IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUDHA ISMAIL JAM, *et al.*, Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	Civil Action No. 15-cv-00612 (JDB)

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

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INTRODUCTION

The United States Government (USG) asks this Court to ignore the allegations of the Amended Complaint and to rewrite its prior order.

The Amended Complaint alleges facts showing that the loan itself is at least part of the gravamen of this case. The USG says the Court should ignore those allegations based on its finding that the *original* Complaint did not plead such facts, but the Court must determine the gravamen of the Amended Complaint by reference to the allegations in the Amended Complaint.

Regardless, the Court's prior decision identified the allegations necessary to establish that the gravamen of this case is in the United States. It dismissed because it found those allegations were absent from the original Complaint. The Amended Complaint provides the allegations this Court found lacking. The USG's argument that that is not enough is just an argument that this Court's analysis was wrong. And to make that argument, the USG relies on rationales this Court has already rejected. This Court should do so again.

The USG's claim that IFC's acts were not commercial activity is wrong. IFC acted pursuant to a commercial loan contract. The fact that contract provisions relate to environmental protection does not turn a commercial loan into regulation. IFC's power is contractual, and thus its acts are commercial, not sovereign.

ARGUMENT

I. The gravamen of Plaintiffs' amended complaint is in the United States.

A. The gravamen of this case is or includes the approval of the loan.

Whether IFC is immune under the allegations of the Amended Complaint depends on the allegations in *that* Complaint. *See, e.g.*, *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 106-107 (D.D.C. 2006) (evaluating whether amended complaint established FSIA jurisdiction when previous

complaint did not). But the USG argues otherwise. It starts with the Court's prior ruling that the loan itself was not the gravamen of the original Complaint. ECF No. 68 at 4. Then it claims that Plaintiffs' new factual allegations about IFC's lack of due diligence, project evaluation, and loan approval – which clarify that the loan itself was negligent and therefore is or is part of the gravamen of Plaintiffs' case – "do[] not relate" to what the Court found to be the gravamen of the original Complaint. But this puts the cart before the horse. The Court must determine the gravamen of the *Amended* Complaint.

The prior ruling does not answer this question. This Court found that the loan itself was not the gravamen of the original Complaint because Plaintiffs did not specifically allege "that approving the funding – by itself – was a negligent act." ECF No. 61 at 18. It did not hold that the loan could *never* be the gravamen of the case, no matter what Plaintiffs alleged. As Plaintiffs have explained, the new allegations demonstrate with specificity that IFC is negligent for funding a project that would necessarily cause irreversible harm without sufficient due diligence, and for doing so without an adequate plan to prevent the effects it could avoid. ECF No. 63 at 9-10; ECF No. 65 at 12-13; AC ¶¶ 161, 166, 208, 217-225. The due diligence and evaluation of the project by IFC management and staff, and approval by the Board of Directors, was done in Washington, D.C. AC ¶¶ 197-215.

This Court also did *not* find that allegations that the loan was negligent are in tension with allegations that IFC had the power to protect Plaintiffs by enforcing loan provisions. ECF No. 68 at 4. The tension it found was between the latter allegations and the allegation that IFC failed to ensure that the agreement included sufficient measures to prevent foreseeable harms. ECF No. 61 at 18.

Regardless, there is no "tension" in the Amended Complaint. Plaintiffs allege both that some 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. ECF No. 63 at

9-10; AC ¶¶ 160-176, 216-225, 250. For the harms that *could* be mitigated, IFC was negligent in approving the loan without adequate mitigation plans. AC ¶¶ 163, 218, 220-225. Nowhere in the Amended Complaint do Plaintiffs allege that "IFC *lacked* . . . power" to protect or mitigate harms to Plaintiffs. USG at 4. IFC still maintained massive *power* through the loan agreement to exercise control over the project and improve the environmental and social outcomes by mitigating harms that could be mitigated.[1]

In short, IFC has engaged in a pattern of tortious conduct. It negligently approved a loan that would necessarily lead to certain harms, and that lacked adequate provisions to avoid those harms that could be avoided. Then, pursuant to and despite its contractual powers to mitigate those harms that could be mitigated, it approved flawed design and failed to lessen the harms. The gravamen is best seen as IFC's entire course of tortious conduct, including its approval of the loan.

B. Even if the gravamen of the Amended Complaint is the same conduct as the original Complaint, Plaintiffs' new allegations show that it is in the United States.

The USG's argument that the new allegations showing IFC acted in the United States do not "shift" the gravamen's location to the United States also fails. Since the question here is the location of the gravamen of the *Amended* Complaint, Plaintiffs do not need to "shift" the gravamen. In any event, the new allegations show that the conduct this Court identified as the gravamen occurred in the United States. The USG asks this Court to rewrite its prior opinion and adopt arguments it has

[1] The documents that lay out IFC's environmental and social standards were incorporated into the Loan Agreement, AC ¶ 53, and could be enforced with the many tools given to IFC in the Agreement. AC ¶¶ 137-138, 230-234, 236, 246, 249-250. IFC still had overall control of the design, construction, and environmental and social aspects of the plant to mitigate and prevent the harms that could be mitigated and prevented. AC ¶¶ 230-234, 238-250. But IFC affirmatively approved harmful aspects of the project. AC ¶¶ 168, 170, 231-233, 238-239. Otherwise, IFC simply chose not to exercise the power it had to prevent or mitigate harms, AC ¶¶ 164, 169-172, 250, 259, and continued to disburse loan tranches despite worsening environmental and social outcomes. AC ¶¶ 62-73, 164, 226-250.

already rejected.

This Court found the gravamen of the original Complaint to be IFC's "alleged failure to ensure that the design, construction, and operation of the plant complied with all environmental and social sustainability standards . . . as well as the alleged failure to take sufficient steps to prevent and mitigate harms." ECF No. 61 at 16. And it held that the original Complaint had not established that "such conduct was 'carried on' in the United States," finding it did not allege that "IFCs direct involvement in the design, construction and operation of the power plant occurred in Washington, D.C." *Id.* at 19-20. The Amended Complaint remedies the specific gaps the Court identified. ECF No. 63 at 8-15.

Plaintiffs' new allegations demonstrate that IFC's failure to ensure CGPL complied with the Loan Agreement's provisions occurred in the U.S. ECF No. 63 at 10-13; AC ¶¶ 226-250. IFC's approval of negligent designs and construction plans was granted in Washington, D.C. ECF No. 63 at 12; AC ¶¶ 231-233, 238-239. IFC's failure to adequately monitor and supervise the plant occurred in Washington, D.C. ECF No. 63 at 10-13; AC ¶¶ 226-250. Indeed, the USG concedes that the new allegations demonstrate "that ultimate authority for IFC's social and environmental oversight of the project rested with officials in the United States." ECF No. 68 at 5. Since Plaintiffs' new allegations establish that IFC committed the acts and omissions that this Court identified as the gravamen in the United States, AC ¶¶ 226-269, if the gravamen of the Amended Complaint is the same conduct as the original Complaint, the Amended Complaint meets this Court's test.

Yet the USG insists that even though IFC committed the conduct that this Court identified as the gravamen in the United States, this case is still based upon conduct *in India*. ECF No. 68 at 5 (citing ECF No. 61 at 14). Indeed, it asserts that this Court should now ignore the monitoring and supervision by IFC staff that the Court previously found to be the basis of the claim, stating that this

Court should *not* look at "which IFC officials oversaw the project or where they were located, disbursed IFC funds, or received communication." *Id.* That is an argument that this Court misidentified the gravamen of the original Complaint.

The USG simply rephrases its original argument that this Court must look at the "last act" in the causal chain. ECF No. 68 at 6 ("[P]laintiffs still have not alleged ... anything that IFC did (or did not do) in the United States that directly led to injuries in India."). But this Court has already held there is no "hardline rule[]" that the last act in the causal chain be the gravamen. ECF No. 61 at 10. And this Court explicitly held that IFC's approval of plant design and failed supervision of the plant's compliance with the loan agreement is the gravamen because "it is the conduct that plaintiffs allege *'actually injured'* them." ECF No. 61 at 16 (emphasis added).

The USG points to the Court's example of IFC conduct that might render the claim based on conduct in the United States: if IFC "actively monitored[ed] and adjust[ed] the power plant's cooling levels from a computer system in the United States" and negligently adjusted the levels resulting in injury. ECF No. 68 at 6 (quoting ECF No. 61 at 12 n.3). But that hypothetical is not meaningfully different than the facts in the Amended Complaint. IFC actively monitored the design, construction, and environmental performance of the plant, and could make changes to the project based on that information, from the United States. AC ¶¶ 226-269. And IFC staff approved the harmful design and construction of the power plant in Washington, D.C. AC ¶¶ 231-233, 238-239.

The USG recycles another rejected argument when it claims that the "locus of the tort" is still in India because that is "where [Plaintiffs] were injured by the power plant." ECF No. 68 at 6. This Court rejected the notion that the gravamen is always found at the site of injury. ECF No. 61 at 10-12. And with good reason. "[P]articular conduct," not injury, is the gravamen of a suit. *OBB*

Personenverkher AG v. Sachs, 136 S. Ct. 390, 396 (2015).[2] As noted, Plaintiffs have alleged that the conduct identified by the Court as the gravamen occurred in Washington, D.C.

The USG's argument conflicts with the FSIA's text. Under the USG's approach, to maintain an action under the commercial activity exception, the injury could never occur abroad, as the gravamen would then *always* be outside the United States. But the commercial activity exception does not require that the injury occur in the United States. ECF No. 45 at 16-17. Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). The first two clauses of the commercial activity exception require that the case be "based upon" a domestic commercial *activity*. 28 U.S.C. § 1605(a)(2). The FSIA requires a domestic *effect* (such as an injury) in only two circumstances: if the claim is based on commercial activity abroad, the third clause requires direct effects in the United States, 28 U.S.C. § 1605(a)(2); and if there is no commercial activity, the noncommercial tort exception requires injury "in the United States." 28 U.S.C. § 1605(a)(5). But if the claim is based upon commercial activity in the United States, that domestic act is the jurisdictional hook, so the location of the effect is irrelevant.

As to the elements of the claim against IFC, the USG simply ignores the fact that the Amended Complaint demonstrates that *IFC's* acts related to the gravamen this Court identified occurred in Washington, D.C. AC ¶¶ 226-269. This includes affirmative acts such as the approval of the plant's harmful design. AC ¶¶ 168, 170, 231-233, 238-239. The USG also ignores the fact that IFC's *mens rea* was necessarily in Washington, D.C. Additionally, the decisions whether to act or not

[2] USG's reliance on *Nnaka v. Fed. Rep. of Nigeria*, 238 F. Supp. 3d 17, 29 (D.D.C. 2017), is misplaced. There the court was determining whether the direct effect clause of the commercial activity exception applied. *Id.* Whether there was a direct effect in the United States is a different inquiry than where the gravamen of a case is.

were made by IFC in Washington, D.C. AC ¶¶ 198-199, 226, 234, 236, 243, 246-252, 259. Washington, D.C. is where any of IFC's failures to act occurred. These elements form the gravamen of a negligence claim. ECF No. 45 at 15.[3]

The USG apparently seeks to revive a third argument this Court rejected. It claims that anything IFC did would have to be "executed by CGPL." ECF No. 68 at 6. But this Court held that the gravamen of the complaint was *IFC*'s conduct. ECF No. 61 at 9; *see also* ECF No. 45 at 13-18. The Court rejected the argument that IFC is immune for its tortious conduct because someone else also acted tortiously, since this would eviscerate ordinary joint tortfeasor liability; it "would effectively immunize state-owned enterprises in which there is an intervening cause that occurred abroad." ECF No. 61 at 12. Here again, the USG's argument conflicts with statutory text; the FSIA dictates that a sovereign is "liable in the same manner and to the same extent as a private individual." U.S.C. § 1606.

The fact that CGPL was a joint tortfeasor does not limit IFC's liability for its own tortious conduct. "If a negligent, intentional or even criminal intervening act or end result was reasonably foreseeable to the original actor, his liability will not ordinarily be superseded by that intervening act." *Rieser v. District of Columbia*, 563 F.2d 462, 479 (D.C. Cir. 1977).[4] Here, IFC foresaw that local

[3] The USG claims that IFC's duty arises in India, ECF No. 68 at 6, but duty is an obligation to *act* in a certain way, and therefore follows the actor. *See Huber v. Taylor*, 469 F.3d 67, 81 (3d Cir. 2006) (finding breach of duty occurred where those owing loyalty could be found, not where plaintiffs were injured). The case the USG cites says only that a duty is owed to foreseeable victims, not *where* the duty is violated. *Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 998 (D.C. Cir. 1980). IFC acted in D.C. Where, as here, the defendant engages in affirmative acts, like approving defective plans, the duty is to exercise reasonable care. Restatement (Second) of Torts, § 302, cmt a. Since IFC acted here, without exercising due care, it violated its duty here. But even if the USG were correct that IFC only breached its duty by failing to act, that was a failure by IFC decision-makers here in D.C. ECF No. 63 at 10-15; AC ¶¶ 198-199, 226, 234, 236, 243, 246-252, 259.

[4] If the USG were correct, sovereigns would always be immune from aiding and abetting liability because the directly harmful act is "executed by" the main perpetrator. *See* ECF No. 68 at 6. But tort liability includes abettor liability. *Halberstam v. Welch*, 705 F.2d 472, 477-478 (D.C. Cir. 1983).

communities would be harmed by the project and that IFC needed to take precautions to prevent and mitigate harms to Plaintiffs, AC ¶¶ 4, 48, 165, 168, 216-217; instead, IFC approved the project and its harmful design. AC ¶¶ 5, 168, 170, 216, 231-233, 238-239. Not merely foreseeing these potential effects of the project, IFC held itself out to add value to this project precisely because it would improve its environmental and social outcomes. AC ¶¶ 60-61, 173-174.

II. IFC's acts were commercial activity.

The USG argues that IFC's actions were sovereign, not commercial. But the D.C. Circuit found that IFC's operations are commercial. *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 707 (D.C. Cir. 2017). And IFC told the Supreme Court that IFC "cannot take sovereign acts." Br. for Respondent at 58, *Jam v. Int'l Fin. Corp.*, No. 17-1011 (U.S. Sept. 10, 2018); ECF No. 45 at 19.

Whether an act is commercial is "determined by reference to [its] nature . . . rather than by reference to its purpose." 28 U.S.C. § 1603(d). Thus, "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992) (internal quotations omitted). Here, IFC acted solely through a commercial loan contract. It loaned money to a private enterprise, to build a privately owned-power plant, at market-based rates. ECF No. 45 at 6; AC ¶¶ 42, 195. And it required compliance with IFC's environmental and social standards, and the ability of IFC to monitor, supervise, and control aspects of the power plant, as a provision of that loan. AC ¶¶ 51, 53, 116-122, 219, 231-234, 238, 250. This commercial loan is commercial activity. ECF No. 45 at 19-23.

The USG's contrary arguments lack merit. Its assertion that "the Court need only determine whether the particular gravamen it already has identified" is commercial ignores Plaintiffs' new allegations. ECF No. 68 at 8. IFC's loan itself is at least part of the gravamen of the Amended

Complaint. *Supra* Section I.A. And there is no dispute that a loan is commercial activity.

Regardless, even if the gravamen of the Amended Complaint is the same as that of the original one, it is still IFC's failure to enforce the loan contract, and thus is commercial activity. This Court found that the gravamen of the original complaint was IFC's "failure to ensure that the design, construction, and operation of the plant complied with all environmental and social sustainability standards laid out *in the loan* agreement, as well as the alleged failure to take sufficient steps to prevent and mitigate harms" to Plaintiffs. ECF No. 61 at 16 (emphasis added); AC ¶¶ 5, 159. IFC's power to supervise and enforce compliance with IFC standards comes solely from the loan contract. Acting pursuant to and failing to enforce provisions in a commercial contract are commercial acts.

The USG misstates this Court's prior opinion in a subtle but critical way. According to the Government, IFC's "implementation (or non-implementation) of its environmental and social policies" is not a commercial act. ECF No. 68 at 8 (emphasis added). But this Court did *not* find that the gravamen of the original complaint was IFC's failure to enforce its own policies *in the abstract*; the gravamen was the failure to enforce provisions "in the loan agreement." ECF No. 61 at 16.

The USG does not argue that in supervising and monitoring the Project, IFC actually regulated anyone. Indeed, it admits that "IFC does not hold the same regulatory responsibilities as a sovereign state." ECF No. 68 at 8. Instead, the USG argues that IFC was acting in a "quasi-regulatory capacity" that is "akin" to a sovereign act – whatever that means. But the USG does not identify the source of IFC's alleged authority to "quasi-regulat[e]" a private party, and for obvious reasons: IFC has no such power. The only power it has here is created by its commercial loan contract. Thus, contrary to the USG's claim, IFC is acting exactly "in the manner of a private player within the market." ECF No. 68 at 8 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 360(1993)).

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. The FSIA is clear: whether an act is commercial is determined by its nature, not its purpose. 28 U.S.C. § 1603(d). Indeed, in finding that the "*type* of actions by which a private party engages in" commerce are commercial acts, the Supreme Court explicitly distinguished contracts from regulations, even when contracts serve a public purpose. *Weltover*, 504 U.S. at 614.[5]

It does not matter whether IFC developed its sustainability standards with input from member states. ECF No. 68 at 8.[6] *How* IFC decided what provisions to include in its commercial contracts is irrelevant. There is nothing sovereign about deciding what provisions go in a contract or whether to enforce those provisions; private parties do that with literally every contract they sign.

Nor does it matter if "governments view these standards as extensions of the[ir] regulatory policies," although the USG provides no evidence that they do. ECF No. 68 at 8. If IFC's standards are "extensions" of member states' regulatory policies, and thus are themselves regulations, they regulate *IFC*, not the private parties with which the IFC contracts. Even if the states' purposes can be attributed to IFC, that is still just a question of *why* IFC includes these provisions in its contracts.

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[5] Cases upon which the USG relies hold likewise. The Seventh Circuit held that the Greek government's contract for medical services was a commercial activity, even though it was the government's constitutional obligation to provide healthcare. *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 580-81 (7th Cir. 1989). And this Court held that Nigeria's alleged retention of plaintiff to file claims on Nigeria's behalf to repatriate proceeds of official corruption was commercial. *Nnaka v. Fed. Rep. of Nigeria*, 238 F. Supp. 3d 17, 28 (D.D.C. 2017).

[6] Much of the input into the formulation of the IFC's performance standards is done by *private* actors. For example, IFC noted that its 2012 update to its Sustainability Framework "benefited from comprehensive inputs" from not just governments and other international organizations but also IFC's clients, the financial sector, business associations, trade unions, civil society organizations, affected communities, and think tanks. *Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability and Access to Information*, International Finance Corporation, 3-4 (April 14, 2011), https://www.ifc.org/wps/wcm/connect/eea7879d-6833-4fc8-8cfc-57bea2492910/Board-Paper-IFC_SustainabilityFramework-2012.pdf?MOD=AJPERES&CVID=jiVQFYY.

But IFC's purposes (and its members') are irrelevant. 28 U.S.C. § 1603(d). The fact that a sovereign may have a particular policy *purpose* for reaching a contractual agreement does not transmogrify a commercial contract into a noncommercial act. The USG's argument cannot be reconciled with *Weltover*, where the Supreme Court held that Argentina was not immune from suit for defaulting on bonds, even though the bonds effectuated Argentina's policy goal of stabilizing its currency. 504 U.S. at 609, 616-17.

Indeed, the USG's position has no limiting principle. IFC and governments have policies that motivate all aspects of their loans or other commercial contracts. If public policy motivations rendered commercial contracts noncommercial, we would essentially be back in the absolute immunity regime rejected by the FSIA's text and the Supreme Court. Even when these contracts encourage contracting private parties to act in a certain way, they do so through the bargain of contract, not the compulsion of regulation.

Additionally, there is nothing uniquely sovereign about *these* particular contract provisions simply because they seek to improve environmental and social outcomes. The USG's suggestion that any attempt to do so is an inherently sovereign act "in which private market participants do not ordinarily engage," ECF No. 68 at 8, suffers at least three fatal flaws.

First, the USG again tries to smuggle in an argument about *purpose* – IFC's alleged purpose to promote environmental and social goals − but that is irrelevant. The act is forming and taking or failing to take action under a loan contract, which is inherently commercial. As *Weltover* noted, even a government contract with a sovereign purpose to equip the military is a commercial act, "because private companies can similarly use sales contracts to acquire goods." 504 U.S. at 614-15.

Second, the question is not whether private parties "ordinarily" engage in a type of act, but rather, as *Weltover* makes clear, whether a private party "can" do so. *Id.* The USG's claim that "it

makes no difference that private parties 'can' address environmental and social harms in their own transactions" flatly conflicts with *Weltover*. And its reliance on *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000), is misplaced. ECF No. 68 at 10. *Butters* held that "a foreign sovereign's decision as to how best to secure the safety of its leaders – is quintessentially an act peculiar to sovereigns." 225 F.3d at 465 (internal quotation omitted). Protecting the royal family is a uniquely sovereign function; protecting the environment by contract is not.

Third, the USG claims that "the "manner" in which IFC monitors and enforces its environmental and social standards "is fundamentally different than the manner in which private players might attempt to pursue environmental or social goals," ECF No. 68 at 10, but the "manner" in which IFC acted is through a commercial contract. Regardless, the notion that private parties do not act similarly is incorrect. J.P. Morgan, for example, engages in the same sort of lending as IFC, for the same purposes, and with standards modelled on IFC's. ECF No. 57 at 1-3. J.P. Morgan isn't regulating anybody, or engaging in inherently sovereign acts, and neither is IFC. Indeed, private parties act to protect people and the environment all the time, including through contract.[7] The fact that private parties "regularly" engage in like conduct is the "ready answer" to USG's argument. *Weltover*, 504 U.S. at 616.

The USG's cases involve specialized contracts in unique situations in which the defendant was engaged in an inherently sovereign function. In *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 216 (5th Cir. 2009), the court held that a contract to repair fighter jet parts was

[7] *E.g.* Cassandra Kane, *What on Earth is a 'conservation agreement*'?, Conservation International (Feb. 20, 2018), https://www.conservation.org/blog/what-on-earth-is-a-conservation-agreement; Larissa Balzer, *Easements for Conservation: Oklahoma landowners are collaborating to protect their legacy for future generations*, The Nature Conservancy (Jan. 15, 2020), https://www.nature.org/en-us/about-us/where-we-work/united-states/oklahoma/stories-in-oklahoma/conservation-easements/; 7 Del. C. § 6901.

commercial, but a contract to provide personnel was not, because the contractor's employees were integrated into the military and could be considered military personnel, and private parties cannot hire military personnel. That has no application here.[8]

The USG claims that any actions involving the environment are inherently sovereign, ECF No. 68 at 9, but there is no such rule.[9] The courts in *Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kazakhstan*, 406 F. Supp. 3d 1, 14-15 (D.D.C. 2016) and *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989), merely recognized that a contract in which a foreign state grants a license to exploit the *state*'s natural resources is not commercial activity, since that is not something a private party can do.[10] That is irrelevant. IFC did not and could not grant a license to exploit India's natural resources.

IFC merely financed a commercial power plant and put conditions in that contract. There is nothing inherently sovereign about building a power plant or causing environmental harm. Nor is there anything inherently sovereign about loaning money with environmental and social safeguards in the contract or approving a power plant's design. Any private party could do likewise. These acts are commercial.

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[8] In *In re Aluminum Warehousing Antitrust Litigation*, No. 13-md-2481, 2014 U.S. Dist. LEXIS 119074 (S.D.N.Y. Aug. 25, 2014), the defendant provided and regulated a market for trading metals. *Id.* at *26-27, *51-52; *see also id.* at *29-30, 37-38, 60; ECF No. 45 at 19-23.

[9] *See Oceanic Exploration Co. v. ConocoPhillips, Inc.*, No. 04-332 (EGS), 2006 U.S. Dist. LEXIS 72231 *14-20 (D.D.C. Sept. 21, 2006) (citing H.R. Rep. No. 94-1487 at 16 (1976)) (noting that, in enacting FSIA, Congress identified a "mineral extraction company" as a commercial activity); *Graham v. Canadian N. R. Co.*, 749 F. Supp. 1300, 1301 (D. Vt. 1990) (hearing pollution claim against foreign sovereign entity under FSIA); *see also Zernicek v. Petroleos Mexicanos (Pemex)*, 614 F. Supp. 407, 410 n.4 (S.D. Tex. 1985) (suit for radiation exposure from oil operations concededly involved commercial activity); *Welch v. Puc Servs.*, Case No. 2:06-CV-230, 2007 U.S. Dist. LEXIS 70901, at *4 (W.D. Mich. 2007) (noting in FSIA context that waste water treatment, while traditionally a public service, can be performed by private businesses as well as governments).

[10] *But see Oceanic Exploration Co.*, 2006 U.S. Dist. LEXIS 72231 at *14-20 (holding sovereign's production sharing contracts with private companies for oil development to be commercial activity).

III. The IOIA entitles IFC only to the "same immunity" as foreign governments, not special treatment.

The USG suggests that since IFC is "headquartered in the United States," it is "[u]nlike foreign sovereigns" and that "[c]ourts therefore should be skeptical" of claims of commercial activity where the U.S. nexus is acts by IFC at its U.S. headquarters. ECF No. 68 at 10. But that is just a plea that the ordinary sovereign immunity rules should not apply. The IOIA, of course, says precisely the opposite: IFC is entitled to only "the same immunity from suit . . . as is enjoyed by foreign governments." 22 USCS § 288a(b). And that's what the Supreme Court held. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 765 (2019).

Indeed, IFC made a similar argument to the Supreme Court, and the Court rejected it. IFC claimed that the purposes of sovereign immunity and organizational immunity are different, and thus that IFC should be treated differently from foreign governments. *Id.* at 786. But the Supreme Court held that this argument conflicts with the IOIA's text, which requires that organizations and governments be treated the same. *Id.* at 768-69. There is likewise no provision in the IOIA that would allow courts to apply different rules for organizations that are headquartered here.

The USG's argument would essentially read the first two clauses of the commercial activity exception out of the FSIA for organizations like IFC. Under those provisions, sovereigns are not immune in cases "in which the action is based upon a commercial activity *carried on in the United States* by the foreign state; or upon an act *performed in the United States* in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2) (emphasis added). This Court must apply those provisions, no matter where IFC is headquartered. *See, e.g.*, *Francisco S. v. Aetna Life Ins. Co.*, No. 2:18-cv-00010-EJF, 2020 U.S. Dist. LEXIS 60469, at *17-20 (D. Utah Apr. 6, 2020) (finding the World Bank, which is also headquartered in Washington, D.C., is not immune under the commercial activity exception).

While foreign government-owned corporations ordinarily have the same immunity as governments, they enjoy *no* immunity if, like IFC, their principal place of business is here. 28 U.S.C. § 1603. There is zero reason to think that although Congress afforded instrumentalities based here *less* immunity than governments, it granted international organizations based here *more* immunity than governments.

A government that undertakes commercial acts in the United States would not be immune. The same rules apply to IFC, and it is not immune either.

CONCLUSION

The Amended Complaint alleges that the loan was at least part of the gravamen of the case, and that IFC's relevant conduct, including that conduct this Court identified as the gravamen of the original Complaint, occurred in the United States.

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Respectfully submitted,

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