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' RESPONSE TO DEFENDANT IFC'S SURREPLY (DE 72-1)

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INTRODUCTION

In addition to rehashing arguments Plaintiffs have already refuted, IFC's surreply (ECF No. 72-1) raises arguments it did not in opposing Plaintiffs' Motion to Amend. Each are unavailing.

First, the new Rule 59(e) case it cites supports Plaintiffs' position that they are not required to satisfy Rule 59(e) because dismissal was without prejudice.

Second, with respect to the gravamen, IFC ignores the significant new allegations in the Amended Complaint that address the gaps identified by the Court in the original complaint.

Third, IFC's claim that its conduct is "quasi-regulatory," not commercial, fails because IFC did not regulate anyone, and because it seeks to inject precisely the "purpose" inquiry the Foreign Sovereign Immunities Act (FSIA) prohibits. IFC's motivations cannot change the *nature* of its conduct; the bargained-for commercial contract here is the type of conduct private parties engage in.

Finally, IFC's argument that the International Organizations Immunities Act (IOIA) should be read to provide special treatment for organizations headquartered in the U.S. conflicts with the statute's plain text. *See Jam v. Int'l. Fin. Corp.* 139 S. Ct. 759, 771 (2019).

ARGUMENT

I. Plaintiffs need not satisfy Rule 59(e), but do so anyway.

The recent Rule 59(e) case IFC cites, *Bernier v. Allen*, No. 16-cv-00828 (APM), 2020 U.S. Dist. LEXIS 126722 (D.D.C. July 20, 2020), says nothing new and supports Plaintiffs. ECF No. 72-1 at 2.

Plaintiffs need not satisfy Rule 59(e) because the complaint was dismissed without prejudice. ECF No. 63 at 5-8; ECF No. 65 at 2-7. Regardless, Plaintiffs meet Rule 59(e), because a Rule 59(e) motion to amend the complaint "should be granted unless the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Brink v. Cont'l Ins. Co.*, 787 F.3d

1120, 1128-29 (D.C. Cir. 2015) (internal quotation omitted); ECF No 65 at 17-18. IFC is correct that *Brink* only applies where the court dismisses *with* prejudice, ECF No. 72-1 at 2 (citing *Bernier*, 2020 U.S. Dist. LEXIS 126722, at *8-9). That is *Plaintiffs*' point. Where dismissal is without prejudice, Plaintiffs need not meet Rule 59(e) at all.

IFC wants to have it both ways, suggesting Rule 59(e) applies, but *Brink*'s interpretation of it does not. Neither *Bernier* nor *Brink* support that. Indeed, IFC's position is that it is *harder* to amend when dismissal is without prejudice than when it is with prejudice, but if anything, it is easier. That is why *Bernier* held that where a court grants a Rule 59(e) motion, it typically also must also grant the accompanying Rule 15(a) motion. 2020 U.S. Dist. LEXIS 126722, at *9.

II. IFC cannot dispute that the Amended Complaint provides the allegations this Court found missing from the original Complaint, and therefore suffices under this Court's prior Order.

A. IFC fails to refute the fact that, under the allegations of the Amended Complaint, IFC's approval of a loan it knew would cause harms that could not be mitigated is part of the gravamen of Plaintiffs' claims.

This Court found that Plaintiffs' original complaint "d[id] not make specific allegations that approving the funding—by itself—was a negligent act," because, as alleged, there was nothing "wrongful about the [approval of the loan] standing alone." ECF No. 61 at 18 (internal quotation omitted). Naturally, non-tortious activity would not be the gravamen of the case. But the Amended Complaint specifically alleges that approving the loan itself was tortious because IFC did not adequately consider the risks, lacked sufficient information to develop or assess mitigation strategies, and *knew* that some of the harms it foresaw were *unavoidable*, and thus would necessarily result from financing the project. ECF No. 63 at 8-10; ECF No. 65 at 12-13.

IFC challenges the last of these, arguing that Plaintiffs have not "identif[ied] which harms are attributable to which conduct." ECF No. 72-1 at 4. But there is no requirement that Plaintiffs

must connect every alleged harm to a specified act within Defendant's pattern of tortious activity for it to form part of the gravamen. If, however, Plaintiffs must do so, the Court should permit discovery into the narrow question of which harms IFC knew could not be mitigated. ECF No. 63 at 16-18; ECF No. 65 at 21-22. Although IFC has previously submitted factual declarations, it does not deny that it knew some harms were unavoidable.[1]

IFC claims that this "Court concluded that it would not matter even if Plaintiffs *had* alleged that IFC's loan was negligent," ECF No. 72-1 at 5 (emphasis original), but nothing in the Court's opinion stands for such a broad position. IFC makes the same mistake as the United States Government (USG): the gravamen of the original complaint does not determine the gravamen of the Amended Complaint. To determine the *Amended* Complaint's gravamen, the Court must consider *that* complaint's allegations. ECF No. 70-1 at 1-2.

IFC tries to revive its argument that the gravamen of a claim does not focus on Plaintiffs' claims and liability theories and instead focuses on the location of the harm as a measure of the act that caused it. ECF No. 72-1 at 6-7. But this Court has rejected IFC's approach. ECF No. 61 at 10-13; *see also* ECF No. 70-1 at 5-7. The Court noted that "the gravamen arises from plaintiffs' claims as articulated in their complaint—'the particular conduct on which the action is based.'" ECF No. 61 at 13 (quoting *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015)).[2]

B. The Amended Complaint demonstrates that the gravamen as identified by this Court is in the United States.

This Court found the gravamen of the original complaint to be "the alleged failure to ensure

[1] IFC's suggestion that Plaintiffs must plead different injuries from those pled in the original complaint makes no sense. ECF No. 72-1 at 4, 6. Plaintiffs are not arguing that there are different harms. They are simply clarifying that some of the harms could not be mitigated, and IFC knew this.

[2] IFC claims Plaintiffs have engaged in artful pleading, ECF No. 72-1 at 3, 6-8, but this Court has rejected IFC's view of "artful pleading." ECF No. 61 at 12; *see also* ECF No. 45 at 17-18.

the design, construction, and operation of the plant complied with all environmental and social sustainability standards laid out in the loan agreement, as well as the alleged failure to take sufficient steps to prevent and mitigate harms" to Plaintiffs. ECF No. 61 at 16. Plaintiffs' Amended Complaint alleges facts showing that IFC committed the acts and omissions comprising these failures in Washington, D.C. ECF No. 63 at 10-15; ECF No. 65 at 13-16. IFC's efforts to avoid this fail.

First, IFC seeks to minimize activity this Court found to be at the core of Plaintiffs' suit. In particular, it recharacterizes IFC's approval of the defective construction designs as "little more than its staff's administration of loan disbursements." ECF No. 72-1 at 10. But this Court specifically identified IFC's approval of the construction design as part of the gravamen. ECF No. 61 at 17, 19-20. IFC cannot rewrite this Court's opinion.

Second, IFC argues that Plaintiffs have not "[ ]rebutted" the Court's finding that IFC's direct involvement in design, construction, and operation "'likely occurred in India.'" ECF No. 72-1 at 10 (quoting ECF No. 61 at 20). IFC ignores Plaintiffs' twenty pages of new allegations that these acts, including the steps IFC undertook to evaluate, approve, and monitor the project, all occurred here. ECF No. 63 at 10-15; ECF No. 65 at 13-15.[3]

Third, IFC suggests IFC must have "actively or directly engaged in conduct [in the United States] that harmed Plaintiffs," and argues that Plaintiffs have not shown that it "undertook any 'active' role in developing CGPL's construction designs." ECF No. 72-1 at 9-10. But approving design and disbursing funds is "active" conduct. *See* ECF No. 65 at 15-16. Regardless, this Court

[3] The Court made no factual finding that these acts occurred in India, so there is nothing to "rebut." It found only that the original "complaint d[id] not allege. . . [they] occurred in Washington, D.C." ECF No. 61 at 20. It noted that certain facts "suggest[]" that IFC's involvement in the design, construction, and operation "likely occurred in India," and that therefore the Court could not "presume" this occurred in the United States. *Id.* But now, Plaintiffs have specifically alleged IFC committed these acts here. And IFC provides no contrary evidence.

found that the gravamen includes "approval" of designs. ECF No. 61 at 20 (finding Plaintiffs did not allege "approval of certain negligent designs or construction plans" in the United States; Court could not "presume [] IFC's direct involvement" including "the approval of harmful designs" occurred in the U.S.). And the Court held that the gravamen is *not* limited to "IFC's direct, affirmative conduct"; it also includes IFC's *failures* to ensure that the plant's design, construction, and operation complied with the loan agreement, and to mitigate harms. ECF No. 61 at 13, 15-16. Plaintiffs have specifically alleged IFC approved the harmful designs and committed the failures the Court identified as the gravamen here in the U.S. That suffices under this Court's opinion.

Fourth, IFC misstates both Plaintiffs' allegations that IFC's inadequate responses to harms from the plant originated in D.C., and the applicable standard. IFC knows where it made these decisions, but it does not deny it made them here, let alone present evidence disputing this.

Instead, IFC argues Plaintiffs "do not establish that IFC's leadership in D.C. disregarded specific information about the Tata Mundra Plant." ECF No. 72-1 at 11. Nonsense. Plaintiffs allege that IFC management in D.C. knew of the problems at the plant and chose not to enforce the Loan Agreement's protective provisions or take steps to mitigate harms. ECF No. 63 at 14-15; ECF No. 65 at 15-16.[4]

IFC also says that Plaintiffs' only "evidence" that IFC made the decision not to protect Plaintiffs in D.C. are the responses to the CAO and the CAO Audit Report. ECF No. 72-1 at 11. That is enough, but there is more. For example, outside the CAO process, the Tata Mundra Plant is out of compliance with IFC standards and operating in violation of Indian law. *E.g.*, AC ¶¶ 99, 170,

[4] For example, the CAO reviewed *these exact claims*. AC ¶¶ 149-157; ECF No. 40-1 at 7-8. Although, the CAO found IFC violated its own policies, IFC management failed to take corrective action. AC ¶¶ 154-156, 159. From the time the CAO complaint was filed, IFC staff and management in D.C. were alerted in order to decide what action IFC would take (or not take). AC ¶¶ 252, 256, 257-266; ECF No. 63 at 14-15; ECF No. 65 at 15-16.

241, 244. This triggers review by D.C.-based IFC upper management and the D.C.-based Board of Directors (which have ultimate authority). AC ¶¶ 198, 246-48. And IFC's Vice President of Operations, the IFC officer who decides what actions to take regarding projects causing environmental and social harms, is based in D.C. ECF No. 63 at 14-15.

This case is at the pleading stage. Plaintiffs need not prove that IFC made the decisions not to mitigate harms in Washington D.C. or "rebut" some "presumption" that it did so in India; it is enough that Plaintiffs have adequately *alleged* that IFC made those decisions here. *See Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) ("defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity."). IFC could have presented contrary evidence if it had any, but it did not. And had IFC challenged the facts, Plaintiffs would be entitled to discovery. *Id.*; ECF No. 63 at 16-18. But since IFC "challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, [this Court] should take the plaintiff's factual allegations as true." *Id.* It can dismiss only if no plausible inferences can be drawn from the facts alleged that would provide grounds for relief. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002). That is not the case here.

Last, IFC agrees with the USG that because CGPL had to execute changes IFC demanded, that alters the gravamen. ECF No. 72-1 at 12. Not so. *See* ECF No. 70-1 at 7. IFC is liable for *its own tortious activity* and that relevant activity, as identified by the Court, occurred in the United States. ECF No. 63 at 10-15; ECF No. 65 at 13-16. IFC is not immune simply because it acted with a third party; this "would effectively immunize state-owned enterprises and international organizations operating in the United States from a large swath of causes of action." ECF No. 61 at 12.[5]

[5] IFC asks this Court to ignore Plaintiffs' showing that the text of the commercial activity exception does not require that the injury occur in the U.S., ECF No. 70-1 at 5-6, erroneously claiming Plaintiffs did not raise it earlier. ECF No. 72-1 at 8 n. 2. Plaintiffs did. ECF No. 45 at 17.

III. The purpose behind IFC's conduct does not change its commercial nature.

IFC argues its conduct is not commercial, but "quasi-regulatory," ECF No. 72-1 at 13-19, largely repeating arguments Plaintiffs have refuted. ECF No. 45 at 19-23; ECF No. 70-1 at 8-13. IFC cannot explain how a bargained-for commercial contract "regulates" or point to any IFC authority to regulate. *See* ECF No. 45 at 21-23; ECF No. 70-1 at 9, 10-11.[6] IFC tries to distinguish its *conduct* from private parties' by positing that *IFC* is different. But it is the nature of the conduct, not the actor that matters.

IFC's suggestion that the policy objectives motivating its commercial contracts and associated acts transform the commercial nature of that conduct is precisely the purpose-based inquiry the FSIA prohibits. *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 616-17 (1992); ECF No. 70-1 at 9-13. The fact that IFC's motivation to lend includes whether other banks will do so cannot transform commercial loans at market-based rates into a "public function." ECF No. 72-1 at 14-15, 17.[7] A sovereign's purpose for entering into a commercial contract does not render it a noncommercial act. *Weltover*, 504 U.S. at 617 ("the *reason* why" is "irrelevant") (emphasis original).

The reasons IFC includes environmental standards in its loans also do not change the nature of its commercial loan or associated acts. *See* ECF No. 72-1 at 14.[8] Nor does the fact that IFC's

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[6] *India's* sovereignty and concern with its natural resources, *see* ECF No. 72-1 at 15, is irrelevant. Plaintiffs do not sue India, and India has not granted IFC authority to regulate on its behalf.

[7] *In re Aluminum Warehousing Antitrust Litig.*, did not, as IFC claims, find the London Metal Exchange (LME) regulated the market because it was a "lender of 'last resort.'" ECF No. 72-1 at 14 (quoting No. 13-md-2481 (KBF), 2014 U.S. Dist. LEXIS 119074, at *27 (S.D.N.Y. Aug. 25, 2014)). The LME provided a "market of last resort", *id.* at *26-27, and was "charged by statute" with *regulating* that market. *Id.* at *51-52; *see also id.* at *29-30, 37-38, 60; ECF No. 45 at 22.

[8] IFC's claim that Plaintiffs' position would make all environmental regulation commercial because private businesses could pursue the "purpose" of environmental protection is wrong. *See* ECF No. 72-1 at 16 n.7. A sovereign *regulating* natural resources is *acting* in a sovereign way that a private party

standards are approved by its Board, *id.*, or included in IFC's loan agreements "at the [Board's] direction," *id.* at 15. How IFC decides what provisions to include in its contracts, and why, is irrelevant; IFC's conduct is still the *type* that a private party can engage in. *See* ECF No. 70-1 at 10.[9]

IFC's "limiting principle," that the conduct be a "public function," ECF No. 72-1 at 16, is thus no limit at all. Under IFC's position, whether conduct is "public" depends on the conduct's purpose, not its nature. *See* ECF No. 70-1 at 11. Virtually any public policy goal would render conduct "a public function," and thus any otherwise commercial contract noncommercial. The FSIA forecloses that result. *Weltover,* 504 U.S. at 617; *accord, Cicippio v. Islamic Republic of Iran,* 30 F.3d 164, 167 (D.C. Cir. 1994) (cautioning against attempts to "describ[e] the act in question as intertwined with its purpose"); *Nnaka v. Federal Republic of Nigeria,* 238 F. Supp. 3d 17, 28 (D.D.C. 2017) (same).

IFC cites the same cases as the USG, ECF No. 72-1 at 16-17, but they are inapposite, since private parties *could not* have engaged in the quintessentially sovereign conduct at issue.[10] IFC nonetheless suggests that its role as "a lender of last resort administering environmental policies" through its lending agreements makes IFC "unique." ECF No. 72-1 at 17-18. But commercial banks include the same or similar standards in their loans. ECF No. 72-1 at 15; AC ¶ 124; ECF No. 57 at 1-2. And they fund commercial projects that would otherwise lack financing. ECF No. 57 at 2 (J.P.

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cannot. *See Weltover,* 504 U.S. at 614-15 (distinguishing between a contract to acquire goods, which "private companies can similarly use," and "regulations," which private parties cannot).

[9] The fact that IFC's Board members are states cannot alter the nature of its conduct any more than the sovereign identity of a foreign state and its purported sovereign motivations could alter the nature of its commercial activity. *See* ECF No. 70-1 at 10-11.

[10] *See* ECF No. 70-1 at 12-13 (discussing *Butters v. Vance Int'l, Inc.,* 225 F.3d 462 (4th Cir. 2000) and *UNC Lears Servs., Inc. v. Kingdom of Saudi Arabia,* 581 F.3d 210 (5th Cir. 2009)); *see also* ECF No. 45 at 22-23 (discussing *In re Aluminum,* 2014 U.S. Dist. LEXIS 119074 and *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek (Persero)*, 600 F.3d 171, 177-78 (2d Cir. 2010)).

Morgan's Development Finance Institution "will only finance projects that otherwise would not receive project financing" and will apply IFC's policies and standards).[11]

IFC's denial that its commercial contracts are commercial acts is striking; it previously told the Supreme Court otherwise. *Jam*, 139 S. Ct. at 771 (noting IFC's argument that because it uses the tools of commerce to achieve its objectives, the commercial activity exception may subject it to suit). It was right.

IV. The IOIA provides no special treatment for organizations headquartered here.

IFC largely rehashes the USG's suggestion that organizations headquartered in the U.S. should be treated differently than foreign sovereigns. *See* ECF No. 68 at 10. But the "same" immunity as foreign states means just that. The FSIA analyzes *conduct*, without reference to headquarters or capitals. ECF No. 70-1 at 14-15. That same analysis applies to IFC.

IFC focuses on congressional purpose, but such purpose "is expressed by the ordinary meaning of the words used." *Jam*, 139 S. Ct. at 769 (internal quotation omitted). Regardless, the purpose it posits – to persuade international organizations to headquarter here – hardly suggests the FSIA should be interpreted differently for organizations that do so. The IOIA's text established all sorts of privileges and immunities to induce organizations to come here. *See, e.g.* 22 U.S.C. §§ 288a(c)-(d), 288b-288d; *Jam*, 139 S. Ct. at 765. The Court should decline IFC's invitation to find, 75 years after Congress enacted the IOIA, that the text should have offered more.[12]

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[11] IFC asserts that Plaintiffs' injuries result from IFC's decisions about whether to "enforce" its standards, which are "quasi-regulatory" activities that "do not flow from the Loan Agreement." ECF No. 72-1 at 18. But IFC does not regulate anyone; it has no power outside that created by its commercial contract. *See* ECF No. 70-1 at 9; ECF No. 45 at 20-22.

[12] Nor is there anything to suggest that, to headquarter here, IFC needed more immunity. Where organizations require more immunity than the IOIA provides, they enshrine it in their Charter or other treaty, *see* ECF No. 45 at 24-25 & n.21; *Jam*, 139 S. Ct. at 771-72, or a headquarters agreement with the United States. IFC has done neither. By comparison, the United Nations has both a

Neither IFC nor the USG says how the Court is supposed to implement Congress' alleged purpose if it does not just apply the statutory text. Neither suggests any standard by which the Court is supposed to weigh the fact that an organization is headquartered here. Indeed, the logic of IFC's inducement argument would favor absolute immunity, exactly what the Supreme Court rejected.

IFC's latest policy arguments fail for the same reasons as its prior ones; the statutory text controls. *Jam*, 139 S. Ct. at 769.

CONCLUSION

Plaintiffs' Amended Complaint satisfies the commercial activity exception under this Court's framework for considering where the gravamen of the action lies. This Court should grant Plaintiffs' motion to amend.

Dated: July 31, 2020

Respectfully submitted,

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separate treaty and a headquarters agreement with the United States that give it greater immunity than the IOIA. *See Jam*, 139 S. Ct. at 771; Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations of 1947, *reprinted at* 22 U.S.C. § 287.

[13] Based in CT; admitted in NY; does not practice in DC's courts.