No. 21-995

In The
Supreme Court of the United States

BUDHA JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Since 1989, *amicus curiae* Center for International Environmental Law (CIEL) has used the law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL was instrumental in creating the World Bank Inspection Panel—the first accountability mechanism at a development finance institution—and has since supported the creation and use of similar mechanisms at numerous other institutions, including the International Finance Corporation (IFC). For decades, CIEL has assisted communities in obtaining legal redress in national, regional, and international fora for environmental and human rights harms. Central to this mission is CIEL's work to ensure that communities adversely affected by public and private development projects have adequate access to legal remedy.

In this case, after obtaining no redress through IFC's accountability mechanism, petitioners seek an opportunity to hold IFC liable—if their allegations are proven—for the harms they suffered as a foreseeable result of an IFC-financed project, the Tata Mundra coal-fired power plant. They allege that IFC, in approving and administering its loans from the United States, exercised sufficient control and supervisory authority over the design and implementation of the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice and have consented to the filing of this brief.

project that IFC should face liability for the contribution of its actions and omissions to petitioners' injuries.

It is a fundamental principle of international law that actors bear responsibility for their own injurious conduct. CIEL has a strong interest in ensuring that the commercial activities exception under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2) (1976), is interpreted consistently with international law, so as not to deny a remedy to parties foreseeably injured by a sovereign entity's commercial activity, like the financing at issue here. Given the commercial nature of IFC's financing activity in the United States, petitioners' claims—and others like them that may arise in the future—should be evaluated on their merits, not deemed beyond judicial reach as a matter of law.

CIEL submits this brief to demonstrate why interpreting the FSIA to bar suit where a covered entity's commercial activity allegedly contributes to—but is not the most direct cause of—harm, as the D.C. Circuit did here, creates a liability carve-out without basis in the international law of immunity or the text of the FSIA, and at odds with concepts of legal responsibility recognized throughout international law and practice.

SUMMARY OF ARGUMENT

The Court should grant certiorari because this case presents an important and unsettled question of federal law—namely, whether a sovereign entity

can be subject to suit by an injured party for harm allegedly caused, in part, by the sovereign's U.S.-based commercial activities, when other actors may have had a more direct role in causing the harm.[2]

By answering that question in the negative and foreclosing relief against respondent IFC here, the D.C. Circuit erred as a matter of law and departed from widely accepted principles of international law and practice, which the FSIA was meant to codify. Rather than examine whether petitioners' claims concern a *type of conduct* for which a sovereign is immune from any liability—namely, public as opposed to private (commercial) conduct—the D.C. Circuit's decision in effect turned on the *type of liability* for which respondent can face suit, even when acting in a commercial capacity.

The decision below insulates sovereigns acting in their commercial capacity from liability for conduct that contributes to but is not the sole or most direct cause of harm. By contrast, international law and practice widely recognize legal responsibility for contribution to harm. Under international law, neither sovereigns nor private individuals can avoid responsibility for their own wrongful conduct by pointing to another's wrongdoing or more proximate relationship to an injury. But that is precisely what the D.C. Circuit

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[2] In *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019), the Court held that the International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.* (1945), grants IFC and other international organizations the immunity afforded to foreign sovereigns under the FSIA. Thus, references to sovereign or sovereign entity herein include FSIA-covered entities like IFC.

allowed IFC to do here. If not corrected by this Court, the decision below risks allowing other FSIA-covered entities—including foreign governments, state-owned enterprises, and international organizations—to do the same.

By focusing its immunity analysis on whether, in its view, another actor's wrongdoing was a more proximate cause of petitioners' alleged injuries, the decision below conflates the scope of respondent's immunity with the extent of its liability (which is a merits issue), and gets neither right. In shutting the courthouse door to suits like this one, the decision risks making the U.S. a safe haven for a wide range of potentially injurious commercial conduct by FSIA-covered entities. The decision is particularly sweeping in its implications for financial institutions, whose conduct by its nature, will rarely be the sole or most proximate cause of an injury, but often a "but for" one. And while this Court previously held that entities like IFC do not enjoy absolute immunity, the rule created by the D.C. Circuit all but ensures such entities may never face suit based on their commercial financing activities because, even when such entities control or supervise a project that causes injury, their clients will always be more proximate to the harm.

ARGUMENT

I. The FSIA should be interpreted consistently with international law and practice.

Because "[i]nternational law is part of our law," *The Paquette Habana*, 175 U.S. 677, 700 (1900), national law should be interpreted consistently with international laws. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Procopio v. Wilkie, Sec'y of Interior*, 913 F.3d 1371, 1375-76 (Fed. Cir. 2019). This general rule applies with all the more force when the statute being interpreted codifies specific principles of international law.

The FSIA codifies the restrictive theory of sovereign immunity under international law. *See Fed. Republic of Ger. v. Philipp*, 141 S. Ct. 703, 713 (2021); *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319-20 (2017); H.R. Rep. 94-1487, at 7 (1976). This Court has looked to "relevant common law and international practice when interpreting the [FSIA]." *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010) (citing *Permanent Mission of India v. City of New York*, 551 U.S. 193, 200-01 (2007)); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704-05 (1976). In drafting the statute, Congress sought to ensure that it did not subject sovereigns to liability out of step with international practice. *See, e.g.*, H.R. Rep. 94-1487, at 22. Courts should likewise interpret the FSIA to ensure outcomes in line with international practice.

II. The D.C. Circuit's interpretation of the commercial activity exception is inconsistent with the restrictive theory of immunity under international law.

The commercial activity exception is a central tenet of restrictive immunity under international law. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, art. 10, Dec. 4, 2004, U.N. Doc. A/RES/59/38;[3] *Sabeh El Leil v. France*, No. 34869/05, Eur. Ct. H.R. (Grand Chamber), ¶ 18 (2011); James Crawford, *Brownlie's Principles of Public International Law* 480 (9th ed. 2019). State immunity instruments around the globe contain exceptions for commercial activity and transactions. *See* Xiaodong Yang, *State Immunity in International Law* 76 (2012). As states increasingly participated in the global marketplace like private actors, the exception emerged to ensure that individuals have equal access to normal avenues for redress against all engaged in commerce, leveling the playing field between public and private actors. *See* H.R. Rep. 94-1487, at 6-7; Yang, *supra*, at 19-23; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 24, 29 (1976) (testimony

[3] Courts have found that the U.N. Convention on Jurisdictional Immunities, while not yet in force, codifies customary international law on state immunity. *See Sabeh El Leil v. France*, No. 34869/05, Eur. Ct. H.R. (Grand Chamber), ¶ 18 (2011); James Crawford, *Brownlie's Principles of Public International Law* 473 n.26 (9th ed. 2019).

of Monroe Leigh, Legal Adviser, U.S. Department of State).

Under the exception, a sovereign entity is immune from suit arising from its sovereign or public acts, but not from its commercial conduct. H.R. Rep. 94-1487, at 7-8; U.N. Convention on Jurisdictional Immunities, *supra*, art. 10; ILC Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, U.N. Doc. A/46/10, art. 10, art. 10 cmt. ¶¶ 13-18 (1991); Crawford, *supra*, at 471. According to the FSIA, when the exception applies, the foreign state is "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

Under international law and practice, the commercial activity exception turns on whether the impugned conduct is commercial. In making that determination, whether a court looks to the nature of the sovereign's activities, their purpose, or both, the test examines the sovereign defendant's conduct—not that of any other actor.[4] *See* U.N. Convention on Jurisdictional Immunities, *supra*, art. 2(2); ILC Draft Articles on Jurisdictional Immunities, *supra*, art. 2(2) cmt. ¶¶ 25-28; Yang, *supra*, at 85-108 (surveying state practice); David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on Int'l Investment 15, 18-20 (2010).

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[4] The FSIA adopts the nature test. 28 U.S.C. § 1603(d).

Immunity does not turn on the degree of legal responsibility the sovereign defendant may bear if the facts alleged are proven, or whether the suit is likely to succeed. As stated by the International Court of Justice, "[t]he rules of State immunity are *procedural* in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State." *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. Rep. 99, ¶ 93 (Feb. 3) (emphasis added). "[T]he legality or illegality of the [sovereign's] act is something which can be determined only in the exercise of that jurisdiction," *id.* at ¶ 60; it has no bearing on the threshold question of whether the sovereign is immune from suit.

This Court's precedent instructing courts to identify whether the "gravamen" of the suit concerns the sovereign's domestic commercial activity is consistent with these principles of international law. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 34-35 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). It directs the inquiry to focus on the conduct that forms the basis of the legal claims against the sovereign defendant, not on the conduct that, in the court's own view, "actually injured" the plaintiffs. *Contra* Pet. App. 7a.

By focusing on the chain of causation instead of the nature of IFC's impugned conduct, the D.C. Circuit put the cart before the horse. The court erroneously allowed its assessment of the *degree* of liability IFC may bear for petitioners' alleged injuries—a question that goes to the merits—to dictate its immunity analysis.

But the rules of restrictive immunity set forth in the FSIA were not intended to turn on or change the substantive law of liability, including "whether an entity sued is liable in whole or in part for the claimed wrong." H.R. Rep. 94-1487, at 12.

III. The D.C. Circuit's rule would make the U.S. a safe haven for injurious conduct that would attract liability elsewhere.

The decision below is also at odds with a broad range of international law and practice. Across legal regimes, contributory conduct can give rise to various forms of liability in cases of multiple wrongdoers, such as joint and several, concurrent, or accessory liability. The D.C. Circuit's decision insulates foreign sovereigns engaged in commercial activities in the U.S. from liability for conduct that contributes to, but is not the sole or direct cause of, harm. Doing so not only treats foreign sovereigns engaged in such conduct differently in U.S. courts from similarly situated private actors, in contravention of section 1606 of the FSIA; it also insulates them from liability for conduct that can give rise to legal responsibility under international law and other legal systems. In effect, sovereigns engaged in commercial conduct in the U.S. would be exempt from suit in situations in which no other actor, public or private, could avoid facing potential liability.

When Congress wanted to limit sovereign liability under the FSIA, it did so. In section 1606, for example, Congress prohibited imposing punitive damages on a

foreign state or subdivision because such damages are not usually assessed under "current international practice." *Id.* at 22.[5] The FSIA contains no such carve-out for multiple participant liability. This is unsurprising because international practice provides no such protection.

A. The international law of state responsibility recognizes wrongful contribution to harm.

That sovereigns bear legal responsibility for their participation in international wrongdoing is a fundamental precept of public international law. As laid out in the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), and recognized by international courts, "[t]he basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations."[6] ARSIWA, with commentaries, U.N. Doc. A/56/10, art. 1 cmt. ¶ 6

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[5] In 2008, Congress amended the FSIA to allow punitive damages in cases brought under the terrorism exception. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 338, § 1083(a); 28 U.S.C. § 1605A.

[6] ARSIWA is an authoritative source on the law of state responsibility, often regarded as reflecting customary international law. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. Rep. 43, ¶¶ 419-20 (Feb. 26); Crawford, *supra*, at 41, 523; U.N. General Assembly, Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, U.N. Doc. A.74/83 (Apr. 23, 2019).

(2001); *see also id.*, art. 1, art. 1 cmt. ¶ 2; ILC Draft Articles on the Responsibility of International Organizations, with commentaries, U.N. Doc. A/66/10, art. 3 (2011). This responsibility requires a sovereign to make full reparation for the injury caused by its wrongful act. ARSIWA, *supra*, arts. 28, 31; ILC Draft Articles on the Responsibility of International Organizations, *supra*, arts. 28, 31; *accord Factory at Chorzow (Claim for Indemnity)*, Merits, 1928 P.C.I.J. (ser. A) No. 13, at 29 (Sept. 13).

This principle applies with equal force when a sovereign entity is one of a plurality of actors whose acts or omissions contribute to an injury. Recognizing that "[i]nternationally wrongful conduct often results from the collaboration of several States," ARSIWA and the ILC Draft Articles on the Responsibility of International Organizations cover various forms of contributory conduct, including aiding and assisting, directing, controlling, or coercing another to commit an internationally wrongful act. *See* ARSIWA, ch. IV cmt. ¶¶ 2-3, arts. 16-18; ILC Draft Articles on the Responsibility of International Organizations, *supra*, arts. 14-16, 58-59; *accord* International Committee of the Red Cross, Commentary on the First Geneva Convention, ¶ 161 (2d ed. 2016) (explaining that a party's participation in activities it knows would violate the Geneva Convention constitutes aiding or assisting violations).

In other words, a sovereign cannot point to another's wrongdoing or more proximate relationship to an injury to avoid responsibility for its own wrongful conduct. *See Certain Phosphate Lands in Nauru*

(Nauru v. Austl.), Judgment, 1992 I.C.J. Rep. 240, ¶ 48 (June 26) (determining that a court can adjudicate a claim before it even if an action could have been brought against others also responsible for the harm); *Corfu Channel (U.K. of Gr. Brit. & N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, at 22-23, 36 (Apr. 9) (holding Albania responsible for the explosion of mines in its waters when it failed to warn of their presence, notwithstanding another state's responsibility for placing them there).

In situations of contributory conduct, "the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound," regardless of who more directly causes the ensuing harm. ARSIWA, art. 16 cmt. ¶ 10. Financing or providing material support for another's internationally wrongful act can incur responsibility. *See id.*, art. 16 cmt. ¶ 1; *see also* Arie Trouwborst, *Nature Conservation*, *in* Practice of Shared Responsibility in International Law (André Nollkaemper *et al.* eds. 2017) (citing a letter by the Secretariat of the Berne Convention on European Wildlife and Natural Habitats stating that funding a project that threatened an endangered species engaged France's international responsibility). The financing, or other aid or support, need not be "essential to the performance of the internationally wrongful act; *it is sufficient if it contributed significantly to that act*." ARSIWA, ch. IV cmt. ¶ 5 (emphasis added).

Likewise, when actors bear concurrent duty to prevent harm under international environmental law,

they may share responsibility when harm occurs. *See, e.g.*, U.N. Convention on the Law of the Sea, art. 139(2), Dec. 10, 1982, 1833 U.N.T.S. 397 (stating that sovereigns "acting together shall bear joint and several liability" for failure to carry out their responsibilities); U.N. Convention on the Law of the Non-navigational Uses of International Watercourses Convention, art. 7.2, May 21, 1997, 2999 U.N.T.S. 77; Council of Europe, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, arts. 6(2)-(3), 11, June 21, 1993, ETS No. 150 (noting that there can be joint and several liability for harm).

B. International law recognizes private actors' responsibility for wrongful contribution to harm.

As explained above, the FSIA aims to treat foreign states engaged in commercial activity like similarly situated private actors. 28 U.S.C. § 1606. Yet, the result of the D.C. Circuit's decision—to immunize sovereigns acting in a commercial capacity for conduct that contributes to injury—is at odds with how private actors would be treated for similar contributory conduct under international law. Bodies of international law that address the conduct of private and non-state actors—such as international criminal law, the law on financing of terrorism, and international human rights law—all hold actors responsible for conduct that facilitates, supports, or otherwise contributes to an injury or wrongful act, even if that conduct is not the most proximate cause of the injury.

1. International criminal law

International criminal law punishes participation in a crime. Under the Rome Statute of the International Criminal Court, a person can be held criminally liable if they commit a crime, "whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible." Art. 25(3)(a), July 17, 1998, 2187 U.N.T.S. 90. Individual responsibility attaches not only to the principal offense, but also to conduct that "orders, solicits or induces," "aids, abets or otherwise assists" (including by providing the means), or in "any other way contributes to," the commission of a crime. *Id.*, art. (25)(3)(b)-(d).[7] Other international tribunals likewise have criminalized conduct that facilitates another's commission of a crime. *See, e.g.*, Statute of the International Criminal Tribunal for Rwanda, art. 6(1), Nov. 8, 1994, S.C. Res. 955; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), May 25, 1993, S.C. Res. 827. Such conduct includes knowingly contributing financial support to an organization or entity committing widespread abuses. *See, e.g.*, *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952).

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[7] *See also* ILC Draft Code of Crimes Against the Peace and Security of Mankind, U.N. Doc. A/51/10, art. 2(3)(d) (1996); ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity, U.N. Doc. A/74/10, art. 6(2)(b) (2019).

2. International law on the financing of terrorism

Prohibitions on financing terrorism under international law make clear that the act of financing another's wrongful conduct or otherwise assisting it can give rise to legal responsibility. Recognizing "that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain," the Terrorism Financing Convention makes it an offense to provide funds, directly or indirectly, with the intention or knowledge that the funds will be used, in full or in part, to carry out a terrorist offense as defined in the Convention. International Convention for the Suppression of the Financing of Terrorism, pmbl., art. 2, Feb. 10, 2000, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002); *see also* U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373, 1(b) (2001). The Convention criminalizes participating as an accomplice, organizing or directing others, and, in certain circumstances, intentionally contributing to the commission of the offense by a group of persons acting with a common purpose. *Id.*, art. 2(5). In requiring ratifying parties not only to criminalize these offenses in domestic law, but also to provide for "*civil or administrative*" liability, the Convention reflects an understanding that supporting another's wrongful act can incur liability. *Id.*, arts. 4, 5(1) (emphasis added).

That same understanding is also reflected in the FSIA's terrorism exception to immunity, which recognizes that "the provision of material support or resources" to a wrongful act can be grounds for liability.

28 U.S.C. § 1605A(1); *see also* 18 U.S.C. § 239A(b)(1) (material support includes financial services). If Congress understood that this type of contributory conduct could lead to liability, that understanding should apply with equal force to the commercial activity exception. Recognizing the wide range of activities that could be considered commercial, Congress chose broad language for the exception, and gave courts "latitude" in determining what constitutes "commercial activity." H.R. Rep. 94-1487, at 16. It is thus irrelevant that section 1605(a)(2) of the FSIA does not specify financing as a type of covered conduct; it does not enumerate any commercial acts.

3. International human rights law and standards

International human rights law and standards likewise recognize that non-state actors—including financial institutions—bear responsibility for conduct that contributes to human rights violations. States are obliged to hold non-state actors accountable for such conduct.[8] Implicit in that duty is a recognition that contributory harm can and should incur liability.

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[8] *See, e.g.*, U.N. Office of the High Commissioner for Human Rights (OHCHR), Guiding Principles on Business and Human Rights, princ. 1, 2011, adopted by the U.N. Human Rights Council, U.N. Doc. A/HRC/RES/17/4 (2011); Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36, ¶¶ 18, 20-21 (2018); Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State obligations under the International Covenant on Economic,

Under the U.N. Guiding Principles on Business and Human Rights and the Guidelines for Multinational Enterprises established by the Organisation for Economic Co-operation and Development (OECD), businesses—including financial institutions—should avoid *contributing to* adverse human rights impacts and provide or cooperate in the remediation of those impacts when they occur.[9] *See* U.N. Guiding Principles on Business and Human Rights, *supra*, princs. 13(a), 22; *accord* OECD Guidelines for Multinational Enterprises, *supra*, ch. II ¶ 11, ch. IV ¶¶ 1-2, 6; OHCHR, *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector* 5-6 (June 12, 2017), https://bit.ly/3oD8O0X (last visited Feb. 9, 2022).

Financing a project when the violations are foreseeable and the bank fails to undertake adequate due diligence is one example of how financial institutions can contribute to adverse human rights impacts. *See*

Social and Cultural Rights in the context of business activities, U.N. Doc. E/C.12/GC/24, ¶¶ 14-15, 30, 32-33, 44, 51 (2017).

[9] The U.N. Office of the High Commissioner for Human Rights describes the Guiding Principles, which the U.N. Human Rights Council unanimously endorsed in 2011, as "the global standard of practice that is now expected of all governments and businesses with regard to business and human rights." OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 1 (2012). The OECD Guidelines are "standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards," created by OECD governments for multinational enterprises. OECD, OECD Guidelines for Multinational Enterprises 13 (2011).

OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises* 46 (2019); *see also id.* at 43-46 (listing additional examples); *Letter to Roel Nieuwenkamp—Chair, Working Party for Responsible Business Conduct, OECD* 3 (Dec. 3, 2013), https://bit.ly/3oDxxSO (last visited Feb. 9, 2022) (same).

A financial institution bears responsibility for its acts or omissions regardless of whether another party's conduct more directly caused the injury. As set out by the U.N. Office of the High Commissioner for Human Rights, a bank contributes to an adverse human rights impact, "if the bank's actions and decisions influenced the client in such a way as to make the adverse human rights impact more likely," or when "a bank's failure to act upon information that was or should have been available to it [creates] a facilitating environment for a client to more easily take actions that result in abuses." *OHCHR response to BankTrack*, *supra*, at 5, 8; *accord* OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting*, *supra*, at 43-46.

C. It is a general principle of law that actors may bear liability for their wrongful contribution to harm.

Legal systems around the world recognize that multiple actors may be held liable for their respective contributions to a harm, and that injured parties may

seek redress from any or all of them. The widespread adoption of the rule of joint and several liability, which legal authorities have recognized as a general principle of international law, reflects this basic understanding.[10] *See Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, 354-58 (Nov. 6) (separate opinion by Simma, J.). In *Aerial Incident of July 27, 1955*, the U.S. asserted as evidence of this general principle of law that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally." Memorial submitted by the Government of the United States of America, 2 Dec. 1958, I.C.J. Rep. Pleadings, *Aerial Incident of 27 July 1955 (U.S. v. Bulg.)*, at 229. Comparative law studies support this conclusion. *See generally* Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 Pepp. L. Rev. 241 (2011) (surveying 22 countries and concluding that joint and several liability is "sufficiently consistent that one can accurately describe it

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[10] General principles are a source of international law. Statute of the International Court of Justice, art. 38(1)(c) (1946). General principles of law are legal norms that are "accepted by all nations *in foro domestico*" and discerned as those that are common to domestic jurisdictions worldwide. Permanent Court of International Justice, Advisory Committee of Jurists, *Procès Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920 with Annexes* 335 (1920). When looking at international law, this Court has long looked to and relied on general principles of law. *See, e.g.*, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 633 (1983); *United States v. Louisiana*, 394 U.S. 11, 22 (1969); *Pearcy v. Stranahan*, 205 U.S. 257, 270 (1907); *United States v. Smith*, 18 U.S. 153, 160-61 (1820).

as a general principle of law, embodied in the major systems of the world"); *see also* W.V.H. Rogers, *Unification of Tort Law: Multiple Tortfeasors* (2004). Courts in the U.S. apply joint and/or several liability. Restatement (Second) of Torts § 875 (1977); *accord* 74 Am. Jur. 2d Torts § 64 ("It is well-established that [a] person who joins in committing a tort cannot escape liability by showing that another person is also liable." (internal citations and quotations removed)).

Courts in varied legal systems have recognized that lenders and their borrowers can be held independently liable for injuries resulting from funded activities, including environmental harm. Such lender liability exists, for example, in Brazil, China, Mexico, Portugal, the United Kingdom, India, and South Africa. *See, e.g.*, (Brazil) S.T.J., REsp 995321, Realtor: Min. Benedito Gonqalves, 15.10.2007, R.S.T.J., 15.12.2009 (Braz.) (finding a Brazilian bank liable for financing harmful mining activities); U.N. Environment Programme & Research Bureau of the People's Bank of China, *Establishing China's Green Financial System: Detailed Recommendation 13—Establish the Legal Liability of Financial Institutions* 8 (2015) (explaining that under Chinese law, banks can be held liable when they provide loans to borrowers despite actual knowledge that the borrowers will carry out environmentally harmful projects); U.N. Environment Programme, *Lenders and Investors Environmental Liability: How Much is too Much?* (2016) (discussing lender liability in several jurisdictions). The circumstances in which a commercial financier can be found liable for harm resulting

from a funded activity may vary, for example, as a function of the degree of influence it exercised over the borrower. Such factual determinations are appropriately addressed at the merits stage, however, not by denying jurisdiction altogether.

IV. The result in this case demonstrates the problems with the D.C. Circuit's approach.

In pointing to the conduct of IFC's client as a reason to grant IFC immunity, the D.C. Circuit's misreading of the commercial activity exception effectively ensures that IFC and other similar entities could never face suit for injuries stemming from their lending activity, because their clients will always be more proximate to the harm. But IFC's financing is unquestionably commercial activity. *See* U.N. Convention on Jurisdictional Immunities, *supra*, art. 2(c)(ii) (defining commercial transaction to include "any contract for a loan or other transaction of a financial nature"). The claims in this suit concern IFC's financing for Tata Mundra, administered from the United States, not any other IFC conduct that could be considered non-commercial. Applying the proper conduct-based immunity test under international law, IFC should not enjoy *immunity* from this suit or any suit concerning injuries stemming from its U.S.-based financial activities. Whether it would incur *liability* in any such suit is a separate merits question, not a threshold jurisdictional one. The financing activities of an entity like IFC are never the last act in the causal chain. The D.C. Circuit's approach would effectively immunize all such

commercial activity, including where a sovereign financier exercises the degree of supervision and control that would plainly subject a similarly-situated private actor to potential liability.

IFC is not merely a passive lender, but often an active participant in developing and implementing the projects it funds, such as the power plant that is the subject of this lawsuit. According to its own policies, IFC seeks to influence the impacts of the activities it finances, through its participation in and oversight of funded projects. *See, e.g.*, IFC, IFC Policy on Environmental and Social Sustainability, ¶¶ 7, 12, 15, 19, 28, 45 (2012); IFC, *IFC Project Cycle*, https://bit.ly/3Iokwny (last visited Feb. 3, 2022); IFC, *Understanding IFC's Environmental and Social Due Diligence Process*, https://bit.ly/3opH6od (last visited Feb. 3, 2022) (explaining how IFC works with clients throughout project design and implementation). IFC emphasizes that implementing its environmental and social framework improves project outcomes and reduces risks of adverse impacts. *See* IFC Policy on Environmental and Social Sustainability, *supra*, ¶¶ 1, 6; *see also* IFC, IFC Performance Standards on Environmental and Social Sustainability (2012). It also extolls the benefits of this framework as a selling point for its commercial products and services, from which it realizes substantial financial earnings. *See* IFC, *Annual Report 2021*, 46, 105-107 (2022). But IFC cannot claim credit for a funded project's positive effects while disclaiming responsibility for its negative ones. Given the organization's expressed aim of influencing its clients'

projects, its financing operations should not, as a matter of law, be construed as too remote from any resulting harm to trigger potential liability.

In a typical project, IFC creates an Environmental and Social Action Plan for the client's approval, which forms part of the project's appraisal by the Washington, D.C.-based Board of Directors. It is then incorporated into IFC's contract with the client, which covenants certain pre-disbursement requirements. *See* IFC Policy on Environmental and Social Sustainability, *supra*, ¶¶ 24, 28; *Understanding IFC's Environmental and Social Due Diligence*, *supra*. IFC continues to monitor the project, track development outcomes, support the clients as needed, disburse money in accordance with any covenants in the contract, and regularly evaluate projects. *See* IFC Policy on Environmental and Social Sustainability, *supra*, ¶¶ 24, 45; *IFC Project Cycle*, *supra*; *Understanding IFC's Environmental and Social Due Diligence*, *supra.* IFC is involved throughout the project cycle, from the earliest identification of foreseeable harm to a project's conclusion.

This precise type of involvement was borne out in the case at hand. *See Jam v. Int'l Fin. Corp.*, Case No. 1:15-cv-00612, ECF No. 10-5, Decl. of Karim Suratgar, Ex. 1, 104 (July 1, 2015) (presenting IFC's loan agreement for the Tata Mundra project with covenants prohibiting the borrower from undertaking various activities that materially change the environmental and social management plans (ESMPs) without IFC's consent). According to the loan agreement, prior to IFC

disbursing the first tranche of money, the borrower had to provide documents acceptable to IFC, detailing the construction plans as well as confirmation of a Resettlement Plan and ESMP compliance measures. *See id.* at 74-76. The financing also makes disbursement contingent upon continued compliance with environmental and social requirements. *Id.* at 86-87, 114 (requiring close monitoring, including submission of quarterly and annual environmental and social reports to IFC).

Contrary to the D.C. Circuit's assertion, the reach of its decision is not limited to this case, Pet. App. 11a; it is hard to imagine any set of facts about lending activity that could get around the bar imposed by the decision below. The ruling not only insulates IFC from potential liability in this case, but would afford IFC and other FSIA-covered entities engaged in similar financing protection from suit even where the facts show they exercised considerable control and influence over a funded activity and harms were foreseeable. There is no basis in international law and practice, or in the text of the FSIA, for doing so. Without clarification or correction by this Court, the D.C. Circuit's interpretation of the commercial activity exception risks extending open arms to potentially injurious commercial conduct by sovereigns, state-owned enterprises, and international organizations operating in the United States, while shutting the courthouse doors to aggrieved parties, denying them a chance at obtaining remedy.

CONCLUSION

The petition for certiorari should be granted.

February 14, 2022

Respectfully submitted,

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