

No. 21-995

In the **Supreme Court of the United States**

BUDHA JAM, ET AL.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF FORMER UNITED STATES DIPLOMATS
AND INTERNATIONAL DEVELOPMENT
PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT
OF PETITION FOR CERTIORARI**

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INTEREST OF *AMICI CURIAE*¹

Amici are former United States diplomats and current and former international development practitioners. Their broad experience in U.S. diplomacy, multilateral institutions, and nonprofit organizations brings a collective wealth of expertise. They include a Nobel Prize-winning economist who was Senior Vice President and Chief Economist of the World Bank (Joseph Stiglitz); a former top Administrator (Brian Atwood) and two former senior officials (Harriet Babbitt and Paige Alexander) of the U.S. Agency for International Development; former and current experts (Mr. Atwood and Mr. Stiglitz) with high level responsibilities in the 38-nation Organization for Economic Cooperation and Development; a former Under Secretary of State (Mr. Atwood), a former Assistant Secretary (Robert Gelbard), four former U.S. Ambassadors (Ambassadors Harriet Babbitt, Robert Gelbard, J.D. Bindenagel, and William Harrop) and a former Minister Counselor (James Bullock); three current or former leaders of nonprofit international development organizations (Paige Alexander, Ambassador Babbitt and Ray Offenheiser); and experts in development economics (Dr. Vijaya Ramachandran) and microfinance (Kim Wilson).

¹The parties in the case received timely notice and have consented in writing to the filing of this *amicus* brief; the petitioner's letter is on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no person or entity other than the *amici curiae* or their counsel of record has made a monetary contribution to the preparation or submission of this brief or authored the brief in whole or in part.

Amici urge the Court to review this case because of the need for clear guidance on a central legal issue of overriding importance – whether the International Finance Corporation (“IFC”) can be sued in the United States for its commercial loan activities in Washington, D.C., concerning social and environmental conditions on projects abroad that it has financed. The fact pattern of this case is highly likely to recur. Continued judicial uncertainty on this central issue could adversely affect both U.S. foreign policy interests and the rights of persons affected by IFC loans. Supreme Court guidance is needed.

The collective experience of *amici* in many countries teaches that the IFC must be held accountable for the social and environmental impacts of the projects its loans make possible. Internal IFC accountability procedures are ineffective. Judicial review is essential.

Amici are concerned that the ruling by the Court of Appeals – in effect that U.S. courts cannot review IFC commercial loan activities in Washington to finance projects abroad – strikes a blow against accountability, judicial review, and the vital IFC mission to promote socially and environmentally sustainable development. That mission is of critical importance, not only for global development, but also for U.S. foreign policy interests in securing stable and prosperous markets and polities.

Amici do not address the technical legal aspects of statutory interpretation. Nor do they express a view on the particular facts of this case. However, *amici* believe that this case is about what the IFC did (or did not do) in Washington, not what a loan recipient did in India.

The plaintiffs here sue only the IFC, not the loan recipient. If IFC loan activities in Washington cannot be judicially reviewed in U.S. courts, they often – as in this case – cannot be judicially reviewed anywhere.

Amici are accordingly convinced that important public policies call for review of the legal issues in this case by the highest court in the land.

SUMMARY OF ARGUMENT

Independently of the grounds advanced by petitioners, *amici* urge the Supreme Court to accept review because the Court of Appeals decided “an important question of federal law that has not been, but should be, settled by this Court.” Supreme Court Rule 10(c).

Three years ago, the Supreme Court ruled in this case that the IFC has the same immunity as foreign states from suit in U.S. courts, subject to the same exceptions. *Jam v. IFC*, 139 S. Ct. 759 (2019). The Court briefly commented on, but did not decide, whether IFC loan activities in Washington, D.C., qualify under the exception which allows U.S. lawsuits based on “commercial activities” in the U.S. *Id.* at 772. The Court remanded to the lower courts for further proceedings.

On remand, the Court of Appeals ruled that U.S. courts lack jurisdiction over this lawsuit, because the “gravamen” of the case is “injurious activity that occurred in India.” *Jam v. IFC*, 3 F. 4th 405, 407 (2021). The Court reasoned that the commercial activities exception allows U.S. lawsuits only if “based upon” commercial activities carried on in the U.S., or

upon acts performed in the U.S. in connection with commercial activity elsewhere. *Id.* at 408. It ruled that Mr. Jam’s lawsuit against the IFC is not “based upon” IFC loan activities in Washington, because the “gravamen” of the case (or its “core” or “crux,” *id.* at 409) is in India, where the environmental impacts of an IFC-funded power plant allegedly injured Mr. Jam. *Id.*

The important issue of whether the IFC can be sued in the U.S. for its commercial loan activities in Washington, D.C., in regard to projects abroad, merits Supreme Court review, for several reasons.

First, the overriding importance of socially and environmentally sustainable development is recognized by multilateral institutions, U.S. foreign policy, and the IFC. IFC financial assistance to private sector development projects – over \$30 billion in over 70 countries in 2021 alone² – is significant for sustainable development. As the largest single shareholder in IFC capital by far,³ and the only country “with veto power over major IMF decisions,”⁴ the U.S. has a unique interest in ensuring that IFC loans support development which is socially and environmentally sustainable.

² IFC *Meeting the Moment: 2021 Annual Report* (“2021 Annual Report”), p. 17.

³ *Id.* p. 85. U.S. support accounts for about 21% of IFC shares. The next closest is Japan with 8%.

⁴ U.S. Dept. of Treasury, *International Programs, Congressional Justification for Appropriations, FY 2021*, p. 6.

Second, multilateral institutions, U.S. foreign policy, and the IFC also recognize that accountability is essential to make IFC social and environmental conditions on loans effective.

Third, for those loan conditions to be effective, accountability must include judicial review. Internal IFC administrative procedures by the Compliance Advisor Ombudsman (“CAO”) have proven ineffective. A recent external review, commissioned by the IFC and chaired by a former IFC executive vice president, concluded, “Remedial actions carried out by IFC, MIGA, and their clients in response to CAO noncompliance findings and to correct related harm are at present mostly unsatisfactory.”⁵ The review cited the CAO finding that remedial actions have been effective in only 13% of the cases. Remedial actions are “partly satisfactory” in 37% of the cases. In fully 50% of the cases, the remedial actions are “unsatisfactory.”⁶

The external reviewers aptly commented, “Such results raise questions about the commitment of IFC/MIGA to their E&S [environmental and social] obligations and the effectiveness of IFC/MIGA in holding their clients accountable to E&S obligations.”⁷

⁵ *External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness Report and Recommendations*, June 2020 (“External Review”), ¶ 58. MIGA is the Multilateral Investment Guarantee Agency of the World Bank Group.

⁶ *Id.*

⁷ *Id.*

Fourth, judicial review of IFC commercial loan activities in Washington by U.S. courts is both warranted and necessary. The Court of Appeals thought that the “gravamen” (or the “core” or “crux”) of this lawsuit is in India, not the U.S., and therefore U.S. courts have no jurisdiction. *Jam v. IFC*, 3 F. 4th 405, 407, 409. This misconceives basic principles of tort law. The alleged negligence of the IFC is separate and independent of any wrong committed by its loan recipient in India, and is actionable in and of itself. Moreover, if U.S. courts cannot review IFC loan activities in Washington, alleged IFC failures to enforce social and environmental conditions on loans often cannot be reviewed anywhere – as in this case. That gap calls for Supreme Court review.

In evaluating the crux of this lawsuit, the Supreme Court should take into account the IFC’s extensive activities to define, implement, monitor, supervise and enforce its social and economic loan conditions. All of these activities place exclusively or predominantly in Washington. The IFC does not merely issue decisions or write checks in Washington. The IFC carries out (or in this case allegedly failed to carry out) elaborate commercial activities in its Washington headquarters. Its U.S. actions on loans for projects abroad are far more extensive and central to IFC loan operations than, for example, merely selling a ticket in the U.S. for a train pass in Europe (as in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015)), or hiring a person for work overseas (as in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)), key precedents relied on by the Court of Appeals.

This case is not about the alleged conduct of the loan recipient in India. That recipient is not a defendant in the case; only the IFC is sued. The loan recipient's conduct may be relevant to support the claim that IFC actions in Washington were deficient. However, the crux of the case is what happened in Washington, not in India. The main issue – the “gravamen” of the case – is whether the IFC committed negligence and other unlawful conduct by violating its social and environmental criteria and procedures for granting, disbursing, monitoring and cancelling loans.

If the IFC in Washington failed to exercise reasonable care in its commercial loan activities and created a risk of harm to others, it committed the tort of negligence in Washington against the persons affected by the project it financed. Issues of whether that breach injured Mr. Jam and, if so, what remedy might be appropriate, are separate questions for the merits and remedial stages, not for the jurisdictional stage.

This fact pattern is likely to recur. The IFC makes numerous loans for private sector projects abroad; in 2021, it supported over 300 projects in over 70 countries.⁸ All are subject to social and environmental conditions. In many instances these loan conditions are neither met nor enforced, resulting in injuries to affected persons.

⁸ IFC *2021 Annual Report*, p. 17.

Yet current law is unclear to potential plaintiffs, loan recipients, the 185 IFC member States,⁹ and the lower courts. While this Court held three years ago that the IFC does not enjoy blanket immunity in U.S. courts, the Court of Appeals has now ruled that the main relevant exception to immunity (for “commercial activities”) does not apply. Continued uncertainty may lead to wasted time and effort in fruitless lawsuits. Supreme Court guidance is needed to make clear whether IFC loan activities in Washington are subject to judicial review in U.S. courts.

ARGUMENT

I. The Court of Appeals Decided an “Important Question” of Federal Law.

A. Social and Environmental Conditions on IFC Loans Are Critical for the Global Goal of Sustainable Development.

The overriding importance of socially and environmentally sustainable development has long been recognized by multilateral institutions, U.S. foreign policy, and the IFC.

The imperative of sustainable development was recognized decades ago by 178 nations in the Rio Declaration on Environment and Development,¹⁰ and

⁹ *Id.* p. 85.

¹⁰ Report of the United Nations Conference on Environment and Development, Annex I: *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Principle 4.

recently by 193 nations in the *2030 Agenda for Global Development*.¹¹ The *Agenda* reiterates that “social and economic development depends on the sustainable management of our planet’s natural resources.”¹²

The U.S. policy commitment is longstanding and bipartisan. The U.S. joined in the Rio Declaration and supports the *2030 Agenda’s* Sustainable Development Goals.¹³ By the 1990s sustainability was the “top priority” of the U.S. Agency for International Development (“USAID”).¹⁴ Sustainability goals were stressed by Presidents George W. Bush,¹⁵ and Barack Obama,¹⁶ and reaffirmed by USAID in each of the last two Administrations.¹⁷ The U.S. encourages strong

¹¹ *Transforming our world: The 2030 Agenda for Sustainable Development*, UN General Assembly Res. A/RES/70/1, 25 September 2015.

¹² *Id.* ¶ 33.

¹³ Secretary of State, *Responsible Business Conduct: First National Action Plan for the United States of America*, December 16, 2016, (“RBC”), p. 16.

¹⁴ *USAID History*, accessible at <https://www.usaid.gov/who-we-are/usaid-history>.

¹⁵ George W. Bush, *Remarks to the Plenary Session of the United Nations General Assembly in New York City*, Sept. 14, 2005.

¹⁶ Barack Obama, *Remarks by the President at the Millennium Development Goals Summit in New York, New York*, Sept. 22, 2010.

¹⁷ U.S. AID, *2020 Sustainability Report and Implementation Plan*, Executive Summary, June 30, 2020; Congressional Research

sustainability policies “across multilateral development banks.”¹⁸

The IFC, too, recognizes sustainability as a “critical component” of its operations and “fundamental to good development impact.”¹⁹ The IFC requires loan recipients to meet the IFC Performance Standards on Environmental and Social Sustainability.²⁰ The IFC Sustainability Policy also imposes due diligence requirements on the IFC itself.²¹ The Environmental and Social Policy and Risk department reports directly to the IFC Managing Director.²²

B. Accountability Is of Undisputed Importance.

Accountability is likewise recognized as essential to sustainability by multilateral institutions, the U.S. and the IFC.

Globally, the United Nations Human Rights Council in 2011 unanimously endorsed the UN *Guiding*

Service, *Foreign Assistance: An Introduction to U.S. Programs and Policy*, updated January 10, 2022, p. 6.

¹⁸ RBC, note 13 above, p. 9.

¹⁹ IFC *Annual Report 2021*, p. 46.

²⁰ Adopted in 2006 and updated effective in 2012.

²¹ *International Finance Corporation’s Policy on Environmental and Social Sustainability* (“IFC Policy”), ¶¶ 19-21, 26.

²² IFC *2021 Annual Report*, p. 46.

*Principles on Business and Human Rights.*²³ The *Guiding Principles* are now widely embraced, including by the U.S.,²⁴ and the IFC.²⁵ Human rights include the human right to a “clean, healthy and sustainable environment.”²⁶

As noted by the IFC’s recent external review, the *Guiding Principles* call for “governments and business enterprises to always observe the principles of ‘Protect,

²³ *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. A/HRC/17/31, March 21, 2011 (“*Guiding Principles*”), endorsed by UN Human Rights Council Resolution, *Human rights and transnational corporations and other business enterprises*, A/HRC/RES./17/4, 16 June 2011, ¶ 1.

²⁴ Antony Blinken, Secretary of State, *10th Anniversary of the UN Guiding Principles on Business and Human Rights*, Press Statement, June 16, 2021; Secretary of State, *Responsible Business Conduct: First National Action Plan for the United States of America*, December 16, 2016, p. 8.

²⁵ *International Finance Corporation’s Policy on Environmental and Social Sustainability*, ¶ 12 and note 4. While not expressly citing the *Guiding Principles*, these provisions of IFC Policy, adopted one year after the *Guiding Principles*, echo their content. See also the *IFC Good Practice Note: Addressing Grievances from Project-Affected Communities*, p. 1.

²⁶ UN Human Rights Council Res. 48/13, *The human right to a clean, healthy and sustainable environment*, October 8, 2021, ¶ 1. The Preamble notes that “more than 155 States have recognized some form of a right to a healthy environment ...”

Respect and Remedy.”²⁷ The *Guiding Principles* have been a “major milestone” in guiding private sector companies “to provide remedy in situations in which they have contributed to harm.”²⁸ The *Guiding Principles* also specify that states - “when acting as members of multilateral institutions that deal with business-related issues,” such as the IFC - retain the duty under international human rights law to ensure that persons affected by abuses “have access to effective remedy.”²⁹

Especially as the largest shareholder by far in the IFC, the U.S. has a duty to ensure that persons affected by IFC loans have access to effective remedy. Indeed, the U.S. seeks to ensure accountability for organizations like the IFC by building consensus “for strong remedy mechanisms through its participation in ... multinational organizations.”³⁰

The IFC likewise recognizes, “We are accountable to our partners, clients, and communities we serve as we aim to achieve our development objectives in an environmentally and socially responsible manner.”³¹ IFC has been “working hard to deliver on a series of accountability and transparency reforms we committed

²⁷ *External Review*, note 5 above, ¶ 79.

²⁸ *Id.* ¶ 7.

²⁹ *Guiding Principles*, note 23 above, Principles 10 and 25 and Commentary.

³⁰ RBC, note 13 above, p. 23.

³¹ IFC *2021 Annual Report*, p. 21.

to in the last few years, including in response to an independent external review of IFC's environmental and social (E&S) accountability.”³²

C. Judicial Review Is Necessary Because Internal IFC Administrative Procedures Are Ineffective.

The IFC endorses accountability in word but often falls woefully short in deed. Internal IFC administrative procedures by the Compliance Advisor Ombudsman (“CAO”) have proven ineffective. The recent external review, commissioned by the IFC and chaired by a former IFC executive vice president, concluded, “Remedial actions carried out by IFC, MIGA, and their clients in response to CAO noncompliance findings and to correct related harm are at present mostly unsatisfactory.”³³

The data are telling: the review cited the CAO finding that remedial actions have been effective in only 13% of the cases. Remedial actions are “partly satisfactory” in 37% of the cases. In fully 50% of the cases, the remedial actions are “unsatisfactory.”³⁴

The IFC has since reformed its internal procedures and adopted a new CAO Policy. As a result, its managing director asserts that accountability

³² *Id.*

³³ *External Review*, note 5 above, ¶ 58.

³⁴ *Id.*

mechanisms within the IFC have “never been stronger.”³⁵

It may well be true that IFC mechanisms have never been stronger. However, they have been so weak in practice that to say they are now better on paper means very little. And even on paper, to cite only one example, the new CAO Policy fails to define “remedial actions.”³⁶

Judicial accountability is needed precisely because internal IFC accountability has proven ineffective. Even the IFC’s recent reforms illustrate the value of judicial review. Those reforms respond to the recent external review,³⁷ the “impetus” for which was a “concern about increasing litigation risks faced by IFC (including with respect to the status of immunity defenses available to international organizations) ...”³⁸ That concern was “intensified” by this case.³⁹ *Jam v. IFC* was the subject of extended discussion in the report of the external review.⁴⁰

³⁵ IFC *2021 Annual Report*, Highlights, Letter from IFC managing director.

³⁶ IFC/MIGA Independent Accountability Mechanism (CAO) Policy, June 28, 2021, ¶ 131.

³⁷ IFC *Annual Report 2021*, p. 1.

³⁸ *External Review*, note 5 above, ¶ 15.

³⁹ *Id.* ¶ 14.

⁴⁰ *Id.* ¶¶ 134-39.

Experience, then, counsels in favor of judicial review of IFC enforcement of social and environmental conditions on its loans. So, too, does principle. As noted above, states acting as members of international institutions retain their duty to ensure access to “effective” remedies for persons injured by those institutions. As counseled by the *Guiding Principles*, “Effective judicial mechanisms are at the core of ensuring access to remedy.”⁴¹

To ensure access to an effective remedy, it is important that the Supreme Court address the issue of whether that review can take place in U.S. courts under the main exception to immunity relevant to IFC commercial loan activities in Washington - the “commercial activities” exception. The alleged facts of this case provide a straightforward opportunity to clarify whether that exception permits U.S. judicial review of alleged IFC negligence and other unlawful conduct in the U.S., for failure to enforce IFC social and environmental loan conditions for projects abroad.

D. U.S. Courts Are Essential for Judicial Review of IFC Loan Activities in Washington.

Judicial review of IFC commercial loan activities should most logically take place in the courts of the U.S., where the IFC is headquartered and where it carries out elaborate commercial activities to define, implement, monitor, and enforce social and environmental conditions on loans.

⁴¹ *Guiding Principles*, note 23 above, Principle 26 Commentary.

The Court of Appeals did not question the “commercial” nature of those loan activities. Instead, it ruled that the “gravamen” of this case is in India, where the plaintiffs were allegedly injured, and not in the U.S., where the IFC defines its social and environmental conditions on loans and then implements, monitors and enforces them. *Jam v. IFC*, 3 F. 4th 405, 407-09 (2021).

In the view of *amici*, the Court of Appeals misconceives what this case is about. This is not a suit against the loan recipient in India. It is a suit against the IFC in Washington. The core issue is not what the loan recipient did. The core issue is whether the IFC negligently failed in Washington to carry out due diligence of its social and environmental loan conditions, as required by its Sustainability Policy.⁴²

In order to exercise due diligence, the IFC conducts elaborate procedures in its Washington headquarters. These procedures constitute commercial activities carried out in the U.S. The IFC does not merely decide to grant loans or issue checks in the U.S. Its U.S. actions to implement, monitor and enforce social and environmental conditions on loans for projects abroad are far more extensive and central to IFC loan operations than, for example, merely selling a ticket in the U.S. for a train pass in Europe (as in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015)), or hiring a person for work overseas (as in *Saudi Arabia v. Nelson*, 507 U.S. 349)), key precedents relied on by the Court of Appeals.

⁴² IFC Policy, note 21 above, ¶¶ 20, 21.

The Court of Appeals ruled that IFC loan activities in Washington could not, by themselves, give rise to a cause of action by plaintiffs. It invoked this Court's guidance that the "gravamen" of a case centers on "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 3 F. 4th at 408, citing *Saudi Arabia v. Nelson*, 507 U.S. at 357. It reasoned that, "Absent the operation of the Plant in India, or appellants' injuries in India, there would have been nothing wrongful about IFC's disbursement of funds." 3 F. 4th at 409.

With respect, that reasoning and its broader implications merit Supreme Court review. The core of plaintiffs' suit is the tort of alleged negligence by the IFC. Count I alleges negligence;⁴³ Count II alleges negligent supervision by the IFC.⁴⁴ Under both counts the IFC is alleged to have violated federal common law.⁴⁵

⁴³ Proposed Amended Complaint, note 50 below, ¶¶ 364-71.

⁴⁴ *Id.* ¶¶ 372-76.

⁴⁵ *Id.* ¶¶ 193, 417(b).

In ascertaining federal common law on torts,⁴⁶ courts commonly look to the Restatement of Torts. E.g., *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 993 (2019). The Restatement defines negligence as a failure to “exercise reasonable care under all the circumstances.”⁴⁷ Primary relevant factors are the foreseeable likelihood and severity of harm, and the burden of precautions to reduce or eliminate the risk of harm.⁴⁸ Whether by act or omission, “the key point is that the defendant’s conduct has created a risk of harm to others.”⁴⁹

Here the IFC is alleged to have “created a risk of harm to others” by financing a project that would not

⁴⁶ Plaintiffs also allege violations of the laws of the District of Columbia and India. Proposed Amended Complaint, ¶¶ 193, 417(b). Under the *Restatement of the Law Third, Conflict of Laws*, Prelim. Draft 3 (2017), § 6.05, their claims would be governed by US law because US law is the “law of the State of conduct” (here the IFC loan activities). Absent a governing statute, federal common law would most likely govern a suit (such as this one) touching on foreign relations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964). Even if District of Columbia law were to govern, the Restatement of Torts would likely guide the decision. *Hedgpeth v. Whitman Walker Clinic*, 22 A. 3d 789, 798 (D.C. Ct. Apps. 2011) (*en banc*).

⁴⁷ American Law Institute, *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, (“Restatement Torts”), Ch. 1, § 3.

⁴⁸ *Id.* and Restatement Torts, Ch. 3, § 19, Comment d.

⁴⁹ *Id.* Ch. 1, § 3, Comment c.

otherwise have gone forward.⁵⁰ The IFC is alleged to have foreseen the likelihood and the severity of harm, but not to have taken precautions – enforcing the social and environmental conditions on its loan – which would not have been a great burden on the IFC.⁵¹ Enforcement oversight of loan conditions constitutes commercial activity. Those IFC failures primarily took place in Washington, not India.

The foreseeable likelihood that harm would result from the IFC loan – unless IFC social and environmental conditions were imposed and enforced -- was not negated by intervening events in India. The Restatement recognizes that in many situations, “the likelihood of eventual harm depends in part on the likelihood of various events that may occur between the time of the actor’s alleged negligence and the time of the harm itself. Such events commonly include human behavior in all its forms; ...”⁵²

Nor does the intervention of a third party – here the coal plant operator in India – negate the IFC’s own alleged negligence. As the Restatement makes clear, “The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the

⁵⁰ [Proposed Amended] Class Action Complaint for Damages and Equitable Relief, filed in *Jam v. IFC*, Civil Action No. 15-cv-00612 (JDB), D.D.C., March 12, 2020 (“Proposed Amended Complaint”), ¶¶ 46, 57-59.

⁵¹ *Id.* ¶¶ 48-51, 367-70, 373-76.

⁵² Restatement Torts, Ch. 1, § 3, Comment g.

improper conduct of ... a third party.”⁵³ Courts recognize that “the existence of intervening causes does not ordinarily elide a prior actor’s liability.”⁵⁴ Liability is appropriate where an actor (here the IFC) is allegedly negligent “precisely because of the failure to adopt adequate precaution against the risk of harm created by another’s acts or omissions ...”⁵⁵

Citing several English cases, the Reporter’s Note recognizes that “English law, overall, provides support for the explanation of the negligence standard” of the Restatement.⁵⁶ English common law decisions recognize a duty of care owed by private companies to persons affected by activities of their business associates overseas (whether subsidiaries or contractors). That duty of care by a company is separate from any duty of the foreign entity. *Vedanta Resources v. Lungowe*, [2019] UKSC 20, ¶¶ 21, 42 and 65; *Okpabi v Royal Dutch Shell*, [2021] UKSC 3, ¶¶ 7 and 8.

Vedanta ruled that a British parent company owed a duty of care to persons allegedly injured by pollution from a mine operated by its subsidiary in Zambia. The unanimous Supreme Court explained that a parent company’s duty of care toward persons affected by its subsidiary “depends on the extent to which, and the

⁵³ *Id.* Ch. 3, § 19.

⁵⁴ *Id.* Ch. 6, § 34.

⁵⁵ *Id.* Ch. 6, § 34 Comment d.

⁵⁶ *Id.*, Reporter’s Note to Ch. 1, § 3, Comment d.

way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations ... of the subsidiary.” *Vedanta*, ¶ 49.

Here the IFC meets the *Vedanta* test for a duty of care. The IFC “controls” the environmental management of the loan recipient - the “relevant operations” - by imposing environmental conditions on the loan. It “supervises” compliance with those conditions and “advises” the recipient with regard to them.

Okpabi similarly ruled that a British-domiciled parent company, Royal Dutch Shell, owed a duty of care to persons allegedly injured by oil spills from pipelines operated by its subsidiary in Nigeria. Again, the unanimous U.K. Supreme Court, reaffirming *Vedanta* (*Okpabi* ¶ 25), reiterated that a duty of care may arise “regardless of the exercise of control.” *Okpabi* ¶ 148. The parent company may incur responsibility to third parties:

“if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.”

Okpabi, ¶ 148, quoting *Vedanta* ¶ 53.

Here the IFC “holds itself out” as supervising, collaborating, advising, engaging, controlling, imposing requirements, and “working with” loan recipients to ensure compliance with social and environmental

conditions. The IFC asserts, “We hold ourselves accountable to the same environmental and social standards we ask of our clients.”⁵⁷ Its published Sustainability Policy⁵⁸, for example, explains the following:

- **Supervision:** “IFC seeks to ensure, through its due diligence, monitoring, and supervision efforts, that the business activities it finances are implemented in accordance with the requirements of the Performance Standards.”⁵⁹
- **Collaboration:** IFC endeavors to “collaborate” with loan recipients “who identify and manage environmental and social risks.”⁶⁰
- **Advice:** IFC advises individual loan recipients on environmental and social performance.⁶¹
- **Engagement:** “With respect to any particular activity, the level of IFC’s engagement is determined by the nature and scope of the proposed investment or advisory activity, as well

⁵⁷ IFC 2021 Annual Report, p. 86.

⁵⁸ IFC Policy, note 21 above.

⁵⁹ *Id.* ¶ 7.

⁶⁰ *Id.* ¶ 15.

⁶¹ *Id.* ¶ 16.

as the specific circumstances of the collaboration and relationship with the client.”⁶²

- **Control:** IFC’s engagement includes “specific provisions” with which loan recipients must comply, including “action plans,” “reporting,” and “supervision visits.”⁶³ In case of noncompliance, IFC will “work with” the recipient and, if need be, exercise “rights and remedies.”⁶⁴
- **Changes:** IFC requires loan recipients to adjust their environmental and social “Management System” to meet IFC Performance Standards.⁶⁵
- **Remediation:** IFC “works with” loan recipients “to determine possible remediation measures.”⁶⁶

By these criteria, the IFC could well be found at trial to owe a common law duty of care to persons allegedly affected by its allegedly negligent failure to enforce its social and environmental criteria, which the IFC “holds itself out” to enforce.

It makes no difference that the IFC is not a parent corporation, or that loan recipients are not IFC subsidiaries. The U.K. Supreme Court made clear that,

⁶² *Id.* ¶ 19.

⁶³ *Id.* ¶ 24.

⁶⁴ *Id.* ¶ 24.

⁶⁵ *Id.* ¶ 25.

⁶⁶ *Id.* ¶ 26.

“for these purposes, there is nothing special or conclusive about the bare parent/subsidiary relationship.” *Vedanta* ¶ 54; *Okpabi* ¶149. “[T]he liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence.” *Vedanta*, ¶ 49. The liability of parent companies “raises no novel issues of law and is to be determined on ordinary, general principles of the law of tort regarding the imposition of a duty of care.” *Okpabi*, ¶ 25. “[T]here is no special test applicable to the tortious responsibility of a parent company for the activities of its subsidiary ...” ¶ 27, 149.

Under “ordinary, general principles of the law of tort,” then, such as those invoked by Mr. Jam under federal common law,⁶⁷ there is a case to be made that the IFC owes a duty of care to persons (like Mr. Jam) harmed by IFC’s alleged failure adequately to supervise and enforce the social and environmental conditions on its loans for projects abroad. That case deserves to be tested at trial, not dismissed on the ground that the crux of the case against the IFC is in India, not the U.S.

A further reason for U.S. Supreme Court review is that, if U.S. courts have no jurisdiction to review IFC commercial loan activities in Washington, those activities often cannot be meaningfully reviewed anywhere – as in this case. The Government of India has issued a Notification whose legal effect is that the

⁶⁷ Proposed Amended Complaint, note 50 above, ¶¶ 193, 366, 369 and 417(b).

IFC cannot be sued in India, except when the IFC expressly waives its immunity in particular cases.⁶⁸ As far as *amici* are able to determine, the IFC has not waived its Indian immunity in this case.

Judicial review of IFC commercial loan activities in Washington would not overburden U.S. courts. When this case was previously before the Supreme Court, the IFC argued that to allow damages suits against it “would bring a flood of foreign-plaintiff litigation into U. S. courts.” 139 S. Ct. at 771. The Court was not persuaded. Among other reasons, the Court noted the U.S. government’s “serious doubts” about whether this suit is “based upon” IFC commercial activities in the U.S. *Id.* at 772. As discussed above, *amici* believe that this case against the IFC is indeed based upon its commercial loan activities in the U.S., and not merely on the effects of those activities in India.

Allowing damages suits against the IFC would not open the gates to a flood of litigation. Three years have passed since this Court ruled that the IFC is not entirely immune from suit in U.S. courts. Since then, as far as counsel for *amici* have been able to ascertain,

⁶⁸ Government of India, Notification S.O. 2448(E) dated 13 July 2016 extending certain provisions of India’s United Nations (Privileges and Immunities) Act, 1947 (UN Act 1947”) to the IFC. As a result, the IFC in India enjoys “immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” UN Act 1947, Schedule, Art. II, § 2. See *M/S Hindustan Engineering & General Mazdoor Union (Regd) & Ors. v. Union of India & Ors* (High Court of Delhi), ILR (2000) II Delhi 353, ¶ 19; Declaration of [Indian Senior Advocate] Ritin Rai, August 19, 2019, filed in the District Court in *Jam v. IFC*.

not a single suit has been filed against the IFC by persons allegedly harmed by IFC failure to enforce social and environmental conditions on loans. The reasons are not hard to understand. In practical reality, transnational suits like *Jam v. IFC* are difficult and expensive to bring and to prove.⁶⁹ The real problem is not that a flood of lawsuits would follow a ruling that U.S. courts have jurisdiction, but rather that fishers, farmers and other persons of limited means in developing countries, allegedly harmed by IFC failure to enforce social and environmental conditions on loans, will continue to encounter serious barriers to access to justice.⁷⁰

II. The Question of IFC Immunity for Its Loan Activities in Washington “Has Not Been, But Should Be, Settled by this Court.”

The preceding sections show the overriding importance of U.S. judicial review of allegedly negligent and otherwise unlawful commercial loan activities of the IFC in the U.S. The IFC is headquartered in the U.S. The U.S. is by far its largest shareholder. The IFC acts in the U.S. to approve, condition, monitor, supervise and enforce social and environmental criteria on billions of dollars of private sector loans abroad annually. U.S. judicial review of

⁶⁹ See generally, e.g., HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE, R. Meeran, ed. (Oxford Univ. Press 2021); G. Skinner, R. McCorquodale and O. De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013).

⁷⁰ *Id.* at 64.

IFC loan activities matters greatly to sustainability, accountability, judicial review, and access to justice.

The question is also one which “has not been, but should be, settled by this Court.” The answer affects potential plaintiffs in many countries, loan recipients, the 185 IFC member States, and the lower courts. Gathering evidence, preparing pleadings, and communicating with often indigent clients in transnational cases like this one is a major undertaking, in addition to the judicial time required to adjudicate them. If U.S. courts indeed have jurisdiction to hear such cases, the time and effort are well spent because there may be no recourse to justice elsewhere. On the other hand, if there is no U.S. jurisdiction in cases like *Jam v. IFC*, it would be far better for all concerned to know that before investing significant resources in U.S. litigation. Yet the Court’s prior judgment in this case, which left open the “commercial activities” exception, contrasted with the unpersuasive closing of that door by the Court of Appeals on remand, leaves the law in a state of confusion. This Court should accept this case for review in order to provide clear and definitive guidance to all those who would follow the law.

CONCLUSION

For the reasons stated above, *amici* urge the Court to grant the petition for certiorari in this case.

Respectfully submitted,

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