No. 17-1011

IN THE

# Supreme Court of the United States

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

v.

INTERNATIONAL FINANCE CORPORATION,
*Respondent.*

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

## BRIEF OF *AMICI CURIAE* INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ET AL., IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are multilateral development banks ("MDBs") that have an interest in the proper determination of the sources and scope of the immunity of international organizations under domestic law. MDBs are international organizations that emerged from the post-World War II international order to provide financial and technical assistance in the pursuit of social and economic development around the world. MDBs play a vital role in the global economy and depend on their privileges and immunities in order to pursue their missions.

*Amici* submit this brief in support of respondent because the International Organizations Immunities Act of 1945, 22 U.S.C. § 288 et seq., is a critical (although not exclusive) component of the privileges and immunities of MDBs and other international organizations with ties to the United States. *Amici* include:

**The African Development Bank Group**, composed of the African Development Bank, the African Development Fund, and the Nigeria Trust Fund, and constituted by 80 member countries, aims to contribute to the sustainable economic development and social progress of its regional members. It achieves its mission by mobilizing and allocating resources for investments in its regional member countries and providing policy advice and technical assistance. The

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

African Development Bank is designated as a public international organization under the IOIA. Exec. Order No. 12,403, 48 Fed. Reg. 6,087 (Feb. 8, 1983).

**The Asian Development Bank**, constituted by 67 member countries, aims to promote economic growth and cooperation in Asia and the Pacific by providing loans, technical assistance, grants and equity investments. It is designated as a public international organization under the IOIA. Exec. Order No. 11,334, 32 Fed. Reg. 3,933 (Mar. 7, 1967).

**The Black Sea Trade and Development Bank**, constituted by 11 member countries, supports economic development and regional cooperation through trade, project finance lending, guarantees, and equity participation in private enterprises and public entities in member countries.

**The Caribbean Development Bank**, constituted by 28 member countries, seeks to reduce poverty in the Caribbean through social and economic development. It promotes public and private investment, provides technical assistance, and helps members optimize the use of their resources to develop their economies and expand production and trade.

**The Council of Europe Development Bank**, constituted by 41 member countries, promotes social cohesion and strengthens social integration in Europe through financing and technical expertise for projects with a high social impact in its member states. It also responds to emergency situations, and works to improve the living conditions of disadvantaged population groups.

**The European Bank for Reconstruction and Development** is constituted by 67 member states, the European Union, and the European Investment Bank; its purpose is to foster the transition towards

open market-oriented economies and to promote private and entrepreneurial initiative in its recipient member countries committed to and applying the principles of multiparty democracy, pluralism and market economics. It is designated as a public international organization under the IOIA. Exec. Order No. 12,766, 56 Fed. Reg. 28,463 (June 18, 1991).

**The Inter-American Development Bank**, constituted by 48 member countries, has the purpose of contributing to the acceleration of the process of economic and social development of its regional developing member countries in Latin America and the Caribbean, individually and collectively. It makes loans and guarantees to the governments, as well as governmental entities, enterprises, and development institutions of its borrowing member countries to help meet their development needs. It also provides technical assistance to its borrowing member countries that focuses on transferring knowledge and supports project preparation, feasibility studies, regional programs, and training. It is designated as a public international organization under the IOIA. Exec. Order No. 10,873, 25 Fed. Reg. 3,097 (Apr. 8, 1960) (as amended in Exec. Order No. 11,019, 27 Fed. Reg. 4,145 (Apr. 27, 1962)).

**The Inter-American Investment Corporation,** constituted by 45 member countries, is a multilateral development bank established to promote the economic development of its regional developing member countries by encouraging the establishment, expansion, and modernization of private enterprises (including those that are small and medium-scale), and partially and wholly owned state enterprises (excluding operations with subsovereign governments) that are aligned with certain priority business areas, to supplement the activities of the Inter-American De-

velopment Bank. It is designated as a public international organization under the IOIA. Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986).

**The International Bank for Reconstruction and Development ("IBRD")**, constituted by 189 member countries, helps developing countries reduce poverty, promote economic growth, and build prosperity. It provides financial resources, knowledge and technical services, and strategic advice to developing countries, including middle income and credit-worthy lower income countries. It is designated as a public international organization under the IOIA. Exec. Order No. 9,751, 11 Fed. Reg. 7,713 (July 11, 1946). IBRD and the International Development Association ("IDA") compromise what is typically referred to as the World Bank. See World Bank, *About the World Bank*, http://www.worldbank.org/en/about.

**The Nordic Investment Bank**, constituted by eight member countries, envisions a prosperous and environmentally sustainable Nordic-Baltic region. It achieves its vision by financing projects both within and outside its membership that improve productivity and benefit the environment, and by offering long-term loans and guarantees to ensure sustainable growth.

## SUMMARY OF THE ARGUMENT

MDBs and other international organizations exist in order to address global and regional challenges in a multilateral fashion. Because these organizations must be independent from their member states and free from member state interference to function properly, they enjoy under both international and domestic law the privileges and immunities necessary to achieve their stated purposes. This includes immunity from suit and legal process. In the United

States, the primary source of immunity for most international organizations under domestic law is the IOIA.

For at least the past twenty years, the D.C. Circuit has held that in drafting the IOIA, Congress did not intend to incorporate subsequent changes to the immunity of foreign sovereigns codified in the Foreign Sovereign Immunities Act ("FSIA"). See *Atkinson* v. *Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998). This has led to a stable jurisprudence of international organization immunity, under which organizations are generally immune from suit and judicial process absent waiver. Many international organizations with offices or operations in the United States are based in the District of Columbia and have relied on the D.C. Circuit's immunity jurisprudence in structuring and running their operations.

Petitioners now ask the Court to set aside over twenty years of precedent. Petitioners argue in favor of a new rule under which the IOIA would be read to incorporate the current contours of foreign sovereign immunity in the FSIA. A lone Court of Appeals—with little experience hearing cases involving international organizations and their immunities—has agreed. See *OSS Nokalva, Inc.* v. *European Space Agency*, 617 F.3d 759 (3d Cir. 2010). The effects of this proposed rule are untested and its legal underpinnings are unsound.

*First*, the language, context, and history of the IOIA demonstrate that Congress did not permanently link the scope of international organization immunity and the scope of foreign sovereign immunity. These immunities serve fundamentally different purposes that, in the case of foreign sovereign immunity, have evolved over time and for good reason. Yet those reasons do not pertain to the scope and nature of the

work of the MDBs and similar international institutions that are the product of carefully negotiated treaties among the member states.

*Second*, the IOIA established a default rule of virtually absolute immunity where international organizations would have the discretion to opt out and waive immunity when necessary to achieve their international missions. MDBs are representative of this design, as many have enacted via their founding treaties a limited waiver of immunity for claims brought by bondholders, creditors, and other contracting parties.

*Third*, jettisoning the D.C. Circuit's longstanding interpretation of the IOIA would create real and significant challenges for MDBs with a presence in the United States. The predictable result of petitioners' proposed rule will be more lawsuits brought against MDBs. What is less predictable is how courts will resolve many of the thorny interpretative issues that are inherent in trying to harmonize the IOIA with the rules for foreign sovereign immunity provided in the FSIA. MDBs ultimately will shoulder the burden of uncertainty and increased financial and operational costs of the ensuing litigation, diverting time and resources away from the pursuit of their agreed-upon mission of economic development.

## ARGUMENT

### I. CONGRESS PROVIDED FOR VIRTUALLY ABSOLUTE IMMUNITY FOR DESIGNATED INTERNATIONAL ORGANIZATIONS AND DID NOT INTEND TO INCORPORATE THE RESTRICTIVE FOREIGN SOVEREIGN IMMUNITY CODIFIED DECADES LATER IN THE FSIA.

In defining the scope of international organization immunity under the IOIA, Congress used an analogy to "the same immunity from suit . . . as is enjoyed by foreign governments" in order to give international organizations the maximum immunity then allowable under law. 22 U.S.C. § 288a(b). At the time of the IOIA's passage in 1945, the common-law principles of foreign sovereign immunity generally granted foreign sovereigns absolute immunity from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 712 (1976); *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L.J. 1167, 1167 (1982) ("In 1945 . . . foreign governments were absolutely immune from the jurisdiction of both state and federal courts in the United States.").

The IOIA's purpose was to confer "privileges and immunities of a governmental *nature*" upon international organizations and thus not to link forever the two forms of immunity. S. Rep. 79-861, at 1 (1945) (emphasis added). As Congress explained in passing the IOIA, extending privileges and immunities to international organizations under domestic law "will not only protect the official character of public international organizations located in this country but it will also tend 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." *Id.* at 2.

Following the IOIA's passage, the paths of foreign sovereign immunity and international organization immunity diverged. As sovereigns participated more frequently in international commercial markets, the State Department saw the need to distinguish between the public and private acts of sovereigns when resolving claims of sovereign immunity. *Alfred Dunhill of London, Inc.*, 425 U.S. at 703-04.

Over time, the federal common-law of foreign sovereign immunity came to recognize several exceptions, which were eventually codified by Congress in the Foreign Sovereign Immunities Act ("FSIA") of 1976. Tellingly, the FSIA did not explicitly contemplate any change in the scope of international organization immunity under the IOIA. The FSIA's sole reference to the IOIA was to provide that the property of an international organization may not be subject to attachment in order to fulfill a judgment against a foreign state. 28 U.S.C. § 1611(a). Such a reservation makes no sense if Congress had in fact meant to make the IOIA-protected entities' immune only to the extent that foreign governments are.

As discussed in respondent's brief, the text, structure, and history of the IOIA together make clear that Congress did not intend to incorporate into the IOIA the changes in the law of foreign sovereign immunity that culminated with the FSIA. Brief for Respondent at 18-39, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (Sept. 10, 2018). Even if the Congress of 1945 could have foreseen the emergence of the FSIA in 1976, the FSIA would have been a poor fit for international organizations because the purposes underlying foreign sovereign immunity and international organization immunity are fundamentally distinct. See

Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* at 1170-71 ("Because the IOIA immunities were . . . tailored to specific organizations and situations, they are different from the immunities of foreign governments, which are laid down by general international or national law, and are grounded on considerations such as reciprocity that do not apply to IGOs.") (citations omitted).

Foreign sovereign immunity has been traditionally granted as a "matter of grace and comity" between coequal sovereigns. *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V.*, 461 U.S. at 486). In contrast, the immunities of international organizations are functional in nature. International organizations are generally granted such privileges and immunities by their member states as are necessary for the fulfillment of their purposes. See *Restatement (Third) of the Foreign Relations Law of the United States* § 467(1) (Am. Law Inst. 1987); Articles of Agreement of the International Bank for Reconstruction and Development art. 7, § 1, *opened for signature* Dec. 27, 1945, T.I.A.S. No. 1,502 ("To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member."); U.N. Charter art. 105 (the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes").

The functional need for international organization immunities stems from the fact that the operations of international organizations are susceptible to attempted interference by member states. See *Broadbent* v. *Org. of Am. States*, 628 F.2d 27, 34 (D.C. Cir. 1980) ("The United States has accepted without qualification the principles that international organiza-

tions must be free to perform their functions and that no member state may take action to hinder the organization."); C. Wilfred Jenks, *International Immunities* 166 (1961) ("The basic function of . . . immunities is to bridle the sovereignty of States in their treatment of international organisations."); Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* 237-42 (2018).[2]

International organizations have no territory of their own, and are dependent on countries to exercise restraint to ensure their independent operations. They lack the co-equal standing with sovereigns that would hypothetically entitle them to certain inherent rights or comity under the law of nations. The immunities provided to international organizations—in particular, immunity from suit and legal process—thus "protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory." *Mendaro* v. *World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). They protect international organizations from antagonistic member states who might otherwise seek advantage in inter-state conflicts by interfering with their neutral operation. Without immunity, lo-

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[2] Decisions of foreign courts have made this same point. *See World Bank Group* v. *Wallace*, [2016] S.C.R. 207 ¶ 93 (Can.) ("It is part of the original agreement that in exchange for admission to the international organization, every member state agrees to accept the concept of collective governance. As a result, no single member can attempt to control the institution . . . ."); *Amaratunga* v. *Nw. Atl. Fisheries Org.*, [2013] S.C.R. 866 ¶ 1 (Can.) (noting that immunity is critical to "avoid undue interference in the operations" of the organization); *Waite* v. *Germany*, 1991-I Eur. Ct. H.R. 393, 409 ¶ 63 ("[T]he attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.").

cal courts would have the ability to influence the internal decision-making processes of international organizations. Further, "[d]enial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations and decisions of the international bodies." *Id.* at 616.[3]

As holders of significant capital and development authority, MDBs are subject to the real world risks of a member state attempting to exert undue influence and control. MDBs engage in an independent evaluation of every investment and its possibility to promote economic development. Indeed, many MDBs are duty bound by their founding treaties to set aside politics when making these decisions. *E.g.*, Convention Establishing the Multilateral Investment Guarantee Agency art. 34, *submitted* Oct. 11, 1985, T.I.A.S. No. 12,089 ("The Agency, its President, and staff . . . shall not be influenced in their decisions by the political character of the member or members concerned."). Accordingly, the investment decisions made by MDBs

[3] International organizations are also structured through their treaties so as to remain insulated from potentially disruptive national interference. For example, many require that disputes over the interpretation of the founding treaty—including disputes over the scope of immunity—be resolved internally by the organization or, in some cases, be referred to an international court. *See* Articles of Agreement of the International Bank for Reconstruction and Development art. 9 ("Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision."); Convention on the Privileges and Immunities of the United Nations art. 8 § 30, *adopted* Feb. 13, 1946, T.I.A.S. No. 6,900 ("All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement.").

must reflect the *collective* will of the member states without regard to the preferences of any one member. If one member state gained an outsized voice in the process, that state could direct investments to itself and its allies while exacting financial punishment on its enemies.

## II. UNDER THE DEFAULT RULE OF VIRTUALLY ABSOLUTE IMMUNITY, DESIGNATED INTERNATIONAL ORGANIZATIONS MAY EXPRESSLY WAIVE THEIR IMMUNITY.

As with all default rules, international organizations can waive the virtually absolute immunity provided by the IOIA in relation to a particular lawsuit or a particular type of lawsuit. This discretion can be exercised in a particular case, but it is most often expressed through the treaty drafting process where member states agree on the scope of immunity for a particular organization.

While the interpretation of the scope of an international organization's waiver of immunity is not an issue before the Court in this case, it is important to note that international organizations do voluntarily submit to suit when their articles or governing bodies allow such suits. See *Jam* v. *Int'l Fin. Corp.*, 138 S. Ct. 2026 (2018) (Mem.) (limiting the grant of certiorari to the interpretation of the IOIA). In line with the deeply functional nature of international organization immunity, such waivers are undertaken when necessary for the fulfilment of the purposes of the organization.

The founding treaties of some MDBs will permit suits by bondholders, creditors, and other contracting parties when necessary for MDBs to achieve their core missions. For example, the Articles of IBRD

provide for a limited waiver of immunity for certain claims. See Articles of Agreement of the International Bank for Reconstruction and Development art. 7, § 3. It is widely recognized that this language exists in order to effect and "enhance the marketability of [IBRD's] securities and the credibility of its activities in the lending markets." *Mendaro*, 717 F.2d at 618; see also *Restatement (Third) of Foreign Relations Law of the United States* § 467, Reporters' Note 3 (noting that "these provisions were designed to permit suits by bondholders and related creditors"); Edward Chukwuemeke Okeke, *Annex VI—International Bank for Reconstruction and Development*, *in The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (August Reinisch ed., 2016) (summarizing the historical evidence surrounding the drafting of the IBRD Articles and the interpretation of the Articles by courts in the United States).

This functional approach to immunities is a product of historical context. At the Bretton Woods Conference of 1944, delegates from the Allied nations drafted the Articles of Agreement for both IBRD and the International Monetary Fund ("IMF"). See Gerald M. Meier, *The Bretton Woods Agreement—Twenty-five Years After*, 23 Stan. L. Rev. 235, 237-43 (1971). IBRD was set up as an international financial institution that would raise capital and make long-term investments in development projects. IMF was primarily designed to facilitate the functioning of the international monetary system under a system of fixed exchange rates and given the authority to provide short term financing to member countries to resolve their balance of payment issues.

IBRD needed to issue securities and attract investments, so its Articles included a limited waiver of

its jurisdictional immunity. These same concerns did not apply to IMF and its Articles thus provide for absolute immunity from suit. See Articles of Agreement of the International Monetary Fund art. 9, § 3, *opened for signature* Dec. 27, 1945, T.I.A.S. No. 1,501; Okeke, *Annex VI—International Bank for Reconstruction and Development*, *supra* at 762.

Following Bretton Woods, many other MDBs included in their founding treaties language identical or similar to IBRD's Articles in order to preserve immunity except for a limited category of lawsuits. See Articles of Agreement of the International Finance Corporation art. 6, § 3, May 25, 1955, T.I.A.S. No. 3,620 (identical language to IBRD Articles); Agreement Establishing the African Development Bank art. 52, Aug. 4, 1963, 569 U.N.T.S. 353 ("The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers . . ."); Agreement Establishing the Asian Development Bank art. 50, *opened for signature* Dec. 4, 1965, T.I.A.S. No. 6,103 ("The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities . . ."); European Bank for Reconstruction and Development, *Chairman's Report on the Agreement Establishing the European Bank for Reconstruction and Development*, art. 46 explanatory note (Apr. 1991), *reprinted in Basic Documents of the EBRD* (Sept. 2013) ("Delegates noted this Article [addressing immunity] was almost exactly the same as . . . the I.B.R.D.'s Articles of Agreement. They hoped that courts construing it would draw on the jurisprudence that had evolved in connection with the I.B.R.D.'s Articles.").

Incorporating this historical context, the D.C. Circuit has developed a predictable and workable test for deciding whether MDBs have waived immunity for purposes of the IOIA. Courts in the D.C. Circuit have generally found a waiver of immunity for claims related to external investing and borrowing activities, but not for claims related to the internal functions of the organizations. Compare *Vila* v. *Inter-Am. Inv., Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009) (unjust enrichment claim brought by an outside consultant who helped negotiate the terms of commercial lending agreements); *Osseiran* v. *Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009) (promissory estoppel and confidentiality claims brought by a prospective investor), with *Hudes* v. *Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 189 (D.D.C. 2011), *aff'd*, 493 F. App'x 107 (D.C. Cir. 2012) (wrongful termination suit).

## III. TETHERING THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS UNDER THE IOIA TO THE FSIA WOULD ENCOURAGE A SURGE OF LAWSUITS, CREATE SIGNIFICANT UNCERTAINTY IN THE OVERALL INTERPRETATION OF THE IOIA, AND HARM THE OPERATIONS OF MDBS.

A. *Exposure.* It is certain that more lawsuits would be filed against MDBs if the IOIA were interpreted to incorporate the exceptions to sovereign immunity outlined in the FSIA. Such a holding would be an invitation to enterprising plaintiff's counsel to fashion new and creative arguments as to why the actions of international organizations fall within any of the enumerated FSIA exceptions. 28 U.S.C. § 1605.

In particular, MDBs that invest in foreign companies and foreign projects would be attractive targets for "impact litigation" that could not be brought

against other defendants in the courts of the United States. Plaintiffs who could not sue a foreign corporation for alleged torts under the Alien Tort Statute, *Jesner* v. *Arab Bank*, *PLC,* 138 S. Ct. 1386, 1407 (2018), could nonetheless try under the FSIA to sue the MDB that invested in the foreign corporation or a particular project in which the foreign corporation was involved. Simply put, what plaintiffs were once unable to achieve through direct liability against the foreign company that allegedly harmed a local community, they will now pursue through indirect liability against their lenders, MDBs. Indeed, the group representing petitioners here has already filed a similar lawsuit in connection with loans IFC made to a company in Honduras. See First Amended Complaint, *Juana Doe* v. *Int'l Fin. Corp.*, No. 17-cv-1494 (D. Del. Mar. 8, 2018).

Courts in the United States will thus become involved in "foreign-cubed" litigation involving MDBs—foreign disputes involving foreign parties governed by foreign law. This resulting entanglement with foreign claims runs counter to the "basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454 (2007)).

The instant case is a sign of what is to come. Petitioners are Indian citizens; the developer and operator of the power plant is in India; the power plant is located in India; and the alleged environmental damage and disruption to the community are in India. But rather than seeking relief in India and bringing a lawsuit against the developer and operator of the power plant who would be directly responsible for any damage, petitioners brought this suit in a U.S. court

over 7,500 miles away against a non-U.S. entity that provided a minority share of the financing.[4]

To be sure, international organizations and MDBs have other lines of defense and will vigorously contest meritless charges.[5] These defenses might conceivably include *forum non conveniens* where a foreign forum is preferable, failure to join indispensable parties where plaintiffs fail to join the other defendants who participated in an investment project, personal jurisdiction where the organization had insufficient contact with the forum, and failure to state a claim. International organizations will also be able to assert treaty-based privileges and immunities that are independent of the immunities granted by the IOIA. See *Nyambal* v. *Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014) (noting the "dual protections" afforded to an international organization by the IOIA and its founding treaty); Exec. Order No. 9,751, 11 Fed. Reg. 7,713 (July 11, 1946) (the designation of, among others, IBRD as a public international organization entitled to the immunities conferred by the IOIA was "not intended to abridge in any respect privileges and immunities which such organizations

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[4] When pressed at oral argument before the D.C. Circuit about why petitioners had not sought any relief in India, the response was to claim that the judicial system in India "takes forever" and "it is seen at least, if not actually seen as corrupt and in favor of huge . . . conglomerates." Oral Argument Transcript at 48, *Jam* v. *Int'l Fin. Corp.*, No. 16-7051 (D.C. Cir. Feb. 6, 2017).

[5] Any decision from this Court regarding the scope of the IOIA should avoid commenting on the availability of these other defenses. In particular, the interpretation of IFC's Articles of Agreement and the scope of its treaty-based privileges and immunities are issues that the Court explicitly declined to address when granting certiorari. *Jam* v. *Int'l Fin. Corp.*, 138 S. Ct. 2026 (2018) (Mem.).

have acquired or may acquire by treaty or congressional action").[6]

Yet other potential lines of defense will not relieve organizations of the burden of having to defend themselves in the first place. See *Tuck* v. *Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) (quoting *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967) (per curiam)) (immunity is meant to shield organizations "not only from the consequences of litigation's results but also from the burden of defending themselves"). Responding to litigation in order to assert immunities, let alone defending suits on their merits, is costly—it both consumes financial resources and detracts from the time and attention of management. Failing to respond to a lawsuit leaves international organizations vulnerable to default judgments and adverse rulings. See *Garcia* v. *Sebelius*, 919 F. Supp. 2d 43, 47 (D.D.C. 2013) (remarking that, although not mandatory, an appearance invoking immunity under the IOIA is advisable to avoid being subject to an entry of default and sanctions in the event a court determines an organization is not immune). Interna-

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[6] The text of this Executive Order is not exceptional. *See* Exec. Order No. 12,766, 56 Fed. Reg. 28,463 (June 18, 1991) (designating the European Bank for Reconstruction and Development as an international organization under the IOIA, and noting that "[t]his designation is not intended to abridge in any respect the privileges and immunities which such organization has acquired or may acquire by treaty . . . or congressional action"); Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986) (for the Inter-American Investment Corporation); Exec. Order No. 12,403, 48 Fed. Reg. 6,087 (Feb. 8, 1983) (for the African Development Bank); Exec. Order No. 10,873, 25 Fed. Reg. 3,097 (Apr. 8, 1960) (as amended in Exec. Order No. 11,019, 27 Fed. Reg. 4,145 (Apr. 27, 1962)) (for the Inter-American Development Bank); Exec. Order No. 11,334, 32 Fed. Reg. 3,933 (Mar. 7, 1967) (for the Asian Development Bank).

tional organizations—and ultimately the member states who fund them—bear these costs when they respond to litigation.[7]

Petitioners' *amici* nonetheless suggest that MDBs could "ameliorate" concerns about the flood of lawsuits by "revising their non-judicial accountability mechanisms so that the institutions respond to complaints and grievances more fully." Brief *Amici Curiae* of Center for International Environmental Law at 29, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (July 31, 2018). This argument incorrectly—and naively—assumes that valid claims underlie all lawsuits. MDBs cannot avoid frivolous litigation "by living a completely virtuous life." *Vila*, 570 F.3d at 289 (Williams, J., dissenting). And even if non-judicial accountability mechanisms were as robust as petitioners' amici imagine they might be, they would offer no protection from the type of suit brought here. The reality is that MDBs would face suits in any event.

This argument also misunderstands the intended role of the accountability mechanisms many MDBs have established for addressing internal or external

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[7] For example, even in the face of clear and controlling law demonstrating that international organizations are immune from suit in the employment context, MDBs have been forced to appear and respond to numerous employment suits. *See*, *e.g.*, *Smith* v. *World Bank Group*, 694 F. App'x 1 (D.C. Cir. 2017); *Hudes* v. *Aetna Life Ins. Co.*, 493 F. App'x 107 (D.C. Cir. 2012) (per curiam); *Sampaio* v. *Inter-Am. Dev. Bank*, 468 F. App'x 10 (D.C. Cir. 2012) (per curiam); *Aguado* v. *Inter-Am. Dev. Bank*, 85 F. App'x 776 (D.C. Cir. 2004) (per curiam); *Dujardin* v. *Int'l Bank for Reconstruction & Dev.*, 9 F. App'x 19 (D.C. Cir. 2001). A decision in petitioners' favor will no doubt give employees of international organizations additional incentive to redouble their efforts to try to fashion an exception to the IOIA for internal employment matters.

complaints.[8] These accountability mechanisms promote compliance with internal investment guidelines, policies, and procedures and ultimately keep MDBs accountable to the member states. The mechanisms were *not* designed to act as international claims tribunals awarding compensatory damages according to external standards. Moreover, opening the door to private lawsuits related to MDB investment decisions would unduly interfere with this internal conversation around compliance and punish MDBs for providing independent review of complaints.

B. *Interpretive Difficulties*. The wholesale incorporation of the FSIA into the IOIA would raise a host of difficult questions regarding how to apply a statute specifically crafted for sovereigns to international organizations in general and MDBs in particular. These interpretive challenges further confirm that, in

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[8] *See* African Development Bank Group, *Independent Development Evaluation*, https://www.afdb.org/en/about-us/organisational-structure/independent-development-evaluation/; Asian Development Bank, *Accountability Mechanism*, https://www.adb.org/site/accountability-mechanism/main; Black Sea Trade and Development Bank, *Procedure for the Receipt, Retention and Treatment of Complaints at the Black Sea Trade and Development Bank*, https://www.bstdb.org/Procedure_for_the_Receipt_Retention_and_Treatment_of_Complaints.pdf; Caribbean Development Bank, *Contact Us – Reporting Fraud, Corruption and Ethics Violations*, http://www.caribank.org/about-cdb/contact-us; European Bank for Reconstruction and Development, *Project Complaint Mechanism*, https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html; Inter-American Development Bank, *The Independent Consultation and Investigation Mechanism*, https://www.iadb.org/en/mici; World Bank – IBRD & IDA, *The Inspection Panel*, http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx; Nordic Investment Bank, *Report Misconduct, Corruption and Non-compliance*, https://www.nib.int/contacts/report_misconduct_corruption.

passing the FSIA, Congress had no intention of altering the scope of immunity under the IOIA.

As a principal example, the application of the commercial activities exception to MDBs is far from clear. The commercial activities exception is founded on the distinction between "sovereign acts" and "commercial acts." When a foreign sovereign is acting as a market regulator and, for example, issues regulations concerning foreign currency exchange, it is engaged in sovereign acts and is immune from suit. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614-15 (1992). On the other hand, when the same foreign sovereign acts as a "private player" within the same market and, for example, issues bonds in furtherance of currency stabilization, it is engaged in commercial acts and is not immune under the FSIA. *Id.* at 615-16.

The distinction between sovereign acts and commercial acts is inapt for the IOIA because MDBs—like all international organizations—cannot undertake sovereign acts. The distinction is also inapt because MDBs do not act as mere private players—as sovereigns often do—in the marketplace. MDBs are mission-bound to pursue economic development and support investments that may not be possible in the private market. For this reason, the loan and investment activities of MDBs are different in nature and purpose than common "commercial" acts undertaken by sovereigns.[9]

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[9] *OSS Nokalva*, the only reported decision to apply a commercial activities exception to an international organization, did not have to grapple with these sorts of issues. In that case, the European Space Agency was involved in a run-of-the-mill contract dispute with a counter-party, one of its software vendors, and the core mission of the organization—promoting space research and technology—was not directly implicated. 617 F.3d at 759.

On the other hand, petitioners, and the plaintiffs that will follow in their wake, view the commercial activities exception as carte blanche for bringing suits against MDBs. Petitioners alleged below that IFC "focused exclusively on the private sector" and thus acted as a private actor in the market. Complaint ¶ 194, *Jam* v. *Int'l Fin. Corp.*, No. 15-cv-612-JDB (D.D.C. Apr. 23, 2015) ("Compl."). In order to comply with the FSIA's requirement that the commercial activity have some nexus to the United States, see 28 U.S.C. § 1605(a)(2), petitioners alleged that "numerous critical decisions relevant to whether to finance the Tata Mundra Project" were made in the United States because IFC has its headquarters in Washington, D.C. Compl. ¶ 197. Petitioners further argued that their legal claims were ultimately "based upon" these commercial activities undertaken in the United States. Reply Brief for Petitioners at 8, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (Apr. 18, 2018) (citing *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395 (2015)).

These same allegations and arguments could be made in connection with every loan that an MDB has ever made so long as the MDB has its headquarters or a central office in the United States. Petitioners thus advance an interpretation of the commercial activities exception that is more akin to a rule of no immunity at all for the core activities of MDBs.[10]

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[10] The Solicitor General fails to appreciate the potential scope of petitioners' theory of commercial activities when it notes that "the . . . commercial-activity exception is not an authorization of just any commercial suit." Brief *Amicus Curiae* of United States at 33, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (July 31, 2018). This is of course true. But petitioners believe the exception is an authorization of a commercial suit related to *every commercial activity* undertaken by an MDB such as IFC.

And while the actual scope of the exception would need to be resolved in future litigation, the intervening uncertainty would cast a long shadow over the operations of MDBs.

Moreover, if the FSIA defined the interpretation of the IOIA in United States courts, there would be an unmistakable tension in the IOIA between the immunity of MDBs from suit and their immunity from compelled discovery. Congress unequivocally provided in the IOIA that "[t]he archives of international organizations shall be inviolable." 22 U.S.C. § 288a(c).[11] This specific provision does *not* reference the immunity of foreign states and cannot incorporate the exceptions to immunity in the FSIA. Simply put, even if MDBs were somehow subject to suits arising out of their commercial activities, they would still be immune from discovery pursuant to the plain language of the IOIA. This result further demonstrates not only that Congress enacted a very robust form of immunity for international organizations, but also that allowable litigation under the FSIA is an impossible model for suits under the IOIA.

C. *Crippled Operations*. Facing *ex ante* uncertainty about the interpretation of the IOIA, MDBs will need to account for substantially increased transaction costs related to legal defense and to "price in" litigation risk when making investment decisions. This is so because, on the theory of commercial activities advanced by petitioners in this case, every potential investment represents a liability risk that would be limited only by the creativity of plaintiff's counsel

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[11] Many treaties of international organizations also separately provide that the organization's archives are "inviolable." *See*, *e.g.*, Articles of Agreement of the International Bank for Reconstruction and Development art. 7, § 5.

who are funded by organizations whose livelihood depends upon such "impact litigation."

There is also no reason to believe that these legal costs and litigation risks would be limited to specious chains of causal inference under the broad jurisprudence of federal and state tort law. Nothing in the FSIA would prevent plaintiffs from bringing suits against MDBs for alleged violations of foreign securities laws, environmental laws, workplace health and safety regulations, among others. MDBs would thus need to invest time and resources in following every legal development in every country where they operate in order to manage legal risks associated with their extensive loan portfolios. Again, these are time and resources that would otherwise be directed towards economic development.

Petitioners and their amici also propose a construction of the IOIA that inevitably would require courts in the United States to review and dictate investment decisions. The ensuing entanglement between U.S. courts and MDBs would severely undermine the structural protections of international organization immunity, which are ultimately meant to shield the internal deliberations of these organizations from interference by member states *and* their local courts.

In this case, for example, petitioners assert that the IFC failed to meet its own *voluntary* social and economic investment guidelines when approving the Tata Mundra project. *E.g.*, Compl. ¶¶ 154, 164, 172. Petitioners also seek equitable relief in the form of a court order requiring IFC to "enforce" the loan agreement and pressure the loan recipient to take certain steps. Compl. ¶ 343.

The Complaint thus invites a United States District Court to review and second guess IFC's investment

decision and internal deliberative process with respect to this project. This, in turn, requires a court to interpret voluntary investment guidelines that were collectively drafted by the member states, pass judgment on the adequacy of the guidelines, and decide whether those guidelines have been sufficiently followed. Allowing a member nation's domestic courts to make these sorts of determinations and exercise this sort of control over an international organization is precisely the type of institutional harm that international organization immunity was meant to guard against. *Mendaro*, 717 F.2d at 615.

## CONCLUSION

For all these reasons, this Court should affirm the judgment of the D.C. Circuit.

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