ORAL ARGUMENT SCHEDULED FOR APRIL 26, 2021

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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March 11, 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.

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants and the Brief for Defendant-Appellees.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

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 F. App'x. 11 (April 5, 2019). There are no other related cases.

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GLOSSARY

FSIA	Foreign Sovereign Immunities Act
IFC	International Finance Corporation

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs-Appellants' Opening Brief showed that the Foreign Sovereign Immunities Act's text, precedent, and legislative history all converge on one simple rule: sovereign immunity under the commercial activities exception turns on the sovereign's conduct. This is not an open question. This Circuit and six others have uniformly indicated that immunity turns on the sovereign's acts. Defendant-Appellee International Finance Corporation (IFC) tries to convince this Court that a claim against IFC for its own tortious conduct is "based upon" a third party's acts, without refuting any of this.

According to IFC, courts determine what conduct the claim is based on in some abstract sense, without reference to who the defendant is or the claim. IFC purports to derive this untethered approach from *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), but it directly contradicts *Nelson*'s holding. Courts determine the gravamen by looking to the "elements of [the] claim . . . under [plaintiff's] theory of the case." *Id.* at 357. Thus, the gravamen depends on who is sued.

Instead of *Nelson*'s elements test, IFC, like the district court, would look to the last act that harmed the plaintiff, ignoring who committed it. IFC purports to derive *that* from *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015). But *OBB* explicitly denied it was establishing a last harmful act rule, never suggested courts should look to third-party conduct, and *applied* the elements test. *Id.* at 33-34.

Congress made clear that the "based upon" inquiry is about specific personal

jurisdiction. It therefore focuses on the *defendant's* connection to the forum. The requirement ensures that the United States has the same sort of interest in hearing the claim, and the defendant the same protections, as in other cases. IFC cites nothing suggesting Congress intended something else. Nor can it explain why Congress would want immunity to turn on third party acts.

On top of this, IFC admits that its last act rule would lead to absurd results, permitting immunity in cases involving third parties where all of the conduct is U.S. commercial activity. Courts interpret statutes to avoid absurdities.

Plaintiffs' claim is "based upon" IFC's negligence. Coastal Gujarat and IFC are joint tortfeasors. IFC, among other things, provided indispensable funding and approved the project's design: IFC would not disburse funds until it found the design "satisfactory." JA1572-74. Plaintiffs would not have been injured without IFC's conduct. Suggesting that the conduct at the "core" of Plaintiffs' action against IFC is not the conduct that makes IFC liable defies logic.

IFC's other arguments are similarly unavailing. IFC has never denied it committed this tortious conduct in the United States. It says this Court should just ignore these facts, but they were squarely before the district court.

IFC's claim that its acts are "akin" to regulation, and therefore not commercial, is meritless. IFC provided a private loan to a private corporation at profit-generating, market-based rates. A bargained-for commercial contract does not "regulate." Since a private party could do this, it is commercial activity.

Regardless of whether IFC is immune under the FSIA, its Articles waive immunity here. The text is clear, and under the Supreme Court's ruling in this case, the text is dispositive.

STATUTES

In addition to statutes previously included, 28 U.S.C. § 1653 provides in full:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

ARGUMENT

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

This Court recognized that because IFC's "operations are *solely* commercial," it would not be immune under the FSIA. *Jam v. Int'l Finance Corp. ("Jam I")*, 860 F.3d 703, 707 (D.C. Cir. 2017); Pls.-Appellants' Opening Br. (AOB) 19. IFC says Plaintiffs "withheld" this argument from the district court, Brief of Defendant-Appellee (IFC) 54, but Plaintiffs raised it multiple times. *See, e.g.*, JA1182; DE 70-1 at 8; JA 1428.

IFC notes the Supreme Court's suggestion that some development bank loans may not be commercial activity. IFC 55. But that addressed certain loans to *governments*. *Jam v. Int'l Finance Corp. ("Jam II")*, 139 S. Ct. 759, 772 (2019); *see also Rodriguez v. Pan Am. Health Org.*, No. 20-928, 2020 U.S. Dist. LEXIS 208904, at *17-18 (D.D.C. Nov. 9, 2020). IFC lent money to a private company at market rates as any private bank could. AOB 5. That is commercial activity.

II. The FSIA does not immunize IFC's commercial conduct.

Rather than simply looking to the sovereign defendant's conduct, IFC proposes that courts determine what conduct the action is based upon without considering who is sued or the elements of the claim. IFC 18, 23. That is wrong. Among many reasons, AOB 21-30, the Supreme Court and this Court have rejected such context-free philosophizing.

Under *Nelson*, courts determine the gravamen by looking to "those elements of [the] claim that, if proven, would entitle [the] plaintiff to relief under his theory of the case." 507 U.S. at 357; *accord OBB*, 577 U.S. at 33-34. Thus, "a suit is based only upon the elements of the cause of action." *In re Papandreou*, 139 F.3d 247, 253 n.4 (D.C. Cir. 1998)(citing *Nelson*, 507 U.S. at 357). Where multiple actors contribute to a harm, the elements of the claims will depend on *who* is sued; typically, this focuses on the defendant's conduct. AOB 37-40.

IFC admits its test would require absurd results: immunizing sovereigns in actions "based entirely on [U.S.] commercial activity." IFC 25; AOB 34-35. The text requires no such thing. AOB 28-30. Indeed, "statutes are to be read to avoid absurd results." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). Looking to the *sovereign*'s acts avoids absurd results. And text, precedent and legislative history all show that sovereign immunity turns on the sovereign's acts. AOB 21-31.

A. IFC's proposal finds no support in the FSIA's text.

Under 28 U.S.C. § 1605(a)(2)'s First Clause, the action must be "based upon a commercial activity carried on in the United States by the foreign state." IFC argues that this language implies a requirement that the last act "[that] actually injured the plaintiff" must be committed by the sovereign. IFC 39. Not so.

Neither *Nelson* nor *OBB* speaks to this question; both involved only state conduct. *OBB* noted that Nelson's suit was "based upon the *Saudi sovereign acts* that actually injured [plaintiff]," not its other acts. 577 U.S. at 34-35 (emphasis added); AOB 26-27. That is true here: IFC's U.S. conduct *is* the defendant's conduct that actually injured Plaintiffs; it is undisputed that IFC "carried on" the lending and design approval for which IFC was sued.

Nothing in the statute's text supports IFC's interpretation. Section 1605(a)(2) is directed to requiring a connection between "the foreign defendant['s conduct] and [U.S.] territory," *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 89 (D.C. Cir. 2002) – not in parsing the relative responsibility of multiple tortfeasors. IFC cannot rewrite the statute to read "based *solely* upon" the sovereign's conduct.

IFC's reliance on the "carried on by" language is misplaced. IFC 39. "Carried on by" partially defines what type of conduct the action must be "based upon." It asks whether conduct *is* the sovereign's conduct. Thus, activity "by" the sovereign includes its agents' acts. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982). That says nothing about whether the *action* is "based

upon" that conduct. Nor does it render "by" the sovereign superfluous. The action must be "based upon" commercial activity "by" the sovereign.

Other FSIA provisions require that immunity turns on the sovereign's conduct. AOB 28-30. For example, Section 1602, which provides that states are not immune for "*their* commercial activities" (emphasis added), states the FSIA's "focus." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018). IFC dismisses Section 1602 as merely "explain[ing] . . . international law," IFC 40-41, but the commercial activity exception *codifies* international law. *Permanent Mission of India to the UN v. City of New York*, 551 U.S. 193, 199 (2007). Immunity is conduct-based under Section 1605, which limits immunity "to sovereign acts." *Id.*

IFC does not deny that a last harmful act requirement would impermissibly import Section 1605(a)(2)'s Third Clause's "direct effect" requirement. IFC 39-40 n.8; AOB 28-29. Even if the district court did not hold that the last act is always the gravamen, it imported the direct effect requirement *here*.

Moreover, Sections 1605(a)(2) and 1606 ensure that sovereigns conducting commercial activity are treated like private individuals. AOB 19-20. But IFC's rule would bar claims involving multiple responsible parties that can be brought against non-sovereigns. *See* AOB 29. IFC suggests that since Section 1606 applies to claims for "which a foreign state is not entitled to immunity under section 1605," it is irrelevant. IFC 41. That "is untenable in light of [the FSIA] as a whole." *See Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 343 (1994). Little would remain of the equal

treatment principle and Section 1606 if the immunity inquiry precluded ordinary liability theories.

IFC states that the FSIA aims to protect U.S. citizens, IFC 41 n.9, which undermines its argument. IFC's theory would bar cases like *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985), which denied immunity from a citizen's suit for harm ultimately caused by another entity.

IFC's reading would also lead to the absurd result that whenever multiple sovereigns act together to commit a wrong, only *one* – the one that committed the last harmful act – could be sued. But cases addressing that situation have determined immunity based on each sovereign's own acts. *Infra* 13-14; AOB 21-24.

B. No cases establish or apply IFC's test.

IFC suggests that *Nelson* "created" a "based upon" test that excludes consideration of the defendant, IFC 23, but that conflicts with *Nelson*'s focus on the claims' elements. *Infra* 4. *Nelson* did not "start[] 'by identifying the particular conduct on which the Nelsons' action is based,'" without reference to the defendant. IFC 23 (quoting 507 U.S. at 356). It *first* noted that there was no dispute that the defendants were "foreign state[s]," 507 U.S. at 356, so it began from the premise that the conduct was committed "by" the sovereign.

IFC misstates *Maritime*. This Court never found that the gravamen of that action against Guinea was "carried on by" Global, a third party. IFC 24. Quite the opposite – it "easily" concluded that the action was "based" on *Guinea's* "contractual

undertaking." *Maritime Int'l*, 693 F.2d at 1104. The "difficult question" was whether Guinea carried out the venture in the United States, which depended partly on whether Global's activities were attributable to Guinea. *Id.* This Court held that Guinea did not "carry on" Global's acts, then evaluated other U.S. conduct and Guinea's acts abroad, *id.* at 1105-10 – which it would not have done if the suit were "based on" Global's conduct. The suit was based on Guinea's conduct; it failed because Guinea acted abroad.

The Sixth Circuit did what IFC claims *Nelson* forbids. In *Global Technology, Inc. v. Yubei (Xinxiang) Power Steering Systems Company*, 807 F.3d 806, 814 (6th Cir. 2015), the question was whether a sovereign corporation was immune from a suit involving its subsidiary's acts. The court directed the district court to determine "which – if any – of the complained-of actions are legally attributable to" the sovereign, and then determine not whether the suit is "based on" those acts, but "whether those acts satisfy the commercial activity exception." *Id.* In the court's framing, *only* conduct attributable to the sovereign could be the gravamen.

Contrary to IFC's argument, *when* in the analysis courts determine the gravamen says nothing about *how* courts do so. The Eleventh Circuit agreed with IFC that courts "first" identify the gravamen, but held that the gravamen is "the *foreign state*'s 'acts that actually injured' the plaintiff." *Devengoechea v. Bolivarian Republic of Venez.*, 889 F.3d 1213, 1222 (11th Cir. 2018)(quoting *OBB*, 136 S. Ct at 396)(emphasis added).

C. The sovereign-focused gravamen test accords with *OBB* and *Nelson*; the last act test does not.

Under *Nelson*, *OBB* and *Papandreou*, courts determine a claim's basis by reference to its elements. IFC suggests *OBB* backtracked from this rule, IFC 27-28, 30, 37 n.5, but *OBB* explicitly reaffirmed it. 577 U.S. at 33-34.

IFC wants a new rule that, in tort cases, the gravamen must be the "point of contact" or the last harmful act that "actually injured" plaintiff, no matter who committed it. IFC 27-29. But IFC misconstrues *OBB*. No case, including *OBB*, holds that the gravamen must be the last act, and the district court rejected that position twice. JA1499, JA1739.

IFC's proposal conflicts with the elements test in a joint-tortfeasor case, because the elements focus on the defendant's conduct. AOB 37-39. By contrast, focusing on the sovereign's actions does *not* contravene *OBB*'s recognition that often, "the essentials of a personal injury will be found at the point of contact." 577 U.S. at 36. That was so "in th[at] case," but that "decision was limited," and it might not be so "in other suits." *Id.* at 36, n.2. This is one such suit. To hold otherwise would be to conclude that *OBB* replaced the elements test it endorsed.

OBB did not limit "other suits" or the elements test to "non-tort cases," and IFC advances no reason to do so. IFC 33. *Nelson* and *OBB* created and applied the elements test in tort cases.

Applying the elements test, *Merlini v. Canada*, 926 F.3d 21 (1st Cir. 2019), held

that *OBB*'s "point of contact" language did *not* require courts to assess the gravamen "independent of the plaintiff's actual claim" or to find that the gravamen was the last act. *Id.* at 30. While the last act was committed by a coworker, that act was not the gravamen in part because the claim was "against the employer — not a fellow employee." *Id.* Although the accident occurred in the U.S., IFC 39, this highlights the absurdity of IFC's argument: IFC's last act test would have meant that the claim was not "based on" Canada's conduct, granting immunity even though all relevant conduct occurred here.

Other tort cases have looked past the point of contact to the *defendant*'s acts. *E.g.*, *Dale v. Colagiovanni*, 443 F.3d 425, 428-29 (5th Cir. 2006)(considering acts aiding wrongful conduct); *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002-04 (D.C. Cir. 1985)(same).

IFC's claim that Plaintiffs "revive" the one-element test *OBB* rejected rings hollow. IFC 29. *OBB* held that the fact that conduct establishes one element of a claim does not show the claim is "based upon" that conduct, since such conduct may not be the suit's "core." 577 U.S. at 34-35. The sovereign's critical activity took place abroad, so its single, tangential U.S. act was insufficient. *Id.* Applying *Nelson*, *OBB* held that "elements – plural" does not support a one-element test. *Id.* at 33-34 (citing 507 U.S. at 357). But Plaintiffs define the gravamen by reference to "elements – plural." Considering those elements, the core of this suit against IFC is IFC's acts. AOB 39-40.

IFC's assertion that this case is like *OBB* because Plaintiffs allege "critical omissions" occurred here is doubly wrong. IFC 32. In *OBB*, the U.S. omissions were *not* critical; Plaintiffs here also allege affirmative conduct. AOB 5-12. And this case is different from *OBB* and *Nelson*. While OBB's ticket sale and Saudi Arabia's recruitment were in the chain of causation, they were not the wrongful conduct at the core of the suit. But IFC's U.S. conduct *is* the conduct for which it was sued; it knowingly and affirmatively enabled Coastal Gujarat to harm Plaintiffs. AOB 37-40.

It makes no difference that IFC's U.S. activities would not entitle Plaintiffs to recover without Coastal Gujarat's conduct. IFC 25-26; Plaintiffs would not have been injured but-for IFC, because Coastal Gujarat could not have built the plant without IFC's funding, or used the dangerous design without IFC's approval. AOB 5-6.

Plaintiffs do not adopt Justice Kennedy's approach, which *Nelson* rejected. IFC 31. That approach analyzes each *count* independently, 507 U.S. at 371 (Kennedy, J., concurring in part and dissenting in part), while the court looked at the sovereign's core conduct underlying all of the claims. *Id.* at 357-58; *but see OBB*, 577 U.S. at 36 n.2 (suggesting gravamen may differ by claim). Looking to the claims' elements, IFC's U.S. conduct is the core of *all* of Plaintiffs' claims.

The sovereign-focused test addresses the concern that Plaintiffs might "evade the Act's restrictions through artful pleading." *OBB*, 577 U.S. at 36. IFC's suggestion that plaintiffs could change the gravamen by adding claims or excluding parties is misplaced. IFC 31-32. The test looks to the *defendant's core* conduct, regardless of

tangential claims or additional parties. AOB 40-42.

IFC suggests that focusing on IFC's own actions would render the FSIA "meaningless" for international organizations "headquartered in the United States." IFC 32. Not so. The activity must be commercial. Regardless, the FSIA affords IFC no special treatment; *all* sovereigns engaging in commercial activity are treated like private actors. *See infra* 6.

The gravamen of a failure to warn claim is the underlying tortious conduct. *OBB*, 577 U.S. at 35-36. Otherwise, plaintiffs could recast every tort as such. But Plaintiffs do not try to "evade" the FSIA's geographic limits by "framing" their claims around U.S. conduct. IFC 31. Plaintiffs have sued IFC for its own U.S. conduct: knowingly enabling Coastal Gujarat to harm Plaintiffs. AOB 37-40. Plaintiffs could not have framed their case *against IFC* differently. There is no artful pleading. *Merlini*, 926 F.3d at 30; AOB 40-41.

There clearly would be no immunity where a sovereign's negligence in the U.S. directly causes harm elsewhere. *See OBB*, No. 13-1067, Oral Arg. Tr. 14-17 (argued Oct. 5, 2015). Under ordinary tort principles, it makes no difference that IFC harmed plaintiffs in conjunction with someone else. AOB 37-40. Indeed, there is no reason to think that the last act is always the most important act. Since the gravamen depends on the elements of the claims, this Court must focus on IFC's conduct. That is the conduct for which Plaintiffs have sued IFC.

D. No case finds that the gravamen is third-party conduct, while seven Circuits indicate that courts exclude third-party conduct.

This Circuit and, counting *Devengoechea*, at least six others, have indicated that immunity turns on the sovereign's conduct. AOB 21-25. Apart from the decision below, IFC cites no case finding that the gravamen was a third-party act. IFC 18.

IFC's *best* case is the unpublished order in *Zhan v. World Bank*, 828 F. App'x 723, 724 (D.C. Cir. 2020), but it summarily affirmed, in one sentence without analysis, an unclear decision that the district court explicitly ignored. JA1743 n.3; AOB 25 n.7.

IFC wrongly suggests that some of Plaintiffs' cases recognize that the gravamen might be third-party conduct. IFC 35-36. *Maritime* and *Global Technology* never suggested that third-party conduct, without attribution to the sovereign, could be the gravamen. *Supra* 13.

Similarly, in *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 839 (S.D. Miss. 2004), the district court held that the gravamen must be the defendant's acts, and the Fifth Circuit never suggested otherwise. IFC 35-36 (citing 443 F.3d at 428-30). Plaintiffs alleged that Colagiovanni aided a third-party's, Frankel's, torts. 337 F. Supp. 2d at 828. The issue was whether Colagiovanni's acts were attributable to the Vatican; neither court suggested the Vatican was immune because the suit was "based on" Frankel's acts, as IFC would require. *Id.* at 833-39; 443 F.3d at 428-29.

Rodriguez found that the gravamen was the sovereign defendant's conduct, not the last harmful act; it approved the district court below's *rejection* of IFC's argument

that the "conduct that actually injured plaintiffs is *always* the gravamen." 2020 U.S. Dist. LEXIS 208904, at *27 (citing JA1739)(internal quotations omitted). It also agreed that conduct that played a small part in causing the harm cannot be the gravamen, *id.*; IFC's conduct was indispensable. AOB 42.

IFC objects that other cases do not explicitly "prohibit[] [courts] from considering third-party conduct." IFC 37-39. But *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), held that courts consider a defendant's own conduct. AOB 22.[2]

Likewise, *Transamerican*, considered "the relevant activity" of each defendant separately. 767 F.2d at 1002-03. IFC's approach would have allowed claims against the Shipping Agency, which detained the ship, but not against the Somali embassy, which only sought payment to release it. This Court, however, found each could be sued based on its own acts.[3] By judging a defendant's immunity by reference to its own acts, not the last harmful act, *Gilson* and *Transamerican* refute IFC's approach.

Callejo held that immunity turns on "those acts of the *defendant* that form the

[2] While "*Nelson* rejected *Gilson*'s equation of 'based upon' with 'causal connection,'" *Papandreou*, 139 F.3d at 253 n.4; IFC 37 n.5, that was the standard for determining whether the nexus exists between defendant's commercial activity and the wrong. *See Gilson*, 682 F.2d at 1027 n.22. A defendant's immunity is still judged by its own conduct.

[3] IFC argues that the embassy and Agency had "an agency relationship," IFC 37 n.6, but if so, the *embassy* was the *Agency's* agent, not the reverse; the Court did not attribute the Agency's directly harmful conduct to the embassy. 767 F.2d at 1002-04.

basis of the suit" – not others' acts. 764 F.2d at 1108 (emphasis added).[4] And the Second Circuit holds that the first step is to "identify *the act of the foreign sovereign State* that serves as the basis for plaintiffs' claims." *Garb v. Republic of Pol.*, 440 F.3d 579, 586 (2d Cir. 2006)(emphasis added).

In short, courts uniformly exclude third-party acts from the gravamen analysis.

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

The commercial activity exception requires a connection between "the foreign defendant['s conduct] and [U.S.] *territory*"; it thus "'prescribe[s] the necessary contacts which must exist'" for personal jurisdiction. *Price*, 294 F.3d at 89-90 (quoting H.R. Rep. No. 94-1487 at 13). The FSIA's text is clear, and its legislative history explicit, that the "based upon" inquiry applies personal jurisdiction principles. AOB 30-31. Since personal jurisdiction evaluates the *defendant's* connection to the forum, third-party acts are irrelevant. AOB 32.

IFC denies that the House Report shows that the "based upon" requirement is a proxy for personal jurisdiction. IFC 47. But the Report confirms that Sections 1330(b) and 1605-07 provide "a Federal long-arm statute." H.R. Rep. No. 94-1487 at 13. Section 1605(a)(2) does this by requiring that the claim be "based upon" U.S.

[4] IFC accuses Plaintiffs of quoting a district court opinion within *Callejo*, IFC 38 n.7, but the Fifth Circuit "agree[d] with [its] conclusion," and restated the same holding. 764 F.2d at 1108-09. The First Opinion presented the quote virtually identically. JA1501.

activity. The Report suggests no other purpose for the "based upon" requirement, and nowhere suggests that the inquiry looks to the last harmful act.

Plaintiffs have not forfeited this argument; they can make "any argument" supporting their position that immunity turns on the sovereign's acts, not just "the precise arguments they made below." *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 358 (D.C. Cir. 2017)(quotation marks omitted). Regardless, this Court may consider new claims involving important and recurring questions, like this one. *Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010).

Plaintiffs do not argue that sovereigns can be sued if they merely "engage in" U.S. commercial conduct. IFC 44-45. Such conduct must be the defendant's act that the suit challenges, and it must have "substantial" U.S. contact. 28 U.S.C. §§ 1603(e), 1605(a)(2).

IFC's argument that only the "carried on by" inquiry addresses whether the sovereign's commercial activity has "substantial contact" with the United States is unavailing. IFC 45-46. Section 1605(a)(2) embodies personal jurisdiction principles throughout. The "based upon" inquiry requires a nexus between the suit and the forum: a specific jurisdiction test. AOB 30-31.

IFC also misconstrues *Maritime*. IFC 46. Maritime's suit *was* based upon Guinea's acts. *Maritime*, 693 F.2d at 1104. In determining whether Guinea "carried on" some conduct, this Court ruled that a sovereign's acts includes its agents', in part because courts look to an agent's forum contacts in assessing personal jurisdiction. *Id.*

at 1105, 1108. That would make little sense if Section 1605(a)(2) had no relation to personal jurisdiction.

Under Section 1330, personal jurisdiction lies if there is subject matter jurisdiction. IFC 46. That is *because* Congress addressed personal jurisdiction through the FSIA's subject matter jurisdiction requirements, including the "based upon" requirement. H.R. Rep. No. 94-1487 at 13; AOB 31.

"Substantial contact" may require more defendant-forum contact than personal jurisdiction, IFC 46, but this is the only difference between personal jurisdiction and Section 1605(a)(2)'s First Clause that this Court has identified. *Maritime*, 693 F.2d at 1109; *Papandreou*, 139 F.3d at 253. That difference is about the *amount* of contact required between the defendant and the forum; Section 1605(a)(2) still looks at the sovereign's acts, and here, IFC's forum contact is indisputably substantial. Looking to third-party conduct would create a different *kind* of test that entirely abandons the personal jurisdiction approach that the FSIA enshrines. Nothing in the text supports that.

The FSIA analysis diverges from a pure personal jurisdiction analysis where the *text* commands. Section 1603(e) directly establish a standard for the amount of contact required. *Maritime*, 693 F.2d at 1109. Similarly, in *Rote v. Zel Custom Manufacturing. LLC.*, 816 F.3d 383, 391-395 (6th Cir. 2016), the court refused to *limit* "direct effect" jurisdiction by importing an arguably stricter personal jurisdiction standard than the text established. Courts do not add new "unexpressed requirement[s]" to FSIA's text.

Id. at 394 (quoting *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)). No text supports IFC's proposed last harmful act requirement.

Nor does Section 1605(a)(2) "swallow" Section 1605(a)(3), IFC 48; the expropriation exception has different requirements. It allows suit where expropriated property is owned by an instrumentality engaged in U.S. commercial activity, but does not require that the claim be "based upon" such activity.

Contrary to its earlier recognition that the FSIA is sometimes stricter than the personal jurisdiction test, IFC suggests that sovereigns never receive personal jurisdiction protections. IFC 46, 49. Thankfully for sovereigns, IFC is wrong. *Price* held only that the Due Process Clause and the terrorism exception amendment to the FSIA provide no such protections. 294 F.3d at 90, 95-97. The "original FSIA," including Section 1605(a)(2), is like a long-arm statute. *Id.* at 89-90.

III. IFC committed its tortious acts in the United States.

IFC erroneously claims that even if IFC's conduct is the gravamen, it occurred in India. IFC 42. But IFC committed its *tortious* acts – approving the loan, authorizing the project's design, supervising implementation, disbursing funds without enforcing protective contract provisions – in the U.S. AOB 9-10, 14, 44-45. IFC has never disputed these facts. IFC 8. It asks this Court to ignore them.

IFC urges the Court to adopt the First Opinion's reasoning. IFC 42. But that opinion overlooked record evidence that IFC committed tortious acts here. JA1668-1686, nn.4-59 (citing overlooked evidence). This Court considers immunity *de novo*.

AOB 18. It cannot ignore that evidence.

Nor can it ignore Plaintiffs' Amended Complaint. Even if Plaintiffs must meet Rule 59(e), IFC 42-43, courts grant Rule 59(e) motions to amend unless the new allegations "could not possibly cure the deficiency." *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1128-29 (D.C. Cir. 2015)(quotation marks omitted). Plaintiffs' new allegations cure the deficiency by alleging that IFC's conduct that the First Opinion found was the gravamen occurred in Washington. AOB 14.[5]

Regardless, Rule 59(e) does not apply. Dismissal of a complaint without prejudice is "not final"; plaintiffs are "free to amend." *Ciralsky v. CIA*, 355 F.3d 661, 666 (D.C. Cir. 2004)(quotation marks omitted). The First Opinion dismissed the "complaint," JA1488-89, and dismissal for lack of jurisdiction, JA1510, is without prejudice. *Blue Water Balt. v. Pruitt*, 293 F. Supp. 3d 1, 5 (D.D.C. 2017). Indeed, omitting essential facts does not warrant dismissal with prejudice. *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006). Since Plaintiffs could amend by right, this Court cannot ignore the amendments.

Rule 59(e) is also immaterial because 28 U.S.C. § 1653 permits amendment of jurisdictional facts after dismissal, under Rule 15. *E.g.*, *Falise v. American Tobacco Co.*, 241 B.R. 63, 65 (Bankr. E.D.N.Y. 1999); *Goble v. Marsh*, 684 F.2d 12, 17 (D.C. Cir.

[5] Although unnecessary, there are also extraordinary circumstances. DE 63 at 15-16; DE 65 at 18-21.

1982). Indeed, Section 1653 permits amendment on appeal. Thus, if necessary, the Court should order Plaintiffs to amend in new facts, *Momenian v. Davidson*, 878 F.3d 381, 389 (D.C. Cir. 2017), or amend itself. *Swan v. Clinton*, 100 F.3d 973, 980 n.3 (D.C. Cir. 1996). Alternatively, Plaintiffs move to amend.[6]

Amendment would not be futile. IFC 44. IFC does not dispute that Plaintiffs allege the facts the First Opinion found lacking. AOB 14. Instead, it inexplicably claims that Plaintiffs do not challenge the ruling that amendment would be futile because the gravamen would still be Coastal Gujarat's conduct. But Plaintiffs' appeal focuses on that point: the Second Opinion's finding that the new allegations were futile because "[t]hey relate only to IFC's conduct," JA1751, misconstrued the gravamen inquiry.

IFC committed tortious, commercial acts here. That defeats IFC's immunity.

IV. IFC's commercial loan to a private party is commercial activity.

IFC's assertion that its acts, involving a commercial loan at market rates, were not commercial because they were "akin to" to regulation and therefore "analogous to" sovereign activity is wrong. Plaintiffs' claims are not based solely on IFC's "failure . . . to enforce its E&S Standards," IFC 50; they are based on IFC's negligent and indispensable funding to a private project and its negligent approval of the plant's dangerous design.

[6] No formal motion is required. *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1239 (D.C. Cir. 1987)(granting oral motion).

Regardless, IFC's suggestion that it acted like a "regulator" is spurious. Whether an act is commercial is determined by its "nature," not its "purpose." 28 U.S.C. § 1603(d). If the acts are "the type of actions by which a private party engages in . . . commerce," they are commercial. *Weltover*, 504 U.S. at 614 (internal quotations omitted). IFC's "operations are solely 'commercial.'" *Jam I*, 860 F.3d at 707. Indeed, IFC told the Supreme Court that it "employ[s] traditional financial tools" and "cannot take sovereign acts." Br. for Respondent at 58, *Jam II*, No. 17-1011 (U.S. Sept. 10, 2018).

Here, IFC acted through a commercial contract. It loaned money to a private enterprise, to build a privately-owned plant, at market-based rates. AOB 5. And it required compliance with IFC's standards, and the ability of IFC to control aspects of the plant, through contract provisions. *Id.* Since IFC thus acted as "a private player" within a market, not a "regulator of a market," its "actions are 'commercial.'" *Weltover*, 504 U.S. at 614; *see also Rodriguez*, 2020 U.S. Dist. LEXIS 208904, at *19 (finding acting like a bank was commercial). Indeed, IFC cannot regulate any market. Including enforceable standards in a commercial contract does not make the contract "regulation." IFC compels conduct only through its contract rights, like any other market actor.

IFC's cases are inapposite. *United World Trade v. Mangyshlakneft Oil Products Association*, 33 F.3d 1232, 1238 (10th Cir. 1994), only addressed whether the defendants' activity had "direct effects" here, not whether it was commercial. In *In re*

Aluminum Warehousing Antitrust Litigation, No. 13-md-2481, 2014 U.S. Dist. LEXIS 119074 (S.D.N.Y. Aug. 25, 2014), the defendant *provided* a market for trading metals, *id.* at *26-27, it was "charged by statute with performing the decidedly public function of" *regulating* that market, *id.* at *51, and the rules at issue "enabl[ed] [defendant] to regulate" the market. *Id.* at *60. Here, IFC lends money *within* a market for loans; it does not regulate that market.

IFC asserts that its actions are "different than the manner in which private players . . . pursue environmental or social goals." IFC 51. But it acted by contract. Private parties engage in the same sort of commercial lending, for the same purposes, and with similar standards. *See, e.g.*, JA1461-77, 1483-84; DE 57 at 1-2. They are not regulating, and neither is IFC.

IFC's claim that its decisions were the product of an "internal" process is true of every contracting party. IFC 50. Nor does it matter whether IFC's policies are based on state "input." IFC 51-52. Many state-owned businesses could say the same. At most, this would mean IFC "regulates" itself or its members regulate IFC. It does not mean IFC regulates anyone else.

How or why IFC decided what provisions to include in its commercial contracts makes no difference. "[I]t is irrelevant *why* [a sovereign] participated in [a commercial] market in the manner of a private actor"; even if it does so to "fulfill[ ] uniquely sovereign objectives," that does not support immunity. *Weltover*, 504 U.S. at 614, 617. IFC's conduct is the type that private parties engage in. There is nothing

uniquely sovereign about deciding whether to enforce contract provisions; private parties do that with every contract.

Finally, IFC suggests that because it is headquartered here, it should receive special treatment, different from sovereigns. IFC 52. But IFC receives only the "same" immunity as foreign states, 22 U.S.C. § 288a(b); *Jam II*, 139 S. Ct. at 765, and the FSIA analyzes *conduct,* without reference to headquarters. Under *Jam II*, IFC does not get a different rule. *Rodriguez*, 2020 U.S. Dist. LEXIS 208904, at *17-19.

IFC skips Section 288's text, and focuses on congressional purpose, but purpose "is expressed by the ordinary meaning of the words used." *Jam II*, 139 S. Ct. at 769 (internal quotation omitted). The purpose IFC advances – to persuade organizations to headquarter here – is promoted by the privileges and immunities the text grants. *Id.* at 765; *e.g.* 22 U.S.C. §§ 288a(c)-(d), 288b-288d. Courts cannot create new ones.

IFC insists that holding it to the same standard as sovereigns would somehow afford it "less protection." IFC 53. But sovereigns can be sued for their U.S. commercial conduct. Indeed, foreign government-owned corporations based here have *less* immunity than governments, 28 U.S.C. § 1603; there is no reason to think Congress granted organizations based here *more* immunity than governments. Nor does anything suggest that IFC needed more. Where organizations require greater immunities, they enshrine them in their Charter or a headquarters agreement. *Jam II*, 139 S. Ct. at 771-72 (collecting examples). IFC has done neither.

V. The plain text of IFC's waiver provision waives immunity here.

IFC ignores the conflict between *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (D.C. Cir. 1967) and *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), arguing only that *Jam I* controls. IFC 56-57. But *Jam I* relied on *Mendaro*, which is not binding because it conflicts with the earlier decision in *Lutcher* and has been wholly undermined by the Supreme Court's decision in *Jam II*. AOB 46-48. *Lutcher* controls.

IFC seeks to avoid the plain-text reading *Jam II* mandates, arguing "treaties are not interpreted like statutes." IFC 58. But for both, interpretation "begins with" text. *Medellin v. Texas*, 552 U.S. 491, 506 (2008). Courts only look beyond a treaty's text to decipher a "difficult or unclear passage." IFC 58 (quoting *Tabion v. Mufti*, 73 F.3d 535, 537 (D.C. Cir. 1996)); *accord United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013)(refusing to "ignore" "plain meaning" because courts "construe treaties based on their text before resorting to extraneous materials.")

IFC's waiver states that "[a]ctions may be brought against the corporation," with only one exception: suits by member states. JA701 Art. VI §3. This, "read literally," is a "categorical" immunity waiver. *Jam I*, 860 F.3d at 706; *accord* AOB 45. Indeed, by specifying immunity from member suits, IFC clearly did not reserve immunity from other suits; "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018)(quotation marks omitted); *see also Georges v. United Nations*, 834 F.3d 88, 93-94 (2d Cir. 2016)(applying principle to

organization's waiver). "[W]hen [drafters] wanted to make an exception to waiver of immunity they knew how to do so." *Lutcher*, 382 F.2d at 4578.[7] *Mendaro* is at odds with the plain text and thus with *Jam II*. AOB 47.

The plain text ends the matter. But if there were need to look further, the context confirms *Lutcher*'s reading. IFC cites *Mendaro*'s reference to the functional necessity doctrine, IFC 59, but that is a presumption *against* immunity unless the organization needs it. *See* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53, 65-68 (1995). *Mendaro* "appl[ied] the same rationale in reverse," 717 F.2d at 617, asking whether *waiver* of immunity is necessary, instead of whether *immunity* is necessary.

The Articles explicitly reserve the immunities the drafters deemed necessary. *See* JA700 Art. VI §1 ("Purpose[]" of the immunities "*set forth in this Article*" is to "enable [IFC] to fulfill [its] functions. . . .")(emphasis added). The drafters made a "deliberate choice" to "resolve the immunity question" in the Articles "rather than leave it to case-by-case decision." *Lutcher*, 382 F.2d at 457. Courts should not limit IFC's waiver.

The need to prevent "unilateral control" by a member does not support *Mendaro*'s reading. IFC 60. The drafters accounted for this through the one exception to waiver: suits *by member states*, and through other provisions. *See, e.g.*, JA701 Art. VI

[7] The surrounding provisions confirm that where the drafters wished to reserve immunity, they expressly did so. *See, e.g.*, Art. VI, §9 (immunity from taxation); *id.* §4 (immunity from search).

§§4-8; JA699 Art. V §2. *Mendaro* erred in second-guessing the drafters' judgment as to the necessary protections. AOB 47.

The State Department's interpretation, IFC 60-61, cannot override the text. Regardless, it would allow waiver here. It concluded that waiver did not extend to "internal personnel and administrative actions," but otherwise approved of *Lutcher*'s denial of immunity. IFC A-23. This conclusion relied on "other relevant provisions" of the Articles that "insulate the Bank's administrative and personnel processes" from Member States' "interference." *Id.* A-24. By contrast, IFC's Articles contain nothing suggesting special concern for tort suits that imply IFC's waiver excludes them.

IFC looks to the International Monetary Fund's charter, IFC 61-62, but the Supreme Court found it "notabl[e]" that while that charter expressly grants absolute immunity, IFC's does not. *Jam II*, 139 S. Ct. at 772. It is "impossible to argue" that a charter "implicitly" grants immunity others "explicitly set forth." *Lutcher*, 382 F.2d at 459.[8]

CONCLUSION

Whether a sovereign is immune turns on the sovereign's conduct. That is what the statute says, courts have held, Congress meant and common-sense dictates. IFC committed tortious acts here. It can be sued here. The district court's decision should

[8] President Eisenhower's acknowledgement that IFC can waive any of its immunities, IFC 61, says nothing about how to interpret Section 3's waiver.

be reversed.

March 11, 2021

Respectfully submitted,

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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 6,468 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 11th day of March, 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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