

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUDHA ISMAIL JAM, et al.,	.	
	.	
Plaintiffs,	.	CA No. 15-0612 (JDB)
	.	
v.	.	
	.	
INTERNATIONAL FINANCE	.	Washington, D.C.
CORPORATION,	.	Wednesday, January 15, 2020
	.	9:40 a.m.
Defendant.	.	
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs:	RICHARD LAWRENCE HERZ, ESQ. MICHELLE HARRISON, ESQ. MARCO SIMONS, ESQ. EarthRights International 1612 K Street NW, Suite 800 Washington, DC 20005 (202) 466-5188
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For Interested Party United States of America:	MATTHEW SKURNIK, ESQ. U.S. Department of Justice Federal Programs Branch 1100 L Street NW Washington, DC 20005 (202) 616-8188
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Court Reporter:	BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue NW Washington, DC 20001 (202) 354-3186
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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, we have civil action 15-612, Budha Ismail Jam, et al., versus International Finance Corp., et al. I would ask that lead counsel at each table please identify yourself and those at your respective tables.

MR. FOSTER: Good morning, Your Honor.

Dana Foster for International Finance Corporation. I'm joined at counsel table with Maxwell Kalmann and Jordan Helton.

THE COURT: Good morning.

MR. SKURNIK: Good morning, Your Honor.

Matthew Skurnik from the Department of Justice on behalf of the United States.

THE COURT: Good morning.

MR. HERZ: Good morning, Your Honor.

Richard Lawrence Herz on behalf of the plaintiffs. With me today is Michelle Harrison and Marco Simons. Also with me but not making an appearance is MacKenna Graziano.

THE COURT: All right. What's the anticipation of who is going to be addressing the issues here this morning, first on behalf of the movant International Finance?

MR. FOSTER: Your Honor, I will be addressing those questions.

THE COURT: And on behalf of the plaintiffs, Jam and others?

MR. HERZ: I will, Your Honor.

1 THE COURT: All right.

2 Is the United States requesting time to say anything today?

3 MR. SKURNIK: Yes, Your Honor.

4 THE COURT: I'll give you five minutes to -- it may
5 take more than five minutes, but a short amount of time to state
6 the United States' position, after International Finance.

7 MR. SKURNIK: Thank you, Your Honor.

8 THE COURT: With that, are we ready to go?

9 MR. FOSTER: Yes, Your Honor.

10 THE COURT: All right. I'll hear first from
11 International Finance. I'm figuring that each side, if you
12 will, is not going to need more than 45 minutes to present their
13 positions. There are a lot of issues. You're going to have to
14 decide what to focus on. I'm very familiar with the papers and
15 those issues, so bear that in mind. And, of course, the primary
16 issue -- not the only but the primary issue -- is the immunity
17 question.

18 MR. FOSTER: Yes, Your Honor. Good morning.

19 THE COURT: Good morning.

20 MR. FOSTER: This court lacks subject-matter
21 jurisdiction over the plaintiffs' derivative environmental
22 tort action against a lender because plaintiffs' action is based
23 upon the construction/operation of two power plants in Gujarat,
24 India.

25 Under the framework set forth by the Supreme Court in *Sachs*

1 and in *Nelson* to apply the Foreign Sovereign Immunities Act
2 commercial-activities exception, this Court must first zero in
3 on the core of plaintiffs' action. That's the language straight
4 from *Sachs*, that is, the conduct that actually injured the
5 plaintiffs.

6 The first step is not to look at what the claims are or
7 the elements of those claims. The first step is not to identify
8 what the commercial activity is or is not or what happened in
9 the United States or not.

10 THE COURT: What if the only claim brought were
11 what I'll call a negligent-funding claim, basically that
12 International Finance had obligations to review the proposed
13 power plant for which funding was being sought and did --
14 indeed, it did so, and that it did that in the United States,
15 through conversations with the construction company and others,
16 and made a determination to fund that is allegedly negligent and
17 entered into that loan agreement here in the United States, and
18 that's the only claim brought?

19 MR. FOSTER: Okay.

20 THE COURT: Just a negligent funding. No supervision,
21 no continuing responsibility with respect to oversight over the
22 design, construction, and maintenance or operation of the power
23 plant. Why is that not commercial activity that falls within
24 the exception under the FSIA?

25 MR. FOSTER: Under your hypothetical, Your Honor,

1 obviously, not this case: What's the harm? What's the
2 damage? Who's bringing this claim? Was is it the borrower?
3 Then there's a direct commercial relationship.

4 THE COURT: No, no. Let's figure it's the same
5 plaintiffs bringing the claim.

6 MR. FOSTER: Right. So the same plaintiffs that
7 are harmed by the project?

8 THE COURT: Right. And they say that IFC was
9 negligent in funding the project and the project wouldn't have
10 gotten off the ground without that funding. It wasn't all the
11 funding, but it was crucial funding.

12 MR. FOSTER: Right. If the plant -- under your
13 hypothetical, the same plant or plants in India, that would not
14 be any different result because the first thing this Court has
15 to do is look at what actually injured the plaintiffs.

16 THE COURT: So you want me to look at where that
17 sort of last act that injured the plaintiffs occurred?

18 MR. FOSTER: Yeah. Well, I think that's what *Sachs*
19 says. The *Sachs* and *Nelson* -- this is not fundamentally
20 different from the incident on the railway platform --

21 THE COURT: Anytime there's an intervening cause,
22 there's no liability, or no exposure to suit.

23 MR. FOSTER: Immunity remains intact because you don't
24 satisfy the requirements of the commercial-activity exception.

25 THE COURT: Where's the evidence that that's what

1 Congress intended in the FSIA, to insulate sovereign states
2 from any possible liability where they weren't the direct or
3 primary or the final step in the causation chain?

4 MR. FOSTER: Well, in looking at -- I know Your
5 Honor's very familiar with the Foreign Sovereign Immunities Act
6 exceptions. There are strict territorial requirements that flow
7 throughout that, and under the commercial-activity exception,
8 the "based upon" requirement -- that's the first part, the
9 "based upon." And then it flows from commercial activity in
10 the United States carried on by a foreign sovereign.

11 THE COURT: What if the suit were brought by CGPL?
12 Is it a different result?

13 MR. FOSTER: Well, if CGPL sued --

14 THE COURT: They couldn't sue for negligent funding.
15 That wouldn't really make sense. But maybe they could sue for
16 breach of contract.

17 MR. FOSTER: Yes. And I think under D.C. Circuit
18 law, under *Mendaro* and others, that direct commercial relationship
19 would probably make the IFC subject to that type of suit.

20 It's a direct commercial relationship, and so I think IFC
21 probably would be subject to that although the contract --
22 again, it was executed in India. There might be some 12(b)(6)
23 arguments we have, but as far as the immunity goes --

24 THE COURT: It almost sounds as though you're
25 attempting to limit exposure to certain parties with respect

1 to the contract. Why is that something that should be taken
2 care of and addressed through immunity rather than through
3 failure to state a claim and the general contracting principles
4 that would apply under whatever law applies, be it India law,
5 English law, or D.C. law?

6 MR. FOSTER: Because what *Sachs* and *Nelson* teaches
7 us is that you never get to those steps if you can't satisfy
8 the very first step, which is what's the core of the suit and
9 the conduct that actually injured the plaintiffs.

10 The courts in *Sachs* and in *Nelson* didn't ask those 12(b)(6)
11 questions even though they had claims sounding in contract.
12 Each of them, I think, had these failure-to-warn claims, right?
13 And they said -- in fact, in *Sachs* they said specifically, look,
14 this is a commercial transaction. The plaintiff bought a ticket
15 in the United States for something that was delivered -- the
16 product was delivered in Austria, and all of the duties that
17 flowed from the defendant came from that purchase of that ticket.

18 They didn't look behind that and say -- you know, to figure
19 out different elements. They said everything flows from that
20 incident in Austria. And that's why this is not based upon
21 commercial activity. It doesn't satisfy the Foreign --

22 THE COURT: *Sachs* and *Nelson* are the cleaner cases, if
23 you will, because you're dealing with the sovereign state that
24 is involved both in the contracting and in the ultimate injury.

25 MR. FOSTER: Well, actually, Your Honor, that's why I

1 think we have a -- it's a much simpler case. We have better
2 arguments, right? It's not -- because we are not responsible
3 for what's going on in India. It would be -- I guess a similar
4 analogy would be, under *Sachs*, if Austria, through an agent,
5 sold the ticket to the plaintiff and didn't run the railway in
6 Austria, didn't run Euro Rail or operate those railway stations,
7 but they lent money to the project that built them and ran them,
8 and then they tried to sue under that theory, that would be, I
9 think, more similar to what we have here.

10 I mean, again, the plaintiffs are reaching up this causal
11 chain. They're not suing the CGPL and Adani. They are not
12 trying to go after the people who are responsible for the
13 construction of the -- that caused these injuries. They're
14 reaching up this causal chain to try to hook something into the
15 United States.

16 THE COURT: Is there anything that an international
17 organization would not be immune from? What kind of action
18 other than a breach-of-contract action with the contracting
19 party? Is there anything in terms of projects that are funded
20 that the international organization, in your view, would not be
21 immune from?

22 MR. FOSTER: It's hard to think right now. Well, no.
23 I think there's nothing as far as a project, right? The project
24 itself, you look at where that project is, and if it's not in
25 the United States, I mean, that's where you stop in any analysis,

1 right? Whether it's a project in India or anywhere else,
2 what's the harm to the plaintiff. This is a tort action: What
3 is the harm, and what's the conduct that actually injured the
4 plaintiffs? And you stop right there if it's something in India
5 or some other place that's not the United States. Off the top
6 of my head, I can't think of --

7 THE COURT: Is that true for states as well? For
8 a nation state, is that true for them as well, that there's no
9 commercial activity that they would be engaged in as to which
10 ultimate injury occurred outside the United States? Is there
11 anything that they would be subject to suit?

12 MR. FOSTER: There are certainly contractors. Lots
13 of suits that sound in contract: where the contract was formed,
14 where the breach occurred. If there is some sort of business
15 torts, like tortious interference with contract or something
16 like that, perhaps in those types of cases.

17 Obviously, the court has applied the commercial-activity
18 exception in lots of ways to foreign sovereigns, but here, when
19 we're talking about the "based upon" inquiry of the commercial-
20 activity exception, just like as the teaching in *Sachs* tells us,
21 you look at what actually caused the injury.

22 THE COURT: So what if IFC, under its contractual
23 provisions, had assumed direct management of the day-to-day
24 design and construction of the power plant and did so remotely
25 out of its offices in the District of Columbia: receiving

1 reports, looking at photos, saying yes to this, no to that.
2 Does that change the outcome?

3 MR. FOSTER: I don't think it does.

4 THE COURT: Why not?

5 MR. FOSTER: Well, okay. This is not this case,
6 right? The allegations -- the hypothetical that you pose is
7 certainly not this. The plaintiffs have not alleged that.
8 In fact, our charter -- I think this is Article 3, Section --

9 THE COURT: Well, you had some review of design
10 that took place in D.C., didn't you? Not a lot, but some,
11 as alleged you did.

12 MR. FOSTER: It's hard to say what exactly the
13 plaintiffs are saying we did and didn't do. Sometimes they
14 say we approved something --

15 THE COURT: But do I have to accept what they say
16 you did?

17 MR. FOSTER: Well, my point is that sometimes they
18 say one thing, and sometimes they say something a little bit
19 differently for the same act. I don't think they allege
20 specific acts that we did in the United States.

21 But to your hypothetical where we had the day-to-day
22 control, which is forbidden in our charter, and I don't think
23 that's something that they've alleged, this is a tort action
24 based on the construction/operation of this plant in India,
25 and so I don't think it changes the analysis where you look

1 to what the conduct was that actually injured the plaintiffs.

2 The conduct that actually injured the plaintiffs was, for
3 example, when the water flows through the cooling system and
4 it's too warm and it gets into the water and it makes the water
5 too warm and it affects the fish stock, that's what actually
6 injured the plaintiffs. When the coal dust flies up from the
7 conveyor belt and gets into the air and fouls the air, that's
8 what injures the plaintiffs.

9 And so in Your Honor's hypothetical, when you're talking
10 about things that happened in Washington, those are not acts
11 that actually injured the plaintiff. So I don't think --

12 THE COURT: Well, they are if you had the
13 responsibility for the cooling levels, if not only design
14 responsibility but also monitoring responsibility for looking
15 at, through reports that came in in terms of cooling levels and
16 the like, then it would be more direct --

17 MR. FOSTER: No. I don't think so --

18 THE COURT: Why not?

19 MR. FOSTER: -- because, again, *Sachs* and *Nelson*
20 didn't ask those questions.

21 THE COURT: They didn't, but I am.

22 (Laughter)

23 MR. FOSTER: That's my point, Your Honor. They didn't
24 have to go to those questions. They didn't look behind and see
25 where else activity may or may not be. They said -- in *Sachs*

1 they said the essentials of this suit remain on that railway
2 platform in Austria.

3 They didn't look behind and say: What did Austria know in
4 the United States? What did this agent know? Did this agent
5 have some sort of responsibility or authority over this railway
6 platform? Did they know that other people had been injured or
7 something like that or there was some sort of probability that
8 this would happen?

9 They didn't ask those types of questions. They looked
10 specifically at the conduct that actually injured, and that was
11 that incident on the railway platform in Austria. That was the
12 end of the analysis.

13 THE COURT: What do I do with the -- is there a
14 breach-of-contract claim here?

15 MR. FOSTER: They do have a third-party
16 breach-of-contract claim in there.

17 THE COURT: Third-party beneficiary breach.

18 MR. FOSTER: Right.

19 THE COURT: All right. So it's in there. What do
20 I do with that? Is there immunity from that?

21 MR. FOSTER: Yes.

22 THE COURT: Why?

23 MR. FOSTER: First of all, if you read the third-party
24 beneficiary claim, it's a tort claim that's disguised as a
25 contract claim, I think, because it says they have -- these

1 benefits flowed from this contract to them even though the
2 contract, again, says there are no third-party beneficiaries,
3 and then we failed or didn't fail --

4 THE COURT: That's not an immunity outcome. That
5 would be an outcome --

6 MR. FOSTER: Right. But the claim is sort of based
7 on the fact that certain benefits flow to them because we had
8 obligations even though the obligations from the ENS standards
9 were on the borrower --

10 THE COURT: Now you're getting me into looking at the
11 contract, and I'm trying to sort it out through the contract.
12 Is that what I do with immunity?

13 MR. FOSTER: No.

14 THE COURT: All right. Then why is there immunity
15 from a pure breach-of-contract claim? Albeit a third-party
16 beneficiary claim, why is there immunity? You've already
17 indicated that maybe some breach-of-contract claims can escape
18 the immunity protection.

19 MR. FOSTER: The reason there's immunity, to answer
20 Your Honor's question directly, is for the same reason why the
21 plaintiffs in *Sachs* and *Nelson*, who had contract claims in those
22 cases, they had failure-to-warn claims in those cases, didn't
23 get them into the United States Court, because the core of the
24 suit, what actually injured plaintiffs, was in India.

25 THE COURT: So how do I determine the core under *Sachs*

1 and Nelson? What do I do to determine the core? Is it the
2 final act that injured the plaintiffs that is determinative?
3 That seems to be, to some extent, your position.

4 MR. FOSTER: To determine the core, all that is
5 required is reading the complaint. Throughout the complaint,
6 the plaintiffs explain what harmed them. In fact, it's in
7 paragraph 1, if you don't mind me reading for a moment.

8 The very first paragraph of their complaint, after they
9 identify the parties, they say this action is for damages and
10 injunctive relief, quote, "relating to property damage,
11 environmental destruction, loss of livelihoods, and threats
12 to human health arising from the Tata Mundra ultra-mega power
13 plant in Kutch District in Gujarat, India."

14 That's how you find out what the core of their suit is.
15 You just read their complaint, and it's throughout, that these
16 farmers and fishermen in India are harmed by both the CGPL
17 plant, the Tata plant, and the Adani plant; and they have fouled
18 that environment there, and that's what has injured them.

19 THE COURT: So even if this were a stand-alone
20 breach-of-contract, third-party beneficiary claim, if that was
21 the only claim, it would still be subject to immunity under IOIA
22 and the FSIA because the core of that third-party beneficiary
23 breach-of-contract claim depends upon the injuries that occur in
24 India.

25 MR. FOSTER: That's right.

1 THE COURT: Is that your argument?

2 MR. FOSTER: That's not my argument. That's exactly
3 what *Sachs* says, and that's exactly what *Nelson* says. They do
4 have -- in each of those decisions, they talk about, hey, wait
5 a minute; they identify the core, and then they say, well, there
6 are these failure-to-warn claims. And the plaintiffs there
7 argued that all of these duties flowed from this transaction in
8 the United States. You can't escape that.

9 All of the duty to protect and warn them about these, they
10 all flowed from this transaction in the United States, and the
11 court said that's not enough, because the first thing you do is
12 you look at the core of the suit, and if the core of the suit --
13 and that all -- and those cases were in Innsbruck, Austria.

14 THE COURT: My question is why is the core of
15 the suit, if the suit is only a third-party beneficiary
16 breach-of-contract claim, why is the core of the suit India
17 rather than the United States?

18 MR. FOSTER: Right, for the same reasons that *Sachs*
19 and *Nelson* say, which is what actually injured the plaintiffs is
20 in India just like what actually injured. And then to allow a
21 third-party claim is this artful pleading explanation that they
22 put in both of those decisions where they said any other way --
23 any other way to interpret it allows for artful pleading, and
24 you can see why. I mean, any conceivable injury has an
25 attendant duty: to warn, to protect, to use reasonable care.

1 All you have to do is find a legal relationship with someone.

2 THE COURT: So is it your position that an
3 international organization is immune so long as its conduct in
4 the United States -- whether it's a tort action or a breach-of-
5 contract action, so long as its conduct in the United States was
6 not the last link in the causal chain triggering the injury?
7 Is that your position?

8 MR. FOSTER: Yes. If that last link that you're
9 referring to is the conduct that actually injured the plaintiffs,
10 I think that's right. I think that comes straight from *Sachs*.
11 Again, the court didn't look behind the allegations in the
12 failure-to-warn claims and say what might have happened here,
13 what happened -- obviously, in *Nelson* there was a tremendous
14 amount of commercial activity in the United States. The
15 recruitment and I think the contract was actually signed in
16 the United States. That all came from the United States.

17 THE COURT: Speaking of which, the papers aren't
18 perfectly clear on this: Where was the loan agreement negotiated?

19 MR. FOSTER: I don't think it's in the record where
20 it's negotiated. We say it was signed in India, but I don't
21 think --

22 THE COURT: So signed in India.

23 MR. FOSTER: Signed in India.

24 THE COURT: By all parties, even IFC?

25 MR. FOSTER: That's the start of our declaration.

1 Let me see if I can -- when I sit down, I'll get you that answer.

2 THE COURT: Is it important to me whether the contract
3 was negotiated in D.C. or in India?

4 MR. FOSTER: No. Again, you don't get to those
5 questions --

6 THE COURT: Isn't your case even stronger if the
7 contract was signed and negotiated in India rather than in
8 the United States?

9 MR. FOSTER: No.

10 THE COURT: Why not?

11 MR. FOSTER: Because you're looking --

12 THE COURT: Because you can't make a stronger case
13 than you already have? Is that your point?

14 (Laughter)

15 MR. FOSTER: I think those might be 12(b)(6) arguments,
16 but those aren't immunity arguments, because you have to look at
17 the conduct that injured the plaintiff.

18 THE COURT: But that's ridiculous, with all due respect.

19 MR. FOSTER: Fair enough.

20 THE COURT: If I have to figure out where the core is,
21 doesn't it matter where the contract was negotiated and signed?
22 Isn't that part of determining where the core of the conduct
23 occurred?

24 MR. FOSTER: Perhaps in a breach-of-contract case
25 where the -- between the two parties that are parties to the

1 contract, maybe. But, again, here we don't have that. Here
2 what we have is the first step, the core of the -- in this tort,
3 this is an environmental -- I think Your Honor observed this in
4 your decision in 2016. This case sounds primarily in tort, and
5 it's about this environmental damage caused by these plants.

6 THE COURT: All right. So, as far as you know, the
7 record says that this loan agreement was executed in India.

8 MR. FOSTER: Right.

9 THE COURT: And it is silent on where it was negotiated.

10 MR. FOSTER: Off the top of my head, I don't think
11 it's in the record before Your Honor where it was negotiated,
12 but when I stand back up during rebuttal, if I have that time --

13 THE COURT: So let's move on from the "based upon,"
14 which is really what we've been talking about, to the commercial
15 activity prong of this immunity inquiry.

16 MR. FOSTER: So this is --

17 THE COURT: Isn't the execution of the loan agreement
18 commercial activity?

19 MR. FOSTER: This is in the alternative argument,
20 right, because you don't get past "based upon."

21 THE COURT: I understand.

22 MR. FOSTER: Right. So in the abstract, the executing
23 the loan agreement would be a commercial activity, perhaps, but
24 that doesn't get the plaintiffs where they need to go, because I
25 think that what they argue -- what they allege in their complaint

1 is that it's all these other activities. Basically, the --

2 THE COURT: But if the duty of care -- and we are
3 talking about a duty of care here for their negligence claims,
4 for their tort claims. If that arises from the decision to
5 enter into the loan and the execution of the loan agreement,
6 then aren't all the succeeding claims for violation of that
7 duty of care based upon that commercial loan activity?

8 MR. FOSTER: No.

9 THE COURT: Why not?

10 MR. FOSTER: Because what's happening here -- well,
11 first of all, this loan -- you know, depending on where it was
12 -- well, it was executed in India. What the IFC does is act as
13 a lender of last resort, and as we explain in our papers, this
14 is noncommercial activity, that they don't compete in the lending
15 market like a traditional lender like Bank of America, right?

16 Their charter is clear, if there is private capital
17 available for a particular project, IFC does not lend to those
18 projects. It is only when there's a lack of this somewhere and
19 there's no other lender. So they act just like -- analogous to
20 Jamsostek, they act as the default lender, just like Jamsostek
21 was the default insurer of the health insurance for its citizens.

22 And so both the lending and what came from the lending,
23 enforcement of these ENS standards or, as the plaintiffs
24 alleged, the lack of enforcement, flow from that. The nature of
25 what the activity that IFC is doing is noncommercial in nature.

1 THE COURT: The nature of what they're doing, which
2 is giving loans to private parties, is not commercial activity.

3 MR. FOSTER: That's right.

4 THE COURT: And the reason is? I lost your train of
5 argument a little bit there.

6 MR. FOSTER: Okay.

7 THE COURT: The reason is what?

8 MR. FOSTER: Let's look at Jamsostek, right?
9 They provided health insurance to their citizens just like
10 Aetna, just like Humana, right? They identified providers.
11 They contracted. They did all those things that Aetna and
12 Humana do. But the nature of what they were doing was providing
13 a default for insurance for their citizens, as same here.
14 Obviously, IFC uses the traditional tools of commercial --

15 THE COURT: See, I thought just the opposite. I
16 thought the problem with applying the FSIA foreign sovereign
17 immunity principles with international organizations like IFC
18 is the commercial-activity exception seems to fit everything
19 that you do because what you do is commercially lend. But
20 you're saying, no, no, no, that's the reason that it's not
21 commercial activity. I don't get it.

22 MR. FOSTER: So if you look at what the Supreme Court
23 said in this case, in *Jam*, near the end of that opinion they
24 talk about the fact when the Supreme Court is saying the IFC's
25 arguments are overblown as far as applying the commercial-

1 activity exception to international organizations, they say it's
2 not clear that everything development banks do is commercial,
3 what fit within the commercial-activity exception. They do give
4 an example of international organizations that offer conditional
5 loans to governments, right? To sovereigns.

6 THE COURT: Yeah, and they talk about also being able
7 to, in your charter, having provisions that might apply some
8 greater immunity.

9 MR. FOSTER: Right.

10 THE COURT: And then they, of course, do not deal
11 ultimately with the government's argument that was made -- not
12 made, but observed -- that maybe the "based upon" standard
13 wouldn't be satisfied here anyway.

14 MR. FOSTER: Right. But --

15 THE COURT: But I don't think that's any kind of a
16 conclusion that the lending in the marketplace that IFC engages
17 in is not commercial activity.

18 MR. FOSTER: I'm just asking Your Honor to observe
19 that the Supreme Court had this observation, right? Everything
20 -- just because it's an organization, not a sovereign, we can't
21 take sovereign acts --

22 THE COURT: It's one of the complications in applying
23 FSIA here.

24 MR. FOSTER: Right. I agree. But they observed that
25 everything these development banks, these development entities,

1 do would not fit within the commercial-activity exception
2 because they would not be -- essentially, they are not acting as
3 a private party to us in commerce and trade. And they gave that
4 one example, and here --

5 THE COURT: But you seem to be focusing more on the
6 purpose of the loan.

7 MR. FOSTER: No. I am not talking about the purpose.
8 It's the nature of what we do. We do not compete in the
9 traditional -- with Bank of America. We don't compete in that
10 market. What we do is --

11 THE COURT: You're only there if Bank of America is
12 not lending the money.

13 MR. FOSTER: Right. Or any other entity. We only
14 go -- this flows straight from our charter objectives. This
15 group of sovereigns got together and said, here is something we
16 can do together, and set IFC out to go do that.

17 And because we act as a lender of last resort, I think it's
18 analogous, quite analogous, to *Jamsostek* where they looked like
19 a health insurer, and that's what the plaintiffs argued there.
20 I mean, they weren't like Aetna or Humana.

21 They did provide health insurance to citizens just like an
22 insurance company, but the nature of what they were doing -- and
23 I know the nature and purpose can get confusing sometimes, and
24 it gets twisted a little bit in some of these cases, but when
25 IFC, acting as a lender of last resort, that's not what Bank of

1 America does. That's not what Citibank does. So that's why the
2 nature of these activities would not be commercial activity.

3 THE COURT: All right. What else do you want to tell
4 me on the immunity issue, or are you ready to move on to other
5 issues?

6 MR. FOSTER: Well, unless Your Honor has any other
7 questions, I'd like to touch briefly on waiver.

8 THE COURT: All right. Go ahead.

9 MR. FOSTER: I think Your Honor's decision in 2016
10 is law of the case, as we've said in our briefs. If Your Honor
11 thinks that was somehow undermined by the D.C. Circuit opinion
12 being vacated or reversed, the analysis has not changed.
13 There's no new facts. There's nothing that would make the
14 outcome any different.

15 The plaintiffs argue that somehow *Mendaro* has been changed
16 in some way because of *Jam* and how they interpreted the IOIA.
17 I don't think that's right. I think what the Supreme Court was
18 doing in this case was interpreting a statute. What *Mendaro* was
19 doing in this circuit's precedent was interpreting the treaty.
20 So that's a completely different analysis, as I know Your
21 Honor's applied the *Mendaro* test several times. So the waiver
22 argument would not change.

23 THE COURT: All right. What about indispensable party?

24 MR. FOSTER: Your Honor, unless Your Honor has any
25 specific questions about indispensable parties, 12(b)(6), or

1 *forum non conveniens*, I'm prepared today to rest on the
2 arguments in our papers.

3 THE COURT: All right. Let me see if there's anything
4 I want to ask on any of those.

5 On *forum non conveniens*, can IFC be sued in India?

6 MR. FOSTER: No. They can't be sued here, either.
7 So that's not different from the United States. The law has
8 changed since this case has been pending. They extended the UN
9 privileges to the IFC in India, so they cannot be sued by these
10 parties in India. But the IFC should not be blamed or should
11 not be penalized because the law changed since this case has
12 been pending.

13 THE COURT: But doesn't that do away with any possible
14 *forum non conveniens* argument that this belongs in India --

15 MR. FOSTER: No.

16 THE COURT: -- if you can't be sued in India?

17 MR. FOSTER: No. And as we explained in our reply
18 brief, under the *Shinya Imamura* case from the District of
19 Massachusetts, GE could not be sued in Japan, and the court
20 looked at that and said --

21 THE COURT: What happened in Japan was they made
22 a collective pool for monies for claims against GE or the
23 Japanese companies or Japan or anybody else. We don't have
24 that here. It's not the same situation as existed --

25 MR. FOSTER: The facts are different, but I think

1 the court's analysis applies here because they said, even if
2 you can't get complete relief from the party you're suing in
3 the United States, if you can get complete relief from another
4 party, then that other forum is available.

5 And here they can go to India, they can sue CGPL, they can
6 sue Adani and get the relief that they're requesting. In fact,
7 they can get injunctive relief that we can't even provide them.
8 Because they can get that relief from another party in India, I
9 think that --

10 THE COURT: And the only case you rely on is that
11 District of Massachusetts case that is on appeal to the First
12 Circuit.

13 MR. FOSTER: Yes.

14 THE COURT: All right. Anything else?

15 MR. FOSTER: Unless Your Honor has any other questions
16 for me.

17 THE COURT: You can reserve some time for rebuttal.

18 MR. FOSTER: Thank you, Your Honor.

19 THE COURT: All right. Is it Mr. Skurnik?

20 MR. SKURNIK: Yes. That's right, Your Honor.

21 THE COURT: All right. A few minutes from the
22 United States.

23 MR. SKURNIK: So, Your Honor, I plan to address today
24 just the "based upon" argument that we covered in the statement
25 of interest that we filed in the record. *Sachs and Nelson*

1 provide several lessons on how to conduct the gravamen inquiry
2 that I think can shape sort of the Court's approach to this case.

3 So the first lesson from *Sachs* and *Nelson* is that, in a
4 tort case, the focus should be on the immediate cause of the
5 injury. The focus of the gravamen --

6 THE COURT: So what if it was solely a breach-of-
7 contract claim? Can that escape the immunity bar because it's
8 a commercial activity?

9 MR. SKURNIK: So the question -- if this case involved
10 solely a breach-of-contract claim, I think what the Court would
11 look to is where the contract was executed and where any breach
12 occurred in determining the gravamen of the claim. But *Sachs*
13 and *Nelson* instruct that, in a tort case, the focus should be on
14 what actually injured the plaintiff.

15 Now, in determining sort of what kind of case we have here,
16 because there are both tort claims and there is this third-party
17 beneficiary, breach-of-contract claim, the approach the Court
18 should take is not to go through an exhaustive claim-by-claim,
19 element-by-element analysis. That was rejected in *Sachs*.

20 Instead, what the Court should do is take a look at this
21 case and say: What is this case about? What is its foundation?
22 And the foundation of this case is a power plant that was
23 constructed and operated in India and caused harm to plaintiffs
24 in India, and it's the causing of that harm that is the gravamen
25 of the complaint. And that's consistent with the approach that

1 the court took in *Sachs* and in *Nelson*.

2 THE COURT: So even if there was a contract that
3 required the IFC, the international organization in this
4 instance, to be actively overseeing design, construction,
5 maintenance issues, that the contract put that obligation on
6 them in the United States -- they then performed, allegedly
7 negligently, those oversight responsibilities by reviewing
8 reports, videos, photos, etc., that were sent to them with
9 respect to design, operation, construction -- nonetheless,
10 because the injury occurs in India, it's not within the
11 commercial-activity exception.

12 MR. SKURNIK: I'll make two points in response to
13 that, Your Honor. The first one is that, typically, in a
14 breach-of-contract action, you don't have what is essentially
15 a tort injury that a plaintiff is attempting to recover for.

16 Now, with plaintiffs' third-party beneficiary, breach-
17 of-contract theory, that's essentially what they're trying to
18 do, and that's the precise type of artful pleading that the
19 Supreme Court rejected in *Sachs* and in *Nelson*.

20 Now, the second point I wanted to make --

21 THE COURT: I don't think artful pleading fits,
22 exactly. Artful pleading is what cause of action -- in response
23 to what you just said, is what cause of action you're going to
24 try to frame against that party. Here it's what party you're
25 suing. You're not suing the contracting party; you're suing --

1 I'm sorry. The person suing is not the contracting party but
2 rather is a third-party beneficiary.

3 Why is that artful pleading? I mean, it's almost like
4 you're laying that on the lawyers, but the plaintiffs are the
5 third-party beneficiaries. The fact that they have sued is not
6 artful pleading; it's just what causes of action they possibly
7 have. Only as third-party beneficiaries do they have any
8 contract claims.

9 MR. SKURNIK: The plaintiffs also, however,
10 Your Honor, have tort claims here.

11 THE COURT: Right. Here. In my hypothetical, it
12 might not be true, but here, yes.

13 MR. SKURNIK: And in your hypothetical, I think the
14 question the Court would have to ask in reading the facts of
15 such a complaint is why haven't the plaintiffs brought tort
16 claims? And I think the fact that the plaintiffs had not
17 brought tort claims and had just brought this unusual
18 third-party beneficiary, breach-of-contract theory would
19 indicate that the plaintiffs were -- or at least their lawyers
20 were engaging in artful pleading in order to evade some of those
21 restrictions of the FSIA.

22 I think that point also goes to plaintiffs' decision in
23 this case to not name as a defendant the one party that was
24 directly responsible, the immediate cause of the plaintiffs'
25 injury, and that's the Indian company CGPL.

1 THE COURT: Is there any reason to believe they would
2 be subject to jurisdiction here in the United States and any
3 personal jurisdiction over them? Any reason to believe there is?

4 MR. SKURNIK: The federal government hasn't taken any
5 position on that, Your Honor. It may not be possible. We sort
6 of haven't thought through that particular issue, but the -- I
7 guess I would say that, in formulating their complaint, what the
8 plaintiffs have attempted to do is, by not including that Indian
9 company, they're attempting to shift the gravamen from a foreign
10 country to the United States.

11 Now, this is not the exact type of artful pleading that
12 the plaintiffs in *Sachs* and in *Nelson* had engaged in. In those
13 cases it was sort of reframing of particular claims, but our
14 position is that this is the same general type of sort of
15 creative approach to pleading that the Supreme Court has
16 rejected. And I think one way to think about it, Your Honor, is
17 let's say the plaintiffs --

18 THE COURT: But the only way they can get access to
19 IFC as a defendant is through the contract. Right? That's what
20 gives rise to any duties or responsibilities IFC has here is the
21 funding that they gave to the project, which was done through a
22 loan agreement. So that's the only way they can get to IFC.
23 That's not like the situations in either *Nelson* or *Sachs* where
24 you're really talking about the failure to warn is by the same
25 entity that ultimately was responsible for the harm.

1 MR. SKURNIK: So I don't think that's the -- at least
2 that's not the plaintiffs' position. They have raised tort
3 claims. They've raised sort of one third-party beneficiary,
4 breach-of-contract claim and a number of different tort claims.

5 THE COURT: Absolutely.

6 MR. SKURNIK: So I think the approach that the Court
7 should take is to look at the complaint and say, what is this
8 case generally about; what's its foundation? And its foundation
9 is this is a tort case. This is a case brought to recover for
10 tort injuries that occurred in India.

11 THE COURT: So with respect to this case, it seems
12 to be IFC's position that what really is determinative is where
13 the last act, if you will, that caused the injury occurred, and
14 here that's in India, with the construction and design,
15 maintenance, and operation of the plant.

16 Does that mean that international organizations that lend
17 money for projects, whether it be IFC or other organizations,
18 are always going to be immune from claims with intervening
19 causes and injury outside the United States?

20 MR. SKURNIK: So to the extent that the claims brought
21 are tort claims and an international organization has lent to a
22 party in another country and sort of that party is the
23 intervening cause before a tort claim, I think the analysis
24 generally will be sort of similar to the analysis that the
25 federal government has put forward in this case.

1 However, let's say --

2 THE COURT: So how does the commercial-activity
3 exception apply to international organizations? Give me some
4 examples of where an international organization -- let's say
5 IFC, what they engage in -- would not have immunity.

6 MR. SKURNIK: So, one example, Your Honor, would be
7 let's say IFC, for its headquarters here in Washington, D.C.,
8 contracted with someone in the United States to supply chairs to
9 their headquarters.

10 THE COURT: Okay. Let's limit it to situations where
11 IFC is funding projects overseas. Is there any cause of action
12 that can arise out of funding projects overseas that would be
13 within the commercial-activity exception and therefore not
14 subject to immunity?

15 MR. SKURNIK: So as far as the commercial-activity
16 exception goes, to the extent IFC's lending activity's sort
17 of generally consistent with what they've done in this case,
18 I don't think --

19 THE COURT: I mean, that's what they do, generally,
20 is fund projects in other countries. They don't fund a lot of
21 projects in the United States, I don't think.

22 MR. SKURNIK: Right. And it would be different if
23 they did fund one here. And I think the answer here, Your Honor,
24 is generally, no, there would be immunity in those cases, and
25 sort of the reasoning --

1 THE COURT: It sounds a little crazy, because they're
2 engaged in commercial activity, one would think, as an outside
3 observer, and yet the commercial-activity exception is never
4 going to apply to remove the immunity. That sounds a little odd.

5 MR. SKURNIK: So sort of two responses on that,
6 Your Honor. The first one is the commercial-activity exception
7 does not just say you can bring a lawsuit with regard to any
8 commercial activity to which you think you've been wronged.
9 It says that the lawsuit itself must be based upon commercial
10 activity with a sufficient nexus to the United States.

11 And so I think that's why, in the particular type of
12 activity that international development banks like IFC engaged,
13 that that sort of activity typically will not fall within the
14 exception.

15 THE COURT: No matter what the loan circumstances are.
16 In other words, no matter where the loan was executed, where it
17 was negotiated, and what the provisions are in terms of any
18 responsibility that IFC may have for continued oversight on the
19 project, none of that matters. It's always going to be outside
20 of the commercial-activity exception, because the core of the
21 action was not here in the United States, and therefore it
22 doesn't fit within the "based upon" language.

23 MR. SKURNIK: I don't think Your Honor would need to
24 make a ruling sort of that broad in this case.

25 THE COURT: No, but I'm always looking for limiting

1 principles and trying to make sense out of where both the
2 United States and the party in the case is trying to take
3 me in the case.

4 MR. SKURNIK: So one -- I guess one way in which it
5 could matter where the contract was negotiated would be if, for
6 instance, rather than sort of citizens in India who are injured
7 by the project had sued IFC, let's say the Indian company that
8 built and operated the power plant, they sued IFC for breach of
9 contract. I think, in that case, where the contract was
10 negotiated, exactly where the breach took place could, if there
11 was a sufficient nexus to the United States, come within the
12 bounds of the commercial-activity exception.

13 And I guess to the extent Your Honor is sort of concerned
14 about having no avenue for plaintiffs like this to recover for
15 these sorts of injuries, the whole idea of the IOIA was to
16 channel disputes like this into diplomatic measures between the
17 various member states of these international organizations and
18 away from the courts, the sort of national courts of different
19 member states.

20 THE COURT: What's the diplomacy angle here? Who are
21 the two countries involved for diplomacy purposes? It's just
22 India.

23 MR. SKURNIK: It's sort of India and the other
24 countries that interact on the IFC board of directors.

25 THE COURT: So it would be diplomacy not among

1 countries involved in this particular case, but just in general.

2 MR. SKURNIK: Yes, Your Honor.

3 THE COURT: All right. What else would you like to say?

4 MR. SKURNIK: I think sort of the last point I'd like
5 to make, Your Honor, is that the gravamen analysis here is
6 arguably more conclusive than it was in *Sachs* and *Nelson*, and
7 the reason why is that, at least in *Sachs* and in *Nelson*, it was
8 the defendant foreign sovereign that was the immediate cause for
9 the plaintiffs' injury. But here, IFC did not build the power
10 plant, does not operate the power plant.

11 So the connection between the acts in the United States --
12 IFC's acts here in the United States and the immediate cause of
13 the plaintiffs' injury is arguably more attenuated than it was
14 in *Sachs* and *Nelson*, because at least in those cases it was the
15 same party that had performed the acts in the United States and
16 also sort of immediately caused the injury to the plaintiffs.

17 So I think in light of that, it's clear that the gravamen
18 of this case is conduct that occurred in a foreign country,
19 affected foreign plaintiffs, and caused injuries abroad. And
20 that's the basis for the result, and as a result, the
21 commercial-activity exception doesn't apply.

22 THE COURT: So I understand the United States'
23 position on the "based upon" prong of the FSIA commercial-
24 activity exception. Do you have a position on whether this
25 is commercial activity?

1 MR. SKURNIK: We have not taken a position on
2 that, Your Honor.

3 THE COURT: All right. Thank you, Mr. Skurnik.

4 MR. SKURNIK: Thank you.

5 THE COURT: Mr. Herz.

6 MR. HERZ: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. HERZ: The IFC is not immune from this suit.
9 The Foreign Sovereign Immunities Act allows the IFC to be
10 sued for claims that are based upon commercial activity in the
11 United States by the foreign sovereign. This is a case about --

12 THE COURT: By an international organization, in this
13 instance.

14 MR. HERZ: Correct. This is a case about IFC's own
15 conduct. The reason we are here is we seek to hold IFC liable
16 for its own actions. The funding that Your Honor mentioned --

17 THE COURT: But just like in *Sachs*, what is there
18 really to this action in -- without looking to the ultimate
19 cause of the injury in India based on inadequacies with respect
20 to the construction and operation of the power plant, there
21 really isn't anything to the case unless you look at that as
22 well, and that's much like the situation in *Sachs* or in *Nelson*.

23 MR. HERZ: It's different from -- it is true that
24 there's nothing to the case unless you look at the actions in
25 India. It's also true that there's nothing to the case unless

1 you look at the actions here. And our view is that, as a
2 plain-language meaning --

3 THE COURT: There wouldn't be cases in *Sachs* and
4 *Nelson* without some action here as well.

5 MR. HERZ: No, because in that case -- what was going
6 on in that case is the --

7 THE COURT: That case. It's two cases. You mean *Sachs*?

8 MR. HERZ: In both of those cases. It was a sovereign
9 committed two different sorts of acts, and the Supreme Court was
10 in the position of saying, okay, which of these acts matter?
11 Was it the selling of the ticket in the United States, or was it
12 the tort and the negligence on the platform? And what the court
13 said in *OBB*, or *Sachs*, what this case is really about is the
14 negligence on the platform in Austria.

15 THE COURT: But isn't this the same kind of situation
16 where the plaintiffs are trying to shift the location of what is
17 called the gravamen of the suit just by attributing a whole lot
18 of conduct elsewhere to this single, discrete act or conduct in
19 the United States? Isn't that the same kind of thing that was
20 occurring in *Sachs* and *Nelson*?

21 MR. HERZ: No, because in *Sachs* and *Nelson* -- this
22 case is about whose acts count. That case -- those two cases
23 were about which acts count. They want to take cases about
24 which acts count and say that that means you can tell whose acts
25 count, and whose acts have to count is always the sovereign's.

1 The Foreign Sovereign Immunities Act is about whether
2 the sovereign can be held liable, and you don't look to third
3 parties to figure that out. An act for IFC's own conduct is
4 based on that conduct, based on just a plain-language reading
5 of the statute.

6 THE COURT: But why isn't that -- as I think both your
7 colleagues have said, why doesn't that make this case even more
8 attenuated? I mean, you've got --

9 MR. HERZ: -- I'm sorry.

10 THE COURT: Go ahead.

11 MR. HERZ: Because what they said in *Sachs* was this
12 woman who fell under a train in Austria, that case is not about
13 the selling of a ticket. It's about the fact that there was a
14 problem at the station in Austria. This is a case against the
15 IFC --

16 THE COURT: But this case, I think the other side
17 would say, is not really about the funding decision. What it's
18 about is the inadequacies in the plan that have caused injuries
19 to the plaintiffs.

20 MR. HERZ: So you have to look at the conduct that
21 we are seeking to hold IFC liable for. Part of that is the
22 negligent decision here in the United States to fund the plant,
23 without which funding this project would not have gone forward.
24 But that's not all of the conduct.

25 This case -- we are also suing them because they looked at

1 the plans, they had final approval authority over the plans, and
2 they approved the plans. And those plans included, for example,
3 no lining to the intake channel that caused the salinization of
4 the wells in Navinal, and it included a cooling system that's
5 putting out a river of heated water that's killing the fish that
6 Mr. Jam depends on for his livelihood.

7 THE COURT: So the monitoring, if you will, to capture
8 everything in terms of any responsibility with respect to design,
9 construction, maintenance, operation, wouldn't that be focused
10 primarily in India? In order to really do anything with respect
11 to design intricacies or construction or construction faults or
12 maintenance or how the plant is operating, doesn't that involve
13 failure by IFC, as alleged, to conduct some activities in India --

14 MR. HERZ: No.

15 THE COURT: -- with respect to overseeing the plant?

16 MR. HERZ: The core of what we're saying is that
17 they approved here in the United States the design -- both the
18 funding and the design. That's a decision that was made here in
19 the United States.

20 Now, even if -- you know, they talk about whether the loan
21 was signed in India. Even if some of the behavior occurred in
22 the United States, the definition of commercial activity in the
23 United States includes --

24 THE COURT: But there was commercial activity in the
25 United States in *Sachs* as well, the failure to warn. So why

1 didn't the Supreme Court say that that claim should survive the
2 FSIA immunity by virtue of the commercial-activity exception?

3 MR. HERZ: Because that isn't what they were really
4 suing OBB about. What they were really suing them about -- and
5 this is the court's holding. What they were really suing them
6 about is the negligence in the train station.

7 THE COURT: But you're really suing here about the
8 negligence with respect to, arguably, any oversight over the
9 plan that resulted in the failures and injuries that occurred
10 in India.

11 MR. HERZ: Not primarily oversight. We are definitely
12 mentioning oversight, but its affirmative approval of the
13 design, and that occurred here in the United States. And it's
14 also important to recognize, they do talk about where this
15 happened, and Your Honor did as well. The actual location of
16 where the harms happened are somewhat irrelevant for this
17 reason: Our argument is that an act -- a suit against IFC for
18 its own conduct is based upon that conduct.

19 THE COURT: Where was this contract signed?

20 MR. HERZ: The contract was signed in India.

21 THE COURT: Where was it negotiated?

22 MR. HERZ: I believe it was negotiated in India, but
23 I'm not a hundred percent sure about that.

24 THE COURT: So what is the connection to the
25 United States if the loan agreement was negotiated and signed

1 in India? Is the connection to the United States only that
2 the funds come out of an account in the United States?

3 MR. HERZ: The approval for the loan was here in
4 the United States. The approval of the design was here in
5 the United States. And what's important to recognize is that,
6 under 1603(e), the definition of a commercial activity includes
7 just activity that, quote, "has a substantial contact with the
8 United States."

9 And the legislative history makes clear that commercial
10 activity in the United States includes activity that occurs in
11 whole or in part in the United States. So the fact that they
12 can say, oh, well, this loan was signed in India doesn't take it
13 outside the clear definition under 1603. This is still commercial
14 activity in the United States.

15 THE COURT: But under analysis of the Supreme Court
16 under *Sachs* and *Nelson*, you have to look at where the gravamen
17 of the conduct occurred under the "based upon" language of the
18 FSIA commercial-activity exception.

19 Here, isn't the gravamen of what you're complaining of
20 not just the approval of designs, as you would allege, but the
21 subsequent monitoring, oversight, and activities with respect
22 to the design, construction, and maintenance of the plant in
23 India? The plant's in India, and the construction failures
24 occurred there and the injuries occurred there.

25 MR. HERZ: That's true. They did -- the failures --

1 the injuries occurred --

2 THE COURT: If there's one gravamen here, one location
3 here, would a reasonable person looking at this say, ah, this
4 problem is really a United States locus problem, or would they
5 say it's an India locus problem?

6 MR. HERZ: In a suit against IFC for IFC's own
7 conduct, this suit is saying that you, IFC, did something wrong,
8 and what IFC did wrong was here in the United States, primarily.
9 But let me just explain why the location -- that their argument
10 applies whether this plant was built in the United States or
11 not, or India. So the location in that sense is irrelevant for
12 the following reason:

13 The dispute between the parties is, is this case based
14 upon IFC's acts, or is it based upon CGPL's acts? Where the
15 construction happened doesn't tell you anything about what the
16 claim is based upon. In fact, the United States government made
17 the exact same argument that it's making here, that this case is
18 not based upon the act of the sovereign, in *Merlini*, in a case
19 that arose entirely in the United States, and the First Circuit
20 rejected it. It said you have to look at the acts of the
21 sovereign.

22 THE COURT: So you think the acts of others are
23 irrelevant here. The only thing that the Court should examine
24 is the conduct of the defendant who was sued, IFC.

25 MR. HERZ: Yes.

1 THE COURT: Not joint tortfeasors or anyone else
2 responsible for the ultimate injuries to the plaintiff.

3 MR. HERZ: Yes, for a number of reasons.

4 THE COURT: So if there are three joint tortfeasors,
5 and you choose to sue only one who conducted some activities
6 in the United States, not the other two who conducted all their
7 activities in India -- and indeed, under a comparative negligence
8 assessment, they would be found to be 95 percent responsible for
9 the injuries -- nonetheless, the gravamen of that case against
10 only the one joint tortfeasor would be in the United States.

11 MR. HERZ: Yes. If that one joint --

12 THE COURT: It seems to me inconsistent with what
13 *Sachs* and *Nelson* say the courts should do in looking at the
14 conduct and what's really involved.

15 MR. HERZ: I'm sorry. I didn't hear the beginning
16 of your question.

17 THE COURT: That seems to be inconsistent with what
18 the Supreme Court has said in *Sachs* and *Nelson* that the court
19 should do in looking at the conduct and determining where the
20 core of the conduct really occurred.

21 MR. HERZ: No, because --

22 THE COURT: In my hypothetical, it occurred mainly
23 in India, and you say, nonetheless, the suit against the single
24 joint tortfeasor who's minimally responsible, that should go
25 forward in the United States; there is no immunity.

1 MR. HERZ: Yes, because in that hypothetical the
2 claim is still about the acts of that particular -- and,
3 remember, what we're doing here is we're trying to figure out
4 whether a sovereign should be --

5 THE COURT: Where the statutory structure for the
6 sovereign, as now applied to international organizations through
7 IOIA, the structure, the statutory intent, is to presume that
8 there will be immunity. It's an immunity statute --

9 MR. HERZ: Yes.

10 THE COURT: -- that the presumption is there's going
11 to be immunity unless you happen to fit within one of a few
12 limited exceptions.

13 MR. HERZ: Right. But what the Supreme Court has
14 said is that the real distinction that they're trying to draw
15 is between sovereign acts and commercial acts. And so --

16 THE COURT: But the sovereign commercial distinction
17 doesn't work as well with an international organization because
18 an international organization doesn't engage in sovereign acts.

19 MR. HERZ: Well, it works perfectly well with --
20 that's exactly the point, and that's why they're --

21 THE COURT: But that can't lead to the conclusion
22 that international organizations get less immunity than nation
23 states do, because that's inconsistent with what the statutory
24 structure, as interpreted by the Supreme Court, dictates.
25 They're the same.

1 MR. HERZ: They are the same. They get exactly the
2 same sovereign immunity that a foreign-owned bank would get
3 that's making commercial loans at market rates. And that's what
4 they're doing. I don't think this question is particularly --
5 you know, the court in *Jam* -- the Second Circuit in *Jam* said
6 everything they do is commercial activity. So I'm not sure that
7 there's a whole lot left on the question of whether their
8 commercial loan at market rates is commercial activity or not.

9 But on the "based upon" question, the problem with their
10 argument that -- one of the problems with their argument that
11 you don't look to the acts of the sovereign is that it would
12 also put --

13 THE COURT: Until that Second Circuit case, what was
14 the tort and the injury?

15 MR. HERZ: I'm sorry. I don't believe I cited a
16 Second Circuit case.

17 THE COURT: Well, the case you just referred to?

18 MR. HERZ: Oh, it was *Jam*. It was this case in the
19 D.C. Circuit.

20 THE COURT: Okay.

21 MR. HERZ: So one of the problems with their argument
22 that you have to look to the final act and you have to look
23 to the acts of somebody other than the sovereign defendant is
24 it puts -- it puts -- there's a conflict with another provision
25 of the Foreign Sovereign Immunities Act.

1 THE COURT: Do you have any case where a state-owned
2 bank funded a project outside of the United States, entered into
3 some funding arrangement in the United States for a project
4 outside the United States that then caused injuries to some
5 parties, and that that was then analyzed under the Foreign
6 Sovereign Immunities Act to see whether that state bank had
7 immunity?

8 MR. HERZ: Off the top of my head, I don't have
9 a case one way or the other on that, but it's important to
10 remember that's not all they did. They also approved the
11 design that caused the harm here.

12 THE COURT: And that approval of design was a
13 contractual obligation that they had?

14 MR. HERZ: It was a right that they had through
15 the contract and that they --

16 THE COURT: A right, not an obligation? If there's
17 a difference.

18 MR. HERZ: I'm not sure if there's a difference.
19 But the fact of the matter is that they did it, and whether that
20 was by contract or some other reason, they approved the conduct
21 that caused the harm. And --

22 THE COURT: The design.

23 MR. HERZ: The design, yeah. But there's a conflict
24 between their argument that you look at the last act and another
25 provision of the Foreign Sovereign Immunities Act, which is

1 1606. 1606 sets forth a general principle that immunity -- or
2 that substantive liability is supposed to be on an equal footing
3 between sovereigns and nonsovereigns.

4 So what they're saying, and Your Honor alluded to this, is
5 there can never be liability for aiding and abetting, there can
6 never be liability for joint tortfeasors, there can never be
7 liability for conspiracy, there can never be liability for alter
8 ego, because the party that committed the last act in all those
9 theories of liability is not the defendant.

10 THE COURT: Well, my obligation is to decide the case
11 as narrowly as possible and not necessarily agree with general
12 principles that may go further than necessary for this case.
13 So I'm not sure that IFC's position that it all depends on where
14 the last act was or where the injury occurred is necessarily the
15 right position.

16 MR. HERZ: Well, I agree with that, but the problem
17 is, if you don't accept their position that you have to look at
18 the last act, then there isn't really a whole lot left.

19 THE COURT: The last act is relevant. I'm not saying
20 the last act is not relevant. Where the injuries occurred,
21 where the final violation of any standard occurs may be very
22 relevant. It may be part of the assessment, but is it
23 determinative? I'm not so sure.

24 MR. HERZ: I think it's important to recognize that
25 where the act occurred is not the question. It's whose act.

1 Because, you know, this case is either based on IFC's act, or
2 it's not based on IFC's act. If this plant was here in the
3 United States, the analysis of whether this act is based on
4 IFC's act or not based on IFC's act would be exactly the same,
5 and as I said, that's the same argument they raised in --

6 THE COURT: And you want to eliminate examination
7 of any conduct by others that helps to cause the injury to the
8 plaintiffs. Your assessment is put blinders on and just look at
9 what IFC did, mainly here in the United States, with respect to
10 funding and any approvals or oversight, and don't be concerned
11 with the construction of the plant by the construction company
12 or its maintenance or operations or anything else that
13 eventually caused injury in India.

14 You want me to just look at what IFC did, whereas they want
15 me to just look at where that final act occurred, and I'm not
16 sure that either analysis is the right analysis. It seems to
17 me that maybe it takes a more holistic analysis of looking at
18 everything involved in determining what the core of the conduct
19 is and what the gravamen is.

20 MR. HERZ: Well, so what they are suggesting to get to
21 their desired outcome, they're saying you don't have to look at
22 the acts of the sovereign, that the entire Sovereign Immunities
23 Act is built upon figuring out -- you don't look at the elements
24 of the claim; you don't look at plaintiffs' theory, even though
25 the elements of the claim in plaintiffs' theory is what *OBB*

1 directs you to. You don't look at any of that. And what you're
2 left to do is sort of eyeball it, and the problem with that is
3 that it's a completely standardless analysis.

4 If you throw away the fact that this is a question about
5 sovereign immunity, if you're not looking at the sovereign's
6 conduct, and if you're not looking at plaintiffs' theory of the
7 case, then they have taken away all the reference points that
8 the statute and the Supreme Court have given us to figure out
9 what's the gravamen of the case.

10 In this case, their best argument is that some of this is
11 in India and some of this is in the United States, and if you're
12 left to choose between those two with no reference points, I'm
13 not sure how the Court conducts that analysis.

14 THE COURT: But, factually, I am left with that.
15 Even by your presentation, I'm left with some of the elements
16 and activity occurring in the United States and some occurring
17 in India.

18 MR. HERZ: Well, but our point is that you look at
19 the conduct -- this is a case about IFC's conduct. The statute,
20 the Foreign Sovereign Immunities Act, is a statute about IFC's
21 conduct.

22 THE COURT: But the failure-to-warn claim in *Sachs* was
23 just about conduct in the United States, and the Supreme Court
24 said, no, no, no, we're not going to carve that out. We look at
25 this conduct and what really matters and what the real gravamen

1 of the conduct is, and it was in Austria.

2 MR. HERZ: But all of that conduct was the sovereign's
3 conduct.

4 THE COURT: So what? I don't see why that's
5 determinative.

6 MR. HERZ: It's determinative because, in our view,
7 the point of the Sovereign Immunities Act is to figure out
8 whether the sovereign's act fits under the exception or not.
9 The primary distinction that the statute draws is between
10 sovereign activity and commercial activity.

11 And then there's a couple of -- there's some limits that
12 you have to have a geographic hook. We have that geographic
13 hook in that everything, or virtually everything, that IFC did
14 that's important to this case happened here.

15 THE COURT: I'm not sure that you have that as a
16 factual record before me since you've already indicated that
17 the contract was executed in India, and it was probably
18 negotiated in India. Some of the oversight activities would
19 have been onsite oversight activities, but you have some things
20 here as well in terms of approval of design and maybe some other
21 things. I'm not sure everything that IFC did is here.

22 MR. HERZ: Everything doesn't have to be, under 1603.
23 That's the point of 1603.

24 THE COURT: I know it has to be substantial conduct.
25 But then it also has to be "based upon," and that's where you

1 get into an analysis of where the core of the conduct really is.

2 MR. HERZ: Right. And our argument is that the core
3 of the conduct that we are suing on is the decision to fund the
4 loan and the decision to approve the design that harmed the
5 plaintiffs. That's the most important things that IFC did, and
6 that's what they're liable for. And the Supreme Court says that
7 the starting point in determining the gravamen of the case is to
8 look at plaintiff's theory of the case.

9 THE COURT: All right. What about the commercial
10 activity prong of this inquiry?

11 MR. HERZ: Yes. So --

12 THE COURT: Why is approving design or overseeing
13 design or construction or operation of a power plant commercial
14 activity?

15 MR. HERZ: Well, the distinction is between commercial
16 activity and sovereign activity, and none of that is sovereign.

17 THE COURT: I know. But for the international
18 organization, you can't have it rest on a distinction between
19 commercial activity and sovereign activity, because there is
20 zero sovereign activity that an international organization
21 engages in. So your comparison doesn't make any sense.

22 MR. HERZ: There's zero sovereign activity that this
23 organization engages in, but the Supreme Court suggests it may
24 be different for, for example, the World Bank, which loans not at
25 market rates to foreign governments. But these loans here are

1 market-rate loans to a private party to build a private project.

2 THE COURT: And, therefore, your position is that all
3 of what IFC does is within the commercial-activity exception --

4 MR. HERZ: It's all commercial.

5 THE COURT: -- to immunity under the IOIA and FSIA.

6 MR. HERZ: But it's not my position. That's what
7 the D.C. Circuit said in *Jam*. They said if you apply the
8 commercial-activity exception, everything the IFC does is
9 commercial.

10 THE COURT: Well, they may have said that, but there
11 is a Supreme Court case that comes after that.

12 MR. HERZ: Well, the Supreme Court certainly didn't
13 suggest that any of IFC's conduct -- in fact, when the Supreme
14 Court said that other international organizations may have --
15 that their acts may be different, it was saying that to cabin
16 off the fact that the IFC might be liable for everything it does.

17 THE COURT: But the Supreme Court went out of its way,
18 as it was concluding its decision in *Jam*, to observe that the
19 government had stated it had serious doubts as to whether the
20 tortious conduct at issue here would satisfy the "based upon"
21 requirement. It seems to me that the Supreme Court -- I'm not
22 saying they're sending a signal, but they're certainly saying
23 that is open.

24 MR. HERZ: It's open. I mean, the government's here
25 arguing it. That's what we're fighting about here today. And

1 the fact is the Supreme Court did not rule that a bank's loans
2 to a foreign government are not commercial, but the point is
3 that it is not saying that every act of every international
4 organization is, therefore, commercial.

5 My only point -- I'm not taking a position on that either.
6 My only point is that these are commercial-rate loans to a
7 private party to build a private enterprise, and there's no
8 argument that that could be sovereign activity. It's certainly
9 not regulation of any kind. Any private party could do this,
10 and that's the test that the Supreme Court offers in *Weltover*,
11 is could a private party do this. And, of course, a private
12 party can do this.

13 THE COURT: So what do you want at the end of the
14 day in this lawsuit? It's a class action that you've brought,
15 a putative class action, and you're seeking damages relief for
16 past harms?

17 MR. HERZ: Yes.

18 THE COURT: And you're seeking injunctive relief to
19 stop future harms. Correct?

20 MR. HERZ: Broadly speaking, our injunctive relief
21 is entirely limited to IFC exercising rights it has under the
22 contract.

23 THE COURT: Well, I understand that you say that.
24 What is it that IFC could be required by me to do under the
25 contract that would correct all the problems that you believe

1 have caused injury to your clients and will continue in the future
2 to cause injury to your clients? I can order IFC to do what?

3 MR. HERZ: Well, IFC has the authority to force CGPL,
4 under the contract, to come into compliance with the performance
5 standards and other standards that IFC adopts including things
6 like, you know, the temperature of the water that's being pumped
7 out through the cooling system.

8 THE COURT: So you're not seeking any injunctive
9 relief, and you don't think that the complaint, in trying to
10 prevent future harm to your clients, you're not seeking any
11 injunctive relief that would go beyond requiring IFC to do
12 something, and you think that I can require IFC to redesign,
13 to force a redesign, of the power plant.

14 MR. HERZ: I think that, yes, you can force them to
15 exercise the rights they have in the contract.

16 THE COURT: And those rights in the contract include
17 a right by IFC to require CGPL or anyone else to redesign the
18 plant or shut down the plant.

19 MR. HERZ: I believe that it would require them to
20 fix the problem.

21 THE COURT: Is the contract before me? Have you
22 submitted the contract?

23 MR. HERZ: They did. I believe the contract is in
24 the record, yeah.

25 THE COURT: What provision is it in the contract

1 that you think gives -- derivatively would give me the authority
2 to require IFC to require a design change in an operating plant?

3 MR. HERZ: I don't have the contract provision number
4 in my head. I can give it to you. But I should say also that --

5 THE COURT: This is pretty important to me, because
6 when you get to the indispensable-party issue under Rule 19,
7 that turns in large part on whether complete relief can be had
8 without other parties here. And I'm concerned -- I'm very
9 concerned that the relief you seek, a large part of which is
10 injunctive relief that would address the risk of future harms,
11 is not really achievable without CGPL here.

12 MR. HERZ: So damages are meaningful relief. If we
13 get damages --

14 THE COURT: Well, wait a minute. Damages for past
15 harm or damages for future harm?

16 MR. HERZ: I think either or both. But the point is --

17 THE COURT: Well, is it really appropriate to subject
18 IFC to significant money damages for future injuries simply
19 because I can't order injunctive relief without CGPL here?
20 Is that really appropriate? Isn't that inconsistent with
21 what Rule 19 really requires in terms of indispensable parties?
22 Are you really saying that I should sock IFC with hundreds of
23 millions of dollars to address future injuries simply because
24 I don't have CGPL here to order injunctive relief?

25 MR. HERZ: No. What I'm saying, Your Honor, is that

1 is a merits question. We get to that --

2 THE COURT: It's not a merits question. This is a
3 question under Rule 19 with respect to indispensable party that
4 has been raised, whether there has been an indispensable party
5 that is not here.

6 MR. HERZ: The reason I say that it's not a problem at
7 the Rule 19 stage is that if Your Honor were to decide, either
8 now or later, that we are not entitled to any injunctive relief
9 or any future damages or anything of the kind --

10 THE COURT: Because you don't have the right parties
11 here, or on the merits you aren't entitled to it?

12 MR. HERZ: Because their argument is we don't have
13 the right parties for injunctive relief.

14 THE COURT: Okay, if I decide you don't have the right
15 party here to order any of that relief.

16 MR. HERZ: Right.

17 THE COURT: Then what?

18 MR. HERZ: Then the question is can meaningful relief
19 still be granted.

20 THE COURT: No. No, the question is whether complete
21 relief as sought in the complaint can be granted, not whether
22 meaningful relief can be granted. If you seek three kinds of
23 relief -- injunctive relief, money damages for X and money
24 damages for Y -- just because I conclude, ah, well, with this
25 party I can grant money damages for Y, but I can't grant money

1 damages for X and I can't grant injunctive relief, that may
2 be meaningful relief, but it's not complete relief as the
3 complaint seeks.

4 MR. HERZ: That might be true -- I'm not sure it's
5 true, but might be true under 19(a). But the second question
6 is 19(b), and that is, is it equitable to dismiss this claim.
7 And the question there is can the Court afford meaningful relief
8 in the absence of the parties. And as the court said in *Doe v.*
9 *Exxon*, Judge Lamberth in *Doe v. Exxon*, damage is meaningful
10 relief. It doesn't matter if you can't get an injunction, and
11 it doesn't matter if the plaintiff sought an injunction that
12 they couldn't get, because you could still can get damages.

13 That's meaningful relief. And if you can get meaningful
14 relief, if you can still afford meaningful relief, then it's not
15 equitable to dismiss the entire claim just because you can't
16 give injunctive relief, and that's our argument here. That's
17 why I said it's a merits question.

18 Maybe down the line we can't get an injunctive relief.
19 I don't know. I'm sure we'll fight about that later. But what
20 I do know is it's not equitable to dismiss this case just
21 because we asked for injunctive relief and can't get it when
22 there's still a remedy we can get.

23 THE COURT: What else do you want to say on the
24 failure to join indispensable parties that has been raised?

25 MR. HERZ: The only other point about the failure to

1 join indispensable parties is that these are joint tortfeasors,
2 and the Supreme Court has said they don't have to be joined.

3 Just very briefly on the *forum non conveniens* issue,
4 Your Honor, because they only raised this Massachusetts District
5 Court case in their reply brief. Their argument is we don't
6 have to be able to sue -- they concede that we can't sue IFC in
7 India, and I should point out that the fact that we can't sue --

8 THE COURT: But you can sue CGPL or India in India.

9 MR. HERZ: In theory. But two points. The first is
10 the fact that we can't sue them. IFC is not only relevant to
11 the *forum non conveniens* analysis, it's also relevant to the
12 Rule 19 analysis. It goes to the equities. It's one of the
13 factors. And we can't sue IFC there. Their argument that it's
14 okay under *forum non conveniens* that we can sue somebody other
15 than them is flat wrong.

16 And let me just -- because we didn't have a chance to put
17 this in a brief, let me just read for you what the D.C. Circuit
18 said in *Pain*, and it's referring to the Supreme Court's case in
19 *Gulf Oil*.

20 THE COURT: If you're referring to a specific case
21 that you haven't included in your brief, you better cite the
22 full case for the court reporter.

23 MR. HERZ: Sure. It's *Pain*, 637 F.2d 775, 783.
24 And what it says is that *Gilbert* requires, quote, "that two
25 alternative forums have jurisdiction over the subject matter

1 and the parties in the suit before the doctrine of *forum non*
2 *conveniens* even comes into play." And *Gulf Oil* itself, *Gilbert*
3 itself, at 330 U.S. 501, says that the doctrine presupposes at
4 least two forums in which the defendant is amenable to process.
5 And the point of this is that --

6 THE COURT: Does that make the Massachusetts District
7 Court case wrong --

8 MR. HERZ: To the extent --

9 THE COURT: -- or is it just distinguishable?

10 MR. HERZ: Well, Your Honor distinguished it, and I
11 agree with that. But to the extent, if any, it stands for the
12 proposition that you don't have to be able to sue the defendant,
13 this defendant, it's wrong. I don't think Your Honor has to
14 rule that way, because it is distinguishable. The argument they
15 are making is unsustainable.

16 THE COURT: All right. So on your contract claim,
17 that third-party beneficiary claim.

18 MR. HERZ: Yes.

19 THE COURT: What law do you think applies --

20 MR. HERZ: D.C. law.

21 THE COURT: D.C. law?

22 MR. HERZ: I think D.C. law.

23 THE COURT: Why not English law, as the contract says?

24 MR. HERZ: Because this -- because the contract has no
25 relation whatsoever to England.

1 THE COURT: But you've got two parties, IFC here
2 looking at D.C. law, and the CGPL in India maybe looking at
3 India law, and why isn't it a reasonable outcome for those
4 parties to decide that their contract should be subject to
5 English law, which India law has some connection to, and they've
6 made a reasonable decision that English law should apply to the
7 contract? Why isn't that something that I should honor? And if
8 I honor it, there's no third-party beneficiary claim that can be
9 brought. You would agree with that. Right?

10 MR. HERZ: Yeah. But the reason you shouldn't honor
11 it is because -- two reasons. One, the case law that we cited
12 about not honoring -- there has to be a connection. But the
13 other is we are not -- you know, we are third-party beneficiaries,
14 but we weren't kind of making that determination. So it's not
15 exactly as in --

16 THE COURT: No, I know you're third-party beneficiaries,
17 but that doesn't give you some right to say, well, Judge, we
18 weren't parties to the contract, so you should ignore the terms
19 of the contract.

20 MR. HERZ: No. The law says that there has to be
21 a real connection, and our position is that there's just no
22 connection.

23 THE COURT: A reasonable relationship is the test.

24 MR. HERZ: Yeah.

25 THE COURT: All right. Anything else you want to

1 say on the failure to state a claim with respect to that claim
2 or the lender-liability claim? I mean, I'm not sure what the
3 claims really are here.

4 In one sense, there are two claims. One's a breach of
5 contract, third-party beneficiary instigated claim, and the
6 other is a lender-liability claim. But in a sense, these are
7 negligence claims -- after you get by the breach of contract,
8 these are negligence claims with respect to funding, negligent
9 funding, or negligent -- I will call it oversight or supervision
10 or approval. And is that the better way to look at your claims?

11 MR. HERZ: Yeah. I wouldn't --

12 THE COURT: You also have "nuisance" thrown in there,
13 but nuisance isn't really a freestanding cause of action; it's
14 really more a relief provision under D.C. law.

15 MR. HERZ: Well, on that last point, that's an open
16 question in D.C., but in general, Your Honor's correct that
17 these are essentially straight negligence claims -- apart from
18 the contract claim, but straight negligence, straight aiding and
19 abetting claims under ordinary theories, you know, ordinary,
20 everyday, black-letter, common-law tort theories.

21 Their argument is that there's something special about
22 lenders, but they cite nothing that would say that the ordinary
23 rules of duty, causation, any of those things, they cite nothing
24 that says that that doesn't apply to lenders. What they cite
25 are cases that brought a different theory. They brought an

1 instrumentality theory and said you have control, but we're not
2 making an instrumentality argument. We're making a straight
3 tort argument.

4 And it's important to recognize that even if they were
5 right that there was some immunity rule for lenders, our case
6 is still not just about a lender. They are also liable because
7 they approved the design that caused the harm.

8 THE COURT: All right. Anything else, Mr. Herz?

9 MR. HERZ: No. I don't think so.

10 THE COURT: All right. Thank you.

11 MR. HERZ: Thank you, Your Honor.

12 THE COURT: Mr. Skurnik, I'll give you 60 seconds
13 if you have anything you need to say in response to anything
14 Mr. Herz has to say, and I literally mean 60 seconds, because
15 I want to hear last from Mr. Foster.

16 MR. SKURNIK: Thank you, Your Honor. I will be very
17 brief. I understand the concern the Court has about the fact
18 that there was some conduct that is alleged in the complaint
19 in the United States as well as some conduct alleged in India.
20 I'll just say that that's also the case in both *Sachs* and *Nelson*.

21 THE COURT: Is there anything as substantial as
22 approving the design? What about -- what if in *Sachs* there had
23 been allegations in the complaint that the entity in Austria --
24 I can't remember the full name of the entity, the train,
25 state-owned train system -- had in the United States developed

1 and approved, with the help of United States companies, the
2 design of the platform? Would that have changed things with
3 respect to the *Sachs* case?

4 MR. SKURNIK: It would not affect the "based upon"
5 inquiry, but it may affect -- so it may affect whether the
6 commercial activity was located in Austria or the United States.
7 You know, it may have enough substantial contact to be commercial
8 activity in the United States, but the lawsuit would still be --
9 so if the answer is that that commercial activity is in fact in
10 Austria rather than --

11 THE COURT: Well, the lawsuit would then be based on
12 faulty design and construction, the design having occurred in
13 the U.S., the construction having occurred in Austria, and the
14 injury then resulting having occurred in Austria. But is it a
15 foregone conclusion that in that hypothetical the Supreme Court
16 would say, no, it's still the gravamen is in Austria?

17 MR. SKURNIK: I think the answer is yes, and the
18 reason is that in *Sachs* the Supreme Court instructed that
19 when you have a tort case, the focus of the gravamen inquiry
20 should be at the place of injury. And because of that --

21 THE COURT: They didn't say that was determinative,
22 did they?

23 MR. SKURNIK: So what they said was, "Rather than
24 individually analyzing each of the" -- sorry. So this is
25 *Sachs* describing what happened in *Nelson* previously.

1 "Rather than individually analyzing each of the Nelsons'
2 causes of action, we zeroed in on the core of their suit, the
3 Saudi sovereign acts that actually injured them," and then went
4 on to state that "the essentials of an personal injury narrative
5 will be found at the point of contact." So I think that's
6 pretty clear instruction.

7 THE COURT: So here, aren't the acts of IFC that
8 injured the plaintiffs acts with respect to design approval
9 that occurred in the United States?

10 MR. SKURNIK: And those acts are not what actually
11 injured the plaintiff in this case. What actually injured the
12 plaintiff was the construction and the operation of the power
13 plant in India.

14 THE COURT: Also the design, but go ahead.

15 MR. SKURNIK: Certainly the design was a predicate
16 to the construction and the operation, much the same way that
17 the hiring of the plaintiff in *Sachs* --

18 THE COURT: Oh, I don't think -- you're going to
19 *Nelson*, not *Sachs*, with the hiring.

20 MR. SKURNIK: Yes, Your Honor.

21 THE COURT: I don't think there's the same space
22 between the hiring and the torture that occurred in *Nelson*.
23 I don't think there's the same space between design and
24 construction. They're much closer together than hiring an
25 employee and then subsequent torture of that employee.

1 MR. SKURNIK: Yes. I'd agree with that, Your Honor.
2 The space between is different, but again, the focus is not
3 on the significance between the two but where the injury took
4 place. Under that analysis here, that's in India. It's not
5 IFC's actions in the United States.

6 THE COURT: All right. Thank you, Mr. Skurnik.

7 MR. SKURNIK: Thank you.

8 THE COURT: Mr. Foster, a few minutes.

9 MR. FOSTER: Thank you, Your Honor. Before I get
10 to responding to my friend's arguments on the other side and
11 some of your questions during his argument, I want to address
12 two questions that I had when I sat down, or that Your Honor had.
13 Paragraph 17 of the Sturtevant Declaration -- it's on page 4 --
14 negotiations of the contract were in Mumbai, India. Paragraphs
15 20 to 21 of the Sturtevant Declaration, which is on page 5, it
16 was signed in Mumbai. So that was the negotiations, and it was
17 signed in Mumbai.

18 THE COURT: Thank you, Mr. Foster.

19 MR. FOSTER: So let me respond to a few of my
20 friend's arguments. He focuses on you only have to look at
21 IFC's conduct.

22 THE COURT: He wants to narrow it down just to look
23 at IFC's conduct, and the two pieces of conduct are, one, the
24 funding decision --

25 MR. FOSTER: Right.

1 THE COURT: -- which seems to have, I think, fairly
2 speaking, activity in both D.C. in India; and then the approval
3 of designs that he thinks took place here in D.C.

4 MR. FOSTER: That's right. And I think that's wrong.
5 I think that's the wrong analysis. I think my friend is
6 pointing you in the wrong direction with regard to *Sachs* and
7 *Nelson*, because they didn't say just look at defendant's
8 conduct. They cannot put that word in there.

9 In fact, *Nelson* says, quote -- this is at 356 -- "We begin
10 our analysis by identifying the particular conduct on which
11 Nelson's action is based for purposes of the Act." So, again,
12 that goes right to the core or what the actual injuries are.

13 Let me give you an example. I can't take credit for this.
14 I think I heard this during the -- I read this during the
15 arguments in *Nelson*.

16 THE COURT: The point here being the action may be
17 based on the conduct of IFC, but there is no claim without also
18 looking at what happened in India.

19 MR. FOSTER: I think that's wrong. I think that you
20 have to look at the conduct that actually injured the plaintiff.

21 THE COURT: I was trying to say something that was
22 helpful to you, but go ahead.

23 (Laughter)

24 MR. FOSTER: Then you're right.

25 (Laughter)

1 I probably misunderstood, Your Honor. I think what you
2 do is look at the conduct that actually injured the plaintiffs
3 and where that is, and if you can't get past that, you don't get
4 to commercial, and you don't get to sovereign.

5 So, for an example, let's say in *Nelson*, instead of
6 Hospital Corporation of America that did the recruiting or the
7 hiring or those activities in the United States, let's say Saudi
8 Arabia did that on behalf of Qatar. They recruited employees
9 in the United States and whatever HCA, those activities are, and
10 then they went to Qatar and all of the sovereign activities, the
11 tortious activities that occurred and injured the Nelsons in
12 *Nelson* were done by the Qatar government. Right?

13 If you change the fact pattern that way, and the Nelsons
14 only sued Saudi Arabia and the complaint was the same -- Saudi
15 Arabia did X, and this happened to me in Qatar -- the outcome is
16 not different. You would still look at Qatar. You would still
17 look at what happened in Qatar and say that's actually what
18 injured the plaintiffs. That's what *Nelson* teaches us. It
19 doesn't say, well, we only sued Saudi Arabia, so we can only
20 look at --

21 THE COURT: Even if the claim was limited to an
22 accusation that Saudi Arabia failed to consider the consequences
23 appropriately and the risks when it hired Nelson for location
24 in Qatar, which is notoriously known for torturing people who
25 disagree with any policies or decisions of the government.

1 MR. FOSTER: I think that's right. It wouldn't change
2 it. They had this claim in *Nelson*. They had this failure to
3 warn. Look, you recruited me in the United States, and you had
4 this duty to warn me. There was a employment contract signed in
5 Florida. You had this duty to warn me that this might happen or
6 this will happen or there's a probability, and the court didn't
7 look at that.

8 They said the core of the suit are the activities in Saudi
9 Arabia, and in my hypothetical, it would be Qatar. But they
10 didn't say, well, we can't look at what Qatar did; we can only
11 look at what Saudi Arabia did because that's the sovereign that
12 you sued. So I don't think you get to a different outcome.

13 I think if you took the common person off the street and
14 you had them read the complaint and asked them what the gravamen
15 of the suit was, I think they would say the suit is in India.
16 I think that's pretty clear from their suit.

17 THE COURT: Although we don't have a reasonable-man
18 test to apply here. But I said the same thing earlier when I
19 was asking a question, so I understand.

20 MR. FOSTER: One of Your Honor's questions was --
21 I want to make sure IFC's argument is clear here. I wouldn't
22 say that it's the last act. I don't know if it's the last act
23 that injured, but it's certainly where the entity was injured.
24 I think that's really important, and I think the colorful
25 example that they used in *Sachs* was the letter from Justice

1 Holmes to Professor Frankfurter about the narrative of the
2 personal injury is where the boy got his fingers pinched.

3 THE COURT: Pinching fingers.

4 MR. FOSTER: Right. They didn't ask any questions
5 about who let the child into the room where he got his fingers
6 pinched or who gave him the object or who shut the door. They
7 didn't ask those types of questions. It was where did the boy
8 get his fingers pinched. And I think that simple analysis right
9 here is very straightforward, is inescapable here, is that the
10 place where the actual injury occurred is in --

11 THE COURT: Does that makes the breach-of-contract
12 claim a little different than a tort claim?

13 MR. FOSTER: It does.

14 THE COURT: Because that's a principle that applies to
15 tort actions. But with breach of contract, the breach may occur
16 where the contract was entered into.

17 MR. FOSTER: I think it does. I think it's the gravamen.

18 THE COURT: That's India here to some extent as well.

19 MR. FOSTER: I agree, but I think the gravamen test
20 can be a little bit different when it is a breach-of-contract
21 case, because when you're looking at where the injury, the
22 conduct that actually injured the parties, is it where the --
23 you know, the circumstances of where the contract is and what
24 the actual breach is and where that occurred, perhaps that might
25 change the gravamen in a tort case, which this one fundamentally

1 is. I think my friend on the other side said he has essentially
2 straight negligence claims except for this third-party claim.
3 I think that you have to look to India.

4 My friend on the other side said IFC has the power to force
5 the bar over to come into compliance or to redesign the plan.
6 I don't think that's right. He couldn't come up with a contract
7 provision that says that. I don't think there is one. In fact,
8 as I think my friend on the other side knows, the borrower has
9 already prepaid the loan in this action, so there's no more
10 outstanding disbursement obligations that IFC has.

11 The other thing I want to point out is there's been some
12 back and forth between Your Honor and my friend on the other
13 side about rights or obligations under the contract. The
14 contract between IFC as the lender and CGPL as the borrower
15 didn't provide any obligations on the side of IFC. It only
16 had certain rights that they could exercise or not exercise.
17 So I think --

18 THE COURT: Did IFC, in fact, exercise a right
19 here to review and approve the design of the project?

20 MR. FOSTER: No. I don't think that's in the
21 contract. As --

22 THE COURT: That wouldn't be in the -- that might be
23 in the contract in terms of an opportunity/right/obligation, but
24 the question is, as a matter of fact, is that what IFC did here?
25 It's an allegation, and don't I have to accept the allegation as

1 made that IFC actually reviewed the design of the project and
2 approved that design?

3 MR. FOSTER: Well, under 12(b)(1), you have to accept
4 the allegations as true, but you could consider other things
5 outside the allegations in the complaint. Certainly, we've put
6 before Your Honor the contract. You also have a lot of the
7 negotiation history and what was reviewed and things like that
8 before you.

9 But to go back to what I was saying closer to the beginning
10 of my argument, when Your Honor raised a similar point about
11 allegations raised in the complaint, my friend on the other
12 side had said a few times they approved this, the design and
13 everything, and I don't think they're very consistent throughout
14 their complaint. If you look at paragraph 165 of their
15 complaint, it says -- and I'll try to read slowly.

16 THE COURT: 165?

17 MR. FOSTER: Yes, Your Honor.

18 THE COURT: I'm there.

19 MR. FOSTER: "Despite acknowledging adequacy of the
20 selection of the cooling system, the large volume of seawater
21 intake, and impacts on marine, environment/fishery among the
22 issues justifying the Category A designation, the IFC executed
23 a loan agreement and disbursed funds without a final design for
24 the cooling system and without a final design for the location
25 of intake and outfall channels in place."

1 Later, reading further down after it says "on information
2 and belief," it says, "Without any imposing meaningful
3 conditions on what that design should ultimately look like or
4 any specifications on how potential impacts and risks should and
5 must be identified, mitigated, and prevented once the design was
6 selected." So that indicates that there was no approval of the
7 design.

8 Paragraph 169. "IFC negligently, recklessly, and/or
9 intentionally allowed the client to design, construct, and
10 operate a cooling system intended to discharge wastewater at
11 a temperature," and it goes on.

12 So I think that those allegations contradict a little
13 bit what my friend said about what we could or couldn't do or
14 did or didn't do. But, again, I don't think Your Honor has to
15 get into any of those questions because the place where the
16 boy got his fingers pinched is in India.

17 Your Honor asked questions before about what claims could
18 possibly -- could parties bring against IFC. I would say
19 perhaps tortious interference of a contract claim. A third
20 party maybe could to do that. Perhaps there was some -- when
21 IFC was negotiating with CGPL, if there was some other party
22 that thought their rights were affected, that might be a claim
23 that could be -- you know, depending on the types of allegations,
24 that might be something that could be brought, maybe some sort
25 of fraud claim. But this claim sounding in tort, the injury and

1 the conduct that actually injured the plaintiffs was all in
2 India.

3 Unless Your Honor has anything further, I would ask that
4 the Court find that you lack subject-matter jurisdiction for
5 plaintiffs' cause and dismiss it with prejudice. Thank you.

6 THE COURT: All right. Thank you.

7 Mr. Herz, I have two questions. What's the name of the
8 other power plant? Adani?

9 MR. HERZ: Yes, Your Honor.

10 THE COURT: How can I enter any relief directed to
11 the future with respect to the Adani power plant?

12 MR. HERZ: The only thing we said in our complaint
13 is that, you know, to the extent, if any, IFC has any influence
14 over Adani, they should exercise it.

15 THE COURT: That's pretty attenuated.

16 MR. HERZ: Yeah. So the point being, though, that if
17 they can't, they can't.

18 THE COURT: All right. Second question is, where in
19 the complaint specifically, so that I can refer to it, is the
20 allegation with respect to the approval of design? Mr. Foster
21 has just identified some paragraphs that seem to be a little
22 inconsistent with IFC actually approving the design. Where's
23 the allegation in the complaint with respect to actual approval
24 of the design?

25 MR. HERZ: I'm looking at page 7 of our brief.

1 THE COURT: Your brief? No, I want it in the
2 complaint. What you say in your brief has to be relying on
3 some facts in the record --

4 MR. HERZ: Well, what it's citing is the contract.

5 THE COURT: All right.

6 MR. HERZ: There's a number of cites at page 7 to the
7 contract.

8 THE COURT: So it's a contract -- so it's just a
9 citation to the provisions of the contract. You're not saying
10 as a matter of fact what happened.

11 MR. HERZ: Of whether they approved it?

12 THE COURT: Right.

13 MR. HERZ: So we haven't had discovery. Whether
14 they actually approved it, we believe they did. I believe we
15 allege they did. The contract says that they were to approve
16 it. We haven't had discovery to, you know, to know that the
17 plans crossed their desk and they stamped it approved.

18 THE COURT: All right. Well, I can look at the
19 provisions of the contract.

20 MR. HERZ: And also, at the top of page 7, it talks
21 about the contract and the binding provisions and their ability.

22 THE COURT: All right. Thank you.

23 MR. HERZ: Thank you, Your Honor.

24 THE COURT: The case is submitted. I will review
25 everything you've submitted, both in terms of the written briefs

1 and supporting materials and the arguments here today. I thank
2 you for the quality of those submissions and arguments. I can't
3 promise a particular time when I'm going to decide it, but I'll
4 try to be diligent and get it decided in a reasonable period of
5 time, and we'll see what happens thereafter, either in this
6 court or other courts. Thank you all.

7 (Proceedings adjourned at 11:26 a.m.)
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan A. Wayne
BRYAN A. WAYNE