ORAL ARGUMENT NOT YET SCHEDULED

No. 20-7092

Consolidated with No. 20-7097

United States Court of Appeals for the District of Columbia Circuit

BUDHA ISMAIL JAM, ET AL.,

Plaintiffs-Appellants,

v.

INTERNATIONAL FINANCE CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF DEFENDANT-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, the undersigned counsel for Appellee International Finance Corporation ("IFC") certify the following:

1. Parties and Amici

Except for the following, all parties and amici appearing before the District Court and in this Court are listed in the Brief for Plaintiffs-Appellants.

Amici for Plaintiffs-Appellants:

Center for International Environmental Law, Accountability Counsel, Center for Constitutional Rights, International Accountability Project, Inclusive Development International, Namati, William Easterly, Erica R. Gould, and Jennifer M. Green.

Defendant-Appellee:

International Finance Corporation. The undersigned counsel certifies, to the best of his knowledge and belief, that IFC is an international organization, as defined in and designated under the International Organizations Immunities Act, the members of which are 185 countries, and that IFC is not owned by any parent corporation or entity.

2. Rulings Under Review

Plaintiffs seek review of the District Court's order denying their Motion to Amend the Complaint under Rule 15 or, in the Alternative, Under Rules 15 and 59(e) and the District Court's order granting IFC's Renewed Motion to Dismiss the Complaint: *Jam v. Int'l Fin. Corp.*, No. 15-cv-612 (JDB), 2020 U.S. Dist. LEXIS 152855 (D.D.C. Aug. 24, 2020), JA1736-53, and *Jam v. Int'l Fin. Corp.*, 442 F. Supp. 3d 162 (D.D.C. 2020), JA1488-1510.

3. Related Cases

This Court previously heard this case in 2017 (No. 16-7051), when Plaintiffs sought review of the District Court's order granting IFC's Motion to Dismiss, dismissing the case for lack of subject-matter jurisdiction under the International Organizations Immunities Act, 28 U.S.C. § 288a(b), and holding that IFC had not waived its immunity. *Jam v. Int'l Fin. Corp.* (*Jam I*), 860 F.3d 703 (D.C. Cir. 2017). The U.S. Supreme Court reversed that decision, holding only that immunity under § 288a is subject to the exceptions enumerated in the Foreign Sovereign Immunities Act ("FSIA"), leaving this Court's decision on waiver intact, and remanding for further consideration consistent with its opinion. *Jam v. Int'l Fin. Corp.* (*Jam II*), 139 S. Ct. 759 (2019).

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GLOSSARY

FSIA:	Foreign Sovereign Immunities Act of 1976
IFC:	International Finance Corporation

JURISDICTIONAL STATEMENT

Applying the Supreme Court's decision in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), the District Court concluded that it lacked subject-matter jurisdiction over Plaintiffs' action. That is, Plaintiffs' action does not fall within the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2), because it is not "based upon" acts in the United States. And, applying this Court's decision in *Jam I*, 860 F.3d 703, 708 (D.C. Cir. 2017), the District Court held that IFC had not waived its immunity from this suit. Consequently, the District Court dismissed Plaintiffs' case and denied Plaintiffs' subsequent motion to amend their Complaint on futility grounds because Plaintiffs' additional allegations cannot alter the core of this case: that Plaintiffs were allegedly injured by conduct in India.

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The core narrative of Plaintiffs' case is that an Indian company constructed and operates a power plant in India that allegedly caused Indian residents environmental harms in India. Plaintiffs sued IFC in Washington, D.C., the location of its headquarters, alleging that IFC's loan and failure to intervene injured them. The two issues on appeal are:

1. Whether the District Court correctly concluded that the gravamen of Plaintiffs' case is the conduct that "actually injured" them: the construction and operation of the Plant in India.
2. Whether this Court's prior ruling that IFC did not waive its immunity remains binding.

Because the answer to both questions is yes, this Court should affirm the District Court's dismissal of Plaintiffs' case for lack of subject-matter jurisdiction.

STATUTES AND TREATIES

Except for those contained in the addendum to this brief, pertinent statutes, treaties, and other sources are contained in the Brief for Plaintiffs-Appellants.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's legal conclusions that this case does not fall within the commercial-activity exception because it is not "based upon" conduct in the United States and that Plaintiffs' proposed amendment, therefore, would be futile. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35 (D.C. Cir. 2014); *Scahill v. District of Columbia*, 909 F.3d 1177, 1181 (D.C. Cir. 2018).

STATEMENT OF THE CASE

I. COASTAL GUJARAT POWER LIMITED BUILDS AND OPERATES A POWER PLANT IN INDIA

In 2006, Tata Power, an Indian power company, presented IFC with a proposal for Tata Power "to build, own, and operate the first 'ultramega' power plant in India, which faced a crippling shortage of power in states near Gujarat." JA0642, ¶ 14; *see* JA0656-57. At that time, IFC's analysis showed that "only 10 percent of India's power was generated by the private sector, and India required an additional 100,000 megawatts of power to sustain its growth over the next ten years." JA0642, ¶ 14. The Coastal Gujarat Plant (the "Plant") was intended to help remedy the "enormous demand supply gap" in India's power sector. JA0657. Tata Power's subsidiary, Coastal Gujarat Power Limited, designed, constructed, and operates the Plant. *See* JA0550, JA0656.

The total cost of the Plant was approximately $4.2 billion. JA0658. Coastal Gujarat financed its project with $1 billion of private investments, $1.5 billion in loans from local banks, an $800 million loan from Korean export agencies, a $450 million loan from the Asian Development Bank, and a $450 million loan from IFC. JA0515.

II. IFC IS A MULTILATERAL DEVELOPMENT BANK THAT PROMULGATES QUASI-REGULATORY ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS

Established in 1956 by multilateral treaty, the IFC Articles of Agreement ("IFC Articles"), IFC is a public international organization that has 185 member states, including the United States and the Republic of India. *See* IFC Articles, Dec. 5, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117. IFC is designated to receive immunity under the International Organizations Immunities Act. Exec. Order No. 10,680, 3 C.F.R. §§ 86-87 (Supp. 1956).

Like the International Bank for Reconstruction and Development (the "World Bank"), IFC's members have a collective role in determining its policies. IFC's highest governing body is the Board of Governors, which consists of one Governor and one Alternate Governor appointed by each member country. JA0695. With few exceptions, the Board of Governors delegated its powers to the Board of Directors, which is "responsible for the conduct of the general

operations" of IFC. JA0696. Members of the Board of Directors are elected or appointed by members of IFC. *Id*. The President of the World Bank is the President of IFC, and the President also chairs IFC's Board of Directors. JA0697.

IFC's Board of Directors adopted the Sustainability Framework which includes a Sustainability Policy and ten Performance Standards on Environmental and Social Sustainability ("E&S Standards") to help ensure that IFC's borrowers assess, manage, and monitor environmental and social impacts associated with their projects. *See* JA0641, ¶ 5; *see also* JA1278 (E&S Standards). The E&S Standards apply generally to all of IFC's loans. Because the E&S Standards are imposed on borrowers, they have, in effect, a regulatory impact on international development finance.

Parties who have grievances regarding IFC-financed projects may file a complaint with the Compliance Advisor Ombudsman (the "Ombudsman"). JA0643, ¶ 24. The Ombudsman is an "office, independent of IFC . . . management, that reports to" the World Bank's President. *Id*. ¶ 22. Complaints brought before the Ombudsman are not legal claims, nor were they intended to be. JA0645, ¶ 39. The Ombudsman is not a court, and does not determine or assign responsibility or liability. The Ombudsman "ascertains whether IFC . . . has followed its own environmental and social policies and

procedures." *Id*. If the Ombudsman concludes that IFC did not act in accordance with its standards, it will publish a public report and monitor any follow-on actions. JA0650, ¶ 71.

III. COASTAL GUJARAT AND IFC NEGOTIATE AND EXECUTE THE LOAN AGREEMENT IN INDIA

IFC's agreements to fund the Plant were negotiated and executed in India. On July 30, 2007, IFC and Coastal Gujarat signed a Mandate Letter. JA0642, ¶ 16. IFC signed the letter in New Delhi, India; Coastal Gujarat signed in Mumbai, India. *Id*. IFC published its Summary of Proposed Investment in the Plant, placing the investment under the IFC infrastructure department for Asia and the Pacific. *Id*. ¶ 18. Negotiations on the IFC Loan Agreement (the "Agreement") were held in Mumbai, India. *Id*. ¶ 17. After receiving approval from its Board, IFC signed the Agreement on April 24, 2008, in Mumbai, India through IFC's Director for South Asia, who was based in New Delhi, India. *Id*. ¶¶ 19-20. On November 7, 2008, IFC signed an amendment to the Agreement through its officer in New Delhi, India. *Id*. ¶ 21.

Under the Agreement, Coastal Gujarat would design, construct, and operate the Plant in Gujarat, India. *See* JA0550-51. In fact, IFC's Articles prohibited IFC from managing the construction or operation of the Plant. JA0693 (under Article III, § 3(iv), IFC "shall not assume responsibility for managing any enterprise in

which it has invested and shall not exercise voting rights for such purpose or for any other purpose which, in its opinion, properly is within the scope of managerial control").

As with other IFC loans, Coastal Gujarat agreed to adhere to the E&S Standards and an Environmental and Social Action Plan that Coastal Gujarat developed to implement them. JA0474; JA0582. The Agreement gave IFC options to remedy violations of the incorporated E&S Standards, including cancelling the loan, but it did not dictate how or even whether IFC must respond to a violation. *Id*.

IV. ONE OF THE PLAINTIFFS FILES A COMPLAINT WITH THE OMBUDSMAN

In June 2011, one of the Plaintiffs—Machimar Adhikar Sangharsh Sangathan ("MASS"), a Gujarati non-profit organization—filed a complaint with the Ombudsman. JA0651, ¶ 80. The Ombudsman's January 2012 assessment report noted that MASS understood "that part of the threat to the livelihoods of the wider Mundra coast's fisher folk stems from sources beyond Tata Power in the wider industrialization of the coast, and thus cannot be resolved by [Coastal Gujarat] and the community alone." JA0652, ¶ 81. On August 22, 2013, the Ombudsman issued an audit report finding that IFC was out of compliance with

some of its internal policies. JA0653, ¶ 87. The Ombudsman process is ongoing. JA0654, ¶ 96.

V. PLAINTIFFS BRING CLAIMS TO THE UNITED STATES

Attempting to leverage the Ombudsman's report, in 2015, Plaintiffs sued IFC in U.S. federal court. Plaintiffs are (i) MASS, (ii) residents and citizens of Gujarat, India, and (iii) a Gujarati local government entity. JA0021 (Compl. ¶¶ 13-15). Plaintiffs' action alleges "property damage, environmental destruction, loss of livelihoods, and threats to human health arising from the Tata Mundra Ultra Mega Power Plant . . . in Kutch District in Gujarat, India." JA0017 (Compl. ¶ 1).

Plaintiffs single out IFC—one lender in the multibillion-dollar Indian project—as the sole defendant. Plaintiffs claim that IFC *caused* their harms by negligently approving the loan to Coastal Gujarat, negligently deciding to loan Coastal Gujarat funding for the Plant, and then by negligently failing to force Coastal Gujarat's compliance with the E&S Standards. JA0048, JA0063, ¶¶ 138, 190 (alleging that IFC was negligent in failing to mitigate harms by not "threatening to terminate its financing of the Project"); JA0060, ¶¶ 176-77 (alleging that the "Project would not have gone forward without IFC funding, and thus the harm to the Plaintiffs would not have occurred without IFC funding"); JA0061-62, ¶¶ 179, 187 (alleging that IFC failed to adequately monitor and

supervise Coastal Gujarat's construction and operation of the Plant); JA0063, ¶ 191 (alleging that IFC was negligent in failing to follow its internal policies).

At the same time, Plaintiffs acknowledge that Coastal Gujarat designed, constructed, and has operated the Plant. JA0024, ¶ 28 ("The plant was developed by Coastal Gujarat Power Limited . . . ."); JA0058, ¶ 169 (alleging that IFC "allowed [Coastal Gujarat] to design, construct, and operate" the Plant's cooling system).

IFC has no commercial relationship with Plaintiffs, and their claims demonstrate that their alleged harms emanate from conduct in India. As the District Court found, "[t]he complaint itself clearly identifies the construction and operation of the plant as the ultimate source of plaintiffs' injuries." JA1749. For example, Plaintiffs' negligence claim is based on (1) how the Plant stores, transports, and burns coal, (2) the discharge of thermal pollution from the Plant's cooling system, (3) the location and construction of the Plant's intake and outflow channels, (4) the Plant's emissions, and (5) salt water intrusion into the groundwater from the Plant's construction (JA0084, ¶ 297)—each of which is an activity occurring at the Plant site in India.

Plaintiffs' public nuisance claim is based on (1) discharge from the Plant's outflow channel into the local waters, (2) fugitive coal dust from the coal storage

yards and coal conveyor belt used by both the Plant and the adjacent Adani plant, (3) fly ash, bottom ash, and other coal combustion byproducts and air pollutants from the Plant, (4) noise pollution from the Plant, and (5) salt water intrusion into the groundwater around the Plant (JA0089-90, ¶ 313)—each of which is an activity occurring at the Plant site in India.

Plaintiffs do not allege that Coastal Gujarat was IFC's agent. And although Plaintiffs add the conclusory allegation that IFC "approved" Coastal Gujarat's designs, the only fact they allege in support of this claim is that IFC disbursed money after it reviewed Coastal Gujarat's proposal. JA1574-75, ¶¶ 234-39.

VI. THIS COURT HOLDS THAT IFC IS ABSOLUTELY IMMUNE FROM SUIT AND DID NOT WAIVE ITS IMMUNITY

In 2015, IFC moved to dismiss Plaintiffs' Complaint. *See Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 106 (D.D.C. 2016). The District Court held that the International Organizations Immunities Act, 22 U.S.C. § 288a(b), provided absolute immunity and that IFC did not waive its immunity from suit. *Id*. This Court affirmed on all points, including that Article VI, § 3, of IFC's Articles did not waive immunity here because Plaintiffs' case fails the "corresponding benefit" test. *Jam I*, 860 F.3d 703, 704, 706-08 & n.3 (D.C. Cir. 2017).

Plaintiffs petitioned this Court to rehear the panel's ruling *en banc*, reasserting the same arguments. Pet. Reh'g 12-16, *Jam I*, No. 16-7051 (D.C. Cir.

July 24, 2017). No member of the Court voted to grant rehearing. Order, No. 16-7051 (D.C. Cir. Sept. 26, 2017).

Then Plaintiffs petitioned the Supreme Court for review, presenting two questions: (1) does § 288a(b) incorporate the FSIA and its exceptions, and (2) what are the rules governing international-organization immunity, including whether *Mendaro* was wrongly decided. Pet. Writ Cert. 11-20, 24-27, No. 17-1011 (U.S. Jan. 19, 2018). The Supreme Court granted review only on the first issue, leaving this Court's ruling on the second issue intact. *See* Order List, 548 U.S. 2 (May 21, 2018).

The Supreme Court held that § 288a(b)'s text provides international organizations with immunity that is "continuously link[ed]" to the immunities provided to sovereigns under the FSIA. *Jam II*, 139 S. Ct. 759, 768 (2019). As a result, international organizations may be subject to suit under the FSIA's enumerated exceptions to sovereign immunity.

IFC, amici, and Justice Breyer in dissent expressed concerns that subjecting international organizations like IFC to suits based upon their commercial activities would impede their work and flood U.S. courts with foreign-plaintiff suits. *Id*. at 771; *id* at 778-79 (Breyer, J., dissenting); Oral Arg. Tr. 31-32, *Jam II*, No. 17-1011 (discussion between Breyer, J. and Assistant Solicitor General Ellis). The United

States advocated a narrower interpretation of the commercial-activity exception as applied to international organizations which focused on claims by U.S. citizens and residents. Oral Arg. Tr. 31-32, *Jam II*.

Declaring these concerns "inflated," the majority saw no "good reason to think that restrictive immunity would expose international development banks to excessive liability." *Jam II*, 139 S. Ct. at 771-72. The Court not only noted that some lending activity of multilateral development banks may not be commercial, it also clarified that "even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit." *Id*. at 772. Further narrowing its ruling and casting doubt over the sufficiency of the allegations in this very case, the Supreme Court cited the United States' "'serious doubts' whether [Plaintiffs'] suit, which largely concerns allegedly tortious conduct in India, would satisfy the 'based upon' requirement." *Id*.

The Supreme Court did not address *Mendaro* or this Court's findings on waiver in its decision. The Court then remanded the case for further proceedings consistent with its opinion. *See id*.

VII. IFC MOVES AGAIN TO DISMISS PLAINTIFFS' COMPLAINT BASED ON A LACK OF SUBJECT-MATTER JURISDICTION

After remand, Plaintiffs did not seek leave to amend their Complaint. On June 19, 2019, IFC filed a renewed motion to dismiss. JA0380. IFC argued that Plaintiffs' suit did not fit within the FSIA's commercial-activity exception because its gravamen—the foundation upon which Plaintiffs' suit is based—is not in the United States; rather, Plaintiffs' suit is based on the construction and operation of the Plant in India. JA0390. IFC further argued that, even if the Court determined that the gravamen of Plaintiffs' suit was not the conduct that actually injured them but was instead IFC's alleged loan-monitoring activities, that conduct was not "commercial" under the FSIA. JA0394-97.

Plaintiffs argued that the gravamen of their suit was IFC's U.S.-based decision to provide the loan to Coastal Gujarat, or at a minimum IFC's loan-monitoring activities. JA1165-66; JA1183. Plaintiffs also contended that even if their actual injuries were caused by the Plant—and, by definition, the company that designed, built, and operates the Plant—the District Court could not consider actions by anyone other than IFC in assessing the gravamen of their Complaint. JA1176.

The United States, through the U.S. Department of Justice, submitted a Statement of Interest, agreeing with IFC that Plaintiffs' case is based upon the

conduct that actually injured them in India, and that "a plaintiff cannot gerrymander the 'gravamen' analysis by declining to name a party that directly caused the harm." JA1321.

The District Court granted IFC's motion, holding that "the commercial activity exception does not apply here because plaintiffs have failed to establish that their suit is based upon conduct carried on in the United States." JA1488-89; JA1496 n.2 ("[T]he Court resolves this case . . . specifically on whether plaintiffs' suit is based upon conduct carried on or performed in the United States . . . ."). It reasoned that the gravamen of a case is usually located where the plaintiff was injured, and Plaintiffs have not alleged sufficient facts that IFC's failure to monitor and supervise the Plant project occurred in the United States. JA1496.

After the Court dismissed Plaintiffs' claims and closed the case—and nearly five years after filing the original complaint—Plaintiffs moved to reopen the judgment and amend their complaint under Rules 59(e) and 15(a) of the Federal Rules of Civil Procedure. Mot. Amend, Mar. 12, 2020 (ECF No. 63). The proposed Amended Complaint purported to add more allegations of U.S.-based negligent lending and failure to monitor. *See* JA1668-87. IFC and the United States both opposed Plaintiffs' motion because their "new" allegations could not change the gravamen of Plaintiffs' suit: the construction and operation of the Plant

in India. JA1725-26; Mem. Opp'n Am. Compl. 12, Mar. 26, 2020 (ECF No. 64). Moreover, the United States agreed with IFC that, even if the gravamen was IFC's failure "to ensure adherence to its own sustainability standards and prevent social and environmental harms," that conduct "is not a 'commercial activity' under the FSIA." JA1730.

The District Court denied the Motion to Amend as futile, finding that Plaintiffs could not succeed "under any theory of the case that they present" because the allegedly harmful conduct occurred in India. JA1749-50. In so doing, the District Court conducted a gravamen analysis of Plaintiffs' proposed Amended Complaint and clarified that the gravamen of Plaintiffs' claims is "what actually injured plaintiffs: the construction and operation of the Tata Mundra Power Plant in India." JA1749.

The District Court also rejected Plaintiffs' argument that the court may consider only conduct by a named defendant, even if the conduct that actually injured the plaintiff was committed by a third party. JA1744-45. The District Court noted that this bright-line rule would run counter to the purpose of the FSIA: "[P]ermitting a plaintiff in an FSIA action to switch jurisdiction off and on, merely by adding or removing named defendants, would give rise to exactly the sort of

evasion of the FSIA's restrictions about which *Sachs* and *Nelson* warned." JA1746.

SUMMARY OF ARGUMENT

For decades, courts have applied the FSIA's commercial-activity exception the same way. First, the court identifies the gravamen of the action—the core *conduct* that the action is "based upon." Then, the court determines if the exception's independent requirements are satisfied: The core conduct must be "commercial activity," "by" or "of" the foreign state, and have the necessary geographic connection to the United States. § 1605(a)(2). The Supreme Court emphasized that these requirements are separate and distinct. *Jam II*, 139 S. Ct. at 772. "[I]f the 'gravamen' of a lawsuit is tortious activity abroad, then the suit is not 'based upon' commercial activity within the meaning of the FSIA's commercial activity exception." *Id*. Nor would it have occurred in the United States. This case "largely concerns alleged tortious conduct in India." *Id*.

In line with *Saudi Arabia v. Nelson* and *OBB Personenverkehr AG v. Sachs*, the District Court's "based upon" analysis focused on *what* conduct in this tort-narrative case "actually injured" Plaintiffs, not *who* committed that conduct. JA1748-49. The District Court concluded that the conduct that actually injured Plaintiffs—the core of Plaintiffs' suit—was the construction and operation of the

Plant in India. JA1749. Thus, the commercial-activity exception does not apply, and Plaintiffs' Complaint should be dismissed for lack of subject-matter jurisdiction.

Plaintiffs reject this straightforward analysis and suggest that this Court redraw the "based upon" analysis along lines that benefit them in two ways.

First, Plaintiffs argue that the "based upon" analysis requires courts to ignore all conduct committed by entities other than the sovereign being sued. The District Court concluded that this artificial restriction would allow plaintiffs to switch on FSIA jurisdiction by declining to name a foreign defendant. To give jurisdictional significance to such a switch would effectively thwart the FSIA's manifest purpose and its interpretation by the Supreme Court. But the "based upon" analysis considers only *what* conduct actually injured Plaintiffs; § 1605(a)(2)'s other distinct requirements address *who* committed the gravamen and *where*.

Second, Plaintiffs argue that the gravamen test requires nothing more than establishing some nexus between a plaintiff's claims and a sovereign's U.S. commercial activity. Their argument mirrors the Ninth Circuit's since-rejected "nexus" test, which a plaintiff could satisfy by merely connecting a sovereign's U.S. commercial activity "with the conduct that gives rise to the plaintiff's cause of

action." *Sachs*, 577 U.S. at 32 (quoting the Ninth Circuit's decision). The Supreme Court overruled the Ninth Circuit's test in *Sachs* precisely because it would allow plaintiffs to avoid the FSIA's geographical restrictions.

In proposing this new test, Plaintiffs ignore the Supreme Court's guidance that, in ordinary personal-injury tort suits—like the one Plaintiffs bring—the gravamen ordinarily will be found at the "point of contact." That reading is required by *Nelson* and *Sachs* and can adapt to other, more complicated cases where the gravamen may not be the place of injury. This case—which resembles *Sachs* in every material way—is not one of those complicated cases.

For the first time, Plaintiffs take their argument one step further, arguing that the "based upon" analysis is somehow equivalent to a personal jurisdiction, minimum-contacts test. Such an interpretation of "based upon" cannot square with this Court's precedent, the plain text of § 1605(a)(2), or various other provisions of the FSIA.

Plaintiffs' proposed reinterpretation of the commercial-activities exception would expand the exception to swallow the rule, rendering the FSIA largely meaningless to IFC and the many other organizations and foreign sovereigns with offices in the United States. This would open the floodgates to litigation against international organizations, undermining the entire purpose of the FSIA and the

Supreme Court's narrow ruling and reservations in this case, while establishing entirely new and unintended theories of lender liability.

The District Court's decision should be affirmed for an additional reason. Even if this case were based upon IFC's loan-monitoring activities, IFC's alleged failure to enforce its own standards is not "commercial activity" under the FSIA. As the United States argued in its Second Statement of Interest, IFC's decisions as to when, how, and whether to enforce its E&S Standards, which were promulgated pursuant to its Articles, are akin to a sovereign's decisions on enforcement of regulations promulgated under law.

Finally, Plaintiffs reprise their argument that IFC's Articles "expressly waive" its immunity from this suit. Plaintiffs' argument relies on the same authorities and the same flawed reasoning as in 2017. This Court's 2017 waiver ruling is binding law of the case; moreover, the Supreme Court did not surreptitiously overrule *Mendaro* in *Jam II*. Accordingly, there was no waiver of immunity, express or implied.

The District Court was correct: Plaintiffs' case does not fall within the commercial-activity exception to immunity because the conduct that is alleged to have actually injured them occurred in India. This Court should affirm.

ARGUMENT

I. IFC RETAINS ITS IMMUNITY UNDER THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT

Residents and citizens of India, allegedly injured by the construction and operation of a power plant in India by an Indian company, brought their claims halfway around the world to seek redress against one lender that provided a loan amounting to 10.6% of the $4.2 billion of project costs. Because Plaintiffs' action is based upon the construction and operation of the power plant in India, Plaintiffs cannot satisfy the elements of the FSIA's commercial-activity exception. The District Court's decision should be affirmed.

A. When Analyzing The FSIA's Commercial-Activity Exception, Courts First Consider *What Conduct* Allegedly Injured The Plaintiff, Not *Who* The Defendants Are Or *Where* The Conduct Occurred

IFC has immunity from suit under the International Organizations Immunities Act[1] unless Plaintiffs prove that their action fits under one of the FSIA's enumerated exceptions. *Jam II*, 139 S. Ct. at 772. The sole exception under which Plaintiffs bring their claims is the commercial-activity exception,

[1] IFC also has immunity from suit under its Articles. Because IFC remains immune from suit under the International Organizations Immunities Act, this Court need not address IFC's charter-based immunity.

which abrogates immunity in any case in which "the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2);[2] *see also Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1222 (11th Cir. 2018) ("All three of the commercial-activity exception's clauses apply only when the action is 'based upon' the conduct that the exception describes." (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993))); *Odhiambo*, 764 F.3d at 37 (same).

The Supreme Court created a straightforward methodology for the application of the exception's elements. *First*, courts must determine the conduct upon which the action is based, i.e., the "gravamen" or "foundation" of the suit. *Then*, courts must consider whether each of the exception's independent, distinct, and necessary requirements is met, i.e., is the conduct commercial activity, did the conduct occur in the United States, and was the conduct "by" or "of" the sovereign. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 356-58 (1993) (starting "by identifying the particular conduct upon which the Nelsons' action is 'based' for purposes of the Act" and then considering the other elements of the exception).

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[2] Plaintiffs do not argue that the third clause (direct effect in the United States) applies. JA1495 n.1; JA1738-39.

If the plaintiff fails to establish any element, the exception does not apply. *Sachs*, 577 U.S. at 29, 37-38. For example, in *Sachs*, the exception did not apply because the gravamen of that action—the "tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria"—occurred outside of the United States. *Id*. at 35. Likewise, in *Nelson*, the exception did not apply because the gravamen of that action—Nelson's imprisonment and torture—was not "commercial activity." *Nelson*, 507 U.S. at 351, 359-62 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-14 (1992)).

And in *Maritime International Nominees Establishment v. Republic of Guinea*, the exception did not apply because gravamen of that action—conduct in breach of a contract to create a shipping joint venture with Guinea—was not "carried on by" Guinea, but rather was attributable to an American shipping company. 693 F.2d 1094, 1104-07 (D.C. Cir. 1982) (concluding that the plaintiff's allegations that Guinea "directed" the American shipping company's acts and held several meetings in the U.S. relating to the contract were insufficient); *see also De Csepel v. Republic of Hungary*, No. 10-cv-1261, 2020 U.S. Dist. LEXIS 82728, at *29, *34 (D.D.C. May 11, 2020) (holding that while "the activities of an agent may be attributed to the principal for jurisdictional purposes," the conduct of an

instrumentality of Hungary could not be attributed to Hungary itself where the instrumentality was a juridically separate entity).

In the face of this unequivocal precedent, Plaintiffs contend that the straightforward analysis from *Nelson* and *Sachs* leads to the "absurd" result that actions "based entirely on commercial activity in the U.S." where a "*third party* and the sovereign both acted in the United States," could "fail the commercial activity exception" if the gravamen is not conduct *by* or *of* the sovereign. Opening Br. 35. But the exception's plain text requires this result. *See* 28 U.S.C. § 1605(a)(2) (under either clause 1 or 2, requiring a suit to be "based upon" conduct "by the foreign state" or in connection with conduct "of the foreign state").

B. Plaintiffs' Case Is "Based Upon" The Conduct That Actually Injured Them: The Construction And Operation Of The Plant In India

All of Plaintiffs' claims turn on the allegedly tortious conduct in India; without it, Plaintiffs could recover nothing. *See, e.g.*, JA1749 ("The complaint itself clearly identifies the construction and operation of the plant as the ultimate source of plaintiffs' injuries."); *see also* JA0017; JA0020; JA0034-41; JA0073; *see supra* Statement of the Case § IV. And despite Plaintiffs' singular focus on IFC's activities in the United States, none of those activities would entitle Plaintiffs to

anything if not for the conduct in India. *See Sachs*, 577 U.S. at 34 ("Without the existence of the unsafe boarding conditions in Innsbruck, there would have been nothing to warn Sachs about when she bought the Eurail pass."); *Berg v. Kingdom of the Netherlands*, No. 2:18-cv-3123, 2020 U.S. Dist. LEXIS 84489, at *43-45 (D.S.C. Mar. 6, 2020) (finding that, despite that plaintiff had alleged certain U.S. commercial activity "that allegedly gives rise to" his claims, "the essentials of this lawsuit occurred in the Netherlands"). The United States reached the same conclusion: "The conduct alleged to have caused plaintiffs' injuries—the construction and operation of the power plant—occurred in India." JA1318.

As directed by *Nelson* and *Sachs*, the District Court first examined the conduct upon which Plaintiffs' action is based: "the construction and operation of the Tata Mundra Power Plant in India." JA1749. Then, finding this case "factually analogous" to *Sachs*, the District Court concluded that the commercial-activity exception did not apply because the core conduct was in India. *See* JA1748-50 ("[E]ven though plaintiffs have asserted claims alleging omissions in the United States, ultimately, all of their claims turn on the same tragic episode in India, allegedly caused by wrongful conduct and dangerous conditions in India, which led to injuries suffered in India." (quotation marks and alterations omitted) (quoting *Sachs*, 577 U.S. at 35)). That ends the matter.

1. The Gravamen Of A Personal Injury Case Is The Conduct That "Actually Injured" The Plaintiff, Regardless Of Whether That Conduct Is "By" Or "Of" A Sovereign

The facts and reasoning of *Sachs* supports the District Court's conclusion that the gravamen of Plaintiffs' case is in India. While in the United States, Sachs purchased her Eurail pass from the Rail Pass Experts, a Massachusetts-based dealer. *Sachs*, 577 U.S. at 30. Later, while boarding a train in Innsbruck, Austria, Sachs "fell from the platform onto the tracks" and was grievously injured. *Id*. Sachs brought her personal-injury suit in the United States against OBB Personenverkehr AG ("OBB"), the Austria-owned train operator, claiming that OBB was liable under negligence, contract, and strict-liability theories. *Id*. Sachs argued that her action fit within the FSIA's commercial-activity exception because the action was based upon her purchase of the Eurail pass. *Id*. at 31.

The Ninth Circuit agreed with Sachs. It found that her suit was "based upon" the sale of the Eurail pass and that Sachs had "show[n] a nexus between her claims and the sale." *Sachs v. Republic of Austria*, 737 F.3d 584, 599-600 (9th Cir. 2013), *rev'd sub nom*. 577 U.S. 27, 34-35 (2015). According to the Ninth Circuit, this result was consistent with a sentence from *Nelson*, which observed that "based upon" is "naturally" read "to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Sachs*, 737 F.3d at 599

(quoting *Nelson*, 507 U.S. at 357); *see also id*. at 601 (concluding that Sachs's case was based upon the sale because it was "relevant to proving [her] claims"). The Ninth Circuit also concluded that the ticket sale was commercial conduct "of" OBB because Sachs established a common-law agency relationship between OBB and the Rail Pass Experts as ticket seller. *Id*. at 593-94.

On review by the Supreme Court, OBB proposed two questions. First, whether the Ninth Circuit properly attributed the ticket sale to OBB. Pet. for Writ of Cert. at i, 5, *Sachs*, 577 U.S. 27 (No. 13-1067). And second, whether Sachs's suit was in fact "based upon" the ticket sale. *Id*.

The Supreme Court skipped the first issue—*who* committed the act—and reversed the Ninth Circuit based solely on the second—*what* conduct formed the basis of Sachs's suit. *Sachs*, 577 U.S. at 33 ("We agree with OBB on the second point and therefore do not reach the first."). Instead of looking to "[plaintiff's] theory of the case" or "individually analyzing each of the [plaintiff's] causes of action" to determine what an action is "based upon," courts find the gravamen by examining what *conduct* "actually injured" the plaintiff. *Id*. at 34-35 (quoting *Nelson*, 507 U.S. at 357). And in tort cases, the Supreme Court explained that the gravamen will usually be "found at the point of contact—the place where the boy got his fingers pinched"—not at previous points along the causal chain of events

that merely "led to" the injury. *Id.* at 35-36 (quotation marks omitted); *see also* JA1751.

Thus, "[h]owever Sachs frame[d] her suit, the incident in Innsbruck remain[ed] at its foundation," the gravamen of her suit was found "in Austria," and the exception did not apply. *Sachs*, 577 U.S. at 36. That the Court's ruling "would immunize" OBB from liability, even if it was deemed to have performed U.S.-based commercial acts (Opening Br. 1-2, 17), was a non-issue for the Court. *Sachs*, 577 U.S. at 33. As the District Court held twice, *Sachs* dictates the result here. JA1748-49; JA1505. Plaintiffs' action is based on allegedly tortious conduct in India, and the commercial-activity exception does not apply.

2. Plaintiffs' Defendant-Only "Nexus" Gravamen Test Mirrors The Ninth Circuit's Test That Was Rejected By The Supreme Court

Plaintiffs revive Sachs's argument here. Faulting the District Court for considering Coastal Gujarat's conduct in constructing and operating its Plant in India, Plaintiffs contend that the gravamen analysis is limited "to the sovereign's acts for which it was sued" because the inquiry examines only whether there is a "nexus between *that defendant's* U.S. commercial activity and the wrong." Opening Br. 21-22 (emphasis in original); *see also id.* at 1 (arguing that the exception should apply if "the sovereign's conduct for which it is liable is

commercial and located in the United States"); *id*. at 16 ("[A] claim is 'based upon' the *defendant's* acts for which it is sued.").

In fact, Plaintiffs borrow their reasoning—and indeed much of their language—from the dead-letter gravamen test from the Ninth Circuit, which *Sachs* rejected. *Compare Sachs*, 737 F.3d at 599 ("To establish that her action is 'based upon' OBB's commercial activity, Sachs must show a nexus between her claims and the sale of the Eurail pass."), *with* Opening Br. 29 (arguing that the exception is satisfied if "the sovereign's relevant acts are commercial and have a geographical nexus to the United States").

Plaintiffs also parrot the Ninth Circuit's "overreading of one part of one sentence in *Nelson*" to stress the form of their claims over the substance. *Sachs*, 577 U.S. at 34; Opening Br. 37. Plaintiffs' argument that "the Supreme Court directed courts to look to the elements of the claim under the plaintiff's theory of liability" (Opening Br. 17) and "*which* of *the sovereign*'s acts was the basis of the claim" (Opening Br. 26 (emphasis in original)) not only is incompatible with *Sachs*'s holding, but also it ignores what *Sachs* expressly did *not* reach. The Supreme Court concluded that the exception did not apply because Sachs's case was not based upon conduct in the United States, and it "[did] not reach" the

question of which party was responsible for the commercial activity that was central to the plaintiff's liability theories. *Sachs*, 577 U.S. at 33.

And Plaintiffs' argument departs even further from *Sachs* in light of *why* the Court focused on what conduct "actually injured" Sachs, and not every step in the causal chain. *Id*. at 34. "[A]ny other approach would allow plaintiffs to evade the Act's restrictions through artful pleading." *Id*. at 36. Here, like *Sachs*, Plaintiffs have attempted to evade the FSIA's strict geographic limits by framing their personal-injury claims around a U.S.-based act or omission earlier in the causal chain, "thereby 'effectively thwarting the Act's manifest purpose.'" *Id*. (alteration omitted) (quoting *Nelson*, 507 U.S. at 363).

The Supreme Court has repeatedly rejected the same arguments that Plaintiffs make here, including in *Nelson*. As the District Court observed, Justice Kennedy's partial dissent argued that the gravamen analysis should focus on Nelson's *claims* against Saudi Arabia. JA1741 n.2 (quoting *Nelson*, 507 U.S. at 371 (Kennedy, J., concurring in part and dissenting in part)). The majority rejected this approach because it would allow plaintiffs to "recast" their claims to avoid the FSIA's geographic limits. *Nelson*, 507 U.S. at 363.

As the United States put it here, and the District Court agreed, allowing Plaintiffs to "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" would be inconsistent with *Sachs*. JA1321; *see* JA1746 (concluding that allowing Plaintiffs "to switch jurisdiction off and on" through pleading tactics would allow "evasion of the FSIA's restrictions about which *Sachs* and *Nelson* warned"). In fact, to hold otherwise and find that IFC's alleged shortcomings in monitoring its borrowers' compliance with contractual sustainability standards are an exception to the immunities provided by the FSIA would render meaningless the entirety of the FSIA as applied to IFC and other international organizations headquartered in the United States.

Plaintiffs encourage a watered-down reading of *Sachs* as merely "focuse[d] on whether plaintiffs' claims are properly labeled." Opening Br. 40. Nothing in *Sachs* suggests that the result would have been different if Sachs brought a different "*type*" of claim (*id.*), other than the various negligence, contract, and strict product-liability claims she had. As Plaintiffs do here, Sachs claimed that critical omissions occurred in the United States. *See Sachs*, 577 U.S. at 30, 35-36 (Sachs's strict liability claim alleged a failure to warn in the United States). Where the Court gave any significance to the "type" of claims Sachs brought, it was only to stress that the gravamen of a tort-narrative case, like Plaintiffs' suit, is based at the "point of contact." *Id.* at 36; *see also Nnaka v. Federal Republic of Nigeria*,

238 F. Supp. 3d 17, 29 (D.D.C. 2017) ("Because most torts are not complete until the plaintiff suffers an injury, the locus of the tort will usually be 'the place where the injury occurred.'" (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004))).

In some non-tort cases, the elements of the plaintiff's claims, rather than the "point of contact," may be a better guide for the gravamen analysis. *See* JA1334-35 (arguing that "the nominal claims in a tort case do not necessarily reflect the gravamen"). *Sachs* reserved the possibility that the last event or conduct that actually injured the plaintiff may not be the gravamen in select cases. JA1747 (quoting *Sachs*, 577 U.S. at 36 n.2) (speculating on cases that might fit *Sachs*'s footnote). In pure contract cases, for example, the gravamen is almost invariably formation and breach, not damages suffered as a consequence of the breach. *Id.* (citing *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 466 (D.C. Cir. 2017) and *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013)); *see also Petersen Energia Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 207 (2d Cir. 2018) (holding that the conduct that actually injured the plaintiff was "Argentina's breach of a commercial obligation").

But Plaintiffs' action is not "one of those unusual cases where something other than the conduct that actually injured the plaintiffs constitutes the gravamen of the complaint." JA1747. The "critical facts of this case" are "that an Indian company built and operated a power plant in India that allegedly caused Indian plaintiffs environmental and social harms in India." JA1751 (quoting JA1726).

3. Plaintiffs' Argument That Courts Must Limit The Gravamen Analysis To Conduct By The Sovereign Lacks Any Support

Plaintiffs propose a bright-line test to limit a court's gravamen analysis to only the sovereign's conduct finds no support in any decision of this or any other court. And in fact, when presented with the same argument by these same Plaintiffs as amicus curiae in *Zhan v. World Bank*, this Court affirmed the district court's order holding that the World Bank was immune from suit. *See* 828 F. App'x 723, 724 (D.C. Cir. 2020), *cited in* Opening Br. 25 n.7; Amicus Br. *Jam* Pls. at 12-14, *Zhan*, No. 19-7166 (D.C. Cir. Apr. 27, 2020).[3]

[3] Plaintiffs claim that "neither party briefed the issue" of whether "third party conduct can constitute the gravamen." Opening Br. 25 n.7. That is incorrect. *See* Bank Br. 12, *Zhan*, No. 19-7166 (D.C. Cir. June 5, 2020) (arguing that Plaintiffs had "offer[ed] to the Court the same legally flawed theory that they have offered elsewhere, attempting to serve their own interest in a likely appeal in *Jam*").

Some of Plaintiffs' own cases recognize that the gravamen may be conduct that is not "by" or "of" the sovereign. The remaining cases either predate *Sachs* or do not focus on the "based upon" analysis.

In *Maritime International* (Opening Br. 33), this Court concluded that the commercial-activity exception did not apply when the actions of an American shipping company could not be attributed to Guinea. 693 F.2d at 1104-07. In *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System Co.* (Opening Br. 23), the Sixth Circuit held that "the district court must determine which—if any—of the complained-of actions are legally attributable to AVIC," the Chinese instrumentality, "or, instead, if those actions are legally attributable to Yubei," a private company. 807 F.3d 806, 814 (6th Cir. 2015). Of course, if a court determines that the complained-of actions are not attributable to the sovereign, the suit would not be "based upon" conduct of the sovereign and would not satisfy the commercial-activity exception.

Plaintiffs also cite the district court's opinion in *Dale v. Colagiovanni* (Opening Br. 24), in which the plaintiffs sued the Holy See and others alleging RICO and other claims. 337 F. Supp. 2d 825, 830 (S.D. Miss. 2004). After the district court denied-in-part the defendants' motion to dismiss, the Fifth Circuit reversed, directing the district court to analyze whether the gravamen was acts

"by" the Holy See. *See Dale v. Colagiovanni*, 443 F.3d 425, 428-30 (5th Cir. 2006). And Plaintiffs' reliance on *Rodriguez v. PAHO*, No. 1:20-cv-0928, 2020 U.S. Dist. LEXIS 208904 (D.D.C. Nov. 9, 2020), *appeal filed*, No. 20-7114 (D.C. Cir. Dec. 9, 2020), *cited in* Opening Br. 24-25, is also misplaced. That opinion cites the District Court's application of *Sachs* and *Nelson* here with *approval*. *Id*. at *27. In fact, the court would have reached the same result as the District Court did here because IFC's alleged acts only "led to the conduct that eventually injured" Plaintiffs. *Id*. (quoting JA1744).[4]

Plaintiffs' remaining cases are distinguishable or pre-date *Sachs*. For example, Plaintiffs misquote *MMA Consultants 1, Inc. v. Republic of Peru*, 719 F. App'x 47 (2d Cir. 2017), in which the Second Circuit followed the guidance from *Sachs*: "[W]e do not conduct the gravamen test by engaging in an 'exhaustive claim-by-claim, element-by-element analysis' of a plaintiff's suit. Instead, we ask one simple question: what action of the foreign state 'actually injured' the plaintiff?" *Id*. at 52. Rather than quote this language, Plaintiffs assert that other circuits "have similarly asked 'wh[ich] action of the *foreign state* 'actually injured'

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[4] The court's claim-by-claim analysis is inconsistent with *Nelson* and *Sachs*. *See Sachs*, 577 U.S. at 34 (clarifying *Nelson*, "we did not undertake such an exhaustive claim-by-claim, element-by-element analysis of the Nelsons' 16 causes of action").

the plaintiff." Opening Br. 23-24 (purporting to quote from *MMA Consultants 1*, 719 F. App'x at 52 (alteration in original)). Plaintiffs signal that they "altered" the Second Circuit's "emphasis," but they actually altered its message. *MMA* did not ask "which" of the state's alleged acts was the gravamen—a word that assumes at least one of them was—but "what" action by the sovereign (if any) actually injured the plaintiff. 719 F. App'x at 52. If the gravamen was not conduct "of" or "by" the foreign state, the answer to this question is "none."

None of Plaintiffs' cases holds that courts are prohibited from considering third-party conduct.[5] *See Transamerican S.S. Corp v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985) (did not consider whether conduct by a third party could be the gravamen), *cited in* Opening Br. 22;[6] *Santos v. Compagnie*

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[5] Plaintiffs cite *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), *cited in* Opening Br. 22, but this Court has recognized that *Nelson* "rejected" *Gilson*'s focus on a causal nexus between Ireland's alleged "enticement" of the plaintiff and his claims. *In re Papandreou*, 139 F.3d 247, 253 n.4 (D.C. Cir. 1998). However, *In re Papandreou*'s statement that "a suit is based only upon the elements of the cause of action," *id.*, is no longer good law. Tellingly, since *Sachs*, no decision in this Circuit has cited *In re Papandreou* for this proposition.

[6] In fact, this Court did not evaluate each defendants' acts separately because they were linked by an agency relationship. *Compare* 767 F.3d at 1003 (concluding that SDR "act[ed] on behalf of its principal"), *with* Opening Br. 23 (claiming that SDR was found "not immune" on the basis of its refusal of payment). And the Court's gravamen analysis did not follow a defendant-by-defendant or claim-by-claim approach, as Plaintiffs suggest. Opening Br. 23. The case was based upon

Nationale Air France, 934 F.2d 890 (7th Cir. 1991) (applying a defunct one-element-based nexus gravamen analysis), *cited in* Opening Br. 24; *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (did not address the issue of whether a third party's conduct could be the gravamen of an action against a sovereign), *cited in* Opening Br. 23.[7]

Plaintiffs' remaining cases are irrelevant to their argument that the gravamen analysis is limited to the defendant's acts. *Universal Trading*, like *Callejo*, explained that to determine if the foreign state's conduct was *commercial*, the court must look at its conduct, not conduct of a third party "with whom the foreign state contracted." 727 F.3d at 17. In *Republic of Argentina v. Weltover, Inc.*, the court did not address the meaning of "based upon"; rather, it considered whether Argentina's issuance of bonds constituted *commercial* conduct and had a direct effect in the United States. *See* 504 U.S. 607, 614, 620 (1992), *cited in* Opening

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the seizure *and* demand for ransom. *See* 767 F.3d at 1000, 1004 (basing the finding of an exception to immunity upon the effects of the detention of the ship and demand for payment).

[7] Plaintiffs re-write a district court decision quoted within *Callejo*, omit any attribution, and claim their modified version is a Fifth Circuit holding. Opening Br. 23 (quoting *Callejo*, 764 F.2d at 1108, omitting attribution to *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465 (S.D.N.Y. 1984), placing emphasis on "named defendant," omitting "which are the basis of the action," and revising "the separate acts of other sovereign instrumentalities or agencies" to "another entity's separate acts"). As the District Court explained, *Callejo* does not help Plaintiffs. JA1501.

Br. 22; *see also Afr. Growth Corp. v. Republic of Angola*, No. 17-2469, 2019 U.S. Dist. LEXIS 120571 at *12, *14 (D.D.C. July 19, 2019) (holding that Angola's failure to prosecute was noncommercial conduct; no third party involved); *Nnaka v. Federal Republic of Nigeria*, 756 F. App'x 16, 17 (D.C. Cir. 2019) (court did not consider gravamen conduct by a third party), *cited in* Opening Br. 22. In *Merlini v. Canada*, a "fellow employee" of Canada negligently laid the telephone cord that injured the plaintiff, and the accident occurred in the United States. 926 F.3d 21, 28-29 (1st Cir. 2019).

4. The FSIA's Plain Text Forecloses Plaintiffs' Argument That An Action Against A Sovereign Is, By Definition, "Based Upon" Conduct By That Sovereign

As *Nelson*, *Sachs*, and their progeny explain, *see supra* Argument I.A., § 1605(a)(2)'s text holds separate the questions of *what* conduct actually injured the plaintiff and whether that conduct is "*by*" or "*of*" the sovereign. Plaintiffs' tautological argument that suits are based upon "the sovereign's activities for which it is sued" (Opening Br. 16-17) would make "by" and "of" superfluous of "based upon."[8] Every suit alleging that a sovereign failed in the United States to

[8] The District Court did not conflate the "direct effect" requirement with "based upon." Opening Br. 28. It concluded that *Sachs*'s footnote 3 may require "a fact-specific analysis of the relative importance of the domestic and foreign conduct to

intervene in a harm overseas—regardless of what actions occurred abroad—would be "based upon" that U.S. omission. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

Contrary to Plaintiffs' arguments (Opening Br. 16-17), no other section of the FSIA supports their reading. The "Findings and declaration of purpose" section (§ 1602) cannot supplant the commercial-activity exception's plain text, which is the sole source of the exception. *See* 28 U.S.C. § 1604 ("[A] foreign state shall be immune . . . except as provided in sections 1605 to 1607 of this chapter."); *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 260 (1994) ("[T]he quoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor . . . fairly implied in the operative sections of the [RICO] Act."). Section § 1602 simply explains

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the eventual injury," but this case "just isn't one where the *Sachs* footnote is applicable." JA1747-48.

Congress's interpretation of "international law," not § 1605(a)(2) or "the principles set forth" within it. 28 U.S.C. § 1602.[9]

Whether sovereign immunity is "conduct based" under international law (Opening Br. 1, 30) says nothing about § 1605(a)(2)'s text or how it is applied under *Sachs*, which requires that the action be *based upon* the sovereign's conduct, i.e., the exception is *suit based*. "[T]he FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts," and merely engaging in U.S. commercial activity is insufficient to invoke § 1605(a)(2). *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-36 (1989) (refusing to interpret the FSIA's more narrow text coextensively with related international-law principles). Plaintiffs also find no support in the "Extent of liability" section of the FSIA, which explicitly applies only once it is determined that a sovereign "is not entitled to immunity under section 1605." 28 U.S.C. § 1606.

[9] The FSIA's legislative history further contravenes Plaintiffs' interpretation, demonstrating that the commercial-activity exception was designed to protect U.S. citizens. *See* H.R. Rep. No. 94-1487, at 6-7 (1976).

5. The Gravamen Of Plaintiffs' Suit Remains In India Regardless Of Plaintiffs' New—And Futile—Allegations

Even if *Sachs* could be read to imply that the gravamen of Plaintiffs' case is IFC's decision-making and alleged failure to enforce its internal standards—it cannot—this conduct occurred in India. JA1503.

First, as the District Court concluded with respect to Plaintiffs' Complaint, the "alleged failures of oversight by IFC are focused on conduct or inaction in India, not the United States." JA1506; *see also* JA1510 ("plaintiffs have not established that such conduct was carried on in the United States; instead, it was focused in India, where the plant is and the harms occurred."); *supra* Statement of the Case III. Thus, even if this Court concludes that Plaintiffs' action is based upon IFC's decision-making and alleged failure to intervene, it should affirm for the same reasons the District Court gave in its February 14, 2020 decision. JA1503-04; *see Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 472 (D.C. Cir. 2007) (affirming FSIA dismissal on alternative grounds).

Second, although Plaintiffs' proposed Amended Complaint offers additional allegations in an attempt to shift the location of IFC's conduct to the United States, this Court should not consider it. Plaintiffs have not established any of the "extraordinary circumstances" warranting reconsideration of the District Court's February 14, 2020 decision under Rule 59(e)'s stringent standard for setting aside a

prior final judgment. *Odhiambo v. Republic of Kenya*, 947 F. Supp. 2d 30, 34 (D.D.C. 2013), *aff'd*, 764 F.3d 31 (D.C. Cir. 2014); *see* Mem. Opp'n Mot. Amend 4-10 (D.D.C. Mar. 26, 2020), ECF No. 64; *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) ("[O]nce a final judgment has been entered, a court cannot permit an amendment unless the plaintiff 'first satisfies Rule 59(e)'s more stringent standard' for setting aside that judgment." (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996))).

Plaintiffs do not argue here, nor did they argue below, a change in controlling law, that their Amended Complaint offered "new" evidence, that the District Court's decision was clearly erroneous, or that reconsideration was necessary to prevent manifest injustice. *See Ciralsky*, 335 F.3d at 671 (setting forth sufficient extraordinary circumstances); *compare* Mot. Amend Compl. 1-3 (D.D.C. Mar. 12, 2020), ECF No. 63, *with* Mem. Opp'n Mot. Amend 4-10. For these reasons, Plaintiffs have not established any extraordinary circumstances supporting a post-judgment amendment, and the new allegations in their proposed Amended Complaint should not be considered. If anything, the circumstances were quite ordinary in that the Solicitor General's amicus briefing, the Supreme Court, and the Supreme Court's opinion itself took a very negative view of the

gravamen test being satisfied here; yet, Plaintiffs chose not to amend their Complaint on remand.

Third, regardless of whether Plaintiffs' proposed Amended Complaint is considered under Rule 15 or Rule 59(e), their amendment would be futile. Notably, Plaintiffs do not argue here that the District Court erred in concluding that Plaintiffs' proposed amendments were "futile" because "[t]he gravamen of the proposed amended complaint remains the construction and operation of the plant" by Coastal Gurajat in India. JA1751. Although Plaintiffs include additional allegations regarding IFC's alleged conduct in the United States, "they do not change the critical facts of this case: that an Indian company built and operated a power plant in India that allegedly caused Indian plaintiffs environmental and social harms in India." JA1751 (quoting the Second Statement of Interest of the United States at 3). Because Plaintiffs' Amended Complaint would not survive a motion to dismiss, amendment would be futile. *See Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012).

C. The FSIA's "Based Upon" Gravamen Analysis Is Not A Personal Jurisdiction Inquiry

Plaintiffs offer a novel reading of the FSIA's legislative history and 28 U.S.C. § 1330(b) to argue that § 1605(a)(2)'s "based upon" requirement is somehow equivalent to personal jurisdiction. That is, "sovereigns are treated like

private parties" and can be sued under any theory as long as they engage in commercial conduct anywhere within the United States. Opening Br. 30. The only requirement, Plaintiffs submit, is that a sovereign's U.S. commercial conduct be sufficient to "satisfy due process concerns." *Id*. at 31. Plaintiffs' pages of Rube Goldberg machinations, shifting back and forth between unconnected FSIA provisions—all to avoid the straightforward analysis of *Sachs* and *Nelson* that fails them—cannot create a brand new test for subject-matter jurisdiction under the commercial-activity exception.

As an initial matter, Plaintiffs did not make this argument in any of their briefs to the District Court. This Court should not consider arguments that the appellant forfeited below. *See Salazar v. District of Columbia*, 602 F.3d 431, 436-37 (D.C. Cir. 2010) ("Generally, an argument not made in the trial court is forfeited and will not be considered absent exceptional circumstances." (internal quotation marks omitted)).

In any event, the text of the FSIA does not support Plaintiffs' argument. Section 1605(a)(2) confirms that a sovereign's engagement in U.S. commercial activity is a *necessary* condition for satisfying the exception, but not a *sufficient* one. Whether "the sovereign's commercial activity has 'substantial contact' with

the United States" is a question for § 1605(a)(2)'s "carried on in the United States" requirement, not the "based upon" analysis.

Plaintiffs' argument—that subject-matter jurisdiction exists where there is personal jurisdiction—gets the test backward. In *Maritime International* (Opening Br. 33), this Court "discern[ed] the far reaches of the 'carried on' requirement by considering . . . principles of personal jurisdiction," but only after it concluded that the case was not based upon acts "by" Guinea. 693 F.2d at 1107-09 (concluding that Global's acts were not attributable to Guinea, there was no evidence that MINE's were either and, regardless, MINE's acts had no sufficient connection with the United States). Citing *Maritime International*, this Court has held that "substantial contact," a requirement of § 1603(e) incorporated in Clause 1 of the commercial-activity exception, "requires more than . . . minimum contacts." *In re Papandreou*, 139 F.3d at 253 (citing *Mar. Int'l*, 693 F.2d at 1109). And 28 U.S.C. § 1330, upon which Plaintiffs also rely (Opening Br. 31), simply provides that courts have personal jurisdiction over a sovereign *if* there is subject-matter jurisdiction and proper service under the FSIA. *Amerada Hess*, 488 U.S. at 435 n.3.

Plaintiffs rely upon the FSIA's Conference Report, but it does not help them. Where Congress explained that certain elements of the exceptions prescribe

necessary personal-jurisdiction contacts, it was referring to the geographical requirements of the immunity exceptions that § 1330(b) incorporates by reference. *See* H.R. Rep. No. 94-1487, at 13 ("[S]ections 1605-1607[] require[] some connection between the lawsuit and the United States"). Nothing in the Report implies that immunity exceptions, or part of an exception, such as "based upon," are mere proxies for personal jurisdiction. *See Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 394 (6th Cir. 2016) (rejecting "a *personal*-jurisdiction argument disguised as one sounding in subject-matter jurisdiction" under the FSIA).

Considering the same passage from the Report, this Court stressed that "the immunity determination involves considerations distinct from the issue of personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind." *Mar. Int'l*, 693 F2d at 1105 & n.18; Opening Br. 32 (citing H.R. Rep. No. 94-1487).

And even if the "direct effects" test were more demanding than minimum contacts, Plaintiffs' reading requires that a case falling within clause 3 of the exception would simultaneously meet and fail the minimum-contacts test. *See S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1304 (11th Cir. 2000) (explaining that "[t]he 'direct effects' language of § 1605(a)(2) closely resembles the 'minimum contacts' language of constitutional due process and these two analyses have

overlapped," but "direct effect" requires an "immediate consequence"); *see also Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183-84 (D.C. Cir. 2013) (recognizing that "direct effects" requires an "immediate consequence" (quoting *Weltover*, 504 U.S. at 618)).

In addition, Plaintiffs' reading of § 1605(a)(2) would swallow the FSIA's expropriation exception, § 1605(a)(3). Where "rights in" expropriated property are "in issue," that exception allows suit if the expropriated property is "exchanged for" property "operated" by a sovereign "engaged in commercial activity in the United States." § 1605(a)(3). But, under Plaintiffs' view, claimants could invoke § 1605(a)(2) by showing that their case "aris[es] out of or [is] connected with" property operated by a sovereign engaged in U.S. commercial activity. Opening Br. 32 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *see Garb v. Republic of Poland*, 440 F.3d 579, 587 (2d Cir. 2006) ("Concededly, the expropriation of property from plaintiffs—indeed, from anyone who claims unlawful taking of property—is, in some sense, 'connected' to any subsequent commercial treatment of that property or its proceeds."). Unlike in § 1605(a)(3), Congress did not specify that § 1605(a)(2) applies to every case involving a "connection with" a sovereign's U.S. commercial activity.

Plaintiffs' minimum-contacts test also cannot be squared with this Court's decision in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). In that case, this Court rejected the argument that due process personal jurisdiction analysis applies in FSIA cases because sovereigns enjoy no rights under the Fifth Amendment. *Id*. at 99-100. Plaintiffs' interpretation would offer sovereigns due process protections that this Court held are unavailable in FSIA cases. *Id*. at 100.

* * * * *

The gravamen of Plaintiffs' action is the construction and operation of the Plant in India, leaving IFC's immunity under the International Organizations Immunities Act intact. The commercial-activity exception's text and the Supreme Court's reasoning in *Sachs* and *Nelson* require this result. Plaintiffs' atextual, defendant-only nexus test not only is inconsistent with Supreme Court precedent, but also renders portions of the FSIA superfluous and invites courts to undertake precisely the type of claim-by-claim, choice of law analysis that *Sachs* rejected. Plaintiffs' belated argument equating the "based upon" analysis with a minimum-contacts test gets the subject-matter jurisdiction analysis backwards and finds no support from a single case analyzing the commercial-activity exception's text. For these reasons, this Court should affirm.

II. EVEN IF THE GRAVAMEN OF THIS CASE WERE IFC'S FAILURE TO ENFORCE THE E&S STANDARDS, THAT CONDUCT IS NOT "COMMERCIAL"

Even if this case were "based upon" an alleged failure by IFC to enforce its E&S Standards, that conduct does not constitute "commercial activity" under the FSIA. IFC's decision when, how, or whether to enforce its E&S Standards—akin to market regulation—is not conduct of a commercial nature but analogous to sovereign activity. *See Weltover*, 504 U.S. at 614. The United States agrees: "In making any internal decisions about how to monitor the environmental and social aspects of an ongoing project, IFC would not be acting in the manner of a private player in the market, but rather would be acting in a public, quasi-regulatory capacity." JA1731.

Plaintiffs' focus on the commercial context of IFC's role is misplaced. Opening Br. 20. IFC's discretionary decisions to monitor Coastal Gujarat's compliance with the E&S Standards were not required by, and did not arise from, the Agreement; rather, they arose from IFC's internal decision-making judgments. *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (failure to provide a bill of lading did not fall within the commercial-activity exception because plaintiffs' losses did not derive from the contract).

The fact that IFC uses loan agreements to enforce its standards on borrowers does not convert its quasi-regulatory activity into commercial conduct. *See In re Aluminum Warehousing Antitrust Litig.*, No. 13-md-2481, 2014 U.S. Dist. LEXIS 119074, at *62 (S.D.N.Y. Aug. 25, 2014) ("There are numerous instances in which a public organ might use a contractual arrangement to fulfill its public function."). As the United States explained, "uniquely sovereign activities can sometimes be emulated by private market participants"; that does not make the activities commercial. JA1732-33.

IFC's monitoring of projects like the Plant, informed by member states' policies, are "fundamentally different than the manner in which private players might attempt to pursue environmental or social goals." JA1733. That "private banks have increasingly engaged in development finance activities despite their lack of immunity from suit" (Amicus Br. 27) does not change the nature of IFC's acts. When private banks like J.P. Morgan apply internal environmental and sustainability standards to their operations, they do not implement a resolution of sovereign representatives. JA641 ("The IFC Board of Directors approves IFC's Policy and Performance Standards on Environmental and Social Sustainability.").

The single, out-of-circuit district court case Plaintiffs cite to the contrary had nothing to do with whether IFC's E&S Standards enforcement decisions are

commercial. Opening Br. 20 (citing *Cruz v. United States*, 387 F. Supp. 2d 1057, 1063 (N.D. Cal. 2005) (considering "fail[ure] to properly safeguard [plaintiffs'] savings funds after they were received, and then fail[ure] to disgorge the funds to" plaintiffs)).

Even amici confirm that IFC's conduct is not similar to a private market participant, but rather is public or quasi-regulatory in nature. Beyond "just fund[ing] projects," amici note that IFC acts pursuant to the policy agenda set by its member states and the IFC Articles. Amicus Br. 12. IFC's Board promulgated the IFC "environmental and social policies . . . to govern its own and its clients' activities." *Id*. at 13. These policies are "based on active and direct input from sovereign member states in light of member states' own policies on environmental and social matters." JA1733.

Moreover, as the District Court and the United States have warned, using decisions made by an international organization at its headquarters as a basis for abrogating their immunity would "largely swallow the general rule that [international organizations] 'are presumptively immune from suit.'" JA1752 (quoting *Jam II*, 139 S. Ct. at 766); *accord Jam II*, 139 S. Ct. at 772 (concluding that applying § 1605(a)(2) to multilateral development banks would not open

floodgates to litigation because the exception requires that, inter alia, the action be "commercial" and based upon conduct in the United States).

The International Organizations Immunities Act was intended to make the United States a more attractive place for international organizations to place their headquarters; many have done so. *See* S. Rep. No. 79-861, at 3 (1945) (explaining that the Act's passage "would be an important indication of the desire of the United States to facilitate fully the functioning of international organizations in this country").

The United States correctly notes that "[u]nlike foreign sovereigns, which have capitals in their own territory," international organizations have no territory and necessarily reside within the borders of a state. JA1733. Subjecting international organizations to suit "based on internal oversight decisions where the only U.S. nexus is an attribution of responsibility to officials working at an international organization's U.S. headquarters" would effectively afford organizations "less protection . . . than foreign sovereigns with capitals elsewhere." *Id*. That would defeat the purposes of Congress and violate the Supreme Court's instruction in *Jam II* that "the immunity of international organizations and foreign sovereigns should be 'equivalent.'" *Id*. (quoting *Jam II*, 139 S. Ct. at 768).

Because Plaintiffs cannot establish that IFC's decisions on how to enforce its E&S Standards constitute "commercial activity," IFC's immunity remains intact.

III. THIS COURT DID NOT RESOLVE WHETHER PLAINTIFFS' CASE SATISFIES THE COMMERCIAL-ACTIVITY EXCEPTION

Remarkably, Plaintiffs begin the argument section of their brief with another argument that they withheld from the District Court. Plaintiffs argue that this Court, in *Jam I*, "held" that IFC would not be immune in this case if the FSIA applied. Opening Br. 19. Because the District Court was not given the opportunity to consider this argument, this Court should not consider it in the first instance. *See Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) ("Absent exceptional circumstances, a party forfeits an argument by failing to press it in district court."). And in any event, *Jam I* did not consider whether Plaintiffs' action fits within the narrow strictures of the FSIA's commercial-activity exception.

This Court's 2017 opinion held only that the International Organizations Immunities Act provided IFC "absolute immunity" from this suit and that IFC "did not waive immunity for this suit in its Articles of Agreement." *Jam I*, 860 F.3d at 704. Until the Supreme Court overruled it, *Atkinson v. Inter-American Development Bank* stood "as an impassable barrier" to Plaintiffs' argument that IFC was not immune under the commercial-activity exception. *Id*. at 706. Now,

Plaintiffs contend that the District Court erred because this Court "held" that the commercial-activity exception applies to this case. Opening Br. 19. This Court did not "hold" that Plaintiffs' case satisfies all—or even *any*—of the requirements of § 1605(a)(2).

In 2017, neither the parties, nor the District Court, nor this Court addressed the issue on appeal now: Whether Plaintiffs' case is "based upon" conduct within the United States. JA1509-10. Rather, this Court posited—without the benefit of any briefing on the issue—that IFC "would *never* retain immunity" under the commercial-activity exception "since its operations are *solely* commercial" as a reason why Article VI, § 3, of the IFC Articles did not waive immunity from this suit. *Jam I*, 860 F.3d at 707.

The Supreme Court noted that "it is not clear that the lending activity of all development banks qualifies as commercial activity." *Jam II*, 139 S. Ct. at 772.[10] Indeed, the Supreme Court explained that "even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit" because the "FSIA includes other

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[10] Even if the gravamen of Plaintiffs' action is "based upon" IFC's alleged monitoring and supervision conduct in the United States, that conduct is not "commercial." *See infra* Argument II. The United States agrees. *See* JA1730-33.

requirements that must also be met." *Id*. The Supreme Court also noted the United States' "'serious doubts' whether [Plaintiffs'] suit, which largely concerns allegedly tortious conduct in India, would satisfy the 'based upon' requirement." *Id*. Then, the Supreme Court remanded this case "for further proceedings consistent with [its] opinion." *Id*. The District Court did not contravene *Jam I*; it simply followed the Supreme Court's lead. JA1737 (citing *Jam II*, 139 S. Ct. at 767, 772).

IV. AS THIS COURT HAS ALREADY RULED, IFC DID NOT WAIVE ITS IMMUNITY

In 2017, this Court unanimously ruled that IFC did not waive its immunity from this suit. *Jam I*, 860 F.3d at 706 & n.3 (concluding that *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), distinguished *Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454 (D.C. Cir. 1967), and that Plaintiffs' case would provide no corresponding benefit); *id*. at 712 (Pillard, J., concurring) ("The IFC successfully argued here that it would enjoy no 'corresponding benefit' from immunity waiver."). Plaintiffs petitioned this Court *en banc*, reiterating the same arguments and relying on Judge Pillard's concurrence. Pet. Reh'g 12-16, *Jam I*, No. 16-7051 (D.C. Cir. July 24, 2017). No member of the Court voted to grant the petition. Order, No. 16-7051 (D.C. Cir. Sept. 26, 2017). Plaintiffs petitioned the Supreme Court to review *Jam I*'s waiver ruling. Pet. Writ Cert. 24-27, No. 17-

1011 (U.S. Jan. 19, 2018). The Supreme Court refused, limiting its review to whether the FSIA applied to international organizations. *See* Order List, 548 U.S. 2 (May 21, 2018).

Thus, *Jam I*'s ruling that IFC did not waive its immunity is law of the case or at least due "precedential weight." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)) (explaining that a holding not addressed by the Supreme Court remains precedent even if the Supreme Court vacates a judgment on other grounds).

Plaintiffs ignore this Court's decision and simply repeat many of the same arguments that this Court considered in their prior appeal, even relying on the same authorities. Plaintiffs again argue that this Court's decision in *Mendaro* is bad law because it "purported to overturn" an earlier decision, *Lutcher* (Opening Br. 18, 46), and that their case satisfies *Mendaro*'s corresponding benefit test in any event (Opening Br. 49-51). *See* Opening Br. 41-44, *Jam I*, No. 16-7051 (D.C. Cir. Aug. 9, 2016) (arguing that *Mendaro* does not apply in light of the preceding *Lutcher* precedent and that even if *Mendaro* did apply, IFC has waived its immunity under that standard).

Remarkably, Plaintiffs also argue that the Supreme Court considered and decided an issue that it expressly declined to review; that is, the Supreme Court overturned *Mendaro*'s corresponding benefit test and this Court's application of it to the IFC Articles and this case. JA1510 n.5 (concluding that the Supreme Court's decision neither "overturn[ed]" *Mendaro* nor interpreted the IFC Articles). Plaintiffs are incorrect.

Plaintiffs contend that, in reviewing the International Organizations Immunities Act, the Supreme Court relied solely on the plain text and refused to consider its legislative history or underlying purposes. Opening Br. 47 (citing *Jam II*, 139 S. Ct. at 769). The Supreme Court's focus on the statutory text, Plaintiffs argue, "eviscerated" *Mendaro*. Opening Br. 46-47.

But Plaintiffs' apples-to-oranges comparison fails. The International Organizations Immunities Act is a domestic *statute*. The Articles are an international treaty, and this Court recognizes that treaties are not interpreted like statutes. "Treaties generally are liberally construed: courts 'may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties' to ascertain the meaning of a difficult or unclear passage." *Tabion v. Mufti*, 73 F.3d 535, 537 (D.C. Cir. 1996) (quoting *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991)).

The Vienna Convention on the Law of Treaties is the "authoritative guide" for treaty interpretation. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001). It provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its *object and purpose*." Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S. 331 (emphasis added). Context includes related treaties. *Id.* art. 31.2. Additionally, when interpreting treaty terms in their "context," the Convention requires considering "any relevant rules of international law." *Id.* art. 31.3. If a treaty is still "ambiguous or obscure" in context, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty." *Id.* art. 32.

This Court's interpretation of Article VI, § 3, relying on *Mendaro*, followed the Convention's framework. *Mendaro* read the "waiver" language in light of relevant public international law, under which it is "well established" that "an international organization is entitled to such privileges and such immunity from the jurisdiction of a member state as are necessary for the fulfilment of the purposes of the organizations, including from legal process." *Mendaro*, 717 F.2d at 615

(quoting Restatement of the Foreign Relations Law of the United States (Revised) § 464(1) (Tentative Draft No. 4) (1983)).[11]

The immunities of international organizations from suit and legal process are designed to protect the neutral operations of these bodies "from unilateral control by a member nation over the activities of the international organization within its territory." *Mendaro*, 717 F.2d at 615. Without immunity, courts of member states would have the ability to influence the internal decision-making processes of international organizations by "passing judgment on the rules, regulations and decisions of the international bodies." *Id*. at 616 (quoting *Broadbent v. Org. Am. States*, 628 F.3d 27, 34-35 (D.C. Cir. 1980)). Thus, this Court has interpreted the language in Article VI, § 3, of the IFC Articles as waiving suit only where necessary to achieve the organization's "chartered objectives." *Id*. at 615; *Jam I*, 860 F.3d at 707.

This Court's interpretation comports with the views of the U.S. Department of State Legal Adviser, who read the provision as "intended specifically to permit

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[11] Plaintiffs quote from Judge Pillard's concurrence in *Jam I* to argue that *Mendaro*'s interpretation was based on absolute immunity under § 288a(b). Opening Br. 48. But Judge Pillard actually observed that Article VI, § 3, allows suit in many cases that would also fall within the commercial-activity exception, i.e., not every case. *Jam I*, 860 F.3d at 712 (Pillard, J., concurring).

suits by private lenders against the Bank in connection with the Bank's issuance of securities" and "not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction." *Mendaro*, 717 F.2d at 620 (quoting Letter from Roberts B. Owen, Legal Adviser, U.S. Dep't of State, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980) (reproduced at A-22)).

Following the Vienna Convention, *Mendaro* found contextual support in a related agreement—the International Monetary Fund's Articles—which were also established at the Bretton Woods Conference. *Mendaro*, 717 F.3d at 618 n.53. The Fund's Articles "absolutely reserve its immunity from suit" because, unlike the World Bank and IFC, the Fund was not designed to issue securities. *Id*. On this point, *Mendaro*'s interpretation accords with the intent of the drafters, who included a provision allowing IFC and the World Bank to waive immunity in cases where its "assertion of an immunity or privilege granted by the charter would give the Corporation an unfair competitive position inconsistent with its objective to encourage private investment." President Dwight D. Eisenhower, Letter of Transmittal & Explanatory Memorandum 42 (May 2, 1955) (summarizing Article VI, § 11, of the IFC Articles for Congress ahead of ratification vote) (reproduced at A-19). *Mendaro* adopted the correct reading of the Article's language.

This Court rejected Plaintiffs' waiver arguments in *Jam I* and interpreted the IFC Articles in line with *Mendaro*. The Supreme Court did not undermine its holding. Because IFC remains immune from suit under the International Organizations Immunities Act, this Court need not separately rely upon IFC's Articles as an independent basis to affirm the District Court's decision, although doing so would be proper. *See Jam II*, 139 S. Ct. at 771 ("[T]he organization's charter can always specify a different level of immunity."); *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014) (noting that international organizations enjoy "dual protections" of statute-based immunity and treaty-based immunity).

CONCLUSION

For the reasons stated herein, IFC respectfully requests that this Court affirm the District Court's orders dismissing Plaintiffs' case and denying their motion for reconsideration and amendment.

February 18, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. R. 32(e)(1) because this brief contains 12,892 words, excluding the parts of the brief exempted by D.C. Cir. Rule 32(e)(1) and Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

February 18, 2021

/s/ Dana Foster
Dana Foster

ADDENDUM

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28 U.S.C. § 1604

§ 1604 Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607 of this chapter.

28 U.S.C. § 1605(a)(3)

§ 1605 General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

84th Congress, 1st Session - - - - - House Document No. 152

INTERNATIONAL FINANCE CORPORATION

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

URGING

ENACTMENT OF LEGISLATION PERMITTING THE UNITED STATES TO JOIN WITH THE OTHER FREE NATIONS IN ORGANIZING THE INTERNATIONAL FINANCE CORPORATION

MAY 2, 1955.—Referred to the Committee on Banking and Currency and ordered to be printed

UNITED STATES
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62010 WASHINGTON : 1955

LETTER OF TRANSMITTAL

To the Congress of the United States:

The establishment of the International Finance Corporation and our participation in it will strengthen the partnership of the free nations. In my message to the Congress, January 10, 1955, on the foreign economic policy of the United States and in my annual Economic Report transmitted to you January 20, 1955, I stated that I would recommend at the appropriate time legislation to permit United States participation in the Corporation as part of our effort to increase the flow of United States private investment funds abroad.

I now forward to you the Articles of Agreement of the International Finance Corporation and an explanatory memorandum approved by the Executive Directors of the International Bank for Reconstruction and Development. I recommend that the Congress enact legislation authorizing me to accept membership in the Corporation for the United States and providing for the payment of our subscription of $35,168,000 to the $100 million capital stock of the Corporation as set forth in the articles of agreement. The subscription was included in the budget.

The entire free world needs capital to provide a sound basis for economic growth which will support rising standards of living and will fortify free social and political institutions. Action to that end by cooperating nations is essential.

In its own enlightened self-interest, the United States is vitally concerned that capital should move into productive activities in free countries unable to finance development needs out of their own resources.

Government funds cannot, and should not, be regarded as the basic sources of capital for international investment. The best means is investment by private individuals and enterprises. The major purpose of the new institution, consequently, will be to help channel private capital and experienced and competent private management into productive investment opportunities that would not otherwise be developed. Through the Corporation we can cooperate more effectively with other people for mutual prosperity and expanding international trade, thus contributing to the peace and the solidarity of the free world.

Economic recovery, notably in Western Europe, enables nations other than the United States to participate substantially in furnishing capital to the less developed areas. The International Finance Corporation is an undertaking in which all nations, as members of the International Bank for Reconstruction and Development, will be able to pool some of their resources to spur such investment. All subscriptions to the Corporation will be paid in gold or dollars.

The Corporation, as an affiliate of the International Bank, will serve as an international agency, which will provide, in association with local and foreign private investors, risk capital for financing the establishment, improvement, and expansion of productive private enterprises in member countries when other sources of funds are not available on reasonable terms. This type of risk or venture capital is most urgently needed.

By providing the margin of capital needed to attract other funds, the Corporation will help expand private investment abroad. It will

make its investments without guaranty of repayment by the member governments concerned. Accordingly, it will complement the activities of existing international investment institutions.

The Corporation will not duplicate the operations of the International Bank for Reconstruction and Development, for the investments of the International Bank are guaranteed by its member governments and are of fixed-interest nature in projects not usually attractive to risk capital.

Since the Executive Directors of the International Bank would serve ex officio as Directors of the Corporation, and the President of the bank would serve as Chairman of the Corporation's Board, effective collaboration between the two agencies and operating economy is assured.

Nor will the Corporation's operations duplicate the work of the Export-Import Bank. That bank, an agency of the United States Government, is an instrumentality of our foreign and trade policy. It is not designed to provide venture capital; its loans are at definite interest rates with fixed schedules of repayment.

The Corporation will not hold capital stock nor participate in operating control but will rely on private management. It will not be a holding company retaining its investments on a long-term basis, but will dispose of its holdings to private investors as opportunity offers so that it can reinvest its funds in new activities. Since its main mission is to supply risk capital where it is needed, its investments will be highly flexible.

In some cases the Corporation may take fixed-interest obligations, in others it may receive obligations bearing a return related to the earnings of the enterprises, and in others its holdings may be obligations convertible into stock when sold by it to private investors. Thus, the Corporation will supplement private investment, and will operate only in association with private interests which are willing to carry a large share of the total investment in each enterprise. In no event will it supply capital for an enterprise which could reasonably be expected to obtain the funds from private sources.

United States participation in the International Finance Corporation will be a step forward in our foreign economic policy in cooperation with the other free nations. It is, however, only one step among several which we must take. In my message to the Congress on January 10, 1955, I outlined other important steps.

These actions—such as extension of the Trade Agreements Act, United States membership in the Organization for Trade Cooperation, simplification and improvement of customs valuation procedures, increased tourist allowances, changes in the law concerning the taxation of income from foreign sources and further developments in tax treaties designed to encourage private investment abroad, continued technical cooperation with other countries, and necessary programs of foreign assistance—are essential to a sound and foresighted foreign economic policy for the United States.

I urge the Congress to enact promptly the legislation permitting the United States to join with the other free nations in organizing the International Finance Corporation—an important part of our foreign economic program which will foster more rapid advance by free people everywhere as they strive to improve their material well-being.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *May 2, 1955.*

Explanatory Memorandum

On the Proposed Articles of Agreement of the International Finance Corporation

This Explanatory Memorandum on the proposed Articles of Agreement (hereinafter called charter) of the International Finance Corporation sets forth reasons for some of the provisions of the charter; explains how some of the general provisions of the charter may be expected to operate in practice; and notes significant differences and similarities between the provisions of the charter and of the Articles of Agreement of the Bank. No express mention is made, however, of a number of provisions of the Bank's Articles which have been omitted from the charter as clearly inapplicable or unnecessary.

This memorandum is not a part of the charter.

ARTICLE I

Purpose

This Article makes clear that the Corporation's essential function is to assist in the economic development of its member countries by promoting the growth of the private sector of their economies. It also makes plain that, in carrying out this function, the Corporation is to supplement and assist the investment of private capital and not to compete with such capital.

The charter, it should be noted, does not exclude any member country from the scope of the Corporation's operations; Article I, however, emphasizes the character of the Corporation as a developmental agency intended to operate particularly in the less developed areas.

While it is not envisaged that the Corporation will select the enterprises in which it invests on the basis of their relative economic priority, Article I indicates that the Corporation is intended to finance only enterprises which are

productive in the sense of contributing to the development of the economies of the member countries in which they operate.

The charter does not explicitly require that the private investors with which the Corporation is to associate itself must invest new capital in the enterprise concurrently with the Corporation's investment. It is expected, however, that as a general rule the Corporation will undertake financing only where new private capital is invested in the enterprise at or around the same time.

ARTICLE II

Membership and Capital

SECTION 1. *Membership*

This section follows, in substance, the comparable provision in the Bank's Articles (Art. II, Sec. 1), except that it is membership in the Bank rather than in the International Monetary Fund that is expressed as the precondition to membership in the Corporation.

SECTION 2. *Capital Stock*

This section expresses the capital stock in terms of United States dollars, rather than gold dollars as in the case of the Bank's Articles (Art. II, Sec. 2(a)). Since the charter, unlike the Bank's Articles, contains no maintenance of value provision and nothing approximating the 80% liability on stock subscriptions, it has not appeared necessary to express the capital stock in terms of gold dollars.

The entire authorized capital stock of the Corporation ($100,000,000) is reserved, in the first instance, for subscription by original members. If all members of the Bank listed in Schedule A accept membership in the Corporation, the entire authorized capital stock will be subscribed, leaving none to be issued to new members. This contrasts with the arrangements made in the case of the Bank, where only about 90% of the authorized capital stock was reserved for

subscription by original members and about 10% was thus available for new members. For this reason, provision is made in paragraph (c)(i) for increasing the capital stock for initial subscription by new members by not more than 10% (10,000 shares), without being subject either to the three-fourths majority vote requirement (paragraph (c)(ii)) or the pre-emptive right requirement (paragraph (d)), both of which apply to other increases of capital stock, as in the case of the Bank (Art. II, Secs. 2(b) and 3(c)).

SECTION 3. *Subscriptions*

Under this section and Schedule A, the initial subscription of each original member is proportionate to its subscription to the capital stock of the Bank. Thus, if all of the members of the Bank join the Corporation as original members, each member will have the same proportion of the Corporation's capital stock as of the Bank's capital stock. On the other hand, the failure of any member of the Bank to join the Corporation will not affect the amount of the subscription of any other member.

In order that the Corporation may not have to operate at a deficit in its early years, the section provides that each original member shall pay its initial subscription in full within 30 days after the Corporation begins operations or within 30 days after the member concerned joins the Corporation, whichever is later, unless this period is extended by the Corporation. It is contemplated that, until its capital funds are needed for financing operations, the Corporation will wish to invest them in appropriate obligations in order to obtain income with which to meet administrative expenses; this is authorized by Article III, Section 6(ii). Payment in full as thus provided does not appear to impose an undue burden on member countries in view of the size of the initial subscriptions. In practice, it may require that legislative or other action necessary to authorize such payment be taken more or less concurrently with action to authorize acceptance of membership.

SECTION 4. *Limitation on Liability*

This section adapts for purposes of the Corporation the provision contained in Article II, Section 6, of the Bank's Articles.

SECTION 5. *Restriction on Transfers and Pledges of Shares*

This section is the same in substance as the comparable provision of the Bank's Articles (Art. II, Sec. 10).

ARTICLE III

Operations

SECTION 1. *Financing Operations*

This section authorizes the Corporation to invest in private productive enterprises in the territories of its members. While it is anticipated that the major emphasis in the Corporation's financing will be on industrial enterprises, the Corporation may also invest in agricultural, financial, commercial or other business ventures. For purposes of deciding whether an enterprise is in the territories of a member, formal considerations such as legal corporate domicile are not intended to be controlling. It is rather the intention that the determining factors should be such matters as the physical location of any plants and the place where the investment has its direct economic impact.

SECTION 2. *Forms of Financing*

This section gives the Corporation authority to make investments in any form or forms it considers appropriate in the circumstances, subject to the single restriction that it may not invest in capital stock, common or preferred. Apart from this restriction, the Corporation is intended to have latitude to tailor each investment to meet the requirements of the particular case, including the type of enterprise being financed, its financial situation and the applicable local laws.

It is expected that the Corporation will utilize this broad grant of authority to make investments on terms providing for financial returns appropriate to the risks undertaken. For example, in situations in which private investors would normally insist on an equity participation, the Corporation may reasonably be expected to require a participation in the profits of the enterprise financed and a right, exercisable by any purchaser of the investment, to subscribe to, or to convert the investment into, capital stock. In determining the form of each investment, the Corporation will presumably wish to bear in mind its interest both in the success of the venture financed and in having an investment portfolio attractive to private investors.

SECTION 3. *Operational Principles*

This section states in general terms the principles which will govern the Corporation's operations.

Of particular importance are the injunction to the Corporation (subpara. (i)) not to undertake any financing for which in its opinion sufficient private capital could be obtained on reasonable terms; the prohibition (subpara. (iv)) against the assumption of responsibility for managing enterprises in which the Corporation has invested; and the requirement (subpara. (vi)) that the Corporation shall seek to revolve its funds by selling its investments to private investors whenever it can appropriately do so on satisfactory terms.

Subparagraph (ii) provides an assurance to members that the Corporation will not invest in any enterprise if the member concerned objects to the proposed financing. The Corporation will make appropriate arrangements to notify any member government desiring such notification of any contemplated financing in the territories of that member. It should be noted, however, that nothing in the Agreement requires the Corporation to obtain any affirmative governmental approval before making an investment.

Subparagraph (iii) is substantially the same as the cor-

responding provision of the Bank's Articles (Art. III, Sec. 5(a)). Subparagraph (v) sets forth the principal considerations which the Corporation is to take into account in deciding upon terms and conditions for its investments. Subparagraph (vii) enjoins the Corporation to seek a diversified investment portfolio; it is expected that in practice this diversification will be both geographical and as among types of undertakings.

In connection with the provision that the Corporation seek to revolve its funds (subpara. (vi)), it has seemed desirable to avoid writing into the charter any requirement that preference be given to any particular class or classes of purchasers. However, the Corporation may often find it necessary or appropriate, when making an investment, to give to private investors with which it is associated in the enterprise a first refusal to purchase the Corporation's interest therein. Moreover, if the Corporation has various opportunities of selling an investment on roughly the same terms, it will presumably bear in mind in deciding among them the desirability of fostering local capital markets.

It is expected that the operational principles set forth in the charter will be supplemented by a more detailed and comprehensive statement of operating policies to be adopted by the Board of Directors of the Corporation. This statement of policies will presumably cover, among other things, the extent to which the Corporation will be expected to go to satisfy itself that the funds which it invests are used efficiently and economically and, where such funds are used for the purchase of goods, that the goods are bought on reasonable terms and in favorable markets.

SECTION 4. *Protection of Interests*

This section authorizes the Corporation, notwithstanding any other provision of the charter, to take appropriate action to protect its interests in any situation which, in its judgment, threatens to jeopardize its investment. The otherwise applicable limitations on the Corporation's power to

acquire capital stock and to undertake management responsibility, for example, would not prevent it from exercising such powers should such a situation of jeopardy arise.

SECTION 5. *Applicability of Certain Foreign Exchange Restrictions*

The purpose of this section is to put the Corporation as nearly as possible in the same position as private investors generally with respect to foreign exchange restrictions, regulations and controls imposed by the country of investment. It should be noted that nothing in the charter precludes the Corporation from negotiating with the government concerned, like any private investor, for appropriate arrangements regarding transfer of income and of return of principal on its investment.

SECTION 6. *Miscellaneous Operations*

This section constitutes the Corporation's authorization to engage in various miscellaneous operations which may prove necessary or desirable for the achievement of the Corporation's purposes. Although the activities thus authorized include the issuance of the Corporation's own obligations, it is not expected that the Corporation will have occasion to engage in borrowing operations in the early years of its operations.

The section also authorizes the Corporation, as the Bank is authorized by its Articles (Art. IV, Sec. 8(i) and (ii)), to guarantee securities in which it has invested in order to facilitate their sale, and to buy and sell securities from its portfolio or securities which it has issued or guaranteed. However, in view of the nature of the Corporation's functions and the probable size of its investments, the Corporation, unlike the Bank, is not required by its charter to obtain governmental approval before it exercises these powers, although it would, of course, be subject to applicable local regulations. Exercise of the power to guarantee securities is expected at most to be infrequent.

SECTION 7. *Valuation of Currencies*

The authority provided by this section is likely to be important, if at all, primarily in cases of withdrawal or in the event of liquidation of the Corporation, and then only where no official par value exists or where the official par value appears unrealistic. It is expected that the Corporation, before making any determination under this section, would in practice consult with the member or members concerned as well as with the International Monetary Fund.

SECTION 8. *Warning to be Placed on Securities*

This section adds to the provisions of the corresponding section of the Bank's Articles (Art. IV, Sec. 9) the requirement that any security issued or guaranteed by the Corporation shall also bear on its face a statement that it is not an obligation of the Bank.

SECTION 9. *Political Activity Prohibited*

This section is the same as the corresponding section of the Bank's Articles (Art. IV, Sec. 10).

ARTICLE IV

Organization and Management

SECTION 1. *Structure of the Corporation*

This provision is substantially the same as the comparable provision of the Bank's Articles (Art. V, Sec. 1), except that it includes a reference to a Chairman of the Board of Directors as well as to a President. As explained below in connection with Section 5, it is envisaged that the Corporation, unlike the Bank, will have different persons serving as Chairman and as President. Apart from this distinction, the over-all organizational structure of the Corporation is designed to be the same as that of the Bank, thus enabling the Corporation to take advantage of the pattern of relationships already established by the Bank.

SECTION 2. *Board of Governors*

This section gives the Corporation's Board of Governors the same broad grant of powers, and the same general authority to delegate those powers to the Directors, as is given to the Bank's Board of Governors by the Bank's Articles (Art. V, Sec. 2). The same powers reserved to the Board of Governors of the Bank are also reserved to the Board of Governors of the Corporation, except that the nondelegable powers include power to declare dividends (instead of power to determine the distribution of net income) and there has been added a new provision, the power to amend the charter (see discussion under Article VII below).

The provisions that members of the Corporation shall be represented by the same Governor and Alternate Governor on the Boards of Governors of the Bank and the Corporation, and that the annual meeting of the Corporation's Board of Governors shall be held in conjunction with the annual meeting of the Board of Governors of the Bank, are designed to emphasize the affiliation between the Bank and the Corporation and to keep the expenses of the Corporation's annual meeting to a minimum. Because of the size of the Corporation, there has been omitted as inappropriate and unnecessary any requirement comparable to the one contained in Article V, Section 2(c), of the Bank's Articles that meetings of the Board of Governors shall be called whenever requested by five members or by members having one-quarter of the total voting power. Although, as in the case of the Bank, the charter provides that the Governors and Alternate Governors shall serve without compensation, it is expected that the by-laws will authorize the Corporation to reimburse them for expenses incurred in attending meetings of the Corporation's Board of Governors over and above those which they would in any event have incurred in attending meetings of the Bank's Board of Governors. For this reason, no provision for reimbursement of expenses is included in the charter.

SECTION 3. *Voting*

The voting provisions are the same as those contained in the Bank's Articles (Art. V, Sec. 3).

SECTION 4. *Board of Directors*

The provisions relating to the Board of Directors are, except as noted below, substantially the same as those relating to the Executive Directors in the Bank's Articles (Art. V, Sec. 4). The major difference is that instead of the provisions contained in the Bank's Articles for the appointment and election of Executive Directors, the charter provides that the Bank's Executive Directors and Alternates shall serve *ex officio* in a corresponding capacity for the Corporation, provided they represent at least one country which is a member of the Corporation. This arrangement is proposed as an effective and economical method of achieving the desired affiliation and coordination of the Bank and the Corporation. The only other substantive changes are the omission as inappropriate of any requirement that the Directors shall function in continuous session and the omission as unnecessary of the authority of the Directors to appoint committees.

The charter does not require payment of remuneration to Directors and Alternates. It is intended that an Executive Director or Alternate of the Bank receiving compensation on a full-time basis shall not receive any additional compensation for serving as a Director or Alternate of the Corporation. However, a part-time Executive Director or Alternate of the Bank, receiving partial compensation, would presumably be entitled to compensation for any additional time involved in service as Director or Alternate of the Corporation.

The Executive Directors of the Bank, in approving the charter, recorded their unanimous agreement to recommend the adoption by the Corporation's Board of Governors of a by-law limiting the aggregate of the remuneration received by a Director or Alternate of the Corporation and of

his remuneration as an Executive Director or Alternate of the Bank to the maximum remuneration which he could receive as an Executive Director or Alternate of the Bank.

SECTION 5. *Chairman, President and Staff*

Under this section, the President of the Bank serves as Chairman of the Board of Directors of the Corporation. There is provision for a separate President who will be the chief of the operating staff of the Corporation but who will serve under the general supervision of the Chairman. This arrangement is designed to assure consistency between the operations of the Bank and those of the Corporation, while at the same time permitting the Corporation to have a separate management with sufficient status and power to enable it to operate effectively. Except for the differences necessary to permit this arrangement, this section is substantially the same as the corresponding section of the Bank's Articles (Art. V, Sec. 5).

The charter contains no provision dealing with compensation of the Chairman. The Executive Directors of the Bank, in approving the charter, recorded their unanimous agreement to recommend the adoption by the Corporation's Board of Governors of a by-law providing that the Chairman shall serve without compensation.

SECTION 6. *Relationship to the Bank*

It is contemplated that, at least in the early stages of operations, the Corporation will make extensive use of the professional and administrative services and personnel of the Bank. To this end, it is expected that the Bank and the Corporation will enter into cooperative arrangements under which the Corporation will reimburse the Bank for the cost of services provided to it by the Bank. Apart from arrangements of this type, however, the Corporation will be required, as provided by this section, to keep its funds separate and distinct from those of the Bank and to refrain from looking to the Bank for any financing.

SECTION 7. *Relations with Other International Organizations*

This section expresses the policy that the Corporation, acting through the Bank, shall enter into formal arrangements with the United Nations and may establish such arrangements with other specialized agencies.

SECTION 8. *Location of Offices*

The provision that the principal office of the Corporation shall be in the same locality as the principal office of the Bank reflects the concept of the Corporation as an affiliate of the Bank. The provision with respect to other offices corresponds generally with the provision in the Bank's Articles concerning agencies or branch offices (Art. V, Sec. 9(b)); it has appeared unnecessary to include any provision for regional offices comparable to that of the Bank's Articles (Art. V, Sec. 10).

SECTION 9. *Depositories*

This section adapts for purposes of the Corporation the corresponding provision of the Bank's Articles (Art. V, Sec. 11).

SECTION 10. *Channel of Communication*

This section is included for purposes of administrative convenience.

SECTION 11. *Publication of Reports and Provision of Information*

This section contains the same provisions as the corresponding section of the Bank's Articles (Art. V, Sec. 13) except that the Corporation is required to circulate a summary statement of its financial position and a profit and loss statement at "appropriate intervals" rather than at "intervals of three months or less."

SECTION 12. *Dividends*

Paragraph (a) differs from the corresponding provision in the Bank's Articles (Art. V, Sec. 14(a)) by explicitly authorizing the distribution of dividends out of surplus as well as out of net income and by omitting any requirement for an annual determination as to such distribution. Paragraph (b), providing for *pro rata* distribution of dividends to all members, necessarily differs from the provisions regarding dividends in the Bank's Articles (Art. V, Sec. 14(b)) because of the differences with respect to members' obligations on their capital subscriptions. It is expected that the Corporation will normally wish to pay dividends in convertible currencies.

ARTICLE V

Withdrawal; Suspension of Membership; Suspension of Operations

SECTION 1. *Withdrawal by Members*

SECTION 2. *Suspension of Membership*

These sections are the same as the corresponding provisions in the Bank's Articles (Art. VI, Secs. 1, 2).

SECTION 3. *Suspension or Cessation of Membership in the Bank*

This section is comparable to the provision of the Bank's Articles (Art. VI, Sec. 3) that any member which ceases to be a member of the International Monetary Fund shall cease to be a member of the Bank; the section does not, however, contain any provision for continuance of membership by a three-fourths vote. It should be noted that suspension from or cessation of membership in the Corporation would have no effect on the member's status in the Bank.

SECTION 4. *Rights and Duties of Governments Ceasing to be Members*

This section establishes a somewhat different and simpler procedure than is contained in the Bank's Articles (Art. VI, Sec. 4) for settling accounts with governments ceasing to be members. The principal changes have been prompted partly by the differences in the nature of the capital structure of the Bank and the Corporation and partly by the Bank's own experience. One important change is that the charter expressly authorizes the Corporation to negotiate an agreement with the government which ceases to be a member which may provide not only for the repurchase of the government's stock on appropriate terms but also for a final settlement of all obligations of the government to the Corporation. In the absence of such an agreement, the procedure to be followed is generally the same as that provided for by the Bank's Articles except that the Corporation is given the right to determine the currency of payment.

SECTION 5. *Suspension of Operations and Settlement of Obligations*

This section is similar to the corresponding section of the Bank's Articles (Art. VI, Sec. 5), except that it has been simplified by consolidating some of the provisions for the protection of creditors and by giving the Corporation more latitude than has been given to the Bank to determine the form of distributions.

ARTICLE VI

Status, Immunities and Privileges

The privileges and immunities set forth in this Article are conferred upon the Corporation and not upon enterprises financed by the Corporation. Those enterprises will not enjoy any special status by reason of the Corporation's investments.

The entire Article follows precisely Article VII of the Bank's Articles except as follows:

(a) Section 6, which confers a general immunity from restrictions on assets, is made subject to the provisions of Article III, Section 5, which permits the application of foreign exchange restrictions in the country of investment. (See discussion under Article III, Section 5, above.)

(b) A new section (Section 11) has been added, expressly authorizing the Corporation to waive any privilege or immunity conferred by the charter.

(c) In view of the general waiver authority contained in Section 11, subparagraph (i) of Section 8 omits the specific reference to waiver contained in the Bank's Articles (Art. VII, Sec. 8(i)).

It is expected that the waiver authority will be used by the Corporation in any case where the assertion of an immunity or privilege granted by the charter would give the Corporation an unfair competitive position inconsistent with its objective to encourage private investment and to demonstrate to private investors in capital-exporting countries the attractiveness of returns obtainable from investment in the less developed areas.

A special comment should be made regarding Section 7, which provides that each member will accord governmental treatment to the official communications of the Corporation. A question arose at the International Telecommunication Conference in Buenos Aires in 1952 as to whether specialized agencies generally should be accorded governmental treatment for their communications and this question is under consideration in the United Nations and the International Telecommunication Union. In view of the close affiliation contemplated between the Bank and the Corporation, it has been deemed desirable to provide in the charter that the Corporation be given the same communication privileges as the Bank. Nevertheless, in the interest of cooperation, it is expected that the Corpora-

tion will work out the practical application of this provision in consultation with appropriate authorities of the International Telecommunication Union.

ARTICLE VII

Amendments

This Article is in substance the same as Article VIII of the Bank's Articles except that, to simplify the amendment procedure, it specifies that approval of amendments is to be by affirmative vote of Governors rather than of both Governors and members.

ARTICLE VIII

Interpretation and Arbitration

This Article is substantially the same as Article IX of the Bank's Articles.

ARTICLE IX

Final Provisions

SECTION 1. *Entry into Force*

Under this section acceptance of the charter by not less than 30 governments whose subscriptions amount to not less than 75 percent of the Corporation's total authorized capital is required. In the case of the Bank's Articles (Art. XI, Sec. 1) the minimum amount required to be subscribed was 65 percent of the total subscriptions set forth in Schedule A to the Bank's Articles; no minimum number of subscribers was prescribed.

SECTION 2. *Signature*

This section is substantially the same as the corresponding section of the Bank's Articles (Art. XI, Sec. 2), except in the following respects. First, it is the Bank rather than

the Government of the United States which is to be the depository of the agreement and to give notice of its entry into force. Second, the charter contains no provision requiring governments to make an initial payment, at the time they sign the agreement, for purposes of the Corporation's administrative expenses. Such minor expenses as may be incurred prior to the time that payment on the subscriptions is made are expected to be borne in the first instance by the Bank, which will thereafter be reimbursed by the Corporation. Third, subparagraphs (h) and (i) of the Bank's Articles have been omitted as inapplicable.

As regards the territorial application of the charter, it is understood that references in the charter to the territories of a member include all territories for whose international relations such member is responsible, except those which have been expressly excluded by the government concerned in its instrument of acceptance, and that such exclusion would therefore not be considered to be a reservation within the terms of Article IX, Section 2(a). In view of the foregoing, a provision corresponding to the territorial application clause in the Bank's Articles (Art. XI, Sec. 2(g)) has not been included in the charter.

SECTION 3. *Inauguration of the Corporation*

Because there is no need to elect Directors for the Corporation, this section sets forth a simpler procedure for inaugurating the Corporation than was possible in the case of the Bank (Art. XI, Sec. 3). The provisions of paragraph (c), authorizing the Board of Directors to exercise all the powers of the Board of Governors (except the nondelegable powers) pending the first meeting of the Board of Governors, obviate the need for a meeting of Governors before the Corporation starts operations.

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN L. NASH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

INTERNATIONAL ORGANIZATIONS

(U.S. *Digest*, Ch. 2, §4.B)

Privileges and Immunities—World Bank

The staff of the General Counsel of the Equal Employment Opportunity Commission sought the views of the Office of the Legal Adviser of the Department of State regarding exercise of jurisdiction in an employee discrimination proceeding involving the World Bank, and were advised that relevant provisions of both domestic and international law, based upon sound policy considerations, precluded the Commission from asserting such jurisdiction. In a letter to Leroy D. Clark, General Counsel of the Commission, dated June 24, 1980, Roberts B. Owen, Legal Adviser of the Department, confirmed in writing the position previously communicated to the General Counsel's staff. The principal portion of his letter follows:[1]

> In the absence of supervening treaty provisions, the privileges and immunities of public international organizations in the United States are governed by the International Organizations Immunities Act of 1945 (Pub. L. 79–291, as amended, 22 U.S.C. §288 *et seq.*) (the "IOIA"). Section 2(b) of the IOIA, 22 U.S.C. §288a(b), provides that international organizations which have been designated by the President:
>
> > "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."
>
> The World Bank was designated pursuant to this Act by Exec. Order No. 9751 on July 11, 1946 (3 CFR 558 (1943–48 Compl.)).
>
> At the time the IOIA was enacted, foreign governments (and, by virtue of the IOIA, international organizations) were entitled, as a general matter, to absolute immunity from proceedings in our courts. The Foreign Sovereign Immunities Act of 1976 (Pub. L. 94–583, 28 U.S.C. §§1330, 1602 *et seq.*) ("FSIA") amended our law by codifying a more restrictive theory of immunity subjecting foreign states to suit in U.S. courts in respect of their commercial activities (acts *jure gestionis*), while continuing their exemption from U.S. jurisdiction for sovereign

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[1] Footnotes to the quoted portion of the Legal Adviser's letter are as follows:

or governmental activities (acts *jure imperii*). By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character.

The U.S. Court of Appeals for the District of Columbia has recently held that disputes arising from the employment relationships between an international organization and its staff members are not "commercial" in nature and, absent a waiver, are therefore not subject to judicial review. See *Broadbent v. Organization of American States*, No. 78–1465, slip op. at 19 (Jan. 8, 1980). This decision was fully consonant with the views of the United States Government as presented *amicus curiae* in the litigation. A copy of the Government's brief on the issue is enclosed for your information. In our view, the ruling in *Broadbent* is binding upon the administrative agencies of the U.S. Government as well as upon the judicial branch and precludes the Commission from asserting jurisdiction in such cases.

Article VII(3) of the World Bank's Articles of Agreement[a] does not, in our judgment, constitute a waiver of immunity in respect of employment disputes. That Article provides as follows:

> "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

The language of the Article does not specify the exact scope of actions which may properly be brought against the Bank under its provisions. However, at the time the Articles of Agreement were negotiated, Article VII(3) was intended as a limited waiver of immunity specifically to permit suits by private lenders against the Bank in connection with the Bank's issuance of securities, and to specify the venue for such actions, in order to facilitate the Bank's access to capital markets. *Cf. Restatement (Second), Foreign Relations Law of the United States*, §84, Reporter's Note at 275 (1965). It was not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction or to expose the Bank's internal personnel and administrative actions to review by our courts and administrative agencies.[b]

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[a] The Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, TIAS No. 1502, as amended, 16 U.S.T. 1942, TIAS No. 5929. Authorization for U.S. participation in the Bank is set forth in the Bretton Woods Agreements Act of 1945, Pub. L. 79–171, as amended, 22 U.S.C. 286 *et seq.*

[b] *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (D.C. Cir. 1967), is not to the contrary. While affirming the dismissal of the complaint on other grounds, the court held that a provision in the IADB Charter similar to Article VII(3) permitted a loan recipient to challenge the Bank's lending practices vis-a-vis its competitors as a breach of its written loan agreement with the Bank—in effect placing the Bank's commercial debtors in the same position as its creditors. The opinion cannot reasonably be read to endorse jurisdiction over employment discrimination complaints brought by internal staff members.

That questions relating to the employment relationships between the Bank and its internal staff are and were intended to be beyond the jurisdiction of Member States is apparent, we believe, from the other relevant provisions of the Articles of Agreement. In particular, Article V(5) explicitly vests responsibility for "the organization, appointment and dismissal of the officers and staff" of the Bank in its President, subject only to the general control of the Executive Directors. Subsection 5(c) of the same Article provides that in the discharge of their official duties, the President, officers and staff of the Bank owe their duty "entirely to the Bank and to no other authority." It also states that "[e]ach member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties." These provisions were carefully crafted to insulate the Bank's administrative and personnel processes from interference by individual Member States, which are legally bound by their proscriptions. They cannot in our view be read consistently with an interpretation of Article VII(3) which would permit unilateral actions to regulate those processes or pass judgment upon specific decisions by the Bank's officers in the course of their duties. In any event, the explicit prohibition in Article VII(3) against actions by "members or persons acting for or deriving claims from members" would preclude the U.S. Government, or any of its agencies, from commencing such proceedings.

There are sound practical considerations which fortify these conclusions. To effectively carry out their responsibilities in the interests of all their members, public international organizations must have a considerable degree of autonomy in personnel matters. Unlike domestic entities, they operate in a unique multilateral environment, typically drawing their staff members from among their constituent Member States. In many cases they are required to take regional and geographical considerations into account in order to ensure balanced national representation.[c] The resulting diversity in background, training and experience among staff members often creates delicate administrative situations with sensitive political overtones, requiring the organizations to formulate and apply stable, uniform and equitable rules of personnel management on a global basis. Forcing the organizations to conform their personnel practices to the varying—and often conflicting—domestic laws of each country in which they operate would create unmanageable administrative burdens and could well prevent them from carrying out the functions for which they were created.

For these reasons there has emerged a widespread practice among States not to exercise jurisdiction over internal employment disputes in international organizations, regardless of whether national law specifically provides for immunity from jurisdiction. This practice has been recognized and given effect by many national courts and tribunals in dismissing claims brought by employees of international organizations[d] and has long been endorsed by preeminent scholars in

[c] See, for example, Article V(5) (d) of the Bank's Articles of Agreement.

[d] E.g., *Holtzel v. Air Traffic Services Agency* (Nov. 30, 1979) (Federal Constitutional Court of Germany); *Intergovernmental Committee on European Migration (ICEM) v. Di Banella Shirone* (April 18, 1975) (Supreme Court of Italy, No. 1266); and *Chemidlin v. International Bureau of Weights and Measures*, 12 Ann. Dig. 281 (Case No. 94) (Tribunal Civil of Versailles, France, 1945). No U.S. courts have held to the contrary, and some have refused

the field.[e] As one leading commentator has put it, "the law governing conditions of service with international organizations is not the municipal law of any one country but the domestic law of the Organization concerned."[f]

Our own practice, as evidenced most recently in the *Broadbent* decision, has been in accord with this principle, and . . . I believe that it is incumbent on the U.S. Government to ensure that it remains so.

Finally, I want to emphasize that, in the view of the Department of State, the privileges and immunities enjoyed by public international organizations impose a special responsibility on them and their Member States to ensure that internal procedures provide effective methods of addressing and resolving "labor-management" disputes. The United States actively supported the recent establishment within the Bank of such a mechanism, the World Bank Administrative Tribunal. The Tribunal, which will become effective on July 1 with retroactive jurisdiction to January 1979, is not only competent to adjudicate employment-related disputes within the Bank but was created specifically to provide a binding and exclusive method of settling such disputes internally.[2]

ALIENS

(U.S. *Digest*, Ch. 3, §3)

Legal Protection Accorded Iranians

A high official of the Embassy of the Democratic and Popular Republic of Algeria, in its capacity as protecting power for interests of the Islamic Republic of Iran in the United States, expressed concern to Department of State officers about possible discriminatory treatment of, or other lack of legal protection being afforded to, Iranian nationals resident in the United States. In response, the Department of State gave assurances which were confirmed in a note dated June 20, 1980, reading as follows:

The Department of State wishes to assure the Embassy of the Democratic and Popular Republic of Algeria, in its capacity of protecting power for the interests of the Islamic Republic of Iran, of the con-

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to take jurisdiction over such disputes. See *Herbert Harvey Inc. v. NLRB*, 424 F.2d 770, 773 (D.C. Cir. 1969); *Weidner v. Int'l. Telecommunications Satellite Org.*, 392 A.2d 508 (D.C. 1978).

[e] See M. Akehurst, *The Law Governing Employment in International Organizations* (1967); W. Friedmann and A. A. Fatouros, *The United Nations Administrative Tribunal*, 11 Int'l Org. 13 (1957); C. W. Jenks, *The Proper Law of International Organizations* (1962); F. Seyersted, *Jurisdiction Over Organs and Officials of States, the Holy See and Intergovernmental Organizations*, 14 Int'l and Comp. L.Q. 493 (1965); F. Seyersted, *Settlement of Internal Disputes of Intergovernmental Organizations by Internal and External Courts*, 24 Zeitschrift für Ausländisches Recht and Völkerrecht (in English) (1964).

[f] Jenks, *supra* at 63. See also Seyersted, *Settlement of Disputes*, *supra* at 79–81.

[2] Dept. of State File No. P80 0108–2131.

On July 22, 1980, the Equal Employment Opportunity Commission voted to ratify the dismissal which had been issued by the director of its Washington area office on Feb. 12, 1980, because of lack of jurisdiction. Dept. of State File No. P80 0109–1562.