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-612-JDB

SECOND STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

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INTRODUCTION

On September 13, 2019, the United States filed a Statement of Interest in this case, setting forth its view that the plaintiffs' allegations do not satisfy the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"). ECF No. 47 at 2. The Government explained that the "gravamen" or "core" of the lawsuit was non-party Coastal Gujarat Power Limited's ("CGPL") allegedly tortious construction and operation of the power plant in India, and that the action was not "based upon" any commercial activity or conduct in connection with commercial activity in the United States. *Id.* at 2–3.

The Court thereafter dismissed the complaint for lack of jurisdiction. *Jam v. Int'l Fin. Corp.*, 2020 WL 759199 (D.D.C. Feb. 14, 2020). Declining to adopt in full the position of the United States or any of the parties, the Court concluded that the "gravamen" of the action was IFC's alleged "failure to ensure the plant was designed, constructed, and operated with due care so as not to harm plaintiffs' property, health, and way of life." *Id.* at *5. Put differently, the Court explained, the lawsuit was based upon "IFC's [] failure to supervise and monitor construction and operation of the Tata Mundra Plant project and ensure its compliance with numerous environmental and social sustainability requirements in the loan agreement." *Id.* The Court further held, based on the allegations in the complaint, that this failure was carried on in India, not the United States. *Id.* at *11. The commercial activity exception thus had not been satisfied. *Id.*

In response, the plaintiffs moved for leave to amend their complaint. ECF No. 63. The Court then issued an order that the United States, as an interested party, may file a memorandum providing its position as to "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."

As explained more fully below, the United States believes that IFC would still enjoy immunity under the FSIA if leave to amend were granted. As an initial matter, the Government respectfully maintains its view, set forth in its first Statement of Interest, that this action would be

"based upon" CGPL's tortious conduct in India, not IFC's acts or omissions in the United States. The plaintiffs' additional allegations would not change that analysis.

But accepting the Court's conclusion that the original complaint is "based upon" IFC's failure to ensure CGPL's compliance with sustainability standards and prevent or address environmental and social harms in India, in the Government's view, the proposed amendment still would not satisfy the FSIA's commercial activity exception, for two independent reasons. First, the plaintiffs' additional allegations do not shift the "gravamen" of the action to the United States. The Court has held that this case is "based upon" IFC's alleged failures of oversight in India, and the amended complaint does not transform this case into one based on actions carried on in the United States. Second, the gravamen identified by the Court does not amount to "commercial activity." To the contrary, IFC's failure to ensure compliance with its own sustainability standards and prevent or mitigate environmental and social harms is public, non-commercial conduct that does not satisfy the commercial activity exception. For these reasons, even if leave to amend were granted, this Court still would lack jurisdiction over IFC in this case.

ARGUMENT

I. If Leave To Amend Were Granted, The "Gravamen" Of This Action Would Still Be CGPL's Construction And Operation Of The Power Plant In India.

The Government continues to believe that the "gravamen" of this action is CGPL's construction and operation of the power plant in India. That conclusion follows from the Supreme Court's guidance in *Sachs* and *Nelson*, which instructed that the "gravamen" inquiry should focus on what "actually injured" the plaintiff—here, CGPL's alleged deficient construction and operation of the power plant. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).[1]

[1] The Government recognizes that this Court invited the United States to provide its position "in light of this Court's February 14, 2020 memorandum opinion and order," Minute Order of May 15, 2020, and that the discussion in Section I necessarily departs from that opinion and order. Nonetheless, the Government briefly reiterates its prior position to ensure a clear and complete record.

The plaintiffs' additional allegations do not lead to a different result. Those allegations primarily relate to IFC's organizational structure, internal processes, and knowledge about potential harms from the project. *See* Proposed Am. Compl. ¶¶ 197–269. They do not change the critical facts of this case: that an Indian company built and operated a power plant in India that allegedly caused Indian plaintiffs environmental and social harms in India. Thus, even if the Court were to grant plaintiffs leave to amend, the lawsuit still would be based upon CGPL's actions in India. The FSIA's commercial activity exception still would not apply.

II. Even Accepting The Court's Analysis, Plaintiffs' Additional Allegations Do Not Satisfy The Commercial Activity Exception.

The Court previously held that this action is based upon IFC's "alleged 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 its "alleged failure to take sufficient steps to prevent and mitigate harms to the property, health, and way of life of people who live near the Tata Mundra plant." *Jam*, 2020 WL 759199, at *8. Accepting this articulation of the gravamen, the proposed amended complaint does not satisfy the commercial activity exception for two independent reasons: (1) the additional allegations do not shift the gravamen from India to the United States; and (2) IFC's failure to prevent or mitigate environmental and social harms and ensure compliance with sustainability standards is not "commercial activity" under the FSIA.

a. The Plaintiffs' Additional Allegations Do Not Shift The Location Of The "Gravamen" From India To The United States.

The allegations added to the amended complaint principally fall into two categories. First, the plaintiffs submit additional allegations that IFC knew or should have known at the time it approved funding for the project that its sustainability measures were insufficient to address the project's risks. *See* Proposed Am. Compl. ¶¶ 163, 216–25, ECF No. 63-1. Second, the plaintiffs provide additional claims that IFC management in charge of monitoring the project's environmental and social performance and approving loan disbursements were located in

Washington, D.C. *Id.* ¶¶ 198–215, 226–69. Neither of these categories is sufficient to shift the gravamen of the action from India to the United States.

At the outset, the first category of allegations does not relate to the gravamen at all. The Court has already ruled that this lawsuit is not "based upon" IFC's approval of the loan, "but rather the subsequent failure '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." *Jam*, 2020 WL 759199 at *9 (alteration in original) (quoting Compl. ¶ 3, ECF No. 1). Accordingly, the added allegations about what IFC knew or should have known when it approved the loan are irrelevant to the location of the gravamen. The fact that in advance of the loan IFC might have lacked a "meaningful" Environmental and Social Action Plan, Proposed Am. Comp. ¶ 219, or have performed only "poor" due diligence, *id.* ¶ 220, simply does not concern whether the identified gravamen—IFC's failure to prevent or mitigate harm "*after approving the loan*," *Jam*, 2020 WL 759199 at *9 (emphasis added)—had "substantial contact" with the United States, 28 U.S.C. § 1603(e).

This Court previously reached the same conclusion as to similar allegations. Addressing claims that "critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions, were made in Washington, D.C.," and that IFC's disbursement of funds "was made in U.S. dollars and came from funds held within the United States," the Court concluded that the allegations "d[id] not pertain to the gravamen of plaintiffs' suit, as identified by this Court." *Jam*, 2020 WL 759199 at *10. Instead, "they relate[d] only to the loan transaction." *Id.*

Moreover, this Court has recognized that such allegations are "in direct tension with the thrust of plaintiffs' complaint." *Id.* at *9. The original complaint was based on the claim that "IFC had the power to protect plaintiffs by enforcing provisions in the loan agreement but failed to do so." *Id*. Yet parts of the amended complaint now contend that IFC *lacked* such power and should not have entered the loan in the first place. *See* Proposed Am. Compl. ¶¶ 163, 216–25. The Court has already ruled that the action is "based upon" IFC's failure to prevent or mitigate harm *after* the loan was approved, and the plaintiffs' handful of additional allegations concerning the initial lending decision cannot change that conclusion.

The second category of added allegations similarly does not shift the location of the gravamen from India to the United States. These allegations consist of claims that ultimate authority for IFC's social and environmental oversight of the project rested with officials in the United States. The plaintiffs allege, for example, that managers "responsible for approving key project decisions about environmental and social (E&S) performance throughout the project" were "located at the IFC's headquarters in Washington, D.C." Proposed Am. Compl. ¶¶ 200–01. They allege that "[d]eterminations about whether any of the environmental and social (or other) conditions of the Loan Agreement have been breached, and whether the IFC should enforce the E&S commitments in the Loan Agreement, were made by the IFC's legal department, which is based in Washington, D.C." *Id.* ¶ 236. They claim that "the decision whether to disburse each tranche of the loan was made by the IFC in Washington, D.C." *Id.* ¶ 235. And they allege that all communications regarding the project were required to be sent to IFC's Washington, D.C. headquarters (in addition to being sent to IFC's New Delhi office). *Id.* ¶ 229.

But even taking these additional allegations into account, the lawsuit is still centered in India. As the Court explained, this action is "based upon" IFC's "failure to ensure the plant project was designed, constructed, and operated with due care." *Jam*, 2020 WL 759199 at *8. That gravamen "focuses on IFC's failure to act *at the Tata Mundra Power Plant* and in the surrounding community in India—which is the point of contact, or 'place of injury,' for the torts alleged in plaintiffs' complaint." *Id*. (emphasis added). In other words, this lawsuit is not "based upon" which IFC officials oversaw the project or where they were located, disbursed IFC funds, or received communications. Under the Court's "holistic approach," *id.*, where IFC made internal decisions and administered the loan is not determinative; instead, the inquiry focuses on the particular basis for the lawsuit—its gravamen. The Court has already explained that the "plaintiffs' complaint against IFC is—at least in large part—based upon [] conduct (whether acts or omissions) *in India*." *Id.* at *7 (emphasis added). The added allegations do not change that conclusion.

The Plaintiffs are alleging a failure to act and asserting that such failure should be attributed to decisions at IFC's headquarters. But even if IFC management in the United States possessed

the necessary authority to require changes to the plant's design, construction, or operation, any new design or method of operation proposed by IFC still would have had to be accepted and executed by CGPL in India. Similarly, even if IFC management could have withheld loan disbursements in the United States in response to a failure to meet conditions in the loan agreement, the intended effect of that action would be merely to incentivize behavior in India. What the plaintiffs still have not alleged is anything that IFC did (or did not do) in the United States that directly led to injuries in India. *Contra id.* at *6 n.3 (suggesting that "if CGPL contracted with IFC to actively monitor and adjust the power plant's cooling levels from a computer system in the United States, but IFC's technicians negligently mis-adjusted the cooling levels, causing a fire at the plant," an action by injured plant workers might be "based upon" IFC's U.S. conduct). Instead, the plaintiffs' additional allegations against IFC merely elaborate on the organizational structure and internal processes behind failures occurring in India. They do not demonstrate that the amended complaint would result in this lawsuit being based on conduct in the United States.

The conclusion that the gravamen identified by the Court is still situated in India is reinforced by the fact that, even with the plaintiffs' new allegations, their tort claims still focus primarily in India. A tort claim typically is not complete until the plaintiff suffers an injury. *Nnaka v. Fed. Rep. of Nigeria*, 238 F. Supp. 3d 17, 29 (D.D.C. 2017). Thus, the "locus" of a tort—the place where the last event necessary to make an actor liable takes place—usually will be "the place where the injury occurred."[2] *Id.* (citations omitted). Here, even taking into account the plaintiffs' additional allegations, the locus of their tort claims is Gujarat, India—where they were injured by the power plant. Moreover, to the extent IFC owed any duty not to allow the plant to harm the plaintiffs, that duty also existed in India—the location where reasonably foreseeable harms might occur. *See Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 998 (D.C. Cir. 1980) (explaining that tort duties traditionally are owed to those "who might foreseeably be injured by defendant's conduct"). If

[2] Although the plaintiffs do not rely on the commercial activity exception's third clause, in that related context, courts routinely look to the locus of the tort to determine where a "direct effect" is felt. *See, e.g.*, *Luxexpress 2016 v. Ukraine*, 2020 WL 1308357, at *7 (D.D.C. 2020).

the plaintiffs are correct that IFC breached their duty to the plaintiffs, IFC did so only by "fail[ing] to take steps to mitigate the foreseeable risks in India." *Jam*, 2020 WL 759199 at *9. And, to the extent IFC proximately "caused" the plaintiffs injuries, they undisputedly did so in India. Thus, notwithstanding assertions concerning IFC's organizational structure, internal processes, and knowledge, the plaintiffs' claims against IFC are still chiefly focused in India, not the United States.[3] Similar to the Supreme Court's assessment in *Sachs*, however the plaintiffs frame their suit, "the incident [abroad] remains at its foundation." 136 S. Ct. at 396.

In short, per the Court's analysis, this action is based upon a failure to prevent harm in India, and the amended complaint does not shift the location of the gravamen to the United States.

b. IFC's Alleged Failure To Ensure Compliance With Its Standards And Prevent Or Mitigate Harms In India Is Not "Commercial Activity" Under The FSIA.

As set forth below, the commercial activity exception has not been satisfied for a second, independent reason: any failure by IFC to ensure adherence to its own sustainability standards and prevent social and environmental harms is not a "commercial activity" under the FSIA.

The FSIA codified the "restrictive theory" of foreign sovereign immunity, under which a foreign state is immune for its sovereign or public acts (*jure imperii*), but not its private or commercial acts (*jure gestionis*). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612–23 (1992). In drawing this distinction, the FSIA explains that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Accordingly, the question whether particular activity is "commercial" turns not on "whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but on "whether the particular actions that the foreign state performs (whatever the motive behind

[3] Even if the plaintiffs could persuasively argue that one of the elements of their tort claims took place in the United States, that would not compel a different result. As this Court has explained, "[t]he fact than an activity . . . would establish a single element of a claim is insufficient to demonstrate that the suit is based upon that activity." *Jam*, 2020 WL 759199 at *5 (citations omitted).

them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614 (citations omitted). "Put differently, a foreign state engages in commercial activity . . . only where it acts 'in the manner of a private player within' the market." *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

Courts have not yet had occasion to address this distinction with respect to international organizations like IFC. However, should the Court reach the issue here, it need not resolve broader questions such as whether IFC's lending activities writ large are "commercial," or even whether the particular loan to CGPL in this case was a "commercial activity." Instead, the Court need only determine whether the particular gravamen it already has identified—IFC's alleged failure to prevent environmental and social harm and ensure compliance with its own sustainability standards—is a "commercial activity" under the FSIA.

In the Government's view, it is not. In making any internal decisions about how to monitor the environmental and social aspects of an ongoing project, IFC would not be acting in the manner of a private player in the market, but rather would be acting in a public, quasi-regulatory capacity. Although IFC does not hold the same regulatory responsibilities as a sovereign state, its discretionary implementation (or non-implementation) of its environmental and social policies is an act more akin to that of a sovereign in which private market participants do not ordinarily engage. After all, IFC's environmental and social standards were created with active and direct input from member governments and by decision of the IFC's member states, acting through the IFC Board of Directors. Consequently, governments view these standards as extensions of the regulatory policies of those member states. Here, IFC's enforcement or non-enforcement of its sustainability standards with respect to the Tata Mundra project is qualitatively different than the types of activities that commonly have been understood to be "commercial" under the FSIA, such as issuing common debt instruments, *see Weltover*, 504 U.S. at 617, or contracting for services, *see Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 580 (7th Cir. 1989). 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. *See, e.g.*, *Junguist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1030 (D.C. Cir. 1997) (finding that administration of a government program to provide health and welfare benefits was not "commercial activity" under the FSIA).

This is especially the case because the policies at issue here relate to the regulation of the environment and natural resources. Courts routinely recognize that actions in this area are distinctly sovereign in nature. *See, e.g.*, *Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kazakhstan*, 406 F. Supp. 3d 1, 15 (D.D.C. 2019) (holding that breaches of agreements "pertain[ing] to the exploration and development of Kazakhstan's oil and gas resources" are sovereign, not commercial, acts); *Rush-Presbyterian*, 877 F.2d at 578 (finding that "a contract whereby a foreign state grants a private party a license to exploit the state's natural resources is *not* a commercial activity, since natural resources, to the extent they are 'affected with the public interest,' are goods in which only the sovereign may deal").

The fact that the plaintiffs frame IFC's alleged conduct as a failure to ensure compliance with provisions in a loan agreement, *e.g.* Compl. ¶ 140, does not transform IFC's conduct into commercial activity. When evaluating whether activity is commercial, courts look to the nature of the conduct that is directly at issue, not to whether that conduct is connected in some way to a contract or other commercial act. *See, e.g.*, *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 216 (5th Cir. 2009) (dispute over contract to provide training and support services to Royal Saudi Air Force not "commercial"); *cf. In re Aluminum Warehousing Antitrust Litig.*, 2014 WL 4211353, at *15 (S.D.N.Y. Aug. 25, 2014) ("[N]ot all contractual arrangements are commercial in nature. There are numerous instances in which a public organ might use a contractual arrangement to fulfill its public function."). Here, the plaintiffs challenge IFC's internal decisions concerning how to promote environmental and social sustainability and conduct oversight in the countries in which it invests. Such conduct is not of the type associated with private players in a market, even if it has a connection to a loan agreement.

Finally, it makes no difference that private parties "can" address environmental and social harms in their own transactions. *See* Pls.' Notice of Supp. Evidence, ECF No. 57. Even uniquely

sovereign activities can sometimes be emulated by private market participants. For example, while a private company "can" hire security for its CEO, "[p]roviding security for the [Saudi] royal family . . . is not a commercial act in which the state is acting in the manner of a private player within the market." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (citations omitted). Here, the manner in which the IFC engages in the monitoring and discretionary enforcement of its environmental and social standards is fundamentally different than the manner in which private players might attempt to pursue environmental or social goals. IFC develops sustainability standards that are formulated based on active and direct input from sovereign member states in light of member states' own policies on environmental and social matters. IFC's discretionary implementation and enforcement of such policies is not a commercial activity, but rather a public, quasi-regulatory function immune from suit under the FSIA.

* * *

In considering the above issues, the Court should keep sight of the novel context in which this case arises. Unlike foreign sovereigns, which have capitals within their own territory, IFC is an international organization headquartered in the United States. As a result, ultimate decision-making authority for functions of the organization frequently will reside in the United States, rather than in foreign jurisdictions. Nonetheless, it is critical not to afford less protection to organizations headquartered in the United States than foreign sovereigns with capitals elsewhere. The thrust of the International Organizations Immunities Act and the Supreme Court's ruling interpreting it in this case is that the immunity of international organizations and foreign sovereigns should be "equivalent." *Jam v. IFC*, 139 S. Ct. 759, 768 (2019). Courts therefore should be skeptical of claims of commercial activity based on internal oversight decisions where the only U.S. nexus is an attribution of responsibility to officials working at an international organization's U.S. headquarters. Here, such allegations fail to satisfy the FSIA's commercial activity exception.

CONCLUSION

For the foregoing reasons, if the Court were to grant Plaintiffs leave to amend their complaint, the United States believes that IFC still would enjoy immunity under the FSIA.

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Respectfully submitted,

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