

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BUDHA ISMAIL JAM, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:15-CV-612-JDB
	)	
INTERNATIONAL FINANCE	)	
CORPORATION,	)	
	)	
Defendant.	)	
	)	

**STATEMENT OF INTEREST  
OF THE UNITED STATES OF AMERICA**

This action involves farmers, fisherman, a village, and a trade union, all located in India, who have brought suit against the International Finance Corporation (“IFC”), a public international organization, seeking compensation for alleged harms suffered in India. The United States previously participated in this case in the Supreme Court, where it set forth its views on the proper interpretation of the International Organizations Immunities Act (“IOIA”), 22 U.S.C. § 288 *et seq.* The Supreme Court held that, under the IOIA, the IFC enjoys the same immunity from suit and judicial process as is available to foreign sovereigns today under the Foreign Sovereign Immunities Act (“FSIA” or “the Act”), 28 U.S.C. § 1602 *et seq.* See *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759 (2019).

Now before this Court once again, plaintiffs assert that IFC does not enjoy immunity because its alleged conduct falls within the FSIA’s commercial activity exception. See 28 U.S.C. § 1605(a)(2). The United States has a substantial interest in the proper interpretation of the FSIA, as litigation against foreign states and international organizations in U.S. courts can have

implications for the United States' foreign relations and can affect the reciprocal treatment of the U.S. Government in the courts of other nations. Moreover, the United States is a member country of the IFC, and is its largest shareholder.

The United States thus respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517<sup>1</sup> to inform the Court of its view that this lawsuit does not fall within the commercial activity exception to immunity. As explained more fully below, this action is centered on harm suffered by plaintiffs in a foreign country and caused by a nonparty in that foreign country. The action is not “based upon” any commercial activity or conduct in connection with commercial activity in the United States. Indeed, although the plaintiffs name IFC as the only defendant and attempt to focus on IFC's lending decisions in the United States, the “gravamen” or “core” of the lawsuit is the allegedly tortious conduct in India that caused the plaintiffs' harm. Accordingly, the Court should hold that IFC is immune from this suit because its alleged conduct does not come within the commercial activity exception.

### **BACKGROUND**

The plaintiffs in this action are farmers, fishermen, a village, and a trade union, all located in India. Compl. ¶¶ 13–15, ECF No. 1. In April 2015, they brought this lawsuit against IFC, raising claims related to the construction and operation of a power plant in Gujarat, India, known as the Tata Mundra Ultra Mega Power Plant (the “Tata Mundra project”). *Id.* ¶ 1. According to the complaint, IFC helped finance construction of the plant, in 2008 lending \$450 million to Coastal Gujarat Power Limited (“CGPL”), the Indian company that built and now operates the

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<sup>1</sup> That statute authorizes the Attorney General of the United States to send any officer of the Department of Justice “to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” 28 U.S.C. § 517.

plant. *Id.* ¶¶ 2, 56. IFC has developed certain performance standards to manage environmental and social risks from its investments, and these standards allegedly were incorporated into IFC’s loan agreement for the Tata Mundra project. *Id.* ¶ 128.

The plaintiffs allege that, despite these standards and IFC’s loan agreement, the Tata Mundra project has had negative social and environmental impacts on their community. *Id.* ¶¶ 74–115. They further allege that they filed a complaint with IFC’s internal compliance ombudsman, and that the ombudsman concluded IFC had failed adequately to consider the potential environmental and social risks that might result from the project. *Id.* ¶¶ 141–156. According to the plaintiffs, IFC is responsible for these harms because IFC financed and enabled the construction of the plant and failed to prevent it from causing harm, or to take corrective action after the harm occurred. *Id.* ¶¶ 176–92, 199, 300. Plaintiffs contend that IFC’s actions and inactions gives rise to claims for negligence, negligent supervision, public and private nuisance, trespass, and breach of contract. *Id.* ¶¶ 294–332.

In March of 2016, this Court dismissed plaintiffs’ complaint, concluding that, pursuant to the IOIA, IFC enjoyed “virtually absolute immunity” from suit and had not waived its immunity. *Jam v. Int’l Fin. Corp.*, 172 F. Supp. 3d 104, 108, 112 (D.D.C. 2016) (quoting *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998)). The D.C. Circuit affirmed, similarly concluding that IFC enjoyed “virtually absolute immunity” from suit and had not waived its immunity. *Jam v. Int’l Fin. Corp.*, 860 F.3d 703, 704–05 (D.C. Cir. 2017) (quoting *Atkinson*, 156 F.3d at 1340).

The Supreme Court reversed, concluding that the IOIA provides international organizations that have been designated by Executive Order, such as IFC, with the same scope of immunity as is currently enjoyed by foreign sovereigns under the FSIA, including the exceptions

to immunity outlined in that Act. *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). The United States participated in the Supreme Court as Amicus Curiae, and, in addition to setting forth its views on the IOIA, “stated that it has ‘serious doubts’ whether petitioners’ suit, which largely concerns allegedly tortious conduct in India, would satisfy the ‘based upon’ requirement” of the FSIA’s commercial activity exception. *Id.* at 772.

After the Supreme Court issued its decision, the D.C. Circuit vacated its prior judgment, reversed this Court’s prior judgment, and remanded to this Court for proceedings consistent with the Supreme Court’s opinion. *Jam v. Int'l Fin. Corp.*, 760 F. App’x 11 (D.C. Cir. 2019).

IFC then filed a renewed motion to dismiss, arguing, among other things, that IFC was immune from suit under the standards set forth in the FSIA. *See* Mem. in Supp. of Def.’s Renewed Mot. to Dismiss 9, ECF No. 40-1. Plaintiffs responded that IFC’s alleged conduct related to the Tata Mundra project falls within the commercial activity exception to the FSIA. Pls.’ Mem. in Opp. to Def.’s Renewed Mot. to Dismiss (“Pls.’ Opp.”) 11, ECF No. 45.

## ARGUMENT

### **I. IFC’s Alleged Conduct Does Not Come Within The FSIA’s Commercial Activity Exception.**

The FSIA governs the circumstances under which international organizations that have been designated by Executive Order are immune from suit in courts in the United States. *Jam*, 139 S. Ct. at 772. The Act establishes that foreign states shall be immune from suit in U.S. courts unless one of the Act’s express exceptions to immunity applies. 28 U.S.C. § 1604. One of these exceptions, known as the commercial activity exception, provides that

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in

connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). By requiring that the lawsuit be “based upon” acts in the United States or causing a direct effect in the United States, the commercial activity exception permits suits against foreign sovereigns only where a sufficient nexus exists between the United States and the allegations giving rise to the action. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976) (referring to § 1605(a)(2) as encompassing “[c]ommercial activities having a nexus with the United States”). Here, plaintiffs rely on the first two prongs of the exception, asserting that their action is “based upon” IFC’s commercial activity in the United States and conduct in the United States in connection with commercial activity outside of the United States. Compl. ¶ 195. But as set forth below, their arguments are squarely foreclosed by Supreme Court precedent.

In *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), the Supreme Court explained how to determine whether the action is “based upon” acts in the United States. According to the Court, for purposes of the exception, “an action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit.” *Id.* at 396. The plaintiff in *Sachs*, a U.S. citizen, had purchased a railway pass in the United States, over the Internet, and then traveled to Austria, where she was injured when she slipped and fell while boarding an Austrian state-owned railway. *Id.* at 393. The plaintiff argued that her causes of action were “based upon” her purchase of the railway pass in the United States because the sale of the pass in the United States was an element of each of her claims. But the Court rejected that argument, and concluded that “the conduct constituting the gravamen” of the complaint “plainly occurred abroad,” thus failing § 1605(a)(2)’s territorial-nexus requirement. *Id.* at 396. The Court stressed that all of the plaintiff’s claims turned “on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria.” *Id.*

The Court's reasoning in *Sachs* relied heavily upon its earlier decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). The plaintiffs in *Nelson*, a married couple, sued Saudi Arabia and its state-owned hospital for torts against the husband, allegedly in retaliation for his reporting of hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants. *Id.* at 352–54. The Court concluded that, although the husband's recruitment and hiring in the United States to work at the hospital "led to the conduct that eventually injured" him, those actions were "not the basis" for the lawsuit. *Id.* at 358. Rather, it was the husband's jailing and alleged torture in Saudi Arabia that formed the gravamen of the complaint. *Id.* The Court emphasized that "[e]ven taking each of the [plaintiffs'] allegations about [the] recruitment and employment as true, those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Id.* Further, although there were 16 causes of actions at issue in *Nelson*, the Court "did not undertake [] an exhaustive claim-by-claim, element-by-element analysis," but instead "zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them." *Sachs*, 136 S. Ct. at 396.

Like in *Sachs* and *Nelson*, the "gravamen" of plaintiffs' lawsuit here is tortious activity that allegedly took place and injured plaintiffs outside of the United States. The conduct alleged to have caused plaintiffs' injuries—the construction and operation of the power plant—occurred in India. It is that conduct that forms the core of the lawsuit, and without it, there would be nothing for which to recover. The complaint alleges that "numerous critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions," were made in the United States, and that IFC's funding for the project likewise was disbursed in the United States. Compl. ¶¶ 197–98. But even taking those allegations as true, "those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Nelson*, 507 U.S. at 358.

Moreover, although IFC's decision to finance the project and its disbursement of funds is a link in the chain of events that "led" to the harm described in the complaint, the "gravamen" of the lawsuit still is conduct in India. As the Supreme Court explained in *Sachs*, "the essentials of a personal injury narrative will be found at the point of contact." 136 S. Ct. at 397 (citation omitted). Here, the construction and operation of the power plant—not IFC's financing—are what "actually injured" the plaintiffs. *Id.* at 396. Like the sale of the train ticket in *Sachs* or the recruitment and hiring in *Nelson*, IFC's loan to the Indian company CGPL is an antecedent step that alone cannot entitle the plaintiffs to relief. *See Nelson*, 507 U.S. at 358 (explaining that the "torts, and not the arguably commercial activities that preceded their commission, form the basis for the [plaintiffs'] suit").

Plaintiffs attempt to escape the geographical thrust of this action by alleging that "IFC's responses to allegations of harm caused by the Project . . . were decided, directed and/or approved from the headquarters in Washington, D.C." Compl. ¶ 199. They assert that IFC's internal compliance ombudsman identified many of the environmental and social harms asserted by the plaintiffs, and that IFC in Washington thereafter failed to remedy the injuries. *Id.* ¶ 153–56, 299, 300. But this theory fares no better. The "core" of plaintiffs' suit, *Sachs*, 136 S. Ct. at 396, remains CGPL's construction and operation of the plant—the conduct giving rise to plaintiffs' injuries. That conduct serves as the "foundation for . . . [plaintiffs'] claims and, therefore, also the gravamen of [their] suit." *Nn aka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 28 (D.D.C. 2017) (Bates, J.). Even if IFC's response to the harms could have mitigated them in some fashion, it is still the

events in India that form the “essentials” of the lawsuit, and without which plaintiffs would suffer no injury.<sup>2</sup> *Sachs*, 136 S. Ct. at 397.

It makes no difference that the plaintiffs plead claims for negligence and negligent supervision, which purport to be based on IFC’s alleged failure to take steps in the United States to prevent or mitigate the harm in India. Compl. ¶¶ 294–306. The Supreme Court rejected similar attempts at “artful pleading” in *Sachs* and *Nelson*. *Sachs*, 136 S. Ct. at 396 (rejecting argument based on strict liability claim for failure to warn, because “however *Sachs* frames her suit, the incident in [Austria] remains at its foundation”); *Nelson*, 507 U.S. at 363 (similarly rejecting argument based on failure to warn claim as “merely a semantic ploy” and a “feint of language”). The same holds true for the plaintiffs’ third-party beneficiary claim for breach of contract. Compl. ¶¶ 325–332. Indeed, the plaintiff in *Sachs* brought claims for breach of implied warranties of merchantability and fitness, which sounded in contract, but the Court nevertheless deemed the gravamen of the suit to be the “wrongful conduct and dangerous conditions in Austria.” *Sachs*, 136 S. Ct. at 396; *cf. Nn aka*, 238 F. Supp. 3d. at 29 (“Although *Nn aka*’s complaint includes a claim for breach of contract, it sounds substantially—maybe even primarily—in tort.”). It would be contrary to the Supreme Court’s reasoning in *Sachs* and *Nelson* to permit plaintiffs to evade the FSIA’s restrictions by recasting actions in India as a negligent failure to act or breach of contract in the United States.

Nor does it matter that plaintiffs have decided to sue only IFC in this action. Plaintiffs insist that the “gravamen” analysis must focus on the actions of the named defendant, and not

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<sup>2</sup> Moreover, even if IFC could have taken steps to mitigate the plaintiffs’ alleged injuries in India, IFC’s failure to take such action is not “a commercial activity carried on in the United States” by IFC, nor is it an act “performed in the United States in connection with a commercial activity” of IFC outside the country. 28 U.S.C. § 1605(a)(2).

nonparties (such as CGPL). Pls.' Opp. 13. But the fact that plaintiffs named only IFC, which did not itself build or operate the plant that allegedly harmed the plaintiffs, cannot shift the gravamen of the lawsuit to IFC's actions in Washington. The lawsuit still is "based upon" conduct which caused harm in India, regardless of whether the plaintiffs choose to sue other defendants. More generally, a plaintiff cannot gerrymander the "gravamen" analysis by declining to name a party that directly caused the harm and instead naming only an entity that is steps removed. Such an approach would make little sense, particularly given the purpose of the "based upon" requirement to allow suits against foreign sovereigns (or international organizations) only where a sufficient nexus exists between the United States and the allegations at the center of the action. *See Nelson*, 507 U.S. at 357 (reading the phrase "based upon" as demanding "something more than a mere connection with, or relation to").

At bottom, the allegations in this case turn on and center around allegedly tortious conduct by a private party that took place in another country and resulted in injuries abroad. IFC's actions in the United States are not the basis or core of plaintiffs' lawsuit. Accordingly, the allegations of this case fall outside the bounds of the commercial activity exception.

### **CONCLUSION**

The Court should hold that IFC is immune from this suit because its alleged conduct does not come within the FSIA's commercial activity exception.

Dated: September 13, 2019

Respectfully submitted,

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