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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS RENEWED MOTION TO DISMISS THE COMPLAINT

September 19, 2019

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INTRODUCTION

As Plaintiffs' Complaint makes abundantly clear, the foundation of their alleged environmental tort claims affecting farmers and fishermen in southwestern India revolves around the construction and operation of the CGPL and Adani power plants in Gujarat, India. There is *no* U.S. nexus to Plaintiffs' claims, much less IFC commercial activity in the United States upon which Plaintiffs' claims are based. Because the commercial-activity exception does not apply to Plaintiffs' claims, IFC's immunity from this suit remains intact, and this Court lacks subject-matter jurisdiction over this suit.

Recognizing this roadblock, Plaintiffs artfully pleaded—and now argue—that this is *not* an environmental tort case at all; rather, it is a "negligent lending" case "based on" decisions in Washington. What follows in the Opposition is a circular, *ipse dixit* analysis, the result of which is, essentially, "The gravamen of our suit is what we say it is." According to Plaintiffs, because they sued IFC for "negligent lending," this Court should only look at alleged decisions in Washington and ignore the acts and omissions that *actually injured them.* Of course, that is not the law, and Plaintiffs' approach has been soundly rejected by the Supreme Court in *Nelson* and in *Sachs*. The United States agrees and states quite clearly, "the 'gravamen' or 'core' of the lawsuit is the allegedly tortious conduct in India that caused the plaintiffs' harm." *See* Statement of Interest of the United States 2, ECF No. 47 (hereinafter "U.S. Statement of Interest").

Plaintiffs' other arguments are also unavailing. Plaintiffs recycle their previously rejected waiver arguments, but those arguments are not viable and this Court's rejection of them remains law of the case. Plaintiffs also do not refute that the power plants' owners and operators are indispensable parties under Rule 19. Further, they fail to refute IFC's arguments that Plaintiffs have not stated a claim against IFC under D.C. or Indian law. Finally, Plaintiffs have

not explained why India is not a proper forum in which to adjudicate their claims. For these reasons, this Court should, again, dismiss Plaintiffs' Complaint in its entirety.[1]

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

Under the FSIA, IFC enjoys immunity from this suit unless Plaintiffs prove that their action "is based upon a commercial activity carried on in the United States" by IFC. 28 U.S.C. § 1605(a)(2). To satisfy their burden, Plaintiffs have chosen an *ipse dixit* approach. That is, they argue that their suit is based upon IFC's U.S. activity simply because they say it is. Opp'n 15 ("Plaintiffs' claim is that IFC's own commercial acts are tortious. If Plaintiffs did not plead IFC's tortious acts, they would have no claim against IFC; therefore, IFC's acts are the gravamen of these claims."). Plaintiffs' focus on IFC's lending decisions ignores the actions that allegedly harmed them in India. Plaintiffs' reasoning was rejected in *Sachs*, in which the plaintiff implored the court to focus on the sale of a rail pass in California instead of on the actions that actually injured the plaintiff on the rail platform in Innsbruck, Austria. It is clear from *Sachs* that the commercial-activity exception does not apply in this case, either.

A. However Plaintiffs Frame Their Suit, Alleged Acts By Third Parties In India Remain At Its Foundation And Are Therefore The "Gravamen"

Plaintiffs' artful pleading and hyperbole—focusing on "activities [that] led to the conduct that eventually injured them" (*Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993))—cannot obscure the core of their case: alleged injuries from the construction and operation of the CGPL and Adani plants in Gujarat, India. Like the incident in Innsbruck (*Sachs*) and the sovereign acts

[1] Included with this Reply are the following: (1) the Reply Affidavit of Gauri Rasgotra (hereinafter "Rasgotra Reply Aff."), dated September 19, 2019, responding to Plaintiffs' declarations of Ritin Rai and Shibani Ghosh; and (2) the Declaration of Dana Foster, dated September 19, 2019, which attaches copies of all of the cases cited by Ms. Rasgotra in her Reply Affidavit and in her June 19, 2019 Affidavit.

in Saudi Arabia (*Nelson*), Plaintiffs were allegedly injured by acts outside of the United States; therefore, IFC enjoys immunity from this suit.

Plaintiffs' tautological argument that the gravamen of a suit is whatever a plaintiff says it is cannot be squared with Supreme Court precedent.

1. Plaintiffs' "Elements Based" Test Was Soundly Rejected In *Sachs*

Knowing that the essentials of their suit are all located in India, Plaintiffs attempt to recast the "based upon" analysis as one focused on elements of their own causes of action. Opp'n 16, 18 (arguing that the elements of Plaintiffs' claims "are the inquiry's lodestar" and that "the gravamen is determined by reference to the *defendant's* acts and the claims as *plaintiffs* frame them" (emphasis in original)). But Plaintiffs' proposal recycles the same arguments that the Supreme Court rejected in *Sachs*.[2] This Court should reject Plaintiffs' arguments for the same reasons as in *Sachs*.

Each of Sachs's claims sought to overcome sovereign immunity by zeroing in on some nexus between her personal injuries and Austria's only arguably U.S.-based commercial act. Sachs argued that, without the sale of the rail pass, she would not have been injured; therefore, the sale *caused* her injuries. The Ninth Circuit agreed. *See Sachs v. Republic of Austria*, 737 F.3d 584, 600 (9th Cir. 2013) (en banc) (concluding that "sale of the Eurail pass [was] an essential fact that Sachs must prove to establish" her negligence and strict-liability claims).

Upon review, the Supreme Court rejected the Ninth Circuit's focus on Sachs's carefully crafted claims; instead, it found that the gravamen was the "particular conduct" that "actually injured" Sachs, regardless of "[h]owever Sachs frame[d] her suit." *OBB Personenverkehr AG v.*

[2] Plaintiffs also suggest that the gravamen of their suit is based upon claims they have not even pleaded. *See* Opp'n 15 n.9 (arguing about the gravamen of an aiding and abetting claim). Moreover, *Overseas Private Inv. Corp. v. Industria de Pesca, N.A.*, 920 F. Supp. 207 (D.D.C. 1996), and *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), are non-FSIA, pre-*Sachs* cases.

Sachs, 136 S. Ct. 390, 396 (2015) (quoting *Nelson*, 507 U.S. at 357). "[A]ny other approach," the Court emphasized, "would allow plaintiffs to evade the [FSIA's] restrictions through artful pleading." *Id*. That concern is particularly relevant in cases presenting "a personal injury narrative," the "essentials" of which "will be found at the 'point of contact.'" *Id*. at 398 (internal quotation marks omitted). The Court faulted the Ninth Circuit for "overreading one part of a sentence in *Nelson*" (*id*. at 395) to imply that the gravamen test merely required Sachs to "show a nexus between her claims and the sale of the Eurail pass," (*Sachs*, 737 F.3d at 599).

Recycling Sachs's rejected arguments, Plaintiffs blatantly over-read the same sentence fragment from *Nelson*. *See, e.g.*, Opp'n 15 (first paragraph). Plaintiffs' remarkable contention that the approval of a loan—which was one among several loans to the project—allegedly occurring in Washington was *the act* that "*actually injured*" farmers and fishermen 4,000 miles away in Gujarat, India, is indistinguishable from Sachs's assertion that the sale of a rail pass in California actually injured her in Innsbruck, Austria. Opp'n 16, 19. Of course, there was nothing wrongful or causal about either act. Yet those plaintiffs attempted to elevate each of them to evade the FSIA's "based upon" requirement. *See Atlantica Hldgs., Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108 (2d Cir. 2016) ("*Sachs* makes clear that in assessing whether an action is 'based upon' acts outside the United States, for FSIA purposes, we look not to the analysis of each individual claim, but to the overall question where a lawsuit's *foundation* is geographically based." (emphasis in original)); *see also* U.S. Statement of Interest 7 (noting that "IFC's loan to the Indian company CGPL is an antecedent step that alone cannot entitle the plaintiff to relief").

Plaintiffs rely on the First Circuit's analysis of a plaintiff's employment-law claims in *Merlini v. Canada*, 926 F.3d 21 (1st Cir. 2019). Opp'n 16. But *Merlini* does not help them.

First, Merlini's workplace injury occurred *in the United States*. *Merlini*, 926 F.3d at 23. *Second*, the First Circuit panel—following the logic of *El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007), a pre-*Sachs* employment case—concluded that Merlini's claims could not be divorced from the "employment context" in which they occurred. *Merlini*, 926 F.3d at 30. But there is no such relationship in this case. *Merlini* simply does not apply.

The other cases upon which Plaintiffs rely—most of which pre-date *Sachs* and deal with commercial disputes between contracting parties—do not support Plaintiffs' elements-based gravamen test either. In fact, Plaintiffs' attempt to borrow the concept of contractual privity from select cases and apply it to vicarious tort liability is just another prohibited attempt at artful pleading around the gravamen test.

The gravamen of a contract suit is usually simple to determine. Almost invariably, the gravamen aligns with elements of the claim. In *Nnaka*, the gravamen of the plaintiff's claims was the Nigerian Attorney General's breach of Nigeria's agreement to pay Nnaka. *Nnaka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 28 (D.D.C. 2017), *cited in* Opp'n 18.[3] In *Nanko Shipping*, the gravamen was the formation and breach of the contract. *See Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 466 (D.C. Cir. 2017) (concluding that award of contract bid to Nanko, and Alcoa's subsequent "disregard" of its "contractual responsibility to deal with Nanko," was the gravamen), *cited in* Opp'n 15-16; *see also Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013) (concluding, pre-*Sachs*, that defendant's "entry into contracts and then breach" was the gravamen of the contract suit), *cited in* Opp'n 13; *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (concluding, pre-*Sachs*, that defendant's "breach of its contractual

[3] Because Nnaka's injury was complete upon Nigeria's breach, this Court's dismissal of the forfeiture action did not actually injure Nnaka, as Plaintiffs argue. Opp'n 18.

obligations" to plaintiffs was the gravamen of contract suit), *cited in* Opp'n 13; *Croesus EMTR Master Fund L.P. v. Brazil*, 212 F. Supp. 2d 30, 34-35 & n.3 (D.D.C. 2002) (dismissing, pre-*Sachs*, plaintiffs' claims because plaintiffs brought "a straight-forward breach of contract claim for non-payment" that was "'based upon' Brazil's failure to pay" and not any alleged commercial relationship in the United States), *cited in* Opp'n 16.

Tort claims are different. As *Sachs* and *Nelson* teach, the nominal claims in a tort case do not necessarily reflect the gravamen of the suit, which concerns where and how the alleged injury occurred. Indeed, tort suits are more susceptible to artful pleading—particularly where, as here, the defendant's alleged tort liability is derivative of a third party's acts. And the gravamen of this case—the conduct that allegedly actually injured Plaintiffs—is the construction and operation of the plants in India. *Cf. Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek*, 600 F.3d 171, 179 (2d Cir. 2010) (refusing to "allow Anglo-Iberia to recast what is effectively a fraud claim, lacking any significant nexus to Jamsostek's insurance activities in Indonesia, as a negligent supervision claim sufficient to bring Jamsostek within FSIA's 'commercial activity' exception"); *see also* U.S. Statement of Interest 8 (explaining that "[i]t would be contrary to the . . . reasoning in *Sachs* and *Nelson* to permit plaintiffs to evade the FSIA's restrictions by recasting actions in India as a negligent failure to act or breach of contract in the United States").

2. Ignoring The Conduct That Actually Injured Plaintiffs Renders The "Based-Upon" Requirement Superfluous

Doubling down on their argument that a plaintiff decides the gravamen of its own suit, Plaintiffs implore this Court to ignore the actual (third) parties that allegedly injured them because Plaintiffs chose not to sue them. Plaintiffs' argument is circular and should be rejected. *See, e.g.*, U.S. Statement of Interest 9 (warning that a plaintiff "cannot gerrymander the

'gravamen' analysis by declining to name a party that directly caused the harm and instead naming only an entity that is steps removed").

None of Plaintiffs' cases supports their argument that a court must ignore conduct of a third party that is alleged to have actually injured the plaintiff simply because the plaintiff chose to bring her personal-injury suit against a sovereign defendant. Opp'n 13 (arguing against "the notion that the 'gravamen' of the claim may be the acts of anyone other than the sovereign defendant").[4]

The court in *Crystallex* did not limit its gravamen analysis to "the sovereign defendant's acts." Opp'n 14 n.6 (citing *Crystallex Int'l Corp. v. PDVSA*, 251 F. Supp. 3d 758, 766-67 (D. Del. 2017). PDVSA (an instrumentality of Venezuela) ordered its wholly owned U.S. subsidiaries to undertake a fraudulent transfer of assets to PDVSA outside the United States in order to frustrate Crystallex's collection on a judgment. *Crystallex Int'l Corp. v. PDVSA*, 879 F.3d 79, 82 (3d Cir. 2018) (reversing on other grounds). That is why the court concluded PDVSA's "'particular act' of directing the [t]ransfers" was the gravamen—not because Crystallex brought the only claim it could against PDVSA or because the court was somehow blinded to the subsidiaries' conduct. *Crystallex*, 251 F. Supp. 3d at 766.

Plaintiffs' assertion that the First Circuit in *Universal Trading* "reject[ed]" consideration of third-party conduct that actually injured the plaintiff is incorrect. Opp'n 13. The court's recognition that its "inquiry will turn on the particular actions that the foreign state performs" was unrelated to the "based upon" analysis. *Universal Trading*, 727 F.3d at 16-17 (internal

[4] Plaintiffs submit that the Supreme Court in *Sachs* evaluated only whether "a personal injury claim against a State railway was 'based upon' *defendant*'s management of the railway abroad, not *defendant*'s sale of a ticket in the United States through a travel agent." Opp'n 14 (emphasis in original). Not so. OBB argued, "the sale of the Eurail pass is not attributable to the railway." *Sachs*, 136 S. Ct. at 395. Because the Supreme Court agreed that Sachs's suit was not based upon the sale of the Eurail pass "even if such attribution were allowed," the Court did not reach whether OBB was actually responsible for the sale. *Id.*

quotation marks omitted). The "inquiry" was whether Ukraine's actions constituted an offer for a unilateral contract, which Ukraine had allegedly breached, and whether that contract was a commercial or a sovereign activity. 727 F.3d at 16-17, 19-20 (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 614-15 (1992)). Nor was *Callejo* a case in which the plaintiff was actually injured by a third party, as Plaintiffs claim. Opp'n 13. The defendant Mexico-owned bank actually injured the plaintiffs when it breached a contractual obligation to pay the plaintiffs in U.S. dollars and implemented Mexican exchange regulations that devalued the plaintiffs' deposits. *Callejo*, 764 F.2d at 1106, 1109.

Callejo actually shows why Plaintiffs' attempt to cast IFC's lending activities as the gravamen of their suit would render the "based upon" requirement superfluous. The Fifth Circuit rejected the argument "that the Callejos' suit was based upon the Mexican exchange regulations since, but for these regulations, it would not have breached . . . and the Callejos' suit would not have arisen." *Id*. at 1109. That is precisely Plaintiffs' argument here; that is, "[w]ithout the IFC's funding, the Tata Mundra Project could not have gone forward." Compl. ¶ 2; *see* Opp'n 19 (asserting that Plaintiffs' chief reason "why IFC is liable is that the Project 'would not have gone forward without IFC funding, and thus the harm to the Plaintiffs would not have occurred without IFC funding'" (quoting Compl. ¶ 176)). But Plaintiffs' "but for" reasoning would render the "based upon" requirement "equivalent merely to a requirement of causation," contrary to *Callejo*, not to mention *Sachs* and *Nelson*. *Callejo*, 764 F.2d at 1109; *see also Sachs*, 136 S. Ct. at 395 (recalling that acts that "led to the conduct that eventually injured" the plaintiff are not the gravamen of a suit (quoting *Nelson*, 507 U.S. at 358)).

Under Plaintiffs' view of the gravamen test, any case is "based upon" commercial activity if it includes a claim that requires proof of the defendant's commercial activity. Opp'n

19-20 & n.16 (arguing that Plaintiffs' claims are based upon commercial activity because they sued IFC for its commercial activity); *see also id.* at 13 ("[T]he issue is whether IFC's *loan* is commercial activity . . . ." (emphasis in original)). In other words, Plaintiffs would make the "based upon" requirement superfluous of the requirement that the commercial activity be "of" or "by" the foreign state.[5] § 1605(a)(2); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute." (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))). Congress could have allowed any "claim" that "involves" commercial activity if it intended that result, but it did not. *See NML Capital, Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 188 (2d Cir. 2011) ("We are mindful that in interpreting the [FSIA] we must 'give effect to Congress' choice of words . . . .").

3. IFC's Discretionary Decisions Whether To Enforce Its Policies Are Not Commercial Activities Under The FSIA

As this Court recognized in 2016, the Complaint alleges primarily that Plaintiffs' injuries can be traced to decisions IFC made *after* it agreed to lend CGPL money: "if IFC had 'followed its own policies and enforced the conditions of the loan agreement,' the negative environmental and social impacts caused by the Plant could have been avoided, minimized, or mitigated." Mem. Op. 4, ECF No. 31 (quoting Compl. ¶ 191) (alterations omitted); *see also, e.g.*, Compl. ¶¶ 138, 296, 303. Indeed, the allegations supporting their claim that IFC was negligent derive mostly from the CAO's findings that IFC was not in full compliance with its own policies. Compl. ¶¶ 160-75. But IFC's internal decisions whether or not to enforce its own policies are

[5] Plaintiffs' interpretation would also compromise the "of the foreign state" requirement. Plaintiffs assert that IFC can be held liable as an aider or abettor of CGPL (though they did not plead this claim), Opp'n 14 n.7, but would bar IFC from arguing CGPL's acts are not attributable to IFC, Opp'n 20 n.16. *Cf. SACE S.p.A. v. Republic of Paraguay*, 243 F. Supp. 3d 21, 35-36 (D.D.C. 2017) (dismissing claim against foreign state where agent lacked authority to waive state's immunity under the FSIA).

not commercial acts; rather, they are more closely analogous to regulatory decisions of a state. *See* Mem. 18, ECF No. 40-1 (hereinafter "Mem.").

Facing this hurdle, Plaintiffs now argue that IFC's post-loan-approval actions are only "an additional reason" for its liability. Opp'n 19-20 (attempting to draw a distinction between Plaintiffs' negligence and negligent supervision claims). Plaintiffs' about-face highlights that their articulation of the gravamen test, which equates the cause of action (i.e., basis for liability) with "actual injury," contravenes *Sachs*. *See, e.g.*, Opp'n 15-18.

This case does not have *seven* gravamen—one for each of Plaintiffs' causes of action—from which Plaintiffs can elevate one with an artfully pleaded commercial nexus in order to skirt the "based upon" requirement. *See Sachs*, 136 S. Ct. at 396 (disfavoring "an exhaustive claim-by-claim" gravamen analysis). It has one: the conduct that allegedly "actually injured" Plaintiffs. *Id*. IFC's loan approval did not "actually injure" Plaintiffs any more than The Rail Pass Experts' sale of a rail pass to Carol Sachs injured her (*Sachs*, 136 S. Ct. at 393), or the Hospital Corporation of America's recruitment and hiring of Nelson injured him (*Nelson*, 507 U.S. at 358).

Remarkably, Plaintiffs argue, "IFC's operations are entirely commercial" simply because IFC (like all international organizations) is not a "sovereign." Opp'n 19. But the Supreme Court declared that an international organization enjoys immunity that is "equivalent" to a foreign state. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768 (2019). Of course, IFC (like any international organization) is literally not a "sovereign"—it has no territory to govern, no legislative capacity, no judiciary, and no marshal. Opp'n 22 (recognizing that "IFC cannot compel anyone to do anything"). That does not mean, however, that the Supreme Court intended IFC to enjoy immunity that is *lesser* than a foreign state. *See* Opp'n 20 (asserting that any conduct that is

"not . . . peculiar to sovereigns" is "therefore commercial"). *Contra* 139 S. Ct. at 772 ("[I]t is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA."). As in other contexts, courts must analogize principles developed in a long line of commercial-activity cases. Here, those principles are clear in their application and refute Plaintiffs' argument that IFC's discretionary decisions whether or how to enforce the E&S Standards are commercial acts.

First, Plaintiffs assert, without support, "inaction is not regulation." Opp'n 21. That is incorrect. *See Afr. Growth Corp. v. Republic of Angola*, No. 17-2469, 2019 U.S. Dist. LEXIS 120571, at *11-12 (D.D.C. July 19, 2019) ("Here, the *conduct* for which AFGC seeks to hold Angola liable is for failure to regulate effectively the exercise of government agents' power . . . which is quintessentially sovereign conduct not falling within the commercial activity exception."); *see also Good v. Fuji Fire & Marine Ins. Co.*, 271 F. App'x 756, 758 (10th Cir. 2008) (case challenging Japan's "failure to prevent the actions of private parties" relating to investments in Japanese insurance companies implicated "Japan's sovereign regulatory activity rather than commercial activity" (internal quotation marks omitted)). In other words, IFC's discretionary judgments regarding enforcement of the E&S Standards may be quasi-regulatory in nature even if IFC's judgment in a particular case is to refrain from enforcing them.

Second, Plaintiffs argue that IFC's discretionary decisions whether or how to enforce the E&S Standards through lending agreements must be "commercial" because a private lender can also "decide whether to enforce contracts." Opp'n 21. That is also wrong. As the court held in *In re Aluminum Warehousing*: "There are numerous instances in which a public organ might use a contractual arrangement to fulfill its public function." No. 13-md-2481, 2014 U.S. Dist. LEXIS 119074, at *62 (S.D.N.Y. Aug. 25, 2014). Plaintiffs attempt to distinguish *In re*

Aluminum Warehousing by claiming that, unlike the E&S Standards, LME's load-out rules played a "vital" role to its function as a state organ. Opp'n 22. But Plaintiffs' argument is contradicted by their own pleading. Plaintiffs have argued throughout this case that IFC's E&S Standards are vital to IFC's chartered objectives. Opp'n 8-9 (stating that the E&S Standards "ensure[s IFC's] investments promote its mission"); Compl. ¶ 118 ("The Performance Standards were adopted in 2006 . . . . Thus, IFC adopted a new, more robust policy framework for environmental and social standards that was intended to better protect local communities and the environment and ensure positive development outcomes consistent with the IFC's mission and purpose.").

Plaintiffs also fail to distinguish *Jamsostek*. They suggest that, unlike the Indonesian "state-owned default insurer," IFC "compete[s] in the market" for loans. Opp'n 22-23. But IFC's "market" (for lack of a better term) is not "loans" generally; nor does IFC *compete* against any private entity. *See* H.R. Rep. No. 84-1299, at 4 (1955) ("Since the IFC can operate only in conjunction with private investors, the IFC would encourage, and not compete with, private investment.").[6] IFC is what its member states created it to be: a lender of last resort for development projects that do *not* attract private lenders. Mem. Op. at 2, ECF No. 31 ("IFC may invest in privately run projects for which 'sufficient capital is not available on reasonable terms.'"). IFC uses the E&S Standards to help these loans achieve an outcome that fits with the Articles' objectives.

The E&S Standards were adopted by IFC's executive organ—the Board of Directors. They support the goals set forth in IFC's constituent instrument—the Articles of Agreement.

[6] "IFC will not compete with private capital. Its job will be to join with private partners in financing productive enterprises. . . . Where private capital can do the whole job, the Corporation will not enter into the financing at all." *International Finance Corporation: Hearings on S. Rep. 1894 Before Subcomm. of S. Comm. on Banking and Currency*, 84th Cong., 1st Sess. 28 (1955) (Statement of George M. Humphrey, Sec. Treas.).

They apply generally to all of IFC's lending agreements. That IFC applies the E&S Standards through lending contracts is not a meaningful distinction: State organs use commercial contracts to achieve their regulatory aims (as in *In re Aluminum Warehousing*), even though states can achieve the same result through legislation or regulations, more clearly immunizing themselves. Because it is not a state, however, IFC has no such alternatives. International organizations can only exert their "power" through agreements. To ignore that fundamental difference is to deny international organizations the "equal treatment" they are due. *Jam*, 139 S. Ct. at 768.

B. This Court's Rejection Of Plaintiffs' Waiver Argument Is Law Of The Case

Plaintiffs repeat the same waiver arguments from 2015. *Compare* Opp'n 23-26, *with* Opp'n 21-33, ECF No. 22. Because this Court rejected those arguments, the D.C. Circuit unanimously affirmed, and the Supreme Court rejected Plaintiffs' invitation to review *Mendaro* and its progeny, this Court's decision remains as the law of the case. *See Robinson v. Sanctuary Record Grps., Ltd.*, 763 F. Supp. 2d 629, 631 (S.D.N.Y. 2011) ("[T]he findings of a district court not expressly or implicitly addressed on appeal remain the law of the case." (quoting *Am. Hotel Int'l Grp., Inc. v. OneBeacon Ins. Co.*, 374 F. App'x 71, 74 (2d Cir. 2010))).

Plaintiffs' new argument—that the Supreme Court *implicitly* undermined *Mendaro*, when it could have *expressly* overruled the case—is not credible. The Court said nothing about *Mendaro* or its underpinnings. And the Court's *statutory* interpretation of the IOIA has no impact on the interpretation of IFC's Articles of Agreement, which is a *treaty*.[7] *See Tabion v. Mufti*, 73 F.3d 535, 537 (D.C. Cir. 2007) ("Treaties generally are liberally construed: courts 'may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties' to ascertain the meaning of a difficult or unclear passage."

[7] Even if *Mendaro* "assumed" that the IOIA provided absolute immunity, that does not undermine its application post-*Jam*.

(quoting *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991))); *Fujitsu Ltd. v. FedEx Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) (recognizing that the Vienna Convention on the Law of Treaties is the "authoritative guide" for U.S. courts interpreting treaties). *Mendaro* interpreted the "Judicial Process" provision of the World Bank Articles in light of the public international law principles that treaty sought to vindicate, and in line with the State Department's views.[8]

At Plaintiffs' urging, the Supreme Court avoided any reference to international law in its interpretation of the IOIA with another domestic statute: the FSIA. *See Jam*, 139 S. Ct. at 768-69. If the Supreme Court meant to rule that public international law principles are irrelevant to treaty interpretation, it would have not left the matter to implication.

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

All of the alleged harm is alleged to have been caused by the construction and operation of the CGPL and Adani plants; yet, the owners, builders, and operators of those plants and the regulating authority for those plants are absent. As Plaintiffs concede, each of these entities had (and has) substantially more direct involvement in the plants' operations than IFC. Opp'n 5, 26-27. Plaintiffs also concede that the conduct of CGPL and Adani is essential to their

[8] *See Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) (quoting Restatement of the Foreign Relations Law of the United States (Revised) § 464(1) (Tentative Draft No. 4) (1983)) ("It is well established under international law that 'an international organization is entitled to such privileges and such immunity from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organizations, including from legal process . . . .'"); Letter from Robert B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980) *in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980) (concluding that Article VII § 3 of the World Bank Articles "was intended . . . specifically to permit suits by private lenders against the Bank in connection with the Bank's issuance of securities, and to specify the venue for such actions, in order to facilitate the Bank's access to capital markets. . . . It was not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction or to expose the Bank's internal personnel and administrative action to review by our courts and administrative agencies").

allegations and claims. *Id*. Because Rule 19 requires joinder of these indispensable and absent parties, this Court must dismiss the Complaint.

This Court cannot accord complete relief without joinder of the other parties. IFC neither owns nor possesses the alleged nuisance, and an injunction against IFC cannot guarantee that the plants' owners/operators would remedy the alleged harm. *Compare* Compl. ¶ 343(a) (requesting injunctive relief to "[e]nsure that the coal ash pond [and] the coal storage yards at the Mundra port . . . are covered"), *with id*. ¶ 30 (alleging that the Tata Mundra Plant shares coal port facilities with the Adani Plant). Neither does the contract between IFC and CGPL provide IFC with the power to control the Plant's operations. *See* Suratgar Decl. Ex. 1, at 124-25 (Section 6.3); *see also* IFC Articles of Agreement art. III, § 3(iv), Dec. 5, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620 (prohibiting IFC from "assum[ing] responsibility for managing any enterprise in which it has invested"). Even more curious is Plaintiffs' false belief that IFC could influence the behavior of Adani, a separate Indian company with which IFC has no commercial relationship. *See* Compl. ¶¶ 29-30.

Courts have required joinder in cases, like this one, where the plaintiff's requested injunction would not bind an absent party. *See, e.g.*, *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155-56 (9th Cir. 2002) (concluding that Navajo Nation was a necessary party where it would not be bound by the injunction); *Glenny v. Am. Metal Climax, Inc.*, 494 F.2d 651, 653, 654 (10th Cir. 1974) (affirming dismissal where plaintiffs sought to enjoin a smelter operator under a nuisance theory but failed to join the smelter's owner); *Sunset Homeowners Ass'n v. Difrancesco*, 386 F. Supp. 3d 299, 306 (W.D.N.Y. 2019) (finding that the legal title holder was a necessary party); *Lykins v.*

Westinghouse Elec., 710 F. Supp. 1122, 1123-24 (E.D. Ky. 1988) (concluding that a landfill owner was a necessary party).

Plaintiffs reflexively invoke the rule that joint tortfeasors are ordinarily not necessary parties. Opp'n 26 (citing *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990)). But *Temple* did not establish a blanket rule that Rule 19 is inapplicable to all joint tortfeasors. Without the owners of the alleged nuisance, this Court simply lacks the authority to grant the relief requested.

Plaintiffs submit that, under *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114 (D.C. Cir. 1991), active participants in the alleged harm are not necessary under Rule 19. Opp'n 27. But the court in *Pyramid* only rejected the "per se rule that a subsidiary is always an indispensable party in a suit against its parent if the subsidiary '. . . is in fact the primary participant in the actions complained of.'" 924 F.2d at 1121. The relationship between a parent and subsidiary is not at issue in this case.

Plaintiffs do not refute that the rights of the plants' owners/operators will be affected. Opp'n 28-29. Nor can they. Although Plaintiffs' requested injunction would nominally apply to IFC, the plants' owners/operators are the real target; indeed, Plaintiffs seek to impose obligations that would require substantial renovations to or closure of the Tata Mundra Plant. *See* Compl. ¶ 343. And before determining whether IFC was negligent in allegedly failing to enforce the IFC Loan Agreement, this Court would have to decide whether CGPL complied with the Agreement's terms; therefore, CGPL has a clear interest in any decision that interprets its contractual obligations. *See Two Shields v. Wilkinson*, 790 F.3d 791, 797 (8th Cir. 2015) (holding that the United States, albeit an alleged joint tortfeasor, was a necessary party because it had "interests . . . beyond those of joint and several liability"); *Laker Airways, Inc. v. British*

Airways, PLC, 182 F.3d 843, 847-48 (11th Cir. 1999) (finding that joinder was necessary when the interests of the absent party "are more significant than those of a routine joint tortfeasor").

Finally, considerations of consistency and efficiency counsel for dismissal and re-filing in India. Plaintiffs fail to respond to this argument; therefore, this Court should consider it conceded. *See* L. Civ. R. 7(b); *Texas v. United States*, 798 F.3d 1108, 1110 (D.C. Cir. 2015).

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

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

Plaintiffs fail to state a breach-of-contract claim because there was no breach. Mem. 30. Even if, *arguendo*, IFC breached the IFC Loan Agreement, that agreement expressly excludes all liability to third-party beneficiaries. Mem. 27-30. The parties to the IFC Loan Agreement identified English law as applicable. Suratgar Decl. ¶ 6, & Ex. 1, at 17 (Section 8.02(a)); Mem. 27-28. Federal courts enforce a choice-of-law clause unless its application would violate the "strong public policy of the forum in which suit is brought." *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 768 (D.C. Cir. 1992) (quoting *The Bremen*, 407 U.S. 1, 15 (1972)). The Agreement's choice-of-law provision does not violate this Court's public policy, and Plaintiffs do not contend otherwise. Plaintiffs simply wish to disregard the parties' express contract language.

The District of Columbia's "reasonable relationship" test only requires that the choice of law bear a reasonable relationship to the transaction or at least one of the parties. *See* Restatement (Second) of Conflict of Laws § 187(2)(a) (rev. 1988); *accord id.* § 187 cmt. f (observing that "[t]he parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties

should be able to choose a law on the ground that they know it well and that it is sufficiently developed"). This test is applied liberally to effectuate the freedom of contract and to honor the choice of the parties. *See Milanovich*, 954 F.2d at 768. The Agreement has a substantial relationship to English law. India's Contract Act, enacted in 1872, is based on the principles of English common law.[9] So choosing English law makes perfect sense. Plaintiffs' only support for their assertion to the contrary is unpersuasive. Opp'n 39-40. *Sandza v. Barclays Bank* does not establish that the chosen jurisdiction *must* be a party's principal place of business to establish a reasonable relationship. 151 F. Supp. 3d 94, 103-04 (D.D.C. 2015).

Even if the agreement fails the "reasonable relationship" test, this Court could invalidate the parties' choice-of-law provision only if it determines that a conflict exists between D.C. law and English law regarding the right of contracting parties to exclude liability to third-party beneficiaries. *See Song fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 61-62 (D.D.C. 2014). But D.C. law and English law are in accord. The District of Columbia follows the Restatement (Second) of Contracts, which permits parties to exclude liability from third parties. *See* Mem. 29; *see also Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064-65 (D.C. 2008); *Anderson v. D.C. Hous. Auth.*, 923 A.2d 853, 862-63 (D.C. 2007). Though Plaintiffs argue otherwise (Opp'n 40-41), the case they rely on, *Martin Marietta Materials, Inc. v. Redland Genstar, Inc.*, does not apply D.C. law and concerned a provision explicitly obligating payments to third parties. No. JFM-99-42, 1999 U.S. Dist. LEXIS 23431, at *12 (D. Md. Aug. 8, 1999). Such a provision is not at issue here, and there is no conflict between contractual clauses. *See* Mem. 30; *see also, e.g.*, Suratgar Decl. Ex. 1, at 90 (Section 5.1(f)(i)),

[9] "The scope of the [Contract Act] was to bring the Indian Law of Contract, as far as might be, into harmony with the English law on the same subject . . . ." Atul Chandra Patra, *Historical Background of the Indian Contract Act, 1872*, 4 J. Indian L. Inst. 373, 395 (1962).

91 (Section 5.1(i)), 104 (Section 5.2(z)(i)(B)), 114 (Section 5.5(c)(v)), 124-25 (Section 6.3). This clarity of contractual party obligations reflects the purpose of the IFC Loan Agreement: providing financial assistance to CGPL.

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

Plaintiffs' non-contract claims must be dismissed because Plaintiffs do not allege sufficient facts to establish IFC's liability as a *lender* for the alleged actions of its *borrower*—or even of Adani. Utterly lacking are allegations that IFC actually exercised the level of control over the Tata Mundra Plant necessary to hold IFC liable for the activities of CGPL or Adani. Plaintiffs' attempt to introduce a new cause of action that they did not allege in their Complaint—aiding and abetting—is untimely. *See Williams v. Spencer*, 883 F. Supp. 2d 165, 181 n.8 (D.D.C. 2012) ("Where the . . . complaint does not make a claim, plaintiff cannot add a new claim through an opposition brief.").

Both in the Complaint and in the Opposition, Plaintiffs offer conclusory allegations about IFC's supposed "supervisory control over the Project" (Opp'n 32), but they offer no facts to support them; therefore, they should not be credited. *See RSM Prod. v. Freshfields Bruckhaus Deringer US LLP*, 682 F.3d 1043, 1052 (D.C. Cir. 2012).

Plaintiffs assert baldly that there is no "special immunity" for lenders. Opp'n 32. Yet they offer this Court no case in which a court found a lender liable for not enforcing contractual covenants to its own benefit. Opp'n 33-34 (citing *United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998) (analyzing a parent company's alleged vicarious liability with respect to site owned by its subsidiary); *Childs v. Purll*, 882 A.2d 227, 239-40 (D.C. 2005) (concluding that corporate officers may be individually liable for their negligence); *Connor v. Great W. Sav. & Loan Ass'n*, 447 P.2d 609, 617 (Cal. 1968) (holding that the lender may be sued for its own

negligence for inducing plaintiffs into purchasing homes with faulty construction)).

Regarding Indian law, Ms. Rasgotra has stated that there is "no legal basis for asserting these claims against a lender, such as IFC, to an allegedly offending property owner or facility operator." Rasgotra Aff. ¶ 89; *see also id.* ¶¶ 55, 73-76, 80, 84, 87-88. In response, Plaintiffs offer the declaration of Ritin Rai. Mr. Rai largely agrees with Ms. Rasgotra regarding lender liability under Indian law; that is, neither of them was able to find a single case finding a lender liable for the acts of a borrower. *Compare* Rasgotra Aff. ¶¶ 55, 76, 80, 84, 87-88, *and* Reply Rasgotra Aff. ¶ 13, *with* Rai Decl. ¶¶ 27, 31, 56.

C. Plaintiffs Have Failed To State A Claim For Nuisance

Plaintiffs have not stated a claim for nuisance under either D.C. or Indian law. In the District of Columbia, "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)). Nuisance claims also require the defendant to possess "control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance." *Id.* at 648 (quoting *Tioga Pub. School Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993)).

Plaintiffs assert—in conclusory fashion—that IFC "exercise[d] substantial control" over the Tata Mundra Plant and had the "constructive equivalent of physical presence" at the Plant. Opp'n 38. These assertions are belied by the facts as alleged in the Complaint. IFC had no day-to-day management and no input on any business decisions. In short, and as Plaintiffs have acknowledged, IFC was just one of a number of lenders.

Regarding India, Ms. Rasgotra has explained in both of her sworn declarations that claims for public and private nuisance under Indian law may be brought only "against the operator of the plant, not the plant's lenders." Rasgotra Aff. ¶ 82; *see* Rasgotra Reply Aff. ¶ 39.

Nothing in Mr. Rai's declaration refutes this point. *Compare* Rai Decl. ¶ 56, *with* Rasgotra Reply Aff. ¶¶ 33-36, 38-40 (reviewing cases cited by Rai). Accordingly, under Indian law "a lender would not be liable under these circumstances." Rasgotra Aff. ¶ 84; *see also* Rasgotra Reply Aff. ¶¶ 30, 39-40.

IV. INDIA IS A PROPER FORUM FOR PLAINTIFFS' CLAIMS

Plaintiffs have not refuted IFC's argument that the National Green Tribunal in India is a proper forum for the adjudication of Plaintiffs' environmental tort claims against the appropriate parties. For this additional reason, this Court must dismiss Plaintiffs' Complaint under the doctrine of forum non conveniens.

A. The National Green Tribunal Is An Available And Adequate Forum

Plaintiffs do not—and cannot—refute that they can get complete relief before the National Green Tribunal in India; instead, Plaintiffs argue that India is unavailable because IFC enjoys immunity there. Opp'n 42. Looking beyond the irony—IFC enjoys immunity from suit in the United States too—Plaintiffs are incorrect that IFC's defense of immunity on IFC's part precludes India as an available forum.

First, the fact that India's United Nations (Privileges and Immunities) Act of 1947 renders IFC immune subject only to waiver would not make India less available than the United States. *See* Rasgotra Reply Aff. ¶ 9 ("There are at present no Indian legal sources or jurisprudence addressing Mr. Rai's conclusion in this regard and the issue is one that would have to be decided by the Indian courts, which would be the proper forum for its determination.") .

Second, even if IFC is immune from suit in India (as remains the case here), that would not bar dismissal. The NGT in India remains an adequate and available forum because Plaintiffs may seek—and obtain—complete relief against other parties like CGPL or Adani

Power. A forum may be adequate if it "provides an adequate remedy from *another* party or entity," if not "a remedy against the specific defendant sued in the American litigation." *Shinya Imamura v. Gen. Elec.*, 371 F. Supp. 3d 1, 8-10 (D. Mass. 2019) (emphasis added) (finding Japan to be an adequate and available forum, despite law prohibiting plaintiffs from "bring[ing] their claims against GE in Japan," where Japanese law allowed plaintiffs to a seek remedy from a nonparty in Japan); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (explaining that a forum is inadequate only if the plaintiff would be "deprived of *any* remedy" in the alternative forum (emphasis added)); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001) (noting that "[t]he forum non conveniens analysis does not look to the precise source of the plaintiff's remedy").

Ms. Rasgotra explains that the NGT would have jurisdiction over CGPL and Adani Power. *See* Rasgotra Reply Aff. ¶¶ 11, 52, 63; *see also id.* ¶¶ 58-59. Plaintiffs' claims would be timely (*id.* ¶¶ 51, 63), which Plaintiffs' expert, Ms. Ghosh, does not refute (Ghosh Aff. ¶ 25). The NGT has handled numerous environmental protection cases directly awarding plaintiffs both compensatory damages and injunctive relief. Rasgotra Reply Aff. ¶¶ 55-57, 59. There is no cap on liability in such cases, and while there is no class action function, representative bodies are easily able to sue on behalf of a group of individuals. *See id.*; *see also* Rasgotra Aff. ¶¶ 48, 54. Further, for non-indigent individuals, the fee for filing an application with the NGT is minimal, and the fee is waived for indigent persons. *See* Rasgotra Aff. ¶ 54.

B. India Is The Preferred Forum For Resolving Plaintiffs' Claims

The private and public-interest factors weigh heavily in favor of India. Plaintiffs' arguments to the contrary are meritless.

Plaintiffs ask this Court to apply a "substantial presumption" that their chosen forum is more convenient. Opp'n 44. But Plaintiffs are not U.S. citizens or residents; therefore, their choice of forum is not deserving of much deference. *See Piper Aircraft*, 454 U.S. at 255-56.

The private interest factors also weigh in favor of India. Plaintiffs do not seriously contest that "the vast majority of material witnesses and documents bearing on causation, liability, and alleged damages is located solely in India." Mem. 39-40. Plaintiffs speculate that IFC evidence is here and that the location of documents is "less important" because of modern technology. Opp'n 44-45 (quoting *Lans v. Adduci Mastriani & Shaumberg L.L.P.*, 786 F. Supp. 2d 240, 294-95 (D.D.C. 2011)). But Plaintiffs' allegations center on the construction and operation of power plants in India, including the potential effects of industrialization and modernization of an entire region 4,000 miles away. Mem. 4-5, 39-41 (citing provisions of the Complaint).

Plaintiffs suggest that dismissal is improper because IFC has not shown that the NGT is familiar with the specific facts of this case. Opp'n 45. No such requirement exists, and the cases Plaintiffs cite are inapposite.[10]

Plaintiffs do not refute that: (i) none of the material witnesses is subject to compulsory process; (ii) the costs of trial in the United States are prohibitive; (iii) a site visit by this Court to the Tata Mundra Plant would be expensive and difficult; and (iv) "all other practical problems that make trial of a case easy, expeditious and inexpensive" weigh in favor of India's NGT as a

[10] *See Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1232 (9th Cir. 2011) (denying dismissal when defendant's own expert "presented compelling evidence of disorder in the Peruvian judiciary" and plaintiffs identified State Department reporting about the difficulty of enforcing judgments); *Lexington Ins. Co. v. Forrest*, 263 F. Supp. 2d 986, 995 (E.D. Pa. 2003) (denying dismissal because, even if dismissed, plaintiff "will have to come before this court if it is to enforce the judgment").

proper forum. Mem. 39-40. The Court should treat these points as conceded. *See* L. Civ. R. 7(b); *Texas*, 798 F.3d at 1110.

Finally, the public-interest factors also favor dismissal. Plaintiffs have not—and cannot—deny that India has a strong interest in resolving this dispute. Mem. 41-43. And courts have routinely dismissed actions on forum non conveniens grounds despite the defendant having a physical presence in the original forum. *See, e.g.*, *In re Air Crash near Peixoto De Azeveda*, 574 F. Supp. 2d 272, 281 (E.D.N.Y. 2008) ("A plaintiff's choice of the defendant's home forum provides a much less reliable proxy for conveniens, than plaintiff's choice of his own home forum." (internal quotation marks omitted)); *In re Bridge Stone/Firestone, Inc.*, No. 1373, 2007 U.S. Dist. LEXIS 98929, at *53 (S.D. Ind. Jan. 31, 2007) ("[T]he 'strong interest' of the defendant's home forum is tempered where, as here, Plaintiffs are foreign citizens and Defendants are American corporations with extensive foreign business dealings.").

All four interest-analysis factors favor India: (1) Plaintiffs' alleged injuries occurred in India; (2) the conduct that caused Plaintiffs' injury occurred in India; (3) Plaintiffs are domiciled in India, while IFC is an international organization with no "nationality"; and (4) the Agreement was signed in India (Suratgar Decl. Ex. 1, at 5, 20). *See Washkoviak v. Sallie Mae*, 900 A.2d 168, 180 (D.C. 2006) (setting out the factors D.C. courts employ when considering choice of law issues). The difficulties of trying this case in a forum thousands of miles away from the vast majority of the evidence cannot be denied, and Plaintiffs do not attempt to do so.

CONCLUSION

For all of these reasons, this Court should thus grant IFC's Renewed Motion to Dismiss the Complaint and dismiss Plaintiffs' Complaint in its entirety with prejudice.

Dated: September 19, 2019

Respectfully submitted,

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