Nos. 20-7092, 20-7097

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Budha Jam *et. al.*,
Plaintiff-Appellants
v.
International Finance Corporation,
Defendant-Appellee

and

Manjaliya Ikbal, *et al.,*
Plaintiff-Appellants
v.
International Finance Corporation,
Defendant-Appellee
(consolidated case)

On Appeal from the United States District Court
for the District of Columbia, No. 15-cv-00612
The Honorable John D. Bates

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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January 19, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to the Court's Order of September 30, 2020 and D.C. Circuit Rule 28(a)(1), Plaintiffs-Appellants Budha Ismail Jam, *et al.*, certify as follows:

A. Parties and Amici.

Plaintiffs-Appellants in this matter are Budha Ismail Jam, Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, Machimar Adhikar Sangharash Sangathan (MASS), Manjaliya Ikbal, Manjaliya Hajraben, Parit Abedabanu, Jabedabanu Sadam Manek and Manjaliya Harun.

Plaintiff-Appellant MASS is a non-profit fishworkers' rights organization and is not owned by any parent corporation. No publicly-held company has a 10% or greater ownership interest in MASS.

Defendant-Appellee in this matter is the International Finance Corporation.

The United States filed two Statements of Interest in the district court.

B. Rulings Under Review.

The rulings under review are the following decisions of Judge John D. Bates of the U.S. District Court for the District of Columbia:

1) the August 24, 2020 Memorandum Opinion denying Plaintiffs' motion to amend their Complaint. *Jam v. Int'l Fin. Corp.*, No. 1:15-cv-612, 2020 U.S. Dist. LEXIS 152855 (D.D.C. Aug. 24, 2020) (district court DE 78), JA1736-1753.

2) the February 14, 2020 Memorandum Opinion granting Defendant's motion to dismiss Plaintiffs' Complaint. *Jam v. Int'l Fin. Corp.*, 442 F. Supp. 3d 162 (D.D.C.

2020) (district court DE 61), JA1488-1510.

C. Related Cases.

This case has previously been before this Court and the United States Supreme Court. It was before this Court in *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017) (No. 16-7051). This Court's decision was reversed and remanded by the Supreme Court in *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019) (No. 17-1011), and subsequently vacated and remanded by this Court. *Jam v. Int'l Fin. Corp.*, 760 Fed. Appx. 11 (April 5, 2019). There are no other related cases.

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TABLE OF AUTHORITIES[1]

[1] Authorities upon which Plaintiffs-Appellants chiefly rely are marked with an asterisk.

Statutes

Other

GLOSSARY

FSIA	Foreign Sovereign Immunities Act
IFC	International Finance Corporation

INTRODUCTION

The Foreign Sovereign Immunities Act (FSIA) allows suits against a sovereign "based upon" its commercial activity in the United States. 28 U.S.C. § 1605(a)(2). But the district court's ruling here would extend immunity in all sorts of cases where the sovereign is sued for its own commercial conduct that occurred in the United States.

The district court ruled that, unless the sovereign committed the last harmful act in the causal chain, a claim against the sovereign would typically not be "based upon" the sovereign's conduct at all. In such a case it would not matter that the sovereign's conduct for which it is liable is commercial and located in the United States – the claim would really be "based upon" a third party's conduct. This contravenes the basic notion that a claim against a defendant for its own conduct is "based upon" that defendant's acts.

Basing sovereign immunity on a third party's acts was an error of law that conflicts with this Court's established FSIA framework. This Court has decided numerous cases involving multiple potentially liable parties, and has looked to the *sovereign*'s acts every time. Every other Circuit to squarely address the issue has agreed.

There is good reason why precedent goes only one way. The FSIA's plain text, purpose and legislative history establish that a sovereign engaged in commercial activity has no *conduct*-based immunity and must be treated like a private party. But the district court's "last harmful act" approach would treat sovereigns engaged in commercial activity differently than private parties, in two ways. It would immunize

the commercial conduct of foreign states, international organizations, and state-owned businesses even where their conduct has a substantial nexus to the United States that would permit a private party to be sued. And it would immunize sovereign entities from the substantive joint liability rules governing private parties. The immunity inquiry asks only whether the defendant must defend itself on the merits. It is not an inquiry into the strength of the plaintiffs' claim and certainly does not limit the types of claims plaintiffs may bring.

Defendant-Appellee here is the International Finance Corporation (IFC), an international organization that, like a private bank, financed a private project at market interest rates. The Supreme Court previously held in this case that IFC is not entitled to the absolute immunity it claimed, but rather only enjoys the same "restrictive" immunity foreign states and state-owned companies receive under the FSIA. *Jam v. Int'l Fin. Corp. ("Jam II")*, 139 S. Ct. 759, 772 (2019).

When IFC thought it had absolute immunity, it acted like it. IFC provided indispensable funding for the construction of the Tata Mundra Ultra Mega coal-fired power plant ("the Plant" or "the Project"), and approved the Plant's inadequate design, despite knowing that the Plant would inevitably harm the very people IFC is mission-bound to protect. The Plant has destroyed the marine life that fishermen like Plaintiff Budha Jam depend on; pollutes the groundwater with salt, leaving farmers like Plaintiff Ranubha Jadeja unable to grow crops; and spews toxins into the air. Despite calls for remedial action from even its own internal ombudsman, IFC has

done nothing, leaving this suit as Plaintiffs' only recourse.

The district court issued two opinions. The first correctly looked to *IFC*'s conduct, rejecting IFC's assertion that these claims against IFC are "based upon" a third party's acts. *Jam v. Int'l Fin. Corp.*, 442 F. Supp. 3d 162 (D.D.C. 2020) ("First Opinion"), JA1499-1500. But the court later reversed course, holding that "a suit can be based primarily upon the conduct of a third party," and "focus[ed] on what actually injured plaintiffs" – the last harmful act in the causal chain. *Jam v. Int'l Fin. Corp.*, No. 15-612, 2020 U.S. Dist. LEXIS 152855 (D.D.C. Aug. 24, 2020) ("Second Opinion"), JA1744-49. The district court was right the first time; this Court should reverse.

Independently of the FSIA, IFC has waived immunity from this suit. IFC's Articles of Agreement expressly waive immunity in all cases except those brought by member states. And this type of suit would benefit IFC, by holding it to its mission and reassuring communities – whose consent IFC needs for dangerous projects like this one – that IFC's promises can be believed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 22 U.S.C. § 282f. After an initial dismissal, the district court denied Plaintiffs' motion under Federal Rules of Civil Procedure 15 and 59(e) on August 24, 2020. D.E. 77.[2] Appellants filed their notices of appeal on September 21, 2020, and – after a 30-day extension order – on October 7,

[2] "DE" cites are to the docket below.

2020. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

A foreign sovereign is not immune from suit in any case "based upon" a commercial activity the sovereign carried on in the United States or where the sovereign waives immunity. 28 U.S.C. § 1605. The questions presented are:

1. May a court find that a claim against a sovereign defendant is "based upon" a third party's conduct, rather than the sovereign's own conduct?

2. Even if a claim against a sovereign could be "based upon" a third party's conduct, were these tort claims against IFC "based upon" IFC's conduct, where IFC is a joint tortfeasor sued for its own tortious acts?

3. Does IFC's waiver of immunity in its Articles of Agreement, which provides that any "[a]ctions may be brought against the Corporation," except by member states, waive immunity here?

STATUTES

The primary statute at issue is 28 U.S.C. § 1605(a)(2):

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case…
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

Additional relevant statutes are included in the Addendum.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

A. IFC provided a market-rate loan to a private corporation to build a private enterprise and exercised substantial control over all stages of the Project.

IFC is an international organization headquartered in Washington, D.C. JA21-22 ¶16. It provides loans to private corporations at market-based, profit-generating interest rates, for commercial projects. JA27 ¶42.[3] In 2008, IFC provided a market-based loan to Coastal Gujarat Power Ltd. ("Coastal Gujarat"), a private corporation, of $450 million for the construction of the coal-fired Tata Mundra plant in Gujarat, India. JA17 ¶2; JA441-43 §3.01. Without IFC's funding, the Project could not have gone forward. JA28 ¶46; JA31 ¶¶57-59.

IFC exercised strict control over the Project. In accordance with IFC's policy to prevent harm, *see infra* I.D., the loan agreement incorporated IFC's environmental and social standards as binding provisions that IFC had contractual authority to enforce. JA30 ¶53; JA1572-75, ¶¶230-36; JA1577 ¶246. IFC had overall control of the design, construction, and environmental and social aspects of the plant. JA1572-78 ¶¶230-250; JA42 ¶116; JA49 ¶140; JA62 ¶186. In particular, the agreement afforded IFC supervisory and approval authority over the Project and included an

[3] *See also e.g.* IFC, Information Statement, (Oct. 11, 2018) at 2, http://documents.worldbank.org/curated/en/751901544072249470/pdf/132684-IFC-FY18-Information-Statement-PUBLIC.pdf ("IFC charges market-based rates for its loans").

Environmental and Social Action Plan to protect nearby communities. JA29 ¶51; JA46 ¶128; JA472-73; JA987; JA343-44. IFC retained the authority to compel Coastal Gujarat to take corrective action, and failure to comply could result in default. *See, e.g.*, JA550-51 §5.1(i)); JA573-74 §5.2(z) & (aa)); JA582 §6.1(x); *see also* JA994.[4]

Loan disbursement was contingent on IFC's approval of the construction plan, JA466-67; JA533 §4.1(b); JA539 §4.1(u), and Coastal Gujarat meeting the environmental and social requirements of the loan agreement, JA535 §4.1(i); JA545 §4.2(q); JA582 §6.1(x).

B. IFC provided essential funding despite knowing Plaintiffs would be – and were – harmed by the Tata Mundra Project, and Plaintiffs have suffered as a result.

Tata Mundra had IFC's highest risk designation, "Category A," from the start, JA28-29 ¶48; JA980, and IFC knew when it approved the loan, allowing the Project to go forward, that it presented serious environmental and social risks; indeed it would cause harms that could *not* be mitigated and would *necessarily* result from financing the Project. JA28-29 ¶48; JA46 ¶129-30; JA1566-67 ¶208; JA1569 ¶216-17. IFC nonetheless approved the Project and its harmful design. JA18-19 ¶5; JA58-59 ¶168-71; JA1569 ¶216; JA1572-75 ¶¶231-39.

IFC also knew that, without sufficient precautions, other harms might result to

[4] IFC also has the power to change Coastal Gujarat's board of directors and senior management, to approve construction contractors, and to appoint consultants whose "observations" must be complied with at pain of default. JA467-68; JA540 §4.1(x); JA553 §5.1(w); JA583 §6.1(aa); JA596 §8.15.

Plaintiffs. JA18 ¶4; JA28 ¶48; JA1555-56 ¶¶165-68; JA1569 ¶¶216-17. Indeed, IFC noted that "improper mitigation" could trigger "unacceptable environmental impacts." JA18 ¶4; JA28-29 ¶48; JA986. Despite identifying precisely the features that posed the most risk – including design of the cooling system and its impacts on the marine environment, among others – where caution was most needed, *see, e.g.,* JA661-62; JA28-29 ¶¶48-49, IFC did not properly address or plan for the risks that could have been mitigated. JA1569-70 ¶¶216, 218; JA52-54 ¶154; JA56-57 ¶¶164-65.

When the foreseeable harms to Plaintiffs materialized, IFC failed to enforce the contract provisions requiring Coastal Gujarat to remediate harm and prevent further injury. JA18-19 ¶5; JA56 ¶163; JA59-60 ¶172-75. And although the loan conditions went unmet, and despite knowing the harms it predicted had materialized, IFC continued to disburse funds. JA56 ¶163; JA59-60 ¶172-75; JA63 ¶¶190-91; JA1555 ¶164; JA1576 ¶¶241, 244.

In response to a complaint filed by Plaintiff Machimar Adhikar Sangharsh Sangathan (Association for the Struggle for Fisherworkers' Rights), IFC's Compliance Advisor Ombudsman audited the Project and found significant failures by IFC at every stage. JA51-54 ¶¶149-54; JA974-76. In particular, it found that: IFC inadequately supervised the project, JA52-54 ¶154; JA975-76; the plant's construction and operation did not comply with the applicable environmental and safety guidelines, JA975-76; and IFC's review and supervision of impacts on the marine environment and the air quality had significant shortcomings. JA975-76; JA1000-07; JA53-54

¶¶154(d)-(g). IFC's Ombudsman noted that IFC's treatment of air quality standards was both "noncompliant" and "at odds" with its "stated rationale for its involvement in the project . . . : namely, improved [environmental and social] performance" through "more stringent" standards. JA59-60 ¶173; JA1006-07.

Despite the Ombudsman emphasizing "the need for a rapid" and "remedial" response, IFC failed to respond effectively to the Ombudsman's findings. JA54 ¶156; JA1047; JA1064; JA1075. IFC still has taken no action.

The result is a "dismal picture." *Jam v. Int'l Fin. Corp. ("Jam I")*, 860 F.3d 703, 704 n.1 (D.C. Cir. 2017). Plaintiffs are fishermen, farmers, a local government, and a trade union of fishworkers who have had their local environment and way of life devastated by the Plant. The individual Plaintiffs who live and work with their families near the Plant can no longer sustain their livelihoods, and face increasing threats to their health. JA34-41 ¶¶73-115.

For example, the Plant's cooling system releases a river of heated water, killing the fish that Plaintiff Budha Jam and others have relied on for decades for both their income and nourishment. JA34 ¶76; JA61 ¶183; JA68 ¶214; JA70 ¶227; JA71 ¶¶235-37. Although Indian law required lining the cooling system's intake channel, this was not done, JA26 ¶36; JA62 ¶185, causing saltwater to foul local wells; fresh drinking water must now be purchased elsewhere, and farmers, including Plaintiff Ranubha Jadeja, have been forced to stop growing many crops. JA19 ¶8; JA41 ¶¶111-15. Between the devastated fish stocks and ruined farms, many of the Project's neighbors

worry they will be unable to feed their families. JA20 ¶11; JA41 ¶114; JA69 ¶221. The Plant also exceeds air pollution limits, JA20 ¶10; JA38-39 ¶¶99-101, and dust and ash from the Plant and the conveyor system that brings it coal disperse into the air and contaminate surrounding land, property, and air, damage crops and drying fish, and seriously harm residents' health. JA20 ¶10; JA39-40 ¶¶103-09. On top of causing all this harm, the Project has been financially disastrous, threatening the viability of its corporate developers. JA33-34 ¶¶70-3.

C. IFC committed the acts and omissions for which it was sued in the United States.

IFC made all of its tortious decisions at IFC headquarters in Washington, D.C. JA64 ¶¶196-97, 99; JA1563-82 ¶¶197-269. IFC decided to finance the project, despite knowing that it posed substantial risks and would inevitably cause irreversible harm, without sufficient due diligence, and without an adequate plan to prevent the effects it could avoid. JA1555-56 ¶¶161-66; JA1566-71 ¶¶208, 215- 25; JA55-57 ¶¶165-68. IFC's project review, decision-making, and approval process all occurred here. JA1563-78 ¶¶197-250; JA64 ¶¶196-99. In particular:

- IFC approved the loan in Washington. JA1564 ¶199.
- IFC did its due diligence in Washington. JA1564-68 ¶¶199-213.
- IFC supervised and approved the plant's negligent design and environmental and social management in Washington. JA1563-81 ¶¶197-234, 236, 238-252, 256-65.
- IFC decided to disburse each tranche of the loan, despite knowledge of

Coastal Gujarat's poor environmental and social compliance, in Washington. JA1555 ¶164; JA1571-78 ¶¶225-250.

- IFC decided not to enforce the environmental and social requirements in the Loan Agreement or take other action to mitigate the harms to Plaintiffs and their neighbors, in Washington. JA1553 ¶155, JA1556-58 ¶¶169-73, JA1574-81 ¶¶234-37, 241-52, 256, 259-266.

Ultimate authority for IFC's social and environmental oversight of the project rested with officials in the United States. Indeed, because this was a high risk project and was out of compliance with IFC standards and Indian law, *e.g.* JA1525 ¶36; JA1537 ¶99; JA1557 ¶170; JA1576 ¶¶241, 244, IFC management in Washington exercised even greater oversight and control than for normal projects. JA1564 ¶199; JA1577-78 ¶¶246-48, ¶250; JA1580 ¶257.

D. IFC's mission is to fight poverty while protecting communities.

IFC's stated "mission is to fight poverty." JA65 ¶203; JA1252 ¶8. "Central" to IFC's mission is its "intent to 'do no harm' to people and the environment[.]" JA65 ¶203; JA1267 ¶8. "Environmental and social issues are among [its mission's] most critical components." JA708; *see also* JA66 ¶¶204-206; JA346.

To ensure that its investments promote its mission, IFC's policies and standards "outline the outcomes IFC must achieve," JA251, in order to "enhance [IFC's] . . . accountability" and ensure "positive development outcomes." JA1252 ¶7; *see also* JA28 ¶45; JA42 ¶117. Among these are IFC's Performance Standards on Environmental and Social Sustainability, *see* JA1275, which define its corporate clients'

"responsibilities" and the "requirements for receiving and retaining IFC support." JA910; JA42 ¶117. These standards are binding on clients, but also require IFC to ensure that the projects it funds can comply with the standards, and actually do so. JA42 ¶117; JA47 ¶¶131-35; JA1251 ¶2; JA1254-56 ¶¶20-31.

Heightened requirements apply to high risk "category A" projects – those "expected to have significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented," – such as ensuring "Broad Community Support" from potentially affected communities. JA46 ¶¶129-30; JA66 ¶207; JA1268-69; JA281-87. IFC also takes on obligations to supervise compliance throughout the duration of its investment, and to take remedial action in the event of a breach of the environmental and social requirements. JA42 ¶117, JA48-49 ¶¶136-139; JA1267 ¶11; JA1270-71 ¶26.

IFC's Compliance Ombudsman can receive complaints and review IFC's compliance with its environmental and social obligations. JA49 ¶141; JA708. The Ombudsman can make a finding of non-compliance and issue recommendations (as it did in this case), but it lacks any power to compel IFC to provide remedies to those harmed or take any other action. JA349; JA203-04; JA65 ¶202. It is not "a substitute for . . . court systems." JA715; *accord* JA349.

E. Accountability is critical to IFC's mission and credibility.

IFC acknowledges that "the internal organization . . . should be subject to *outside scrutiny*." JA708 (emphasis added). "Robust implementation" of IFC's policies

and standards "is the only way [IFC] can guarantee that project outcomes are consistent with [its] overarching goal, and that those who host [IFC] projects – local communities – do not bear an undue burden of risk." JA829; *accord* JA65-66 ¶203-04. IFC recognizes that because "community participation and partnership" are "essential" to IFC's ability to provide "deliver positive outcomes," JA829-30, the "complaints of people affected by [IFC] projects . . . have to be addressed in a manner that is fair, constructive and objective." JA708.

II. PROCEDURAL HISTORY

Plaintiffs sued IFC for its negligence in financing the Project and approving its design, despite knowing that the plant would harm local families, and in failing to mitigate the harms. IFC moved to dismiss, arguing that the International Organizations Immunities Act, 22 U.S.C. § 288a(b), entitles it to absolute immunity from suit. Plaintiffs countered that this statute provides only the same immunity as the FSIA, and that IFC's Articles of Agreement waive immunity from suit.

The district court dismissed and this Court affirmed, finding that IFC was absolutely immune under the International Organizations Immunities Act, based on this Court's then-binding precedent. *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 108 (D.D.C. 2016) (citing *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998)), *aff'd Jam I*, 860 F.3d 703. The district court also held that despite "the broad language of [IFC's] waiver," IFC had not waived immunity. 172 F. Supp. 3d at 109, 112. This Court affirmed; it recognized that Plaintiffs' claims would result in a "'corresponding

benefit'" to IFC by holding it to its mission and allowing it to gain communities' trust, but concluded that there was no waiver because these claims "implicate internal operations" and "threaten [IFC's] policy discretion." *Jam I*, 860 F.3d at 707-08 (citing *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983)).

The Supreme Court reversed. It held that the International Organizations Immunities Act only grants IFC restrictive immunity under the FSIA, and thus IFC may be sued for its commercial acts. *Jam II*, 139 S. Ct. at 768-72.

On remand, IFC again claimed immunity, this time asserting that the FSIA's commercial activity exception does not apply. IFC argued that FSIA claims are always "based upon" the last act in the causal chain that harmed plaintiffs, even if committed by someone other than the defendant, and that Plaintiffs' claims are thus based on Coastal Gujarat's acts. First Opinion, JA1496-97.

The district court originally rejected IFC's arguments, concluding that the suit was "based upon" *IFC*'s "failure to supervise and monitor construction and operation of the [project] and ensure its compliance with numerous environmental and social . . . requirements in the loan agreement[.]" JA1496. The court nonetheless dismissed, finding Plaintiffs did not specifically allege that IFC committed *those* tortious acts in the United States. JA1507-09. The court also found that IFC's lending was not the basis of the claim because plaintiffs did not "make specific allegations that approving the funding – by itself – was a negligent act." JA1505-06.

Plaintiffs moved to amend their complaint to address the district court's

concerns, or alternatively for reconsideration based on facts already in the record that the court did not address. D.E. 63 at 9-16. Plaintiffs' proposed amended complaint alleged, and the unconsidered facts showed, that approving the loan by itself *was* negligent; IFC knew that the project, which could not have proceeded absent IFC funding, presented serious risks, and that at least some of those harms could not be prevented. JA1569-71 ¶¶216-225. Plaintiffs also alleged that IFC committed the acts and omissions that the district court found to be the gravamen in Washington, D.C.; this includes IFC's approval of the project's design, supervision of project planning and implementation, response to complaints about the project, and decision to continue disbursing funds without enforcing the protective loan provisions. JA1563-68 ¶¶197-215; JA1571-82 ¶¶226-51, 256-60, 266-68.

The district court denied Plaintiffs' motion, "revis[ing]" its earlier opinion, this time holding the claims are "based upon" Coastal Gujarat's conduct, not IFC's. JA1749.[5] The court reaffirmed that IFC's proposed "bright-line rule that the conduct that 'actually injured' plaintiffs is *always* the gravamen . . . remains incorrect." JA1739. But it found that "in the typical case – though not in every case – the conduct that actually injured a plaintiff *will* constitute the gravamen of a complaint," even if that conduct is committed by a third party. JA1739-40 (quotation marks omitted). This

[5] The court misstated Plaintiffs' position as suggesting that the claim can be based only on IFC's *affirmative* conduct. First Opinion, JA1502-03; Second Opinion, JA1739. IFC's omissions can be the gravamen.

"will depend heavily on the facts and circumstances of each case." JA1744.

Under its "refined understanding," the court concluded that Plaintiffs' claims are based upon Coastal Gujarat's "construction and operation of the [plant] in India." JA1743, JA1748-49. In so doing, the court abandoned its original holding that the suit was based upon "'IFC's failure to ensure the [ ] Plant was designed, constructed, and operated with due care.'" JA1749 (quoting First Opinion, JA1511).

The court rejected Plaintiffs' amendments as futile, holding that the amendments "relate only to IFC's conduct," and "IFC's conduct is not what the suit is based upon." JA1750-52. Plaintiffs appeal this denial of leave to amend and dismissal.

SUMMARY OF THE ARGUMENT

This Court held, in this case, that if the FSIA applies, IFC is not immune. The Supreme Court has now held that the FSIA applies. This Court should reverse based on its prior decision.

In any event, the Court was right. Whether a sovereign defendant is entitled to immunity under the commercial activity exception depends on the nature and location of the *sovereign's* acts. A sovereign has no immunity for its commercial activities and can be held liable under the same circumstances as any other defendant. The "based upon" inquiry looks to the *sovereign's* acts that form the core of the case against the sovereign, and asks whether that conduct is commercial, and whether it has a sufficient connection to the United States. If both conditions are met, the sovereign

can be sued. 28 U.S.C. § 1605(a)(2). Nothing more is required.

But the Second Opinion would create an additional requirement. It held that, in most cases, the sovereign must commit the last act preceding the injury, even though ordinary liability rules have no such limitation. The district court's focus on a third party's conduct rather than the sovereign's would sharply circumscribe the commercial activity exception, contrary to precedent and the FSIA's text and purpose.

This Court has addressed a number of FSIA cases where someone other than the sovereign defendant commits the last harmful act, and has always found that immunity turns on the sovereign's conduct. Five other Circuits have ruled likewise. But the district court somehow thought this was an open question. It relied on *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), but neither addressed whether courts determine a sovereign's immunity based on third party conduct, or suggested courts should do so. Both considered the *sovereign's* acts. The question was not *whose* acts were the basis of the suit, but *which* of the sovereign's acts counted.

The district court's third party–focused immunity analysis runs headlong into the FSIA's text. It is foreclosed by Section 1602's instruction that sovereigns are not immune "insofar as *their* commercial activities are concerned." (Emphasis added.) It conflicts with Section 1605(a)(2), which allows suit where the claim is "based upon a commercial activity carried on in the United States by the foreign state," since a claim is "based upon" the *defendant's* acts for which it is sued. And it would eliminate joint

tortfeasor liability, eviscerating Section 1606's mandate that sovereigns engaged in commercial activity are liable to "the same extent" as private parties.

We also know that the "based upon" standard requires only that the *sovereign's* commercial conduct have a geographical nexus to the United States, because the text and legislative history make clear that the inquiry is about personal jurisdiction. Since a sovereign's commercial conduct is not immune, the question, as for private parties, is whether the U.S. is a proper forum. The "based upon" provision was patterned after long-arm statutes, permitting suit where the defendant's conduct has sufficient ties to the United States. Accordingly, the inquiry is satisfied where the sovereign's activities for which it is sued have a substantial U.S. nexus. Third parties' acts are irrelevant.

The Supreme Court has cautioned that jurisdictional rules must be clear and easily administered. The Second Opinion's "rule" that the claim is usually, but not always, based on the last harmful act is anything but. And it would immunize sovereigns even if both the third party and the sovereign acted entirely within the U.S., because the claim would still be "based upon" the third party's acts. Congress did not intend such absurd results.

Even if a third party's conduct *could* be the basis of the claim, it is not here, since Plaintiffs sued IFC for its *own* tortious conduct. The Supreme Court directed courts to look to the elements of the claim under the plaintiff's theory of liability. Under the ordinary tort standards Plaintiffs invoke, a defendant who enables or abets another's torts is liable for its own conduct, even if its co-tortfeasor's acts are the

more immediate cause of the harm. IFC's liability is based upon its own negligence.

In any event, IFC's Articles of Agreement waive any FSIA immunity here. As this Court held in *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank,* 382 F.2d 454, 457 (D.C. Cir. 1967), the plain text of IFC's Articles waives immunity for all suits except those by member states. A subsequent panel reinterpreted that provision, concluding that despite its broad language, immunity should only be deemed waived where the type of suit would "further the organization's goals." *Mendaro*, 717 F.2d at 617. *Lutcher* controls, because *Mendaro* purported to overturn *Lutcher* without intervening *en banc* or Supreme Court authority, and because under *Jam II*, the waiver language must be read to mean what it says.

Regardless, IFC waived immunity even under *Mendaro*, because suits by communities neighboring IFC projects benefit IFC. They promote IFC's mission to help, not hurt, poor people by vindicating rights IFC obligates itself to protect. And while IFC must obtain local people's consent before funding dangerous projects like Tata Mundra, communities may hesitate to trust IFC if they could not enforce IFC's promises.

STANDARD OF REVIEW

Review of FSIA immunity decisions is *de novo*, *Schubarth v. Federal Republic of Germany*, 891 F.3d 392, 398 (D.C. Cir. 2018), as is the denial of a motion to amend on futility grounds, *Singletary v. Howard University*, 939 F.3d 287, 295 (D.C. Cir. 2019).

ARGUMENT

I. *Jam I* held that IFC does not have immunity under the FSIA.

This Court previously held that since IFC's operations are "commercial," if, as *Jam II* later found, the FSIA applies, IFC would not "retain immunity." *Jam I*, 860 F.3d at 707. Although *Jam I* was reversed by the Supreme Court in *Jam II*, and then vacated by this Court, the Supreme Court "expressed no opinion on the merit of [this] holding[]"; it therefore "continue[s] to have precedential weight." *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991). Thus, under *Jam I*, the inquiry ends here: the IFC does not retain immunity under the commercial activity exception to the FSIA.

II. Sovereigns engaged in commercial activity are treated like private parties.

The FSIA codifies "the restrictive theory of sovereign immunity," under which a sovereign is immune from suits involving its public acts, but not its commercial acts. *Verlinden BV v. Cent. Bank of Nigeria*, 461 U.S. 480, 487-88 (1983). Since a sovereign engaged in commercial activities "exercises only those powers that can also be exercised by private citizens," not "powers peculiar to sovereigns," it is treated like any other private actor and is due no special immunity. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (quotation marks omitted).

The FSIA codifies the equal treatment of sovereigns engaged in commercial acts and private parties through two provisions. First, the commercial activity

exception provides that a sovereign can be sued where its "commercial activity" has a sufficient nexus to the United States. 28 U.S.C. § 1605(a)(2). Thus, a sovereign is not immune in any "action . . . based upon," among other things, "a commercial activity carried on in the United States by the [sovereign]; or upon an act performed in the United States in connection with a commercial activity of the [sovereign] elsewhere." 28 U.S.C. § 1605(a)(2).

Second, Section 1606 provides that, when a sovereign is "not entitled to immunity," it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." Thus, the FSIA does not "affect the substantive law determining the [sovereign's] liability." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983). Together, Sections 1605(a)(2) and 1606 ensure that foreign sovereigns and private parties engaged in commercial activity are treated the same way.

A sovereign's acts are "commercial" when it "acts, not as regulator of a market, but in the manner of a private player within it." *Weltover*, 504 U.S. at 614. IFC's tortious conduct – its commercial loan to a private corporation at market rates, its failure to enforce contract provisions, and its approval of inadequate design, Statement of Facts ("SOF") §A-C, – is clearly commercial. *See, e.g.*, *Cruz v. United States,* 387 F. Supp. 2d 1057, 1063 (N.D. Cal. 2005) (acts "indistinguishable from [those] of a private bank" are commercial).

III. The district court's holding that Plaintiffs' claims against IFC are "based upon" a third party's acts is error.

The Second Opinion's holding that a claim is usually based on the last act that harmed the plaintiff, even if committed by a third party, cannot be sustained. Sovereign immunity depends on the sovereign's acts. The "based upon inquiry" requires courts to "identify the particular conduct on which the plaintiff's action is based," *i.e.* its "gravamen," by looking to "those elements that, if proven, would entitle a plaintiff to relief." *OBB*, 577 U.S. at 33-34 (quotation marks and punctuation omitted); *accord Nelson*, 507 U.S. at 357. A claim is thus "based upon," and its "elements" focus on, the *defendant*'s conduct.

This Court and other Circuits have uniformly determined immunity by reference to the sovereign's acts for which it was sued, not another's conduct. That accords with the FSIA's text and purpose to treat sovereigns and state-owned enterprises engaged in commercial activity the same as private parties. And it avoids the anomalous results and standardless inquiry that reading the "based upon" language to turn on a third party's acts entails.

A. Precedent requires that sovereign immunity be determined by reference to the *sovereign's* acts, not a third party's.

1. The Supreme Court, this Court, and other Circuits look to the sovereign defendant's acts.

A foreign state is only immune for "*its* sovereign" acts, not its "commercial" acts. *Nelson*, 507 U.S. at 359-60 (emphasis added); *accord Permanent Mission of India to the*

U.N. v. City of N.Y., 551 U.S. 193, 199 (2007) (courts consider the "acts . . . of [the] state"). Because immunity turns on whether the "actions that the foreign state performs" are commercial, *Weltover*, 504 U.S. at 614, it cannot depend on the separate acts of any other entity.

This Court has always looked to the sovereign defendant's acts to determine immunity, even where multiple parties acted to harm the plaintiff. *E.g.*, *Jam I*, 860 F.3d at 707. In *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), four sovereign defendants allegedly enticed the plaintiff to contract with one defendant, who breached and gave his property to another defendant. *Id.* at 1024, 1027. This Court held that courts must consider, for *each* defendant, the nexus between *that defendant's* U.S. commercial activity and the wrong, and that the claim was based on the enticement, not the conversion, which was the last act that injured plaintiff. *Id.* at 1027, n.22;[6] *see also Nnaka v. Fed. Republic of Nigeria*, 756 F. App'x 16, 17-18 (D.C. Cir. 2019) (finding claims against Nigeria were "based upon" Nigeria's letter to the Department of Justice (DOJ), rather than the last act that harmed plaintiff, DOJ's successful motion to strike plaintiff's lawsuit).

This Court also assessed sovereign immunity based on the sovereign's conduct in *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985).

[6] Even if *OBB* undermines this holding with respect to the two entities that actually converted property, it does not affect this Court's holding assessing the immunity of the two that did not by their own conduct.

There, plaintiff sued two government entities, one for seizing its ship and the other for refusing payment to free the ship. *Id.* at 1002-04. Neither was immune. *Id.* This Court analyzed each entity's immunity by reference to its *own* acts, and found the latter was not immune even though the act that actually injured plaintiff was the ship's detention. *Id.*

Other Circuits likewise reject the notion that a claim against the sovereign defendant can be "based upon" someone else's acts. The Sixth Circuit case the district court cited involved acts by the sovereign defendant's subsidiary. *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015). The proper analysis involved first deciding which acts were legally attributable to the sovereign, and then "determin[ing] whether *those* acts satisfy the commercial activity exception." *Id.* (emphasis added).

Similarly, the Fifth Circuit held that because the issue is "whether the act of the named defendant" was sovereign or commercial, the "analysis must focus on the *named defendant's* acts . . . and not on [another entity's] separate acts." *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108-09 (5th Cir. 1985) (emphasis added, quotation marks omitted); *accord De Sanchez v. Banco Cent. de Nicaragua,* 770 F.2d 1385, 1391 (5th Cir. 1985) (holding that the analysis "focus[es] on the acts of the named defendant.") The Supreme Court relied on *Callejo* in determining how to apply the "based upon" language. *Nelson*, 507 U.S. at 357; *OBB*, 577 U.S. at 34.

The Second, Seventh and First Circuits have similarly asked "wh[ich] action of

the *foreign state* 'actually injured' the plaintiff?" *MMA Consultants 1, Inc. v. Republic of Peru,* 719 F. App'x. 47, 52 (2d Cir. 2017) (quoting *OBB*, 577 U.S. at 34) (emphasis altered); *accord Garb v. Republic of Pol.*, 440 F.3d 579, 586 (2d Cir. 2006) (courts "identify the act of the foreign sovereign"); *Santos v. Compagnie Nationale Air Fr.*, 934 F.2d 890, 893 n.3 (7th Cir. 1991) (noting the FSIA refers to the "[commercial] activity of the defendant foreign government"); *Univ. Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 16-17 (1st Cir. 2013) (holding inquiry "turn[s]" on the "'actions that the foreign state performs'") (quoting *Weltover*, 504 U.S. at 614); *see also, e.g.*, *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 839 (S.D. Miss. 2004), *rev'd on other grounds*, No. 04-60928, 2006 U.S. App. LEXIS 6571 (5th Cir. Mar. 16, 2006) (holding gravamen was "the acts of the named [sovereign] defendant, not [] other acts that may have had a causal connection with the suit.") (quotation marks omitted).

In *African Growth Corporation v. Republic of Angola*, No. 17-2469, 2019 U.S. Dist. LEXIS 120571 (D.D.C. July 19, 2019), the plaintiff sued individuals for seizing its properties and Angola for permitting the seizures and denying it due process. The basis of the "claims against Angola" was Angola's "conduct for which [plaintiff] seeks to hold Angola liable," not the seizure that actually injured plaintiff. *Id.* at *10-12.

Similarly, in *Rodriguez v. Pan American Health Organization*, No. 20-928, 2020 U.S. Dist. LEXIS 208904 (D.D.C. Nov. 9, 2020), plaintiffs sued the Pan American Health Organization for facilitating forced labor by Cuba by transferring payments for the

labor to Cuba, just like a bank. *Id.* at *20-22. The organization argued the gravamen was *Cuba*'s conduct, since the forced labor "actually injured" the plaintiffs. *Id.* at *26-27. But the court held that the claim against the organization was based on *the organization's* conduct, despite considering the district court's opinion below. *Id.* at *20-21, 27.[7]

A third party's acts may be relevant to determine which of the *defendant's* acts the claim is based upon, but they are not themselves the gravamen. First Opinion, JA1499-1502. The Second Opinion conflicts with precedent uniformly holding that the "based upon" inquiry asks which of the *defendant*'s acts injured the plaintiff.

2. *OBB* and *Nelson* do not support the district court's holding.

Despite this caselaw, the Second Opinion inexplicably stated that whether courts should look to third parties' acts was "a question of first impression." JA1743. It analogized to *OBB* and *Nelson*, JA1743-45, but extended those decisions far beyond their "limited" reach. *See OBB*, 577 U.S. at 36 n.2 (citing *Nelson*, 507 U.S. at 358 n.4). Indeed, when the court first reviewed those cases, it correctly held that Plaintiffs' claims are "based upon" IFC's conduct. JA1503-06.

First, neither *OBB* nor *Nelson* involved third parties. The Second Opinion

[7] *Zhan v. World Bank*, No. 19-1973, 2019 U.S. Dist. LEXIS 201172 at *6 (D.D.C. Nov. 20, 2019), *summarily affirmed*, No. 19-7166, 2020 U.S. App. LEXIS 32290 (D.C. Cir. Oct. 13, 2020) (per curiam), may have concluded that third party conduct can constitute the gravamen, but is unclear. Since neither party briefed the issue and the court provided little analysis, "[not] much can be drawn from that case." Second Opinion, JA1743 n.3.

acknowledged that "neither case addressed the issue explicitly." JA1745; *see also* JA1745 n.5 (noting that in *OBB*, this issue "did not arise").

Second, neither *OBB* nor *Nelson* even suggests that courts look to third parties' acts – indeed, the FSIA's text and purpose foreclose that approach. *Infra* §§III(B), III(C). Both cases considered *which* of *the sovereign*'s acts was the basis of the claim in determining where those acts occurred (in *OBB*) and whether they were commercial in nature (in *Nelson*). In *OBB*, a personal injury claim against a State railway was "based upon" *the defendant*'s management of the railway abroad, not *the defendant*'s sale of a ticket in the United States. 577 U.S. at 35. In *Nelson*, the plaintiff's torture claim was based on *the defendant*'s "tortious conduct," the torture, which was a non-commercial act, not that same defendant's commercial act of hiring the plaintiff. 507 U.S. at 358, 361-63. Thus, *OBB* turned on the fact that *the defendant*'s negligence occurred abroad, and *Nelson* on the fact that *the defendant*'s tortious act was not commercial. The holdings of both cases are therefore "limited"; "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." *OBB*, 577 U.S. at 36 n.2 (citing *Nelson*, 507 U.S. at 358 n.4).

The Second Opinion fixated on *OBB*'s reference to the conduct that "actually injured" plaintiff, and extrapolated from *OBB* and *Nelson* to find that such conduct typically, but not always, will be the basis of the claim, even in the quite different context where a third party committed the last harmful act. JA1742. But the "actually injured" language *only* appears in those cases in *OBB*'s observation that *Nelson*'s torture

claim was based upon "*the Saudi sovereign acts* that actually injured [plaintiff]," rather than the sovereign's other acts. *OBB*, 577 U.S. at 34, 35 (emphasis added). That hardly suggests courts should assess sovereign immunity based on a third party's conduct. *See* First Opinion, JA1499 (noting Supreme Court rejected failure to warn claims as artful pleading, not because last harmful act must be the gravamen).

The Second Opinion "f[ou]nd nothing in [*OBB* and *Nelson*] suggesting that courts should restrict the gravamen analysis to just the named defendants' conduct." JA1744-45. But the Supreme Court's silence about an issue that was not presented does not justify extending those cases beyond their limited holdings.

All *OBB* actually *held* is that in deciding which of the sovereign's acts is the gravamen, the relevant conduct is that at the suit's "core," not conduct that merely satisfies one element of the claim. 577 U.S at 34-35; *see* First Opinion, JA1499-50 (noting "last harmful act" standard would enshrine single element approach *OBB* rejected). The elements of Plaintiffs' claim against IFC focus on IFC's conduct. *Infra* §III(E)(1).

Cases the district court cited to support its "actually injured" approach confirm its error. One expressly held that "court[s] must focus on . . . the *foreign sovereign*'s acts that actually injured the plaintiff." *Sarkar v. Petroleum Co. of Trin. & Tobago Ltd.*, No. 15-2372, 2016 U.S. Dist. LEXIS 82175, *25 (S.D. Tex. June 23, 2016) (emphasis added). In another, the court only considered the sovereign defendant's acts; the basis for suit regarding art stolen by the Nazis was the Netherlands' assertion of ownership, not the

Nazis' original theft. *Berg v. Kingdom of the Neth.*, No. 2:18-cv-3123, 2020 U.S. Dist. LEXIS 84489, *44-45 (D.S.C. Mar. 6, 2020).[8]

B. The FSIA's plain text indicates that sovereign immunity must turn on the sovereign's conduct.

Where, as here, statutory text is "plain and unambiguous," text alone resolves the question. *Chao v. Day*, 436 F.3d 234, 235 (D.C. Cir. 2006). Four FSIA provisions show that sovereign immunity depends on the sovereign's conduct, not anyone else's.

First, "states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned." 28 U.S.C. § 1602 (emphasis added).

Second, the FSIA permits suit where the claim is "based upon a commercial activity carried on in the United States *by the foreign state*." *Id.* § 1605(a)(2) (emphasis added). Both Section 1602 and 1605(a)(2) focus on *defendant's* conduct, not someone else's.

Third, under the Second Opinion, Section 1605(a)(2)'s First Clause would require the sovereign's act to have a direct effect on Plaintiffs. JA1749 (noting the harms "flow directly" from Coastal Gujarat's acts). But Section 1605(a)(2)'s Third Clause – which requires an "act [that] causes a direct effect in the United States" –

[8] Two cases the district court cited did not involve third parties. *Devengoechea v. Bolivarian Repub. of Venezuela*, 889 F.3d 1213, 1218-19 (11th Cir. 2018); *Petersen Energía Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 199-203 (2d Cir. 2018). Similarly, *Sequeira v. Repub. of Nicaragua*, No. 13-4332, 2018 U.S. Dist. LEXIS 144607 *16-21 (C.D. Cal. Aug. 24, 2018), addressed only the defendants' acts, and held that plaintiffs failed to show commercial activities in the U.S.

shows that when the FSIA requires a direct effect, it says so. "[W]hen Congress includes particular language in one section of a statute but omits it in another," courts presume it acted "purposely." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quotation marks omitted).

Fourth, a sovereign engaged in commercial activity "shall be liable . . . to the same extent as a private individual." 28 U.S.C. § 1606; *supra* Section I. But the last harmful act approach imposes a substantive limit that would bar many claims that can be brought against private parties. As the First Opinion recognized, it would "immunize state-owned enterprises and international organizations [engaged in commercial conduct] in the United States" from "any suit in which there is an intervening cause that occurred abroad, even if all of the defendant's relevant conduct occurred in the United States." JA1499. This would preclude "a large swath of causes of action, including failure-to-protect claims, negligent hiring or supervision claims, defective design claims, or any negligence claim with an intervening cause, so long as the 'last act' ultimately occurred outside the United States." *Id.* "Nothing in [*OBB*] or *Nelson* supports this bold proposition." *Id.*; *accord Rodriguez*, 2020 U.S. Dist. LEXIS 208904 at *28. And Section 1606 forecloses it.

These provisions each bar courts from basing immunity on a third party's acts. Taken together, they confirm that the commercial activity exception has "two prerequisites": that the sovereign's relevant acts are commercial and have a geographical nexus to the United States. 15A Moore's Federal Practice - Civil §

104.12[2][a] (LexisNexis 2015). The Second Opinion's additional requirement – that the sovereign commit the last harmful act – conflicts with the statute's plain text.

C. Courts must look to the *defendant*'s conduct because the "based upon" requirement is about specific personal jurisdiction.

Where the sovereign engages in commercial activity, the "based upon" inquiry is a proxy for personal jurisdiction, which looks to the defendant's conduct. IFC's commercial decision-making and supervision in D.C. would easily suffice for personal jurisdiction, and similarly satisfy the commercial activity exception.

1. The "based upon" requirement ensures there is a geographical nexus between defendant's commercial activity and the United States that supports personal jurisdiction.

Section 1605(a)(2) addresses "'commercial activity' involving significant *jurisdictional* contacts with this country." H.R. Rep. No. 94-1487, at 20 n.10 (emphasis added). Since sovereigns engaged in commercial activity have no *conduct*-based immunity, 28 U.S.C. § 1602; *Permanent Mission of India*, 551 U.S. at 199, the only remaining question is whether they can be sued *here*. To ensure such sovereigns are treated like private parties, Congress answered that question by permitting defendants to be sued in circumstances similar to those where the court would have personal jurisdiction.

The FSIA's text makes clear that the "based upon" requirement is about the defendant's personal jurisdiction contacts with the United States. Reading the commercial activity exception together with its definitions, a claim must be "based

upon" the sovereign's commercial activity that has "substantial contact" with the United States. 28 U.S.C. §§ 1603(e), 1605(a)(2); *Nelson*, 507 U.S. at 356. That mirrors the test for specific jurisdiction. *See McGee v. Int'l Life Insur. Co.*, 355 U.S. 220, 223 (1957) (noting due process met for suit "based on" contract with "substantial connection" to the forum).

The legislative history explicitly confirms that the "based upon" inquiry is a proxy for personal jurisdiction. Congress "patterned" section 1330(b) after D.C.'s long-arm statute. H.R. Rep. No. 94-1487 at 13. And the immunity exceptions "prescribe the necessary contacts" for "personal jurisdiction" because they "each . . . require[] some connection between the lawsuit and the United States," or require the foreign state to waive objection to jurisdiction. *Id.* In short, Sections 1330(b) and 1605-07 "provide[], in effect, a Federal long-arm statute over foreign states" that "embodie[s]" the due process "requirements of minimum jurisdictional contacts." *Id.*

Indeed, where service has been made, the FSIA has no personal jurisdiction inquiry distinct from its immunity provisions. 28 U.S.C. § 1330; *Williams v. Romarm, S.A.*, 756 F.3d 777, 782 (D.C. Cir. 2014) (noting the Constitution does not require state to have minimum forum contacts). The "based upon" requirement simply ensures that when a sovereign engages in commercial activity – and thus sheds its conduct-based immunity – the *sovereign's* commercial activity has a sufficient nexus to the United States to satisfy due process concerns. This effectuates Congress's intent to treat sovereigns engaged in commercial activity like private parties.

2. Personal jurisdiction looks to the *defendant*'s conduct.

Personal jurisdiction turns on the relationship between *defendant's* acts for which it is sued and the forum; it does *not* ask, as the Second Opinion did, whether a third party's acts are a more direct cause of the harm than the defendant's. The "defendant-focused 'minimum contacts' inquiry" considers "defendant's suit-related conduct." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (quotation marks omitted). A "third person['s]" acts are "not an appropriate consideration when determining whether a defendant has sufficient [forum] contacts." *Id.* (quotation marks omitted). Accordingly, third parties' acts are irrelevant to the "based upon" inquiry.

In noting that Section 1330 "embodie[s]" the "requirements of minimum jurisdictional contacts," Congress cited *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *McGee* and D.C.'s long-arm statute. H.R. Rep. No. 94-1487 at 13. Under *International Shoe*, jurisdiction lies to enforce the *defendant's* "liabilities sued on," that "arise out of or are connected with" *defendant's* forum activities. 326 U.S. at 317, 319. *McGee* held similarly, using the term "based on." 355 U.S. at 223. And D.C.'s long-arm statute confers jurisdiction over a defendant for claims "arising from the [*defendant's*] . . . business" in the forum. D.C. Code § 13-422 (1970). Since the FSIA's "based upon" language is "modeled" on the long-arm statute, with no "overwhelming" "textual differences" regarding whose conduct counts, the "parallel text and purposes counsel in favor of interpreting the two provisions consistently." *See Lawson v. FMR LLC*, 571 U.S. 429, 458-59 (2014).

This does not necessarily mean that the FSIA and personal jurisdiction inquiries *exactly* overlap; the FSIA may require more contact between the defendant and the forum. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1109 (D.C. Cir. 1982). But the FSIA's "based upon" analysis and personal jurisdiction's "based upon" analysis ask the same essential question: did the *defendant* engage in sufficient forum-connected conduct? To cast aside the FSIA's focus on the type of contacts that establish personal jurisdiction would conflict with the FSIA's text and purpose. Indeed, this Court has looked to personal jurisdiction principles to determine *whose* acts count under the FSIA. *Id.* at 1105 (holding agent's acts count). Since *OBB* and *Nelson* were about *which* of the *defendant*'s acts count, neither addressed whether the "based upon" provision's personal jurisdiction focus forecloses basing immunity on a third parties' acts. The district court's approach – looking to a third party's acts and entirely discounting Defendant's forum conduct – is the exact opposite of a personal jurisdiction analysis and cannot be sustained.

Specific jurisdiction would lie over IFC here, since it committed tortious acts at its D.C. headquarters. *See, e.g.*, *Licci v. Leb. Can. Bank*, 732 F.3d 161, 168-74 (2d Cir. 2013) (finding jurisdiction over bank that abetted terrorism abroad by transferring money from the forum); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 44 (D.D.C. 2010) (same). This case is nothing like *OBB*, where defendant railroad's negligence occurred entirely abroad and its only U.S. conduct was a ticket sale. IFC made all of its key negligent decisions at issue – to fund the Project, to approve the design, to not

enforce the contract – in this forum. Thus, it cannot claim immunity for its commercial acts.

The Second Opinion's "last harmful act" approach conflicts with the FSIA's personal jurisdiction focus, and thus with Congress's intent that states engaged in commercial activities be treated like private parties. *See Keeton v. Hustler Magazine*, 465 U.S. 770, 780 (1984) (tort defendant can be sued "in any forum" in which it has certain minimum contacts). Courts must look to the defendant's acts, not third parties' acts.

D. The Second Opinion would lead to absurd results and invites a standardless inquiry.

The First Opinion rejected the last harmful act approach in part because it would immunize sovereign enterprises "from any suit in which there is an intervening cause that occurred abroad." JA1499. That result would not only conflict with the statute's text, *supra* §III(B), it "would lead to [ ] absurd result[s] Congress could not plausibly have intended." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012).

As the First Opinion recognized, the Second Opinion's approach would exclude "large swath[s]" of claims, "even if all of the defendant's relevant conduct occurred in the United States." JA1499. The cases cited above highlight the vast scope of this exclusion; for example, companies harmed by a sovereign that facilitated fraud, *e.g.*, *Dale,* 337 F. Supp. 2d at 839, would be out of luck. Congress did not intend to hamstring such ordinary commercial claims.

Indeed, the implications are far broader than the district court suggested. The Second Opinion's holding that the "[defendant's] conduct is not what the suit is based upon" would immunize a sovereign's commercial activity where a third party committed the last harmful act, even if *the third party* and the sovereign both acted in the United States. Such a suit would not be based upon commercial activity "by the [sovereign]." 28 U.S.C. § 1605(a)(2). Instead, it would be "based upon" the non-sovereign's act; here, the district court found IFC's conduct to be irrelevant.[9] Focusing on the defendant's acts avoids the result that a suit based entirely on commercial activity in the U.S. would fail the commercial activity exception.

The Second Opinion's approach is also too uncertain. "[J]urisdictional rules should be clear." *Lapides v. Bd. of Regents*, 535 U.S. 613, 621 (2002). Courts therefore "place primary weight upon the need for judicial administration . . . to remain as simple as possible," *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010), and "eschew [a] fact-specific jurisdictional inquiry." *Sisson v. Ruby*, 497 U.S. 358, 364 (1990). Yet, the Second Opinion found that whether a claim is based upon a third party's conduct "will depend heavily on the facts and circumstances." JA1744.

The court also opined that although the last act will typically be the gravamen, other conduct might be the gravamen where it was "so significant and closely tied to

[9] Under Section 1605(5), the noncommercial tort exception, there might be jurisdiction if the claim was for personal injury or property damage and if the injury also occurred here, but the commercial activity exception contains no such limits.

the eventual injury that it constitutes the gravamen." JA1747-48 (citing *OBB*, 577 U.S. at 36 n.2). There are no guideposts for how to apply this circular standard.

The Second Opinion further asserted that Coastal Gujarat's conduct "had a much larger and more direct role" in the harm than IFC's. JA1746; *see also* JA1748 (suggesting other circumstances where courts would have to "conduct a fact-specific analysis of the relative importance" of various conduct). But determining which of two or more responsible parties' conduct is most important is hardly simple; it has the same sort of complexities as the merits determinations that jurisdictional inquiries avoid. Indeed, where more than one party's acts are indispensable, determining whose is most important may be less a judicial question than a koan.

All of these questions would be litigated in future FSIA cases. But "collateral litigation" regarding jurisdiction is "particularly wasteful," and "counsels strongly against any course that would impair the certainty of our jurisdictional rules." *Grupo Dataflux v. Atlas Global Grp. L.P.*, 541 U.S. 567, 582 (2004). Looking to the defendant's conduct is a far better approach.

E. Even if a court could look beyond the defendant's acts, Plaintiffs' claims are "based upon" IFC's own tortious acts and omissions.

As detailed above, *OBB* and *Nelson* addressed *which* of the *defendant's* acts a claim is "based upon." If this Court were to repurpose those cases to decide *whose* acts form the basis of the claim, it still must follow the Supreme Court direction to look to the

elements of the claim under plaintiffs' liability theory. Here, Plaintiffs' theory is that IFC is liable for *its own* tortious acts. The elements focus on those acts.

1. The gravamen must be determined based on the elements of plaintiff's claim and plaintiff's theory of the case.

Courts determine the claim's basis by looking to "those elements of [the] claim that, if proven, would entitle [the] plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. *Nelson* did "not . . . suggest" that "every element of a claim [must] be commercial activity by a foreign state." *Id.* at 358, n.4. Where, as here, plaintiffs sue a joint tortfeasor for its own conduct, their "theory" is that *defendant*'s conduct is tortious and the elements focus on *defendant's* conduct. *See Callejo*, 764 F.2d at 1109 (holding the "acts of the defendant that form the basis of the suit" are the acts "complained of"). Thus, a sovereign who commits tortious acts is not immunized simply by acting in conjunction with a third party.

"[A] single injury can arise from multiple causes, each of which constitutes an actionable wrong." *Nelson*, 507 U.S. at 375 (Kennedy, J., concurring in part and dissenting in part) (citing Restatement (Second) of Torts ("Restatement") §§ 447–449 (1965)).[10] Thus, a defendant can be liable for its own negligence regarding the foreseeable likelihood that a third person would commit a harmful act. Restatement § 449; *Rieser v. District of Columbia*, 563 F.2d 462, 479 (D.C. Cir. 1977). The *defendant's*

[10] Justice Kennedy sought to apply this joint liability principle to a single responsible party. Here, joint liability principles should apply to joint tortfeasors.

conduct that contributed to plaintiff's injury forms the basis of the claim against *that defendant*, even where another's conduct was a more immediate cause.

The Supreme Court has recognized this general tort principle. In *Sheridan v. United States*, 487 U.S. 392 (1988), for example, a drunk federal employee shot the plaintiff. The case involved "two tortious acts": the shooting, and the "negligence of [other Government employees] who allowed a foreseeable assault and battery to occur," which was an "entirely independent" basis for Government liability. *Id.* at 395, 398, 401. This Court similarly held that the Government could be liable for negligence in failing to *prevent* sexual assaults. *Bembenista v. United States*, 866 F.2d 493, 494, 497-98 (D.C. Cir. 1989). And on facts analogous to these, the Supreme Court allowed a construction defect claim against the Government for failing to properly inspect the structure. *Block v. Neal*, 460 U.S. 289, 296-98 (1983). Thus, the fact that the most immediate cause of an injury is a third party's conduct does not make that conduct the basis of the claim.

This Court has applied the elements analysis to the FSIA. It found, in a case where a contract authorization was "central to [plaintiff's] theory," that since the foreign state announced the authorization in the U.S., the facts suggested the commercial activity exception was met. *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 466 (D.C. Cir. 2017). And in *Croesus EMTR Master Fund L.P. v. Federative Rep. of Brazil,* 212 F. Supp. 2d 30, 34-35 (D.D.C. 2002), third parties sold U.S. investors bonds that Brazil had already cancelled. Brazil's immunity turned on Brazil's conduct

relevant to the "elements" of the claims pled.

The First Circuit has expressly rejected the Second Opinion's approach. In *Merlini v. Canada*, 926 F.3d 21, 29 (1st Cir. 2019), the U.S. as *amicus* sought to redefine a workplace injury claim against Canada as based on a non-party coworker's negligence that injured the plaintiff. But the court determined the basis of plaintiff's claim against Canada, as an employer, by looking to its elements. *Id.*

Plaintiffs' claims against IFC are based on *IFC*'s negligence and abetting. The elements of Plaintiffs' claims – tortious conduct, duty to act a certain way, and *mens rea* – focus on *IFC*'s conduct. The gravamen of Plaintiffs' negligence theory is that *IFC* acted without due care and without regard for the risk from another's foreseeable conduct. *See* Restatement §§ 302, 302B & cmt. h. Similarly, "the gravamen of [Plaintiffs'] aiding and abetting" theory is *defendant's* knowing, substantial assistance to another's breach of duty. *Overseas Private Inv. Corp. v. Industria de Pesca, N.A.*, 920 F. Supp. 207, 210 (D.D.C. 1996); *accord Aziz v. Alcolac, Inc.*, 658 F.3d 388, 394 (4th Cir. 2011) ("gravamen" of claim for abetting chemical weapon attack was defendant's sale of chemical). The basis of these claims is what IFC knew and did.

The analysis cannot focus on what Coastal Gujarat did, because the claims are "based upon" IFC's own tortious conduct that makes it liable. "[T]he negligence of [the defendant] wh[ich] allowed a foreseeable [injury] to occur" supports a claim against the defendant based upon its own conduct. *Sheridan*, 487 U.S. at 401. Indeed, this "theory of liability . . . is analogous to cases in which a person assumes control of

a vicious animal, or perhaps an explosive device." *Id.* at 403. Saying this case is "based upon" Coastal Gujarat's acts is like saying a case against a negligent handler is "based upon" the tiger's attack or the bomb's explosion.

2. The Second Opinion misconstrued the gravamen inquiry, which focuses on whether plaintiffs' claims are properly labeled.

OBB and *Nelson* refused to allow plaintiffs to "'recast'" ordinary tort claims as defendant's failure to warn of "'its own tortious propensity,'" which plaintiffs could virtually always do. *OBB*, 577 U.S. at 36 (quoting *Nelson*, 507 U.S. at 363). Courts prevent plaintiffs from "thwart[ing] the [FSIA's] manifest purpose to codify the restrictive theory," *Nelson*, 507 U.S. at 363, "through artful pleading." *OBB*, 577 U.S. at 36. But the inquiry merely looks past the complaint's "labels" to ascertain the *type* of claim plaintiff actually brought; it "makes central the plaintiff's own claims." *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 755-56 (2017) (citing *OBB*, 577 U.S. at 34-36).

Thus, in rejecting the assertion that courts should look to a third party's act that harmed the plaintiff, *Merlini* held that there was no artful pleading; the defendant's acts "did not simply 'le[ad] to' the injury that [the plaintiff] received; [they] provide[] the legal basis for the only cause of action that [the plaintiff] has against [the defendant]." 926 F.3d at 30 (quoting and distinguishing *Nelson*, 507 U.S. at 358); *accord Rodriguez*, 2020 U.S. Dist. LEXIS 208904 at *25-26 (holding claim against international organization for facilitating Cuba's forced labor did not "repackag[e]" same conduct

by same defendant as a new claim; the organization's conduct was separately wrongful conduct from that supporting claim against Cuba).

Here, Plaintiffs did not "recast" their claims; they have accurately stated them as claims against IFC. There is no artful pleading, since Plaintiffs pled the only claims they could against this defendant. *Merlini*, 926 F.3d at 30.

The district court erred in assuming that it must determine whose conduct would be the gravamen of the entire case if Coastal Gujarat had also been sued, and in concluding that it would be Coastal Gujarat's conduct since it "had a much larger and more direct role" in the harm than IFC. Second Opinion, JA1746. That approach has five fatal flaws.

First, courts determine the gravamen of claims against sovereigns by reference to *their* conduct, *supra* §III(A), even where more directly responsible tortfeasors are also sued. *Transamerican S.S. Corp.*, 767 F.2d at 1002-04; *African Growth Corporation*, 2019 U.S. Dist. LEXIS 120571 at *10-12.

Second, *OBB* recognized that the "gravamen" may be different for "each claim." 577 U.S. at 36 n.2. If different claims against one defendant may be based on different conduct, surely different claims against different defendants can be, too. So even if Coastal Gujarat had been sued, the gravamen of claims against Coastal Gujarat and IFC would be different – each based on its own conduct.

Third, under ordinary liability rules, a responsible party can be liable even if another party's conduct is more important. Treating sovereigns engaged in

commercial activity differently conflicts with Section 1606's requirement that ordinary tort principles apply. Of course, a sovereign's conduct can be too attenuated from the harm for liability, but that is a merits question. The FSIA's "based upon" standard cannot be more onerous than the attenuation standard imposed by substantive law.

Fourth, even *Rodriguez*, which incorrectly considered the *extent* of the defendant's responsibility, held that the gravamen was *defendant*'s acts that facilitated forced labor, rather than Cuba's forced labor itself, since defendant's role was not "minor or ancillary." 2020 U.S. Dist. LEXIS 208904 at *27-28. Here, contrary to the district court's suggestion that IFC "played only a small part," Second Opinion, JA1746, IFC's conduct was indispensable to the injury – even more so than the Pan American Health Organization's conduct. The Plant could not have been built without IFC's participation and approval. *Supra* SOF §A.

Fifth, the court could not treat this case as if Plaintiffs sued Coastal Gujarat, when they did not, and given personal jurisdiction limits, could not. As the Second Opinion acknowledged, Plaintiffs are the "'master[s] of the[ir] complaint,' and can choose to assert whatever claims . . . they wish." JA1744 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987)). But the Second Opinion erroneously "recast" Plaintiffs' case against IFC as a case against Coastal Gujarat.

The Second Opinion erred in other respects, too. It referenced *OBB*'s language that there was "'nothing wrongful about the sale of the Eurail pass standing alone,'" JA1744 (quoting 577 U.S. at 35), but that is not true of IFC's conduct, which was

negligent, and thus independently wrongful. *E.g. Sheridan*, 487 U.S. at 401; *Rodriguez*, 2020 U.S. Dist. LEXIS 208904 at *25-26 (rejecting argument that there was "nothing wrongful about [the organization's] role as a financial middleman . . . absent [Cuba's] alleged forced labor" and finding the organization's acts "separately wrongful" and thus the basis of the claim, given its knowledge of Cuba's forced labor) (quotation marks omitted).

The Second Opinion stated that "Plaintiffs cannot succeed on their claims . . . without [the third party's] allegedly harmful conduct." JA1749-50. But that was true in many cases that look to the sovereign's conduct. *Supra* Section III(A)(1). And Plaintiffs' claims also cannot succeed without *IFC*'s tortious conduct. *See*, *e.g.*, *Crystallex Int'l Corp. v. Venez.*, 251 F. Supp. 3d 758, 766-67 (D. Del. 2017) (determining gravamen by reference to *sovereign defendant*'s acts, even though another entity performed the fraudulent transfer, and finding gravamen was *defendants*' intent, as there would be no claim without it), *rev'd on other grounds*, 879 F.3d 79 (3d Cir. 2018). Even if plaintiffs' claim is not based entirely on defendant's conduct, the Supreme Court expressly did *not* require *every* element of the claim to be a sovereign entity's commercial activity. *Nelson*, 507 U.S. at 358 n.4.

The most IFC could say of *this* case is that it is based on *both* Coastal Gujarat and IFC's acts. But the FSIA does *not* require a claim to be based solely upon a state's commercial activity; *Nelson* held only that jurisdiction is lacking "where a claim rests entirely upon" defendant's sovereign acts. *Id.* IFC must show that this case is not

based on IFC's acts *at all*. It cannot.

F. Plaintiffs' claims are "based upon" IFC's United States conduct.

The sovereign's commercial activity must merely "hav[e] substantial contact with the United States." 28 U.S.C. § 1603(e). The Second Opinion stated that Plaintiffs did not meet this requirement, given its conclusion that the gravamen is *Coastal Gujarat's* conduct in India. JA1751 n.11. That was error, since this case is "based upon" IFC's acts.

IFC's tortious conduct has substantial contact with the United States. IFC committed virtually all of it – its negligent funding decisions, supervision, design approvals, and failure to enforce the contract – at IFC's D.C. headquarters. *Supra* SOF §E. Even if some of it occurred in India, Section 1605(a)(2) does not require suits to be based entirely upon wrongful acts in the United States. The First Clause's reference to "commercial activity" includes not only an "act" but also "a regular course of commercial conduct," 28 U.S.C. § 1603(d), and thus looks to the totality of the commercial conduct giving rise to the suit. And "substantial contact" includes activity performed only "in part in the United States." H.R. Rep. No. 94-1487 at 17.[11] IFC's

[11] Moreover, because the "based upon" inquiry is a proxy for specific jurisdiction, *supra* III.C, which lies wherever the defendant engages in substantial relevant conduct, a case may be based upon conduct in multiple forums. As the United States has recognized, the "based upon" test requires only that the commercial activity provide an adequate basis for jurisdiction; the U.S. need not be the only proper forum. *OBB*, 13-1067, Tr. at 31-32, (argued Oct. 5, 2015) (noting a claim "could be based-upon

activities at issue are a course of conduct occurring at least in part in the United States.

But even if IFC's commercial activity were somehow deemed to be entirely in India, Plaintiffs would meet the Second Clause, because their claims are "based upon . . . act[s] performed in the United States in connection with" IFC's commercial activity.

IV. IFC has waived any immunity it might have from this suit.

A. The plain language of IFC's Articles waives immunity in this case.

There is no immunity where an organization has waived it. 28 U.S.C. § 1605(a)(1); 22 U.S.C. § 288a(b). IFC's Articles of Agreement expressly waive immunity: "[a]ctions may be brought against the Corporation . . . in a court of competent jurisdiction in the territories of a member in which the Corporation has an office." JA701 Art. VI §3; *see also* 22 U.S.C. § 282g (giving this provision "full force and effect"). IFC's member states are expressly barred from suing, JA701 §3, but the "broad language" of the waiver otherwise "contain[s] no exceptions." *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 839-40 (D.C. Cir. 2009).

This Court already ruled, over 50 years ago, that the plain text of an identical provision waives immunity "in broad terms," to allow all suits by anyone "having a cause of action for which relief is available," except member states. *Lutcher*, 382 F.2d

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activity in . . . two jurisdictions" and that the FSIA addresses only "whether you can sue in the United States" not "[w]hether you can sue abroad").

at 457. The Court rejected a "restrictive" reading and a "case-by-case" analysis of waiver. *Id.* That ruling was never overturned *en banc* or by the Supreme Court.

Absent such intervening case law, one panel cannot overturn another. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). Yet a later panel "read a qualifier into" the same waiver language, holding waiver requires a "'corresponding benefit'" to the organization. *Osseiran*, 552 F.3d at 839 (quoting *Mendaro*, 717 F.2d at 617); *see also Jam I,* 860 F.3d at 710 (Pillard, J., concurring) (*Mendaro* "decided that courts should pare back an . . . apparent waiver of immunity"). *Mendaro* is "impossible to reconcile" with *Lutcher*. *Vila v. Inter-Am. Inv. Corp.*, 583 F.3d 869, 870 (D.C. Cir. 2009) (statement of Williams, J.); *see also id.* (discussing "*Lutcher*'s different interpretation") (statement of Rogers, J.). The corresponding benefit test closely mirrors *Lutcher*'s characterization of the test that it *rejected*, in which courts would consider whether suits would be "harassing to Bank management," or "necessary . . . to raise its lending capital" or attract "responsible borrowers." 382 F.2d at 460-61.[12] Given the conflict, *Lutcher*, not *Mendaro*, is binding. The earlier decision controls. *Sierra Club*, 648 F.3d at 854.

But even if later panels were "obliged to apply" *Mendaro*, *Jam I*, 860 F.3d at 707, it no longer survives since intervening Supreme Court authority – *Jam II* –

[12] Although *Jam I* stated that "the *Mendaro* test emerged in part from *Lutcher*'s discussion that the charter . . . indicated waiver where 'vulnerability to suit contributes to the effectiveness of the [organization's] operations,'" 860 F.3d at 706 n.3 (quoting *Lutcher,* 382 F.2d at 456), that was the summary of *the Bank's argument* that *Lutcher rejected*, 382 F.2d at 456.

"eviscerated" it. *See, e.g.*, *Dellums v. U.S. Nuclear Reg. Com.*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988). The district court's cursory statement to the contrary is incorrect. First Opinion, JA1510 n.5.

Mendaro conflicts with *Jam II* for at least four reasons. First, the Supreme Court held that courts cannot substitute their analysis of the purpose of immunity for the plain text; the drafter's purpose is generally "expressed by the ordinary meaning of the words used." *Jam II*, 139 S. Ct. at 769 (quotation marks omitted). But *Mendaro* looked past the waiver's plain text to what it believed to be immunity's "underlying purposes," 717 F.2d at 615, precisely what *Jam II* forbids.

Mendaro assumed the drafters were careless, suggesting the plain text would result in "inadvertent" waiver. *Id.* at 617. And *Mendaro* made its assumption that waiver in cases without a "benefit" was "less likely to have been intended" the starting point for reading the provision. *Id.* ("a court's interpretation of the provision … should start with that in mind."). *Lutcher*, by contrast, noted identical language was a "deliberate choice" by its "drafters," who were "aware that they were waiving immunity in broad terms." 382 F.2d at 457; *accord Jam I*, 860 F.3d at 711 (Pillard, J., concurring) (*Mendaro* "second-guess[es]" the "waiver decisions" in an organization's charter). *Lutcher* conforms to *Jam II*; *Mendaro* does not.

Second, *Jam II* requires a plain text reading of the International Organizations Immunities Act. 139 S. Ct. at 768-70. That statute provides that organizations may "expressly waive their immunity." 22 U.S.C. § 288a(b). IFC did so. *Jam I,* 860 F.3d at

706 ("read literally," IFC's charter "would seem to include categorical waiver"); *Mendaro*, 717 F.2d at 617 (identical provision "expressly waive[d] immunity"). By requiring courts to honor express waivers, the International Organizations Immunities Act bars courts from limiting them. *Mendaro*'s qualifier directing courts to assess whether an organization will "benefit" from waiver is just such an impermissible limit.

Third, *Mendaro* construed the waiver language against a backdrop of what it believed to be absolute Section 288a immunity. "The perceived need for *Mendaro*'s odd approach would not have arisen if [the Court] had . . . read the [statute] to confer . . . the same immunity as is enjoyed by foreign governments," *Jam I*, 860 F.3d at 712 (Pillard, J., concurring), as *Jam II* later held. *Mendaro* thought that waiver to permit claims regarding "commercial transactions" was necessary because immunity would "hobble [the organization's] ability to perform the ordinary activities of a financial institution operating in the commercial market place." 717 F.2d at 618. *Jam II*'s holding that Section 288a immunity is *not* absolute, 139 S. Ct. at 772, refutes that assumption, and makes waiver in such cases unnecessary, given the commercial activities exception. *See Jam I*, 860 F.3d at 712 (Pillard, J., concurring). Indeed, when IFC was founded in 1956, the restrictive theory was already well-established. *See* Ltr. from Jack Tate, Acting Legal Adviser, Dep't. of State, to Acting Attorney General Phillip Perlman (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 (1976). The drafters of IFC's Articles knew immunity was restrictive when they wrote IFC's broad waiver.

Fourth, *Mendaro* rejected the plain meaning of the waiver in part because it found generic preamble language in Section 1 "states that the purpose of the waiver . . . is 'to enable [IFC] to fulfill [its] functions.'" 717 F.2d at 617.[13] But Section 1 actually states that this is the purpose of the expressly listed "immunities and privileges," *not* waiver. *See* JA700 § 1. *Jam II* forbids courts from attributing to the drafters a purpose that the plain text does not support.

Regardless, the preamble language cannot limit IFC's waiver since both IFC and Congress have explicitly adopted the broad waiver language elsewhere *without* the preamble that *Mendaro* cited. *See, e.g.*, Convention on the Privileges and Immunities of the Specialized Agencies Annex XIII §1, Nov. 21, 1947, 33 U.N.T.S. 261; 22 U.S.C. § 282g (giving "full force and effect" to article VI, sections 2-9, but not section 1). Those provisions too must be given their plain meaning.

Thus, after *Jam II*, *Mendaro* is no longer binding; IFC's waiver must be read to mean what it says. IFC is not immune from this suit.

B. IFC waived immunity under *Mendaro* because this suit furthers IFC's mission.

Even if *Mendaro*'s corresponding benefit test applies, immunity is waived here. Where, as here, IFC harms a host community, the very people it is meant to protect,

[13] Article VI, Section 1 of IFC's Articles is identical to the provision discussed in *Mendaro*.

in violation of its own policies, and refuses to follow the findings of its own compliance arm, allowing suit furthers IFC's mission and chartered objectives.

Under *Mendaro*, IFC waives immunity where waiver "would further the organization's goals," 717 F.2d at 617, and particularly where it needs an external party's trust, *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009). IFC's mission is to end poverty and its guiding principle is to "do no harm." SOF §D. IFC requires "broad community support" before funding high-risk projects like Tata Mundra, *id.*, and is less likely to secure such support if it can ignore its own promises and leave communities with no recourse. Absent suit, IFC management may continue to ignore IFC's commitments, further undermining the institution. Plaintiffs' "ability to enforce the requirement that the IFC protect surrounding communities is as central to the IFC's mission as a commercial partner's ability to enforce the requirement that the IFC pay its electricity bill." *Jam I*, 860 F.3d at 708.

Thus, the *Jam I* panel was "convince[d]" Plaintiffs' claims *would* benefit IFC by holding it to its mission and enabling it to gain the trust of communities whose support it requires. *Id.* But instead of finding that satisfied *Mendaro*, the panel required that plaintiffs have a "commercial relationship" with IFC that relates to "ancillary business transactions," not IFC's "core operations." *Id.* If the aspects of *Jam I* that the Supreme Court did not reverse survive, then IFC is not immune under the FSIA. *Supra* §I. If not, then it is not precedent here, either.

Regardless, *Jam I* cannot be followed, because it would overturn *Mendaro*. *Sierra Club*, 648 F.3d at 854; *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (noting law-of-the-case doctrine is inapplicable to clearly erroneous prior decision and suggesting law-of-the-circuit is stronger than law-of-the-case). *Mendaro* recognized waiver encompasses claims by "debtors, creditors," and "other potential plaintiffs" where needed "to achieve [the organization's] chartered objectives"; it applies to both "external activities and contracts." 717 F.2d at 615, 621. Waiver was "clear" for borrowers' suits in *Mendaro*, *id.* at 615, 618, even though they go to the "core" of the organization's function and "policy discretion," *Jam I*, 860 F.3d at 708. *Jam I*'s "ancillary" transaction requirement would bar precisely the suits that *Mendaro* expressly allowed.

While IFC has waived immunity for creditors' suits, "there is no reason to believe that suits by creditors are less harassing . . . than [others]." *Lutcher*, 382 F.2d at 459. Management's failure to follow IFC policy, hurting those it is supposed to help, not its amenability to suit, is what endangers IFC's mission.

IFC's relations with people like *these* Plaintiffs are critical to its mission; *Mendaro*'s corresponding benefit test is satisfied and IFC is not immune.

CONCLUSION

Sovereign immunity is about the *sovereign*'s acts, not the extent to which someone else participates in the actionable conduct. When a foreign state, international organization, or state-owned business abandons its immunity by

engaging in commercial activity, the FSIA treats it like a private entity. Since IFC committed its tortious acts here, IFC is not immune. Regardless, this Court must follow the plain language of the immunity waiver IFC drafted. The district court's decision should be reversed.

January 19, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,988 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2021, I filed the foregoing Brief of the Plaintiffs-Appellants in *Jam et al. v. International Finance Corporation*, Nos. 20-7092, 20-7097, with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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ADDENDUM

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22 U.S.C. § 282f

§ 282f. Jurisdiction and venue of actions

For the purpose of any action which may be brought within the United States or its Territories or possessions by or against the Corporation in accordance with the Articles of Agreement of the Corporation, the Corporation shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action. When the Corporation is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law.

22 U.S.C. § 282g

§ 282g. Status, privileges, and immunities of the United States

The provisions of article V, section 5(d), and article VI, sections 2 to 9, both inclusive, of the Articles of Agreement of the Corporation shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of, the Corporation.

22 U.S.C. § 288a

§ 288a Privileges, exemptions, and immunities of international organizations

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

* * *

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, 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.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

28 U.S.C. § 1330

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title [28 USCS §§ 1605–1607] or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title [28 USCS § 1608].

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title [28 USCS §§ 1605–1607].

28 U.S.C. § 1602

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments

rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 USCS §§ 1602 et seq.].

28 U.S.C. § 1603

§ 1603 Definitions

For purposes of this chapter –

* * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1605

§ 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—

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> * * *
>
> (5)not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the

tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A)any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
(B)any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

28 U.S.C. § 1606

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.