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 RESPONSE TO PLAINTIFFS' RESPONSE TO SECOND STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

On May 15, 2020, this Court requested the United States' position, as an interested party, on "whether, in light of this Court's February 14, 2020 memorandum opinion and order and plaintiffs' proposed amended complaint, IFC would still enjoy immunity under the FSIA if the Court granted plaintiffs leave to amend their complaint." Min. Order, May 15, 2020. On June 30, 2020, the United States' position is that IFC would still enjoy immunity under the FSIA if leave to amend were granted for two independent reasons: (1) Plaintiffs' new allegations do not relocate the core of Plaintiffs' suit from India to the United States; and (2) Plaintiffs' suit is not based on IFC's commercial activity. U.S. 2d Statement of Interest 3, ECF No. 68. Now that this Court has heard from the parties, Plaintiffs' motion is ripe for decision. Plaintiffs' Response repeats old arguments already addressed by the parties.

First, Plaintiffs' arguments are moot because Plaintiffs have failed to satisfy the procedural requirements of Rule 59(e).

Second, Plaintiffs' Response to the United States' position is an ode to the artful pleading that the Supreme Court warned against in *Sachs*. In their endeavor to shift the gravamen to the United States, Plaintiffs discard this Court's February 14, 2020 Decision and argue that IFC's *loan* is the new core of their suit. But under *Sachs*, the gravamen does not change merely because the plaintiff shifts to a different theory of relief for the same alleged injurious conduct by the same defendant. Plaintiffs' suit—concerning the construction and operation of a power plant in India—still lacks a sufficient nexus to the United States.

Third, Plaintiffs' claims are based on IFC's quasi-regulatory decisions about how, when, or whether to enforce the E&S Standards. Plaintiffs' attempt to dismiss this point as an argument regarding the "purpose" of IFC's acts ignores the context in which IFC operates and

why its E&S Standards exist, all of which defines the nature of IFC's conduct. For all of these reasons and the reasons set forth in IFC's Opposition, this Court should deny Plaintiffs' motion for reconsideration or leave to amend and deny Plaintiffs' request for jurisdictional discovery.

ARGUMENT

I. PLAINTIFFS STILL FAIL TO SATISFY RULES 59(e) AND 15(a)(2)

Although neither the United States' Second Statement of Interest nor Plaintiffs' Response address the procedural defects in Plaintiffs' Motion for Leave to Amend, IFC maintains that the Court need not consider Plaintiffs' arguments in response to the United States because they are moot. *See* Opp'n Mot. Amend, ECF No. 64.

Plaintiffs argue that *Brink* allows them to satisfy Rule 59(e) *without* identifying a clear error if they can simply plead allegations that "fix" the jurisdictional defect this Court identified. Reply Supp. Mot. Amend 18, ECF No. 65. But according to a recent decision from this Court, under *Brink*, the fact "any defects can be fixed" is only sufficient to establish clear error under Rule 59(e) where the final judgment was a dismissal *with prejudice*. In that limited circumstance, the "dismissal with prejudice was *a fortiori* 'erroneous.'" *Bernier v. Allen*, No. No. 16-cv-828, 2020 U.S. Dist. LEXIS 126722, *8-9 (D.D.C. July 20, 2020) (quoting *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 2015)). Plaintiffs do not argue that this Court dismissed their complaint with prejudice, or that its decision was clearly erroneous. Opp'n Mot. Amend 7-8. In any event, a subject-matter dismissal without prejudice is a final judgment subject to Rule 59(e), and this Court did not invite Plaintiffs to amend. *Id.* at 11 (citing *Attias v. CareFirst, Inc.*, 865 F.3d 620, 624 (D.C. Cir. 2017)).

II. PLAINTIFFS DO NOT—AND CANNOT—CURE THE DEFECTS IN THEIR ORIGINAL COMPLAINT

IFC's immunity remains intact because Plaintiffs' additional allegations do not shift the gravamen of this case, which is a tort that occurred in India, to the United States. Plaintiffs offer two arguments in response to the United States' position: (1) despite this Court's analysis, the gravamen of their case "is or includes [IFC's] approval of the loan" to CGPL; and (2) their amended complaint now describes conduct that directly led to the alleged injuries in India. Both arguments fail.

A. Plaintiffs' Late-Breaking Attempt To Re-Define The Core Of Their Suit Exemplifies "Artful Pleading"

Plaintiffs' semantic ploy to recast their claims to emphasize U.S. conduct is forbidden under *Sachs* and *Nelson*.

In *Nelson*, the Nelsons tried to cast their foreign intentional tort claims as a failure-to-warn claim founded upon actions and omissions in Florida. *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993). In *Sachs*, Ms. Sachs formulated her foreign strict-liability tort claims as a failure-to-warn claim based on actions and omissions in California. *Obb Personenverkehr v. Sachs*, 136 S. Ct. 390, 396 (2015). In each case, the Supreme Court rejected those attempts to plead around the strict territorial requirements of the FSIA. *Id.* at 396-397; *Nelson*, 507 U.S. at 363.

Plaintiffs' new allegations about the loan-approval process are irrelevant to the question posed by the Court because the loan approval is not—and is not included in—the basis of Plaintiffs' suit. Opp. Mot. Amend 16; U.S. 2d Statement of Interest 3-4. As the Court found, "IFC's board of directors' mere approval of the loan is not the conduct that 'actually injured' plaintiffs." Mem. Op. 17, ECF No. 61 (citing *Sachs*, 136 S. Ct. at 396). And this Court went further:

> Here, the act complained of throughout the vast majority of plaintiffs' complaint is the negligent design, construction, and operation of the power plant in India. *That conduct, not the loan transaction, is at the heart of plaintiffs' alleged injuries*. Those activities in India are not a separate, contributing cause to plaintiffs' injuries; they are activities that, according to plaintiffs, IFC is directly responsible for and that are central to plaintiffs' claims for relief.

Mem. Op. 14 (emphasis added).

Grasping at footnote 3 of this Court's decision (Mem. Op. 12)—in which the Court hypothesized a scenario in which IFC's conduct in the United States could have directly harmed Plaintiffs in India—Plaintiffs now claim that their additional loan-approval allegations were specifically designed to plead around this Court's finding by, remarkably, alleging that the loan approval itself caused *different injuries* to Plaintiffs. Resp. 2-3, ECF No. 70-1 ("[S]ome harms were known to be irreversible when IFC approved the loan (and thus that doing so was negligent), and that IFC could have mitigated *other harms* if it enforced the contract." (emphasis in original)). Plaintiffs make no effort to identify which harms are attributable to which conduct. Nor could they. *They have pleaded no new or different harms*. *See, e.g.*, AC ¶¶ 282-347 (Plaintiffs leave the section entitled "VI. Each Plaintiff Has Been Harmed By The Tata Mundra Project" unchanged). Plaintiffs' brazen attempt to gerrymander injuries in order to connect them more closely to U.S. conduct should be rejected.

1. The Court's Prior Analysis Of The Core Of Plaintiffs' Case Is Binding On Plaintiffs

When a court analyzes whether a post-judgment motion to reopen and reconsider a judgment in light of new allegations would be futile, it examines whether those new allegations would "cure the jurisdictional issues addressed in" the judgment. *Odhiambo v. Republic of Kenya*, 947 F. Supp. 2d 30, 37 & n.3 (D.D.C. 2013); *see* Mot. Amend 6, ECF No. 63; Reply Supp. Mot. Amend 11 (amendment would "directly address the Court's concerns"). In fact, Plaintiffs agreed that the deficiencies identified by the Court were geographical: "The Court

found that the gravamen of the case was the oversight of the design, construction, and operation of the plant, and that Plaintiffs had not adequately alleged where this happened. The issue was the *location* of that conduct, not the *type* of conduct." Reply Supp. Mot. Amend 14 (emphasis in original).

Indeed, the Court rejected Plaintiffs' argument that the gravamen is (or even "includes") IFC's authorization of the loan to CGPL. Mem. Op. 16. Seizing on this Court's observation that Plaintiffs did not make "specific allegations that approving the funding—by itself—was a negligent act" (*id.* at 18), Plaintiffs seek to make much of their new allegations that the *loan itself* was negligent, as if those allegations alone could relocate the core of their suit. Resp. 2-3. But Plaintiffs ignore the very next sentence: "The negligent conduct *at the center of plaintiffs' complaint is not the approval of the loan*, but rather the subsequent failure to 'to take sufficient steps or exercise due care to prevent and mitigate harms to the property, health, [and] livelihoods' of those who live near the plant." Mem. Op. 18 (emphasis added). That is, the Court concluded that it would not matter even if Plaintiffs *had* alleged that IFC's loan was negligent: "The approval of the loan *without IFC's subsequent negligence* is akin to transfer of money without the Venezuelan oil company's fraudulent intent in *Crystallex*, or the sale of the railway ticket without the Australian railway company's 'unsafe boarding conditions' in *Sachs*. There is 'nothing wrongful about the approval of the loan standing alone." *Id.* (internal citations and alterations omitted) (quoting *Sachs*, 136 S. Ct. at 396). Plaintiffs' "new" allegations about IFC's loan-approval process are irrelevant because "mere approval of the loan is not the conduct that 'actually injured' plaintiffs"; at best, the loan is a "but for" cause of Plaintiffs' alleged harms, not the conduct upon which their suit is based. *Id.* at 17.

And, as explained above, Plaintiffs do not connect IFC's loan to *different* injuries than Plaintiffs alleged before. Plaintiffs have simply sought to add new knowledge allegations to their old liability theory that IFC was negligent in funding the project at all. *Compare* Opp'n Mot. Dismiss 3-4, ECF No. 45 (alleging that IFC provided funding despite knowing risks), *with* Resp. 6-7 (same, imputing knowledge based on the project's Category A rating (citing AC ¶¶ 198-99)). No matter how Plaintiffs try to frame it, IFC's loan authorization is neither the gravamen of their case; nor did it actually injure them.

Plaintiffs also mischaracterize the Court's observation that their negligent-lending theory is in direct conflict with the gravamen, which still holds true. Resp. 2. The Court's point was that Plaintiffs advance two competing theories of liability: (1) that IFC should not have funded the project because provisions in the loan agreement could not have been used to mitigate Plaintiffs' guaranteed harm; and (2) that IFC should have used provisions in the loan agreement to mitigate Plaintiffs' harms. Mem. Op. 18. The Court's reasoning was not limited to Plaintiffs' allegation that IFC "failed to ensure sufficient measures were incorporated into the loan" (still in Paragraph 163 of the Proposed Amended Complaint). *Id.*; Resp. 2.

2. Plaintiffs' Attempt To Change The Gravamen By Adding Negligent-Lending Allegations Underscores Their Artful Pleading Strategy To Evade The FSIA's Territorial Limitations

Plaintiffs' new arguments that their March 2020 allegations alter the core of their suit brings into stark relief their pleading strategy.

Even if the Court were to consider these new arguments, they do not carry the day. Following *Sachs*, this Court rejected Plaintiffs' argument that their theory of liability or causes of action determine the gravamen. Mem. Op. 12-13. The Supreme Court recognized that its dicta in *Nelson* had unintentionally misled lower courts to focus on the plaintiff's claims and elements,

and where those concepts were "located" according to a choice-of-law analysis. *Sachs*, 136 S. Ct. at 395-396. That focus, particularly in foreign tort cases, enabled claimants to bring their foreign tort claims into U.S. courts by pleading any theory of relief that centers on the sovereign defendant's U.S. conduct, *i.e.*, "artful pleading." *Id.* at 396. But *Sachs* instructed courts to begin with the harm for which the plaintiff seeks compensation as a guide for finding the acts "that actually injured" the plaintiff. *Id.* at 395; *see id.* at 393 (explaining that Sachs "suffered traumatic personal injuries when she fell onto the tracks at the Innsbruck, Austria, train station" and thus "her action is . . . 'based upon' the railway's conduct in Innsbruck"). *This* is the core, however the plaintiff "frames her suit." *Sachs*, 136 S. Ct. at 396.

And the *core* of Plaintiffs' suit against IFC—the conduct that actually injured Plaintiffs—has not changed from one complaint to the next. Plaintiffs' April 2015 complaint and their March 2020 proposed amended complaint both center on IFC's alleged failure "to protect plaintiffs from the plant in India." Mem. Op. 20. Despite this, Plaintiffs' view is that the core of their suit is any combination of allegations that could maneuver their tort claims—claims based on the construction and operation of a power plant in India by an Indian company that allegedly harmed Indian plaintiffs—into a U.S. court.[1] *See* Mem. Op. 13 (noting that "plaintiffs seek to hold IFC responsible for conduct that occurred in India"). Their allegation choreography is forbidden under *Sachs*. *See Atlantica Hldgs., Inc. v. Sovereign Wealth Fund Samruk-Kazyna*

[1] An approach to divining the gravamen that focuses on the plaintiff's claims or liability theories necessarily devolves into choice-of-law arguments about the locus of each of the plaintiff's various claims. *See, e.g.*, Resp. 7 ("These elements form the gravamen of a negligence claim."); *id.* at 7 n.3 (arguing that the element of duty "follows the actor," and that the breach element lies in the U.S.); *id.* at 6 (arguing "that IFC's *mens rea* was necessarily in Washington, D.C."). *Sachs* counsels against such an approach. *Sachs*, 136 S. Ct. at 396 ("[W]e did not undertake such an exhaustive claim-by-claim, element-by-element analysis of the Nelsons' 16 causes of action, nor did we engage in the choice-of-law analysis that would have been a necessary prelude to such an undertaking.").

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)).

B. The Amended Complaint Does Not Shift The Gravamen Of This Case To The United States

As the Court found, "the act complained of throughout the vast majority of plaintiffs' complaint *is* the alleged negligent design, construction, and operation of the power plant in India." Mem. Op. 14. The Court, therefore, examined whether Plaintiffs' complaint alleges facts sufficient to shift the gravamen from India, which is its natural location in this personal-injury case, "to the United States."[2] *Id.* at 21-22. Bearing in mind that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role" in some tort suits than others, the Court searched for allegations demonstrating that IFC's U.S. conduct "actively" led to the environmental harms that Plaintiffs allege in India. *Id.* at 12 n.3 (quoting *Sachs*, 136 S. Ct. at 397 n.2) (providing a hypothetical example if IFC's own "technicians

[2] Plaintiffs unfairly criticize the United States for applying the Court's decision. Resp. 5-6. The United States' observation that the gravamen of a tort case "usually will be 'the place where the injury occurred'" (U.S. 2d Statement of Interest 6) was plainly not an argument "that the gravamen is always found at the site of injury" (Resp. 5). It was an indictment of Plaintiffs' failure to cure the deficiencies in their complaint that this Court identified in its opinion. Plaintiffs' new textual argument that "the commercial activity exception does not require that the injury occur in the United States" mischaracterizes the U.S. position and is procedurally improper. *Id.* at 6; *see Odhiambo*, 947 F. Supp. 2d at 38 n.4 ("[A] losing party cannot use a Rule 59 motion to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings." (internal quotation marks omitted)). And it is meritless: Plaintiffs' broad pronouncement that the location of the injury "is irrelevant" runs head-long into *Sachs* and this Court's ruling. Resp. 6; *Sachs*, 136 S. Ct. at 397; *accord* Mem. Op. 11-12.

negligently mis-adjusted the cooling levels" from a computer system in the United States, "causing a fire at the plant" and injuring plant workers in India).

The Court found no allegation of "IFC's direct involvement in the design, construction, and operation of the power plant occurr[ing] in Washington, D.C." *Id.* at 20. It found only allegations that (1) "critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions, were made in Washington, D.C."; (2) that "the disbursement was made in U.S. dollars and came from funds held within the United States"; and (3) that "IFC's responses to allegations of harm caused by the Project[,] including the injuries alleged . . . were decided, directed and/or approved from the headquarters in Washington, D.C." *Id.* 20-21. Thus, under *Sachs*, the Court could not "simply presume" that IFC actively or directly engaged in conduct that harmed Plaintiffs in India. *Id.* at 20. And the United States is correct: Plaintiffs' new allegations still do not shift the gravamen of this case to the United States. U.S. 2d Statement of Interest 7.

The Proposed Amended Complaint simply adds more innuendo to Plaintiffs' original allegations that IFC "approved" construction designs for the Plant because IFC staff reviewed CGPL's environmental submissions before deciding "whether to disburse each tranche of the loan." AC ¶ 235; *see also id.* ¶¶ 231-33, 238 (CGPL required to provide E&S information to IFC staff in D.C. "[a]s conditions of all subsequent disbursements"); *id.* ¶¶ 234-35 (staff who determine if IFC has received all required E&S-related information are located in D.C.); *id.* ¶ 236 (determination if the loan has been breached is made in D.C.); *id* ¶ 235 (loan disbursements made from D.C.); *id.* ¶ 239 (therefore, "IFC approved the construction design in Washington, D.C."), *relied upon in* Resp. 4.

Stripped of Plaintiffs' rhetoric, IFC's alleged design "approval" was little more than its staff's administration of loan disbursements, *i.e.*, "not . . . the gravamen of [P]laintiffs' suit." Mem. Op. 21. Plaintiffs still do not allege that IFC undertook any "active" role in developing CGPL's construction designs in the United States—nor can they. *Compare id.* at 12 n.3., *with* AC ¶ 170 (IFC "allowed" CGPL to design the Plant in a manner that harmed Plaintiffs). Moreover, this Court's findings that any direct involvement IFC had with the design, construction, and operation of the Plant "likely occurred in India" remain unrebutted. *See* Mem. Op. 20 (noting that (1) IFC signed the initial mandate letter through its office in New Delhi; (2) IFC conducted various site visits in Gujurat; (3) negotiated and signed the loan agreement in Mumbai; and (4) IFC's Director of Infrastructure and Natural Resources of Asia, who initially responded to the CAO report and signed the IFC's response, was located in New Delhi).

Remarkably, Plaintiffs now argue that when IFC approved loan disbursements to CGPL, those actions were "not meaningfully different" from the Court's hypothetical in which IFC remotely controlled the Tata Mundra Plant's cooling levels from Washington. Resp. 5 (arguing that the Court's hypothetical "is not meaningfully different than the facts in the Amended Complaint"). Plaintiffs' comparison aside, whatever actions were taken in Washington—short of remote-controlled cooling—did not actually injure Plaintiffs in India.

The Proposed Amended Complaint's new allegations regarding IFC's negligent "responses to allegations of harm" in the United States are materially indistinguishable from the original complaint, and they still fail to shift the gravamen of this case from India. Mem. Op. 21-22. When considering "what [P]laintiffs mean by 'responses to allegations of harm,'" the Court "assum[ed] that the phrase . . . is a reference to IFC's written responses to the CAO's assessment and audit," because IFC headquarters officials approved those responses. *Id.* at 22. The Court

found that these allegations are "not sufficient to establish that plaintiffs' complaint is based upon conduct carried on in the United States." *Id.*

The Proposed Amended Complaint proves that the Court's determination was correct: Plaintiffs infer that IFC's alleged oversight failure must have occurred in D.C. because (1) the CAO process required informing leadership in D.C.; and (2) IFC leadership in D.C. approved the IFC's written responses to the CAO, which Plaintiffs allege signified a decision not to respond effectively. *See*, *e.g.*, AC ¶ 252 (IFC's legal department in D.C. is notified of CAO complaints); *id.* ¶ 253 (CAO is based in D.C.); *id.* ¶ 256 ("E&S staff must report to upper management" if a CAO complaint is filed, and the "response is cleared" by management); *id.* ¶ 259 (CAO complaint put senior management in D.C. "directly on notice of Plaintiffs' claims and gave them ample opportunity to correct the harmful aspects of the Project"); *id.* ¶¶ 262-63 (written response to CAO issued and signed by IFC's senior officials). In other words, although Plaintiffs now allege that "IFC's responses to the allegations included more than just its responses *to* the CAO and CAO Audit Report" (*id.* ¶ 251), they continue to rely *only* on those written memoranda *as* the evidence of IFC's decision to do nothing (*id.* ¶ 251).

The remainder of Plaintiffs' new allegations regarding IFC's structure do no more than Plaintiffs' original allegations; that is, paint a picture of, at most, "relatively minor conduct" (Mem. Op. 22), and do not establish that IFC's leadership in D.C. disregarded specific information about the Tata Mundra Plant and actively contributed to Plaintiffs' harms. AC ¶¶ 238, 240 (alleging that, "as with all communications and documentation," CGPL sent construction progress and environmental monitoring reports to IFC management in D.C.); *id.* ¶¶ 245-46 (IFC E&S staff provide information to IFC department heads, who write "quarterly reports to upper management on the status of investments"); *id.* ¶¶ 247-48 (IFC upper

management receives reports generally regarding IFC environmental and social performance); *id.* ¶¶ 249-50 (VP of Operations, Investment Committee, and others in D.C. have ultimate authority over projects). These allegations do not rebut the natural presumption that "IFC's failure to act at the Tata Mundra Power Plant and in the surrounding community in India" was "focused in India, where the plant is and the harms occurred." Mem. Op. 16, 23.[3]

As the United States correctly noted, even if IFC senior management in D.C. had the authority to change the Plant's design, construction, and operations, CGPL still would have had to accept and execute that design in India. U.S. 2d Statement of Interest 6. And, if IFC management had decided to punish CGPL by withholding loan disbursements, the intended effect would center on CGPL's compliance in India. *Id.* Plaintiffs do not disagree; instead, they argue that the Court held that it would not consider CGPL's conduct in determining the gravamen, "because" doing so "would eviscerate ordinary joint tortfeasor liability." *See* Resp. 7 ("The Court rejected the argument that IFC is immune for its tortious conduct because someone else also acted tortiously . . . ."). Plaintiffs are incorrect in their attempt to convert the Court's criticism of a "last act" gravamen test into an endorsement of their *defendant's acts only* gravamen test, which the Court rejected. *See* Mem. Op. 12, 13-16 (rejecting argument that CGPL's conduct "should be excluded from the gravamen analysis on the ground that courts must consider only the sovereign (or international organization) defendant's conduct"). And contrary to Plaintiffs' argument (Resp. 7), section 1606 of the FSIA cannot bear upon this Court's

[3] Plaintiffs offer a self-defeating argument that the United States "misplaced" its reliance on *Nnaka* because there the Court was applying the direct-effect clause of the commercial-activity exception. Resp. 6 n.2. But the Court applied the direct-effect clause because it found that suit was "based 'upon an act *outside* the territory of the United States.'" *Nnaka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 28 (D.D.C. 2017) (emphasis added). The gravamen was in Nigeria because the locus of the plaintiff's claims was Nigeria—from where the Nigerian Attorney General sent the letter that directly led to the alleged injury. *Id.*

gravamen analysis because it only applies *if* the Court determines the gravamen is in the United States. 28 U.S.C. § 1606 (limiting state-law liability of sovereigns as to claims for which they are "not entitled to immunity under section 1605 or 1607").

III. IFC'S INTERNAL, DISCRETIONARY DECISIONS ABOUT WHETHER AND HOW TO ENFORCE ITS BOARD-DEVELOPED AND APPROVED E&S STANDARDS ARE NOT COMMERCIAL CONDUCT UNDER THE FSIA

IFC's internal decisions about policy enforcement are not commercial conduct under the FSIA. Plaintiffs simply repeat most of their misplaced and inaccurate arguments from their Opposition to IFC's Renewed Motion to Dismiss regarding IFC's enforcement of their own E&S standards. *Compare* Resp. 8-13, *with* Opp'n Mot. Dismiss 12-19. Plaintiffs' singular focus on IFC's vehicle of enforcement—a loan agreement—rather than the nature of the conduct—the administration of its sustainability standards—dooms their position.

Because the gravamen this Court articulated necessarily examines whether or how IFC should have enforced its E&S Standards, the core of this case is quasi-regulatory, noncommercial conduct of IFC. Moreover, IFC's noncommercial acts are not converted into commercial activity simply because the E&S Standards were incorporated into a loan agreement.

A. IFC's Alleged Conduct That The Court Concluded Was At The Core Of Plaintiffs' Suit Is Not Commercial In Nature

IFC's decisions whether and how to enforce its own E&S Standards against borrowers are not commercial activity under the FSIA.

As an initial matter, the Supreme Court declared that international organizations enjoy "equivalent" immunity to sovereigns. *Jam v. Int'l Fin. Corp.* 139 S. Ct. 759, 768 (2019). Not more, but certainly not less. Plaintiffs' fixation on IFC as a "commercial" lender that engages in only "commercial activity" is wrong. Resp. 8-13. As an international organization, IFC

executes the policy objectives of its member states, including those policies related to the environment.

Plaintiffs do not refute that IFC's E&S Standards are approved by IFC's Board of Directors, a subset of its member states, or that IFC fulfills its public function—specifically, its chartered objectives as laid out Article I of the IFC Articles of Agreement—in part through the E&S Standards. IFC Articles of Agreement, Art. I, Dec. 5, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620; Reply Supp. Mot. Dismiss 12, ECF No. 48.

Analogous to *Aluminum Warehousing* (1) IFC is a lender of "last resort,"[4] and therefore in effect provides and regulates that "market" (*In re Aluminum Warehousing Antitrust Litig*, No. 13-md-2481, 2014 U.S. Dist. LEXIS 119074, at *27 (S.D.N.Y. Aug. 25, 2014)); (2) under the Articles of Agreement, IFC's Board of Directors adopted the E&S Standards, which apply generally to all of IFC's loan agreements (*id.* at *28); and (3) IFC implemented these standards in the only way it could enforce them—through provisions in its loan agreements (*id.* at *62).[5]

For the first time, Plaintiffs note that IFC consults private industry before the Board of Directors adopts the E&S Standards. Resp. 10 n.6. But, of course, sovereigns routinely consult

[4] *See* Mem. Op. 2 ("IFC may invest in privately run projects for which 'sufficient capital is not available on reasonable terms.'"); *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.) ("Since the IFC can operate only in conjunction with private investors, the IFC would encourage, and not compete with, private investment.").

[5] Plaintiffs' unsupported argument that the Board of Directors intended the E&S Standards to "regulate IFC" is contradicted by the Standards themselves, which state "managing environmental and social risks and impacts in a manner consistent with the Performance Standards is the responsibility *of the client*." Herz Decl. Ex. 2 at 16 (2012 E&S Policy), ECF No. 22-5 (emphasis added).

the private industries they regulate before issuing rules. *E.g.*, 5 U.S.C. § 553(c) (APA notice-and-comment).

Plaintiffs compare IFC's E&S Standards to the environmental provisions some traditional banks include in lending agreements. Resp. 12 & n.7. But commercial banks, by definition, do not lend money to infrastructure projects when private capital will not; nor do they impose environmental standards upon those projects at the direction of a Board composed of member states, pursuant to an international treaty.

The context of this case is particularly relevant because India is a member of IFC, is concerned with its own natural resources, and had a pivotal role in attracting IFC financing on these terms. Plaintiffs do not dispute that regulation of environmental and natural resources is a quintessentially sovereign act; they offer the non sequitur that IFC cannot "exploit India's natural resources." Resp. 13; U.S. 2d Statement of Interest 9 (citing *Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kazakhstan*, 406 F. Supp. 3d 1, 15 (D.D.C. 2019); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989)).[6] Plaintiffs' cited cases concerning state-owned for-profit enterprises (oil companies and waste-water treatment companies) or railroads are irrelevant here. Resp. 13 n.9.

At most, Plaintiffs highlight what courts already know: the judge-made line between "nature" and "purpose" is a fine one. Resp. 11 (arguing that the United States "tries to smuggle

[6] Repeatedly, Plaintiffs mischaracterize the United States' position as being "that IFC's actions were sovereign." Resp. 8. That is wrong. *See, e.g.*, U.S. 2d Statement of Interest 8 (explaining that "IFC does not hold the same regulatory responsibilities as a sovereign state," but that IFC's "discretionary implementation (or non-implementation) of its environmental and social policies is an act more akin to that of a sovereign"); *id.* (arguing IFC's conduct was "quasi-regulatory"); *id.* at 8-9 ("Instead, IFC's discretionary administration of its own environmental and social policies is more akin to the regulatory acts of foreign sovereigns that commonly are held to be non-commercial.").

in an argument about *purpose*" (emphasis in original)). Plaintiffs insist that this is a call for returning to "absolute immunity," but it is not.[7] Resp. 11. Any number of cases could be founded on conduct *other than* the implementation of an international organization's charter-based policies. But this is not such a case, and Plaintiffs fail to distinguish the similarities between the nature of IFC's reliance on a contract here, and the sovereigns' conduct in *In re Aluminum*, *Butters*, and *UNC Lear Servs*. *See In re Aluminum*, at *62 (enforcement of load-out regulations through contracts not commercial); *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 216 (5th Cir. 2009) (procuring training and support services for Royal Saudi Air Force through contract not commercial); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (providing security for the Saudi royal family through contract not commercial). Plaintiffs argue that the United States' (and IFC's) position "has no limiting principle." Resp. 11. But the limiting principle is found in *In re Aluminum*: If the international organization's conduct at issue is a public function to which the organization is entrusted by its member states, as set forth in its founding treaty, then that conduct is non-commercial. *In re Aluminum*, at *37, 51, 58.

B. IFC's Enforcement Of Its E&S Standards Remains Non-Commercial Even When Implemented Via Contract

Unable to deny the quasi-regulatory nature of IFC's internal decision-making processes, Plaintiffs' fallback position is that the *vehicle* IFC uses to administer its environmental policies—a lending agreement—automatically converts non-commercial activity to commercial

[7] Under Plaintiffs' position, a sovereign's environmental regulations of its natural resources are commercial acts because private businesses could pursue the same "purpose" of protecting the environment. *See* Resp. 10 ("To be sure, some regulation has environmental and social protections as its purpose, but this does not mean everything with a goal of environmental and social protection is a sovereign rather than commercial act.").

activity. Resp. 8 ("Here, IFC acted solely through a commercial loan contract."); *id.* at 9 ("Acting pursuant to and failing to enforce provisions in a commercial contract are commercial acts."); *id.* at 11 ("The act is forming and taking or failing to take action under a loan contract, which is inherently commercial."); *id.* at 12 ("[T]he 'manner' in which IFC acted is through a commercial contract."); *id.* at 13 ("IFC merely financed a commercial power plant and put conditions in that contract."). But courts must focus on the nature of a particular activity rather than the tools utilized in deciding whether an activity is commercial. *See Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek (Persero)*, 600 F.3d 171, 177-78 (2d Cir. 2010) (concluding that defendant's insurance operations "do not equate to those of an independent actor in the private marketplace of potential health insurers" (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 615 (1992))). Each of Plaintiffs' re-formulations knocks down the same strawman, that is, IFC lends money to commercial entities, ergo all of IFC's activity is commercial conduct under the FSIA. Plaintiffs' arguments miss the point, for several reasons.

First, courts have recognized that sovereign entities often fulfill public functions through contractual arrangements. *See UNC Lear Servs.*, 581 F.3d at 216 (providing training and support services to Royal Saudi Air Force); *Butters*, 225 F.3d at 465 (hiring security for the Saudi royal family); *In re Aluminum*, at *62 (enforcing load-out regulations through contracts). Each of these cases refutes Plaintiffs' mantra that, even if the conduct at issue is sovereign in nature, once the sovereign engages in a related commercial transaction, the underlying conduct becomes "commercial" under the FSIA. Resp. 8-13. And Plaintiffs' effort to distinguish these cases by characterizing them as "specialized contracts in unique situations" reinforces IFC's argument. *Id.* at 12-13. IFC's role as a multilateral development bank—a lender of last resort administering environmental policies by applying them generally to all of its lending agreements—is singularly

unique. To use Plaintiffs own example, J.P. Morgan does not purport to compete with IFC or other international finance institutions ("IFIs").[8] Pls.' Suppl. Evid., Ex. A at 4, ECF No. 57 (describing J.P. Morgan's Development Finance Institution as a potential "partner of choice" as a contributing lender on IFI-financed or organized projects).

Second, the acts and omissions that Plaintiffs claim injured them are IFC's decisions according to its own internal processes for how to best advance IFC's environmental and sustainability goals in the countries in which IFC operates. Not only are those activities quasi-regulatory in nature, they do not flow from the Loan Agreement. Plaintiffs did not—nor could they—identify any provision in the Loan Agreement that requires IFC to enforce its E&S Standards. The Loan Agreement did not impose such a duty on IFC; rather, CGPL undertook the duty to ensure compliance with the E&S Standards. Mem. Supp. Mot. Dismiss 17, ECF No. 40-1. IFC's decisions whether to enforce its E&S Standards did not arise from an obligation under the Loan Agreement. *Cf. United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (concluding that defendant's failure to provide a bill of lading did not fall within the commercial activity exception because plaintiffs' losses did not derive from the contract).

Finally, as the United States rightly argued, to find for IFC, this Court need not address Plaintiffs' red herrings regarding whether IFC's lending "writ large" is commercial or whether IFC's loan to CGPL is a commercial loan. U.S. 2d Statement of Interest 8. Those questions are

[8] Plaintiffs cite to their "Notice of Supplemental Evidence" to support their claims about J.P. Morgan's "Development Finance Institution." Resp. 12. This Court should not consider this "evidence" for the reasons stated in IFC's Motion to Strike. ECF No. 60. This Court denied IFC's Motion to Strike as moot once it granted IFC's Renewed Motion to Dismiss without considering Plaintiffs' "supplemental evidence." Order, ECF No. 62.

irrelevant to whether the core of Plaintiffs' suit—IFC's alleged failure to ensure that CGPL adhered to IFC's E&S Standards—is commercial activity. For the reasons stated above, it is not.

IV. THE COURT MUST AVOID INTERPRETING THE IOIA TO ALLOW SUITS SEEKING DOMESTIC CONTROL OVER INTERNATIONAL ORGANIZATIONS' OPERATIONS

In closing, Plaintiffs twist the words "same immunity as foreign states" from the IOIA to effectively mean that international organizations enjoy "less immunity than governments" because organizations have no territory. Resp. 15. The plain text of the statute refutes Plaintiffs' argument. And the United States' caution remains valid: Foreign states can choose to make decisions in their capitals, or they can choose to transact business within another nation's land. International organizations must be able to carry out their functions without undue influence by any one state, and in particular, the state in which the organization is headquartered. *See* S. Rep. No. 861, 79th Cong., 1st Sess. 4 (1945) (the IOIA would "facilitate fully the functioning of international organizations in this country"); *see also* Secretary of State, *Report to the President on the Results of the San Francisco Conference* 159 (1945), https://babel.hathitrust.org/cgi/pt?id=uiug.30112046487697;view=1up;seq=2 (immunity was granted to "insure the smooth functioning of [each organization] free from interference by any state"); Restatement (Second) of Foreign Relations § 83 cmt. e.

Congress understood this concern well, and it enacted the IOIA with the goal of persuading organizations like IFC to place their headquarters in the United States, with considerable economic and diplomatic benefits to the United States.[9] But Plaintiffs do not deny

[9] *See* 91 Cong. Rec. 12,530 (Dec. 21, 1945) ("Everybody thinks it would be very fine to have the headquarters of this international organization in this country. I communicated with the State Department today and was told that it was highly essential for us to complete action on this."); *see also San Francisco Conference Report* 158-60 (expressing need for IOIA).

that they would have the commercial-activity exception apply to any case in which an organization's headquarters officials in the United States bore ultimate responsibility for a harm. Resp. 14-15. Although the Supreme Court held that international organizations are subject to the FSIA, it did not direct this Court to ignore the IOIA's purpose when interpreting *how* the FSIA is applied to international organizations. Nor did the Supreme Court imply that organizations should be equivalent to corporate "instrumentalities" of a foreign state (Resp. 15). The IOIA provides immunity in line with "foreign governments" (22 U.S.C. 288a(b)). Plaintiffs' arguments to the contrary should be rejected.

CONCLUSION

For these reasons, this Court should deny Plaintiffs' motion for reconsideration or leave to amend, and deny Plaintiffs' alternative request for jurisdictional discovery.

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Respectfully submitted,

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