No. 21-___

IN THE

Supreme Court of the United States

BUDHA JAM, *et al.*,
Petitioners,
v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

AND

MANJALIYA IKBAL, *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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11, governs whether foreign sovereigns and international organizations are subject to suit in U.S. court. As relevant here, a covered entity is subject to suit under the Act for any claim "based upon" commercial activity the entity carried on in the United States or where the entity waives immunity. *Id.* § 1605. The questions presented are:

1. Whether the commercial activity exception to immunity allows suit where the alleged acts of the defendant that give rise to its liability constitute commercial activity carried on in the United States, regardless of whether another party's conduct more directly caused the injury.

2. Whether a treaty provision stating that "[a]ctions may be brought against the [international organization]" waives the organization's immunity.

PARTIES TO THE PROCEEDING

Petitioners, all of whom were plaintiffs below, are Budha Ismail Jam, Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, Machimar Adhikar Sangharash Sangathan, Manjaliya Ikbal, Manjaliya Hajraben, Parit Abedabanu, Jabedabanu Sadam Manek and Manjaliya Harun.

Respondent, the defendant in this case, is the International Finance Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Budha Jam, *et. al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in Nos. 20-7092 and 20-7097.

OPINIONS BELOW

The most recent opinion of the United States Court of Appeals for the D.C. Circuit (Pet. App. 1a-13a) is published at 3 F.4th 405 (D.C. Cir. 2021). The opinions of the district court addressing the first question presented (Pet. App. 14a-36a, 37a-66a) are published at 442 F. Supp. 3d 162 (D.D.C. 2020) and 481 F. Supp. 3d 1 (D.D.C. 2020), respectively. The earlier opinion of the D.C. Circuit, addressing the second question presented (Pet. App. 67a-88a), is published at 860 F.3d 703 (D.C. Cir. 2017).

JURISDICTION

The opinion of the court of appeals was issued on July 6, 2021. Pet. App. 1a. The court of appeals denied rehearing en banc on August 13, 2021. *Id.* 89a. On November 3, 2021, the Chief Justice extended the time in which to file a petition for certiorari to and including December 27, 2021. *See* No. 21A124. On December 21, 2021, the Chief Justice extended the deadline to January 10, 2022. *See id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, and the International Organizations Immunities Act, 22 U.S.C. § 288a, are reproduced at Pet. App. 90a-104a.

INTRODUCTION

Foreign sovereigns, international organizations and state-owned businesses engage in all manner of ordinary commercial activity, with ever-increasing frequency. When they do, their immunity from suit in the United States is governed by the Foreign Sovereign Immunities Act (FSIA). The FSIA codified the "restrictive theory" of immunity. As relevant here, that theory provides that foreign sovereigns (and other covered entities) are subject to claims "based on" their acts in the United States "in the course of their purely commercial operations." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976); *see also Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612, 614 (1992).

Until this case, federal courts of appeals applying the commercial activity exception to immunity had always found that immunity turns on the nature and location of the *covered defendant*'s own acts. If the defendant's conduct that allegedly makes it liable was commercial activity carried on in the United States, the defendant is not immune from suit (though, of course, it may prevail on the merits).

Here, however, the D.C. Circuit held that even if the covered defendant's relevant conduct was U.S. commercial activity, the commercial activity exception cannot be met where the conduct that most directly injured the plaintiff was committed by a third party. It thus granted immunity to a sovereign that was sued for its U.S. commercial activity, by looking to a non-sovereign third-party's acts.

This new split of authority requires this Court's intervention. The D.C. Circuit's decision is at odds with the text and purpose of the commercial activity

provision; dramatically alters the law applicable to all foreign sovereigns, state-owned enterprises, and international organizations; and will have harmful and absurd consequences, especially for American citizens and businesses.

In particular, sovereign entities sometimes participate with others, through commercial conduct, in various sorts of harmful acts, including fraud, price-fixing, human trafficking, terrorism, breach of contract, torts, and property expropriation. On the merits, such sovereigns would be liable under ordinary joint-liability theories. If, however, the FSIA immunizes sovereigns who do not most directly cause the harm, then states and state-owned companies could facilitate wrongdoing from U.S. territory and leave American citizens and businesses without recourse. Indeed, requiring that sovereigns must commit the most directly harmful act would immunize them even where both the sovereign and the third party's conduct was commercial, and all of the conduct occurred in the United States.

A second holding of the D.C. Circuit, declining to enforce the express waiver of immunity in respondent's founding treaty on the ground that it would not "benefit" respondent, also warrants review. This holding conflicts with the plain text of the International Organizations Immunities Act (IOIA), which provides without qualification that waivers should be enforced. The D.C. Circuit's judicially invented waiver-curbing doctrine also is "amorphous" and "awkward to apply." Pet. App. 83a, 88a (Pillard, J., concurring). The doctrine should not be allowed to persist—at least not without this Court's consideration.

STATEMENT OF THE CASE

1. The FSIA governs the immunity of foreign sovereigns, state-owned businesses, and (by incorporation through the IOIA) international organizations. *See* 28 U.S.C. § 1605; 22 U.S.C. § 288a(b); *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768-72 (2019). Under the FSIA, a sovereign is subject to suit 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). This provision codifies the principle that sovereigns and other covered entities engaged in commercial activity are treated like, and afforded no greater protection than, private parties. *Weltover*, 504 U.S. at 612, 614. Thus, once commercial activity is shown, Section 1605(a)(2) operates "in effect, [as] a Federal long-arm statute" that simply requires "minimum jurisdictional contacts." H.R. Rep. No. 94-1487, at 13 (1976).

2. This case arises out of a commercial project financed by respondent, International Finance Corporation (IFC). Headquartered in Washington, D.C., IFC is an international organization that provides loans in the developing world to private corporations, at profit-generating interest rates, for projects that otherwise would not attract "sufficient private capital." Pet. App. 38a. IFC comprises 185 member countries, including the United States. *Id.* 2a.

In 2008, IFC made a $450 million investment in the coal-fired Tata Mundra Power Plant, located in

Gujarat, India. Pet. App. 40a.[1] In accordance with IFC's policy to prevent social and environmental damage, the loan agreement afforded IFC substantial supervisory authority over the project. *Id.* 40a-41a. Loan disbursement was "contingent on IFC's approval of the project's construction plan." *Id.* 41a. The agreement required the borrower, Coastal Gujarat Power Ltd., to meet "IFC's environmental and social requirements." *Id.* Should Coastal Gujarat fail to abide by these conditions, IFC "could revoke [its] financial support." *Id.* 69a.

According to IFC's ombudsman, however, "the plant's construction and operation did not comply" with the loan conditions meant to protect the surrounding communities. Pet. App. 69a. And despite knowing the harms it had predicted had materialized, IFC continued to disburse funds. IFC failed to enforce the contract provisions requiring Coastal Gujarat to remediate harm and prevent further injury and has never taken any steps to address the situation.

The result is a "dismal picture." Pet. App. 68a n.1. The power plant has "devastated" the local environment and way of life. *Id.* 68a. Neighboring villagers and farmers can no longer procure fresh water because the plant's construction caused sea water to contaminate the aquifer. *Id.* 68a n.1. The "cooling system discharges thermal pollution into the sea, killing off marine life on which fishermen rely for their income." *Id.* And "coal dust and ash" pollute the air. *Id.* 69a n.18.

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[1] Because this appeal arises from a motion to dismiss, all allegations in the complaint must be taken as true. *See, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 281 n.2 (2014).

Neither the power plant's construction nor its attendant harms could have occurred without IFC's financing and approval of the plant's design. All of IFC's decisions that contributed to these harms were made at IFC headquarters in Washington, D.C. This includes its decision to finance the project, despite knowing that it posed substantial risks and would inevitably cause irreversible harm, and its decisions to disburse each tranche of the loan, knowing the project did not comply with the environmental and social conditions. IFC also supervised and approved the plant's negligent design and environmental and social management from D.C. Pet. App. 3a, 33a-34a.

3. Petitioners are farmers and fishermen who live near the plant, a trade union of fishworkers, and a local government. Pet. App. 41a. In 2015, they sued IFC in the United States District Court for the District of Columbia, where IFC is domiciled. *Id.* 14a. Focusing on actions IFC took in the United States, petitioners brought claims for negligence, negligent supervision, public and private nuisance, trespass, and breach of contract. *Id.* 43a. They sought injunctive relief or damages. *Id.*

Petitioners argued, for two independent reasons, that IFC was not immune from this suit. First, petitioners maintained that their claims are based upon IFC's commercial activity in the United States. Second, petitioners noted that international organizations "may expressly waive their immunity," 22 U.S.C. § 288a(b), and that IFC's founding treaty contains an express immunity waiver: "Actions 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." IFC Articles

of Agreement art. VI § 3, Dec. 5, 1955, 7 U.S.T. 2197, 2214.[2] There is only one exception (suits by *member states* are expressly prohibited), *id.*, and that exception is inapplicable here.

The district court rejected both arguments and dismissed petitioners' suit on the ground that IFC was immune under the IOIA. *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 108 (D.D.C. 2016).

4. The D.C. Circuit affirmed. Applying then-binding circuit precedent, the court of appeals held that IFC enjoyed "virtually absolute immunity" from suit under the IOIA, even if petitioners' claims satisfied the FSIA's commercial activity exception. Pet. App. 70a (citing *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998)).

Turning to waiver, the court of appeals acknowledged that IFC's Articles, "read literally, would seem to include a categorical waiver" of immunity from suit. Pet. App. 73a. But it held that its precedent "obliged" it to ask whether the claim "benefits" the organization, and since, in its view, the benefits of this type of suit would be outweighed by the burdens, it found IFC had not waived immunity. *Id.* 74a.

Judge Pillard wrote separately to argue that both strands of D.C. Circuit precedent the panel applied were "wrongly decided." Pet. App. 78a (Pillard, J., concurring). Directing that courts "pare back an international organization's apparent waiver of immunity," according to the "amorphous" question whether a particular lawsuit would "benefit" an

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[2] IFC's Articles of Agreement, as amended through April 2020, are available at https://bit.ly/3EUPhyc.

organization, creates a "doctrinal tangle." *Id.* 88a. It would be far better, Judge Pillard proposed, to determine waiver according to organizations' own charters and the "time-tested body of law under the FSIA" that allows lawsuits based on commercial activity. *Id.* 87a.

4. This Court granted certiorari, reversed and remanded. The Court clarified that the IOIA grants organizations like IFC only the restrictive immunity codified in the FSIA, and thus IFC may be sued for its commercial acts that fall within 28 U.S.C. § 1605(a)(2). *Jam*, 139 S. Ct. at 768-72. The Court did not address waiver.

5. On remand in the district court, IFC again claimed immunity, asserting that the FSIA's commercial activity exception is not satisfied here. Pet. App. 45a-46a. IFC argued that claims implicating the FSIA are "based upon" the last act in the causal chain that harmed plaintiffs, even if not committed by the defendant, and that petitioners' claims are therefore based on Coastal Gujarat's acts. *Id.* 49a.

At first, the district court rejected IFC's arguments that petitioners' claims against IFC are actually "based upon" third party acts. Pet. App. 49a-52a. The court nonetheless dismissed, reasoning that petitioners did not specifically allege that IFC committed *its* tortious acts in the United States or "that approving the funding—by itself—was a negligent act." *Id.* 58a-64a.

Petitioners moved to amend their complaint to address the district court's concerns, or for reconsideration based on record facts that the court overlooked. Pet. App. 15a. Petitioners' amendments

alleged, and the unconsidered facts showed, that approving the loan *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. DE 63-1 ¶¶ 216-25. Petitioners also alleged that IFC committed the acts and omissions that the district court found to be the gravamen of the case in Washington, D.C., including IFC's approval of the project's design, supervision of project planning and implementation, response to complaints, and decisions to continue disbursing funds without enforcing the protective loan provisions. *Id.* ¶¶ 197-215, 226-51, 256-60, 266-68.

The district court then abandoned its original holding that petitioners' claims against IFC are based upon IFC's conduct. In a second opinion, the court now reasoned that a claim is typically based on the conduct that "actually injured" a plaintiff, even if committed by a third party. Pet. App. 18a-19a. Applying that test, the court held that petitioners' claims are based upon Coastal Gujarat's "construction and operation" of the plant. *Id.* 24a. The court then rejected Plaintiffs' amendments as futile, stating that the amendments "relate[d] only to IFC's conduct," and adhering to its view that "IFC's conduct is not what the suit is based upon." *Id.* 34a-35a.

6. The court of appeals affirmed. Like the district court, the D.C. Circuit reasoned that where a non-sovereign third party's conduct more directly caused the plaintiff's injury, a claim against an entity covered by the FSIA is not based upon that defendant's conduct. Pet. App. 7a-11a. The court of

appeals also adhered to its earlier holding that IFC did not waive its immunity. *Id.* 11a.

7. Petitioners sought rehearing en banc, but the court of appeals denied the petition without comment. Pet. App. 89a.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve whether the FSIA immunizes covered entities from suits challenging their U.S.-based commercial activity where the injury was more directly caused by a third party's conduct.

A. The D.C. Circuit's decision creates a split over this issue.

1. The FSIA lifts immunity where a suit is "based upon a commercial activity carried on in the United States by the foreign [sovereign]." 28 U.S.C. § 1605(a)(2). The D.C. Circuit concluded that the sovereign's acts must be the most direct cause of the harm; otherwise, in its view, the claims are not "based upon" the acts of the foreign sovereign and are instead "based upon" "the conduct of a non-sovereign third party." Pet. App. 8a-9a. On this understanding of the FSIA, it does not matter whether the sovereign's acts occur in the U.S. or whether they are commercial; nor does it matter whether the third party's acts occur in the U.S. or whether they, too, are commercial. If the foreign sovereign is not the most direct cause of the plaintiff's injury, the claim is not "based upon" its conduct, and the plaintiff's claim cannot meet the commercial activity exception.

2. Every other court of appeals to have considered cases involving multiple responsible parties disagrees with this approach. Rather than making a

threshold determination of whether the claims are "based upon" the defendant's conduct or someone else's, the Second, Fifth, Sixth, and Tenth Circuits all determine a sovereign's immunity by simply examining the acts of *the sovereign* upon which the claim is grounded. If *the sovereign*'s relevant conduct is commercial activity in the United States, it is not immune. Period.

In *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174 (2d Cir. 2010), for example, the plaintiff alleged that a foreign sovereign negligently supervised someone who committed fraud. Even though the fraudster obviously more directly injured the plaintiff, the Second Circuit looked to "the act of the foreign sovereign that serves as the basis for the plaintiff's claim" in assessing whether the sovereign was immune. *Id.* at 177.[3]

In *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), the Fifth Circuit held that "immunity depends on the nature of those acts of the *defendant* that form the basis of the suit"—not the acts of others. *Id.* at 1109 (emphasis added). There, Mexico's regulations devalued American investors' bank deposits. Plaintiffs sued a Mexican state-owned bank

[3] The Second Circuit has similarly held that *two* sovereign entities could be sued, which was only possible because the court did *not* ask which defendant was more directly responsible, let alone hold that the other defendant was immune. *See Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 205-10 (2nd Cir. 2018). Instead, applying this Court's teaching that courts must look to "'the core of [the plaintiffs'] suit,' *i.e.*, 'the . . . acts that actually injured them,'" *id.* at 204 (quoting *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015)), the court assessed the gravamen of the claim against each defendant by reference to each defendant's *own* conduct.

for breach of contract. *Id.* at 1104. The district court held that the suit was "based upon" Mexico's regulation, not the bank's acts. *Id.* at 1107. But the Fifth Circuit rejected that holding, focusing on the defendant's acts; the defendant bank's breach was "the act complained of." *Id.* at 1108-09; *accord De Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985).

In *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System Co.*, 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 Sixth Circuit held that the proper analysis required first determining which acts were attributable to the sovereign, then "whether those acts satisfy the commercial activity exception." *Id.* The court did *not* ask whose conduct more directly caused the injury. In the court's framing, only conduct attributable to the sovereign could be the gravamen. *Accord Riedel v. Bancam, S.A.*, 792 F.2d 587, 591-92 (6th Cir. 1986) (following *Callejo* on similar facts).

Finally, the Tenth Circuit held in *Southway Constr. Co. v. Cent. Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999), that two Nigerian sovereign entities were not immune for allegedly conspiring with others to defraud U.S. investors. *Id.* at 1218. Although those with a direct contractual relationship with the plaintiff more directly caused its injuries, the court held that the sovereign entities were not immune from suit. *Id.*

3. This conflict will not resolve itself without this Court's intervention. The D.C. Circuit insisted here that cases from other circuits were "distinguishable

on their facts" (though it provided no explanation for that assertion) or were off-point because they predated this Court's decision in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35-36 (2015). Pet. App. 9a. It then denied rehearing en banc without comment. *Id.* 89a. But there is no real prospect that any other court of appeals—much less all of them—will reconsider its precedent. The Second Circuit, for example, considered *Sachs* in *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 206 (2nd Cir. 2018). And in *Sachs* itself, this Court relied on the Fifth Circuit's decision cited above, making it especially unlikely that the court would feel any need to reconsider the issue. *See Sachs*, 577 U.S. at 33-34 (citing *Callejo*, 764 F.2d at 1109); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993) (same).

B. The D.C. Circuit's decision conflicts with how the Government has urged the FSIA be interpreted.

The Government's longstanding position has been that sovereign immunity should be determined by looking to the acts of the sovereign defendant, not third parties. For example, the Government argued to this Court in 2018 that "it is natural to understand a U.S. court's jurisdiction over a foreign defendant to depend on that entity's contacts with the United States—and not the contacts of some other, separate entity." Br. of the United States as Amicus Curiae 11, *De Csepel v. Republic of Hungary*, 139 S. Ct. 784, 2018 WL 6382956 (2019). Therefore, the Government explained, an entity's immunity "depends on the connection between the expropriated property and *that entity's own* U.S. commercial activities." *Id.*; *see*

also Br. for the United States as Amicus Curiae 16, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. 935, 2009 WL 1539068 (2009) (arguing in concerted action case that focus should be on "the foreign state's act or omission—not that of any third party").

The Government has also recognized that the gravamen of claims against different defendants must be assessed according to each defendant's conduct. In *Petersen Energía Inversora*, the plaintiff alleged that Argentina had harmed it by taking over YPF, in which Petersen had invested. 895 F.3d at 207-10. The United States recognized that the gravamen of a claim against a particular defendant was that defendant's wrongful conduct, so "[t]he 'gravamen' of Petersen's claims against Argentina is that Argentina violated its promise to Petersen," while "the 'gravamen' of Petersen's claims against YPF is that YPF violated its promise to Petersen." Br. for the United States as Amicus Curiae 10, *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 139 S. Ct. 2741, 2019 WL 2209263 (2019). Under the decision below, however, the gravamen of both claims would have been Argentina's takeover because that was the conduct that most directly injured Petersen; YPF, a state-owned entity, would have been immune because the claims would not be "based upon" its conduct.

To be sure, the Department of Justice urged in the district court that IFC should be immune from this suit. But the State Department did not join these statements, and the Government did not participate at all in the court of appeals. So the earlier filing should not be taken as agreement with the D.C. Circuit's ultimate decision.

C. This question is extremely important.

Under the D.C. Circuit's holding below, the FSIA immunizes a covered entity from suit in *every* case where that entity was not the most direct cause of the harm. Thus, as the district court foretold, the D.C. Circuit's rule entitles covered entities to immunity from a "large swath" of ordinary claims—including in "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." Pet. App. 51a. Indeed, the D.C. Circuit's rule necessarily applies even where *all* of the conduct—*both* the third-party's and the covered entity's—is commercial activity in the United States. This is because the suit must be "based upon" conduct "by the [*sovereign*]." 28 U.S.C. § 1605(a)(2). If a court deems the gravamen of claims against the covered entity to be a third-party's acts, the entity is necessarily immune—full stop—because that conduct was not carried on by the entity. A suit based entirely on commercial activity in the U.S. would fail the commercial activity exception.[4]

Whether the FSIA's commercial activity exception turns on the sovereign's own conduct when another actor may have more directly caused the plaintiff's injuries has significant implications for individuals, businesses, international organizations,

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[4] To be sure, the D.C. Circuit stated that the commercial activity exception did not apply here because "the gravamen of appellants' complaint is injurious activity *that occurred in India*." Pet. App. 2a (emphasis added). But if the D.C. Circuit were correct that the gravamen is "the operation of the Plant," *id.* 7a, the *location* of that conduct is irrelevant. The sovereign defendant, IFC, did not operate the Plant, and therefore no suit could be "based upon" IFC's conduct regardless of where that operation occurred—even if the Plant were in the United States.

foreign governments and state-owned enterprises. Whenever multiple entities act together to commit a wrong, only one (at most) could be sued. The result would be that a wide range of ordinary joint-liability claims against FSIA-covered entities would suddenly be barred. Pet. App. 51a.

For example:

• *Human trafficking/forced labor*. In *Rodriguez v. Pan American Health Organization*, 502 F. Supp. 3d 200 (D.D.C. 2020), plaintiffs sued an international organization for facilitating forced labor by transferring payments for the labor to Cuba, just like a bank. *Id.* at 214-15. The organization argued the gravamen was Cuba's conduct, since the forced labor "actually injured" the plaintiffs. *Id.* at 215-16. But the court held that the claim against the organization was based on the *organization*'s conduct that facilitated Cuba's forced labor. *Id.* at 214, 216-17. Under the D.C. Circuit's new test, only the actor that actually committed forced labor could be liable.

• *Expropriation/property seizure*. Sovereign entities sometimes aid illegal property seizures or traffic in such property. Under the D.C. Circuit test, none of these sovereigns would be liable for their actions—leaving Americans without redress when their property is stolen, even if a sovereign benefits from that theft.

For instance, in *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, No. 19-cv-01277, ___ F. Supp. 3d ___, 2021 U.S. Dist. LEXIS 75679 (D.D.C. Apr. 20, 2021), Exxon sued a Cuban sovereign enterprise, CIMEX, for trafficking and profiting from American property that Cuba expropriated. *Id.* at *2-10. The district court held that because the

expropriation "alone would not 'entitle a plaintiff to relief'" against CIMEX, the gravamen of the claim against CIMEX was CIMEX's trafficking—the conduct for which CIMEX was sued. *Id.* at *26 (quoting *Sachs*, 577 U.S. at 33). But under the D.C. Circuit test, only the initial theft would form the gravamen of these claims; the sovereign defendants would be immune for the subsequent trafficking because it was not what "actually injured" Exxon.

Similarly, 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 district court held that the gravamen of the claims against Angola was *Angola*'s activities. *Id.* at *10-12.

• *Fraud*. Sovereign entities sometimes aid others' fraud. Indeed, examples abound. *E.g. Dale v. Colagiovanni*, 443 F.3d 425, 428-29 (5th Cir. 2006) (alleging Vatican's agent conspired in massive scheme to defraud American insurers); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 424-25 (S.D.N.Y. 2007) (sovereign bank allegedly facilitating removal of stolen funds from the U.S.). Americans are regularly injured by such schemes. Yet under the D.C. Circuit's rule, the sovereign would get off scot-free.

Take *Southway Construction Company*, where two Nigerian sovereign defendants allegedly schemed, along with other, more direct perpetrators, to defraud Colorado investors. 198 F.3d at 1212-13; *see supra* at 12. The foreign sovereigns never directly contacted the defrauded plaintiffs. *Southway v. Cent.*

Bank of Nig., 994 F. Supp. 1299, 1303-04 (D. Colo. 1998). Accordingly, the activity that most directly harmed the plaintiffs was committed by a third party. Yet the Tenth Circuit concluded that the action was based upon the sovereigns' acts and the sovereigns were not immune. 198 F.3d at 1217-18. These claims would not survive the D.C. Circuit's test.

- *Price Fixing*. State-owned enterprises sometimes conspire to fix prices. For example, in *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2018 U.S. Dist. LEXIS 16926 (N.D. Cal. Feb. 1, 2018), a Chinese sovereign enterprise conspired with non-sovereign entities to fix television parts prices. *Id.* at *56-61. The conspiracy "allegedly resulted in overcharges of billions of U.S. dollars to [U.S.] companies." *In re Cathode Ray Tube CRT Antitrust Litig.,* 07-cv-05944-JST, 2020 U.S. Dist. LEXIS 67163, *1 (N. D. Cal. March 11, 2020). The court looked to "the anticompetitive behavior *of the [sovereign] Defendants*, as part of the broader conspiracy," 2018 U.S. Dist. LEXIS 16926, at *73 (emphasis added), and *that* behavior was commercial activity with an effect on the United States. *Id.* at *69-75. And in *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. CV 16-2345-DMG, 2016 U.S. Dist. LEXIS 139342 (C.D. Cal. Aug. 18, 2016), a Mexican state-owned business conspired to fix salt prices and the court looked to the "[*sovereign*'s] alleged price-fixing." *Id.* at *8-9 (emphasis added).

Neither court followed the D.C. Circuit's rule and considered whether a co-conspirator more directly injured the plaintiff. Indeed, that would be a near impossible task in a conspiracy, which, by definition, requires collective action, but typically involves

different conduct by each participant. In the price-fixing context, for example, would courts focus on the conspiracy's mastermind? The actor that sold the goods to the plaintiff? Or perhaps the actor with the biggest market share, that had the greatest effect on the price? Looking at the *defendant*'s actions is a much clearer rule, and led to both of these sovereigns facing liability for their participation in the conspiracy.

- *Contracts*. Sovereign entities frequently contract with American businesses. Where, for instance, non-contracting parties induce a breach, multiple parties could be liable under ordinary contract principles. Courts have allowed businesses to seek redress, and have not tried to identify a single wrongful commercial act as the only one claims could be based upon. *See, e.g.*, *Callejo*, 764 F.2d at 1109.

Thus, in *Petersen Energía Inversora*, Argentina expropriated investors' shares in a petroleum company, YPF, which thereby became a state entity. 895 F.3d at 207-10. Investors brought breach-of-contract claims against Argentina and YPF. While defendants argued that the breach was caused by Argentina's expropriation, which was what directly injured the plaintiffs, the court analyzed each party's acts separately, and found both entities could be sued. *Id.* at 207-11. Under the decision below, the court would have had to determine which party most directly injured the investors; only claims against that party could proceed.

- *Aircraft Accidents*. In *Sachs*, Chief Justice Roberts asked: if there was negligence in aircraft maintenance in the United States that caused a rough landing and injuries abroad, would there then

be two gravamina? Tr. of Oral Arg at 14:5-17:4, *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015).

Similar cases involving multiple actors are *not* hypothetical. Plaintiffs in air crash cases have sued both the manufacturer for defects in the plane and the airline, where the airline was state-owned, *Saunier v. Boeing Co.*, No. 13 C 8507, 2014 U.S. Dist. LEXIS 56616, *2 (N.D. Ill. April 23, 2014); *In re Air Crash near Nantucket Island, Mass., on Oct. 31, 1999*, 392 F. Supp. 2d 461, 466 (E.D.N.Y. 2005), and conversely, where the manufacturer was state-owned, *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 935 (7th Cir. 1996). And in *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1329 (2d Cir. 1990), plaintiffs sued an airline, airline maintenance companies, and the manufacturer—each for its own negligence—where all of the companies were sovereign entities of two different countries.

Under the decision below, courts would have to determine which conduct the claim was *really* based on—the manufacture or the airline's acts? But such cases necessarily involve different gravamina for different defendants. Courts have focused on the plaintiffs' actual theory of liability, and *that defendant*'s allegedly wrongful act. *Filus*, 907 F.2d at 1333 (looking at USSR activities to assess immunity, not other entities').

- *Products Liability*. State-owned enterprises also manufacture and sell commercial goods. This is commercial activity, so when these goods injure Americans, sovereign sellers *and* manufacturers should be liable to the same extent as private parties. These cases typically involve multiple sovereign *and* private defendants, including the manufacturer and

the seller. *E.g. Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1543-44 (11th Cir. 1993) (denying immunity for French sovereign manufacturer). Thus, in *Rote v. Zel Custom Mfg. LLC*, No. 2:13-cv-1189, 2015 U.S. Dist. LEXIS 16700, *4-5 (S.D. Ohio Feb. 11, 2015), a plaintiff injured by an exploding rifle round sued, among others, the gun manufacturer, the gun seller, the ammunition manufacturer and the ammunition seller. The sovereign ammunition manufacturer was not immune. *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016).

No court has ever zeroed in on one actor in the supply chain as the "actual cause" of the harm, leaving other defendants immune. As the district court acknowledged, parsing whether the manufacturer or the seller actually injured the victim would be "difficult"; both "might bear similar levels of responsibility." Pet. App. 29a.

• *Terrorism*. State-owned entities have been accused of abetting terrorism. For instance, in *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 18 (D.D.C. 2010), the Bank of China's U.S. branches transferred millions of dollars for members of Palestinian Islamic Jihad, which allegedly facilitated terrorist attacks in Israel, including the restaurant bombing that killed plaintiffs' decedent. Under the decision below, a state-owned entity would be immune from claims for aiding terrorism through U.S. commercial activity, because the terrorists' acts "actually injured" plaintiffs.

• *Criminal Cases.* The decision below could even hamstring the Government's prosecutions of covered entities engaged in criminal conspiracies or other joint-criminal activity. Courts have not settled

whether the FSIA applies to criminal prosecutions, but some circuits have decided cases on the assumption that it does. *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 347-48 (2d Cir. 2021); *United States v. Pangang Grp. Co., Ltd.*, 6 F.4th 946, 954 (9th Cir. 2021); *In re Grand Jury Subpoena*, 912 F.3d 623, 625, 627 (D.C. Cir. 2019). If that assumption is correct, the decision below would immunize crimes that harm our national security.

For instance, in *Turkiye Halk Bankasi*, a state-owned bank allegedly conspired with others to evade U.S. sanctions by helping Iran launder billions of dollars. 16 F.4th at 341. The decision below would have courts determine which co-conspirator most directly caused the sanctions evasion. Instead, the Second Circuit found Halkbank was not immune based on its own contributions to the conspiracy. *Id.* at 347-50; *see also, e.g.*, *Pangang Grp. Co.*, 6 F.4th at 950-51 (addressing under FSIA prosecution of Chinese state-owned companies for conspiracy to commit economic espionage by stealing U.S. company's trade secrets).

D. This case is an excellent vehicle for resolving this issue.

The FSIA question presented here is outcome-determinative of whether IFC is immune from this suit. Petitioners sued IFC for negligently funding a private project and approving the plant's dangerous design. Those allegations meet both of Section 1605(a)(2)'s requirements: IFC's conduct is commercial, and it occurred here.

1. Acts are "commercial" if they are "the type of actions by which a private party engages in . . . commerce." *Weltover*, 504 U.S. at 614 (internal

quotations and emphasis omitted). Loaning money through a commercial contract, at market-based interest rates, to a private entity is commercial activity. *See Rodriguez*, 502 F. Supp. 3d at 214 (finding acting like a bank was commercial). So is approving a business partner's design. Indeed, IFC told this Court that it "employ[s] traditional financial tools" and "cannot take sovereign acts." Br. for Respondent at 58, *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019).

2. IFC's commercial activity also had "substantial contact with the United States." 28 U.S.C. § 1603(e). IFC has never disputed that it committed the conduct petitioners challenge at its D.C. headquarters. *Supra* at 6.

E. The D.C. Circuit's interpretation of the FSIA is incorrect.

The decision below conflicts with the FSIA's plain text and obvious purpose. The FSIA does not ask courts to compare multiple tortfeasors' relative responsibility nor require that the defendant be the most direct cause of the harm. Instead, immunity turns simply on the nature and location of the "actions that the foreign state performs" (or performed). *Weltover*, 504 U.S. at 614.

1. *Text.*

a. The commercial activity exception denies immunity where "the *action* is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (emphasis added). An "action" is short for a "cause of action"—that is, "[a] legal theory of a lawsuit." *Cause of Action*, Black's Law Dictionary (11th ed. 2019). The FSIA's

focus on the "action," as the plaintiff frames it, thus dictates that covered defendants are subject to suit when their acts *upon which their liability is alleged* constitute U.S. commercial activity.

The FSIA does not impose any additional requirement that the covered defendant must be the actor that most directly caused the plaintiff's injury. Indeed, in the words of a neighboring section of the FSIA, covered entities "are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned." 28 U.S.C. § 1602 (emphasis added). And courts cannot add "unexpressed requirement[s]" to this test. *Weltover*, 504 U.S. at 618.

The D.C. Circuit never engaged with the import of the word "action." And it treated Section 1602 as just an aside about international law. Pet. App. 9a-10a. But the commercial activity exception *codifies* international law, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). Indeed, Section 1602 states the FSIA's "focus." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018). Section 1602 confirms what is apparent in Section 1605: Immunity turns on the sovereign's own acts, not on whether another actor more directly harmed the plaintiff.

b. The D.C Circuit's rule also flouts Section 1606. That provision states that sovereigns "shall be liable in the same manner and to the same extent as a private individual under like circumstances." But the decision below shields sovereigns from whole categories of ordinary joint-liability claims commonly brought against private parties. *See supra* at 15-22.

The court of appeals thought that because Section 1606 applies to claims for which a sovereign "is not entitled to immunity," it is irrelevant. Pet. App. 10a. But Section 1606 shows that the FSIA "was not intended to affect the substantive law" governing sovereigns, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983), and the court's approach impermissibly does exactly that. If Congress intended the FSIA to radically limit the liability rules that apply to sovereigns, it would not have expressly stated that ordinary liability rules apply.

c. Contrary to the D.C. Circuit's assertion (Pet. App. 9a), focusing on defendant's conduct does not read "based upon" out of Section 1605. That language ensures that there is a connection between the sovereign's commercial activity in the U.S. and the activity for which the sovereign was sued: "Proof that defendants were involved on another occasion in the United States in commercial activity that has no connection with, or relationship to, the conduct which gave rise to plaintiff's cause of action will not suffice." *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991). In other words, the "based upon" provision answers the question of *which* of the sovereign defendant's acts must be commercial conduct with a U.S. nexus: the acts upon which the action is based. It weeds out cases where the sovereign engaged in some U.S. commercial conduct, but the core of the sovereign's actionable conduct is non-commercial, *see Nelson*, 507 U.S. 349, or has no

nexus to the United States, *see Sachs*, 577 U.S. 27.[5] Neither of those scenarios is present here.

2. *Purpose.* The D.C. Circuit's holding also thwarts the FSIA's purpose. Congress enacted the FSIA to codify the "restrictive" view of sovereign immunity that the State Department had adopted. *Permanent Mission of India*, 551 U.S. at 199. The State Department's position was that foreign states' commercial activities "'do not give rise to sovereign immunity.'" *Alfred Dunhill of London, Inc.*, 425 U.S. at 698 (quoting Letter of Monroe Leigh, November 26, 1975); *accord Samantar v. Yousuf*, 560 U.S. 305, 312-13 (2010). There was no exception for commercial acts committed with others.

The D.C. Circuit's rule similarly frustrates the FSIA's operation as a proxy for personal jurisdiction. Personal jurisdiction over a covered entity is present whenever subject-matter jurisdiction is satisfied. 28 U.S.C. § 1330(b). The commercial activity exception accordingly functions as a "basic long-arm provision for obtaining personal jurisdiction." *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 (3d Cir. 1981); *accord* H.R. Rep. No. 94-1487, at 13 (1976) (noting that the immunity exceptions of Sections 1605-07 "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction"). Indeed, the FSIA's requirement that a claim be "based upon" the sovereign's commercial activity that has

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[5] *Sachs* and *Nelson* addressed not *whose* acts were the basis of the suit, but *which* of the *sovereign*'s acts were. *See Sachs*, 577 U.S. at 35-36 (finding gravamen of personal injury suit was *defendant*'s management of a railway, not its ticket sale); *Nelson*, 507 U.S. at 358, 361-63 (finding claim based on sovereign's torture, not its hiring).

"substantial contact" with the United States, 28 U.S.C. §§ 1603(e); 1605(a)(2); *Nelson*, 507 U.S. at 356 (quoting 28 U.S.C. § 1605(a)(2)), 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); H.R. Rep. No. 94-1487, at 13 (1976) (citing, *inter alia*, *McGee*, 355 U.S. at 223).

Yet, contrary to the D.C. Circuit's rule, personal jurisdiction inquiries ask simply whether a "defendant's suit-related conduct" has a "substantial connection" to the forum. *Walden v. Fiore*, 571 U.S. 277, 284 (2014). A "third person['s]" acts are "not an appropriate consideration." *Id.* (quotation marks omitted).

The appeals court noted that *Sachs* did not apply a personal jurisdiction-like approach. Pet. App. 10a. But *Sachs* decided *which* of *defendant*'s acts counted. That is consistent with personal jurisdiction's focus on the *defendant*'s conduct. *Sachs* did not address whether the "based upon" provision's personal jurisdiction foundation forecloses predicating immunity on third-party acts.

3. *Precedent*. The D.C. Circuit's holding that the gravamen is a third-party's conduct conflicts with this Court's precedent—specifically, its elements-based approach to the commercial activity exception—and the ordinary joint-liability principles that approach embodies. The court of appeals thought courts determine what conduct the claim is based on in some metaphysical sense, without reference to the defendant or the claim against it. Pet. App. 7a-9a. But courts must to look 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; *accord Sachs*, 577 U.S. at 33-34. A claim's elements are keyed to—and thus the claim is "based" on—the *defendant*'s conduct that allegedly makes the defendant liable, not any third-parties' acts.

Indeed, under traditional joint-liability "theor[ies] of the case," joint-tortfeasors are liable for their *own* conduct. *See, e.g.*, Restatement (Second) of Torts (hereinafter "Restatement") §§ 302, 302A, 302B & cmt. H, 876 (1965). Conspiracy and aiding and abetting claims, for example, hold defendants liable for *their* concerted action with the direct perpetrator. Restatement § 876; *Overseas Priv. Inv. Corp. v. Industria de Pesca, N.A., Inc.*, 920 F. Supp. 207, 210 (D.D.C. 1996) (gravamen of aiding and abetting is *defendant*'s assistance to another's breach). Likewise, defendants are liable for their *own* negligence that "allowed [someone else's] foreseeable [tort]." *Sheridan v. United States*, 487 U.S. 392, 401 (1988). Such cases involve "two tortious acts": the directly harmful conduct, and the acts of others who allowed it to occur. *Id.* at 398, 403; *accord* Restatement §§ 447-49 (explaining that negligent or tortious acts of third party do not absolve another negligent party of liability). Thus, each defendant's conduct is the basis of the claim against *that defendant*.

Of course, a sovereign's conduct can be too attenuated from the harm for liability. But such cases should fail on the *merits*. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004). That is, if a plaintiff seeks recovery based on conduct that is too remote from its injuries, then a court can dismiss the case for lack of causation or the

like. But the FSIA provides no basis for dismissing such claims on the ground of immunity.

4. *Administrability*. This Court has admonished that "jurisdictional rules should be clear." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). Courts "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). Indeed, the FSIA was passed in part because the immunity rules were unclear. *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020). The State Department likewise supports "clear, reasonable, and workable [immunity] rule[s]" rather than "uncertain ad hoc inquir[ies]." Br. for the United States as Amicus Curiae Supporting Respondents 11, *Weltover*, 504 U.S. 607, 1992 WL 12012096 (1992).

The D.C. Circuit's approach is anything but clear or simple. Conducting some undefined comparative analysis of two or more responsible parties' conduct to determine whether the claim is *really* "based upon" a third party's conduct rather than the defendant's would be complex and indefinite. In fact, the district court acknowledged that where multiple parties "bear similar levels of responsibility," "it would be difficult to discern" whose conduct is the gravamen. Pet. App. 29a. This is no way to conduct a threshold jurisdictional inquiry. Better to stick with the FSIA's plain directive to focus exclusively on the named defendant's alleged conduct, and to let substantive law, joint-liability, and other doctrines sort out the rest on the merits.

II. This Court should make clear that express waivers of international organizations' immunity should be enforced according to their plain text.

This Court's intervention is separately warranted because the D.C. Circuit's judicially-created test for determining whether an organization has waived its immunity conflicts with the plain text of the IOIA. This issue affects a number of organizations, including IFC, with express waivers in their founding treaties. And it overwhelmingly arises in the D.C. Circuit, where many international organizations are based. The issue is too important to be left to D.C. Circuit precedent that even that court concedes "is a bit strange," Pet. App. 74a, and that "lacks a sound legal foundation and is awkward to apply," *id.* 83a (Pillard, J., concurring).

1. All international organizations have founding agreements that reflect their member states' judgment as to the immunities the organization needs. Like several other international organizations, IFC's Articles state that "[a]ctions may be brought against the Corporation." IFC Articles of Agreement art. VI § 3.[6] This provision prohibits suits by member states, but the "broad language" otherwise "contain[s]

[6] *See also, e.g.*, Agreement Establishing the European Bank for Reconstruction and Development art. 46, May 29, 1990, 29 I.L.M. 1077; Agreement Establishing the Inter-American Investment Corporation art. VII, Nov. 19, 1984, T.I.A.S. No. 12087; Agreement Establishing the Inter-American Development Bank art. XI § 2, Apr. 8, 1959, 10 U.S.T. 3029; Articles of Agreement of the International Bank for Reconstruction and Development art. VII § 3, Dec. 27, 1945, 60 Stat. 1440.

no exceptions." *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 839-40 (D.C. Cir. 2009).

Where, as here, a treaty plainly waives immunity, that express waiver must be honored. The IOIA provides in no uncertain terms that international organizations "may expressly waive their immunity." 22 U.S.C. § 288a(b). Consequently, when the D.C. Circuit first addressed a treaty waiver like the one at issue here, it held that the plain text waived immunity "in broad terms," allowing suit by anyone except member states. *Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967). And the D.C. Circuit acknowledged in *this* case that "read literally," the provision "would seem to include a categorical waiver." Pet. App. 73a. That is consistent with how the State Department read identical language when it was originally drafted, noting the World Bank "will be subject to a suit." U.S. Dep't of State, Constitutionality of the Bretton Woods Agreement Act 90 (1945).

But instead of continuing after *Lutcher* to enforce treaty waivers according to their terms, the D.C. Circuit subsequently gave itself the power, where it deemed it advisable, to "read a qualifier into" treaty language, *Osseiran*, 552 F.3d at 839. In *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), the D.C. Circuit held that it would not enforce waivers unless the organization would receive a "corresponding benefit" from being subject to suit. *Id.* at 617. And the court of appeals applied that limitation here, refusing to enforce IFC's waiver because it did not believe this is "the type of suit by the type of plaintiff that would benefit the organization over the long term." Pet.

App. 73a (quotation marks and emphasis omitted); *see also, e.g.*, *Atkinson*, 156 F.3d at 1338-39 (same).

The IOIA's approval of "express[] waive[rs]," 22 U.S.C. § 288a(b), precludes such judicial policymaking. The statute contains no exception allowing U.S. judges to second-guess treaties' drafters and decline to apply an express waiver where they believe that the suit will not "benefit" the organization. Instead, the ordinary rules of treaty construction apply. And under those rules, a treaty's plain text controls. *See, e.g.*, *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020).

In short, the D.C. Circuit's "corresponding benefit" test is a relic from an age when courts felt more free to depart from text. The court of appeals breezed past the waiver's plain text to what it believed to be immunity's "underlying purposes," *Mendaro*, 717 F.2d at 615, and assumed the drafters were careless, suggesting the plain text would result in "inadvertent[]" waiver. *Id.* at 617. We now know this methodology is untenable. The drafters' purpose is generally "expressed by the ordinary meaning of the words used." *Jam*, 139 S. Ct. at 769 (quotation marks omitted). What's more, organizations' assessments of costs and benefits "are more reliably reflected in their charters and policies—here, in the broad waiver included in IFC's Articles of Agreement—than in their litigation positions defending against pending claims." Pet. App. 85a (Pillard, J., concurring).

2. Review is especially warranted because the D.C. Circuit's waiver test makes no sense after this Court's decision in *Jam.* The D.C. Circuit crafted its

test under the erroneous assumption that the IOIA confers absolute immunity. Against that backdrop, the court of appeals reasoned that the key goal of waiver was to permit claims regarding "commercial transactions." Pet. App. 74a; *Mendaro*, 717 F.2d at 618. If counterparties could not enforce the organizations' contracts, the reasoning went, they would be less likely to contract at all; immunity would "hobble its ability to perform the ordinary activities of a financial institution operating in the commercial marketplace." *Mendaro*, 717 F.2d at 618.

But this Court's holding that IOIA immunity is *not* absolute, but instead mirrors sovereign immunity, *Jam*, 139 S. Ct. at 768-72, makes tailoring waiver to such commercial interests unnecessary. *See* Pet. App. 87a (Pillard, J., concurring). The FSIA contains a commercial activities exception, which addresses any concerns about organizations' ability to contract. Nevertheless, the D.C. Circuit has steadfastly clung to its "corresponding benefit" test, even after this Court rejected its absolute immunity rule. *Id.* 11a. Now that this Court has knocked the pins out from under the "corresponding benefit" test, this Court should assess whether the D.C. Circuit's test is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 10, 2022

APPENDIX

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 26, 2021 Decided July 6, 2021

No. 20-7092

BUDHA ISMAIL JAM, ET AL.,

APPELLANTS

v.

INTERNATIONAL FINANCE CORPORATION,

APPELLEE

Consolidated with 20-7097

Appeals from the United States District Court for the District of Columbia

(No. 1:15-cv-00612)

Richard L. Herz argued the cause for appellants. With him on the briefs were *Marco Simons* and *Michelle Harrison*.

Henry C. Su was on the brief for *amici curiae* Center for International Environmental Law, et al. in support of appellants.

Jeffrey T. Green argued the cause for appellee. With him on the brief were *Dana Foster* and *Maxwell J. Kalmann. Marisa S. West* entered an appearance.

Before: ROGERS and TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* ROGERS.

Concurring opinion by *Senior Circuit Judge* RANDOLPH.

ROGERS, *Circuit Judge*: Appellants allege that the International Finance Corporation negligently lent funds to a power-generation project in India, which damaged their environment, health, and livelihoods. Because the gravamen of appellants' complaint is injurious activity that occurred in India, the United States' courts lack subject-matter jurisdiction, *see OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35–36 (2015), and the district court's dismissal on that ground is affirmed.

I.

Appellants are residents of Gujarat, India, a government entity from the same region, and a nonprofit focused on fishworkers' rights. The International Finance Corporation ("IFC") is an international organization, established by Articles of Agreement among its 185 member countries.[1] Appellants' allegations have been fully described in prior opinions. *See Jam v. Int'l Fin. Corp.* (*Jam II*), 139 S. Ct. 759, 765–67 (2019); *Jam v. Int'l Fin. Corp.* (*Jam I*), 860 F.3d 703, 704 (D.C. Cir. 2017); *Jam v.*

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[1] IFC Articles of Agreement arts. I–II, *as amended through* Apr. 16, 2020, https://www.ifc.org/wps/wcm/connect/d057dbd5-4b02-40f8-8065-9e6315c5a9aa/2020-IFC-AoA-English.pdf?MOD= AJPERES&CVID=n7H2n-h; World Bank, *IFC Member Countries* (Apr. 16, 2019), https://www.worldbank.org/en/about/leadership/members#3.

Int'l Fin. Corp. (*Jam III*), 442 F. Supp. 3d 162, 166–69 (D.D.C. 2020). For present purposes, a summary will suffice: Appellants allege that they have been injured by operations of the coal-fired Tata Mundra Power Plant (the "Plant"), which is located in India and owned and operated by Coastal Gujarat Power Limited ("CGPL"). IFC loaned funds for the project and conditioned disbursement of those funds on CGPL's compliance with certain environmental standards. Appellants allege that IFC negligently failed to ensure that the Plant's design and operation complied with these environmental standards but nonetheless disbursed funds to CGPL. These supervisory omissions and disbursement decisions allegedly took place at IFC's headquarters in the United States, specifically in Washington, D.C.

The district court initially dismissed the case for lack of subject-matter jurisdiction, based on then-binding circuit precedent that international organizations like IFC enjoyed virtually absolute immunity from suit. *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 108–09, 112 (D.D.C. 2016). This court affirmed in *Jam I*, 860 F.3d at 708, but the Supreme Court reversed, holding that such organizations possess more limited immunity equivalent to that enjoyed by foreign governments, *Jam II*, 139 S. Ct. at 765. Applying the new standard on remand, the district court in February 2020 again ruled that IFC was immune from appellants' claims. *Jam III*, 442 F. Supp. 3d at 179. The district court in August 2020 denied as futile appellants' motion for leave to amend their complaint, reasoning that IFC would remain entitled to immunity, even crediting the allegations

of the proposed amended complaint. *Jam v. Int'l Fin. Corp.*, 481 F. Supp. 3d 1, 4, 13–14 (D.D.C. 2020).

II.

The parties dispute whether the district court's February 2020 order granting IFC's renewed motion to dismiss the complaint was final and appealable. The court need not resolve that issue. Appellants timely filed a motion to amend their complaint pursuant to Federal Rule of Civil Procedure 15 or, in the alternative, Rule 59(e). The pendency of such a motion tolls the time to appeal. FED. R. APP. P. 4(a)(4)(A)(iv); *Obaydullah v. Obama*, 688 F.3d 784, 788 (D.C. Cir. 2012). After the district court's August 2020 denial of the motion for leave to amend the complaint, appellants timely filed a notice of appeal. The August 2020 decision was a final, appealable order. Therefore, no matter whether the February decision was final, the appeal is timely, and this court has jurisdiction under 28 U.S.C. § 1291. We turn to the merits.

Under the International Organizations Immunities Act ("IOIA"), international organizations "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." 22 U.S.C. § 288a(b). In *Jam II*, the Supreme Court held that the IOIA confers on international organizations the same immunity available to foreign governments under the Foreign Sovereign Immunities Act ("FSIA"). 139 S. Ct. at 764–66, 772.

The FSIA, in turn, provides that foreign states are immune from the jurisdiction of United States' courts, 28 U.S.C. § 1604, subject to a handful of exceptions, *id.* §§ 1605–07. At issue in this appeal is the commercial activity exception, which provides that a foreign state shall not be immune from jurisdiction

> in any case . . . in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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[.]

Id. § 1605(a)(2). The third clause, concerning foreign activity with a direct effect in the United States, is not at issue here.

The "based upon" phrase in the commercial activity exception requires courts to identify the "gravamen" of the lawsuit: "[I]f the 'gravamen' of a lawsuit is tortious activity abroad, the suit is not 'based upon' commercial activity within the meaning of the FSIA's commercial activity exception." *Jam II*, 139 S. Ct. at 772. In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Supreme Court explained that in identifying what an action is "based upon"—its "gravamen"—courts should examine "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. There, the plaintiff had been hired to work in a government-

owned Saudi Arabian hospital. *Id.* at 351–52. The plaintiff alleged that after he reported safety defects at the hospital, Saudi authorities detained and tortured him. *Id.* at 352–53. The Court held that the lawsuit was not based upon domestic commercial activity, despite allegations that Saudi Arabia had tortiously failed to warn the plaintiff of the risks when it recruited him in the United States. *Id.* at 358, 363.

More recently, in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), the Supreme Court clarified that the gravamen analysis does not require courts to undertake a "claim-by-claim, element-by-element analysis," but rather to "zero[] in on the core of [the] suit." *Id.* at 34–35. "What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017). In *Sachs*, the plaintiff had purchased a Eurail pass from a travel agent in the United States and was later injured by a government-owned railway car in Austria. 577 U.S. at 30. The plaintiff sued for, among other things, failure to warn that the train and boarding platform were defectively designed. *Id.* The Court concluded that the gravamen of the suit was tortious activity abroad, because the plaintiff's claims all "turn[ed] on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." *Id.* at 35. The domestic sale of the railway pass did not change the result because there was "nothing wrongful about the sale of the Eurail pass standing alone. Without the existence of the unsafe boarding

conditions in [Austria], there would have been nothing to warn Sachs about when she bought the Eurail pass." *Id.* at 35–36. However the suit was "fram[ed]," "the incident in [Austria] remain[ed] at its foundation." *Id.* at 36. Any other approach, the Court observed, "would allow plaintiffs to evade the [FSIA's] restrictions through artful pleading." *Id.*

In the instant case, paralleling *Sachs*, all of appellants' claims turn on allegedly wrongful conduct in India, which has led to injuries suffered in India. The Washington, D.C. decisionmaking that appellants criticize consists of providing funding that facilitated conduct in India. Absent the operation of the Plant in India, or appellants' injuries in India, there would have been nothing wrongful about IFC's disbursement of funds. Even crediting the allegation that the Plant would not have been built without IFC's funding, *see* Prop. Am. Compl. ¶ 57, the operation of the Plant is what actually injured appellants, *cf. Sachs*, 577 U.S. at 34, and the manner of its construction and operation is the crux of their complaint. The gravamen of appellants' lawsuit is therefore conduct that occurred in India, not in the United States, and IFC consequently cannot be subjected to the jurisdiction of United States' courts under the commercial activity exception. That conclusion holds for each of the various theories that appellants have pleaded: negligent supervision, public nuisance, trespass, breach of contract to third party beneficiaries, and others.

Appellants' contrary arguments are unpersuasive. At the outset, appellants make the bold suggestion that *Jam I* "previously held" that IFC would not be immune under the FSIA, that such a

result survived *Jam II*, and that it remains binding circuit precedent. Appellants' Br. 19. This is a transparent misreading of *Jam I*, which in fact held that IFC had "virtually absolute" immunity under the IOIA. 860 F.3d at 705–06. Insofar as *Jam I* suggested a potential outcome of the FSIA analysis it rejected, *see id.* at 707, that dictum is not binding circuit precedent, *see Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017).

Appellants' principal contention is that the gravamen analysis must be categorically limited to the sovereign defendant's conduct, and correspondingly that the conduct of any non-sovereign entity must be ignored. *See* Appellants' Br. 15–17, 21–30. (Although IFC is not a "sovereign," the parties—and this opinion—use the term as a shorthand to include international organizations that enjoy sovereign-like immunity. *See generally Jam II*, 139 S. Ct. at 768.) Applying their proposed rule, appellants maintain that their lawsuit is "based upon" only IFC's decisionmaking in Washington, D.C., and that CGPL's operation of the Plant in India is irrelevant. Appellants' Br. 44–45. This view cannot be squared with *Sachs* and *Nelson*, which instruct courts to examine "the 'basis' or 'foundation' for a claim, 'those elements that, if proven would entitle a plaintiff to relief,' and 'the "gravamen of the complaint."'" *Sachs*, 577 U.S. at 33–34 (alteration omitted) (citations omitted) (quoting *Nelson*, 507 U.S. at 357); *cf. also Nestle USA, Inc. v. Doe*, 593 U.S. ___ (2021) (slip op., at 3–5). There is no suggestion that the examination is restricted to the sovereign's conduct, especially where, as here, the core of appellants' complaint is that IFC enabled or failed to

adequately supervise the conduct of a non-sovereign third party. Insofar as appellants purport to identify authority to the contrary, those cases are either distinguishable on their facts, pre-date *Sachs*, or both. *See, e.g.*, *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002–04 (D.C. Cir. 1985); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 & n.22 (D.C. Cir. 1982); *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 814 (6th Cir. 2015); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108–09 (5th Cir. 1985).

Appellants' textual arguments on this point are similarly unavailing. The commercial activity exception denies immunity in "any case . . . 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[.]" 28 U.S.C. § 1605(a)(2) (emphasis added). Appellants interpret the italicized text to "bar courts from basing immunity on a third party's acts." Appellants' Br. 29. This argument essentially reads "based upon" out of the statute. Appellants' position is that a court must look only to the alleged acts of the sovereign and then determine whether those acts are commercial and have a geographical nexus to the United States. *Id.* at 15–16, 29–30. This approach skips a step required by the statute: determining what the case is "based upon." The text of the commercial activity exception does not constrain the gravamen inquiry to only the sovereign acts alleged in the complaint or require courts to ignore the importance of third parties' conduct. Appellants' other textual arguments are no more persuasive. The congressional findings in 28

U.S.C. § 1602 concerning international law cannot overcome the operative language in § 1605. *Cf. Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 66 (D.C. Cir. 2016). And the statement in § 1606—that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"—applies only "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607." Since IFC is entitled to immunity under § 1605, the scope of liability specified by § 1606 is of no importance.

Appellants suggest that the "based upon" inquiry should function like a personal jurisdiction requirement, asking simply whether "there is a geographical nexus between [the] defendant's commercial activity and the United States." Appellants' Br. 30. Rather than determining the gravamen of the lawsuit, appellants therefore contend that courts should engage in a "defendant-focused 'minimum contacts inquiry[.]'" *Id.* at 32 (internal quotation marks omitted) (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). This is markedly not the approach that the Supreme Court has taken to the FSIA. In *Sachs*, for example, the Court found it unnecessary to determine whether the seller of the railway pass had acted as the agent of the sovereign entity, 577 U.S. at 31, 35–36, which would have been critical to a minimum contacts analysis, *see Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320–21 (1945). Rather, the Court "zeroed in on the core of [the plaintiffs'] suit," the "wrongful conduct and dangerous conditions" abroad, which led to injuries suffered abroad. *Sachs*, 577 U.S. at 35. It was of no

consequence whether the defendant had purposefully availed itself of the U.S. market through ticket sales. *Cf. J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–81 (2011).

Appellants warn against adopting a "last harmful act" requirement under the FSIA, in which "the sovereign must commit the last act preceding the injury, even though ordinary liability rules have no such limitation." Appellants' Br. 16. Like the Supreme Court's decision in *Sachs*, 577 U.S. at 36 & n.2, today's decision does not impose such a requirement. Rather, "the reach of our decision [is] limited," *id.* at 36 n.2, holding only that the gravamen of appellants' particular complaint is conduct occurring abroad.

Nor has IFC waived its immunity to appellants' lawsuit. This issue *was* actually decided by *Jam I*. 860 F.3d at 706–08. Appellants' petition for certiorari to the Supreme Court on that issue was not granted. *See* Petition for a Writ of Certiorari at i, 21, 24–27, *Jam v. Int'l Fin. Corp.*, No. 17-1011 (Jan. 19, 2018), *granted in part by* 138 S. Ct. 2026, 2026 (2018). Nor did the reasoning of *Jam II* undermine this court's conclusion on the waiver issue. *Jam I* thus remains law of the circuit as to IFC's purported waiver, and the present panel is bound thereby. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996).

Accordingly, United States' courts lack subject-matter jurisdiction over appellants' complaint because their claims are not based upon activity carried on in the United States, and IFC has not waived its immunity to the claims. We therefore

affirm the judgment of the district court dismissing the complaint.

* * *

RANDOLPH, *Senior Circuit Judge*, concurring,

A few days ago, before we issued this opinion, the Supreme Court decided *Nestle USA, Inc. v. Doe*, 593 U.S. ___ (2021). Justice Thomas's opinion for the Court in *Nestle* reinforces Judge Rogers' opinion for our court in this case.

Nestle answered this question—did plaintiffs "establish that 'the conduct relevant to the [Alien Tort Statute's] *focus* occurred in the United States.'" *Id.* at ___ (slip op., at 3–4) (quoting *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2101 (2016)) (emphasis added). Our decision answered the question whether the "*gravamen*" of Jam's suit was the defendant's activity in the United States. *See* 28 U.S.C. § 1605(a)(2); *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33–34 (2015). The two statutes are different but the analysis is the same. It is the same because in this context there is no meaningful distinction between "focus" and "gravamen."

The *Nestle* plaintiffs alleged that the company aided and abetted forced labor in Ivory Coast by providing farms with resources "in exchange for the exclusive right to purchase cocoa." *Nestle*, 593 U.S. at ___ (slip op., at 2). Knowing that the Alien Tort Statute lacks extraterritorial reach, the plaintiffs claimed that Nestlé "made all major operational decisions from within the United States." *Id.* As the Ninth Circuit put it, "the [plaintiffs] had pleaded a domestic application of the [statute] . . . because the

'financing decisions originated' in the United States." *Id.* at ___ (slip op., at 3) (internal alterations omitted).

The Supreme Court disagreed. The Court stressed that "[n]early all the conduct that [the plaintiffs] say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast." *Id.* at ___ (slip op., at 4–5). While the plaintiffs "pleaded as a general matter that 'every major operational decision by [Nestlé] is made or approved in the U.S.[,] . . . allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the [statute]." *Id.* at ___ (slip op., at 5). And the Court continued: "Because making 'operational decisions' is an activity common to most corporations, generic allegations of this sort do not draw sufficient connection between the cause of action [plaintiffs] seek . . . and domestic conduct." *Id.*

The same is true here. Jam failed to show how anything actionable was based upon something that occurred in the United States. *See* 28 U.S.C. § 1605(a)(2); *Sachs*, 577 U.S. at 33–34. Like the *Nestle* plaintiffs, Jam alleged that general corporate activity (loan decision-making and oversight) occurred at the defendant's headquarters, so the suit is "based upon" conduct in the United States. That is not enough. Although the International Finance Corporation's financing decisions originated in D.C., nearly all of the conduct that allegedly harmed Jam occurred in India. General allegations of decisionmaking in D.C. cannot alone transform this suit from one based upon conduct in India to one based upon conduct in the United States.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[filed August 24, 2020]

BUDHA ISMAIL JAM, et al., Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	Civil Action No. 15-612 (JDB)

MEMORANDUM OPINION

On February 14, 2020, the Court dismissed plaintiffs' complaint against defendant International Finance Corp. ("IFC") under the Foreign Sovereign Immunities Act ("FSIA"). Plaintiffs have now moved to amend their complaint, seeking to add additional allegations about IFC's decision-making process. IFC and the United States, as an interested party, oppose the motion. For the reasons that follow, the Court will deny the motion as futile.

I. Background

In April 2015, plaintiffs filed this action against IFC, an international organization that focuses on ending poverty in developing countries by funding private-sector projects, for its alleged contributions to "property damage, environmental destruction, loss of livelihoods, and threats to human health" arising

from the construction and operation of the coal-fired Tata Mundra Power Plant in Gujarat, India. Compl. [ECF No. 1] ¶¶ 1, 42–43. Plaintiffs asserted various claims against IFC, including negligence, negligent supervision, nuisance, and trespass. *See id.* ¶¶ 294–345. A long period of litigation then ensued, involving an initial dismissal by this Court under then-binding D.C. Circuit precedent that international organizations enjoy absolute immunity from suit, an affirmance by the D.C. Circuit, and then a trip to the Supreme Court, which reversed that D.C. Circuit precedent and concluded that international organizations enjoy only the same immunity as foreign sovereigns enjoy today under the FSIA. *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 767, 772 (2019). When the case eventually returned here, this Court on February 14 again dismissed on immunity grounds, concluding that the suit did not fall within the FSIA's commercial activity exception because it was not "'based upon' activity . . . that was carried on in (or performed in) the United States." *See Jam v. Int'l Fin. Corp.*, 442 F. Supp. 3d 162, 171 (D.D.C. 2020). Plaintiffs' motion to amend followed. *See* Pls.' Mot. to Amend the Compl. Under Rule 15 or, in the Alternative, Under Rules 15 and 59(e) ("Mot. to Amend") [ECF No. 63] at 1.

II. Discussion

A. Legal Standard

As a preliminary matter, the parties disagree as to what standard the Court should apply in deciding the motion to amend. IFC argues that the Court's February 14 decision was a final judgment, so the Court should apply the rigorous Fed. R. Civ. P. 59(e)

standard. *See* Def. Int'l Fin. Corp.'s Mem. in Opp'n to Pls.' Mot. to Amend the Complaint Under Rules 59(e) and 15 ("Opp'n") [ECF No. 64] at 4–5. "Motions under Fed. R. Civ. P. 59(e) are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Odhiambo v. Republic of Kenya*, 947 F. Supp. 2d 30, 34 (D.D.C. 2013) (quotation omitted). Plaintiffs, on the other hand, contend that the February 14 decision was not a final judgment, so they need only satisfy the "comparatively lenient requirements for filing an amended pleading under Rule 15(a)." *Agrocomplect, AD v. Republic of Iraq*, 262 F.R.D. 18, 21 (D.D.C. 2009); see Mot. to Amend at 5–6. The Court need not resolve this dispute. As will be explained below, plaintiffs' motion fails even under the more relaxed Rule 15(a) standard.

Rule 15 governs the amendment of pleadings. Parties may amend their pleadings once as a matter of right, if they do so within a specified timeframe, usually 21 days. Fed. R. Civ. P. 15(a)(1). Once the time for amendment as a matter of right has lapsed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Ordinarily, courts "should freely give leave when justice so requires." Id. Courts may, however, deny leave to amend based on "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of [the] amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

B. Futility

"A district court may deny a motion to amend a complaint as futile if the proposed claim would not survive a motion to dismiss." *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012); *see Bell v. United States*, 301 F. Supp. 3d 159, 165 (D.D.C. 2018) ("Where . . . the proposed amended complaint would not survive a motion to dismiss, leave to amend appropriately is denied."). IFC argues that plaintiffs' proposed amended complaint would not survive a motion to dismiss under Fed. R. Civ. P. 12(b)(1) because the proposed amended complaint, like the original complaint, does not fall within the FSIA's commercial activity exception. *See* Opp'n at 15. The Court agrees.[1]

a. Identifying the Gravamen

As the Court explained in its prior opinion, the commercial activity exception, "as applied to international organizations, withholds immunity when an action is based upon (1) 'a commercial activity carried on in the United States' by an international organization or (2) 'an act performed in the United States in connection with a commercial activity' of the international organization 'elsewhere.'" *Jam*, 442 F. Supp. 3d at 170–71 (quoting 28 U.S.C. § 1605(a)(2)). The first step in determining whether the exception applies, therefore, is to "consider whether the action is 'based upon' activity 'carried on' or 'performed' in the United States." *Id.*

[1] Because the Court resolves the motion on futility grounds, it does not address IFC's other arguments, including the contention that allowing plaintiffs to amend at this stage of litigation would be unduly prejudicial. *See* Opp'n at 13.

To make that determination, courts must look to "the basis or foundation of a claim, those elements that, if proven, would entitle a plaintiff to relief, and the gravamen of the complaint." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (internal quotation marks, citations, and alterations omitted).

At the motion-to-dismiss stage, the parties had each proposed competing bright-line rules for how to identify the gravamen of the complaint. Plaintiffs argued for a narrow approach focused only on IFC's affirmative lending activity. *See Jam*, 442 F. Supp. 3d at 173–74. IFC, in contrast, advocated for an equally narrow approach focused exclusively on the last act that "actually injured" plaintiffs. *See id.* at 172–73. The Court rejected both of these approaches. As to plaintiffs' approach, the Court emphasized that it is not only "IFC's direct, affirmative conduct" that is relevant to the gravamen analysis—instead, the "design, construction, and operation of the power plant in India" must also be considered when identifying the gravamen, since that conduct is equally critical to the success of plaintiffs' claims. *Id.* at 173–74. The Court continues to reject plaintiffs' approach.

The Court does, however, wish to clarify its view of IFC's approach. IFC's bright-line rule that the conduct that "actually injured" plaintiffs is *always* the gravamen remains incorrect. But the Court's February 14 opinion perhaps understated the importance of that conduct to the gravamen analysis as a whole. It is worth emphasizing that the Supreme Court's two main decisions expounding on the gravamen analysis, and subsequent caselaw interpreting those decisions, make clear that in the

typical case—though not in every case—the conduct that "actually injured" a plaintiff *will* constitute the gravamen of a complaint.

The Supreme Court's first foray into the gravamen analysis was in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). There, Scott Nelson was recruited and hired by the Saudi government in the United States to work in a state-owned hospital in Saudi Arabia. *Id.* at 351–52. After he traveled to Saudi Arabia and commenced work at the hospital, Nelson discovered safety defects and reported them to hospital management. *Id.* In retaliation, Saudi government officials unlawfully detained, tortured, and beat him. *Id.* at 352–53. He and his wife later sued Saudi Arabia and the hospital in U.S. federal court, alleging "an array of intentional tort claims, including battery, unlawful detainment, and torture," as well as a claim that Saudi Arabia had failed to warn him of the dangers of his employment when it recruited him in the United States. *Jam*, 442 F. Supp. 3d at 172. To satisfy the FSIA's requirement that a suit against a foreign sovereign be "based upon" commercial activity in the United States, the Nelsons argued that their suit was based upon Saudi Arabia's recruitment, signing of an employment contract, and employment of Nelson in the United States. *See Nelson*, 507 U.S. at 358.

The Supreme Court rejected that argument, pointing out that while those alleged activities may have "led to the conduct that eventually injured the Nelsons," they were not the basis of the suit. *Id.* The activities in the United States "alone entitle[d] the Nelsons to nothing under their theory of the case." *Id.* As a result, the Court concluded that the suit was

instead based on "the tortious conduct itself": the detention, torture, and beating in Saudi Arabia. *Id.* Because such tortious conduct is not itself commercial activity, the Court determined that the suit did not fall within the commercial activity exception. *Id.* at 361. Moreover, although the Court did not dispute that the Nelsons' failure-to-warn claim did have a United States hook, the Court thought that attenuated claim was a "semantic ploy" to artificially manufacture U.S. jurisdiction, the acceptance of which would allow "a plaintiff to recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn." *Id.* at 363.[2]

The Supreme Court's analysis in the more recent *Sachs* decision closely tracks that in *Nelson*. In *Sachs*, "a U.S. citizen [Sachs] sued an Austrian state-owned railway operator after she fell in Austria from a train station platform onto the tracks where a moving train crushed her legs." *Jam*, 442 F. Supp. 3d at 172. She brought a number of claims against the railway, including negligence, strict liability, and breach of implied warranty. *Sachs*, 136 S. Ct. at 393. Like the Nelsons, Sachs also brought a failure-to-warn claim, this time for the railway's failure to warn her of dangerous conditions at the Austrian train station when it sold her (through an agent) a railway

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[2] The Court was not persuaded to change its mind on this point by a partial dissent from Justice Kennedy that argued, similar to plaintiffs' argument here, that the failure-to-warn claim "complain[s] of a negligent omission made during the recruitment of a hospital employee in the United States" and was therefore "based upon" that omission. *Id.* at 371 (Kennedy, J., concurring in part and dissenting in part).

pass in the United States. *Id.* She then argued that, under the FSIA, her suit was "based upon" commercial activity in the United States: the railway's sale of the pass to her. *Id.*

The Supreme Court disagreed. Just as the Nelsons were not entitled to anything for the Saudi government's recruitment activity alone, Sachs was entitled to nothing for the sale of the railway ticket, because "there [was] nothing wrongful about the sale of the Eurail pass standing alone." *Id.* at 396. After all, "without the existence of the unsafe boarding conditions [in Austria], there would have been nothing to warn [plaintiff] about when she bought the Eurail pass." Id. Whichever way the Court sliced it, "all of[plaintiff's] claims turn[ed]on the same tragic episode in Austria," so the "conduct constituting the gravamen of [her] suit plainly occurred abroad." *Id.* Quoting Justice Holmes, the Court noted that "the 'essentials' of a personal injury narrative will be found at the 'point of contact'—'the place where the boy got his fingers pinched.'" *Id.* at 397. The Court also reiterated Nelson's concern about "artful pleading," warning against "giv[ing] jurisdictional significance to [a] feint of language, thereby effectively thwarting the [FSIA's] manifest purpose." *Id.* at 396–97 (internal quotation marks omitted).

In short, Sachs and Nelson both focused on "'the core of [the plaintiffs'] suit[s],' *i.e.*, 'the . . . acts that actually injured them.'" *Petersen Energía Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 206 (2d Cir. 2018) (quoting *Sachs*, 136 S. Ct. at 396). Importantly, this was not a single-element test focused on the injury element of the plaintiffs' tort claims. In rejecting a one-element approach, the

Sachs Court noted that application of such a test would "necessarily require[] a court to identify all the elements of each claim in a complaint before that court may reject those claims for falling outside" the commercial activity exception. *Sachs*, 136 S. Ct. at 396; *but see Jam*, 442 F. Supp. 3d at 173 (characterizing an "actual injury" test as "effectively a one-element approach to identifying the gravamen of a suit" (internal quotation marks omitted)). Neither *Sachs* nor *Nelson* did any such thing, declining to undertake a "claim-by-claim, element-by-element analysis" of the asserted causes of action. *Sachs*, 136 S. Ct. at 396. Instead, "[r]ather than individually analyzing each of the [plaintiffs'] causes of action," the Court "zeroed in on the core of their suit"—the "acts that actually injured them." *Id.*

To be sure, *Sachs* emphasized that it was not imposing a strict rule that the gravamen is *always* the conduct that "actually injured" a plaintiff, adding in a brief footnote that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." *Id.* at 397 n.2. But the clear thrust of both *Sachs* and *Nelson* is that in the usual case, the conduct that "actually injured" the plaintiff—that pinched the boy's fingers—will be the gravamen, and in any event will always be an important factor to consider when identifying the gravamen. Federal courts around the country have interpreted *Sachs* accordingly. *See, e.g.*, *Devengoechea v. Bolivarian Repub. of Venezuela*, 889 F.3d 1213, 1223 (11th Cir. 2018) (noting that, to "identify the conduct on which [plaintiff] bases his suit," the court must look to "the conduct that actually injured" him, and "therefore that makes up

the gravamen of [his] lawsuit"); *Petersen Energía*, 895 F.3d at 206 (same); *Berg v. Kingdom of the Netherlands*, 2020 WL 2829757, at *14 (D.S.C. Mar. 6, 2020) (same); *Sequeira v. Repub. of Nicaragua*, 2018 WL 6267835, at *6 (C.D. Cal. Aug. 24, 2018) (same); *Sarkar v. Petroleum Co. of Trinidad & Tobago Ltd.*, 2016 WL 3568114, at *8 (S.D. Tex. June 23, 2016) (same).

b. The Gravamen of the Proposed Amended Complaint

With that refined understanding of how to identify the gravamen in mind, the Court is nearly ready to undertake an assessment of the gravamen of the proposed amended complaint here. That analysis, however, is intertwined with what is essentially a question of first impression that the Court touched on only briefly in its February 14 opinion: what is a court to do under the FSIA where the conduct that "actually injured" the plaintiffs was not primarily that of a named defendant, but rather that of a third party?[3]

IFC and the United States have argued that this is such a case, and that *Sachs* and *Nelson* compel the conclusion that a suit can be "based upon" the

[3] One other judge in this District appears to have concluded that third-party conduct can constitute the gravamen of a suit. *See Renjie Zhan v. World Bank*, 2019 WL 6173529, at *2 (D.D.C. Nov. 20, 2019) (concluding that the gravamen of a suit against the World Bank was non-party China's "tortious actions in China and against Chinese citizens"), *appeal docketed*, No. 19-7166 (Dec. 27, 2019). However, this Court does not think much can be drawn from that case, as neither party seems to have briefed the issue, and the court reached its conclusion with little analysis.

conduct of a third party, if that conduct is what "actually injured" the plaintiffs within their theory of the case. *See*, *e.g.*, Statement of Interest of the United States ("First U.S. Statement") [ECF No. 47] at 6, 8–9. As support, they point to the language in *Nelson* that the suit there was not based upon Saudi Arabia's recruitment activity within the United States, which "alone entitle[d] [plaintiffs] to nothing under their theory of the case," *Nelson*, 507 U.S. at 358, and the language in *Sachs* that there was "nothing wrongful about the sale of the Eurail pass standing alone," *Sachs*, 136 S. Ct. at 396. Using that same logic, IFC and the United States contend that there was nothing wrongful about either IFC's funding of the Tata Mundra Plant or IFC's alleged failure to enforce certain provisions of the loan agreement standing alone—recovery on any claims for that conduct is derivative of, and depends on, subsequent tortious activity in India by Coastal Gujarat Power Limited ("CGPL"), the Indian power company that constructed and operated the plant. *See* First U.S. Statement at 6–7. The United States points out that while IFC's conduct may have "led to the conduct that eventually injured" plaintiffs, merely being a distant link in the causal chain is insufficient to invoke the commercial activity exception. *See* First U.S. Statement at 7; *Nelson*, 507 U.S. at 358. According to IFC and the United States, the conduct that actually injured plaintiffs here was the construction and operation of the plant in India, done mainly by CGPL. *See* First U.S. Statement at 7–9; Def. IFC's Reply Mem. of Law in Further Supp. of its Renewed Mot. to Dismiss [ECF No. 48] at 2–6.

The Court agrees with IFC and the United States that, for purposes of the FSIA, a suit can be based primarily upon the conduct of a third party, although that determination will depend heavily on the facts and circumstances of each case. This does not mean that courts should employ a freeform approach to identifying the gravamen where they look outside the four corners of the pleadings and independently determine who the "real" defendant is in some theoretical or metaphysical sense. Plaintiffs are, of course, the "master[s] of the[ir] complaint," and can choose to assert whatever claims against whichever defendants they wish. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987). But the Supreme Court's guidance in both *Sachs* and *Nelson* is that courts should, in the usual FSIA case, look to the conduct that "actually injured" plaintiffs. And this Court can find nothing in either of those cases suggesting that courts should restrict the gravamen analysis to just the named defendants' conduct where it is clear from the face of a plaintiff's complaint that the conduct that actually injured her was in large part that of a third party.[4]

Indeed, while neither case addressed the issue explicitly, both the reasoning of the Supreme Court's opinions and the warnings against giving jurisdictional significance to feints of language

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[4] The Court takes no position on how the determination that the conduct of a third party is the gravamen of a suit interacts with Fed. R. Civ. P. 19, regarding the joinder of required parties. The point here is not that an actually-injuring third party must be named as a defendant—rather, it is that the decision whether or not to name that third party as a defendant is not itself of jurisdictional significance in the FSIA context.

support considering the conduct of a third party, at least in a case like the present one. Nothing in *Sachs*, for example, suggests that the result would have been any different if all relevant facts were the same, except that the Austrian railway and the ticket-seller had been two different state-owned entities,[5] and Sachs had sued the ticket-seller instead of the railway for failure to warn. Under that hypothetical, the Court's reasoning in its gravamen analysis would continue to hold true. It would remain the case that "[w]ithout the existence of the unsafe boarding conditions in [Austria], there would have been nothing to warn Sachs about when she bought the [railway] pass." *Sachs*, 136 S. Ct. at 396. The core of the suit would likewise remain the "wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." *Id.*

This Court is mindful of the Supreme Court's repeated admonitions that courts should not give

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[5] In fact, the lower court decision in *Sachs* dwelled extensively on the nature of the principal-agent relationship between the Austrian railway and the Massachusetts-based ticket-seller, and whether the ticket-seller's conduct could be imputed to the railway, ultimately concluding that it could. *See Sachs v. Republic of Austria*, 737 F.3d 584, 587, 591–98 (9th Cir. 2013) (en banc). For purposes of its gravamen analysis, the Supreme Court assumed that such imputation was permissible. *See Sachs*, 136 S. Ct. at 395. But because Sachs had sued the railway, which had actually injured her, not the ticket-seller, which had not (and moreover was not a sovereign entity presumptively entitled to immunity under the FSIA), the issue now before this Court did not arise. Here, IFC and the United States argue that plaintiffs have sued the entity that did not actually injure them (IFC), which would be analogous to suing the ticket-seller in *Sachs*.

"jurisdictional significance" to "feint[s] of language," nor should they "allow plaintiffs to evade the [FSIA's] restrictions through artful pleading." *Id.* at 396–97. The point of the gravamen analysis is to look past the technicalities of plaintiffs' claims and the precise details of how they framed their pleading and "zero[] in on the core of their suit." *Id.* at 396; *see Glob. Tech., Inc. v. Yubei* (XinXiang) *Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015) ("Courts must look past artful pleading to determine the underlying reality of the core activities being challenged, to determine if the gravamen of the complaint truly falls within one of the exceptions Congress wrote into the FSIA."). In general, permitting a plaintiff in an FSIA action to switch jurisdiction off and on, merely by adding or removing named defendants, would give rise to exactly the sort of evasion of the FSIA's restrictions about which *Sachs* and *Nelson* warned.

Here, the Court has no real doubt that, had plaintiffs named CGPL as a second defendant and asserted claims against CGPL, the gravamen of that action would have been in India.[6] All of CGPL's

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[6] It is true, of course, that *Sachs* suggested that "the gravamina of different claims may occur in different locations." *Devengoechea*, 889 F.3d at 1223; *see Sachs*, 136 S. Ct. at 397 n.2 ("[W]e consider here only a case in which the gravamen of each claim is found in the same place."). But while it might be the case that a complaint presenting various claims with no factual commonality could have more than one gravamen, that is not the situation here. Just as in *Sachs*, plaintiffs' claims here (as well as any hypothetical claims against CGPL) all have a commonality: the construction and operation of the plant. Their claims "turn on this circumstance." *Devengoechea*, 889 F.3d at 1223. This is so even if some of the claims, such as the negligent

conduct—as alleged in plaintiffs' complaint and proposed amended complaint—was in India, and it clearly had a much larger and more direct role in the plant's construction and operation, and hence in the alleged harms to plaintiffs, than did IFC, which played only a small part in the whole affair. The claims against IFC are, by necessity, more attenuated than any claims against CGPL would be, just as the failure-to-warn claims in *Sachs* and *Nelson* were quite attenuated relative to the other claims plaintiffs asserted. Indeed, the Seventh Circuit has noted that *Sachs* relied—if only implicitly—on the rationale that claims for conduct extending far back on the "chain of causation" leading to an ultimate injury cannot be the basis for jurisdiction—particularly where those claims are asserted against an entity that did not actually injure the plaintiff. *See Noboa v. Barceló Corporación Empresarial, SA*, 812 F.3d 571, 572–73 (7th Cir. 2016); *see also Nelson*, 507 U.S. at 358 (deeming it insufficient for gravamen purposes that activities "led to the conduct that eventually injured the Nelsons"). Accordingly, whether the concern is framed as one of feints of language or too much attenuation, this Court is extremely wary of permitting plaintiffs to manufacture jurisdiction under the FSIA by choosing not to name a defendant. And the Court does not

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supervision claim, would also require plaintiffs to prove additional facts. That was true of the failure-to-warn claim in *Sachs*, but the Court nonetheless determined that the action had only one gravamen. *See Sachs*, 136 S. Ct. at 396–97. So, too, in *Nelson* only one gravamen was identified, although the failure to warn claim there would likewise have required additional facts to be proven. *Nelson*, 507 U.S. at 357–58.

think that this is one of those unusual cases where something other than the conduct that actually injured the plaintiffs constitutes the gravamen of the complaint, as may have been contemplated by *Sachs*'s enigmatic statement that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." *Sachs*, 136 S. Ct. at 397 n.2. This Court can perhaps envision circumstances where that statement would come into play—where a sovereign's or international organization's conduct, while not actually injuring the plaintiff, was nonetheless so significant and closely tied to the eventual injury that it constitutes the gravamen of the complaint. Although the Court is loath to speculate on scenarios not presented in this case, the *Sachs* footnote could potentially apply in, for instance, an action asserting products-liability claims, where a sovereign entity (or international organization) manufactures a fatally defective drug inside the United States and sells it to another sovereign entity, who then sells it to a consumer abroad. In that scenario, it would be difficult to discern which conduct "actually injured" the consumer and was the basis for the suit under the standard *Sachs* and *Nelson* test, given that both domestic conduct (the manufacturing of the deadly drug) and foreign conduct (the sale of the drug) might bear similar levels of responsibility for the injury. To determine what the gravamen would be in a case where it is not clear which conduct actually injured the plaintiff, a court may well have to forego the actual injury analysis and instead conduct a fact-specific analysis of the relative importance of the

domestic and foreign conduct to the eventual injury, as the *Sachs* footnote might suggest.[7]

But this Court has no need to analyze any further how that hypothetical would play out, because the present case just isn't one where the *Sachs* footnote is applicable. Here, it is clear what conduct actually injured plaintiffs: construction and operation of the Tata Mundra Power Plant in India. Many of plaintiffs' claims, on their face, allege that IFC failed to do certain things inside the United States. *See, e.g.*, Compl. ¶ 299 (alleging that IFC "fail[ed] to take reasonable steps to prevent harms to Plaintiffs"); ¶ 306 (alleging that IFC "has failed and continues to fail to exercise due care and monitor, supervise[,] and control CGPL"). But as the Supreme Court concluded with respect to the failure-to-warn claims in *Sachs* and *Nelson*, and as the Court has emphasized in a related context, claims for failures or omissions in the United States resulting in an injury abroad are particularly suspect when used as the basis for jurisdiction and should "flash[] the yellow caution light," because "it will virtually always be possible to assert that the . . . activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the *United States." Sosa v. Alvarez-Machain*, 542 U.S.

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[7] The possibility that the Sachs footnote will apply in future cases also alleviates to some extent the concern the Court articulated in its February 14 opinion that an "actual injury" test would "immunize state-owned enterprises and international organizations . . . from a large swath of causes of action" involving "an intervening cause that occurred abroad." *Jam*, 442 F. Supp. 3d at 173.

692, 702 (2004) (quoting *Beattie v. United States*, 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting)).[8] Indeed, this case is factually analogous to *Sachs*: even though plaintiffs have asserted claims alleging omissions in the United States, ultimately, "[a]ll of [their] claims turn on the same tragic episode in [India], allegedly caused by wrongful conduct and dangerous conditions in [India], which led to injuries suffered in [India]." *Sachs*, 136 S. Ct. at 396.

For these reasons, the Court refines its definition of the gravamen of plaintiffs' original complaint. The February 14 opinion defined the gravamen as "IFC's failure to ensure the Tata Mundra Power Plant was designed, constructed, and operated with due care so

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[8] Sosa concerned the Federal Tort Claims Act ("FTCA"). Under the FTCA, federal courts generally have jurisdiction over claims against the United States for injuries caused by U.S. government employees. *See Sosa*, 542 U.S. at 700. The FTCA withholds jurisdiction, however, for "[a]ny claim arising in a foreign country." *Id.* (quoting 28 U.S.C. § 2680(k)). Some courts of appeals had, over time, developed what is known as the "headquarters doctrine," whereby the foreign country exception did not apply to acts and omissions occurring in the United States but having operative effect in another country. *See id.* at 701. But in 2004, in *Sosa*, the Supreme Court rejected the headquarters doctrine, out of concern that claims for conduct occurring abroad, such as legal malpractice claims, negligent medical care claims, or slip-and-fall cases, could all be "repackaged as . . . claims based on a failure to train, failure to warn, the offering of bad advice, or the adoption of a negligent policy." *Id.* at 702. While *Sosa* was interpreting the FTCA, not the FSIA, the decision nonetheless reinforces the guidance in *Sachs* and *Nelson* that courts should be hesitant to conclude that jurisdiction exists based on claims involving conduct (omissions inside the United States) that is derivative of, but several steps removed from, the conduct that actually injured a plaintiff overseas.

as not to harm plaintiffs' property, health, and way of life." *Jam*, 442 F. Supp. 3d at 177. The Court now revises that gravamen to focus on what actually injured plaintiffs: the construction and operation of the Tata Mundra Power Plant in India.

To reiterate, in reaching this conclusion, the Court has looked only at the conduct alleged within the four corners of the complaint. The complaint itself clearly identifies the construction and operation of the plant as the ultimate source of plaintiffs' injuries. All of the harms to plaintiffs alleged therein, such as "property damage, environmental destruction, loss of livelihoods, and threats to human health," Compl. ¶ 1, flow directly from the plant's construction and operation and the dangerous and harmful conditions in the surrounding area that followed, like the "discharge[] into the sea" of thermal pollution, *id.* ¶ 7, the spread of coal dust and fly ash, *id.* ¶ 9, the discharge of air pollutants and particulate matter into the air, *id.* ¶ 10, and the "burn[ing of] approximately 12–13 million tons of coal each year," *id.* ¶ 31.[9] Plaintiffs cannot succeed on their claims, "[u]nder any theory of the case that [they] present[]," *Sachs*, 136 S. Ct. at 396, without this allegedly harmful conduct—most of it done by CGPL in India.

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[9] The plaintiff-specific harms that the complaint identifies, too, arise directly from the construction and operation of the plant. *See*, *e.g.*, *id.* ¶ 214 ("Since 2011, when the Plant started operating, Mr. Budha Jam's fish catch has drastically declined, especially in the last three years."); ¶ 232 (noting that "increased ship traffic near the Plantis . . . a problem," because plaintiff Manjalia "cannot fish close to the area anymore"); ¶ 243 (noting that "Mr. Sidik Jam's wife now has asthma, but she did not have it before the Tata Mundra Plant started operating").

See, *e.g.*, Compl. ¶ 297 (on negligence claim, arguing that IFC should have known that CGPL would operate the plant in a manner to "cause coal dust, ash[,] and other coal combustion byproducts to be deposited on the surrounding villages and fishing harbors"); ¶ 303 (on negligent supervision claim, arguing that IFC should have known that "CGPL failed and continued to fail to take reasonable and sufficient steps to prevent, mitigate, and remediate harm to Plaintiffs"); ¶ 311 (on public nuisance claim, arguing that "building and operating the enormous coal-fired power plant at issue is and was unreasonably dangerous to local people and the local environment"); ¶ 317 (same for private nuisance claim); ¶ 321 (on trespass claim, arguing that operation of the plant has resulted in the discharge of "particles and pollutants" onto plaintiffs' property). And because all of that conduct was in India—just as the gravamen in *Sachs* was the dangerous conditions in Austria and the gravamen in *Nelson* was Saudi conduct in Saudi Arabia—the complaint fails to satisfy the commercial activity exception's requirement that an action be based upon conduct "carried on" or "performed" in the United States. 28 U.S.C. § 1605(a)(2).

Given this clarification of the gravamen of the action, none of the new allegations in the proposed amended complaint change the Court's calculus. There are two main sets of new allegations. The first set consists of more specific facts in support of plaintiffs' claim that it was negligent for IFC to execute the loan agreement and invest in the Tata Mundra project in the first place. *See* Proposed Am. Compl. [ECF No. 63-1] ¶¶ 216–25. Plaintiffs allege,

for example, that IFC, "[d]espite knowing the Project was a high-risk project and identifying significant specific harms likely to result from the project . . . [,] provided keystone funding to enable the project to go forward." *Id.* ¶ 216. The second set of new allegations concern *where* IFC's decision-making activity took place. For instance, plaintiffs allege that "IFC's monitoring and supervision of the Project's environmental and social performance and the decision to continue to disburse the loan despite worsening performance occurred in IFC's Washington, D.C., headquarters." *Id.* at 56.

These new allegations do not undercut the gravamen of plaintiffs' action, as the Court has defined it. They relate only to IFC's conduct. And while IFC's conduct may have led to the injuries that plaintiffs suffered, so too may have the Austrian railway's failure to warn in *Sachs*, or the Saudi government's failure to warn in *Nelson*. But the Supreme Court deemed that insufficient in those cases, and this Court does as well. As the United States put it, the new allegations "do not change the critical facts of this case: that an Indian company built and operated a power plant in India that allegedly caused Indian plaintiffs environmental and social harms in India." Second Statement of Interest of the United States [ECF No. 68] at 3.[10] The

[10] Plaintiffs have moved for leave to file a response to the United States's Second Statement of Interest. *See* Pls.' Mot. to File Resp. to Second Statement of Interest of the United States of America [ECF No. 70] at 1. IFC opposes the motion. *Id.* Because the United States's Second Statement of Interest contains arguments that do not appear in IFC's opposition brief,

gravamen of the proposed amended complaint remains the construction and operation of the plant, primarily carried out by CGPL. That conduct took place in India.[11] Hence, the proposed amended complaint fails to satisfy the commercial activity exception and would not survive a motion to dismiss. The Court will therefore deny leave to amend the complaint as futile. *See Hettinga*, 677 F.3d at 480.

As a final note, the Court recognizes that application of the FSIA's commercial activity exception to international organizations, as mandated by the Supreme Court's decision in this case, is fraught with difficulty and can lead to seemingly odd results. As Justice Breyer noted in his lone dissent, "[t]he core functions of [international] organizations are at least arguably 'commercial' in nature," as they primarily exist "to promote

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the Court will grant plaintiffs' motion for leave to file a response, and has considered that response.

[11] Although none of their briefs have addressed the FSIA's "substantial contact" requirement, the Court notes that plaintiffs have also failed to establish that their suit is based upon activity with "substantial contact" with the United States. *See Odhiambo v. Republic of Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014); 28 U.S.C. § 1603(e). D.C. Circuit precedent makes clear that a plaintiff's action must be "'based upon' *the aspect of the [international organization's] commercial activity that establishes substantial contact with the United States*." *Odhiambo*, 764 F.3d at 37. In other words, the activity establishing substantial contact with the United States must be encompassed within the conduct that makes up the gravamen. Here, as this Court has explained, the gravamen of plaintiffs' action is the construction and operation of the plant in India. That is what the action is "based upon." Because that conduct does not itself establish contacts with the United States, plaintiffs have not satisfied the substantial contact requirement.

international development by investing in foreign companies and projects across the world." *Jam*, 139 S. Ct. at 778–79 (Breyer, J., dissenting). Given the nature of these organizations, it may turn out that the commercial activity exception, as applied to international organizations located in the United States, will largely swallow the general rule that they "are presumptively immune from suit," *id.* at 766 (majority opinion). Even so, the commercial activity exception's requirements still have some teeth. As a result, under the FSIA, the fact that an entity bears some possible moral blameworthiness for an injury, or might have faced liability in the United States if all the relevant conduct had occurred domestically, is not sufficient to create jurisdiction. The entity's conduct must also have been what the suit is "based upon," 28 U.S.C. § 1605(a)(2)—i.e., the gravamen of the action. Here, IFC's conduct is not what the suit is based upon, and the Court is bound to withhold jurisdiction, regardless of IFC's alleged blameworthiness. For better or worse, that is how immunity often plays out.

CONCLUSION

For the foregoing reasons, the Court will deny plaintiffs' motion to amend their complaint. A separate order will be issued on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: August 24, 2020

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[filed February 14, 2020]

BUDHA ISMAIL JAM, et al., Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	Civil Action No. 15-612 (JDB)

MEMORANDUM OPINION

Residents of Gujarat, India and other local community stakeholders seek to hold the International Finance Corporation ("IFC"), an international organization, liable for property damage, environmental destruction, loss of livelihood, and threats to human health arising from the construction and operation of the coal-fired Tata Mundra Power Plant in Gujarat, India. This Court previously dismissed plaintiffs' suit based on binding D.C. Circuit precedent that international organizations enjoy absolute immunity under the International Organizations Immunities Act ("IOIA"). The D.C. Circuit affirmed this Court's decision, but the Supreme Court reversed and remanded the case, holding that international organizations do not enjoy absolute immunity; instead, they enjoy the same immunity as is enjoyed by foreign governments under the Foreign Sovereign Immunities Act ("FSIA").

Back before this Court, IFC has filed a renewed motion to dismiss plaintiffs' complaint. IFC raises the same grounds for dismissal as before but now argues that IFC is immune from suit even under the more limited immunity granted to foreign governments under the FSIA. Plaintiffs counter that IFC is not immune because the suit falls under the FSIA's commercial activity exception. For the reasons explained below, this Court concludes that the commercial activity exception does not apply here because plaintiffs have failed to establish that their suit is based upon conduct carried on in the United States. Accordingly, IFC is immune from this suit and plaintiffs' complaint will be dismissed.

BACKGROUND

IFC is a public international organization with 185 member countries, including the United States and India, that seeks "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas." Articles of Agreement, Ex. 4 to Decl. of Leslie Sturtevant ("Sturtevant Decl.") [ECF No. 40-9] Art. I; Def. IFC's Mem. of Law in Supp. of its Renewed Mot. to Dismiss the Compl. ("Def.'s Mot.") [ECF No. 40-1] at 3. IFC finances "private enterprises which would contribute to the development of its member countries by making investments, without guarantee of repayment by the member government concerned, in cases where sufficient private capital is not available." Def.'s Mot. at 19.

IFC is committed to investing in "sustainable projects" and ensuring that "the costs of economic

development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process, and that natural resources are managed efficiently and sustainably." IFC's 2006 Policy on Social & Environmental Sustainability, Ex. 2 to Decl. of Richard Herz ("Herz Decl.") [ECF No. 45-7] at 2. The organization's "Performance Standards on Social & Environmental Sustainability" create a framework for the assessment, avoidance, and mitigation of environmental and social risks. IFC's 2006 Performance Standards on Social & Environmental Sustainability, Ex. 3 to Herz Decl. [ECF No. 45-8] at i.

Under IFC internal policy, "managing social and environmental risks and impacts in a manner consistent with the Performance Standards is the responsibility of the client," but "IFC seeks to ensure that the projects it finances are operated in a manner consistent with the requirements of the Performance Standards." IFC's 2006 Policy on Social and Environmental Sustainability at 1. As a result, "IFC's social and environmental review of a proposed project is an important factor in its decision to finance the project or not, and will determine the scope of the social and environmental conditions of IFC financing." *Id.* Additionally, after making an investment, IFC will "monitor" its investment by requiring the borrower to submit periodic Monitoring Reports on the project's social and environmental performance, conduct site visits, and review the project's performance. *See id.* at 5. If the client fails to comply with its social and environmental commitments, then IFC will work with the client to

bring it back into compliance to the extent feasible, and if the client fails to reestablish compliance, IFC will exercise remedies where appropriate. *Id.* at 5–6.

This case arises out of IFC's investment in the coal-fired Tata Mundra Power Plant project, located on the Kutch coast of Gujarat, India, where traditional agricultural and fishing communities depend on the natural environment. Compl. [ECF No. 1] ¶¶ 1–3. The project was carried out by Coastal Gujarat Power Limited ("CGPL"), which is a subsidiary of Tata Power, an Indian power company. *Id.* ¶ 2. IFC loaned CGPL $450 million to develop the plant, which was estimated to cost $4.14 billion in total. *Id.* ¶¶ 2, 47.

Before investing in the Tata Mundra Power Plant project, IFC recognized that the development of the Plant had "potential significant adverse social and/or environmental impacts that were diverse, irreversible or unprecedented." *Id.* ¶ 48; Compliance Advisory Ombudsman Audit Report ("Audit Report"), Ex. 14 to Sturtevant Decl. [ECF No. 40-19] at 4–5. IFC conducted an environmental and social review of the project in which it identified a number of performance gaps that needed to be addressed to ensure the project was carried out in accordance with IFC standards. Compl. ¶¶ 50–51; Audit Report at 16.

Hence, before closing the deal on IFC's $450 million investment, IFC and CGPL developed an Environmental and Social Action Plan to address those gaps, and the plan was incorporated into IFC's loan agreement with CGPL along with other environmental guidelines. Compl. ¶ 51; *see also* Loan Agreement Between CGPL & IFC ("Loan

Agreement"), Ex. 1 to Decl. of Karim Suratgar [ECF No. 40-4] at 91–92. The loan agreement was negotiated in Mumbai, India, approved by IFC's board of directors at IFC's headquarters in Washington, D.C., and then executed back in India. Sturtevant Decl. [ECF No. 40-5] ¶¶ 12, 17–21; Compl. ¶¶ 196–97.

Under the agreement, CGPL was required to design, construct, and operate the plant in accordance with IFC's environmental and social requirements, as well as other industry standards, and to implement diligently the Environmental and Social Action Plan. *See* Compl. ¶ 122; Loan Agreement at 91–92. Disbursement of the funds was contingent on IFC's approval of the project's construction plan, schedule, and budget. Loan Agreement at 74–75. Finally, the loan agreement provided IFC some authority over the project after the funds were disbursed. For example, IFC retained a right to access and inspect the project site and records, to conduct an independent audit to ensure compliance with its environmental and social requirements and, if necessary, to take corrective action. *Id.* at 91–92.

Plaintiffs in this case are: fishermen and farmers who live and work near the plant, suing on behalf of themselves and others similarly situated; a local trade union dedicated to the protection of fisherworkers' rights; and the local government of a nearby village. *See* Compl. ¶¶ 6, 13–15. Plaintiffs claim that the Tata Mundra Power Plant project has damaged their property, health, and way of life. *See id.* ¶¶ 7–11. For example, plaintiffs allege that the plant's cooling system has discharged thermal

pollution into the sea, degrading the local marine ecosystem and resulting in the decline of critical fish stocks and other marine resources. *Id.* ¶ 7. The intake and outfall channels of the plant have also closed off access routes to traditional fishing grounds and caused sea water to contaminate the groundwater such that the groundwater can no longer be used by farmers for irrigation or as drinking water. *Id.* ¶¶ 7–8. Additionally, the plant's coal conveyor system causes coal dust and fly ash to periodically cover homes, burial sites, crops, salt resources, and fish laid out to dry, damaging agricultural production, polluting the air, and causing respiratory problems among the local population. *Id.* ¶ 9.

Plaintiffs claim their case arises out of "the irresponsible and negligent conduct of the International Finance Corporation in appraising, financing, advising, supervising and monitoring its significant loan to enable the development of the Tata Mundra Project in Gujarat, India." *Id.* ¶ 2. For support, Plaintiffs point to IFC's Compliance Advisor Ombudsman's ("CAO's") audit of the project, which concluded that IFC's environmental and social assessments did not adequately consider the project's impact on the local fisherman, and that IFC failed to address environmental and social compliance issues during its supervision of the project. *Id.* ¶¶ 153–55; Audit Report at 4.

Plaintiffs allege that IFC, despite knowing that the project would likely inflict serious environmental and social harm to the property, health, and livelihood of people living near the plant, chose to fund the project without taking reasonable steps to

prevent or mitigate those foreseeable harms. Compl. ¶¶ 3–5. According to plaintiffs, IFC is "intimately involved in and has substantial control over the decisions concerning construction, design, and operation of the projects it funds," but IFC failed to ensure the Tata Mundra Plant was constructed and operated with due care for the environment and local community. *Id.* ¶¶ 116–17. That conduct, plaintiffs contend, gives rise to valid claims for negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract. *See id.* ¶¶ 294–332. As remedies, plaintiffs seek various forms of injunctive relief or, in the alternative, compensatory and punitive damages. *See id.* ¶¶ 333–45.

IFC first moved to dismiss this case on grounds of immunity, forum non conveniens, failure to join indispensable third parties, and failure to state a claim upon which relief can be granted. *See* Def. IFC's Mot. to Dismiss the Compl. [ECF No. 10] at 1–2. This Court, relying on binding D.C. Circuit precedent, dismissed the case on the ground that the IOIA granted international organizations "virtually absolute immunity," and the D.C. Circuit affirmed that decision. *See Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 108 (D.D.C. 2016), *aff'd*, 860 F.3d 703 (D.C. Cir. 2017). However, the Supreme Court reversed and remanded the case, explaining that the IOIA confers on international organizations the same immunity that foreign governments enjoy today under the FSIA and not the "virtually absolute immunity" that foreign governments enjoyed as a matter of international comity at the time the IOIA

was enacted. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 770 (2019).

On remand, IFC has filed a renewed motion to dismiss plaintiffs' complaint, raising the same four grounds for dismissal as before, but this time arguing that IFC is immune even under the more limited immunity that foreign governments enjoy today under the FSIA. *See* Def.'s Mot. at 1–2. Plaintiffs oppose the motion and, on the question of immunity, argue that IFC is not immune because this suit falls under the FSIA's commercial activity exception. Pls.' Mem. of Law in Opp'n to Def.'s Renewed Mot. to Dismiss the Compl. ("Opp'n Br.") [ECF No. 45] at 11–18. Because this Court concludes that that commercial activity exception does not apply and that IFC therefore is immune from this suit, the Court need not address IFC's alternative arguments for dismissal.

LEGAL STANDARD

IFC claims immunity and seeks to dismiss this suit for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Such a claim "presents a threshold challenge to the Court's jurisdiction" and obligates the Court "to determine whether it has subject-matter jurisdiction in the first instance." *Curran v. Holder*, 626 F. Supp. 2d 30, 32 (D.D.C. 2009) (internal citation and quotation marks omitted). "Federal courts are courts of limited jurisdiction . . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). That party

must establish jurisdiction by a preponderance of the evidence. *See Gordon v. Office of the Architect of the Capitol*, 750 F. Supp. 2d 82, 87 (D.D.C. 2010). In assessing jurisdiction, "the Court must accept as true all of the factual allegations contained in the complaint," but those allegations "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 86–87 (internal quotation marks and citations omitted). The Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

ANALYSIS

IFC argues it is immune from suit under the IOIA. *See* Def.'s Mot. at 9–22. Under that statute, international organizations "enjoy the same immunity from suit . . . as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity." 22 U.S.C. § 288a(b). The IOIA "continuously link[s] the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two." *Jam*, 139 S. Ct. at 768. Therefore, at this time, "the Foreign Sovereign Immunities Act governs the immunity of international organizations." *Id.* at 772.

The FSIA provides foreign governments—and therefore also international organizations—presumptive immunity from suit, subject to several statutory exceptions. *See* 28 U.S.C. § 1604. "[T]he plaintiff bears the initial burden to . . . produc[e]

evidence that an exception applies, and once shown, the sovereign bears the ultimate burden of persuasion to show the exception does not apply." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013) (citations omitted). However, "[i]f the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations," as is the case here, "then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *see also SACE S.p.A. v. Republic of Paraguay*, 243 F. Supp. 3d 21, 32 (D.D.C. 2017). IFC thus "bears the burden of proving that the plaintiff's allegations do not bring [the] case within a statutory exception to immunity." *Phoenix Consulting*, 216 F.3d at 40.

In this case, plaintiffs allege that their suit falls within the FSIA's commercial activity exception. That exception, as applied to international organizations, withholds immunity when an action is based upon (1) "a commercial activity carried on in the United States" by an international organization or (2) "an act performed in the United States in connection with a commercial activity" of the international organization "elsewhere." 28 U.S.C. § 1605(a)(2); *see also Jam*, 139 S. Ct. at 772.[1] An

[1] Plaintiffs do not suggest that this case falls under the commercial activity exception's third category: an action based upon an act that occurred "outside the territory of the United States in connection with a commercial activity of [an international organization] elsewhere and that . . . causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

activity is "carried on in the United States" if the activity has "substantial contact with the United States." 20 U.S.C. § 1603(e). Thus, to determine whether the exception applies, courts must first consider whether the action is "based upon" activity "carried on" or "performed" in the United States, and then must consider the commercial nature of that activity. *See* 28 U.S.C. § 1605(a)(2).

The Court's analysis here starts and ends with that first question: whether plaintiffs' suit is "based upon" activity—commercial or otherwise—that was carried on in (or performed in) the United States.[2] Plaintiffs argue that their suit is based upon "IFC's tortious conduct"—"its lending to a private corporation and associated acts"—that "occurred right here in the United States." Opp'n Br. at 12. IFC counters that the suit is in fact based upon the "construction and operation of the Tata Mundra Plant" in Gujarat, India because that is what "actually injured" plaintiffs. Def.'s Mot. at 11, 13. Likewise, the United States as an interested party argues that "although the plaintiffs name IFC as the only defendant and attempt to focus on IFC's lending decisions in the United States, the 'gravamen' or 'core' of the lawsuit is the allegedly tortious conduct in India that caused the plaintiffs' harm." Statement of Interest of the United States of America ("U.S. Statement of Interest") [ECF No. 47] at 2.

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[2] Because the Court resolves this case on immunity grounds, and specifically on whether plaintiffs' suit is based upon conduct carried on or performed in the United States, this Court does not address whether plaintiffs' suit is based upon *commercial* conduct, nor does it consider IFC's alternative grounds for dismissal.

As explained below, this Court does not fully adopt either of the parties' positions, but ultimately concludes that plaintiffs' suit is based upon IFC's failure to ensure the plant was designed, constructed, and operated with due care so as not to harm plaintiffs' property, health, and way of life. And while plaintiffs allege that the loan agreement was approved by IFC's board of directors in Washington, D.C., plaintiffs have not established that the gravamen of the complaint—IFC's subsequent failure to supervise and monitor construction and operation of the Tata Mundra Power Plant project and ensure its compliance with numerous environmental and social sustainability requirements in the loan agreement—was carried on in the United States.

A. Identifying the Gravamen

To identify the particular conduct on which an action is based, courts must look to "the basis or foundation for a claim, those elements that, if proven, would entitle a plaintiff to relief, and the gravamen of the complaint." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (internal quotation marks, citations, and alterations omitted). The fact than an activity "led to the conduct that eventually injured" plaintiffs or "would establish a single element of a claim" is insufficient to demonstrate that the suit is "based upon" that activity. *Id.* at 395 (internal quotation marks omitted); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 357–58 (1993). Courts should not "individually analyz[e] each of the [plaintiffs'] causes of action," but should instead "zero[] in on the core," "essentials," or "gravamen" of the suit. *Sachs*, 136 S. Ct. at 396–97. "[A]ny other approach," the Supreme Court has warned, "would allow plaintiffs to

evade the Act's restrictions through artful pleading." *Id.*

IFC and the United States argue that the Supreme Court's two decisions in *Nelson* and *Sachs* stand for the proposition that the last act that "actually injured" plaintiffs—regardless of whose act it was—constitutes the gravamen of the suit. *See* Def.'s Mot. at 11; U.S. Statement of Interest at 7; Tr. of Mot. Hearing [ECF No. 56] at 5:18–20. At the hearing on the renewed motion to dismiss, IFC went even further, alleging that the gravamen of a tort claim is always at the place of the injury. Tr. of Mot. Hearing at 62:17–20; 64:1–5; 71:14–16.

But neither *Nelson* nor *Sachs* establishes such hardline rules. In *Nelson*, a U.S. citizen sued Saudi Arabia and its state-owned hospital for personal injuries he suffered after being tortured, beaten, and unlawfully detained by Saudi government officials in retaliation for reporting safety defects at a Saudi hospital. 507 U.S. at 351–53. In addition to an array of intentional tort claims, including battery, unlawful detainment, and torture, Nelson alleged that Saudi Arabia negligently failed to warn him of the dangers of his employment when recruiting him in the United States. *Id.* at 353–54. The Supreme Court held that even though Saudi Arabia recruited and hired Nelson in the United States, those commercial activities did not "form the basis" of his suit. *Id.* at 358. Instead, the suit was based upon the "tortious conduct itself," which took place in Saudi Arabia. *Id.*

Similarly, in *Sachs* a U.S. citizen sued an Austrian state-owned railway operator after she fell in Austria from a train station platform onto the

tracks where a moving train crushed her legs. 136 S. Ct. at 393. She brought negligence, strict liability, and breach of implied warranty claims, including a failure-to-warn claim based on the railway company's failure to alert her to the dangerous conditions at the train station when it sold her a railway pass in the United States. *Id.* Sachs argued her suit was "based upon" commercial activity carried on in the United States, namely the railway's sale of the pass in the United States through a U.S.-based travel agent. *Id.* The Supreme Court disagreed and held that "the conduct constituting the gravamen of Sachs's suit plainly occurred abroad" as "[a]ll of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria." *Id.* at 396.

IFC correctly notes that, in Sachs, the Supreme Court relied on Justice Holmes's observation that the "essentials of a personal injury narrative will be found at the point of contact." *Id.* at 397 (internal quotation marks omitted). But the Supreme Court did not say that the gravamen of *any* tort claim will *always* be found at the "point of contact" or "place of injury." *See Sachs*, 136 S. Ct. at 397 (stating only that "[a]t least in this case, that insight holds true"). In fact, the Supreme Court expressly cautioned that the reach of its decision in *Sachs* "was limited" and that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." *Id.* at 397 n.2.[3]

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[3] Imagine, for example, if CGPL contracted with IFC to actively monitor and adjust the power plant's cooling levels from a computer system in the United States, but IFC's technicians

Further, the fact that the Supreme Court in both *Nelson* and *Sachs* focused on the conduct that "actually injured" plaintiffs does not mean that, as IFC argues, the "last act" in the causal chain is always the conduct that constitutes the gravamen of a suit. IFC concedes that, under its reading of *Nelson* and *Sachs*, foreign states and international organizations would be immune 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. *See* Tr. of Mot. Hearing at 5:16–24. This approach would effectively immunize state-owned enterprises and international organizations operating in the United States from 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.

Nothing in *Sachs* or *Nelson* supports this bold proposition. The Supreme Court did not reject *Sachs*'s and *Nelson*'s failure-to-warn claims because the act that most immediately proceeds the injury always constitutes the gravamen of a tort claim; instead, it rejected those failure-to-warn claims because they were a mere semantic reframing of plaintiffs' primary claims resting on the defendants' negligent and intentional tortious conduct abroad. *See Sachs*, 136 S. Ct. at 396–97; *Nelson*, 507 U.S. at

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negligently mis-adjusted the cooling levels, causing a fire at the plant. If plant workers injured by the fire brought a tort action against IFC, that action may be based upon IFC's technicians' particular conduct in the United States even though the plant workers were physically injured in India.

361–62. The failure-to-warn claims were brazen efforts to artificially shift the gravamen of a complaint about a foreign government's conduct abroad to the United States through artful pleading. *See id.* Moreover, a tort claim cannot always be "based upon" the last act in the causal chain of a tort because that is effectively a "one-element approach" to identifying the gravamen of a suit, which the Supreme Court has expressly rejected. *See Sachs*, 136 S. Ct. at 396. Instead, the Supreme Court instructed courts to avoid an element-by-element analysis and make a more holistic assessment as to what particular conduct constitutes the "core" of the suit. *Id.*

While IFC's rigid "place of injury" or "last act" tests are not the proper way to identify the gravamen of a suit, neither is plaintiffs' approach. Plaintiffs argue that a large percentage of the conduct alleged in the complaint—namely, how the design, construction, and operation of the power plant in India has harmed plaintiffs' property, health, and livelihoods—should be excluded from the gravamen analysis on the ground that courts must consider only the sovereign (or international organization) defendant's conduct, not the conduct of third parties, in identifying the gravamen of the suit. It is true that the gravamen arises from plaintiffs' claims as articulated in their complaint—"the particular conduct on which the action is based." *See id.* at 395. But here, plaintiffs' claim is that IFC is responsible for the harmful design, construction, and operation of the power plant in a variety of ways. *See* Compl. ¶¶ 160–92. Because plaintiffs seek to hold IFC responsible for conduct that occurred in India, that

conduct is relevant to identifying the "core" of the suit even if IFC was not *physically* constructing or operating the plant in India. Moreover, the gravamen of a complaint—the conduct a suit is based upon—may be a failure to act. The fact that plaintiffs allege IFC is responsible for the negligent design, construction, and operation of the plant through its omissions—its failure to act as opposed to its affirmative conduct—does not mean that the negligent design, construction, and operation of the plant should be excluded from the gravamen analysis.

Plaintiffs point to cases where, they argue, courts have focused solely on the sovereign defendant's acts in determining the gravamen of the complaint, even if third-party conduct was the primary, or even the most immediate, cause of a plaintiff's injury. For example, in *Callejo v. Bancomer*, S.A., plaintiffs sued a previously-private-but-now-nationalized Mexican bank that had reclaimed their certificates of deposits ("CDs") in devalued foreign currency rather than in U.S. dollars to comply with Mexico's new government regulations. 764 F.2d 1101, 1104–05 (5th Cir. 1985). The Mexican bank argued that the "suit was based upon the Mexican exchange regulations since, but for these regulations, it would not have breached the terms of the CDs." *Id.* at 1109. The Fifth Circuit, however, held that the analysis "must focus on the named defendant's acts . . . and not on the separate acts of other sovereign instrumentalities or agencies." *Id.* Because the act complained of was the bank's breach of its obligations to plaintiffs and not Mexico's promulgation of regulations, the bank's conduct formed the basis of the suit. *Id.* at 1108–09.

But *Callejo* simply stands for the uncontroversial claim that, to identify what conduct a suit is "based upon," courts must look to "the act complained of." *Id.* at 1109. Here, the act complained of throughout the vast majority of plaintiffs' complaint is the negligent design, construction, and operation of the power plant in India. That conduct, not the loan transaction, is at the heart of plaintiffs' alleged injuries. Those activities in India are not a separate, contributing cause to plaintiffs' injuries; they are activities that, according to plaintiffs, IFC is directly responsible for and that are central to plaintiffs' claims for relief. *See*, *e.g.*, Compl. ¶ 295 ("Defendant had substantial control over the design and construction of the Plant and continues to maintain substantial control over how the Plant is operated and under what conditions."). The fact that IFC may be responsible for that wrongful conduct through its omissions, or that a third party like CGPL played a more direct role in designing, constructing, and operating the plant, does not change the fact that plaintiffs' complaint against IFC is—at least in large part—based upon that conduct (whether acts or omissions) in India.

Similarly, plaintiffs rely on *Crystallex Int'l Corp. v. Venezuela*, where a Venezuelan state-owned oil company, operating out of Venezuela, allegedly directed its subsidiaries in Delaware to transfer $2.8 billion to the parent oil company as a dividend, with the fraudulent intent to evade potential creditors. *See* 251 F. Supp. 3d 758, 762–63, 766 (D. Del. 2017). The court reasoned that the suit was based upon the Venezuelan oil company's particular act of directing the transfers with fraudulent intent, even though the

transfers themselves occurred in the United States, because an identical transfer of the funds—absent the fraudulent intent of the oil company directing the transfers—would not give rise to a claim. *Id.* at 766.

But the court in *Crystallex* did not, as plaintiffs suggest, ignore the transfers that occurred in the United States simply because they were "undertaken by another entity." *See* Opp'n Br. at 14 n.6. Rather, the court, in assessing the gravamen, expressly considered the fact that the transfers occurred in the United States, but then ultimately concluded that the "core" of the suit was the oil company's act of directing the transfers with fraudulent intent because "if the same, identical Transfers were carried out *without* fraudulent intent, there would be no cognizable claim that could be brought." *Crystallex Int'l Corp.*, 251 F. Supp. 3d at 766. There may be cases, like *Crystallex*, where the last act that directly injures plaintiffs (there, the transfer of $2.8 billion out of the United States) is not the gravamen of the complaint, but that does not mean that, when determining the gravamen of a particular suit, courts should overlook conduct that plaintiffs allege the sovereign government or international organization is responsible for just because that conduct involves a third party.

Therefore, in identifying and locating the gravamen of the complaint, this Court will not follow IFC's approach and look *solely* at the place of injury or where the last act that actually caused the injury occurred, nor will it adopt plaintiffs' approach and look only at IFC's direct, affirmative conduct. Instead, this Court adopts a more holistic approach and "zero[s] in on the core," "essentials," or

"gravamen" of the suit, considering "the basis or foundation" for plaintiffs' claims. *Sachs*, 136 S. Ct. at 396–97.

B. The Gravamen of Plaintiffs' Complaint

Having reviewed plaintiffs' complaint, the Court concludes that the "gravamen," or "core," of the suit is the alleged failure to ensure that the design, construction, and operation of the plant complied with all environmental and social sustainability standards laid out in the loan agreement, as well as the alleged failure to take sufficient steps to prevent and mitigate harms to the property, health, and way of life of people who live near the Tata Mundra plant. *See* Compl. ¶¶ 3–4, 159, 303. Specifically, this includes IFC failing "to enforce conditions of the loan agreement intended for the protection of affected communities and the environment," "designing and/or approving remedial, mitigation, and preventive steps that were inadequate," "monitoring and supervision of the Plant's compliance," and "failing to take steps to remediate and mitigate harms that have already occurred" or "to ensure adequate compensation for those affected." Compl. ¶ 300.

This conduct—or lack thereof—is at the core of plaintiffs' negligence, negligent supervision, nuisance, and trespass claims because it is the conduct that plaintiffs allege "actually injured" them. *See* Compl. ¶¶ 3–4, 159, 300–03; *see also Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 177 (2d Cir. 2010) (holding negligent supervision lawsuit was based upon acts of "alleged negligent supervision," including "hiring, training,

employment, and supervision of employees"). Furthermore, the particular conduct a suit is based upon is often found at the "point of contact," *see Sachs*, 136 S. Ct. at 397, and here, IFC's failure to ensure the plant project was designed, constructed, and operated with due care focuses on IFC's failure to act at the Tata Mundra Power Plant and in the surrounding community in India—which is the point of contact, or "place of injury," for the torts alleged in plaintiffs' complaint. Therefore, IFC's active involvement in "[p]roject design and management, including, for example, approval of construction plans" as well as its failure "to adequately supervise the Project and mitigate [its] risks" is the gravamen of plaintiffs' negligence claims. Opp'n Br. at 32.

And it is this same conduct—namely, IFC's failure to ensure that the design, construction, and operation of the plant comply with all of the loan agreement's environmental and social sustainability standards—that plaintiffs allege constitutes a breach of IFC's contractual obligations to plaintiffs. *See* Compl. ¶ 331. Therefore, such conduct also constitutes the gravamen of plaintiffs' third-party breach-of-contract claim. *See Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1223 (11th Cir. 2018) (holding, in action against Venezuela seeking the return of historically significant items, that the "failure to return the [items] constitutes the alleged breach" and is therefore the "conduct that actually injured" plaintiff and the "gravamen" of plaintiff's breach-of-contract claim).

Plaintiffs argue that the gravamen of the complaint is instead IFC's authorization of the loan

agreement with CGPL. Opp'n Br. at 15–16. But IFC's board of directors' mere approval of the loan is not the conduct that "actually injured" plaintiffs. *Sachs*, 136 S. Ct. at 396. It may be true that "[w]ithout the IFC's funding, the Tata Mundra Project could not have gone forward," Compl. ¶ 2, but it is also true that, absent the Saudi hospital's recruitment of Nelson in the United States, he would not have been tortured and that, absent the Austrian railway company's sale of a railway pass to Sachs in the United States, she would not have fallen from the train station platform onto the tracks. The fact that a plaintiff would not have a claim *but for* some activity in the causal chain does not mean the suit is "based upon" that activity. *See Nelson*, 507 U.S. at 358 (acknowledging Saudi hospital's recruiting activities "led to the conduct that eventually injured" the employee, but determining that those activities were "not the basis for [his] suit"); *Sachs*, 136 S. Ct. at 395 (explaining that "the mere fact that" an event "establish[es] a single element of a claim is insufficient to demonstrate that the claim is 'based upon' that" event).

Plaintiffs do allege that IFC negligently "provided integral funding for the Project even though it knew or had reason to know that the harms alleged would occur," Compl. ¶ 187, but they do not make specific allegations that approving the funding—by itself—was a negligent act. The negligent conduct at the center of plaintiffs' complaint is not the approval of the loan, but rather the subsequent failure "to take sufficient steps or exercise due care to prevent and mitigate harms to the property, health, [and] livelihoods" of those who live near the plant. *Id.* ¶ 3.

The approval of the loan without IFC's subsequent negligence is akin to the transfer of money without the Venezuelan oil company's fraudulent intent in *Crystallex*, *see* 251 F. Supp. 3d at 76, or the sale of the railway ticket without the Austrian railway company's "unsafe boarding conditions" in *Sachs*, *see* 136 S. Ct. at 396. There is "nothing wrongful about the [approval of the loan] standing alone." *Id.*

In one sentence of the lengthy complaint, plaintiffs do assert that IFC failed to ensure sufficient measures were incorporated into the loan agreement to prevent foreseeable harms, *see* Compl. ¶ 163, but that assertion is not supported by specific facts and is in direct tension with the thrust of plaintiffs' complaint: that IFC had the power to protect plaintiffs by enforcing provisions in the loan agreement but failed to do so. Plaintiffs explain, at great length, how there *were* robust measures in the loan agreement requiring CGPL to act with due regard for the environment and the local community, but that IFC failed to enforce those requirements. *See id.* ¶ 51–53. According to plaintiffs, IFC identified a number of environmental and social performance gaps in the project proposal, developed measures to close those gaps, and then documented them in an Environmental and Social Action Plan that was made a necessary condition of the loan agreement. *Id.* Moreover, IFC's loan agreement with CGPL required CGPL to comply with "the Performance Standards, the Thermal Power Guidelines, the EHS Guidelines, and relevant provisions of national law." *Id.* ¶ 122. Plaintiffs allege that if CGPL failed to meet these conditions, IFC had "the power to terminate the obligations to make disbursements and/or declare the

loan to be due and payable, and/or cancel the loan." *Id.* ¶ 138.

In other words, the gravamen of the complaint is not that IFC's board of directors, in approving the loan, wrote CGPL a blank check without imposing any conditions to ensure protection of the environment and the local population. It is instead that IFC—after approving the loan—failed to enforce the conditions of the loan agreement designed to protect the environment and local population. These alleged failures of oversight by IFC are focused on conduct or inaction in India, not the United States. According to plaintiffs, IFC directly oversaw and participated in the negligent design, construction, and operation of the plant in India and failed to take steps to mitigate the foreseeable risks in India. Thus, based on plaintiffs' own allegations, the Court concludes that the particular conduct that lies at the core of this suit is not the act of approving the loan, but is instead IFC's subsequent failure to ensure the Tata Mundra Power Plant was designed, constructed, and operated in accordance with the robust environmental and social sustainability standards in the loan agreement.

C. The Location of the Gravamen of Plaintiffs' Complaint

Having identified the gravamen of plaintiffs' complaint as IFC's failure to ensure the Tata Mundra Power Plant was designed, constructed, and operated with due care so as not to harm plaintiffs' property, health, and way of life, the Court now considers whether such conduct was "carried on" in the United States for the purpose of applying the FSIA's

commercial activity exception. The Court concludes that plaintiffs have not established that such conduct was "carried on" in the United States. IFC's failure to protect plaintiffs from the plant in India is the gravamen of the suit, and that failure to act in India does not have "substantial contact" with the United States.[4]

The complaint does not allege that IFC's direct involvement in the design, construction, and operation of the power plant occurred in Washington, D.C. For example, it does not allege that IFC's failure to ensure CGPL's compliance with the loan agreement's provisions, or its approval of certain negligent designs or construction plans, or its failure to adequately monitor or supervise the plant were "carried on" in the United States. In fact, the record suggests such conduct likely occurred in India. IFC signed the initial Mandate letter with CGPL through its office in New Delhi, India; conducted various site visits in Gujarat, India, to identify potential issues and evaluate community support; and then negotiated and signed the loan agreement with CGPL in Mumbai, India. Sturtevant Decl. ¶¶ 16–17, 20–21, 91. Further, IFC's Director of Infrastructure & Natural Resources of Asia, who first responded to the

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[4] If this suit is not based upon IFC's failure to act to ensure that the plant was constructed and operated with due care but is instead based upon the actual construction and operation of the power plant itself, which directly injured plaintiffs, *see* Def.'s Mot. at 11, then the gravamen of the complaint is even more certainly in India. The power plant's contamination of the groundwater, its dissemination of ash, and its effect on local fisherman—indeed, all of the alleged harms to plaintiffs' property, health, and livelihood—occurred in India.

CAO's assessment report and who was a signatory on IFC's response to the CAO's audit, was located in New Delhi, India. *Id.* ¶ 84. Given these facts, this Court cannot simply presume that IFC's direct involvement in the Tata Mundra Power Plant—whether that involvement was a failure to act or the approval of harmful designs—occurred in the United States.

Although plaintiffs' briefing assumes all of IFC's tortious conduct occurred here in the United States, *see* Opp'n Br. at 12, plaintiffs' complaint alleges only that (1) "critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions, were made in Washington, D.C.," (2) that "the disbursement was made in U.S. dollars and came from funds held within the United States," and (3) that "IFC's responses to allegations of harm caused by the Project—including the injuries alleged herein—and to the findings of the CAO, were decided, directed and/or approved from the headquarters in Washington, D.C." Compl. ¶¶ 197–99.

Plaintiffs' first two allegations as to IFC's conduct carried on in the United States do not pertain to the gravamen of plaintiffs' suit, as identified by this Court. Instead, they relate only to the loan transaction. Additionally, even if post-approval disbursements of funds could be considered part of IFC's failure to ensure proper design, construction, and operation of the plant, plaintiffs never allege that the decision to make those subsequent disbursements occurred in the United States. The mere transfer of funds from the United States is not enough to establish "substantial contact" between the United

States and the gravamen of the complaint. *See Crystallex*, 251 F. Supp. 3d at 769 (finding no "substantial contact" between fraudulent direction of transfer and the United States even though funds were directed to be transferred out of the United States); *Broadfield Fin., Inc. v. Ministry of Fin. of Slovak Republic*, 99 F. Supp. 2d 403, 406 (S.D.N.Y. 2000) (holding transfers of money through New York bank accounts insufficient to establish relationship between sovereign defendant's commercial activity and the United States); *see also In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) ("[S]ubstantial contact . . . requires more than the minimum contacts sufficient to satisfy due process in establishing personal jurisdiction.").

Plaintiffs' third allegation—that "IFC's responses to allegations of harm caused by the Project . . . and to the Findings of the CAO were decided, directed, and/or approved from the headquarters in Washington, D.C."—is a general and ambiguous allegation insufficient to shift the gravamen of the complaint to the United States. Compl. ¶ 199. It is not clear what plaintiffs mean by "responses to allegations of harm" and the Court can only speculate as to what kind of conduct (e.g., express deliberations or tacit approval) actually took place in the United States. Such an abstract allegation of relatively minor conduct in the United States does not establish that IFC's oversight failures in India involved "substantial contact" with the United States. *See Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1108–09 (D.C. Cir. 1982) (holding that a contractual arrangement that involved two business meetings in the United States

did not have "substantial contact" with United States, particularly because the record contained no specific facts about the meetings so the court could only "speculate" as to their "scope and importance.").

Even assuming that the phrase "IFC's responses to allegations of harm" is a reference to IFC's written responses to the CAO's assessment report and audit, *see* Exs. 11 & 15 to Sturtevant Decl. [ECF Nos. 40-16, 40-20], those memoranda are not themselves the gravamen of plaintiffs' complaint—the particular conduct that actually injured plaintiffs. Moreover, plaintiffs simply allege that IFC's responses were, at minimum, approved by someone in Washington, D.C. The mere fact that someone in the United States approved a letter that defended IFC's approach to environmental and social risk management for the Tata Mundra project and announced that IFC will consider certain suggestions raised by the CAO is not sufficient to establish that plaintiffs' complaint is based upon conduct carried on in the United States.

* * *

Thus, even accepting all of plaintiffs' allegations as true, plaintiffs have not established that this lawsuit is "based upon" conduct "carried on" in the United States as is required for application of the commercial activity exception to the FSIA. Plaintiffs' suit is based upon IFC's failure to ensure that the plant was designed, constructed, and operated with due care so as not to harm plaintiffs' property, health, and way of life. That is the *gravamen* of the complaint. And plaintiffs have not established that such conduct was carried on in the United States; instead, it was focused in India, where the plant is

and the harms occurred. Because plaintiffs bear the "initial burden" to establish that an exception to IFC's presumptive immunity under the FSIA applies, *Bell Helicopter*, 734 F.3d at 1183, and they have failed to satisfy that burden, IFC's immunity remains intact and the Court will dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1).[5]

CONCLUSION

For the reasons explained, this Court concludes that plaintiffs' lawsuit does not fall within the FSIA's commercial activity exception because the suit is not, at its core, based upon activity—commercial or otherwise—carried on or performed in the United

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[5] Plaintiffs also argue that even if the commercial activity exception does not apply, IFC has waived its immunity. But this Court's prior decision rejected that argument, reasoning that waiver requires there to be a "corresponding benefit" that would "further the organization's goals," but suits like plaintiffs' would likely "impose considerable costs upon IFC without providing commensurate benefits." *Jam*, 172 F. Supp. 3d at 109–12 (citing *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C Cir. 1983)). The D.C. Circuit affirmed that decision, reasoning that "claims that implicate internal operations of an international organization are especially suspect because claims arising out of core operations, not ancillary business transactions, would threaten the policy discretion of the organization" and "[t]hat notion applies here." *Jam*, 806 F.3d at 708. Contrary to plaintiffs' arguments, *see* Opp'n Br. at 23–24, the Supreme Court's decision in *Jam* interpreting the IOIA did not overturn the D.C. Circuit's corresponding benefits test for waivers of immunity in international treaties, nor does the Supreme Court's interpretation of the IOIA provide any information as to what the drafters of the IFC Articles of Agreement intended. Accordingly, this Court continues to conclude that IFC did not waive its immunity in this case.

States. Accordingly, IFC is immune from suit, and this Court will grant IFC's motion to dismiss for lack of subject matter jurisdiction. A separate order will be issued on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: February 14, 2020

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 2017 Decided June 23, 2017

No. 16-7051

BUDHA ISMAIL JAM, ET AL.,
APPELLANTS

v.

INTERNATIONAL FINANCE CORPORATION,
APPELLEE

Appeal from United States District Court
for the District of Columbia
(No. 1:15-cv-00612)

Richard L. Herz argued the cause for appellants. With him on the briefs were *Marco B. Simons* and *Michelle C. Harrison*.

Deepak Gupta was on the brief for *amicus curiae* Daniel Bradlow in support of appellants.

Jennifer Green was on the brief for *amicus curiae* Dr. Erica Gould in support of appellants.

Francis A. Vasquez, Jr. argued the cause for appellee. With him on the brief was *Maxwell J. Hyman*.

Jeffrey T. Green and *Sena N. Munasifi* were on the brief for *amicus curiae* The International Bank for Reconstruction and Development, et al. in support of appellee.

Before: PILLARD, *Circuit Judge*, and EDWARDS and SILBERMAN, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* PILLARD.

SILBERMAN, *Senior Circuit Judge*: Appellants, a group of Indian nationals, challenge a district court decision dismissing their complaint against the International Finance Corporation (IFC) on grounds that the IFC is immune from their suit. The IFC provided loans needed for construction of the Tata Mundra Power Plant in Gujarat, India. Appellants who live near the plant alleged—which the IFC does not deny—that contrary to provisions of the loan agreement, the plant caused damage to the surrounding communities. They wish to hold the IFC financially responsible for their injuries, but we agree with the well-reasoned district court opinion that the IFC is immune to this suit under the International Organizations Immunities Act, and did not waive immunity for this suit in its Articles of Agreement.

I.

Appellants are fishermen, farmers, a local government entity, and a trade union of fishworkers. They assert that their way of life has been devastated by the power plant.[1]

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[1] Appellants' complaint paints a dismal picture. For example, the plant's cooling system discharges thermal pollution into the sea, killing off marine life on which fishermen rely for their income. Saltwater intrusion into the groundwater—a result of the plant's construction—means that farmers can no longer use that water for irrigation. (In fact, the villagers must purchase

The IFC, headquartered in Washington, is an international organization founded in 1956 with over 180 member countries. It provides loans in the developing world to projects that cannot command private capital. IFC Articles, art. III §3(i), Dec. 5, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117. The IFC loaned $450 million to Coastal Gujarat Power Limited, a subsidiary of Tata Power, an Indian company, for construction and operation of the Tata Mundra Plant. The loan agreement, in accordance with IFC's policy to prevent social and environmental damage, included an Environmental and Social Action Plan designed to protect the surrounding communities. The loan's recipient was responsible for complying with the agreement, but the IFC retained supervisory authority and could revoke financial support for the project.

Unfortunately, according to the IFC's own internal audit conducted by its ombudsman, the plant's construction and operation did not comply with the Plan. And the IFC was criticized by the ombudsman for inadequate supervision of the project. Yet the IFC did not take any steps to force the loan recipients into compliance with the Plan.

The appellants' claims are almost entirely based on tort: negligence, negligent nuisance, and trespass. They do, however, raise a related claim as alleged third party contract beneficiaries of the social and environmental terms of the contract. According to

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elsewhere freshwater necessary for consumption.) And because the plant is coal-powered, coal must be transported from nine miles away on an open-air conveyor system. During that relocation, coal dust and ash disperse into the atmosphere and contaminate the surrounding land and air.

appellants, the IFC is not immune to these claims, and, even if it was statutorily entitled to immunity, it has waived immunity.

II.

Appellants are swimming upriver; both of their arguments run counter to our long-held precedent concerning the scope of international organization immunity and charter-document immunity waivers.

The IFC relies on the International Organizations Immunities Act (IOIA), which provides that international organizations "shall enjoy the same immunity from suit . . . 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." 22 U.S.C. § 288a(b). The President determines whether an organization is entitled to such immunity. 22 U.S.C. § 288. The IFC has been designated an international organization entitled to the "privileges, exemptions, and immunities" conferred by the statute. Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 5, 1956).

In response to the IFC's claim of statutory entitlement under the IOIA, appellants rather boldly assert that *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998), our leading case on the immunity of international organizations under that statute, should not be followed. *Atkinson* held that foreign organizations receive the immunity that foreign governments enjoyed at the time the IOIA was passed, which was "virtually absolute immunity." *Id.* at 1340 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)). And that immunity

is not diminished even if the immunity of foreign governments has been subsequently modified, particularly by the widespread acceptance and codification of a "commercial activities exception" to sovereign immunity. *E.g.*, 28 U.S.C. § 1605(a)(2).

Attacking *Atkinson*, appellants make two related contentions. First, *Atkinson* was wrong to conclude that when Congress tied the immunity of international organizations to foreign sovereigns, it meant the immunity foreign sovereigns enjoyed in 1945. Instead, according to appellants, who echo the arguments pressed in *Atkinson* itself, lawmakers intended the immunity of the organizations to rise or fall—like two boats tied together—with the scope of the sovereigns' immunity. In other words, even assuming foreign sovereigns enjoyed absolute immunity in 1945, if that immunity diminished, as it has with the codification of the commercial activity exception, Congress intended that international organizations fare no better.

The problem with this argument—even if we thought it meritorious, which we do not—is that it runs counter to *Atkinson*'s holding, which explicitly rejected such an evolving notion of international organization immunity. *See* 156 F.3d at 1341. We noted that Congress anticipated the possibility of a change to immunity of international organizations, but explicitly delegated the responsibility to the President to effect that change—not the judiciary. *Id.* Morever, when considering the legislation, Congress rejected a commercial activities exception—which is exactly the evolutionary step appellants wish to have us adopt. *Id.* As the district court recognized, we recently reaffirmed *Atkinson*, saying that the case "remains vigorous as Circuit law." *Nyambal v. Int'l Monetary Fund*, 772

F.3d 277, 281 (D.C. Cir. 2014). Recognizing that a frontal attack on *Atkinson*'s holding would require an en banc decision, appellants next argued that we can, and should, bypass its precedential impact because the Supreme Court has undermined its premise—that in 1945 the immunity of foreign sovereigns was absolute (or virtually absolute).

To be sure, the Court has said in dicta that in 1945, courts "'consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction' over particular actions against foreign sovereigns . . . ." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (quoting *Verlinden*, 461 U.S. at 486). But as a matter of practice, at that time, whenever a foreign sovereign was sued, the State Department did request sovereign immunity. *Id.* The only arguable exception involved a lawsuit in rem against a ship owned but not possessed by Mexico; it was not a suit against Mexico. *See Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). And, even if appellants are correct that the executive branch played an important role in immunity determinations in 1945, that does not diminish the absolute nature of the immunity those sovereigns enjoyed; although Supreme Court dicta refers to the *mechanism* for conferring immunity on foreign sovereigns in 1945, Executive Branch intervention does not speak to the *scope* of that immunity.

In any event, the *holding* of *Atkinson*—regardless how one characterizes the immunity of foreign sovereigns in 1945—was that international organizations were given complete immunity by the IOIA unless it was waived or the President intervened. And as we noted, that holding was reaffirmed in

Nyambal after the Supreme Court dicta on which appellants primarily rely. Therefore, we conclude our precedent stands as an impassable barrier to appellants' first argument.

III.

That brings us to the waiver argument. There is no question that the IFC has waived immunity for some claims. Indeed, its charter, read literally, would seem to include a categorical waiver.[2] But our key case interpreting identical waiver language in the World Bank charter, *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), read that language narrowly to allow only the *type of suit* by the *type of plaintiff* that "would benefit the organization over the long term," *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009)

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[2] The Articles of Agreement contains the following provision, titled "Position of the Corporation with Regard to Judicial Process":

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

IFC Articles, art. 6, § 3(vi). That provision carries "full force and effect in the United States" under the International Finance Corporation Act. 22 U.S.C. § 282g.

(citing *Atkinson,* 156 F.3d at 1338 and *Mendaro*, 717 F.2d at 618).[3]

To be sure, it is a bit strange that it is the judiciary that determines when a claim "benefits" the international organization; after all, the cases come to us when the organizations *deny* the claim, and one would think that the organization would be a better judge as to what claims benefit it than the judiciary. Perhaps that is why *Osseiran*, when applying *Mendaro*, refers to long-term goals, rather than immediate litigating tactics.

But whether or not the *Mendaro* test would be better described using a term different than "benefit," it is the *Mendaro* criteria we are obliged to apply. Ironically, the line of cases applying *Mendaro* ended up tying waiver to commercial transactions, so there is a superficial similarity to the commercial activities test that appellants would urge us to accept. But whatever the scope of the commercial activities exception to sovereign immunity, that standard is necessarily broader than the *Mendaro* test; if that exception applied to the IFC, the organization would *never* retain

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[3] Appellants argue that *Mendaro* impermissibly overruled our earlier case, *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 832 F.2d 454 (D.C. Cir. 1967), without an intervening Supreme Court or en banc decision. Appellants rely on dicta in *Lutcher*, but its holding was that the Inter-American Development Bank waived immunity to a breach of contract suit by a debtor. 382 F.2d at 456-68. *Mendaro* expressly considered the rationale of *Lutcher* and declined to extend its holding to the suit before it. 717 F.2d at 614-17. Indeed, the *Mendaro* test emerged in part from *Lutcher*'s discussion that the charter language at issue indicated waiver where "vulnerability to suit contributes to the effectiveness of the [organization's] operations." *Lutcher*, 382 F.2d at 456.

immunity since its operations are *solely* "commercial," i.e., the IFC does not undertake any "sovereign" activities.

The *Mendaro* test instead focused on identifying those transactions where the other party would not enter into negotiations or contract with the organization absent waiver. *See* 717 F.2d at 617 (inferring waiver only insofar as "necessary to enable the [organization] to fulfill its functions"). *Mendaro* provided examples: suits by debtors, creditors, bondholders, and "those other potential plaintiffs to whom the [organization] would have to subject itself to suit in order to achieve its chartered objectives." *Id.* at 615.

We have stretched that concept to include a claim of promissory estoppel, *see Osseiran*, 552 F.3d at 840-41, and a quasi-contract claim of unjust enrichment, *see Vila v. Inter-Am. Invest. Corp.*, 570 F.3d 274, 278-80 (D.C. Cir. 2009). But all the claims we have accepted have grown out of business relations with outside companies (or an outside individual engaged directly in negotiations with the organization).[4] *Compare Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454 (D.C. Cir. 1967) (finding

[4] Appellants do present a third party beneficiary claim, which, unlike their other claims, sounds in principles of contract law. We have previously found the distinction between contract and noncontract claims relevant. See *Vila* 570 F.3d at 280 n.3. But even if appellants qualified as third party beneficiaries, a point we do not address, they were not a necessary negotiating party. Accordingly, inferring waiver in this case stands at odds with the reasoning in *Mendaro*, i.e., that *Mendaro* implies waiver when the parties negotiated with the background of international organization immunity.

waiver in debtors' suit to enforce loan agreement) *with Mendaro*, 717 F.2d at 611 (rejecting employee sexual harassment and discrimination claim); *Atkinson*, 156 F.3d at 1336 (rejecting garnishment proceeding against organization employee).

Appellants attempt to define "benefit" more broadly. They argue that holding the IFC to the very environmental and social conditions it put in the contract, conditions which the IFC itself formulated, would benefit the IFC's goals. Even though appellants had no commercial relationship with the IFC (other than, allegedly, as third party beneficiaries of the loan agreement's requirements), they contend that the IFC will benefit from their lawsuit because they are attempting to hold the IFC to its stated mission and to its own compliance processes. They argue that obtaining "community support" is a required part of any IFC project, and suggest that communities will be unlikely to support IFC projects if the IFC is not amenable to suit. Appellants' 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.

But *Mendaro* drew another distinction between claims that survive and those that don't. Those claims that implicate internal operations of an international organization are especially suspect because claims arising out of core operations, not ancillary business transactions, would threaten the policy discretion of the organization. *Accord Vila*, 570 F.3d at 286-89 (Williams, J., dissenting).

That notion applies here. Should appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the subject of a suit in Washington.[5] Appellee's suggestion that the floodgates would be open does not seem an exaggeration. Finally, if the IFC's internal compliance report were to be used to buttress a claim against the IFC, we would create a strong disincentive to international organizations using an internal review process. So even though appellants convince us that the term "benefit" is something of a misnomer—its claim in some sense can be thought of as a "benefit"—it fails the *Mendaro* test.

Accordingly, the district court decision is affirmed.

So ordered.

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[5] We need not reach appellee's alternative argument that this case may be dismissed under the doctrine of forum non conveniens.

PILLARD, *Circuit Judge*, *concurring*: I agree that *Atkinson* and *Mendaro*, which remain binding law in this circuit, control this case. I write separately to note that those decisions have left the law of international organizations' immunity in a perplexing state. I believe both cases were wrongly decided, and our circuit may wish to revisit them.

1. The International Organizations Immunities Act (IOIA), Pub L. No. 79-291, 59 Stat. 669 (1945) (codified at 22 U.S.C. § 288 *et seq.*), grants international organizations the same immunity "as is enjoyed by foreign governments." *Id.* § 2(b). When Congress enacted the IOIA in 1945, foreign states enjoyed "virtually absolute immunity," so long as the State Department requested immunity on their behalf. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). President Eisenhower designated the IFC as entitled to immunity under the IOIA in 1956. *See* Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 5, 1956). Congress and the courts have since recognized that foreign governments' immunity is more limited, as described by the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1604-05; *see Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). We took a wrong turn in *Atkinson* when we read the IOIA to grant international organizations a static, absolute immunity that is, by now, not at all the same "as is enjoyed by foreign governments," but substantially broader.

When a statute incorporates existing law by reference, the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up. *Atkinson* itself correctly acknowledged that a "statute

[that] refers to a subject generally adopts the law on the subject," including "all the amendments and modifications of the law subsequent to the time the reference statute was enacted." *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (emphasis omitted); *see El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016).

The IOIA references foreign sovereign immunity, but in *Atkinson* we did not apply the familiar rule of dynamic incorporation because we thought another IOIA provision showed that Congress intended that reference to be static. Section 1 of the IOIA authorizes the President to "withhold or withdraw from any such [international] organization or its officers or employees any of the privileges, exemptions, and immunities provided for" by the IOIA. IOIA § 1. We read that language to mean that Congress intended the President alone to have the ability, going forward, to adjust international organizations' immunity from where it stood as of the IOIA's enactment in 1945. *Atkinson*, 156 F.3d at 1341. That presidential power was, we thought, exclusive of any shift in international organizations' immunity that might be wrought by developments in the law of foreign sovereign immunity to which the IOIA refers.

Correctly read, however, section 1 merely empowers the President to make organization- and function-specific exemptions from otherwise-applicable immunity rules. It says that the President may "withhold or withdraw from *any such organization*"—note the singular—"or *its* officers or employees any of the privileges, exemptions, and

immunities" otherwise provided for by the IOIA. IOIA § 1 (emphasis added). Section 1 thus empowers the President to roll back an international organization's immunity on an organization-specific basis. *See, e.g.*, Elizabeth R. Wilcox, *Digest of United States Practice in International Law* 405 (2009) (describing President Reagan's 1983 exercise of section 1 authority to withhold immunity from INTERPOL, followed by President Obama's 2009 restoration of the immunity after INTERPOL opened a liaison office in New York). Nothing about section 1 suggests that Congress framed or intended it to be the exclusive means by which an international organization's immunity might be determined to be less than absolute.

The inference we drew from section 1 in *Atkinson* seems particularly strained because it assumes that Congress chose an indirect and obscure route to freezing international organizations' immunity over a direct and obvious one. If Congress intended to grant international organizations an unchanging absolute immunity (subject only to presidential power to recognize organization-specific exceptions) it could have simply said so. It might have expressly tied international organizations' immunity to that enjoyed by foreign governments as of the date of enactment. Or, even better, it might have avoided cross-reference altogether by stating that international organizations' immunity is absolute. As it happens, the original House version of the IOIA did just that, providing international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. (as introduced, Oct. 24, 1945; referred to H. Comm. on Ways and Means), but the

Senate rejected that as "a little too broad," 91 Cong. Rec. 12,531 (1945), even as it retained the absolute immunity language in provisions granting the property of international organizations immunity from search, confiscation and taxation. *See* IOIA §§ 2(c), 6. In lieu of the House version's broad language, the Senate adopted the current formulation of section 2(b), which provides international organizations the "same immunity . . . as is enjoyed by foreign governments." H.R. 4489, 79th Cong. (as reported by S. Comm. on Finance, Dec. 18, 1945).

The considered view of the Department of State, harking back to before *Atkinson*, is that the immunity of international organizations under the IOIA was not frozen as of 1945, but follows developments in the law of foreign sovereign immunity under the FSIA. In a 1980 letter, then-Legal Adviser Roberts Owen opined that, by "virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities." Letter from Roberts B. Owen, Legal Adviser, U.S. Department of State, to Leroy D. Clark, General Counsel, Equal Employment Opportunity Commission (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 917-18 (1980). Although the State Department's interpretation of the IOIA is not binding on the court, the Department's involvement in the drafting of the IOIA lends its view extra weight. *See* H.R. Rep. No. 79-1203, at 7 (1945) (referring to the draft bill as "prepared by the State Department"); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (citing a letter of the State

Department's Legal Adviser and encouraging courts to "give serious weight to the Executive Branch's view" in cases that may affect foreign policy).

Reading the IOIA to dynamically link organizations' immunity to that of their member states makes sense. The contrary view we adopted in *Atkinson* appears to allow states, subject to suit under the commercial activity exception of the FSIA, to carry on commercial activities with immunity through international organizations. Thus, the Canadian government is subject to suit in United States courts for disputes arising from its commercial activities here, but the Great Lakes Fishery Commission—of which the United States and Canada are the sole members—is immune from suit under *Atkinson*. *See* Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962); *see also* Convention on Great Lakes Fisheries, Can.-U.S., Sept. 10, 1954, 6 U.S.T. 2836. Neither the IOIA nor our cases interpreting it explain why nations that collectively breach contracts or otherwise act unlawfully through organizations should enjoy immunity in our courts when the same conduct would not be immunized if directly committed by a nation acting on its own.

Were I not bound by *Atkinson*, I would hold that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states. *Accord OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010) (declining to follow *Atkinson* and holding that restricted immunity as codified in the FSIA, including its commercial activity exception, applies to international organizations under the IOIA).

2. *Atkinson*'s error is compounded in certain suits involving waiver under the *Mendaro* doctrine. In *Mendaro v. World Bank*, we decided that courts should pare back an international organization's apparent waiver of immunity from suit whenever we believe the waiver would yield no "corresponding benefit" to the organization. 717 F.2d 610, 617 (D.C. Cir. 1983); *see Osserian v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009) (holding organization's facially broad waiver of immunity effective only as to types of plaintiffs and claims that "would benefit the organization over the long term"). That doctrine lacks a sound legal foundation and is awkward to apply; were I not bound by precedent, I would reject it.

It is undisputed that IOIA immunity may be waived, 22 U.S.C. § 288a(b), and the majority recognizes that the IFC's charter "would seem to include a categorical waiver." Maj. Op. 6-7 & n.2; *see* IFC Articles of Agreement art. 6, § 3, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 118. Half a century ago, we read the Agreement establishing the Inter-American Development Bank (IADB) to effectuate a broad waiver of the Bank's immunity. *See Lutcher S. A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967) (Burger, J.). The IFC's Articles of Agreement, which use the same waiver language as did the IADB in *Lutcher*, would appear to waive the IFC's immunity here. Under the reasoning of *Lutcher*, the IFC, like the IADB in that case, may be sued in United States court.

But *Lutcher* was not our last word. As just noted, we decided in *Mendaro* to honor an international organization's "facially broad waiver of immunity" only insofar as doing so provided a "corresponding

benefit" to the organization. 717 F.2d at 613, 617. We thought it appropriate to look to the "interrelationship between the functions" of the international organization and "the underlying purposes of international immunities" to cabin a charter document's immunity waiver. *Id.* at 615. The member states, we opined in *Mendaro*, "could only have intended to waive the Bank's immunity from suits by its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives." *Id.* We decided the waiver did not apply to the claim of Mendaro, a former Bank employee challenging her termination, because recognizing employment claims had no "corresponding benefit" for the Bank. *Id.* at 612-14.

We saw *Mendaro* as distinguishable from *Lutcher*. Allowing the debtor's claims in *Lutcher* "would directly aid the Bank in attracting responsible borrowers," whereas complying with the law governing the Bank's "internal operations" in *Mendaro* would not "appreciably advance the Bank's ability to perform its functions." *Id.* at 618-20 (emphasis omitted). In other words, *Mendaro* assumes that business counterparties will be unwilling to transact with an international organization if they lack judicial recourse against it, but that making employees' legal rights unenforceable against such an organization will not affect their willingness to work there. We thus held that a facially broad waiver of an organization's immunity should be read not to allow employee claims.

The "corresponding benefit" doctrine calls on courts to second-guess international organizations' own waiver decisions and to treat a waiver as inapplicable unless it would bring the organization a "corresponding benefit"—presumably one offsetting the burden of amenability to suit. The majority acknowledges that "it is a bit strange" that *Mendaro* calls on the judiciary to re-determine an international organization's own waiver calculus. Slip Op. at 8. I agree that the organization itself is in a better position than we are to know what is in its institutional interests. But, whereas my colleagues point to the fact that "the cases come to us when the organizations *deny* the claim," *id.*, I would be inclined to think that organizations' assessments of their own long-term goals are more reliably reflected in their charters and policies—here, in the broad waiver included in IFC's Articles of Agreement—than in their litigation positions defending against pending claims.

It is not entirely clear why we have drawn the particular line we have pursuant to *Mendaro*. Why are suits by a consultant, a potential investor, and a corporate borrower in an international organization's interest, but suits by employees and their dependents not? *Compare, e.g.*, *Vila v. Inter-American Investment, Corp.*, 570 F.3d 274, 276, 279-82 (D.C. Cir. 2009) (permitting suit by a consultant); *Osseiran*, 552 F.3d at 840-41 (permitting suit by a potential investor); *Lutcher*, 382 F.2d at 459-60 (permitting suit by a corporate borrower), *with, e.g.*, *Atkinson*, 156 F.3d at 1338-39 (barring suit by a former wife seeking garnishment of former husband's wages); *Mendaro*, 717 F.2d at 618-19 (barring suit by a

terminated employee asserting a sex harassment and discrimination claim).

Our cases seem to construe charter-document immunity waivers to allow suits only by commercial parties likely to be repeat players, or by parties with substantial bargaining power. But the opposite would make more sense: Entities doing regular business with international organizations can write waivers of immunity into their contracts with the organizations. *See, e.g.*, *OSS Nokalva*, 617 F.3d at 759 (contract clause authorizing software developer to sue European Space Agency in state and federal courts in New Jersey). Sophisticated commercial actors that fail to bargain for such terms are surely less entitled to benefit from broad immunity waivers than victims of torts or takings who lacked any bargaining opportunity, or unsophisticated parties unlikely to anticipate and bargain around an immunity bar.

The IFC successfully argued here that it would enjoy no "corresponding benefit" from immunity waiver. The local entities and residents that brought this suit contend that giving effect here to the IFC's waiver would advance the Corporation's organizational goals. The "IFC requires 'broad community support' before funding projects" like the Tata Mundra power plant, and "local communities may hesitate to host a high-risk project," the appellants contend, "if they know that the IFC can ignore its own promises and standards and they will have no recourse." Appellants Br. at 48-49. Without directly addressing the benefits of legal accountability to the communities it seeks to serve, the IFC contends that treating the waiver in its Articles of Agreement as effective here would open a

floodgate of litigation in United States courts. That argument has it backwards: The IFC persuaded the majority to stem a litigation flood it anticipates only because the immunity waiver in the IFC's own Articles of Agreement opened the gate.

The perceived need for *Mendaro*'s odd approach would not have arisen if we had, back in *Atkinson*, read the IOIA to confer on international organizations the same immunity as is enjoyed by foreign governments—*i.e.* restrictive immunity that, today, would be governed by the FSIA. As the majority observes, Slip Op. at 8, the cases in which we have applied *Mendaro* to hold that claims are not immunity-barred look remarkably like cases that would be allowed to proceed under the FSIA's commercial activity exception. The activities we held to be non-immunized—such as suits by "debtors, creditors, [and] bondholders," *Mendaro*, 717 F.2d at 615, "suits based on commercial transactions with the outside world" affecting an organization's "ability to operate in the marketplace," *Osseiran*, 552 F.3d at 840, and unjust enrichment claims by commercial lending specialists, *Vila*, 570 F.3d at 276, 279-82—seem like just the kinds of claims that would be permitted under the commercial activity exception. We should have achieved that result, not via *Mendaro*'s "corresponding benefit" test, but by recognizing that the IOIA hitched the scope of international organizations' immunity to that of foreign governments under the FSIA. There is a time-tested body of law under the FSIA that delineates its contours—including its commercial activity exception. The pattern of decisions applying *Mendaro* may approximate some of the results that would have

occurred had international organizations been subject to the FSIA, but *Mendaro* begs other important questions that assimilation of IOIA immunity to the FSIA would resolve.

Our efforts to chart a separate course under the IOIA were misguided from the start, and the doctrinal tangle has only deepened in light of the amorphous waiver-curbing doctrine that has developed under *Mendaro*. I believe that the full court should revisit both *Atkinson* and *Mendaro* in an appropriate case. But because those decisions remain binding precedent in our circuit, I concur.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-7092 **September Term, 2020**
1:15-cv-00612-JDB
Filed On: August 13, 2021

Budha Ismail Jam, et al.,
Appellants
Kashubhai Abhrambhai Mahjalia,
Appellee

v.

International Finance Corporation,
Appellee

Consolidated with 20-7097

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker and Jackson, Circuit Judges; and Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F

Relevant Provisions of the International Organizations Immunities Act, 22 U.S.C. §§ 288-288a

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Subchapter XVIII—Privileges and Immunities of International Organizations

22 U.S.C. § 288. "International organization" defined; authority of President.

For the purposes of this subchapter, the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and

employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.

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§ 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:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(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.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such

immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

APPENDIX G

Relevant Provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 – 1606

Title 28. Judiciary and Judicial Procedure

Chapter 97. Jurisdictional Immunities of Foreign States

§ 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.

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§ 1603. Definitions.

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(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.

§ 1604. Immunity of a foreign state from jurisdiction.

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

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§ 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;

(3) in which rights in property taken in violation of international law are in issue and that

property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(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

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the

party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall

preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[**(e), (f)** Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to

stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under

this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional immunity for certain art exhibition activities.--

(1) In general.--If--

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.--

(A) Nazi-era claims.--Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and--

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works.--In addition to cases exempted under subparagraph (A), paragraph (1) shall not

apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and--

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions.--For purposes of this subsection--

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means--

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

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§ 1606. Extent of liability.

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.

APPENDIX H

Statutory Provisions Related to the International Finance Corporation, 22 U.S.C. §§ 282 – 282o

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§ 282. Acceptance of membership by United States in International Finance Corporation.

The President is hereby authorized to accept membership for the United States in the International Finance Corporation (hereinafter referred to as the "Corporation"), provided for by the Articles of Agreement of the Corporation deposited in the archives of the International Bank for Reconstruction and Development.

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§ 282a. Governor, executive director, and alternates of Corporation.

The governor and executive director of the International Bank for Reconstruction and Development, and the alternate for each of them, appointed under section 286a of this title, shall serve as governor, director and alternates, respectively, of the Corporation.

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§ 282b. Applicability of National Advisory Council on International Monetary and Financial Problems.

The provisions of section 286b of this title, shall apply with respect to the Corporation to the same extent as with respect to the International Bank for Reconstruction and Development.

§ 282c. Congressional authorization needed for certain actions.

Unless Congress by law authorizes such action, neither the President nor any person or agency shall on behalf of the United States (a) subscribe to additional shares of stock under article II, section 3, of the Articles of Agreement of the Corporation; (b) accept any amendment under article VII of the Articles of Agreement of the Corporation; (c) make any loan to the Corporation. The United States Governor of the Corporation is authorized to agree to an amendment to article III of the articles of agreement of the Corporation to authorize the Corporation to make investments of its funds in capital stock and to limit the exercise of voting rights by the Corporation unless exercise of such rights is deemed necessary by the Corporation to protect its interests, as proposed in the resolution submitted by the Board of Directors on February 20, 1961. Unless Congress by law authorizes such action, no governor or alternate representing the United States shall vote for an increase of capital stock of the Corporation under article II, section 2(c)(ii), of the Articles of Agreement of the Corporation.

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§ 282d. Federal Reserve banks as depositories.

Any Federal Reserve bank which is requested to do so by the Corporation shall act as its depository or as its fiscal agent, and the Board of Governors of the Federal Reserve System shall supervise and direct the carrying out of these functions by the Federal Reserve banks.

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§ 282e. Payment of subscriptions to Corporation by United States; dividends covered into Treasury.

(a) Authority of Secretary of the Treasury

The Secretary of the Treasury is authorized to pay the subscription of the United States to the Corporation and for this purpose is authorized to use as a public-debt transaction not to exceed $35,168,000 of the proceeds of any securities hereafter issued under chapter 31 of Title 31, and the purposes for which securities may be issued under that chapter are extended to include such purpose. Payment under this subsection of the subscription of the United States to the Corporation and any repayment thereof shall be treated as public-debt transactions of the United States.

(b) Dividends treated as miscellaneous receipts

Any payment of dividends made to the United States by the Corporation shall be covered into the Treasury as a miscellaneous receipt.

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§ 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.

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§ 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.

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§ 282h. Loans to or from International Bank for Reconstruction and Development; amendment to Articles of Agreement.

The United States Governor of the Corporation is authorized to agree to the amendments of the articles of agreement of the Corporation to remove the prohibition therein contained against the Corporation lending to or borrowing from the International Bank for Reconstruction and Development, and to place limitations on such borrowing.

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§ 282i. Increase in capital stock of Corporation; subscription to additional shares.

(a) The United States Governor of the Corporation is authorized--

(1) to vote for an increase of five hundred and forty thousand shares in the authorized capital stock of the Corporation; and

(2) if such increase becomes effective, to subscribe on behalf of the United States to one hundred and eleven thousand four hundred and ninety-three additional shares of the capital stock of the Corporation: *Provided, however,* That any commitment to make payment for such additional subscriptions shall be made subject to obtaining the necessary appropriations.

(b) In order to pay for the increase in the United States subscription to the Corporation provided for in this section, there are authorized to be appropriated, without fiscal year limitation, $111,493,000 for payment by the Secretary of the Treasury.

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§ 282j. Increase in capital stock of Corporation; subscription to additional shares.

(a) The United States Governor of the Corporation is authorized--

(1) to vote for an increase of 650,000 shares in the authorized capital stock of the Corporation; and

(2) to subscribe on behalf of the United States to 175,162 additional shares of the capital stock of the Corporation, except that any subscription to additional shares shall be effective only to such

extent or in such amounts as are provided in advance in appropriations Acts.

(b) In order to pay for the increase in the United States subscription to the Corporation provided for in this section, there are authorized to be appropriated, without fiscal year limitation, $175,162,000 for payment by the Secretary of the Treasury.

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§ 282k. Securities issued by Corporation.

(a) Exemption from securities laws; reports to Securities and Exchange Commission

Any securities issued by the Corporation (including any guaranty by the Corporation, whether or not limited in scope) and any securities guaranteed by the Corporation as to both principal and interest shall be deemed to be exempted securities within the meaning of section 77c(a)(2) of Title 15 and section 78c(a)(12) of Title 15. The Corporation shall file with the Securities and Exchange Commission such annual and other reports with regard to such securities as the Commission shall determine to be appropriate in view of the special character of the Corporation and its operations and necessary in the public interest or for the protection of investors.

(b) Authority of Securities and Exchange Commission to suspend exemption; reports to Congress

The Securities and Exchange Commission, acting in consultation with the National Advisory Council on International Monetary and Financial Problems, is authorized to suspend the provisions of subsection (a) at any time as to any or all securities issued or

guaranteed by the Corporation during the period of such suspension. The Commission shall include in its annual reports to the Congress such information as it shall deem advisable with regard to the operations and effect of this section.

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§ 282*l*. Capital stock increase.

(a) Subscription authorized

(1) In general

The United States Governor of the Corporation may--

(A) vote for an increase of 1,000,000 shares in the authorized capital stock of the Corporation; and

(B) subscribe on behalf of the United States to 250,000 additional shares of the capital stock of the Corporation.

(2) Prior appropriation required

The subscription authority provided in paragraph (1) shall be effective only to such extent or in such amounts as are provided in advance in appropriations Acts.

(b) Limitations on authorization of appropriations

In order to pay for the subscription authorized in subsection (a), there are authorized to be appropriated, without fiscal year limitation, $50,000,000 for payment by the Secretary of the Treasury.

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§ 282m. Authority to vote for capital increases necessary to support economic restructuring in independent states of former Soviet Union.

The United States Governor of the Corporation may vote in favor of any increase in the capital stock of the Corporation that may be needed to accommodate the requirements of the independent states of the former Soviet Union (as defined in section 5801 of this title).

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§ 282n. Authority to agree to amendments to Articles of Agreement

The United States Governor of the Corporation is authorized to agree to amendments to the Articles of Agreement of the Corporation that would--

(1) amend Article II, Section 2(c)(ii), to increase the vote by which the Board of Governors of the Corporation may increase the capital stock of the Corporation from a three-fourths majority to a four-fifths majority; and

(2) amend Article VII(a) to increase the vote by which the Board of Governors of the Corporation may amend the Articles of Agreement of the Corporation from a four-fifths majority to an eighty-five percent majority.

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§ 282*o*. Selective capital increase and amendment of the Articles of Agreement.

(a) Vote authorized

The United States Governor of the Corporation is authorized to vote in favor of a resolution to increase the capital stock of the Corporation by $130,000,000.

(b) Amendment of the Articles of Agreement

The United States Governor of the Corporation is authorized to agree to and accept an amendment to Article IV, Section 3(a) of the Articles of Agreement of the Corporation that achieves an increase in basic votes to 5.55 percent of total votes.

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