Deconstructing International Organization Immunity

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DECONSTRUCTING INTERNATIONAL ORGANIZATION IMMUNITY

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In the United States, public international organizations derive privileges and immunities from a variety of sources of law. In particular, the International Organizations Immunities Act of 1945 (IOIA) grants certain international organizations “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.” When the IOIA was enacted, those organizations had few legal protections but foreign sovereigns generally had “absolute immunity” from civil suits in U.S. courts. Over time, the international community, including the United States, clarified exceptions to foreign sovereign immunity, allowing some suits against foreign states. This rule of “restrictive immunity” was codified in the United States by the Foreign Sovereign Immunities Act of 1976 (FSIA). However, some courts, like the D.C. Circuit, have continued to grant absolute immunity to international organizations covered by the IOIA—exceeding the level of protection enjoyed today by foreign governments—while others, such as the Third Circuit, have not.

This Note discusses what privileges and immunities public international organizations have in the United States based on the IOIA, the FSIA, and recent Supreme Court jurisprudence. It concludes that the text and the legislative history of those statutes do not demonstrate congressional intent to incorporate developments in the law of foreign sovereign immunity into the privileges and immunities of international organizations. Moreover, the Supreme Court’s recent decisions in Dole Food and Samantar help clarify which entities U.S. courts should consider covered by the FSIA, and international organizations do not appear to be included under that statute. International organizations may also benefit from other sources of law, including international agreements, other congressional or administrative action, and common-law doctrines. However, there is probably no customary international law yet that defines the boundaries of privileges and immunities of international organizations.

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TABLE OF CONTENTS

I. INTRODUCTION .................................... 312
II. DOCTRINAL DEVELOPMENT AND DIVERGENCE ............... 315
   A. Pre-FSIA Immunity for Foreign Entities .................. 315
      1. Effect of the IOIA (Pre-1945 and 1945-1952) ..... 315
      2. Effect of the Tate Letter (1952-1976) .......... 318
   B. Post-FSIA Split ................................ 320
      1. Granting Absolute Immunity .......................... 321
      2. Restricting Immunity ............................... 328

III. DOES THE TEXT OR THE LEGISLATIVE HISTORY OF THE IOIA OR
     THE FSIA SHOW THAT CONGRESS INTENDED TO INCORPORATE
     CHANGES TO THE IMMUNITY OF INTERNATIONAL
     ORGANIZATIONS? .................................. 331
   A. Does the Text of the IOIA or the FSIA Indicate Congressional
      Intent? ...................................... 332
   B. Does Legislative History Provide Any Indication of
      Congressional Intent? ............................. 341
      1. Legislative History of the IOIA................ 341
      2. Legislative History of the FSIA................ 345
      3. Subsequent Legislation .......................... 347

IV. OTHER SOURCES OF LAW MAY PROVIDE PRIVILEGES AND
    IMMUNITIES FOR INTERNATIONAL ORGANIZATIONS IN U.S.
    COURTS ......................................... 348
   A. International Agreements .............................. 349
   B. Other Legislative and Administrative Action ......... 351
   C. Common-Law Doctrines ................................ 351
   D. Customary International Law ......................... 354
V. CONCLUSION ..................................... 364

I. INTRODUCTION

Janet Atkinson went through an acrimonious divorce from Robert Kestell.1 Kestell moved to Jamaica and refused to pay alimony and child support.2 Had Kestell been working for a private firm, Atkinson would probably have been able to execute a Maryland state court’s judgment

1. Kestell filed for bankruptcy in 1995, declaring, “I don’t want [Atkinson] to have anything.” In re Kestell, 99 F.3d 146, 147, 150 (4th Cir. 1996). The Fourth Circuit later found that, “Kestell’s conduct was an abuse of the bankruptcy process, and his petition for discharge from debt was properly denied.” Id. at 150.

in her favor by garnishing his wages. Unfortunately for Atkinson, Kestell was working for an international organization, the Inter-American Development Bank (IDB). The D.C. Circuit concluded that the IDB is entitled to absolute immunity and that Atkinson’s action to garnish Kestell’s wages could not proceed.

This Note discusses how the D.C. Circuit arrived at this decision and whether it remains appropriate based on the statutes involved and recent Supreme Court jurisprudence.

In the United States, public international organizations derive privileges and immunities from a variety of sources of law. Many, including the IDB, are covered by the International Organizations Immunities Act of 1945 (IOIA). Some others, such as the United Nations, have privileges and immunities based on the instrument that creates them or based on international agreements in which the United States participates. Still other international organizations have been granted privileges and immunities by specific statutory or administrative authority. Finally, public international organizations

3. Atkinson, 156 F.3d at 1337.
4. Id.
5. Id.
6. See Restatement (Third) of Foreign Relations Law § 221 (1987) (defining an “international organization” as “an organization that is created by an international agreement and has a membership consisting entirely or principally of states”). Comments to the Restatement specify that the definition does not include non-intergovernmental organizations or “continuing arrangements,” like the General Agreement on Tariffs and Trade, that have “no formal organizational structure.” Id. § 221 cmts. 1-2 (citing Ian Brownlie, Principles of Public International Law 681 (3d ed. 1979)). See also Ian Brownlie, Principles of Public International Law 677 (7th ed. 2008) (summarizing the criteria for legal personality for international organizations as (1) “a permanent association of states, with lawful objects, equipped with organs;” (2) “a distinction, in terms of legal powers and purposes, between the organization and its member states;” and (3) “the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states”).
10. See, e.g., Brzak v. United Nations, 597 F.3d 107 (2d Cir. 2010) (finding that the United Nations enjoys immunity based on the Convention on Privileges and Immunities of the United Nations, which the United States has ratified); see also discussion infra Part IV.A.
might benefit from common-law doctrines and customary international law.\textsuperscript{12}

The IOIA provides that certain international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.”\textsuperscript{13} When the IOIA was enacted, foreign sovereigns generally had “absolute immunity” in U.S. courts, meaning simply that a foreign state could not be sued. However, since at least the mid-1940s, the international community, including the United States, has clarified exceptions to foreign sovereign immunity, allowing some suits against foreign states; this practice of “restrictive immunity” was codified in the Foreign Sovereign Immunities Act of 1976 (FSIA).\textsuperscript{14} To the consternation of some commentators\textsuperscript{15} and would-be plaintiffs,\textsuperscript{16} courts have generally continued to grant absolute immunity to international organizations covered by the IOIA—effectively exceeding the level of protection enjoyed today by foreign governments.\textsuperscript{17}

This Note explores whether the 1945 Congress intended the IOIA to incorporate developments in the doctrine of foreign sovereign immunity, whether the 1976 Congress intended the FSIA to cover international organizations, and, if the FSIA does not apply, what privileges and immunities international organizations may have under the IOIA and other sources of law.

Part II of this Note describes the development of foreign sovereign immunity and the privileges and immunities granted to international organizations, and the divergence of these areas of law. Part III considers whether the text or the legislative history of the IOIA and the FSIA demonstrates congressional intent. Part IV discusses other sources of law that may benefit international organizations in U.S. courts. Finally, Part V summarizes conclusions.

\textsuperscript{12} See discussion infra Parts IV.C-D.
\textsuperscript{13} 22 U.S.C. § 288a(b).
II. DOCTRINAL DEVELOPMENT AND DIVERGENCE

The doctrines of foreign sovereign immunity and the privileges and immunities of international organizations in U.S. courts have been dynamic over the past century.18 These areas of law converged in the middle of the twentieth century with the enactment of the IOIA,19 but quickly began to show signs of tension following the publication of the Tate Letter in 195220 and the widespread adoption of restrictive immunity for foreign states.21 This tension became explicit soon after Congress codified the restrictive theory of foreign sovereign immunity in the FSIA.22 Some courts and commentators have argued, explicitly or implicitly, for reunification of these areas of law.23

A. Pre-FSIA Immunity for Foreign Entities

1. Effect of the IOIA (Pre-1945 and 1945-1952)

For many years, U.S. courts followed Executive Branch recommendations24 or granted foreign sovereigns “virtually absolute” jurisdictional immunity25 but there is little historical support for granting absolute

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18. See generally Clive Archer, INTERNATIONAL ORGANIZATIONS (2d ed. 1992) (discussing historical developments in these areas).
20. Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep’t of State, to Philip B. Perlman, Acting Attorney General, U.S. Dep’t of Justice (May 19, 1952), in 26 DEP’T OF STATE BULL. 984-85 (1952) [hereinafter Tate Letter]. As discussed in Part II.A.2 of this Note, the purpose of this letter was to give foreign states notice that the Executive Branch would recommend “restrictive” immunity, rather than absolute immunity, in cases against foreign sovereigns.
23. See, e.g., OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 764 (3d Cir. 2010) (holding that the IOIA incorporates subsequent changes to the extent of foreign sovereign immunity, which is now defined by the FSIA).
24. See Samantar, 130 S. Ct. at 2284 (noting that a District Court would either follow a “suggestion of immunity” from the U.S. Department of State, or, in the absence of a recommendation from the State Department, “decide for itself whether all the requisites for such immunity existed”) (citations omitted). The Court noted that “[p]rior to 1952, the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns . . . .” Id. at 2285.
immunity to international organizations in the United States. For example, the U.S. government declined to extend diplomatic immunities to representatives from the League of Nations and denied demands from officers of international organizations for exemption from income tax provisions. This may have been because the United States wanted to “avoid any implication that [an international organization like] the United Nations is, in any sense, a ‘Super-State.’”

The IOIA, enacted at the end of 1945, grants legal capacity to contract, acquire and dispose of property, and institute legal proceedings to international organizations in which the United States participates and which have been designated by the President by Executive Order. The IOIA also grants jurisdictional immunity to those organizations to the same extent as enjoyed by foreign governments.
Contemporaneous commentators described the IOIA as “a great advance over the previous law and practice of the United States.” However, the scope of powers of international organizations prior to World War II and the development of the United Nations and the Bretton Woods system had been very limited. Also, the international organizations that existed before World War II had limited presence or effects in the United States that would have provided a court with a basis for jurisdiction.

Professor Lawrence Preuss, contrasting the new privileges and immunities under the IOIA with “customary international law” in 1946, also noted that several other countries had even stronger statutory protections granting immunity for international organizations. Similarly, Professor Josef Kunz traced the roots of privileges and immunities of representatives of international organizations back to 1826, showing how far international organization immunities law had come. Kunz described the basis of privileges and immunities for international organizations as functionalism, or the level of protection necessary in order for the organization to fulfill its functions. He argued that the “only adequate method [of protecting international organizations] is to grant these immunities in [a] basic international treaty, creating identical and binding international obligations upon all Member States,” such as the United Nations Charter. Kunz believed that

34. See Preuss, supra note 27, at 338.
35. For example, the privileges and immunities of League of Nations officials in the United States had not been defined as of 1927. See Marriner Letter, supra note 27; see also Preuss, supra note 27, at 338 (describing the United States’ responsibilities as “host to an ever-growing number of international organizations” (quoting Walter R. Sharp, American Foreign Relations Within an Organized World Framework, 38 Am. Pol. Sci. Rev. 931, 944 (1944) (recommending at least functional “immunity from suit” for postwar international organizations, “particularly those handling economic and financial functions,” that would “doubtless be located in the United States”))).
36. See Preuss, supra note 27, at 333 (“Although the United States has recognized the legal capacity of public international organizations, it has taken the position that there exists no obligation under customary international law to extend to such organizations the privileges, exemptions, and immunities accorded to foreign governments.”).
37. See id. at 338 (citing the Covenant of the League of Nations, and Canadian, Chinese, and British legislation).
39. See id. at 847 (“Complete independence from the local authority . . . in order to enable it to fulfill its international functions, constitutes the raison d’être.”).
40. See id. at 848.
express waivers of limited scope would provide appropriate counter-
balances against abuses of immunity.41

So, in the late 1940s and the early 1950s, foreign governments and
international organizations both generally enjoyed immunity in U.S.
courts.

2. Effect of the Tate Letter (1952-1976)

In response to and consistent with a broad trend in international
practice, the 1952 Tate Letter, from Acting Legal Advisor Jack Tate to
Acting Attorney General Philip Perlman, gave foreign states notice that
the Executive Branch would recommend “restrictive” immunity, not
absolute immunity, in cases against foreign sovereigns.42 Under the
theory of restrictive immunity, “immunity is confined to suits involving
the foreign sovereign’s public acts, and does not extend to cases arising
out of a foreign state’s strictly commercial acts.”43

The immediate effect of the Tate Letter on the privileges and
immunities of international organizations was not clear.44 Some academ-
ics and practitioners argued that international organizations did not
share foreign states’ level of immunity.45 For example, C. Wilfred Jenks,
a lawyer with and later Director-General of the International Labour

41. See id. at 852.
42. See Tate Letter, supra note 20.
Yousuf, 130 S. Ct. 2278, 2285 (2010). However, the State Department continued to recommend
immunity in some commercial cases for political reasons and “the inconsistent application of
sovereign immunity” led to codification of the restrictive theory of immunity in the FSIA.
Samantar, 130 S. Ct. at 2285 (citing Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004)).
44. See J. Henry Glazer, A Functional Approach to the International Finance Corporation, 57 COLUM.
L. REV. 1089, 1097-103 (1957) (considering whether the International Finance Corporation
should have absolute or restrictive immunity); Note, The Status of International Organizations Under
the Law of the United States, 71 HARV. L. REV. 1300, 1312 (1958) (noting that the State Department
had adopted “restrictive” immunity for foreign states, and concluding that international organiza-
tions do not necessarily have this level of protection although that result might be a desirable
policy).
45. See U.N. Secretariat, The Practice of the United Nations, the Specialized Agencies and the
(1967) (discussing the immunity of the United Nations, specialized agencies, and the IAEA from
legal process); C. WILFRED JENKS, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS 228-29, 242-46
(1962) (discussing immunity and arbitration); see also DAVID B. MICHAELS, INTERNATIONAL PRIVI-
LEGES AND IMMUNITIES: A CASE FOR A UNIVERSAL STATUTE 50 (1971) (dealing mostly with the
privileges and immunities of individuals associated with international organizations, but noting
that immunity of international organizations is based on functionalism because those “organiza-
Organization, traced the development of immunities of international organizations in various contexts and distinguished the immunities of foreign states from the immunities of international organizations based on the different rationales. Specifically, he described several reasons for international organization immunity: (1) “danger of prejudice or bad faith in the national courts”; (2) “need for protection against baseless actions brought from improper motives or by the numerous cranks, fanatics or cantankerous persons who may conceive that they have a duty to compel the organisation to take some particular step or that they have suffered a wrong at its hands”; and (3) “the undesirability of allowing the courts of particular members to determine, quite possibly in different senses, the legal effects of acts performed in the exercise of the organisation’s functions.” Jenks noted that the threat of reciprocity protects a state against partial treatment, denial of justice, or unreasonable interference by another state’s courts, and that international organizations have no such protection mechanism.

Jenks contrasted the movement toward a restrictive theory of immunity for foreign sovereigns with international agreements incorporating jurisdictional immunity for international organizations, implicitly validating the considerations he identified. But, he concluded, this development was “greatly facilitated by the simultaneous recognition of the obligation of international organisations to provide equivalent means of redress by inter-national or other appropriate procedures as the counterpart of new jurisdictional immunity.”


47. Id. at 40 (quoting Hugh McKinnon Wood, Legal Relations Between Individuals and a World Organization of States, 30 Transactions of the Grotius Society for 1944 141 (1944)); see also Liang, supra note 29, at 584 (“Jurisdictional immunity is essential” for the United Nations based on the “possible danger of prejudice or bad faith in national courts . . . [;] the need for protection against baseless actions which might be brought against the organisation by cranks, fanatics, and persons of similar ilk[;] and] . . . the undesirability of depending on the courts of Member States for the determination of the legal effects of acts performed in the exercise of the functions of the organization.”) (also citing Wood).

48. See Jenks, supra note 46, at 40.

49. See id.

50. Id. at 41; see also C. Wilfred Jenks, Some Problems of an International Civil Service, 3 Pub. Admin. Rev. 93, 103-04 (1943) (advocating the creation of a “World Administrative Tribunal” to hear cases involving international organization officials; “[s]ince subjection to any national jurisdiction would be totally incompatible with the international character which international public services must possess, it is necessary to organize an international jurisdictional control over the official acts of international civil servants and any of their private affairs in respect of which the
B. Post-FSIA Split

In 1976, Congress codified the customary international law of “restrictive” foreign sovereign immunity in the FSIA. Section 1604 of the FSIA grants foreign states immunity from jurisdiction of U.S. federal and state courts and sections 1605 through 1607 set out several exceptions, notably for suits based upon commercial activities and torts.

Just as with the Tate Letter, the effect of the FSIA on the status of international organizations in U.S. courts has not been apparent. The jurisdiction of an international authority may seem preferable to a waiver of immunity in favor of the jurisdiction of one state. Jenks also cited an interesting case dealing with the IOIA in the U.S. Zone of Occupation of Germany. In that case, the U.S. Court of Appeals for the Occupation Zone held that the IOA applied only within the territory of the United States, and not in the physically and legally separated Occupied Zone of Germany, but concluded that the International Refugee Organization was immune from suit on other grounds, by grant of immunity from the U.S. High Commissioner for Germany. See Jenks, supra note 46, at 39 (describing Schaffner v. Int’l Refugee Org., 18 I.L.R. 444, 444-46 (1951)).

51. See 28 U.S.C. § 1602 (2006) (“The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”); Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) (“The [FSIA] ‘codifies, as a matter of federal law, the restrictive theory of sovereign immunity’ . . . .” (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983))). For more about the purpose and legislative history of the FSIA, see H.R. REP. NO. 94-1487 (1976), S. REP. NO. 94-1310 (1976), and infra Part III.


54. See Richard J. Oparil, Immunity of International Organizations in United States Courts: Absolute or Restrictive?, 24 VAND. J. TRANSNAT’L L. 689, 709-10 (1991) (arguing that international organizations may still be entitled to absolute immunity based on the transnational nature of those entities and the different purposes the IOIA and the FSIA serve); Note, Jurisdictional Immunities of
IOIA grants international organizations “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments”55 and the FSIA clearly limits the immunity of foreign states.56 However, nothing in the IOIA says that immunity for international organizations was meant to evolve with developments in foreign sovereign immunity57 and nothing in the FSIA expressly amends the IOIA.58 The only mention of international organizations in the FSIA is in section 1611(a), which prohibits courts from attaching property of an international organization covered by the IOIA based on an action brought against a foreign state under the FSIA.59

As courts have interpreted the IOIA in light of the FSIA, some, in particular the D.C. Circuit, have continued to grant absolute immunity to international organizations, while others, specifically the Third Circuit, have partially abrogated that immunity. Other courts have avoided the issue by deciding cases on other grounds. The following sections describe this Circuit split.

1. Granting Absolute Immunity

Among the first cases on this subject to reach a federal appellate

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57. See, e.g., Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (“The text of the IOIA unfortunately provides no express guidance on whether Congress intended to incorporate in the IOIA subsequent changes to the law governing the immunity of foreign sovereigns.”).
58. See, e.g., id. at 1342 (“The FSIA is ‘beside the point’ because it does not ‘reflect any direct focus by Congress upon the meaning of the earlier enacted provisions’ of the IOIA.”) (citation omitted).
59. See 28 U.S.C. § 1611(a) (2006); see also Joseph W. Dellapenna, Refining the Foreign Sovereign Immunities Act, 9 WILAMETTE J. INT’L L. & DISP. RESOL. 57, 113 (2001) (“The [FSIA], by its terms, does not apply to any international organization, except to provide immunity from garnishment of funds in the hands of an international organization and payable to, or on the order of, a foreign state.”).
court was the 1980 case *Broadbent v. Organization of American States*. In *Broadbent*, the D.C. Circuit affirmed dismissal of a suit against the Organization of American States (OAS) by seven former employees. The United States filed an amicus curiae brief in *Broadbent* urging the D.C. Circuit to apply the FSIA to suits against international organizations, but the court avoided deciding whether the international organization had only restrictive immunity. It instead concluded that even if the restrictive theory applied, the underlying activity was not commercial. “[T]he employment by a foreign state or international organization of internal administrative personnel civil servants is not properly characterized as ‘doing business.’” The court also noted that the FSIA does not explicitly amend the IOIA, that the text and legislative history of the IOIA could be interpreted as leaving to the President responsibility for limiting the immunity of international organizations, and that the rationale for restricting the immunity of foreign states may not apply to international organizations.

The State Department interpreted *Broadbent* narrowly to mean that employment relationships are not commercial in nature, and maintained its position that “[b]y virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations...
are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character.”

The D.C. Circuit similarly concluded in Tuck v. Pan American Health Organization that “claims aris[ing] from the [Pan American Health Organization’s] supervision of its civil service personnel and from its provision and allocation of office space” would not fall within the FSIA’s commercial activities exception, and in Mendaro v. World Bank that the World Bank was immune from a suit alleging sexual harassment, discrimination, and retaliatory termination because it related to the organization’s “internal administrative affairs.” These courts reasoned that “the purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory.”

However, the D.C. District Court came out the other way in Rendall-Speranza v. Nassim, concluding that the IOIA incorporated subsequent changes in foreign sovereign immunity, including the FSIA. The court found that congressional inaction after the enactment of the FSIA was sufficient evidence for the court to infer “that Congress felt the more restrictive immunity afforded foreign governments under the FSIA was to apply in like fashion to international organizations.” The court reasoned that “[a]lthough Congress enacted the IOIA in 1945, when foreign governments enjoyed broad immunity, presumably it

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70. Letter from Roberts B. Owen, Legal Adviser, U.S. Dep’t of State, to Leroy D. Clark, Gen. Counsel, U.S. Equal Emp’t Opportunity Comm’n (June 24, 1980), reprinted in Marian L. Nash, Contemporary Practice of the United States Relating to International Law, 74 AM. J. INT’L L. 917, 917-20 (1980) [hereinafter Owen Letter]. Nash prefaced the letter by noting that “The staff of the General Counsel of the Equal Employment Opportunity Commission sought the views of the Office of the Legal Adviser of the Department of State regarding exercise of jurisdiction in an employee discrimination proceeding involving the World Bank [Broadbent] and were advised that relevant provisions of both domestic and international law, based upon sound policy considerations, precluded the Commission from asserting such jurisdiction.” Id. at 917.


73. Id. at 615 (citing A. PLANTEY, THE INTERNATIONAL CIVIL SERVICE § 1343 (1981); JENKS, supra note 46, at 17-18).

74. See Rendall-Speranza v. Nassim, 932 F. Supp. 19, 21, 23-24 (D.D.C. 1996) (denying the International Finance Corporation’s motion to dismiss the case, which was based on alleged assault and battery of an employee by a supervisor).

75. Id. at 24.
knew how to revise the IOIA when the immunity of foreign governments was diminished with the passage of the FSIA."

The 1998 case *Atkinson v. Inter-American Development Bank* ended debate on this issue in the D.C. Circuit. The case arose out of Atkinson’s attempt to enforce state court judgments against her former husband by garnishing his wages from his employer, the IDB. The IDB argued that it was immune from garnishment under the IOIA and the D.C. Circuit agreed, holding that entities listed in the IOIA are absolutely immune from suit and that the FSIA does not affect this determination.

Atkinson argued first that courts should read into the IOIA a *de minimis* exception to absolute immunity. She also claimed (based on a canon of statutory construction that says a statute which refers to a subject generally adopts subsequent changes to that area of law) that the 1945 Congress intended to incorporate into the IOIA subsequent changes to the law governing the immunity of foreign sovereigns. Finally, Atkinson argued that the FSIA imposes restrictive immunity on international organizations based on its codification of exceptions to foreign sovereign immunity. She claimed that section 1611(a) of the FSIA indicated that Congress was aware of the impact this law would have on the immunity of international organizations, and chose not to update the IOIA.

The D.C. Circuit panel rejected each of Atkinson’s positions. It concluded that there is no *de minimis* exception because the plain language of the IOIA says that covered international organizations are immune “from suit and every form of judicial process.” Moreover, the

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76. *Id.*
78. *See id.* at 1336-37.
79. *See id.* at 1336.
80. *See id.* at 1342 (affirming the lower court’s dismissal on the grounds that the IDB was absolutely immune from this action and did not waive its immunity in this case).
81. Atkinson was represented by counsel in the District Court, but argued the case and filed briefs *pro se* at the appellate level. *See id.* at 1336; *see also* *Atkinson v. Kestell*, 954 F. Supp. 14, 14 (D.D.C. 1997).
82. *See Atkinson*, 156 F.3d at 1339.
84. *See Atkinson*, 156 F.3d at 1341-42.
85. *See id.*
86. *Id.* at 1339 (quoting 22 U.S.C. § 288a(b) (2006)).
court found that the text of the IOIA provided “no express guidance on whether Congress intended to incorporate in the IOIA subsequent changes to the law governing the immunity of foreign sovereigns.”87 The court added that “Congress does not express its intent by a failure to legislate . . . and even if it did, the will of a later Congress as to the meaning of a law enacted by an earlier Congress is of little weight.”88 Instead, the court noted, language in the legislative history indicated that the mechanism Congress intended to keep the IOIA up-to-date with changes in the law of foreign sovereign immunity is political action, particularly by the Executive Branch.89 The court quoted a Senate committee report on the IOIA describing the provision delegating to the President the authority to modify an organization’s immunities as “permit[ting] the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature.”90

The D.C. Circuit also concluded, similar to its decision in Broadbent, that Atkinson’s wage-garnishment action fell outside the scope of the FSIA entirely.91 “Congress’s focus was on foreign states,” the court declared, “not on other types of judgment debtors. The FSIA is ‘beside the point’ in these cases because it does not ‘reflect any direct focus by Congress upon the meaning of the earlier enacted provisions’ of the IOIA.”92 The court stressed that even if the FSIA’s commercial activity exception applied to international organizations, the garnishment proceeding in Atkinson did not fall within that exception.93

While this decision has been criticized,94 the D.C. Circuit has upheld Atkinson’s rule.95 For example, the Inversora Murten, S.A. v. Energoprojekt-

87. Id. at 1341.
88. Id. at 1342.
89. See id. at 1341.
90. Id. (quoting S. REP. No. 79-861, at 2 (1945)) (alteration in original).
91. See id. at 1342.
92. Id. (citation omitted).
93. Id. at 1342-43.
94. See, e.g., Herz, supra note 15, at 532 (“The broad immunity afforded by Atkinson far exceeds the legitimate functional needs of international organizations.”).
Niskogradnja Co. panel denied the plaintiff’s attempt to enforce a judgment against the defendant (a contractor that was doing work for the Nigerian government allegedly financed by the World Bank) by garnishing the Bank’s payments to Nigeria.96 The court concluded that “[b]ecause the immunity conferred upon international organizations by the IOIA is absolute, it does not contain an exception for commercial activity such as the one codified in the [FSIA].”97 Similarly, in Fazzari v. Inter-American Development Bank, the D.C. Circuit found that a retiree’s claim was no different than that of an employee, and noted that “the exceptions of the [FSIA] do not limit the immunity provisions of the [IOIA].”98

However, the D.C. Circuit has developed some exceptions to the IOIA’s seemingly bright-line rule of absolute jurisdictional immunity, especially around the concept of waiver of immunity.99 For example, in the pre-FSIA case Lutcher S. A. Celulose e Papel v. Inter-American Development Bank, a Brazilian lumber company sued the IDB to prevent the Bank from lending to its competitors.100 A provision in the international agreement establishing the IDB authorized that “[a]ctions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.”101 Then-D.C. Circuit Judge Warren Burger wrote for the panel that this provision, while “hardly a model of clarity,”102 permitted “the assertion of a claim against the Bank by one having a cause of action for which relief is

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97. Id. at 15.
99. Note that the courts’ reasoning in these cases does not affect the D.C. Circuit’s analysis of the relationship between the IOIA and the FSIA. See, e.g., Mendaro v. World Bank, 717 F.2d 610, 618 n.54 (D.C. Cir. 1983) (“Since we are construing the extent to which the Articles of Agreement waive the Bank’s immunity, we express no opinion on whether the Bank would, in the absence of a waiver, enjoy absolute immunity under the [IOIA], or only the restricted immunity for noncommercial activities contemplated by the [FSIA].”).
100. Lutcher S. A. Celulose e Papel v. Inter-Am. Dev. Bank, 382 F.2d 454, 455 (D.C. Cir. 1967).
101. Id. at 456.
102. Id.
available.”103 The court dismissed the Bank’s argument that even if the provision waived immunity, it did so “only with respect to suits brought by ‘bondholders, and other like creditors and the beneficiaries of its guarantees.’”104

In more recent cases, the D.C. Circuit has interpreted similar provisions to require courts to engage in a balancing act to determine whether the organization would benefit from waiving immunity to that type of suit by that type of plaintiff.105 In Osseiran v. International Finance Corp., for instance, the court found that the International Finance Corporation, while covered by the IOIA, waived immunity where it made certain representations while engaging in “commercial transactions with the outside world.”106 The court reasoned that “parties may hesitate to do business with an entity insulated from judicial process; promises founded on good faith alone are worth less than obligations enforceable in court.”107 The Vila v. Inter-American Investment Corp. court similarly focused on “the nature of the parties’ relationship rather than the nature of the contested transaction and inquir[ed] as to the reasons why the [international organization] would waive immunity for this type of suit.”108 In that case, the court allowed a consultant’s unjust enrichment claim against the Inter-American Investment Corporation (IIC) to proceed because, the court asserted, a waiver for this type of suit would help make consultants more willing to enter into contracts with the organization.109 This, the court said, “affords the IIC flexibility in using independent consultants, allowing it, for instance, to

103. Id. at 457.
104. Id. at 458.
105. See Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1338 (D.C. Cir. 1998) (“[T]he Bank’s immunity should be construed as not waived unless the particular type of suit would further the Bank’s objectives.”).
106. Osseiran v. Int’l Fin. Corp., 552 F.3d 836, 839 (D.C. Cir. 2009) (“International Finance is in the business of selling its investments to private parties . . . . Sales agreements result from negotiations. Osseiran’s promissory estoppel and confidentiality claims concern International Finance’s alleged representations during such negotiations.”); see also In re Dinastia, L.P., 381 B.R. 512, 520 (S.D. Tex. 2007) (noting in another case involving the IFC that the Fifth Circuit has not yet interpreted the scope of immunity for international organizations under the IOA, but not determining the matter in this case because the plaintiff conceded that the IFC had immunity unless expressly waived).
107. Osseiran, 552 F.3d at 840; see also Vila v. Inter-Am. Inv. Corp., 570 F.3d 274, 279 (D.C. Cir. 2009).
108. Vila, 570 F.3d at 281.
109. Id. at 276.
establish and maintain relationships with consultants whom it may want to engage without a formal written agreement.

On the other hand, D.C. Circuit courts have not found waivers in defamation claims, employment disputes such as wrongful-termination and employment-discrimination claims, or where the court has determined that allowing private contract litigation would not “aid the [organization] in attracting responsible borrowers [or] encouraging American investment in developing nations generally.”

In conclusion, the D.C. Circuit generally grants absolute immunity to international organizations under the IOIA, although it has broadly interpreted waiver provisions in cases involving “external activities.”

2. Restricting Immunity

Until recently, courts in the Third Circuit followed the D.C. Circuit’s rule and granted absolute immunity to international organizations covered by the IOIA. For example, the District Court in *Bro Tech Corp. v. European Bank for Reconstruction and Development* followed *Atkinson* and concluded that the defendant international organization was

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110. *Id.*


114. See *id*.

115. *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 132 (D.D.C. 2003) (interpreting the IDB’s “waiver effectively narrowing its scope to a minimum” in a suit to prevent the IDB from lending money to Guyana to support construction of a competing telecommunications network); *see also Sampaio v. Inter-Am. Dev. Bank*, 806 F. Supp. 2d 238, 245 (D.D.C. 2011) (concluding that the IDB did not waive immunity “with respect to suits filed by employees, or that such suits further the IDB’s purposes” in a case where an employee alleged “violation of [the employee’s] right to due process, defamation, employment discrimination based on age, invasion of privacy, and intentional infliction of emotional distress”).

116. See *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 281 (D.C. Cir. 2009) (“[D]rawing a distinction between external activities and the internal management of international organizations reflects well-established precedent without creating an artificial category of waived claims.”) (citation omitted).

117. See *OSS Nokalva, Inc. v. European Space Agency*, No. 08-3169 MLC, 2009 WL 2424702, at *4 (D.N.J. Aug. 6, 2009) (following *Atkinson* and finding that the “ESA is entitled to absolute immunity” unless immunity is waived).
“entitled to absolute immunity under the IOIA, contingent on any waiver of that immunity by the EBRD.”

However, the Third Circuit now finds that it is “unreasonable to assume that those international organizations that were established under the IOIA after foreign sovereign immunity had been altered by the FSIA would still be subject to that level of immunity enjoyed by foreign governments and international organizations in 1945.”

In *OSS Nokalva*, an American software company sued the European Space Agency (ESA), an international organization headquartered in Germany, in the United States based on a contract dispute. The District Court denied the ESA’s motion to dismiss for lack of subject-matter jurisdiction based on immunity, holding that the international organization “was generally entitled to absolute immunity” but had waived immunity in this case. The Third Circuit upheld this ruling but on different grounds.

The appellate court’s analysis mirrored the D.C. Circuit’s reasoning in *Atkinson*, considering the text and legislative history of the IOIA and the FSIA, but arrived at the opposite conclusion. Where the D.C. Circuit found that “the IOIA provided that international organizations were to have indefinitely the same level of ‘virtually absolute’ immunity as foreign sovereigns enjoyed in 1945, later changes to foreign sovereign immunity notwithstanding,” the Third Circuit determined “that Congress intended the IOIA would adapt with the law of foreign sovereign immunity.”

The Third Circuit agreed with the D.C. Circuit that the text of the IOIA does not explicitly address this question, but said that the

119. OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 764 (3d Cir. 2010).
120. See id. at 758-60.
121. Id. at 758, 760; see also OSS Nokalva, Inc. v. European Space Agency, No. 08-3169 MLC, 2009 WL 2424702, at *4, *8 (D.N.J. 2009) (citing Mendaro v. World Bank, 717 F.2d 610, 613-14 (D.C. Cir. 1983)).
122. See OSS Nokalva, 617 F.3d at 758.
123. See id. at 762.
124. Id. (quoting Atkinson, 156 F.3d at 1340).
125. Id. at 764.
126. Id. at 762 (“As a ‘reference statute,’ [the reference] raised whether the IOIA should be understood to codify for international organizations the extent of immunity that foreign governments enjoyed in 1945 when the IOIA was enacted, or whether it should be understood to require incorporation of subsequent changes in the law of foreign sovereign immunity.”) (citing Atkinson, 156 F.3d at 1340).
language of the IOIA suggests that “subsequent changes to the extent of immunity accorded foreign sovereigns should . . . be reflected in the immunity to which international organizations are entitled under the IOIA.” \textsuperscript{127} It noted that Congress could have easily “tether[ed] international organization immunity to the law of foreign sovereign immunity as it existed at the time the IOIA was passed . . . [or] just specified the substantive scope of the immunity it was conferring” but did neither. \textsuperscript{128} Therefore, the \textit{OSS Nokalva} court applied the “well-established canon of statutory interpretation” that the D.C. Circuit dismissed in \textit{Atkinson} \textsuperscript{129}: “a statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted. \textit{This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.”} \textsuperscript{130}

Under this view, the IOIA incorporates the movement from absolute to restrictive immunity for foreign sovereigns codified in the FSIA. The Third Circuit found that “the immunity foreign sovereigns enjoyed in 1945 is irrelevant to the appropriate level of immunity due international organizations today.” \textsuperscript{131} However, the court noted that the practice of determining immunity for foreign sovereigns “on a case-by-case basis in 1945 bolster[ed the court’s] conclusion that Congress intended the IOIA’s ‘same immunity’ language to reflect changes to foreign sovereign immunity as they occurred.” \textsuperscript{132}

Where the D.C. Circuit found that provisions in the IOIA and that statute’s legislative history show that the sole mechanism for keeping international organization immunities up-to-date is Executive Branch action, the Third Circuit concluded the IOIA merely \textit{permits} the President to exert authority in this area. \textsuperscript{133} “[N]othing in the statutory language or legislative history . . . suggests that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the immunity of foreign sovereigns.” \textsuperscript{134}

The panel found particularly persuasive State Department statements made soon after the FSIA was enacted indicating that the Act

\begin{flushleft}
127. \textit{Id.}
128. \textit{Id.} at 764.
129. \textit{Id.} at 763.
130. \textit{Id.} (quoting \textit{Atkinson}, 156 F.3d at 1340).
131. \textit{Id.} at 762 n.4.
132. \textit{Id.}
133. \textit{Id.} at 763-64.
134. \textit{Id.} at 763 (citing the Senate committee report described in \textit{Atkinson}).
\end{flushleft}
amended international organizations’ immunities. The court also noted that the congressional record for other legislation suggested that Congress shared this view.136

Also unlike the D.C. Circuit, the Third Circuit expressed concern that an alternative rule would allow foreign governments to operate with absolute immunity, rather than the restrictive immunity provided in the FSIA, simply by acting through an international organization.137 The court reasoned that if the government of the foreign country in which the international organization’s headquarters were located had itself contracted with the plaintiff, the foreign sovereign would not have been immune because the agreements at issue in the case were undisputedly “commercial activities.”138

In conclusion, the Third Circuit has moved away from the D.C. Circuit’s rule of absolute immunity for international organizations under the IOIA by narrowing the scope of that statute’s protection.

III. DOES THE TEXT OR THE LEGISLATIVE HISTORY OF THE IOIA OR THE FSIA SHOW THAT CONGRESS INTENDED TO INCORPORATE CHANGES TO THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS?

If the IOIA incorporates the evolution of foreign sovereign immunity or if international organizations listed in the IOIA are “foreign states” for the purposes of the FSIA, then the FSIA would define the scope of those entities’ immunity from suit139 and may provide the “sole basis for obtaining jurisdiction” over them in a U.S. court.140 However, despite the seemingly clear language of the IOIA that a court must grant an international organization the same level of immunity the court would accord to a foreign government,141 the FSIA exceptions142

135. See id. at 764-65 (quoting Owen Letter, supra note 70).
136. Id. at 764 n.6 (citing H.R. REP. NO. 105-802, at 13 (1998) (stating, in an explanation of an amendment to the Foreign Corrupt Practices Act that was published the day before Atkinson was decided, that “international organizations . . . generally have the same immunity as foreign governments, and the [FSIA] provides that foreign governments are not immune for actions taken in connection with their commercial activities”) (alteration in original)).
137. See id. at 764 (citing Herz, supra note 15, at 521-22).
138. See id. at 765.
139. 28 U.S.C. §§ 1604-1605 (2006). However, a court could find that international organizations are granted immunity under section 1604 of the FSIA based on the IOIA but are not subject to the restrictions in sections 1605-1607 because those restrictions apply only to foreign states, agencies, and instrumentalities.
to the general grant of foreign sovereign immunity may not apply in cases involving international organizations. Recently-decided Supreme Court cases suggest that courts should read the FSIA narrowly and exclude entities that Congress did not clearly intend to define as foreign states or as agencies or instrumentalities. Most recently, in Samantar v. Yousuf, the Court looked closely at the text and the legislative history of the FSIA to determine congressional intent. The following sections track the same analytical steps.

A. Does the Text of the IOIA or the FSIA Indicate Congressional Intent?

The text of the IOIA does not state explicitly whether international organizations should be granted the level of immunity generally provided to foreign states in 1945 or the present, but the plain language of the FSIA suggests that Congress intended to differentiate “foreign states” and “agencies and instrumentalities” from international organizations, thereby codifying restrictive immunity for only the former entities.

First, the findings and purpose section of the FSIA states that the Act was intended to codify the customary international law of “restrictive” foreign sovereign immunity. In contrast, the standard for interna-
tional organizations has traditionally been “functional” immunity. If Congress had intended to incorporate such a significant legal change into the FSIA, it would likely have mentioned the modification in the findings and purpose section. In addition, the IOIA invites the Executive Branch to fix and adjust the privileges and immunities of international organizations, perhaps based on the practice of granting foreign sovereign immunity when that law was enacted, while the FSIA was designed specifically to remove that discretion from the President and State Department.

The scope of the IOIA is also different from the scope of the FSIA. In particular, the FSIA covers foreign sovereigns while the IOIA was originally written to protect international organizations of which the United States is a member (although other statutes have expanded the IOIA to provide privileges and immunities to some organizations in which the United States does not participate). Also, the IOIA commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.

149. See, e.g., Restatement (Third) of Foreign Relations Law § 467(1) (1987) (“Under international law, an international organization generally enjoys such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization, including immunity from legal process, and from financial controls, taxes, and duties.”). But see Preuss, supra note 27, at 333 (noting that the United States took the position that there was no customary international law on this subject before the IOIA was enacted); see also infra Part IV.D (discussing current lack of customary international law in this area).

150. Cf. Samantar, 130 S. Ct. at 2294 (Scalia, J., concurring) (pointing out that there is no need to consult the “legislative history [of the FSIA] to establish the purpose of the statute . . . because the enacted statutory text itself includes findings and a declaration of purpose”).


152. See supra Part II.A.


154. See id.

155. See 22 U.S.C. § 288 (“[T]he term ‘international organization’ means a public international organization in which the United States participates . . . .”)

156. See, e.g., 22 U.S.C. § 288k (2006) (authorizing the President to extend the IOIA’s provisions to the “Hong Kong Economic and Trade Offices in the same manner, to the same extent, and subject to the same conditions as such provisions may be extended to a public international organization in which the United States participates . . . .”)

157. A court might also determine that the FSIA’s definition of a “foreign state” was not intended to cover international organizations because the IOIA uses a different term, “foreign government,” as its reference point for the immunity of international organizations. See 22 U.S.C.
covers individuals but the FSIA does not.\textsuperscript{158}

The only textual overlap between the IOIA and the FSIA is that the FSIA prohibits the attachment of an international organization’s disbursements to a foreign state in order to execute a judgment against the state.\textsuperscript{159} The mention of international organizations in section 1611(a) of the FSIA, while not dispositive, indicates that Congress at least considered the effect of the FSIA on those organizations and chose not to expressly incorporate them into the statute’s definitions or remedies provisions.

Moreover, the definitional section of the FSIA seems inconsistent with the definition of an international organization covered by the IOIA,\textsuperscript{160} and the Supreme Court has interpreted the FSIA’s definitional section narrowly. In 2003, the Supreme Court held in\textit{Dole Food Co. v. Patrickson} that “a subsidiary of an instrumentality is not itself entitled to instrumentality status” under the FSIA because the two entities have separate legal personalities.\textsuperscript{161} The Court concluded that Congress’s failure to describe alternative ownership structures indicated that it meant to exclude subsidiaries from the scope of the FSIA, noting that “[w]here Congress intends to refer to ownership in other than the formal sense, it knows how to do so.”\textsuperscript{162} In 2010, the Court concluded in\textit{Samantar} that Congress did not intend to include indi-


\textsuperscript{162} \textit{Id.} at 476.
individual officials in the FSIA’s definition of either “foreign state” or “agency or instrumentality.” The Court noted in that case that “elsewhere in the FSIA Congress expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state, which suggests that officials are not included within the unadorned term ‘foreign state.’” The Court also found the FSIA’s sections covering “specific remedial choices for different types of defendants” do not mention foreign officials.

International organizations are arguably closer to the FSIA’s definition of a “foreign state” than the subsidiary corporation in Dole Food or the individual in Samantar because international organizations are typically composed of entities covered by the FSIA. However, the implicit distinction between international organizations and foreign states in section 1611(a) of the FSIA weighs against that reasoning and in favor of a rule that distinguishes these groups. In other words, a reader may infer from the mention of international organizations in section 1611(a), and nowhere else, that Congress did not intend to extend the definition of “foreign state” to cover international organizations.

Nor should an international organization be considered an “agency or instrumentality of a foreign state,” which is defined by the FSIA as an entity that is: (1) a separate legal person, such as a corporation; (2) “an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof”; and (3) “neither a citizen of a State of the United States . . . nor created under the laws of any third country.” International organizations may be closer than subsidiary companies or individuals to this definition because they share some of the statutorily required characteristics with entities that have been recognized by

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163. See Samantar, 130 S. Ct. at 2282. Similar to individuals after Samantar, international organizations could benefit from not being covered by the FSIA if they receive more protection under the IOIA or other sources of law. See infra Part IV.

164. Samantar, 130 S. Ct. at 2288 (citing Kimbrough v. United States, 552 U.S. 85, 103 (2007) (“Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express.”)).

165. Id. (noting that 28 U.S.C. § 1606 (2006) allows punitive damages in cases against an agency or instrumentality but not in cases against a foreign state, and that 28 U.S.C. § 1610 (2006) “afford[s] a plaintiff greater rights to attach the property of an agency or instrumentality as compared to the property of a foreign state”).

166. In contrast, Dole Food and Samantar were about whether components of covered entities shared the FSIA’s protections.

courts as agencies or instrumentalities, such as treaty-created corporate entities wholly owned by multiple foreign governments. Notably, international organizations listed in the IOIA are “separate legal person[s]” under that statute and applicable Executive Orders or additional legislation. Moreover, the text of section 1603(b)(1) of the FSIA says explicitly that this definition is not limited to corporations. But, the Dole Food Court noted that this definition includes “indicia that Congress had corporate formalities in mind,” and in Samantar the Court reasoned that an individual could not be considered an “agency or instrumentality” because the phrase “typically refers to an organization,” and the required attributes “apply awkwardly, if at all, to individuals.” The Court in Samantar interpreted the required characteristic of separate legal personality to “include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name.”

However, international organizations that lack capacity to sue or be sued in the United States without the IOIA may not meet this criterion, and many were not created in a specific foreign state where they have capacity to sue or be sued, contract, or hold property in their own name. In addition, an international organization might not be considered “an organ of a foreign state or political subdivision thereof” because it does not necessarily have shares or ownership interest like a corporation. The Supreme Court analyzed section

172. Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003) (“The language of § 1603(b)(2) refers to ownership of ‘shares,’ showing that Congress intended statutory coverage to turn on formal corporate ownership. Likewise, § 1603(b)(1), another component of the definition of instrumentality, refers to a ‘separate legal person, corporate or otherwise.’”).
173. Samantar v. Yousuf, 130 S. Ct. 2278, 2286 (2010) (citing BLACK’S LAW DICTIONARY 612 (9th ed. 2009)). The Court also rejected Samantar’s suggestion “that § 1603(b)(3) describes only which defendants cannot be agencies or instrumentalities.” Id. at 2287.
1603(b)(2) of the FSIA in *Dole Food* and held that a foreign state must own a majority of the shares of an entity for the entity to be considered an instrumentality under the FSIA, and that this determination must be made at the time of the filing of the complaint. The Court relied heavily on agency principles from corporation law, focusing on the “ownership interest” requirement in 1603(b)(2). Finally, while international organizations listed in the IOIA are not citizens of a state of the United States, the definitional language forbidding that they have been created under the laws of a third country either suits international organizations awkwardly or could exclude them from the FSIA’s scope.

Courts have extended the definition of “agency or instrumentality” to some “treaty-created companies owned jointly by several foreign nations” or associations in a similar position where the organization is controlled by states and is clearly designed to conduct commercial activities. For example, in *Rios v. Marshall*, the District Court for the Southern District of New York concluded that the British West Indies Central Labour Organization (BWICLO), an unincorporated not-for-profit association functioning as an administrative arm of the Caribbean Regional Labour Board, was an “instrumentality” of the Labour
Board’s foreign member states.” In that case, the court noted that BWICLO’s Chief Liaison Officer in the United States had “acted as agent for the Governments of Antigua, Barbados, British Honduras, Dominica, Granada, Guyana, Jamaica, Montserrat, St. Kitts, St. Lucia, and St. Vincent, and ha[d] signed employment contracts on behalf of the Government of Jamaica,” and that BWICLO was funded out of the treasuries of the Labour Board’s member states. Similarly, the Fifth Circuit concluded in Mangattu v. M/V Ibn Hayyan that the United Arab Shipping Company, a Kuwaiti corporation, satisfied “both the purpose and the letter” of the FSIA because it was wholly owned by foreign states and “was created by an agreement that was given the force of law in all member nations, and incorporated under the laws of one of its members.” However, the corporation in that case was clearly designed primarily to engage in commercial activities.

In contrast, in European Community v. RJR Nabisco, Inc., a District Court in the Second Circuit considered the European Community, a treaty-based international organization not covered by the IOIA, “neither a ‘foreign state,’ a ‘political subdivision of a foreign state,’ nor an “agency or instrumentality of a foreign state’” under the FSIA based on a close read of Samantar. The Eleventh Circuit also concluded, without much discussion, that the Organization of the Petroleum Exporting Countries (OPEC) “is not a foreign state or political subdivision of a foreign state pursuant to § 1608 of the FSIA.” So, it would

182. Rios v. Marshall, 530 F. Supp. 351, 371 (S.D.N.Y. 1981). The court also held, pre-Samantar, that BWICLO’s Chief Liaison Officer was “equally protected by principles of foreign sovereign immunity.” Id.

183. Id. (also concluding that BWICLO’s acts did not fall under the FSIA’s commercial activities exception because they “were the equivalent of establishing terms for the temporary removal of manpower resources from its territory”). See generally U.S. GEN. ACCOUNTING OFFICE, GAO-92-95, FOREIGN FARM WORKERS IN U.S.: DEPARTMENT OF LABOR ACTION NEEDED TO PROTECT SUGAR CANE WORKERS 2 (1992) (describing the relationship among the Labour Board, its member states, BWICLO, and the workers).


185. See id. at 209.

186. European Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 198, 208 (E.D.N.Y. 2011). The court concluded that “the European Community was not created under the laws of a third country” because “the only countries’ laws establishing the European Community are those of its Member States.” Id. at 208 (citation omitted).

187. Prewitt Enter., Inc. v. Org. of Petroleum Exp. Countries, 353 F.3d 916, 922 n.9 (11th Cir. 2003) (also concluding that it does not “qualify under § 288 of the IOIA because the statute only applies to international organizations in which the United States participates pursuant to a treaty or an act of Congress”); see also Linton v. Airbus Industrie, 794 F. Supp. 650 (S.D. Tex. 1992) (holding that removal to federal court was improper where pooling of foreign
not be wholly unprecedented for a court to find that an international organization is an agency or instrumentality of its member states, and therefore covered by the FSIA, but courts have reached that conclusion only in narrow factual circumstances.

Another textual indication that the FSIA was not intended to cover international organizations listed in the IOIA is that it is not clear what types of conduct by those organizations would fall into the FSIA’s exceptions. For example, courts interpreting the commercial activities exception must determine the commercial character of an activity “by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”\(^\text{188}\) In Republic of Argentina v. Weltover, Inc., the Supreme Court held that Argentina’s issuance of bonds was a commercial activity for the purposes of the FSIA because the bonds were “in almost all respects garden-variety debt instruments.”\(^\text{189}\) It rejected the foreign state’s characterization of the underlying activity as a “component of a program designed to control that nation’s critical shortage of foreign exchange.”\(^\text{190}\) But, imposing restrictive immunity might lead to absurd results or be too “severe” for some international organizations, such as the International Finance Corporation, International Monetary Fund, or World Bank, whose activities could be characterized as nearly entirely “commercial” in nature.\(^\text{191}\) In those cases, the commercial activities exception might swallow the IOIA and FSIA’s general rule of immunity.

Additionally, courts have not been consistent in what types of conduct by international organizations would fall under the FSIA’s exceptions. The D.C. Circuit has concluded in several cases that most employment disputes would be outside the scope of the FSIA’s commercial activities exception if the statute applied to international organiza-

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190. Id. at 616.

Nevertheless, in *Saudi Arabia v. Nelson*, the Supreme Court suggested that recruitment, hiring, and employment could be characterized as commercial activities under the FSIA. However, the Court in that case held that the underlying conduct at issue—wrongful arrest, imprisonment, and torture—was abuse of power by police, and therefore did not fall under any of the FSIA’s exceptions abrogating foreign sovereign immunity.

Finally, it is not clear whether granting or abrogating immunity for international organizations would be retroactive. Should courts grant only restrictive immunity to international organizations added to the IOIA after the Tate Letter or after the enactment of the FSIA, based on the evolution of U.S. policy and international law? The Third Circuit seemed to limit its holding in *OSS Nokalva* to “international organizations that were established under the IOIA after foreign sovereign immunity had been altered by the FSIA.” However, in *Republic of Austria v. Altmann*, the Supreme Court held that the FSIA applies to suits against foreign states “regardless of when the underlying conduct occurred.” If any international organizations have less-than-absolute immunity, then all of the entities covered by the IOIA probably share that lower level of protection unless otherwise determined by statute or administrative action.

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194. *See id.* at 355, 358 (distinguishing the case from breaches of employment contracts).

195. *See id.* at 355.

196. *See id.* at 363; *see also id.* at 364-70 (White, J., concurring) (finding that the action was based on retaliation for whistle-blowing, but that there was no connection with the United States). Justice Kennedy, in concurrence, noted that negligent failure to warn, with regard to an employment contract, might fall under the FSIA’s commercial activity exception. *See id.* at 371 (Kennedy, J., concurring in part and dissenting in part).


199. *See also* Garcia v. Sebelius, 867 F. Supp. 2d 125, 144 (D.D.C. 2012) (holding, among other things, that because the Pan-American Health Organization and the Director of that organization “were entitled to IOIA immunity when the plaintiffs filed their Complaint, the Court lack[ed] jurisdiction over the plaintiffs’ claims against [the Director] regardless of when those claims accrued.”); Weidner v. Int’l Telecomms. Satellite Org., 392 A.2d 508, 510 (D.C. 1978) (“The crucial date is that on which the complaint is filed. If a cause of action arises and an individual or organization is subsequently clothed with immunity, courts lack jurisdiction to entertain actions brought against such individuals or organizations so long as the immunity exists.”) (citations omitted).
In conclusion, the text of the IOIA does not indicate congressional intent. In addition, the plain language of the FSIA seems inapplicable to international organizations, evincing a lack of congressional intent to include them in the statute except where expressly noted.200

B. Does Legislative History Provide Any Indication of Congressional Intent?

1. Legislative History of the IOIA

The IOIA was enacted in large part to make the United States more legally hospitable for the newly-founded United Nations and other international organizations.201 Britain, Canada, and the Netherlands had recently passed similar legislation202 and the House committee report on the draft legislation noted that “the question of extension of privileges and immunities . . . should not be permitted to embarrass the United States” at the United Nations debate on the location of its headquarters.203 “Since the readiness of the United States to extend privileges and immunities may well be a condition precedent to the

200. See also Dellapenna, supra note 59, at 114-15 (describing an ABA Working Group’s proposed amendment to the FSIA that would have clearly excluded international organizations from the statutory definitions in 28 U.S.C. § 1603, and noting that the group found the case law, statutes, and legislative history inconclusive on this subject).


establishment of the [United Nations] headquarters in this country, the United States should be well prepared with respect to this point."  

The IOIA represents a carefully considered legislative judgment on the proper scope of these privileges and immunities. Its drafters gave “careful study” to the definition of which organizations would be covered. In addition, while the organizational immunity provisions seem to have been based on Swiss and British precedents, Congress limited immunity for individuals in several areas. Representative Jere Cooper noted on the House floor that “[i]n fact, it is not quite as broad as the general application now in the case of embassies and legations.” One of the IOIA’s principal proponents in the House, Representative Absalom Willis Robertson of Virginia, added that “[w]e limited this as much as we could safely do and still permit the proper entry of employees of the international organizations.” For example, immunity from suit for international organization officials is limited to

204. Id. at 3.

205. Id. It is unclear, however, whether Congress intended the array of international organizations and related entities that are not covered by the IOIA to have no privileges or immunities at all, unless supplied by international agreement, other domestic legislative or executive action, common law, or customary international law. See infra Part IV.

206. See Edwin H. Fedder, The Functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization, 9 Am. U. L. Rev. 60, 64 (1960) (“The [statutory reference to the immunity of foreign states] can only be explained as one of convenience; it does not dispute the theory pertaining throughout the law, especially that provision with respect to legal status [referring to functional immunity for international organizations].”). On the other hand, it is possible that Congress tied the IOIA to foreign sovereign immunity because it specifically intended to give states acting together as states the same privileges and immunities as states acting alone, but then it is not clear why the IOIA covers only a subset of international organizations, privileges, and immunities. See Gordon H. Glenn et al., Immunities of International Organizations, 22 Va. J. Int’l L. 247, 256-59 (1982) (reviewing the legislative record and concluding, similar to and quoting Fedder, that “the drafters’ clear implication that the ‘conception and content’ of the IOA embody complete jurisdictional immunity supports the conclusion of one commentator that the Act’s reference to foreign sovereigns ‘can only be explained as one of convenience’” (citation omitted)). But the authors, who collaborated on the OAS’s appellate brief in Broadbent, confuse the chronology when they state that the IOA was enacted “barely one year before the Supreme Court unofficially abolished the doctrine of absolute sovereign immunity [in Republic of Mexico v. Hoffman, 324 U.S. 30 (1945)].” Glenn et al., supra, at 247, 259-60. The IOIA was enacted after Hoffman, actually strengthening their argument.


208. 91 Cong. Rec. 10,865-66 (daily ed. Nov. 20, 1945). House members initially at least were particularly concerned about potential costs and immigration. See id. (discussing whether the legislation would require an appropriation of funds and how the legislation would align with immigration laws).

209. Id.
official acts “whereas diplomatic officers enjoy full immunity from legal processes in this country.”

In addition, the House and Senate committees recognized that international organizations could not “reciprocate” the benefits conferred by the IOIA, but believed, based on practice at the time, that the Executive Branch could withdraw “privileges and immunities from nationals of any foreign country which fails to provide corresponding privileges to the citizens of the United States; this is an important sanction in which the committee places considerable importance.”

The legislative history of the IOIA shows that the 79th Congress was also concerned about whether the IOIA would extend immunity to “commercial activities,” and that Congress did, as the D.C. Circuit concluded in *Atkinson*, want for the President to be the main check on this form of protection. Representative Robertson said that the drafters designated the President to limit immunity under the IOIA “because he handles our foreign affairs under the Constitution...he is directed to withdraw from [individuals] these privileges if he finds they are violating the terms under which they were permitted to enter and to do business presumably for some international organization.”

But the 1945 Congress was not speaking about “commercial activities” as that term is now defined in the FSIA. Rather, the main concern seems to have been that either individuals working with international organizations or an international organization itself might engage in conduct, such as running a side business or supporting

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211. Id. at 5; S. REP. NO. 79-861, at 5-6 (1945); see also supra Part IIA (discussing how foreign sovereign immunity was granted when the IOIA was enacted).
213. See S. Rep. No. 79-861, at 2 (1945) (“This provision [authorizing the President to withhold or withdraw privileges or immunities under the IOIA] will permit the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature.”); 91 CONG. REC. 12,530 (daily ed. Dec. 21, 1945).
214. 91 CONG. REC. 12,530 (daily ed. Dec. 21, 1945).
215. See 28 U.S.C. § 1603(d) (2006) (defining “commercial activity” for the purposes of the FSIA as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”).
216. 91 CONG. REC. 12,530 (daily ed. Dec. 21, 1945) (Rep. Robertson commented that “[i]t is a very hypothetical case, though, that representatives of Great Britain, for instance, who would be assigned to headquarters of the [United Nations] would open up a shipping business in Boston or San Francisco. They just do not operate that way.”).
labor strikes against American companies, \(^{217}\) completely apart from their official responsibilities. \(^{218}\) Senator Robert Taft noted that the Senate Finance Committee amended the House bill to address the Senate committee’s concern that international organizations “may try to engage in commercial enterprises, or be authorized to do so.” \(^{219}\) He added that they “did not wish in such event to give them any exemption from taxation that is not given to private concerns operating in the same field.” \(^{220}\) There is no indication from the legislative history that members of Congress intended to provide any additional mechanism for reducing the privileges and immunities of an international organization operating within the scope of its official responsibilities; \(^{221}\) the drafters seem to have believed that the limitations included in the legislation were sufficient. \(^{222}\)

So why did Congress not speak in greater detail? As Representative John Rankin even asked: “Ought not that be written into law? Why should we wait for the Executive? Should not that be written into law, that if they come here and engage in other business these privileges

\(^{217}\) 91 Cong. Rec. 12,531-32 (daily ed. Dec. 21, 1945) (Rep. Clare Hoffman of Michigan was concerned that Russian officials might support a strike against General Motors).

\(^{218}\) See 91 Cong. Rec. 12,432 (daily ed. Dec. 20, 1945); see also S. Rep. No. 79-861, at 4 (1945) (“The [tax] exemption [for alien officers and employees of international organizations] is limited to wages, fees, or salary received as compensation for official services to such international organizations so that the beneficiaries of the exemption are not relieved by the [IOIA] from taxes on income derived from commercial activities in the United States, speculation in securities, or other sources within the United States.”).


\(^{220}\) Id.

\(^{221}\) But see Broadbent v. Org. of Am. States, 628 F.2d 27, 32 (D.C. Cir. 1980) (“[T]his provision may reveal that Congress intended to grant absolute immunity to international organizations giving to the President the authority to relax that immunity, including removal or restriction of immunity in cases involving the commercial activities of international organizations.”).

\(^{222}\) United Nations personnel also seem to have believed that the IOIA did not restrict the organization’s immunity for “commercial activities” as that term is now defined in the FSIA. See Liang, supra note 29, at 585 (“Immunity of the United Nations from suit in the courts of Member States raises the question as to who is to determine claims between the organisation and persons with whom it must do business. How is the essential immunity of the organisation to be reconciled with the rights of persons who come in contact with it and have a legal remedy for wrongs? While the organisation might waive its immunity, and it is even envisaged that this might be done in advance in the conclusion of certain contracts, there is serious objection to the waiver of the immunity of the organisation itself, as distinguished from the waiver of the immunity of its officials.”). Liang recommended “some kind of international tribunal which can determine rights between the organisation and persons having claims against it.” Id.
should cease?" For the same reason every Congress leaves some matters undone: it was a Friday and they were going on recess. Representative Robertson and Representative Karl Mundt noted that the IOIA needed to be enacted immediately because a decision on the location of the United Nations headquarters was imminent and the State Department said the legislation was necessary for placement in the United States—although no one yet knew which city would be selected. The Senate amendments were agreed to without objection even though House members may have had no chance to review the changes in writing.

2. Legislative History of the FSIA

The legislative history of the FSIA suggests that Congress did not intend that legislation to amend the privileges and immunities of international organizations. Generally, the House and Senate committees reported that one key purpose of the FSIA was to bring some stability to the law of foreign sovereign immunity in U.S. courts. More importantly, the House and Senate committee reports accompanying the legislation specified that the purpose of section 1611(a), the only textual overlap between the FSIA and the IOIA, is to allow international organizations "to carry out their functions from their offices located in the United States without
hindrance by private claimants seeking to attach the payment of funds to a foreign state; *such attachments would also violate the immunities accorded to such international institutions.*\(^{228}\) The reports also said that section 1611(a) was “not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.”\(^{229}\) This language indicates that the drafters of the FSIA had international organizations in mind, and considered the immunity of those organizations as separate from, and possibly higher than, that of foreign states under contemporaneous law.

The legislative history behind the definition of “agency or instrumentality of a foreign state”\(^{230}\) as applied to international organizations is less clear, but suggests that Congress at least did not have these entities in mind even if it did not intend to exclude them. As discussed, the Supreme Court has adopted the meaning of section 1603(b)(1) from the House committee report, indicating that the definition encompasses “a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.”\(^{231}\) This language could be read to include international organizations if a court deems the organization to have been created in a specific foreign state and have capacity to sue or be sued, contract, or hold property in its own name there.

Similarly, the legislative history suggests that the “organ of a foreign state” provision\(^{232}\) was meant to ensure that where a foreign state owns only part of an entity, “the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state’s political subdivision.”\(^{233}\) Courts may avoid extending this aspect of the definition of an agency or instrumentality to cover international organizations if foreign states do not have any “ownership interest” in these entities, but some courts

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231. See Samantar, 130 S. Ct. at 2287 n.9 (quoting H.R. Rep. No. 94-1487, at 15 (1976)).
232. 28 U.S.C. § 1603(b) (2).
have referred to member states as “owner nations.”

Finally, even if an international organization is considered not to have been created under the laws of a third country, the drafters of this language stated that “[t]he rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either [commercial] or private in nature.” In other words, Congress intended courts to find that an entity meets this criterion if the purpose of the entity is commercial or private. International organizations, in contrast, are generally not presumptively engaging in commercial activities or private.

In conclusion, the legislative history of the FSIA suggests that the statute was not intended to alter the privileges and immunities of international organizations covered by the FSIA.

3. Subsequent Legislation

Congressional attempts to clarify this area of law have failed. In 1990, for example, Senator William Roth proposed legislation that would have amended the IOIA by expressly reducing international organization immunity to the extent enjoyed by foreign states under the FSIA. While introducing the bill, he stated that “[e]ven though the immunity enjoyed by foreign governments has changed, the 1945 law has not been changed and the listed international organizations retain absolute immunity.”

In 1991, Representative Eleanor Holmes Norton proposed a bill, also never enacted, that would have removed the IOIA’s property tax exemption for “property of an international organization used for

234. See European Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 208 (E.D.N.Y. 2011); cf. Rios v. Marshall, 530 F. Supp. 351, 372 (S.D.N.Y. 1981) (dismissing claims against the British West Indies Central Labour Organization, an unincorporated association and administrative arm of the Caribbean Regional Labour Board, on the grounds that it was an instrumentality of the Board’s member states under the FSIA).


238. See Dellapenna, supra note 59, at 114 (“Attempts in Congress to amend the International Organizations Immunities Act to incorporate the standards of the [FSIA] have been unsuccessful.”).


commercial activities in the United States.”241 The bill would have defined “commercial activities” along the lines of the FSIA’s definition.242

In conclusion, these legislative attempts to either change or clarify the law support judicial restraint where Congress has declined to modify the statute and the President also has not limited an organization’s privileges and immunities.243

IV. OTHER SOURCES OF LAW MAY PROVIDE PRIVILEGES AND IMMUNITIES FOR INTERNATIONAL ORGANIZATIONS IN U.S. COURTS

The IOIA and the FSIA are not the only possible sources of privileges and immunities for international organizations in the United States.244 Other domestic and international law may provide alternative grounds for a U.S. court to dismiss or decide a case involving an international organization.245 Specifically, international organizations could have privileges and immunities under international agreements, other statutory authority or administrative action, common-law doctrines, or customary international law.

242. See id.
243. But see, e.g., Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (“Congress does not express its intent by a failure to legislate... and even if it did, the will of a later Congress as to the meaning of a law enacted by an earlier Congress is of little weight.”) (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 77 n.6 (1994) (“[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight, and the views of the committee of one House of another Congress are of even less weight.”)).
244. Cf. Polak v. Int’l Monetary Fund, 657 F. Supp. 2d 116, 120 (D.D.C. 2009) (reviewing whether other law provided immunity for the defendant international organization, but dismissing the case for lack of subject-matter jurisdiction under the IOIA), aff’d, No. 09-7114, 2010 WL 4340534 (D.C. Cir. Oct. 20, 2010); Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89-90 (Dec. 20) (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”).
245. See, e.g., Glenn et al., supra note 206, at 249-50 (“U.S. courts must look to international as well as domestic sources of law in order to determine the proper scope of the immunities of international organizations.”); cf. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11) (concluding that the United Nations had a legal personality by implication of its designated functions, but not deciding whether the organization was a “super-State” or whether its legal personality, rights, and duties are the same as those of a state).
International agreements in which the United States participates, such as the Convention on the Privileges and Immunities of the United Nations (CPIUN), are important sources of legal aegis for international organizations.\textsuperscript{246} The Second Circuit, for example, refrained from deciding in \textit{Brzak v. United Nations} whether the FSIA “now defines what sort of immunity the IOIA applies to international organizations” because, the court concluded, “the United Nations enjoys absolute immunity from suit” under the CPIUN “unless it has expressly waived its immunity.”\textsuperscript{247} District courts in the Second Circuit have followed the \textit{Brzak} court’s lead,\textsuperscript{248} even while acknowledging that the Third Circuit’s holding in \textit{OSS Nokalva}\textsuperscript{249} supports abrogation of absolute immunity under the IOIA.\textsuperscript{250} Some foreign national courts have also denied

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\textsuperscript{246} See U.S. Const. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .”); see also 28 U.S.C. § 1604 (2006) (foreign sovereign immunity is “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]”). \textit{See generally} Liang, \textit{supra} note 29, at 580-81 (discussing history and significance of the CPIUN); Miller, \textit{supra} note 202, at 12, 16 (reviewing protections for the United Nations).

\textsuperscript{247} \textit{Brzak} v. United Nations, 597 F.3d 107, 112 (2d Cir. 2010), \textit{cert. denied}, 131 S. Ct. 151 (2010) (concluding, despite Medellin v. Texas, 552 U.S. 491 (2008), that the Convention is self-executing) (citation omitted); \textit{see also} \textit{Restatement (Third) of Foreign Relations Law} § 467 cmt. f (1987) (“The immunities provisions in [the CPIUN] are probably self-executing and to be given effect even without legislative implementation . . . . To the extent that the provisions of an agreement and of the [IOIA] are not identical, an organization enjoys the benefits of both.”). The Second Circuit noted two additional reasons why it did not need to decide this issue: (1) “whatever immunities are possessed by other international organizations, the CPIUN unequivocally grants the United Nations absolute immunity without exception,” and (2) “plaintiffs have not presented any argument, either at the district level or to us, which would suggest that one of FSIA’s exceptions to immunity would apply.” \textit{Brzak}, 597 F.3d at 112-13.

\textsuperscript{248} See \textit{Sadikoglu} v. United Nations Dev. Programme, No. 11 Civ. 0294(PKC), 2011 WL 4953994, at *4 (S.D.N.Y. Oct. 14, 2011) (noting the Circuit split and remarking that the Second Circuit has not decided “whether the IOIA incorporates FSIA’s narrower scope of immunity as against international organizations such as the UN”); United States v. Chalmers, No. S5 05 CR 59 (DC), 2007 WL 624063 (S.D.N.Y. Feb. 26, 2007) (order concluding that the United Nations and its Independent Inquiry Committee were immune from disclosure requests under the CPIUN and the IOIA); \textit{see also} \textit{Askir} v. Boutros-Ghali, 933 F. Supp. 368, 371-72 (S.D.N.Y. 1996) (pre-\textit{Brzak}, questioning, but not deciding, whether the FSIA narrows the immunity provided by the IOIA or the CPIUN).

\textsuperscript{249} OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 766 (3d Cir. 2010) (concluding that Congress intended the IOIA to reflect changes in foreign sovereign immunity, and applying restrictive immunity based on the FSIA).

\textsuperscript{250} \textit{See Sadikoglu}, 2011 WL 4953994, at *4; \textit{see also} Hunter v. United Nations, No. 106796/04, 2004 WL 3104829, at *3 (N.Y. Sup. Ct. Nov. 15, 2004) (“It is unclear whether the [IOIA], by
immunity to international organizations in the absence of an international agreement or specific domestic legislation.\footnote{251} The United Nations’ International Law Commission (ILC) has developed draft articles on the Responsibility of International Organizations that could help address this issue multilaterally,\footnote{252} but the ILC’s work on the privileges and immunities of international organizations has remained a low priority.\footnote{253}

granting to international organizations immunity co-extensive with that of foreign governments, confers the absolute immunity foreign governments enjoyed at the time of the Act’s passage, or the somewhat restrictive immunity provided for the Foreign Sovereign Immunities Act of 1976.”). However, the \textit{Hunter} court found that the United Nations had immunity based on the CPIUN. \textit{Hunter}, 2004 WL 3104829, at *3. \textit{Contra} Banco de Seguros del Estado v. Int’l Fin. Corp., Nos. 06 Civ. 2427(LAP), 06 Civ. 3739(LAP), 2007 WL 2746808, at *4 (S.D.N.Y. Sept. 20, 2007) (holding, pre-\textit{Brzak} based on \textit{Atkinson}, that “an international organization’s immunity under the IOIA is absolute and is co-extensive with the absolute immunity accorded to foreign sovereigns in 1945”).

\footnote{251}{See Corte di cassazione [Cass.] [Supreme Court], 19 febbraio 2007, n.3718, \textit{translated in Oxford Reports on Int’l Law in Domestic Courts [ILDC] 827 (2007) (It.)} (international organizations “are not necessarily guaranteed immunity from national jurisdiction” because the customary international law of foreign sovereign immunity does not extend to those bodies, so “the privileges and immunities (international organizations) enjoy can arise only from specific agreements”); Cass., 28 ottobre 2005, n.20995, \textit{translated in ILDC 297 (2005) (It.)} (“As it is impossible to place States and international organisations on the same level, the privileges and immunities the latter enjoy can only arise from specific agreements.”); Cour de Cassation [Cass.] [Court of Cassation], Mar. 12, 2001, n.S.99.0103.F, \textit{reprinted in ILDC 42 (2001) (Belg.)} (denying immunity where the federal parliament failed to ratify treaty); Cour de cassation [Cass.] [supreme court for judicial matters] le civ., May 29, 2001, n.99-16672, \textit{reprinted in ILDC 789 (2001) (Fr.)} (upholding denial of immunity from execution, in a complicated case, where the relevant treaty had not been duly ratified by the French parliament); Jan Wouters, Cedric Ryngaert & Pierre Schmitt, \textit{International Decision}, 105 Am. J. Int’l L. 560, 560-61 (2011) (“In the absence of a treaty . . . national courts will normally not grant immunity to organizations on the basis of customary international law or general principles of law.”). But see Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands] 20 december 1985, \textit{reprinted in 94 I.L.R. 321 (Iran-United States Claims Tribunal/A.S.)} (Neth.) (dismissing a case against the tribunal, even though the Netherlands had not yet ratified the treaty, because the Dutch government “stated both in public (in reply to questions put by a member of the Lower House of Parliament) and in writing to the Tribunal that it assumes that the Tribunal is nonetheless entitled in the Netherlands to ‘the usual immunity from jurisdiction conferred on international organizations, which is necessary for the performance of the tasks for which the organization has been established’”).

\footnote{252}{Draft articles are available at http://untreaty.un.org/ilc/texts/9_11.htm (last visited Feb. 13, 2013). \textit{See also Finn Seyers ted}, \textit{Common Law of International Organizations} 415 (2008) (discussing the responsibilities of international organizations and constitutive member states, and the ILC’s ongoing work in this area); Kunz, \textit{supra} note 38, at 848 (contemplating a multilateral treaty that would address this issue).}

\footnote{253}{More information about this discontinued work is available at http://untreaty.un.org/ilc/summaries/5_2.htm (last visited Feb. 25, 2013).}
B. Other Legislative and Administrative Action

While the focus of this Note is international organizations covered by the IOIA, some entities benefit from specific statutory authority, administrative action, or both. For example, the Organization for Security and Cooperation in Europe\textsuperscript{254} and the African Union\textsuperscript{255} among others, are not technically covered by the terms of the IOIA but derive privileges and immunities from separate legislation and administrative action.

Conversely, Congress or the President can reduce the privileges and immunities of entities that have been designated public international organizations covered by the IOIA.\textsuperscript{256} However, instances of Congress or the Executive Branch doing so seem to be rare.\textsuperscript{257}

C. Common-Law Doctrines

International organizations may have a broad array of common-law defenses, such as common-law immunity, \textit{forum non conveniens}, comity, and the Act of State doctrine, even if they lack immunity under the IOIA or in cases where immunity has been abrogated.

The Supreme Court in \textit{Samantar} explained that individual officials of foreign states might have immunities under U.S. common law even though they are not shielded by the FSIA.\textsuperscript{258} Similarly, in \textit{Lutcher}, Judge Burger noted that “[i]mmunity can arise from the common law doctrine of sovereign immunity in some circumstances and from specific legislation. Congressional belief, well founded or not, that

\begin{footnotesize}
\footnote{256. See 22 U.S.C. § 288 (2006) (authorizing the President to place conditions on, limit, or revoke the privileges and immunities provided under the IOIA).}
\footnote{257. See Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) (designating the International Food Policy Research Institute “a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]; except those provided by Section 2(a), Section 2(b), Section 2(c), that portion of the last clause of Section 2(d) relating to official communications, and Section 7(b) of that Act (22 U.S.C. 288a(a), (b), (c), the last clause of (d) and 288d(b))”); see also Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) (designating the International Criminal Police Organization, INTERPOL, “a public international organization entitled to enjoy the privileges, exemptions and immunities conferred by the [IOIA]; except those provided by Section 2(c), the portions of Section 2(d) and Section 3 relating to customs duties and federal internal-revenue importation taxes, Section 4, Section 5, and Section 6 of that Act”).}
\footnote{258. See Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010).}
\end{footnotesize}
United States law did not provide immunity for international organizations was a motivating factor behind the [IOIA].

Generally, courts should not interpret the IOIA to provide less protection for international organizations that have been singled out for special treatment by Congress and the President than the traditional level of “functional” immunity. However, international organizations that are not covered by the IOIA might not have even functional immunity, and, even if they do, it is not clear whether functional immunity is necessarily a higher jurisdictional bar for plaintiffs than restrictive immunity, as that doctrine has been interpreted under the FSIA.

In Verlinden B.V. v. Central Bank of Nigeria, the Supreme Court identified several other grounds for a U.S. court to decline to adjudicate a case, including forum non conveniens and comity. In Sinochem

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259. Lutcher S. A. Celulose e Papel v. Inter-Am. Dev. Bank, 382 F.2d 454, 456 n.3 (D.C. Cir. 1967); see also U.N. Secretariat, supra note 45, at 223 n.49 (“It is the position of the United Nations that its immunity from suit forms part of general international law, and thus part of the law of the United States, even in the absence of any legislature, and, moreover, that the Organization’s immunity from suit is derived from Articles 105 and 104 of the Charter, a treaty to which the United States is a party and which similarly forms part of the law of the land. United States courts have preferred to rely on national legislation, however, in upholding the Organization’s immunity.”).

260. Cf. Glenn et al., supra note 206, at 290 (arguing for incorporation of “the established international law concept of functional immunity into application of the IOIA”).

261. If an organization does not have privileges or immunities under the IOIA, an international agreement, other legislative or administrative action, common law doctrines, or customary international law, it might have no privileges or immunities at all, or even legal capacity to sue or be sued, in U.S. courts. Cf. 22 U.S.C. § 288a (2006) (granting, among other things, capacity to institute legal proceedings). But, these could still be considered instrumentalities under the FSIA. See supra Part III.

262. Compare Vila v. Inter-Am. Inv. Corp., 570 F.3d 274, 279 (D.C. Cir. 2009) (determining whether an international organization would benefit from waiver of immunity by focusing on the nature of the parties’ relationships rather than the nature of the contested transaction), with 28 U.S.C. § 1603(d) (2006) (“The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”).


264. See id. at 490 n.15.

265. See, e.g., Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (“Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”). See generally Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003) (citing Verlinden, 461 U.S. at 480) (“Foreign sovereign immunity . . . is not meant to avoid chilling foreign
International Co. v. Malaysia International Shipping Corp., the Court clarified that “where subject-matter or personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.”\(^{266}\) A plaintiff may need to also show exhaustion of alternative available remedies, such as an organization’s alternative dispute resolution process.\(^{267}\) Cases and secondary sources discussing forum non conveniens typically refer to available local remedies in the foreign forum state, but the general rule could be interpreted more broadly.\(^{268}\)

A court could also determine that it is “unreasonable” to exercise jurisdiction in the name of comity.\(^{269}\) However, the underlying principles favoring dismissal based on comity in cases involving foreign sovereigns do not seem applicable in cases involving international organizations.\(^{270}\)

266. Sinochem Int’l Co. v. Malay. Int’l Shipping Corp., 549 U.S. 422, 429, 436 (2007) (“A federal court has discretion to dismiss a case on the ground of forum non conveniens ‘when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.’”) (citation omitted); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (discussing public and private interest factors); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947).

267. See Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004) (Breyer, J., concurring) (“[A] plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking.” (quoting Restatement (Third) of Foreign Relations Law § 713 cmt. f (“Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.”))); Owen Letter, supra note 70, at 920 (“[T]he privileges and immunities enjoyed by public international organizations impose a special responsibility on them and their Member States to ensure that internal procedures provide effective methods of addressing and resolving ‘labor-management’ disputes.”).

268. See also infra Part IV.D (discussing U.S., foreign, and international cases where parties had an alternative forum available).

269. See Restatement (Third) of Foreign Relations Law § 403(2) (1987) (describing when it is reasonable for a state to exercise prescriptive jurisdiction); id. § 421(2) (describing when it is reasonable for a state to exercise adjudicative jurisdiction, through the state’s courts); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 812-22 (1993) (Scalia, J., dissenting) (distinguishing legislative comity from judicial comity).

270. Cf. Hartford Fire, 509 U.S. at 798 (majority opinion) (finding that comity was no bar to exercising jurisdiction where there was no “true conflict between domestic and foreign law”) (citation omitted); id. at 817 (Scalia, J., dissenting) (defining judicial comity as a court’s decision
Finally, U.S. courts have generally held that foreign sovereigns cannot be sued for “Acts of State” for reasons including “international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations.”271 Under the Act of State doctrine, “acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”272 By analogy, a court might deem valid acts of an international organization taken within the jurisdiction granted by international agreement, such as the organization’s internal administration. However, it is unclear how a court might determine at the margins whether an action is either official or within the international organization’s jurisdiction.273

D. Customary International Law

As the Supreme Court has said, “international law is part of our law.”274 While decisions by foreign and international courts carry no precedential value in the United States, the American judiciary may look for guidance to a “general and consistent practice of states followed by them from a sense of legal obligation.”275 However, the
hodgepodge of foreign and international cases dealing with the privileges and immunities of international organizations shows that there is no general and consistent practice or “opinio juris”276 in this area of law.277

Foreign and international courts have traditionally granted immunity for international organizations as “necessary for the fulfillment of the purposes of the organization,” but not necessarily based on a sense of legal obligation.278 Philippe Sands and Pierre Klein cite Jenks on the proper level of immunity for international organizations (“what is

3 L. Ed. 287 (1812) (holding that the newly formed United States was impliedly bound by the customary international law of foreign sovereign immunity); see also Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) (“As The Schooner Exchange made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.”).

276. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. c (1987) (noting that “a sense of legal obligation (opinio juris sive necessitatis) . . . may be inferred from acts or omissions”).

277. At the time the IOIA was enacted, at least, the position of the United States was that there was no customary international law on this subject. See, e.g., H.R. REP. NO. 79-1203, at 2 (1945) (“Under provisions of law and the comity of nations . . . governments have traditionally granted to each other, and to the officials of each other, certain specific privileges, exemptions, and immunities with respect to these and other matters. However, in cases where [the United States] Government associates itself with one or more foreign governments in an international organization, there exists at the present time no law of the United States whereby this country can extend privileges of a governmental character with respect to international organizations or their officials in this country. It is to fill this need that this bill has been presented.”); see also discussion supra Part II.A.1. See generally BROWNLIE (2008), supra note 6, at 680 (“[T]here is as yet no general agreement on the precise content of the customary law concerning the immunities of international organizations. The minimum principle appears to be that officials of international organizations are immune from legal process in respect of all acts performed in their official capacity.”) (citations omitted).

necessary for the impartial, efficient and economical discharge of the functions of the organization”279) but describe a developing trend “in some countries to apply to international organizations the same distinction as is now generally accepted for states, namely [restrictive immunity].”280 For example, they point out that Italian courts have concluded in several cases that international organizations lacked immunity, even if treaty language seemed to indicate otherwise.281 (However,
Sands and Klein cite the IOIA as a “particularly obvious” example of this trend despite the fact that most U.S. courts have not followed that rule.282) The D.C. Circuit has taken some steps indirectly towards adopting this approach in cases where the organization has a broad waiver in its charter,283 although it is not always clear how a court should decide what level of autonomy the organization needs in a particular area in order to be effective.284

Along the same lines, some international courts and foreign national courts have begun to decline immunity for international organizations on what have been described as human rights grounds.285 These cases generally focus on ensuring that individuals have access to legal mechanisms for holding international organizations accountable.286 In Waite law, but noting that the United Nations and subsidiary bodies might not have immunity from all proceedings in “private law” matters). But see Investerings- & Finansieringsselskabet af 11/1 1984 ApS v. A [Inv. & Fin. Co. of 11 Jan. 1984 Ltd v UNICEF], Østre Landsret [Court of Second Instance for the Eastern Circuit], 26 Aug. 1999, U 2000 478 Ø, translated in ILDC 64 (1999) (Den.) (granting immunity to UNICEF in a contract dispute).

282. SANDS & KLEIN, supra note 279, at 494.


285. See generally August Reinisch & Ulf Andreas Weber, In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 INT’L ORG. L. REV. 59, 76-82 (2004) (reviewing some of the case law); Cedric Ryngaert, The Immunity of International Organizations Before Domestic Courts: Recent Trends, 7 INT’L ORG. L. REV. 121, 122 (2010) (noting that “many European domestic courts have refrained from carrying out a functional necessity analysis. Because the latter analysis typically turns out in favour of the organization, they have instead espoused a (human) rights approach”); Singer, supra note 191, at 58 (“This development of human rights norms imposes a limitation on the jurisdictional immunity of international organizations.”). To see how far courts have come in this regard, consider the early case of Manderlier v. Org. des Nations Unies & État Belge (Ministre des Affairs Étrangers), PASCRISIE BELGE [PAS.] 1966, III, 103, translated in 45 I.L.R. 446 (Civil Trib. of Brussels 1966) (Belg.) (granting absolute immunity to the United Nations in a case based on destruction of the plaintiff’s property in the Congo). The court asserted that “[i]mmunity from jurisdiction is the absolute privilege of whoever enjoys it. It can be withdrawn only by a properly effected change in the law which granted it; and the courts are not judges of when it is expedient for the beneficiary to invoke it.” Manderlier, 45 I.L.R. at 453. But see Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 1, 35, 37 (Feb. 3), available at http://www.icj-cij.org/docket/files/143/16883.pdf (concluding that under current customary international law there is no exception to foreign sovereign immunity even for alleged violations of human rights law, international humanitarian law, or jus cogens).

and Kennedy v. Germany and Beer and Regan v. Germany, German courts declined to hear contracts cases against the ESA. The plaintiffs appealed to the European Court of Human Rights (ECHR) on the grounds that the Convention for the Protection of Human Rights and Fundamental Freedoms entitled them to a “fair hearing.” The ECHR declined the appeals, mainly because there were “alternative means of legal process available to the applicants” in the ESA Appeals Board and local courts (albeit against other actors). The ECHR concluded that “necessarily requiring the application of national legislation in [this type of case] would, in the Court’s view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.”

In 2005, the French Court of Cassation denied immunity for the African Development Bank, despite a treaty provision, because “the absence of any industrial tribunals set up within the African Development Bank . . . makes it impossible for the employee to exercise his court decisions); Reinisch & Weber, supra note 285, at 65-93 (“Such a demand for an adequate dispute-settlement mechanism for claims against international organizations derives not only from a fundamental rights argument. Rather, it seems to flow from a forceful combination of legal considerations all pointing to the same direction and requiring a reconsideration of the traditional absolute immunity paradigm.”).


289. Waite & Kennedy, 30 Eur. H.R. Rep. at 288; Beer & Regan, 33 Eur. H.R. Rep. at 80; see also Emmanuel Gaillard & Isabelle Pingel-Lenuzza, International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass, 51 Int’l & Comp. L.Q. 1, 7 (2002) (criticizing the ECHR’s analysis of alternatives, noting that “it is doubtful that the Court made an adequate assessment of the independence of the institution put in place by the organisation to resolve disputes. One might also question whether the means of recourse that were available were effective”).

290. Waite & Kennedy, 30 Eur. H.R. Rep. at 288; Beer & Regan, 33 Eur. H.R. Rep. at 79-80; see also Cass., 19 Maggio 1992, n. 5942, translated in 101 I.L.R. 385, 393 (It.) (“It is sufficient to note, that as interpreted by the Contracting Parties, the FAO Headquarters Agreement in conjunction with Article IX (Section 31) of the Convention on the Privileges and Immunities of the Specialized Agencies, even at the stage of actually giving it effect, safeguards the right of workers employed by the Organization to bring an action against it to protect their rights.”).
right to have a court consider his case.  

More recently, in three cases decided on December 21, 2009, the Belgian Court of Cassation applied the ECHR’s reasoning from Waite and Kennedy and Beer and Regan to deny immunity for international organizations due to a lack of a reasonable alternative forum. In Secrétariat Général du Groupe des États d’Afrique, des Caraïbes et du Pacifique v. Lutchmaya and Secrétariat Général du Groupe des États d’Afrique, des Caraïbes et du Pacifique v. BD, the organization lacked any dispute settlement mechanism, and in Western European Union v. Siedler, the court upheld denial of immunity due to concerns about procedural protections such as the independence of the organization’s internal appeals commission.

However, in an even more recent case, SA Energies Nouvelles et Environnement v. Agence Spatiale Européenne, a Belgian appellate court, following Waite and Kennedy and Beer and Regan, but taking a broader approach than Siedler, granted immunity to the international organization because the plaintiff could have brought actions against other actors for other causes in a national court, or could have gone to Belgium’s representative to the organization or the organization’s ombudsman. Moreover, the Dutch Supreme Court has limited its

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291. Cass., Jan. 25, 2005, No. 04-41012, translated in ILDC 778 (2005) (Fr.) (not citing Waite & Kennedy); see also Cour d’appel [CA] [regional court of appeal] Paris, 14e ch. a, June 19, 1998, 1999 REVUE DE L’ARBITRAGE 343, translated in 24a Y.B. COMM. ARB. 294 (1999) (Fr.) (affirming denial of immunity for UNESCO, where the international organization sought to avoid appointing an arbitrator, because immunity would “inevitably lead to preventing [Mr. Boulois] from bringing his case to a court” and “would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Liberties”).

292. See, e.g., Wouters et al., supra note 251, at 560 (summarizing the three cases).


296. See CA, Mar. 23, 2011, n. 2011/2013, reprinted in ILDC 1729 (2011) (Belg.); see also Tribunaux de Première Instance [Tribunal of First Instance], Dec. 1, 2005, JT 2006, No. 6216, 171, reprinted in ILDC 1229 (2005) (Belg.). The German Federal Constitutional Court has similarly granted jurisdictional immunity in that country’s courts where there is another adequate forum available to hear a plaintiff’s complaints. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 10, 1981, 59 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 63, 1981 (Ger.) (granting Eurocontrol immunity where the Administrative Tribunal of the International Labour Organisation (ILOAT) offered sufficient procedural protections for Eurocontrol personnel disputes); see also BVerfG, Jul. 3, 2006, no. 2 BVR 1458/03 (dismissing the
application of the reasoning from Waite and Kennedy to “internal” employment disputes.\textsuperscript{297}

It is not clear what alternative forum a U.S. court should accept under this rationale.\textsuperscript{298} For example, an international organization’s internal dispute resolution or arbitration mechanisms could be sufficient per se\textsuperscript{299} or if the organization has an independent review board and has adopted “reasonable” procedural protections.\textsuperscript{300} A more ex-
treme approach could require a plaintiff to show that legal remedies are completely unavailable within the organization or in any member state against any related actor.\textsuperscript{301}

Finally, U.S., foreign, and international courts have heard cases that indirectly involve international organizations.\textsuperscript{302} Among the most recently decided foreign and international cases in this category is a pair of opinions by the Court of Appeal in The Hague ruling against the Dutch government for its failure to protect civilians in Srebrenica.\textsuperscript{303} The court found that the Dutch government was liable where Dutch troops participating in the United Nations peacekeeping operation in Srebrenica were responsible for the deaths of refugees.\textsuperscript{304} The court rejected the government’s defense that the troops were acting under the “command and control” of the United Nations at the time,\textsuperscript{305} reasoning that although the soldiers were under the command of the United Nations, the Dutch government had “effective control” over the troops and was “closely involved” in directing operations.\textsuperscript{306} Similarly, in an earlier case, the British House of Lords found the government of the United Kingdom responsible for the actions of British troops evaluated in order to determine amongst other things the consistency of the decisions with respect to fundamental rights”) (citing \textit{Waite & Kennedy}).

\begin{itemize}
  \item \textsuperscript{301} See Melissa Su Thomas & Olufemi Elias, \textit{The Role of International Administrative Law, in The Development and Effectiveness of International Administrative Law: On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal} 397, 405-06 (Olufemi Elias ed., 2012) (noting that “tribunals have not found as a general matter that the mechanisms available for the resolution of staff disputes in international organizations have been deficient,” criticizing decisions by national courts to adjudicate cases against international organizations (specifically citing OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 764 (3d Cir. 2010)), and asserting that “such judgments are based on a failure to recognize the basis of those immunities in the particular characteristics of international organizations and the circumstances in which they operate”). However, the authors conclude, “[i]n the final analysis, it beho[o]ves international organizations to demonstrate, and to be seen to demonstrate, that they take the rule of law (and all of its implications) seriously.” \textit{Id} at 407.
  \item \textsuperscript{302} See, e.g., \textit{Int’l Bank for Reconstruction & Dev. v. District of Columbia}, 171 F.3d 687, 695 (D.C. Cir. 1999) (holding that a food service contractor “at the World Bank’s headquarters, did not share the Bank’s immunity from [state] sales and use taxes”).
  \item \textsuperscript{304} See \textit{id}.
  \item \textsuperscript{305} See \textit{id}. at 5.6-5.20.
  \item \textsuperscript{306} See \textit{id}. at 5.9, 5.18.
\end{itemize}
serving with the United Nations peacekeeping operation in Cyprus.\textsuperscript{307}

On the other hand, the ECHR has seemed to take a broader approach in these types of cases than in cases where the international organization itself is a party. In \textit{Gasparini v. Italy and Belgium}, the ECHR dismissed claims against Italy and Belgium related to a North Atlantic Treaty Organization (NATO) employment dispute where NATO offered procedural protections “equivalent” to those required under the Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{308} The ECHR concluded that NATO’s mechanism for resolving internal staff disputes was sufficiently fair even though it lacked public hearings because that particular protection is not required in all proceedings.\textsuperscript{309}

In these cases, “democratic principles” might favor immunity for an international organization if an individual member state is responsible for damages but would not be amenable to suit, so that the other member states do not bear the costs of an adverse judgment.\textsuperscript{310} However, applying this reasoning in U.S. courts may cut against the impetus for enacting the IOIA and the FSIA in the first place: to protect foreign nations, their representatives in this country, and the United States itself, whether those parties act independently or through an intermediary.\textsuperscript{311} However, the Third Circuit in \textit{OSS Nokalva} found “no

\begin{itemize}
\item \textsuperscript{309} \textit{Gasparini}, App. No. 10750/03; see also Cedric Ryngaert, \textit{The European Court of Human Rights’ Approach to the Responsibility of Member States in Connection With Acts of International Organizations}, 60 \textit{INT’L & COMP. L.Q.} 997, 1005 (2011) (“Nonetheless, what is clear after \textit{Gasparini} is that the Court holds Member States of IOs responsible for internationally wrongful acts of IOs in two scenarios: (1) when a Member State has directly or indirectly intervened in the act/decision of the IO; or (2) when the complaint relates to a structural lacuna in the internal dispute-settlement mechanism. The latter principle in particular is in palpable tension with the principle that Member States should not be responsible for the acts of IOs by reason of their membership alone.”).
\item \textsuperscript{310} See, Andrew Stumer, \textit{Note, Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections}, 48 \textit{HARV. INT’L L.J.} 553, 553 (2007) (discussing policy arguments about “whether Member States bear secondary or concurrent liability to third parties for the acts of an international organization”).
\item \textsuperscript{311} See \textit{Dole Food Co. v. Patrickson}, 538 U.S. 468, 485 (2003) (Breyer, J., dissenting) (“[T]he [FSIA] seeks to guarantee these protections to the foreign nation not only when it acts directly in its own name but also when it acts through separate legal entities.”).
\end{itemize}
compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone. Indeed, such a policy may create an incentive for foreign governments to evade legal obligations by acting through international organizations." The Federal Circuit, in a case against the United States for actions taken by the International Joint Commission (IJC), drew a line that "[o]ne seeking just compensation from the United States for actions of an international organization must show ‘sufficient direct and substantial United States involvement.’" This rule could be extended to foreign states’ involvement in international organizations.

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312. OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 764 (3d Cir. 2010). Contra Oberster Gerichtshof [OGH] [Supreme Court] Aug. 28, 2003, docket No. 2 Ob 156/03k, translated in ILDC 3 (2005) (Austria) (declaring that the court would consider the nature and not the object or purpose of the underlying conduct in the case, but nonetheless dismissing the plaintiff-airport operator’s claims against the United States regarding landing fees because the U.S. flights in question were operated pursuant to a NATO operation and were therefore not “private”).

313. The United States and Canada established the IJC to manage waters along the countries’ common boundary. President Truman added the organization to the IOIA in 1948. See Exec. Order No. 9,972, 13 Fed. Reg. 3573 (June 25, 1948).

314. Erosion Victims of Lake Superior Regulation v. United States, 833 F.2d 297, 299 (Fed. Cir. 1987) (quoting Langenegger v. United States, 756 F.2d 1565, 1571 (Fed. Cir. 1985)). The United States asked the IJC to reduce outflows from Lake Superior to help address flooding around the lower lakes due to heavy rains, and the IJC agreed. Id. at 298-99. American owners of property along Lake Superior claimed that this caused erosion or flooding of their land, and that the United States, acting through the IJC, had “taken” their land, in violation of the Fifth Amendment. Id. at 299. The court compared the circumstances of the case to precedents involving international joint ventures and concluded that “a showing that a United States employee has acted as a representative of an international organization does not establish direct, substantial United States involvement.” Id. at 301 (citing Best v. United States, 292 F.2d 274, 279 (Ct. Cl. 1961) (Allied High Commission for Germany was “an international body with no capacity to sue or be sued”); Standard-Vacuum Oil Co. v. United States, 153 F. Supp. 465, 466 (Ct. Cl. 1957) (“[A]ll action taken was by the Supreme Commander for the Allied Powers, not by the United States . . . leav[ing] no doubt but that occupation of plaintiff’s properties [in Japan] was not an act by the United States but by the Allied Powers.”); Anglo Chinese Shipping Co. v. United States, 127 F. Supp. 553, 554 (Ct. Cl. 1955) (“The occupation of Japan was a joint venture, participated in by the United States of America, the United Kingdom, China, and Russia; and whatever benefit the occupying powers derived from the use of plaintiff’s vessel in the laying and repairing of submarine cables was derived by all of them in common and not by any one more than another.”); accord Soucheray v. Corps of Engineers of the U.S. Army, 483 F. Supp. 352, 357 (W.D. Wis. 1979) (finding the United States was not responsible for the IJC’s actions under the same facts as Erosion Victims); see also Edison Sault Elec. Co. v. United States, 552 F.2d 326 (Ct. Cl. 1977) (finding that any actions were attributable to the IJC, not the United States, and that the IOIA grants immunity from suit except where expressly waived, under the same facts underlying
In conclusion, foreign and international courts offer some practical alternatives for the U.S. judiciary to consider in dealing with this thorny issue. However, the divisions among those courts show that there is no customary international law yet defining the boundaries of privileges and immunities of international organizations.

V. CONCLUSION

The text and the legislative history of the IOIA and the FSIA do not demonstrate congressional intent to incorporate developments in the law of foreign sovereign immunity into the privileges and immunities of international organizations. Moreover, the Supreme Court’s recent decisions in *Dole Food*315 and *Samantar*316 help clarify which entities U.S. courts should consider covered by the FSIA, and international organizations do not appear to be included under that statute. International organizations may also benefit from other sources of law, including international agreements, other congressional or administrative action, and common-law doctrines. However, there is probably no customary international law yet that defines the boundaries of privileges and immunities of international organizations.

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315. *Dole Food*, 538 U.S. at 468 (holding that the FSIA does not cover subsidiaries of entities owned by foreign states).