No. 21-995

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF IN OPPOSITION

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March 16, 2022

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly applied *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27 (2015), and *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), to conclude that allegations of tortious conduct in India, which allegedly injured Indian nationals in India, did not meet the Foreign Sovereign Immunity Act commercial activity exception to respondent's presumptive immunity.

2. Whether the D.C. Circuit correctly concluded that the International Finance Corporation's founding treaty did not waive its immunity—a question this Court already declined to review in this case—where there has been no intervening changes in the legal landscape and the D.C. Circuit's forty-year-old precedent is consistent with treaty interpretation principles established by this Court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

International Finance Corporation ("IFC") was established in 1956 by its founding multilateral treaty, the IFC Articles of Agreement. As a public international organization, IFC is owned by the governments of 185 nations.

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INTRODUCTION

Petitioners present no question that warrants review of the D.C. Circuit's straightforward application of this Court's precedent. The D.C. Circuit properly affirmed dismissal of this ordinary tort action involving residents and citizens of India, allegedly injured by a power plant in India constructed and operated by a non-party Indian company. In so doing, the D.C. Circuit correctly held that because the gravamen of petitioners' complaint is injurious activity allegedly caused by a power plant that was constructed, owned, and operated in India, the United States' courts lack subject-matter jurisdiction. Petitioners have mischaracterized the D.C. Circuit's analysis and seek review of: (i) a non-existent holding; and (ii) an issue this Court already declined to hear in this very case just three years ago.

Contrary to petitioners' arguments, nowhere does the D.C. Circuit find, hold, or even suggest that the commercial activity exception of the Foreign Sovereign Immunities Act ("FSIA") applies only when the sovereign's conduct is "the most direct cause" of a claimant's alleged injuries. In fact, the D.C. Circuit explicitly disclaims imposing such a requirement, noting that its narrow holding, consistent with this Court's decision in *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27 (2015), is "only that the gravamen of [petitioners'] particular complaint is conduct occurring abroad." Pet. App. 11a. Accordingly, the FSIA commercial activity exception to immunity does not apply in this case, and respondent is immune from suit pursuant to the International Organizations Immunities Act ("IOIA"). Petitioners' attempt to extract a broader holding does not withstand scrutiny.

With no lower-court error to correct nor legal issue to clarify, petitioners claim a split of authority where

none exists. All but one of the cases petitioners cite predates this Court's decision in *Sachs*, which squarely governs this case. And not even the more recent case supports petitioners' claim that a third party's actions are *always* irrelevant to the gravamen analysis of the commercial activity exception. Petitioners' contrary contention (that in all cases only the sovereign's acts matter) collapses the "commercial activity" analysis into a personal jurisdiction inquiry and cannot survive this Court's guidance in *Sachs*.

Alternatively, although the D.C. Circuit did not reach the issue, IFC's immunity remains intact for an additional reason, which makes this case a poor vehicle for further review. As the United States observed on remand, the commercial activity exception still would not apply because IFC's alleged conduct was not the type of conduct that can be exercised by private parties and therefore not of a commercial nature.

Lastly, this Court should decline, once again, petitioners' request to review the D.C. Circuit's interpretation of IFC's founding treaty, the IFC Articles of Agreement. In its 2017 opinion, the D.C. Circuit applied settled law to hold that IFC did not waive its immunity from suit through its Articles. This Court then declined to review the D.C. Circuit's well-founded holding, and, on remand, the district court and court of appeals reaffirmed. Petitioners are still pressing the point even though nothing has changed in the interim that warrants review.

STATEMENT OF THE CASE

I. THE PARTIES

Respondent IFC was established in 1956 by a multilateral treaty and is a public international organization, created and governed by its 185 member countries and a member of the World Bank Group. IFC's

specific purpose is to further economic development by encouraging the growth of private enterprise in developing countries to support the World Bank Group's goals of ending extreme poverty and boosting shared prosperity. See Articles of Agreement of the International Finance Corporation, art. I, Dec. 5, 1955, 7 U.S.T. 2193, T.I.A.S. No. 3620 (as amended through April 16, 2020) ("Articles of Agreement"); see also Report of Committee on Banking and Currency, International Finance Corporation, H.R. Rep. No. 84-1299, at 1–2, 4 (1955).

Central to IFC's mission is to make investments where sufficient private capital is not available on reasonable financial terms. See Articles of Agreement, art. I. In short, IFC is a multilateral development institution that lends or invests where private or commercial banks will not reasonably invest or loan sufficient funds because of commercial impediments, including instability in the political or economic conditions of a country, lack of capacity in the public and private sectors, and other risks that would hinder commercial lending and investment. IFC lends and invests in such cases in order to stimulate and create conditions that foster private-sector development, including the creation of markets, businesses, or jobs. See *id.*

Petitioners are residents of India who allege that they were harmed in India by a coal-fired power plant that is owned and operated by an Indian company.

II. STATUTORY FRAMEWORK

A. Under the IOIA, IFC Enjoys the Same Immunity from Suit as Foreign Sovereigns

IFC is presumptively immune from suit as an international organization under the IOIA. See Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 5, 1956). The importance of the immunities enjoyed by international

organizations is rooted in history: one of the reasons for the IOIA itself was the United States' effort to persuade member countries to locate international organizations in the United States. See Report of the Committee on Ways and Means, Granting Certain Privileges and Immunities to International Organizations and Their Employees, H.R. Rep. No. 79-1203, at 3 (1945) (because "the readiness of the United States to extend privileges and immunities may well be a condition precedent to the establishment of the headquarters [of the United Nations] in this country, the United States should be well prepared with respect to this point.").

Subsequent to the founding of the International Monetary Fund, the International Bank for Reconstruction and Development (another member of the World Bank Group), and the United Nations, Congress enacted the IOIA, 22 U.S.C. § 288 *et seq.*, to "not only protect the official character of public international organizations located in this country" but also to "strengthen the position of international organizations of which the United States is a member when they are located or carry on activities in other countries." H.R. Rep. No. 79-1203, at 2; see also *Int'l Refugee Org.* v. *Rep. S.S. Corp.*, 189 F.2d 858, 861 (4th Cir. 1951) (quoting *Balfour, Guthrie & Co.* v. *United States,* 90 F. Supp. 831, 833 (N.D. Cal. 1950)) ("The broad purpose of the [IOIA] was to vitalize the status of international organizations of which the United States is a member and to facilitate their activities.").

The IOIA grants international organizations the "same immunity" from suit as is enjoyed by foreign governments. 22 U.S.C. § 288a(b). This Court recently held that this means the scope of the immunity provided by the IOIA is construed through the lens of the

FSIA, 28 U.S.C. § 1604 *et seq*. See *Jam* v. *IFC*, 139 S. Ct. 759, 772 (2019) ("*Jam II*").

B. Under the FSIA, a Court Must Determine What the Suit is "Based Upon" Before Turning to the Commercial Activity Exception's Other Elements

"Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). Under the relevant provisions of the FSIA, a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case "in which 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).[1]

Following the statute's text, first a court must determine the conduct upon which the action is based, *i.e.*, the "gravamen" or "foundation" of the suit. *Nelson*, 507 U.S. at 356–58 ("We begin our analysis by identifying the particular conduct on which the Nelsons' action is 'based' for purposes of the Act"). "[A]n action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Sachs*, 577 U.S. at 34–35. Rather than undertaking an "exhaustive claim-by-claim [or] element-by-element analysis," courts identify the gravamen of a plaintiff's suit by zeroing in on the core of

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[1] Petitioners do not invoke the third clause. Pet. App. 5a. Petitioners claim to rely on the second clause, but their petition and their arguments below focus solely on alleged commercial activity by IFC in the United States. *See, e.g.*, Pet. 6 ("All of IFC's decisions that contributed to these harms were made at IFC headquarters in Washington, D.C.")

their suit, *i.e.*, the conduct that "actually injured" the plaintiff. *Id.*

Then, a court considers whether the gravamen is commercial activity; whether the gravamen occurred in the United States; and whether the gravamen was "by" or "of" the foreign state. See *Nelson*, 507 U.S. at 356 ("For there to be jurisdiction in this case, . . . the [action] must be 'based upon' some 'commercial activity' by petitioners that had 'substantial contact' with the United States within the meaning of the Act."); 28 U.S.C. § 1605(a)(2). If the plaintiff fails to establish any of the elements, the exception does not apply.

III. BACKGROUND AND PROCEEDINGS BELOW

A. Petitioners Sue IFC for Its Role as a Lender to Coastal Gujarat Power Limited to Construct, Own, and Operate a Power Plant in India

Petitioners' action is based upon the construction and operation of a power plant by Coastal Gujarat Power Limited ("CGPL"), a wholly owned subsidiary of Tata Power. CGPL built and now owns and operates a coal-fired power plant located in Gujarat, India (the "Plant"). See Pet. App. 40a. Consistent with its mission to further economic development, IFC advanced loans comprising approximately 10% of the total cost of the Plant, negotiating and executing the loan agreement in India. See *id.* 40–41a. As the constructor, owner, and operator of the Plant, CGPL agreed to implement an Environmental and Social Action Plan to minimize any negative effects on the surrounding community. See *id.*

Petitioners are residents of Gujarat, India, a Gujarati trade union, and a Gujarati government entity. In

2015, petitioners sued IFC, one of several lenders to CGPL, alleging that the Plant injured their health, property, and subsistence. See *id.* 41–42a. Instead of suing CGPL—the entity that, according to petitioners, actually injured them—petitioners brought this action only against IFC. See *id.* 47a.

B. The District Court and the D.C. Circuit Hold that IFC is Immune from Suit and Has Not Waived Its Immunity

Applying D.C. Circuit precedent, the district court dismissed the case for lack of subject-matter jurisdiction because IFC was immune and had not waived its immunity under its Articles of Agreement. See *Jam* v. *IFC*, 172 F. Supp. 3d 104, 112 (D.D.C. 2016). The D.C. Circuit unanimously affirmed. In a concurring opinion, Judge Pillard probed the longstanding corresponding-benefits test established by *Mendaro* v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983). See Pet. App. 83–87a. The D.C. Circuit declined to rehear the case *en banc*, with no judge requesting rehearing, including Judge Pillard.

C. This Court Holds that IOIA Immunity is Construed Through the Lens of the FSIA and Declines to Review *Mendaro*

In their 2018 petition for a writ of certiorari, petitioners presented two questions for review and requested that this Court overturn the *Mendaro* corresponding-benefits test. See Petition for a Writ of Certiorari at i, 21, 24–27, *Jam* v. *IFC*, No. 17-1011 (Jan. 19, 2018), granted in part by 138 S. Ct. 2026 (2018). This Court granted certiorari only on the first question related to the IOIA and declined to review the corresponding-benefits test established by *Mendaro*. See *id.*

This Court held that because the IOIA grants international organizations the same immunity as foreign

sovereigns, the IOIA must be construed through the lens of the FSIA. See *Jam II*, 139 S. Ct. at 772. In particular, the Court echoed the United States' statement at oral argument "that it has 'serious doubts' whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the 'based upon' requirement" of the commercial activity exception of the FSIA. *Id.* (quoting Tr. of Oral Arg. 25–26). Moreover, this Court noted that international organizations enjoy two sources of immunity: that granted by the IOIA and that specified by its founding charter. *Id.* at 771 ("[T]he organization's charter can always specify a different level of immunity."). This Court did not address *Mendaro* or the D.C. Circuit's findings on waiver.

D. On Remand, the District Court Dismisses Petitioners' Complaint for Lack of Subject-Matter Jurisdiction; the D.C. Circuit Affirms and Denies Rehearing

The case was remanded to the district court, and IFC filed a renewed motion to dismiss, arguing that petitioners' suit does not meet the requirements of the FSIA commercial activity exception. The United States filed a Statement of Interest, explaining that "the 'gravamen' or 'core' of the lawsuit is the allegedly tortious conduct in India that caused the plaintiffs' harm." Opp. App. at 2a. For the second time, the district court dismissed petitioners' action for lack of subject-matter jurisdiction. See Pet. App. 66a.

Five years after the initiation of this action, petitioners sought to amend their complaint to include allegations that IFC's lending decision itself was negligent. See Pet. App. 14a. IFC opposed the motion. The United States filed a second Statement of Interest, explaining that petitioners' new allegations of "negligent lending" "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." Opp. App. 16a. In addition, the United States observed that "IFC's failure to ensure compliance with its own sustainability standards and prevent or mitigate environmental and social harms is public, non-commercial conduct that does not satisfy the commercial activity exception." *Id.* at 15a.

For a third time, the district court agreed with IFC. Denying petitioners' motion to amend as futile, the court held that "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].'" Pet. App. 31a (quoting *Sachs*, 577 U.S. at 35). The court held that it did not have subject-matter jurisdiction because petitioners' suit was based upon the construction and operation of the Plant in India. See *id.* at 32a.

The D.C. Circuit affirmed and noted that petitioners' case "parallel[s] *Sachs*" and held that petitioners' claims "turn on allegedly wrongful conduct in India." *Id.* at 7a. "Even crediting the allegation that the Plant would not have been built without IFC's funding," the D.C. Circuit added, "the operation of the Plant is what actually injured appellants, and the manner of its construction and operation is the crux of their complaint." *Id.* (internal citation omitted). Applying this Court's reasoning in *Sachs*, the D.C. Circuit observed that "[a]bsent the operation of the Plant in India, or appellants' injuries in India, there would have been nothing wrongful about IFC's disbursements of funds." *Id.*; see also *Sachs*, 577 U.S. at 35–36 ("Without the existence of the unsafe boarding conditions in Innsbruck, there

would have been nothing to warn Sachs about when she bought the Eurail pass."). The D.C. Circuit concluded that "[b]ecause the gravamen of appellants' complaint is injurious activity that occurred in India, the United States' courts lack subject-matter jurisdiction." Pet. App. 2a (citing *Sachs*, 577 U.S. at 35–36).

The D.C. Circuit also held that IFC had not waived its immunity from suit, observing that the waiver question had been decided in its 2017 decision and that this Court did not grant certiorari on that issue. See Pet. App. 11a. In a concurring opinion, Judge Randolph noted that petitioners' argument is the latest in a long list of creative attempts by plaintiffs to manufacture a U.S. nexus for claims that are inherently foreign. See Pet. App. 13a (quoting *Nestlé USA, Inc.* v. *Doe, et al.*, 141 S. Ct. 1931, 1937 (2021) ("'[A]llegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the [statute].'")). "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." *Id.*

Petitioners requested rehearing *en banc*, but no member of the D.C. Circuit called for a poll. See *id.* at 89a.

REASONS FOR DENYING THE PETITION

I. THE D.C. CIRCUIT FOLLOWED SETTLED LAW

A. The D.C. Circuit Faithfully Applied This Court's Analysis in *Sachs* and *Nelson*

No close or complicated question remains in this case. As the D.C. Circuit recognized, a straightforward application of this Court's FSIA precedent shows that the gravamen of petitioners' suit is conduct that

occurred in India. This Court's interpretation of the commercial activity exception's "based upon" requirement, both in *Nelson*, 507 U.S. 349, and in *Sachs*, 577 U.S. 27, controls this case and has settled the law in this area.

The D.C. Circuit properly applied the principles and methodology delineated in *Nelson* and *Sachs* in its decision affirming the district court by determining that petitioners' action is "based upon" allegedly wrongful conduct in India, which led to the injuries suffered in India. See Pet. App. 7a. "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." *Id.*

Petitioners mischaracterize the D.C. Circuit's holding by claiming that "[t]he 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." Pet. 10. The D.C. Circuit held no such thing. Petitioners spend several pages setting forth a parade of horribles they say will flow from this fictional holding. See *id.* at 16–22. But their imaginative parade immediately vanishes in the face of the D.C. Circuit's actual holding.

Indeed, the D.C. Circuit addressed petitioners' "warning" against adopting a "last harmful act" requirement under the FSIA and noted that "today's decision does not impose such a requirement. "Rather, 'the reach of our decision [is] limited,' holding only that the gravamen of appellants' particular complaint is conduct occurring abroad." Pet. App. 11a (quoting *Sachs*, 577 U.S. at 36 n.2).

Similarly, petitioners claim that "[t]he 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." Pet. 27. To the contrary, there is nothing new about courts looking past artful-pleading attempts to identify the crux of plaintiffs' suits. The D.C. Circuit followed *Sachs* by drilling down on the "core" of petitioners' action, *i.e.*, the conduct that petitioners plead "actually injured" them. Moreover, the D.C. Circuit analyzed the text of the commercial activity exception to find that petitioners' argument that courts may analyze only the sovereign's conduct "essentially reads 'based upon' out of the statute." Pet. App. 9a. In so doing, the D.C. Circuit adhered to this Court's guidance in *Sachs* to "identify that 'particular conduct' by looking to the 'basis' or 'foundation' for a claim" to determine what the suit was "based upon." *Sachs*, 577 U.S. at 33.

Petitioners' interpretation of the commercial activity exception improperly collapses the FSIA immunity analysis into a personal jurisdiction inquiry. See Pet. 26. This would render the FSIA meaningless because courts would only need to apply the same personal-jurisdiction analysis that is required in all suits. Rejecting petitioners' reading, the D.C. Circuit explained, "[t]his is markedly not the approach that the Supreme Court has taken to the FSIA." Pet. App. 10a. Nor is such a tautological test consistent with IFC's fundamental nature. IFC is not a commercial bank; it is a multilateral development bank established and operated by sovereign governments. See Articles of Agreement, art. I. If core functions of multilateral development banks are construed as commercial in all

instances, then the commercial activity exception would swallow the rule as applied to these international organizations.

B. The D.C. Circuit Adopted the Methodology and Result Urged by the United States Before the District Court

Petitioners overlook the United States' two Statements of Interest filed in the district court and fail to include them in the petition's appendix. On two separate occasions, the United States urged the district court to adopt the precise outcome that the district court and the D.C. Circuit reached. The United States noted that it "has a substantial interest in the proper interpretation of the FSIA" and "inform[ed] the Court of its view that this lawsuit does not fall within the commercial activity exception to immunity." Opp. App. 2a. Relying on *Sachs* and *Nelson*, the United States argued that "the 'gravamen' of plaintiffs' lawsuit here is tortious activity that allegedly took place and injured plaintiffs outside of the United States. The conduct alleged to have caused plaintiffs' injuries—the construction and operation of the power plant—occurred in India. It is that conduct that forms the core of the lawsuit, and without it, there would be nothing for which to recover." *Id.* at 7a.

The United States also recognized that petitioners' proposed approach would contradict this Court's precedent. "It would be contrary to the Supreme Court's reasoning in *Sachs* and *Nelson* to permit plaintiffs to evade the FSIA's restrictions by recasting actions in India as a negligent failure to act or breach of contract in the United States." *Id.* at 10a. So would confining the "gravamen" analysis to "the actions of the named defendant, and not nonparties," as petitioners seek to do here. *Id.* Either of these approaches would provide

opportunities for "artful pleading"—a result this Court in *Sachs* and *Nelson* expressly rejected. *Id.* (citing *Sachs*, 577 U.S. at 37; *Nelson*, 507 U.S. at 363). "[A] plaintiff cannot gerrymander the 'gravamen' analysis by declining to name a party that directly caused the harm and instead naming only an entity that is steps removed." *Id.*

At the district court's request, the United States filed a second Statement of Interest after petitioners moved to amend their complaint. The United States reasserted that this action is "'based upon' CGPL's tortious conduct in India, not IFC's acts or omissions in the United States." Opp. App. at 15a . This reasoning was embraced by the district court in denying the motion to amend and the D.C. Circuit in deciding to affirm.

Disregarding the Statements of Interest that the United States filed in *this* case, petitioners highlight irrelevant passages from the United States' positions in *other* cases. See Pet. 13–14. In its brief opposing the plaintiffs' petition for a writ of certiorari in *De Csepel* v. *Republic of Hungary*, the United States argued that the Republic of Hungary's immunity from suit remained intact because petitioners' suit failed the demanding U.S. nexus test under the FSIA's expropriation exception. Br. of the United States as Amicus Curiae at 8, *De Csepel* v. *Republic of Hungary*, 139 S. Ct. 784 (2019). The language that petitioners excerpt, see Pet. 13, is unrelated to the commercial activity exception and its exacting "based upon" analysis.

The United States' amicus brief in *Fed. Ins. Co.* v. *Kingdom of Saudi Arabia*, a case involving the FSIA's noncommercial tort exception, is likewise irrelevant. See Pet. 14; Br. for the United States as Amicus Curiae

at 1–3, *Fed. Ins. Co.* v. *Kingdom of Saudi Arabia*, 557 U.S. 935 (2009) (arguing that the lower courts correctly concluded Saudi Arabia was immune from suit and that the petition for writ of certiorari should be denied). There, the United States argued that the noncommercial tort exception had not been satisfied and made no reference to the commercial activity exception. See *id.* at 16.

In its brief supporting denial of the petition for writs of certiorari in *YPF S.A.* v. *Petersen Energía Inversora S.A.U.*, the United States argued that the gravamen of Petersen's claims against the two defendants were different. See Pet. 14. But petitioners mischaracterize this argument as claiming that "the gravamen of claims against different defendants *must* be assessed according to each defendant's conduct." *Id.* (emphasis added). The United States made no such argument. And, in fact, the two gravamina correspond to the two alleged breaches of YPF's bylaws which each "actually injured" Petersen. Br. for the United States as Amicus Curiae at 5, 11, *YPF S.A.* v. *Petersen Energía Inversora S.A.U.*, 139 S. Ct. 2741 (2019).

Petitioners' attempt to make hay of the fact that the State Department did not "join" the United States' statements, see Pet. 14, is a red herring. Both of these statements were submitted on behalf of the United States under 28 U.S.C. § 517, which permits the Department of Justice "to attend to the interest of the United States in a suit pending in a court of the United States." See Opp. App. 2a, n.1; Notice by the United States Concerning Potential Participation at 2, *Jam* v. *IFC*, 481 F. Supp. 3d 1 (D.D.C. 2020) (No. 1:15-cv-612), ECF No. 66.

And the fact that "the Government did not participate at all in the court of appeals" does not diminish the importance of the Statements of Interest. Pet. 14. The United States did not need to weigh in again because it had twice already stated in this case that the application of *Sachs* and *Nelson* was straightforward. See also *Jam II*, 139 S. Ct. at 771 (quoting Tr. of Oral Arg. 25–26). If anything, the United States went further, arguing that even if petitioners' suit were based on IFC's alleged omissions with respect to enforcing CGPL's compliance with the loan agreement's environmental and social standards, the commercial activity exception still would not apply because the gravamen would not be sufficiently connected to the United States and because IFC's alleged conduct was noncommercial. See Opp. App. 17a.

There is no question regarding the United States' position on how the commercial activity exception is interpreted and its inapplicability to this action. The United States has been consistent in its view before the district court and this Court as well. See *Jam II*, 139 S. Ct. 759, Tr. of Oral Arg. 25–26 ("[T]his suit isn't going to be able to go forward regardless of the answer to the question presented, because in addition to . . . being connected in some way to commercial activity, there must be a much stronger nexus.").

II. THERE IS NO CIRCUIT SPLIT

Lower courts have applied *Nelson* and *Sachs* consistently, and there is nothing to clarify.[2] Petitioners

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[2] Since *Sachs*, federal courts have repeatedly applied this Court's precedent without any inconsistency. *See, e.g.*, *Atlantica Holdings* v. *Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 107–08 (2d. Cir. 2016); *France.com, Inc.* v. *French Republic*, 992 F.3d 248, 253 (4th Cir. 2021); *Rote* v. *Zel Custom Mfg.*

contend that "every other court of appeals" to address the question concluded that a claim against a sovereign defendant must necessarily be "based upon" the sovereign's own conduct. Pet. 10–11. But none of the cases petitioners cite stands for that proposition. Those cases and others make clear that courts may, and routinely do, consider more than the sovereign's conduct when assessing the gravamen of the suit.

For example, in *Petersen Energía Inversora S.A.U.* v. *Argentine Republic and YPF S.A.*, the Second Circuit states that the commercial activity exception requires the Court to "identify the act of the foreign sovereign State that serves as the basis for plaintiffs' claims." 895 F.3d 194, 204 (2d Cir. 2018) (quoting *Garb* v. *Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006)). But neither *Petersen Energía* nor *Garb* involves any third-party conduct; with no third-party conduct to consider, the Second Circuit's language does not support the conclusion that the "based upon" analysis exclusively considers the foreign state's conduct, as petitioners propose.

The remainder of the cases petitioners cite were decided before this Court's opinion in *Sachs*, which specifically clarified how the commercial activity exception should be applied. See *Sachs*, 577 at 34–36 (noting that one sentence in *Nelson* was overread by the court of appeals and reiterating the warning against attempts by "plaintiffs to evade the [FSIA]'s restrictions through artful pleading."). For this reason, *Sachs* controls this case, the district court and court of appeals

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LLC, 816 F.3d 383, 389 (6th Cir. 2016); *Packsys, S.A. de C.V.* v. *Exportadora de Sal, S.A. de C.V.*, 899 F.3d 1081, 1092 n.10 (9th Cir. 2018); *Devengoechea* v. *Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1222 (11th Cir. 2018).

correctly followed it, and any alleged circuit split is an illusion.

Far from undermining the D.C. Circuit's decision, petitioners' earlier cases are consistent with it. For example, *Anglo-Iberia Underwriting Mgmt. Co.* v. *P.T. Jamsostek (PERSERO)* cites *Garb* for the proposition that a court's inquiry into whether the sovereign engaged in activity of a commercial nature begins by "examining the act of the foreign sovereign that serves as the basis for the plaintiff's claim." 600 F.3d 171, 177 (2d Cir. 2010) (citing *Garb*, 440 F.3d at 586). Thus, the *Jamsostek* court was not engaged in an analysis of what conduct served as the gravamen of the suit, but rather, whether any of the sovereign's complained-of conduct was commercial in nature. See *id.* at 176. In any event, the Second Circuit held that there was an insufficient nexus between the alleged negligent supervision of the employee who engaged in the alleged fraudulent conduct and any activity by the sovereign. See *id.* at 179 ("[W]e cannot conclude that Jamsostek's alleged negligent supervision of [the responsible third-party actor] and his colleagues was 'in connection with' its provision of basic health insurance in Indonesia" because the record "demonstrates nothing more than the barest connection between Anglo-Iberia's alleged injuries" by the third party and the sovereign's alleged conduct).

Similarly, the pre-*Sachs* and pre-*Nelson* Fifth Circuit cases that petitioners cite do not help them. In *De Sanchez* v. *Banco Cent. de Nicaragua*, the Fifth Circuit delineated the conduct that actually injured the plaintiff from the conduct that was merely a link in the causal chain, noting that "[t]his requires focusing on the acts of the named defendant, not on other acts that may have had a causal connection with the suit." 770 F.2d 1385, 1391 (5th Cir. 1985). In so doing, the Fifth

Circuit zeroed in on the conduct that actually injured the plaintiff.

Likewise, *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), "simply stands for the uncontroversial claim that, to identify what conduct a suit is 'based upon,' courts must look to 'the act complained of.'" Pet. App. 54a. The Fifth Circuit did not address the issue of whether a third party's conduct could be the gravamen of an action against a sovereign.

In *Glob. Tech., Inc.* v. *Yubei (XinXiang) Power Steering Sys. Co.*, the Sixth Circuit focused on "which—if any—of the complained-of actions are legally attributable to [the sovereign]" because it was conducting an agency law analysis (*i.e.*, were the actions of the subsidiary attributable to the parent). 807 F.3d 806, 814 (6th Cir. 2015). The other Sixth Circuit case cited by petitioners, *Riedel* v. *Bancam, S.A.*, involves facts similar to those in *Callejo* and does not involve third-party conduct. 792 F.2d 587 (6th Cir. 1986). The Sixth Circuit analyzes *Callejo* merely to determine that the sale of certificates of deposit are commercial. The court does not engage in a gravamen analysis at all.

Lastly, *Southway* v. *Cent. Bank of Nigeria* does not support petitioners' claim of a circuit split because the court did not determine the conduct upon which the action was based. 198 F.3d 1210 (10th Cir. 1999). Rather, the court considered only whether the conduct that the parties agreed was the gravamen was "commercial" under the FSIA.

Petitioners have not been able to identify a single case that is inconsistent with the D.C. Circuit's approach. For good reason: the D.C. Circuit decision is a textbook application of *Sachs*.

III. PETITIONERS' CASE COULD HAVE BEEN DISMISSED ON ALTERNATIVE GROUNDS

Even if petitioners' suit were "based upon" IFC's conduct—which it was not—the case still would have been dismissed because IFC did not engage in commercial activity. See Pet. 23. IFC's monitoring and enforcement activities are not the "type of actions by which a private party engages in . . . commerce," *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 614 (1992) (cleaned up), and therefore do not fall within the commercial activity exception. See also Opp. App. 23.

IFC's monitoring and enforcement of its Environmental and Social Sustainability standards is not conduct of a commercial nature. Much like national regulations enacted by sovereigns, these standards were adopted by IFC's member states through IFC's Board of Directors, modeled on international and national environmental and social regulations, designed to regulate and limit social and environmental impacts from regulated entities, and compulsory for the IFC investments to which it applies.

The United States agreed with this analysis, arguing, "[i]n making any internal decisions about how to monitor the environmental and social aspects of an ongoing project, IFC would not be acting in the manner of a private player in the market, but rather would be acting in a public, quasi-regulatory capacity." Opp. App. 24a. Likewise, as this Court noted in *Jam II*, not all of "the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA." See *Jam II*, 139 S. Ct. at 772.

IV. THERE IS NO REASON TO REVISIT THE D.C. CIRCUIT'S DECISION THAT IFC DID NOT WAIVE ITS IMMUNITY

Faced with the inevitable conclusion that IFC is immune from this suit under the IOIA and FSIA, petitioners are left to argue—once again—that IFC waived that immunity, even though five courts in this case, including this one, have already declined to make such a finding. Just as it did in 2018, this Court should decline to grant certiorari on this issue because the district court and D.C. Circuit conclusions are sound, consistent with precedent, and undisturbed by any intervening change in the law.

Petitioners argue that review is warranted because the D.C. Circuit's waiver determination "makes no sense after this Court's decision in *Jam*," Pet. 32, and because the D.C. Circuit's settled precedent on treaty interpretation must be reexamined.[3] Petitioners are wrong on both counts.

In its 2017 opinion, the D.C. Circuit, relying on forty-year-old precedent, held that IFC had not waived its immunity under its Articles of Agreement. See Pet.

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[3] Petitioners incorrectly describe the record on the alleged waiver. For example, petitioners argue that the import of the corresponding-benefits test "is too important to be left to D.C. Circuit precedent that even that court concedes 'is a bit strange,'" and that "lacks a sound legal foundation and is awkward to apply." Pet. 30 (quoting Pet. 74a, Pillard, J., concurring) (internal citation omitted). Judge Pillard's concurrence is not the D.C. Circuit's opinion and cannot be ascribed to "that court." In fact, "that court" agreed with IFC that the corresponding-benefits test remains good law. *See* Pet. App. 11a ("Nor has IFC waived its immunity to appellants' lawsuit. This issue was actually decided by *Jam I*. Appellants' petition for certiorari to the Supreme Court on that issue was not granted. Nor did the reasoning of *Jam II* undermine this court's conclusion on the waiver issue." (citations omitted)).

App. 73a–77a (applying *Mendaro*). Petitioners sought this Court's review on that holding, but the Court declined to reconsider the D.C. Circuit's conclusion on this point. See Petition for a Writ of Certiorari at i, 21, 24–27, *Jam* v. *IFC*, No. 17-1011 (Jan. 19, 2018), granted in part by 138 S. Ct. 2026 (2018). In the 2021 decision, the D.C. Circuit appropriately held that "the reasoning of *Jam II* [did not] undermine this court's conclusion on the waiver issue." Pet. App. 11a (noting its 2017 holding on waiver remained "law of the circuit."). This appeal presents nothing new that would warrant this Court's revisiting the D.C. Circuit's 2017 determination now.

Contrary to petitioners' claims, this Court's decision in *Jam* casts no doubt over that settled circuit precedent. Indeed, reading the IOIA to be coterminous with the FSIA, as this Court instructed in *Jam*, has no bearing on how IFC's Articles of Agreement should be construed. The interpretation of the Articles was not before this Court in 2019, and there is no doubt that the Articles are a separate (and second) source of immunity, which this Court's opinion in *Jam* acknowledges. See *Jam*, 139 S. Ct. at 771 ("[T]he organization's charter can always specify a different level of immunity.").

Moreover, there is no need for this Court to intervene because the D.C. Circuit's analysis was sound, and its 1983 precedent, reaffirmed many times, was correctly decided. *Mendaro's* interpretation is consistent with the "functional necessity" principles that underpin international-organization immunity. See Memorandum from Ansel F. Luxford, Chief Legal Adviser, U.S. Treasury Department, to Mr. Smith (July 17, 1946) (because these institutions "must market securities

directly with the public, . . . holders thereof could establish their rights in the courts in case of a dispute.").[4]

Seeking to overcome this sound reading, petitioners ask this Court to do what a clear-eyed D.C. Circuit has repeatedly refused to do for decades: read a narrow provision of IFC's Articles of Agreement "in a vacuum" without reference to the functions of IFC and the purposes of its immunities. *Mendaro*, 717 F.2d at 615. Although the analysis of a treaty *begins* with the plain language of the treaty, it does not end there. It is pure sophistry to assert that the plain language of a single provision of a treaty, read in isolation, is the end-all and be-all of the analysis. See Pet. 32 (citing *GE Energy Power Conversion Fr. SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020)).

On the contrary, as this Court has recognized, because "[a] treaty is in its nature a contract between . . . nations, not a legislative act," "[i]t is our responsibility to read the treaty in a manner 'consistent with the shared expectations of the contracting parties." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 12 (2014) (cleaned up). The D.C. Circuit in 2017, relying on *Mendaro*, did exactly this when it considered the scope of IFC's waiver of immunity under its Articles of Agreement. See Pet. App. 73a–77a; *Mendaro*, 717 F.2d at 617. Thus, there is no basis to revisit the D.C. Circuit's corresponding-benefits test, which follows these well-accepted principles of treaty interpretation.

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[4] *See also* Edward Chukwuemeke Okeke, *Annex VI—International Bank for Reconstruction and Development (IBRD)*, *in* The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies 762 (August Reinisch & Peter Bachmayer eds., 2016).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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March 16, 2022

APPENDIX

APPENDIX A
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUDHA ISMAIL JAM, *et al.*, Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	)	Civil Action No. 1:15-CV-612-JDB

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

This action involves farmers, fisherman, a village, and a trade union, all located in India, who have brought suit against the International Finance Corporation ("IFC"), a public international organization, seeking compensation for alleged harms suffered in India. The United States previously participated in this case in the Supreme Court, where it set forth its views on the proper interpretation of the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288 *et seq*. The Supreme Court held that, under the IOIA, the IFC enjoys the same immunity from suit and judicial process as is available to foreign sovereigns today under the Foreign Sovereign Immunities Act ("FSIA" or "the Act"), 28 U.S.C. § 1602 *et seq*. *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019).

Now before this Court once again, plaintiffs assert that IFC does not enjoy immunity because its alleged conduct falls within the FSIA's commercial activity exception. *See* 28 U.S.C. § 1605(a)(2). The United States has a substantial interest in the proper interpretation of the FSIA, as litigation against foreign states and international organizations in U.S. courts can have implications for the United States' foreign relations and can affect the reciprocal treatment of the U.S. Government in the courts of other nations. Moreover, the United States is a member country of the IFC, and is its largest shareholder.

The United States thus respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] to inform the Court of its view that this lawsuit does not fall within the commercial activity exception to immunity. As explained more fully below, this action is centered on harm suffered by plaintiffs in a foreign country and caused by a nonparty in that foreign country. The action is not "based upon" any commercial activity or conduct in connection with commercial activity in the United States. Indeed, 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. Accordingly, the Court should hold that IFC is immune from this suit because its alleged conduct does not come within the commercial activity exception.

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[1] That statute authorizes the Attorney General of the United States to send any officer of the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

BACKGROUND

The plaintiffs in this action are farmers, fishermen, a village, and a trade union, all located in India. Compl. ¶¶ 13–15, ECF No. 1. In April 2015, they brought this lawsuit against IFC, raising claims related to the construction and operation of a power plant in Gujarat, India, known as the Tata Mundra Ultra Mega Power Plant (the "Tata Mundra project"). *Id.* ¶ 1. According to the complaint, IFC helped finance construction of the plant, in 2008 lending $450 million to Coastal Gujarat Power Limited ("CGPL"), the Indian company that built and now operates the plant. *Id.* ¶¶ 2, 56. IFC has developed certain performance standards to manage environmental and social risks from its investments, and these standards allegedly were incorporated into IFC's loan agreement for the Tata Mundra project. *Id.* ¶ 128.

The plaintiffs allege that, despite these standards and IFC's loan agreement, the Tata Mundra project has had negative social and environmental impacts on their community. *Id.* ¶¶ 74–115. They further allege that they filed a complaint with IFC's internal compliance ombudsman, and that the ombudsman concluded IFC had failed adequately to consider the potential environmental and social risks that might result from the project. *Id.* ¶¶ 141–156. According to the plaintiffs, IFC is responsible for these harms because IFC financed and enabled the construction of the plant and failed to prevent it from causing harm, or to take corrective action after the harm occurred. *Id.* ¶¶ 176–92, 199, 300. Plaintiffs contend that IFC's actions and inactions gives rise to claims for negligence, negligent supervision, public and private nuisance, trespass, and breach of contract. *Id.* ¶¶ 294–332.

In March of 2016, this Court dismissed plaintiffs' complaint, concluding that, pursuant to the IOIA, IFC enjoyed "virtually absolute immunity" from suit and had not waived its immunity. *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 108, 112 (D.D.C. 2016) (quoting *Atkinson v. Inter–Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998)). The D.C. Circuit affirmed, similarly concluding that IFC enjoyed "virtually absolute immunity" from suit and had not waived its immunity. *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 704–05 (D.C. Cir. 2017) (quoting *Atkinson*, 156 F.3d at 1340).

The Supreme Court reversed, concluding that the IOIA provides international organizations that have been designated by Executive Order, such as IFC, with the same scope of immunity as is currently enjoyed by foreign sovereigns under the FSIA, including the exceptions to immunity outlined in that Act. *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). The United States participated in the Supreme Court as Amicus Curiae, and, in addition to setting forth its views on the IOIA, "stated that it has 'serious doubts' whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the 'based upon' requirement" of the FSIA's commercial activity exception. *Id.* at 772.

After the Supreme Court issued its decision, the D.C. Circuit vacated its prior judgment, reversed this Court's prior judgment, and remanded to this Court for proceedings consistent with the Supreme Court's opinion. *Jam v. Int'l Fin. Corp.*, 760 F. App'x 11 (D.C. Cir. 2019).

IFC then filed a renewed motion to dismiss, arguing, among other things, that IFC was immune from suit under the standards set forth in the FSIA. *See* Mem. in Supp. of Def.'s Renewed Mot. to Dismiss 9, ECF No. 40-1. Plaintiffs responded that IFC's alleged conduct

related to the Tata Mundra project falls within the commercial activity exception to the FSIA. Pls.' Mem. in Opp. to Def.'s Renewed Mot. to Dismiss ("Pls.' Opp.") 11, ECF No. 45.

ARGUMENT

I. IFC'S ALLEGED CONDUCT DOES NOT COME WITHIN THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION.

The FSIA governs the circumstances under which international organizations that have been designated by Executive Order are immune from suit in courts in the United States. Jam, 139 S. Ct. at 772. The Act establishes that foreign states shall be immune from suit in U.S. courts unless one of the Act's express exceptions to immunity applies. 28 U.S.C. § 1604. One of these exceptions, known as the commercial activity exception, provides that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . 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.

28 U.S.C. § 1605(a)(2). By requiring that the lawsuit be "based upon" acts in the United States or causing a direct effect in the United States, the commercial activity exception permits suits against foreign sovereigns only where a sufficient nexus exists

between the United States and the allegations giving rise to the action. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976) (referring to § 1605(a)(2) as encompassing "[c]ommercial activities having a nexus with the United States"). Here, plaintiffs rely on the first two prongs of the exception, asserting that their action is "based upon" IFC's commercial activity in the United States and conduct in the United States in connection with commercial activity outside of the United States. Compl. ¶ 195. But as set forth below, their arguments are squarely foreclosed by Supreme Court precedent.

In *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), the Supreme Court explained how to determine whether the action is "based upon" acts in the United States. According to the Court, for purposes of the exception, "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id.* at 396. The plaintiff in Sachs, a U.S. citizen, had purchased a railway pass in the United States, over the Internet, and then traveled to Austria, where she was injured when she slipped and fell while boarding an Austrian state-owned railway. *Id.* at 393. The plaintiff argued that her causes of action were "based upon" her purchase of the railway pass in the United States because the sale of the pass in the United States was an element of each of her claims. But the Court rejected that argument, and concluded that "the conduct constituting the gravamen" of the complaint "plainly occurred abroad," thus failing § 1605(a)(2)'s territorial-nexus requirement. *Id.* at 396. The Court stressed that all of the plaintiff's claims turned "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.*

The Court's reasoning in *Sachs* relied heavily upon its earlier decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). The plaintiffs in *Nelson*, a married couple, sued Saudi Arabia and its state-owned hospital for torts against the husband, allegedly in retaliation for his reporting of hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants. *Id*. at 352–54. The Court concluded that, although the husband's recruitment and hiring in the United States to work at the hospital "led to the conduct that eventually injured" him, those actions were "not the basis" for the lawsuit. *Id*. at 358. Rather, it was the husband's jailing and alleged torture in Saudi Arabia that formed the gravamen of the complaint. *Id*. The Court emphasized that "[e]ven taking each of the [plaintiffs'] allegations about [the] recruitment and employment as true, those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Id*. Further, although there were 16 causes of actions at issue in Nelson, the Court "did not undertake [] an exhaustive claim-by-claim, element-by-element analysis," but instead "zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them." *Sachs*, 136 S. Ct. at 396.

Like in *Sachs* and *Nelson*, the "gravamen" of plaintiffs' lawsuit here is tortious activity that allegedly took place and injured plaintiffs outside of the United States. The conduct alleged to have caused plaintiffs' injuries—the construction and operation of the power plant—occurred in India. It is that conduct that forms the core of the lawsuit, and without it, there would be nothing for which to recover. The complaint alleges that "numerous critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions," were made in the United

States, and that IFC's funding for the project likewise was disbursed in the United States. Compl. ¶¶ 197–98. But even taking those allegations as true, "those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Nelson*, 507 U.S. at 358.

Moreover, although IFC's decision to finance the project and its disbursement of funds is a link in the chain of events that "led" to the harm described in the complaint, the "gravamen" of the lawsuit still is conduct in India. As the Supreme Court explained in *Sachs*, "the essentials of a personal injury narrative will be found at the point of contact." 136 S. Ct. at 397 (citation omitted). Here, the construction and operation of the power plant—not IFC's financing—are what "actually injured" the plaintiffs. *Id*. at 396. Like the sale of the train ticket in Sachs or the recruitment and hiring in *Nelson*, IFC's loan to the Indian company CGPL is an antecedent step that alone cannot entitle the plaintiffs to relief. *See Nelson*, 507 U.S. at 358 (explaining that the "torts, and not the arguably commercial activities that preceded their commission, form the basis for the [plaintiffs'] suit").

Plaintiffs attempt to escape the geographical thrust of this action by alleging that "IFC's responses to allegations of harm caused by the Project . . . were decided, directed and/or approved from the headquarters in Washington, D.C." Compl. ¶ 199. They assert that IFC's internal compliance ombudsman identified many of the environmental and social harms asserted by the plaintiffs, and that IFC in Washington thereafter failed to remedy the injuries. *Id*. ¶ 153–56, 299, 300. But this theory fares no better. The "core" of plaintiffs' suit, *Sachs*, 136 S. Ct. at 396, remains CGPL's construction and operation of the plant—the conduct giving rise to plaintiffs' injuries. That conduct serves as the "foundation for . . .

[plaintiffs'] claims and, therefore, also the gravamen of [their] suit." *Nn aka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 28 (D.D.C. 2017) (Bates, J.). Even if IFC's response to the harms could have mitigated them in some fashion, it is still the events in India that form the "essentials" of the lawsuit, and without which plaintiffs would suffer no injury.[2] *Sachs*, 136 S. Ct. at 397.

It makes no difference that the plaintiffs plead claims for negligence and negligent supervision, which purport to be based on IFC's alleged failure to take steps in the United States to prevent or mitigate the harm in India. Compl. ¶¶ 294–306. The Supreme Court rejected similar attempts at "artful pleading" in *Sachs* and *Nelson*. *Sachs*, 136 S. Ct. at 396 (rejecting argument based on strict liability claim for failure to warn, because "however Sachs frames her suit, the incident in [Austria] remains at its foundation"); *Nelson*, 507 U.S. at 363 (similarly rejecting argument based on failure to warn claim as "merely a semantic ploy" and a "feint of language"). The same holds true for the plaintiffs' third-party beneficiary claim for breach of contract. Compl. ¶¶ 325–332. Indeed, the plaintiff in *Sachs* brought claims for breach of implied warranties of merchantability and fitness, which sounded in contract, but the Court nevertheless deemed the gravamen of the suit to be the "wrongful conduct and dangerous conditions in Austria." *Sachs*, 136 S. Ct. at 396; cf. *Nn aka*, 238 F. Supp. 3d. at 29 ("Although Nnaka's complaint includes a claim for

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[2] Moreover, even if IFC could have taken steps to mitigate the plaintiffs' alleged injuries in India, IFC's failure to take such action is not "a commercial activity carried on in the United States" by IFC, nor is it an act "performed in the United States in connection with a commercial activity" of IFC outside the country. 28 U.S.C. § 1605(a)(2).

breach of contract, it sounds substantially—maybe even primarily—in tort."). It would be contrary to the Supreme Court's reasoning in *Sachs* and *Nelson* to permit plaintiffs to evade the FSIA's restrictions by recasting actions in India as a negligent failure to act or breach of contract in the United States.

Nor does it matter that plaintiffs have decided to sue only IFC in this action. Plaintiffs insist that the "gravamen" analysis must focus on the actions of the named defendant, and not nonparties (such as CGPL). Pls.' Opp. 13. But the fact that plaintiffs named only IFC, which did not itself build or operate the plant that allegedly harmed the plaintiffs, cannot shift the gravamen of the lawsuit to IFC's actions in Washington. The lawsuit still is "based upon" conduct which caused harm in India, regardless of whether the plaintiffs choose to sue other defendants. More generally, a plaintiff cannot gerrymander the "gravamen" analysis by declining to name a party that directly caused the harm and instead naming only an entity that is steps removed. Such an approach would make little sense, particularly given the purpose of the "based upon" requirement to allow suits against foreign sovereigns (or international organizations) only where a sufficient nexus exists between the United States and the allegations at the center of the action. *See Nelson*, 507 U.S. at 357 (reading the phrase "based upon" as demanding "something more than a mere connection with, or relation to").

At bottom, the allegations in this case turn on and center around allegedly tortious conduct by a private party that took place in another country and resulted in injuries abroad. IFC's actions in the United States are not the basis or core of plaintiffs' lawsuit. Accordingly, the allegations of this case fall outside the bounds of the commercial activity exception.

CONCLUSION

The Court should hold that IFC is immune from this suit because its alleged conduct does not come within the FSIA's commercial activity exception.

Dated: September 13, 2019

Respectfully submitted,

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUDHA ISMAIL JAM, *et al.*, Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	)))))))	Civil Action No. 1:15-CV-612-JDB

SECOND STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

On September 13, 2019, the United States filed a Statement of Interest in this case, setting forth its view that the plaintiffs' allegations do not satisfy the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"). ECF No. 47 at 2. The Government explained that the "gravamen" or "core" of the lawsuit was non-party Coastal Gujarat Power Limited's ("CGPL") allegedly tortious construction and operation of the power plant in India, and that the action was not "based upon" any commercial activity or conduct in connection with commercial activity in the United States. *Id.* at 2–3.

The Court thereafter dismissed the complaint for lack of jurisdiction. *Jam v. Int'l Fin. Corp.*, 2020 WL 759199 (D.D.C. Feb. 14, 2020). Declining to adopt in full the position of the United States or any of the parties, the Court concluded that the "gravamen" of the action was IFC's alleged "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." *Id.* at *5. Put differently, the Court explained, the lawsuit was based upon "IFC's [] failure to supervise and monitor construction and operation of the Tata Mundra Plant project and ensure its compliance with numerous environmental and social sustainability requirements in the loan agreement." *Id.* The Court further held, based on the allegations in the complaint, that this failure was carried on in India, not the United States. *Id.* at *11. The commercial activity exception thus had not been satisfied. *Id.*

In response, the plaintiffs moved for leave to amend their complaint. ECF No. 63. The Court then issued an order that the United States, as an interested party, may file a memorandum providing its position

as to "whether, in light of this Court's February 14, 2020 memorandum opinion and order and plaintiffs' proposed amended complaint, IFC would still enjoy immunity under the FSIA if the Court granted plaintiffs leave to amend their complaint."

As explained more fully below, the United States believes that IFC would still enjoy immunity under the FSIA if leave to amend were granted. As an initial matter, the Government respectfully maintains its view, set forth in its first Statement of Interest, that this action would be "based upon" CGPL's tortious conduct in India, not IFC's acts or omissions in the United States. The plaintiffs' additional allegations would not change that analysis.

But accepting the Court's conclusion that the original complaint is "based upon" IFC's failure to ensure CGPL's compliance with sustainability standards and prevent or address environmental and social harms in India, in the Government's view, the proposed amendment still would not satisfy the FSIA's commercial activity exception, for two independent reasons. First, the plaintiffs' additional allegations do not shift the "gravamen" of the action to the United States. The Court has held that this case is "based upon" IFC's alleged failures of oversight in India, and the amended complaint does not transform this case into one based on actions carried on in the United States. Second, the gravamen identified by the Court does not amount to "commercial activity." To the contrary, IFC's failure to ensure compliance with its own sustainability standards and prevent or mitigate environmental and social harms is public, non-commercial conduct that does not satisfy the commercial activity exception. For these reasons, even

if leave to amend were granted, this Court still would lack jurisdiction over IFC in this case.

ARGUMENT

I. I. IF LEAVE TO AMEND WERE GRANTED, THE "GRAVAMEN" OF THIS ACTION WOULD STILL BE CGPL'S CONSTRUCTION AND OPERATION OF THE POWER PLANT IN INDIA.

The Government continues to believe that the "gravamen" of this action is CGPL's construction and operation of the power plant in India. That conclusion follows from the Supreme Court's guidance in *Sachs* and *Nelson*, which instructed that the "gravamen" inquiry should focus on what "actually injured" the plaintiff—here, CGPL's alleged deficient construction and operation of the power plant. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).[1]

The plaintiffs' additional allegations do not lead to a different result. Those allegations primarily relate to IFC's organizational structure, internal processes, and knowledge about potential harms from the project. *See* Proposed Am. Compl. ¶¶ 197–269. They 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. Thus, even if the Court were to grant plaintiffs leave to amend, the lawsuit still would

[1] The Government recognizes that this Court invited the United States to provide its position "in light of this Court's February 14, 2020 memorandum opinion and order," Minute Order of May 15, 2020, and that the discussion in Section I necessarily departs from that opinion and order. Nonetheless, the Government briefly reiterates its prior position to ensure a clear and complete record.

be based upon CGPL's actions in India. The FSIA's commercial activity exception still would not apply.

II. EVEN ACCEPTING THE COURT'S ANALYSIS, PLAINTIFFS' ADDITIONAL ALLEGATIONS DO NOT SATISFY THE COMMERCIAL ACTIVITY EXCEPTION.

The Court previously held that this action is based upon IFC's "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 its "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." *Jam*, 2020 WL 759199, at *8. Accepting this articulation of the gravamen, the proposed amended complaint does not satisfy the commercial activity exception for two independent reasons: (1) the additional allegations do not shift the gravamen from India to the United States; and (2) IFC's failure to prevent or mitigate environmental and social harms and ensure compliance with sustainability standards is not "commercial activity" under the FSIA.

a. The Plaintiffs' Additional Allegations Do Not Shift The Location Of The "Gravamen" From India To The United States.

The allegations added to the amended complaint principally fall into two categories. First, the plaintiffs submit additional allegations that IFC knew or should have known at the time it approved funding for the project that its sustainability measures were insufficient to address the project's risks. *See* Proposed Am. Compl. ¶¶ 163, 216–25, ECF No. 63-1. Second, the plaintiffs provide additional claims that

IFC management in charge of monitoring the project's environmental and social performance and approving loan disbursements were located in Washington, D.C. *Id.* ¶¶ 198–215, 226–69. Neither of these categories is sufficient to shift the gravamen of the action from India to the United States.

At the outset, the first category of allegations does not relate to the gravamen at all. The Court has already ruled that this lawsuit is not "based upon" IFC's 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." *Jam*, 2020 WL 759199 at *9 (alteration in original) (quoting Compl. ¶ 3, ECF No. 1). Accordingly, the added allegations about what IFC knew or should have known when it approved the loan are irrelevant to the location of the gravamen. The fact that in advance of the loan IFC might have lacked a "meaningful" Environmental and Social Action Plan, Proposed Am. Comp. ¶ 219, or have performed only "poor" due diligence, *id.* ¶ 220, simply does not concern whether the identified gravamen—IFC's failure to prevent or mitigate harm "*after approving the loan*," *Jam*, 2020 WL 759199 at *9 (emphasis added)—had "substantial contact" with the United States, 28 U.S.C. § 1603(e).

This Court previously reached the same conclusion as to similar allegations. Addressing claims that "critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions, were made in Washington, D.C.," and that IFC's disbursement of funds "was made in U.S. dollars and came from funds held within the United States," the Court concluded that the allegations "d[id] not pertain to the gravamen of plaintiffs' suit, as identified by this

Court." *Jam*, 2020 WL 759199 at *10. Instead, "they relate[d] only to the loan transaction." *Id.*

Moreover, this Court has recognized that such allegations are "in direct tension with the thrust of plaintiffs' complaint." *Id.* at *9. The original complaint was based on the claim that "IFC had the power to protect plaintiffs by enforcing provisions in the loan agreement but failed to do so." *Id.* Yet parts of the amended complaint now contend that IFC lacked such power and should not have entered the loan in the first place. *See* Proposed Am. Compl. ¶¶ 163, 216–25. The Court has already ruled that the action is "based upon" IFC's failure to prevent or mitigate harm after the loan was approved, and the plaintiffs' handful of additional allegations concerning the initial lending decision cannot change that conclusion.

The second category of added allegations similarly does not shift the location of the gravamen from India to the United States. These allegations consist of claims that ultimate authority for IFC's social and environmental oversight of the project rested with officials in the United States. The plaintiffs allege, for example, that managers "responsible for approving key project decisions about environmental and social (E&S) performance throughout the project" were "located at the IFC's headquarters in Washington, D.C." Proposed Am. Compl. ¶¶ 200–01. They allege that "[d]eterminations about whether any of the environmental and social (or other) conditions of the Loan Agreement have been breached, and whether the IFC should enforce the E&S commitments in the Loan Agreement, were made by the IFC's legal department, which is based in Washington, D.C." *Id.* ¶ 236. They claim that "the decision whether to disburse each tranche of the loan was made by the IFC in

Washington, D.C." *Id.* ¶ 235. And they allege that all communications regarding the project were required to be sent to IFC's Washington, D.C. headquarters (in addition to being sent to IFC's New Delhi office). *Id.* ¶ 229.

But even taking these additional allegations into account, the lawsuit is still centered in India. As the Court explained, this action is "based upon" IFC's "failure to ensure the plant project was designed, constructed, and operated with due care." *Jam*, 2020 WL 759199 at *8. That gravamen "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." *Id.* (emphasis added). In other words, this lawsuit is not "based upon" which IFC officials oversaw the project or where they were located, disbursed IFC funds, or received communications. Under the Court's "holistic approach," *id.*, where IFC made internal decisions and administered the loan is not determinative; instead, the inquiry focuses on the particular basis for the lawsuit—its gravamen. The Court has already explained that the "plaintiffs' complaint against IFC is—at least in large part—based upon [] conduct (whether acts or omissions) *in India*." *Id.* at *7 (emphasis added). The added allegations do not change that conclusion.

The Plaintiffs are alleging a failure to act and asserting that such failure should be attributed to decisions at IFC's headquarters. But even if IFC management in the United States possessed the necessary authority to require changes to the plant's design, construction, or operation, any new design or method of operation proposed by IFC still would have had to be accepted and executed by CGPL in India.

Similarly, even if IFC management could have withheld loan disbursements in the United States in response to a failure to meet conditions in the loan agreement, the intended effect of that action would be merely to incentivize behavior in India. What the plaintiffs still have not alleged is anything that IFC did (or did not do) in the United States that directly led to injuries in India. *Contra id.* at *6 n.3 (suggesting that "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 negligently mis-adjusted the cooling levels, causing a fire at the plant," an action by injured plant workers might be "based upon" IFC's U.S. conduct). Instead, the plaintiffs' additional allegations against IFC merely elaborate on the organizational structure and internal processes behind failures occurring in India. They do not demonstrate that the amended complaint would result in this lawsuit being based on conduct in the United States.

The conclusion that the gravamen identified by the Court is still situated in India is reinforced by the fact that, even with the plaintiffs' new allegations, their tort claims still focus primarily in India. A tort claim typically is not complete until the plaintiff suffers an injury. *Nnaka v. Fed. Rep. of Nigeria*, 238 F. Supp. 3d 17, 29 (D.D.C. 2017). Thus, the "locus" of a tort—the place where the last event necessary to make an actor liable takes place—usually will be "the place where the injury occurred."[2] *Id.* (citations omitted). Here, even

[2] Although the plaintiffs do not rely on the commercial activity exception's third clause, in that related context, courts routinely look to the locus of the tort to determine where a "direct effect" is felt. *See, e.g., Luxexpress 2016 v. Ukraine*, 2020 WL 1308357, at *7 (D.D.C. 2020).

taking into account the plaintiffs' additional allegations, the locus of their tort claims is Gujarat, India—where they were injured by the power plant. Moreover, to the extent IFC owed any duty not to allow the plant to harm the plaintiffs, that duty also existed in India—the location where reasonably foreseeable harms might occur. *See Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 998 (D.C. Cir. 1980) (explaining that tort duties traditionally are owed to those "who might foreseeably be injured by defendant's conduct"). If the plaintiffs are correct that IFC breached their duty to the plaintiffs, IFC did so only by "fail[ing] to take steps to mitigate the foreseeable risks in India." *Jam*, 2020 WL 759199 at *9. And, to the extent IFC proximately "caused" the plaintiffs injuries, they undisputedly did so in India. Thus, notwithstanding assertions concerning IFC's organizational structure, internal processes, and knowledge, the plaintiffs' claims against IFC are still chiefly focused in India, not the United States.[3] Similar to the Supreme Court's assessment in *Sachs*, however the plaintiffs frame their suit, "the incident [abroad] remains at its foundation." 136 S. Ct. at 396.

In short, per the Court's analysis, this action is based upon a failure to prevent harm in India, and the amended complaint does not shift the location of the gravamen to the United States.

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[3] Even if the plaintiffs could persuasively argue that one of the elements of their tort claims took place in the United States, that would not compel a different result. As this Court has explained, "[t]he fact than an activity . . . would establish a single element of a claim is insufficient to demonstrate that the suit is based upon that activity." *Jam*, 2020 WL 759199 at *5 (citations omitted).

b. IFC's Alleged Failure To Ensure Compliance With Its Standards And Prevent Or Mitigate Harms In India Is Not "Commercial Activity" Under The FSIA.

As set forth below, the commercial activity exception has not been satisfied for a second, independent reason: any failure by IFC to ensure adherence to its own sustainability standards and prevent social and environmental harms is not a "commercial activity" under the FSIA.

The FSIA codified the "restrictive theory" of foreign sovereign immunity, under which a foreign state is immune for its sovereign or public acts (*jure imperii*), but not its private or commercial acts (*jure gestionis*). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612–23 (1992). In drawing this distinction, the FSIA explains that "[t]he 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." 28 U.S.C. § 1603(d). Accordingly, the question whether particular activity is "commercial" turns not on "whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but on "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614 (citations omitted). "Put differently, a foreign state engages in commercial activity . . . only where it acts 'in the manner of a private player within' the market." *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

Courts have not yet had occasion to address this distinction with respect to international organizations like IFC. However, should the Court reach the issue here, it need not resolve broader questions such as whether IFC's lending activities writ large are "commercial," or even whether the particular loan to CGPL in this case was a "commercial activity." Instead, the Court need only determine whether the particular gravamen it already has identified—IFC's alleged failure to prevent environmental and social harm and ensure compliance with its own sustainability standards—is a "commercial activity" under the FSIA.

In the Government's view, it is not. In making any internal decisions about how to monitor the environmental and social aspects of an ongoing project, IFC would not be acting in the manner of a private player in the market, but rather would be acting in a public, quasi-regulatory capacity. Although IFC does not hold the same regulatory responsibilities as a sovereign state, its discretionary implementation (or non-implementation) of its environmental and social policies is an act more akin to that of a sovereign in which private market participants do not ordinarily engage. After all, IFC's environmental and social standards were created with active and direct input from member governments and by decision of the IFC's member states, acting through the IFC Board of Directors. Consequently, governments view these standards as extensions of the regulatory policies of those member states. Here, IFC's enforcement or non-enforcement of its sustainability standards with respect to the Tata Mundra project is qualitatively different than the types of activities that commonly have been understood to be "commercial" under the FSIA, such as issuing common debt instruments, *see*

Weltover, 504 U.S. at 617, or contracting for services, *see Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 580 (7th Cir. 1989). Instead, IFC's discretionary administration of its own environmental and social policies is more akin to the regulatory acts of foreign sovereigns that commonly are held to be non-commercial. *See, e.g., Junguist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1030 (D.C. Cir. 1997) (finding that administration of a government program to provide health and welfare benefits was not "commercial activity" under the FSIA).

This is especially the case because the policies at issue here relate to the regulation of the environment and natural resources. Courts routinely recognize that actions in this area are distinctly sovereign in nature. *See, e.g., Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kazakhstan*, 406 F. Supp. 3d 1, 15 (D.D.C. 2019) (holding that breaches of agreements "pertain[ing] to the exploration and development of Kazakhstan's oil and gas resources" are sovereign, not commercial, acts); *Rush-Presbyterian*, 877 F.2d at 578 (finding that "a contract whereby a foreign state grants a private party a license to exploit the state's natural resources is not a commercial activity, since natural resources, to the extent they are 'affected with the public interest,' are goods in which only the sovereign may deal").

The fact that the plaintiffs frame IFC's alleged conduct as a failure to ensure compliance with provisions in a loan agreement, e.g. Compl. ¶ 140, does not transform IFC's conduct into commercial activity. When evaluating whether activity is commercial, courts look to the nature of the conduct that is directly at issue, not to whether that conduct is connected in some way to a contract or other commercial act. *See,*

e.g., UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210, 216 (5th Cir. 2009) (dispute over contract to provide training and support services to Royal Saudi Air Force not "commercial"); *cf. In re Aluminum Warehousing Antitrust Litig.*, 2014 WL 4211353, at *15 (S.D.N.Y. Aug. 25, 2014) ("[N]ot all contractual arrangements are commercial in nature. There are numerous instances in which a public organ might use a contractual arrangement to fulfill its public function."). Here, the plaintiffs challenge IFC's internal decisions concerning how to promote environmental and social sustainability and conduct oversight in the countries in which it invests. Such conduct is not of the type associated with private players in a market, even if it has a connection to a loan agreement.

Finally, it makes no difference that private parties "can" address environmental and social harms in their own transactions. *See* Pls.' Notice of Supp. Evidence, ECF No. 57. Even uniquely sovereign activities can sometimes be emulated by private market participants. For example, while a private company "can" hire security for its CEO, "[p]roviding security for the [Saudi] royal family . . . is not a commercial act in which the state is acting in the manner of a private player within the market." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (citations omitted). Here, the manner in which the IFC engages in the monitoring and discretionary enforcement of its environmental and social standards is fundamentally different than the manner in which private players might attempt to pursue environmental or social goals. IFC develops sustainability standards that are formulated based on active and direct input from sovereign member states in light of member states' own policies on environmental and social matters.

IFC's discretionary implementation and enforcement of such policies is not a commercial activity, but rather a public, quasi-regulatory function immune from suit under the FSIA.

* * *

In considering the above issues, the Court should keep sight of the novel context in which this case arises. Unlike foreign sovereigns, which have capitals within their own territory, IFC is an international organization headquartered in the United States. As a result, ultimate decision-making authority for functions of the organization frequently will reside in the United States, rather than in foreign jurisdictions. Nonetheless, it is critical not to afford less protection to organizations headquartered in the United States than foreign sovereigns with capitals elsewhere. The thrust of the International Organizations Immunities Act and the Supreme Court's ruling interpreting it in this case is that the immunity of international organizations and foreign sovereigns should be "equivalent." *Jam v. IFC*, 139 S. Ct. 759, 768 (2019). Courts therefore should be skeptical of claims of commercial activity based on internal oversight decisions where the only U.S. nexus is an attribution of responsibility to officials working at an international organization's U.S. headquarters. Here, such allegations fail to satisfy the FSIA's commercial activity exception.

CONCLUSION

For the foregoing reasons, if the Court were to grant Plaintiffs leave to amend their complaint, the United States believes that IFC still would enjoy immunity under the FSIA.

Dated: June 30, 2020

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