property owner or facility operator." Shroff Aff. ¶¶ 51-67. After individually reviewing the decisions of the Supreme Court of India and the National Green Tribunal addressing negligence, nuisance, and trespass, Mr. Shroff concludes that Indian law does not permit such causes of action to be brought against a lender who has loaned money to the directly responsible tortfeasor. *See id.* ¶ 54 ("[N]o duty is cast upon the lender, under the theory of negligence to ensure that the borrower does not violate environmental norms."); *id.* ¶ 62 ("A claim of nuisance requires that the offending party own or control the 'wrongful act' . . . . [A] lender would not be liable in these circumstances."); *id.* ¶¶ 63, 65 ("Trespass signifies every direct, intentional or negligent transgression into another person's property without any right or lawful authority even though no actual damage may be done . . . . [T]his analysis does not extend liability to a *lender* to the plant or the project."). Accordingly, each of the tort claims raised by Plaintiffs against IFC must also be dismissed under Indian law.

For these additional reasons, Plaintiffs' non-contractual claims must each be dismissed under Rule 12(b)(6) for failure to state a claim.

C. Plaintiffs Have Failed To State A Claim For Nuisance Under Federal Common Law, District Of Columbia Law, Or Indian Law

Finally, Plaintiffs have failed to state a claim for private or public nuisance under applicable law. According to Plaintiffs, "[t]he IFC's conduct as alleged herein violates the laws of the District of Columbia, United States federal common law, Indian law, and the laws of any other jurisdiction that might apply." *See* Compl. ¶ 192. Plaintiffs' allegations, however, do not support a claim for nuisance under any of these bodies of law.

First, the federal common law of nuisance is inapplicable in this case, because the federal common law of nuisance governing water pollution and air pollution is premised on "ambient or interstate" effects within the United States. *See Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527, 2535 (2011) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law") (quoting *Illinois v. Milwaukee* (*Milwaukee I*), 406 U.S. 91, 103 (1972)); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) ("[T]he control of interstate pollution is primarily a matter of federal law."). Thus, federal common law can apply to lawsuits based on harmful conduct occurring in one state that gives rise to harmful "transboundary" effects in another state. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855-56 (9th Cir. 2012). Here, where the pollution occurred in India and affected only citizens and residents of India, the federal common law of nuisance has no applicability. *See Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 20 (D.D.C. 2005) ("[F]ederal common law should only be employed in the rarest of circumstances.").

Second, the District of Columbia does not recognize a cause of action for nuisance which is not based "on some underlying tortious conduct, such as negligence." *Tucci v. District of Columbia*, 956 A.2d 684, 697 (D.C. 2008). As the District of Columbia Court of Appeals has held, "nuisance is a type of damage and not a theory of recovery in and of itself . . . ." *District of*

Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 646 (D.C. 2005) (quoting *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 934 (D.C. 1995)). Moreover, nuisance claims are not viable in the District of Columbia where the defendant lacks "control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance." *Beretta*, 872 A.2d at 648 (quoting *Tioga Pub. Sch. Dist. # 15 v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993)). Here, Plaintiffs' allegations do not support the conclusion that IFC exercised control over the Tata Mundra project or the activities of CGPL. Similarly, IFC's alleged failure to intervene in CGPL's industrial practices is not consistent with a finding of the constructive equivalent of physical presence at the project site. *See Beretta*, 872 A.2d at 648-49; s*ee also Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 103 (D.D.C. 2010). Accordingly, Plaintiffs' claims for nuisance under D.C. law must be dismissed under Rule 12(b)(6).

Finally, as explained by Mr. Shroff, Indian law provides that claims for public and private nuisance may be brought only "against the operator of the plant, not the plant's lenders." Shroff Aff. ¶ 60. Accordingly, although Plaintiffs may bring claims against CGPL, Adani, or other polluters before the National Green Tribunal for actions that "cause[] pollution, nuisance and damage to the environment," under Indian law "a lender would not be liable in these circumstances." *Id.* ¶ 61.

Whether Plaintiffs' claims are considered under federal law, District of Columbia law, or Indian law, therefore, Plaintiffs' claims for nuisance must be dismissed under Rule 12(b)(6).

CONCLUSION

Plaintiffs' Complaint must be dismissed in its entirety. First, IFC is entitled to absolute immunity under the IOIA, and this immunity has neither been waived nor abrogated. Second, Plaintiffs have alleged that Indian entities have caused harm to Indian by actions committed entirely in India, such that an Indian court – the National Green Tribunal – should consider these claims

under the doctrine of *forum non conveniens*. Third, Plaintiffs have failed to join three indispensable parties, whose involvement in the alleged conduct is far more direct that IFC's. Finally, each of the alleged causes of action has been insufficiently pleaded under Rule 12(b)(6). This Court should thus grant IFC's Motion to Dismiss the Complaint.

Dated: July 1, 2015

Respectfully submitted,

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