No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,
v.
INTERNATIONAL FINANCE CORPORATION,
Respondent.

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

BRIEF OF *AMICI CURIAE* FORMER SECRETARIES OF STATE AND SECRETARIES OF THE TREASURY IN SUPPORT OF RESPONDENT INTERNATIONAL FINANCE CORPORATION

JAMES A. BAKER, III
TIMOTHY F. GEITHNER
JOHN F. KERRY
JACOB J. LEW
HENRY M. PAULSON, JR.
ROBERT E. RUBIN
GEORGE P. SHULTZ
LAWRENCE H. SUMMERS

CELESTE KOELEVELD
JOHN P. ALEXANDER
CLIFFORD CHANCE US LLP
31 W. 52nd St.
New York, NY 10019
(212) 878-8000

STEPHEN M. NICKELSBURG
Counsel of Record
KATIE BARLOW
CLIFFORD CHANCE US LLP
2001 K St., N.W.
Washington, D.C. 20006
(202) 912-5000
Steve.Nickelsburg@cliffordchance.com

Counsel for Amici Curiae

September 17, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are a bipartisan group of former Secretaries of State and Secretaries of the Treasury with decades of service to the Nation. During their tenures, *amici* Secretaries of State were responsible for developing and managing U.S. foreign policy, including as to relationships with international financial institutions and economic programs in developing countries. *Amici* Secretaries of the Treasury formulated and managed U.S. economic policy and economic development programs, including with respect to multilateral development banks ("MDBs") such as the International Finance Corporation ("IFC").

James A. Baker, III served as Secretary of the Treasury from 1985 to 1988 in the Reagan Administration and as Secretary of State from 1989 to 1992 in the George H.W. Bush Administration. Timothy F. Geithner served as Secretary of the Treasury from 2009 to 2013 in the Obama Administration. John F. Kerry served as Secretary of State from 2013 to 2017 in the Obama Administration. Jacob J. Lew served as Secretary of the Treasury from 2013 to 2017 in the Obama Administration. Henry M. Paulson, Jr. served as Secretary of the Treasury from 2006 to 2009 in the George W. Bush Administration. Robert E. Rubin served as Secretary of the Treasury from 1995 to 1999 in the Clinton Administration. George P. Shultz served as Secretary of the Treasury from 1972 to 1974

---

[1] Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that counsel for all parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no person or entity aside from counsel for *amici curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

in the Nixon Administration and as Secretary of State from 1982 to 1989 in the Reagan Administration. Lawrence H. Summers served as Secretary of the Treasury from 1999 to 2001 in the Clinton Administration.

Amici have filed this brief because they believe that IFC, which was established to engage in development-focused lending to private enterprises, always has been and should continue to be immune from third-party suits in connection with its lending activities. That immunity is critical to the public policy mission of IFC; and it is in our national interest that IFC be able to fulfill its mission without concern for liability from private lawsuits in the United States.

ARGUMENT

I. IFC FURTHERS IMPORTANT U.S. POLICY GOALS.

MDBs serve a range of important U.S. policy goals, and immunities are important to achieve those goals. IFC itself is deeply rooted in American history. It had its genesis in the 1950s through the work of IFC founder Robert Garner, who had a vision of healing and developing the post-War world by advancing private enterprise, industry, and agriculture through multilateral public finance. The goal was simple: increase production of goods, spur new jobs for more people, raise the standard of living, and build a global economy in which the rising tide lifts all boats.

That support for IFC's founding goals, and the goals of MDBs generally, continues as a fundamental principle in American foreign policy today. As the Department of the Treasury recently reported to Congress:

> U.S. participation in the MDBs can: (1) foster U.S. national security by supporting MDB engagement with fragile and conflict-affected states (*e.g.*, Ukraine, Iraq, and Afghanistan) and providing assistance that addresses the root causes of instability; (2) promote U.S. economic growth through exports by helping the MDBs boost growth in emerging markets; (3) help respond to global crises, such as the refugee crisis in the Middle East and North Africa and natural disasters, and build countries' resilience to future crises; and (4) address global priorities, such as energy security, food security, and environmental degradation.

U.S. DEP'T TREASURY, REPORT TO CONGRESS FROM THE CHAIRMAN OF THE NATIONAL ADVISORY COUNCIL ON INTERNATIONAL MONETARY AND FINANCIAL POLICIES (June 2018), at 7.

IFC serves these policy goals through public investment in private sector development. It is in the United States' interest to support this "emphasis on the private sector as the engine of growth and . . . to unleash private investment in the world's poorest countries." Press Release, Statement of U.S. Dep't of the Treasury, Secretary Steven T. Mnuchin to the Development Committee of the World Bank and International Monetary Fund (Apr. 21, 2017). IFC's goal is not to compete in commercial markets; it is to "create markets in poor economies," and thus "to support job creation and create opportunities in the most difficult environments." *Id*.

The United States has invested a total of more than USD 569 million in IFC since its founding, and the Department of the Treasury has consistently emphasized the United States' interest in the mission and approach of IFC. *See, e.g.*, IFC, *Management's Discussion and Analysis and Consolidated Financial Statements* (June 30, 2018); Statement by U.S. Treasury Secretary Jacob J. Lew to the Joint Ministerial Committee of the World Bank and the IMF (Oct. 11, 2014) ("We see great potential for the International Finance Corporation (IFC) to deepen its engagement in fragile and conflict-affected states and call upon the IFC to redouble its efforts in these countries and seek out investments with the greatest levels of development impact, even if this requires taking more financial risk."); Press Release, U.S. Dep't of the Treasury, Statement by Secretary Timothy F. Geithner to the IMF and World Bank (Apr. 16, 2011) ("The IBRD and the

IFC, in particular, have a central role to play on behalf of the international community, both in bringing their substantial financial resources to bear and in providing the smart and targeted investments that can best support these new transitions."); Press Release, U.S. Dep't of the Treasury, Secretary Paulson Announces New Latin American and Caribbean Initiative (Jul. 6, 2007) ("The United States' interest in [IFC's mission in] the Americas is strong. We are committed to helping the region reduce poverty, fight corruption, build a middle class, and generate more opportunities, including for those who currently feel excluded from the region's growing prosperity . . . ." (internal quotation marks omitted)).

A healthy, wealthy, and stable world is good for America, and a stable and strong IFC is in the interest of the United States.

II. MDBs ARE FUNDAMENTALLY DIFFERENT FROM SOVEREIGNS.

Sovereign states and MDBs are different entities with different functions. Sovereign states are independent, self-interested actors. MDBs, by definition, are not. They are comprised of independent, self-interested member states and must "serve as the instrumentalities of many nations" all at once. Br. United States, *Veiga v. World Meteorological Organization*, 2009 WL 8186687, No. 08-3999-cv (2d Cir. Mar. 3, 2010).

It follows that MDBs like IFC do not advance the goals of any single member state. Rather, the various independent states—including the United States—that comprise the collective body that is IFC agree that IFC's purpose is "to further economic development by

encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas . . . ." Articles of Agreement of the International Finance Corporation, Art. I, 7 U.S.T. 2197 (July 20, 1956). Various provisions of IFC's Articles reflect this multilateral purpose and prevent IFC from acting as an arm of any particular state. For example, IFC's officers are committed to IFC, not any particular nation: "The President, officers and staff of the [IFC], in the discharge of their offices, owe their duty entirely to the [IFC] and to no other authority. Each member of the [IFC] shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties." *Id*. Art. IV(5)(c). One of IFC's Operational Principles is that IFC "shall impose no conditions that the proceeds of any financing by it shall be spent in the territories of any particular country." *Id*. Art. III(3)(iii). IFC also refrains from political activity: IFC and its officers "shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned." *Id*. Art. III(9).

In addition, MDBs differ structurally from states in fundamental ways. "The most significant difference between states and international organizations lies in the fact that states possess the totality of international rights and duties, while international organizations possess only those rights and duties that are established by treaty, functionally necessary, or developed by practice." Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts,* 41 VA. J. INT'L L. 1, 16 (Fall 2000). "Therefore, we should not be surprised that they require different kinds of immunity than states do." *Id*. at 17.

In short, the character of international organizations—even those engaged in activities of a financial nature—is fundamentally different from that of sovereign states. When an MDB engages in financial activity in furtherance of its purposes, it is not acting as a self-interested sovereign or even at the behest of one. Accordingly, immunity for MDBs serves a fundamentally different purpose from immunity for states—to provide "[c]omplete independence from the local authority . . . in order to enable [them] to fulfill [their] international functions." Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 836, 847 (1947).

III. IMMUNITY IS NECESSARY FOR IFC TO PERFORM ITS MISSION.

The fact that international organizations ("IOs") require immunity from suit in order to perform their functions is well-established. "The strong foundation in international law for the privileges and immunities accorded to international organizations denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action through multinational organizations with specific missions." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). Without immunity, not only would organizations be hampered by facing litigation over the performance of their functions, but their independence would be undermined by submission to suit in local jurisdictions:

> [T]he very structure of an international organization, which ordinarily consists of an administrative body created by the joint action of several participating nations, requires that the organization remain independent

> from the intranational policies of its individual members.

Id. at 615.

IFC's need for immunity is particularly strong. IFC provides financing to projects in the developing world "when other sources of funds are not available on reasonable terms." *International Finance Corporation: Hearings on S. 1894 before International Finance Subcomm. of S. Comm. On Banking and Currency*, 84th Conf. 3 (1955) (Message of the President). These projects are inherently risky. If in addition to this financial risk IFC also faced civil liability based on those projects, it may be unable to provide financing in the first place, especially in the regions that need it most. *See Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 110-11 (D.D.C. 2016) (seeing "little reason to doubt" that a lack of immunity would "produce a considerable chilling effect on IFC's capacity and willingness to lend money in developing countries").

Without immunity, IFC's priorities could shift. IFC might be forced to adopt defensive tactics both financially and strategically. And investor states might re-evaluate their monetary contribution to IFC if an increasing percentage of that investment were subject to attorney's fees, settlements, and defense-related costs rather than global strategic development objectives. With fewer dollars coming in due to investor risk aversion and more dollars going out to satisfy litigation-related costs, pressure from both sides could degrade IFC's ability to fulfill its mission. That development would reduce the effectiveness of a key mechanism for the U.S. to exert global influence and achieve its critical policy goals.

This would be highly unfortunate, especially where potential liability is based on IFC's alleged failure to meet its own ideals, for example, as set forth in the Environmental and Social Sustainability Standards invoked in this case. Indeed, a collateral consequence of imposing liability for failure to meet its own standards is that IFC may refrain from setting such standards at all.

IV. A RESTRICTIVE IMMUNITY REGIME WOULD OPEN IFC AND OTHER MDBs TO BURDENSOME LITIGATION THAT WOULD DIVERT RESOURCES FROM THEIR MISSION.

Reducing the immunity of MDBs would subject them to a new risk of U.S. lawsuits merely for pursuing their internationally-agreed mission. Any time a plaintiff has a claim arising out of a project receiving MDB financing, the plaintiff would have the incentive to sue a deep-pocketed entity. And because the MDB was involved in providing financing, the plaintiff would argue that the MDB should not be immune for such alleged "commercial activity" under the Foreign Sovereign Immunities Act.

For MDBs headquartered in the U.S. (like IFC and the World Bank), there is a serious risk that courts will find the required U.S. nexus to provide U.S. jurisdiction for a court to consider such a claim. Petitioners here have made this very argument. (*See* Petitioners' D.C. Circuit Brief, at 40-41.) If having a U.S. headquarters opened MDBs to burdensome suits from around the world, an MDB might very well be dissuaded from having a U.S. headquarters at all—a point invoked during congressional debate on providing immunity to the United Nations Organization. *See, e.g.*, 91 CONG. REC. 10866, 10866 (Nov. 20, 1945)

("[I]f we are to hope to have the United Nations Organization's headquarters to be located in the United States, it will be absolutely essential for this [IOIA] type of legislation to be passed."). This would disadvantage the United States with respect to such organizations, reducing the substantial leverage the United States now enjoys to "help shape the global development agenda, leveraging its investments to ensure effectiveness and on-the-ground impact." U.S. DEP'T OF THE TREASURY, RESOURCE CENTER: MULTILATERAL DEVELOPMENT BANKS, https://www.treasury.gov/resource-center/international/development-banks/Pages/index.aspx (last visited Sept. 14, 2018).

If they were subject to this threat of private civil litigation, MDBs would have to devote substantial financial and managerial resources to defend those lawsuits, which in turn would divert resources from their institutional missions. Tort litigation arising out of injuries in foreign countries is particularly costly and burdensome. And injunctive relief, such as that requested here, would allow private plaintiffs and courts to insert themselves as micromanagers of complex, technical, and expensive projects. Having to defend these suits, no matter how meritless they might be, would defeat the purpose of International Organizations Immunities Act ("IOIA") immunity.

For this reason, "IOIA immunity, where justly invoked, properly shields defendants not only from the consequences of litigation's results but also from the burden of defending themselves." *Zuza v. Office of the High Representative*, 857 F.3d 935, 938 (D.C. Cir. 2017) (internal quotation marks omitted); *see also Rendall-Speranza v. Nassim*, 107 F.3d 913, 916-17 (D.C. Cir. 1997) ("Immunity protects the defendant not only from liability upon the merits of the claim against

it but also from the burden of standing trial in the first place.") (addressing immunity of an IFC official).

This new burden would be especially problematic in light of MDBs' historical reliance on full immunity. A new rule developed case-by-case in the courts, rather than through the political process and legislation, would subject MDBs to substantial uncertainty about their legal status and protection. In short, a new immunity rule developed in this manner would destabilize MDBs' decision-making processes—including for projects already funded. Grappling with uncertain legal change and new legal risk would divert scarce MDB resources from organizations' core development mission.

V. THE JUDICIARY SHOULD NOT UPEND THE WELL-ESTABLISHED UNDERSTANDING THAT MDBs ENJOY ABSOLUTE IMMUNITY.

Amici recommend caution before adopting a wholesale change in the decades-long understanding of the immunity enjoyed by MDBs and other IOs. Stability in the understanding of fundamental rules such as the immunity of MDBs is critical to the function of those institutions. If a change in a bedrock rule regarding the legal status of MDBs is to occur, it should be through the political branches, not the courts.

A. The Need For IO Immunity Has Long Been Recognized.

The international community agreed from the outset that international organizations like IFC would be answerable to their member countries alone, acting through their representatives on their Boards, and free from local control.

These principles are expressed in the Secretary of State's 1945 Report to the President regarding the formation of the United Nations. The Secretary noted that while international organizations were "relatively new" and so the "exact nature" of the immunities to which they are entitled was not yet clear, certain immunities would be "necessary." U.S. Dep't of State, Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State 158, Pub. 2349, Conference Series 71 (June 26, 1945). For example:

> The United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the Organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat. . . . *The United States shares the interest of all Members in seeing that no state hampers the work of the Organization through the imposition of unnecessary local burdens*.

Id. at 159 (emphasis added). And Congress' interest in supporting IOs extended not only to the United Nations, but all organizations of which the U.S. was a member, including international financial institutions like the IMF and the World Bank. *See* S. REP. NO. 79-861 (1945), at 2.

B. The IOIA Was Enacted Against The Backdrop Of This International Understanding.

"The fundamental hypothesis upon which all of the jurisdictions base their [immunity-conferring] provisions is not disputed. International organizations must remain free from national interference so that they might be permitted to carry out their functions." Edwin H. Fedder, *The Functional Basis of Int'l Privileges & Immunities: A New Concept in International Law and Organization*, 9 AM. U. L. REV. 60, 69 (1964). This international consensus was the context in which the IOIA was enacted, in part to demonstrate the United States' commitment to it. Thus, IOIA immunity was intended to "protect the official character of" and "strengthen the position of" international organizations. S. REP. NO. 79-861, at 2. And it was well understood when the IOIA was enacted that IOs were to enjoy virtually absolute immunity. *See* Letter from Robert B. Owen, State Dep't Legal Adviser, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980) ("At the time the IOIA was enacted, foreign governments (and, by virtue of the IOIA, international organizations) were entitled, as a general matter to absolute immunity from proceedings in our courts."), in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 918 (1980); *see also Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) ("Congress' intent [in the IOIA] was to adopt that body of law only as it existed in 1945—when immunity of sovereigns was absolute.").

C. IFC Has Long Been Understood To Enjoy Immunity From Suit, And The Judiciary Should Not Change This Stable Legal Status.

IFC was established against this same background, and its articles accordingly provided for this well-understood immunity from suit. *See* Articles of Agreement of the International Finance Corporation, Art. VI(1), 7 U.S.T. 2197 (providing that the immunities set forth therein are intended "[t]o enable [IFC] to fulfill the functions with which it is entrusted"). This understanding has been borne out in litigation, as IFC has repeatedly and successfully invoked immunity from suits by persons who were not IFC's commercial counterparties. *See, e.g.*, *Rendall-Speranza*, 107 F.3d at 915 (IFC successfully invoked immunity with respect to employment-related tort claims); *In re Dinastia, L.P.*, 381 B.R. 512 (S.D. Tex. 2007) (IFC successfully invoked immunity against claim by assignee of a creditor of an IFC borrower); *Banco de Seguros del Estado v. Int'l Fin. Corp.*, Nos. 06 Civ. 2427(LAP), 06 Civ. 3739(LAP), 2007 WL 2746808, at *5-6 (S.D.N.Y. Sept. 20, 2007) (IFC successfully invoked immunity against claims by "tenuously related" commercial parties).

Stability in the status of and rights afforded to MDBs is critical to their function. IFC and other MDBs were established and chose to locate in the United States with an understanding that they would be absolutely immune from suit, and they have operated with that understanding ever since. That immunity was granted, after deliberation, by Act of Congress and by Order of the President. If a fundamental change such as the removal of immunity is to occur, it should only be through the deliberation

of those same political branches, not at the behest of private litigants.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the D.C. Circuit.

Respectfully submitted,

CELESTE KOELEVELD
JOHN P. ALEXANDER
CLIFFORD CHANCE US LLP
31 W. 52nd St.
New York, NY 10019
(212) 878-8000

STEPHEN M. NICKELSBURG
Counsel of Record
KATIE BARLOW
CLIFFORD CHANCE US LLP
2001 K St., N.W.
Washington, D.C. 20006
(202) 912-5000
Steve.Nickelsburg@
cliffordchance.com

Counsel for Amici Curiae

September 17, 2018