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International Organizations in US Courts: Reconsidering the Anachronism of Absolute Immunity

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I. INTRODUCTION

Over the last two decades, the way we think about the legitimacy and accountability of international organizations has been dramatically transformed. Previously, under the traditional state-centered understanding of international law and diplomacy, international organizations gained legitimacy by being accountable to their member states through their formal governance structures. In the absence of a formal relationship with the organization, non-state actors could only influence decisions or seek redress for harms the organization caused by petitioning their
government representatives to act on their behalf. In addition, international organizations were seen to have only those legal obligations that were specified in their founding charters or the other agreements to which they were signatories. This traditional understanding has been displaced by a new paradigm that recognizes the rights and interests of non-state actors. Accordingly, the old notions of international organization legitimacy and accountability have increasingly been challenged. As democratic governance (in all of its forms) has become the litmus test of acceptable governance at the national level, it has also become a benchmark of appropriate governance of international institutions. Moreover, international organizations must now ensure that their actions are consistent with more than just their charters and internal governance procedures. There is an emerging consensus that as subjects of international law, international organizations must adhere to general principles and customary norms of international law, including certain human rights norms.

To meet public expectations regarding democratic governance and accountability, many international organizations have improved transparency, pluralized aspects of their decision-making, and provided more meaningful opportunities for members of the public to directly assert their rights and express their interests. But international organizations have not fully integrated

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3 August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in P. ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 46 (2005) (“The underlying tenor of recent developments appears to be that international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law.”); H. SCHERMERS AND N. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 3rd ed. 822 (1995)(“...as [international organizations] have been established under international law, these rules apply directly as part of the legal order of the organization in question...”); P. SANDS AND P. KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS*, 5th ed. 458-59(2001) (“This view [that IOs are bound by the generally accepted standards of the world community] appears unimpeachable.”); C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS*, 240 (1996)(“...there can
these emerging norms and expectations into their governance or practice: Transparency remains circumscribed, governance structures continue to be plagued by substantial democracy deficits, formal lines of accountability still run almost exclusively to member governments, and mechanisms of public accountability (where they exist) are limited and often ineffective.

One of the most important shortcomings in the public accountability of international organizations is the lack of opportunities for aggrieved individuals to obtain legal redress. By and large, international organizations still refuse to accept that they may have legal obligations to individuals, or that they should be accountable when they violate these obligations. Instead, international organizations have often sought to foreclose legal accountability by asserting that they are entitled to expansive immunity from the jurisdiction of national courts. In addition to being inconsistent with contemporary notions of international organization accountability and legitimacy, these assertions of immunity also contravene other well-settled and widely accepted international legal principles. Thus, they are incompatible with the notion that individuals are entitled to minimum standards of procedural fairness in resolving claims against public entities, and with the modern presumption against using expansive grants of immunity to exempt sovereigns (and entities that derive their authority from sovereigns) from the rule of law or popular moral judgment.  

be no doubt that under customary International law…international organisations can also have international obligations towards other international persons…”).

4 National City Bank v. Republic of China, 348 U.S. 356, 359 (1955) (sovereign immunity “has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgement”); AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 287 (2000) (discussing a “growing consensus that measures aimed at…immunizing certain persons from their accountability or responsibility [have] become less and less acceptable under current human rights standards.”). Michael H. Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 HARV. L. REV. 608 (1954) (arguing that concern with the rights of private litigants should inform the Court’s approach to sovereign immunity); Sir Hersch Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 BYIL 22 (1951).
On the other hand, it is generally recognized that international organizations should be afforded some measure of immunity from the jurisdiction of national courts in order to achieve their organizational objectives. Most observers agree that such protections can help international organizations effectively discharge their delegated responsibilities by insulating them from undue external interference and the potentially onerous burdens of divergent or politically motivated judgments. It is therefore well-established that an international organization should be afforded immunity based upon its “functional necessity.” Under the “functional necessity” doctrine, an organization should enjoy only those immunities that are strictly necessary for it to achieve its organizational objectives.

The “functional necessity” standard is conceptually appealing, in that it is flexible enough to allow courts to balance the operational needs of international organizations against other important legal principles and public expectations, such as fairness to private litigants and accountability under the rule of law. But in practice, many international organizations—including those whose foundational charters clearly contemplate that they will be sued in national courts—have insisted that only absolute or near-absolute immunity is sufficient to ensure that judicial scrutiny does not impede them from discharging their delegated responsibilities.

United States courts have been reluctant to challenge these expansive claims of immunity. Instead, they have largely conflated “functional necessity” with a presumption of absolute

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immunity, and refused to exercise jurisdiction in cases in which the organization has not waived its immunity. The immunity of international organizations in United States courts is determined by the International Organizations Immunity Act of 1945 (IOIA). The IOIA provides that international organizations shall enjoy the “same immunity” as is enjoyed by foreign governments, except to the extent that such organizations may waive that immunity.\textsuperscript{8} In \textit{Atkinson v. Inter-American Development Bank}, the most important judicial treatment of the IOIA, the D.C. Circuit concluded that Congress intended this language to afford international organizations “virtually absolute” immunity.\textsuperscript{9} It further concluded that even an organization whose charter recognizes broad amenability to suit in domestic courts should not be understood to have waived IOIA immunity unless such a waiver would further the institution’s objectives.\textsuperscript{10}  

This article contends that the \textit{Atkinson} Court’s interpretation of the IOIA should be fundamentally reconsidered in light contemporary norms, legal principles and public expectations regarding the obligations and accountability of international organizations. In my view, \textit{Atkinson}’s maximalist interpretation of the immunity granted by the IOIA and its constrained reading of the statute’s waiver provision far exceed the legitimate functional needs of international organizations, and cannot be reconciled with these norms and principles. Accordingly, there is a strong case for reassessing whether \textit{Atkinson} was correct that the IOIA requires such limited jurisdiction over international organizations. As it happens, nothing in the IOIA compels such a parsimonious understanding of jurisdiction under the IOIA; indeed, the text and history of the IOIA, and the language of the immunity provisions in many organizational charters contemplate much broader amenability to suit than the \textit{Atkinson} Court recognized.

\textsuperscript{8} 22 U.S.C. section 288a (b).
\textsuperscript{9} 156 F.3d 1335, 1340 (D.C. Circuit) (1998).
\textsuperscript{10} 156 F.3d at 1338.
Part II of this article examines the modern understanding of the legal obligations and public accountability of international organizations. Part III provides an overview of the potential statutory bases of international organization immunity in the United States—the IOIA and the Foreign Sovereign Immunity Act (FSIA), which defines the scope of immunity that is extended to foreign sovereigns. Part IV explores how courts have interpreted these statutes. First, it considers and critiques the judicial interpretation of the IOIA. It concludes that Atkinson’s holdings that the IOIA adopted the law of foreign sovereign immunity only as it existed in 1945, and that immunity at that time was “virtually absolute” were erroneous as both a matter of statutory interpretation and historical analysis. As a matter of statutory interpretation, Atkinson should have held that the “same immunity” language of the IOIA requires that the immunity of international organizations evolve in parallel with that of foreign governments, and therefore currently incorporates the provisions of the FSIA. Moreover, Atkinson was simply incorrect that foreign sovereign immunity was “virtually absolute” when the IOIA was passed in 1945. The Supreme Court had recently decided Republic of Mexico v. Hoffman, in which it disclaimed any fixed judicial standard of immunity in favor of a political approach in which courts were to defer to Executive determinations of whether immunity would advance the diplomatic interests of the United States on a case-by-case basis. Indeed, Atkinson’s originalism has been further undermined by subsequent Supreme Court precedent reaffirming Hoffman’s principle that the political branches, not the judiciary, should determine the scope of foreign immunities according to current exigencies. Second, Part IV considers Atkinson’s interpretation of immunity waivers found in charter agreements. It concludes that the narrow criteria for implementing charter-based waivers endorsed by Atkinson is inconsistent with the plain language of such waivers, and reverses the presumption that “functional necessity” should be strictly interpreted. Part V then
considers what the parameters of international organization immunity would be under the FSIA. It concludes the FSIA provides ample protections for the functional needs of an international organization while allowing at least some aggrieved plaintiffs to have their day in court.

II. THE LEGAL OBLIGATIONS AND PUBLIC ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS

Traditionally, public accountability of international organizations was entirely political and narrowly circumscribed. International organizations were thought to be accountable only to their member states, who could assert their interests through the formal governance mechanisms of the organization. Individuals and other non-state actors could not directly hold the institution to account for harms it may have caused unless they had an express relationship with the organization—such as membership or privity of contract.11 Rather, they could influence policy or practice or seek redress only by petitioning their government representatives to act on their behalf.12

Under the traditional approach, legal accountability to non-state actors was virtually non-existent. Although international organizations were understood to be creatures of international law and to enjoy international legal personality, their obligations under international law were narrowly circumscribed. The prevailing view, promulgated largely by the organizations themselves, was that their obligations were limited to those specifically provided for in their charters, or in other treaties and conventions to which they had formally acceded.13 In particular,

12 Id.
they denied any obligations under treaties and conventions that protect individual interests, including human rights conventions.\textsuperscript{14}

The traditional understanding of international organization accountability was largely a function of a particular approach to international law that was ascendant in the middle of the 20\textsuperscript{th} Century, when the most important international organizations were created and flourished. Under this view, international law was concerned only with the rights and remedies of sovereign states in their interactions with each other.\textsuperscript{15} States were seen as the sole source and repository of legitimate authority. Sovereignty was inviolable within a State’s territory, and constrained by international law only by consent.\textsuperscript{16} Individuals and other non-state actors were beyond the ken of international law.\textsuperscript{17} Since states were the only legitimate subjects of international law, and therefore the exclusive representative of their citizens’ interests on the international stage, it was up to the state to press any international law claims on behalf of its aggrieved citizens.\textsuperscript{18}

Ironically, the edifice of an exclusively state-centered international law was already starting to crumble in the immediate aftermath of World War II, when the most important international organizations were being created. As Dean Harold Koh has explained, the war crimes tribunals in Nuremberg and Tokyo began the recovery of a lost tradition in international law.

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law in which rights of individuals and the responsibilities of public officials were legitimate foci of attention. In so doing, they “pierced the veil of state sovereignty and dispelled the myth that international law is for states only... Thereafter, private citizens, government officials, nongovernmental organizations and multinational enterprises could all be rightsholders and responsible actors under international law...” At the same time, the newly ratified United Nations Charter—with its recognition of the importance of human rights and its express commitments by member states to cooperate in promoting respect for those rights—further reinforced the idea that the treatment of individuals was a matter of international concern.

Soon after its creation, the United Nations began to translate this idea into a substantive human rights regime with the adoption of the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. Since then, it has become generally accepted that international law affords legal rights to individuals, including claims by citizens against their own governments.

remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.”). 

Dean Koh notes, for example, that the “law of nations” had long included bodies of maritime and merchant law, and had recognized piracy and slave trading as international crimes, even though they were committed by individuals against other individuals. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2351-54, 2358-59, fn 66 (1991).


The expanded recognition of the individual as a rightsholder and legitimate object of concern under international law came with a concomitant reduction in the inviolability of state sovereignty. The post-war era saw a marked decline in the sanctity of sovereignty as the central organizing principle of international law and relations. This decline has manifested itself in a number of ways, four of which are particularly relevant to the accountability and jurisdictional immunity of international organizations. First, as we have seen, a state’s autonomy within its territorial borders is no longer absolute. At least in principle (if not always in practice), state action is now circumscribed by the recognition that international human rights law can legitimately address the manner in which a government treats its own citizens. Similarly, state action is also increasingly subject to an emerging body of international development law, which defines the rights and obligations of states and non-state actors in the development process by reference to international trade, human rights, and environmental law principles.


26 There is a rich, multidisciplinary literature concerning the decline of the power and authority of states. See, e.g., August Reinisch, The Changing International Legal Framework for Dealing with Non-State Actors, in P. ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 74, fn. 190 (2005)(citing a range of representative work); See also, Oscar Schacter, The Decline of the Nation-State and its Implications for International Law, 36 COLUM. J TRANSNAT’L L 7 (1997), and sources cited therein.


28 Daniel D. Bradlow, Development Decision-making and the Content of International Development Law, 27 B.C.Int. & COMP.L.R. 195 (2004); Gunther Handl, The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development, 92 AM.J. INT’L L. 642, 662 (1998) (“It cannot be denied, first, that there exists today a growing and ever more specific body of norms of international law bearing on “sustainable development;” and second, that a large number of these concepts clearly represent affirmative duties incumbent upon states and international institutions…”).
Second, states are no longer thought to have unfettered discretion in the manner in which they organize their governmental processes. As fundamental civil and political rights have become increasingly well-established, a normative expectation (if not yet a clear legal requirement) has emerged that the exercise of sovereign power must be legitimized by the consent of the governed through democratic processes.\textsuperscript{29} Democratic governance, in all of its forms, has accordingly become the benchmark of political legitimacy--there are no longer any widely-accepted alternatives.\textsuperscript{30}

Third, states’ traditional role as the sole legitimate representatives of their people in international relations has been challenged by the emergence of transnational civil society.\textsuperscript{31} While states continue to play the lead role in articulating and representing their national interests, citizens are increasingly bypassing their government representatives and asserting their interests in international fora through non-governmental organizations and social movements that they believe more reliably or effectively articulate their interests.\textsuperscript{32} As a result, states must now share the stage with a variety of non-state actors, many of whom may have markedly different priorities or conceptions of the public good.


\textsuperscript{32} For example, civil society organizations have been instrumental in placing issues of pressing concern on the global agenda—including climate change, human rights, gender equity, AIDS, and debt relief—and have effectively mobilized public opinion to demand that they are adequately addressed. United
Finally, states no longer grant, or expect to receive, expansive sovereign deference in their bilateral relations with one another. This is particularly true with respect to the role of the judiciary in cases against foreign sovereigns. As Michael Singer has explained, courts no longer treat sovereigns “as if they had emerged from the pages of Shakespeare crowned, robed and preceded by trumpets.”\(^{33}\) Rather, increased concern with fairness to private litigants,\(^{34}\) and a growing discomfort with broadly exempting governments from the rule of law and from popular moral judgment has led to a more restrictive understanding of the proper scope of sovereign immunity.\(^{35}\) As a result, there has been a considerable expansion of the use of “transnational public law litigation,” in which individuals seek to obtain compensation and redress, vindicate public rights, and facilitate the development of international legal norms through judicial findings of international law violations.\(^{36}\) Perhaps the most important manifestation of this trend is the *Filártiga* line of cases under the Alien Tort Claims Act (ATCA), in which foreign nationals

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\(^{34}\) For example, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights each provide for a right to access to court for the determination of a rights and obligations. Article 10 Universal Declaration, Article 14(1) ICCP, Article 6(1) European Convention. See, AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 281-2 (2000) (discussing the contradiction between the international law based human right to access to court and the restriction of such access through expansive grants of immunity).


have brought human rights cases in United States courts against corporations and foreign
government officials.  

As these developments have displaced the state-centered approach to international law,
they have also largely discredited the traditional understanding of international organization
accountability. International organizations can no longer claim public legitimacy or
accountability exclusively through the participation of member states in their formal governance
structures.  

First, as democracy has become the litmus test of acceptable governance at the
national level, it has also become a guiding principle of the governance of international
institutions. Citizens who evaluate the legitimacy of their own governments against democratic
standards of representation, transparency, participation, responsiveness and accountability are
increasingly insisting on the same qualities of governance from their international institutions.

37 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). For an analysis of current ATCA jurisprudence,
see Beth Stephens, Sosa v. Alvarez-Machain: The Door Is Still Ajar” for Human Rights Litigation in U.S.
38 Benedict Kingsbury, Nico Krisch & Richard Stewart, The Emergence of Global Administrative Law,
68 L. & CONTEM. PROBLS. 15, 26 (Summer/Autumn 2005)(“In our view, international lawyers can no
longer credibly argue that there are no real democracy or legitimacy deficits in global administrative
governance because global regulatory bodies answer to states, and the governments of those states
answer to their voters and courts.”). Menno T. Kamminga, The Evolving Status of NGOs under
International Law: A Threat to the Inter-State System?, in P. ALSTON, ED., NON-STATE ACTORS AND
HUMAN RIGHTS 110 (2005)(“By contributing the views of civil society, [NGOs] confer badly needed
legitimacy on the international system); Daniel C. Esty, Good Governance at the Supranational Scale:
Globalizing Administrative Law 115 YALE L.J. 1490, 1530 (2006)(“Openness and some opportunity for
public participation have thus emerged as nearly universal principles of good governance.”); Even under
a state representation model of legitimacy, the lines of accountability between individuals and their
nominal representatives are often so attenuated that representation is more notional than real. See, Steven
Herz and Alnoor Ebrahim, A Call for Participatory Decision-Making: Discussion Paper on World Bank-
df#search=%22herz%22
40 This not to say that international organizations must adopt the governance mechanisms of a
Madisonian or Continental democracy to achieve democratic legitimacy. Much of the political
infrastructure that supports democratic governance at the State level— direct election of representatives,
“one-person, one-vote” apportionment of the franchise, political parties, etc.—does not yet exist at the
international level, and unlikely to develop any time soon. Rather, the most pressing legitimacy
Increasingly, they are demanding more inclusive and responsive mechanisms of participation and accountability.

These claims have been only partially satisfied by international organizations. Public pressure on many international organizations has forced them to improve transparency, open some limited new avenues of accountability and moderately increase the political space for non-state actors to influence decision-making. But substantial “democracy deficits” remain. Multilateral development banks (MDBs), for example, still generally lack inclusive, formalized procedures for developing policy and deliberating the public interest, have inadequate mechanisms of accountability, and cannot credibly claim to derive their legitimacy from the consent of affected populations. Public confidence in these institutions has suffered


Beginning in the mid-1990s, most IFIs have expanded their public consultations, revised their information disclosure policies to allow for more informed public input, and created formal grievance mechanisms to enable project-affected peoples to raise complaints with management or the Board of Executive Directors.


accordingly. As the United Nations Development Programme has observed, “Large parts of the public no longer believe that their interests are represented in institutions such as the IMF [and] World Bank…or that the institutions are adequately accountable for what they do.”

Second, an international organization’s fidelity to its internal governance procedures—regardless of their democratic *bona fides*—is no longer sufficient to confer legitimacy. International organizations are now also expected to adhere to the rule of international law. There is a broad consensus that international organizations are subjects of international law, and must therefore adhere to general principles and customary norms of international law, including certain human rights norms. This principle has a distinguished legal pedigree. In 1980, the International Court of Justice observed that “[i]nternational Organisations 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 a party.”


*45 August Reinisch, The Changing International Legal Framework for Dealing with Non-State Actors, in P. Alston, ed., Non-State Actors and Human Rights 46 (2005) (“The underlying tenor of recent developments appears to be that international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law.”); H. Schermers and N. Blokker, International Institutional Law: Unity Within Diversity 3rd ed. 822 (1995) (“...as [international organizations] have been established under international law, these rules apply directly as part of the legal order of the organization in question...”); P. Sands and P. Klein, Bowett’s Law of International Institutions, 5th ed. 458-59(2001) (“This view [that IOs are bound by the generally accepted standards of the world community] appears unimpeachable....”); C.F. Amerasinghe, Principles of the Institutional Law of International Organizations, 240 (1996) (“...there can be no doubt that under customary International law...international organisations can also have international obligations towards other international persons...”).

*46 Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C. J. Reports 1980, 73 at 89-90.*
European Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, and in the pronouncements of the United Nations’ International Law Commission, Special Rapporteurs of the United Nations Commission on Human Rights, the International Law Association, and the vast majority of academic commentators and practitioners that have expressed a view on the subject.

47 Advisory opinion of 28 March 1996 of the European Court of Justice on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (concluding that although European Community cannot accede to the European Convention on Human Rights, “respect for human rights is a condition of the lawfulness of Community acts,” because human rights, including the provisions of the ECHR, are given effect as general principles of EC law.).

48 Prosecutor v. Simic et al., Case IT-95-9-PT, Decision on motion for judicial assistance to be provided by SFOR and others, 18 October 2000, para. 46 (concluding that the Statute of the Tribunal applies to “collective enterprises undertaken by States, in the framework of international organizations” such as the NATO-led Stabilisation Force (SFOR)).


50 Joseph Oloka-Onyango and Deepika Udagama, Globalization and its impact on the full enjoyment of human rights,” Progress report submitted to the United Nations Commission on Human Rights, E/CN.4/Sub.2/2001/10, 25-27 (2 August 2001) (arguing that intergovernmental organizations are creatures of the international legal system, and are therefore bound by fundamental principles of international law such as the obligation to respect universal human rights norms).


Nevertheless, some prominent international organizations such as the World Bank and the IMF have long denied that they operate within the rubric of international law, and have traditionally refused to recognize any international legal obligations beyond their charter and treaty obligations to their members, *jus cogens* requirements, and Chapter VII Security Council resolutions. The General Counsel of the World Bank vividly summarized this position in 1998, when he complained that it “demeaned” his institution to suggest that the Bank had responsibilities that were not specified in its Articles of Agreement. Recently, however, the World Bank has become markedly more circumspect in its rhetoric, and no longer seems to take umbrage at the suggestion that it is subject to the rule of international law. The IMF, on the other hand, remains bound and determined to assert its independence from the rule of most of international law.

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rights law system is a state-based system…. It ignores actions by nonstate actors, such as the United Nations and other intergovernmental organizations….)


The recognition that international organizations have obligations under international law leads naturally to the conclusion that they, like other legal entities, should be responsible when they violate those obligations. As Mahnoush Arsanjani has observed, there is no convincing reason to exempt international organizations from the general principle that a legal entity is responsible for the harms that it may cause. Accordingly, in the 1999 case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, the International Court of Justice concluded that the United Nations may be required to pay compensation for damages caused by its actions or those of its agents acting in their official capacity. Indeed, the principle that international organizations may be internationally responsible for their tortious acts is now so well accepted that it is considered to be part of customary international law.

Third, it is widely accepted that there is a fundamental right under international human rights law to have one’s claims adjudicated by an independent and impartial court or tribunal. The right to a fair and impartial proceeding is specifically recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and

60 AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 281-2 (2000); Report of the Seventy-First Conference, Berlin, Aug. 16–21, 2004 Final Report of the International Law Association Committee on Accountability of International Organizations, 33 (“the right to a remedy is widely considered to be a general principle of law.”).
61 Article 10 of the Universal Declaration of Human Rights provides “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations ….”
the European Convention on Human Rights. 63 For its part, the European Court of Human Rights has consistently interpreted this right in the European Convention to include the right to access to court. 64 Again, there is no clear reason why these basic due process requirements should not apply when an international organization is the subject of the complaint. As the International Law Association’s Committee on Accountability of International Organizations has concluded, “[n]o situation should arise where an [international organization] would not be accountable to some authority for an act that might be deemed illegal.” 65

III. THE STATUTORY BASES OF INTERNATIONAL ORGANIZATION IMMUNITY

A. THE INTERNATIONAL ORGANIZATION IMMUNITY ACT OF 1945

Beginning in 1943, as victory over the Axis powers became increasingly likely, the United States and its allies started to plan in earnest for the war’s aftermath. 66 They recognized the need to continue to cooperate after hostilities ended to rebuild the world’s shattered economies and to avert another catastrophic collapse of the international order. Towards this end, they sought to create international institutions that would deter and respond to aggression,

62 Article 14(1) of the International Covenant on Civil and Political Rights provides “All persons are equal before the courts and tribunals. In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.”

63 Article 6(1) of the European Convention on Human Rights provides “In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”


facilitate the peaceful resolution of disputes, finance economic reconstruction, stabilize currencies and facilitate international trade, and improve the political and cultural links between nations.\textsuperscript{67} Most of this work was to be done by the United Nations. But the Allies also saw the need to create other affiliated institutions, such as the International Monetary Fund and the International Bank for Reconstruction and Development (the “World” Bank), to serve more specialized economic functions.\textsuperscript{68}

Because the United States was the indispensable participant and funder of these institutions, it was a “practical certainty” that they would locate, or at least conduct substantial activities, in the United States.\textsuperscript{69} In order to host these institutions, the United States had to ensure that certain key enabling conditions were in place. In particular, it had long been recognized that international organizations needed some measure of legal and practical independence from host and member governments in order to fulfill their institutional objectives.\textsuperscript{70} Until the early 19\textsuperscript{th} Century, this had meant that international organizations should be afforded “complete independence from the territorial authority” and “the benefits of neutrality.”\textsuperscript{71} Thereafter, however, it was understood to require that officials of international organizations be granted the privileges, exemptions and immunities normally reserved for diplomatic officers.\textsuperscript{72} At the same time, the impending ratification of the United Nations Charter

\begin{footnotesize}
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\item Id., at 31-32.
\item Id., at 31-32.
\item H.R.Rep. No. 1203, 79\textsuperscript{th} Cong., 1\textsuperscript{st} Sess, reprinted in 1945 U.S.Cong.Serv. 946, 947.
\item Josef L. Kunz, Privileges and Immunities of International Organizations, 41 AM. J. INT’L L. 828, 836 (1947).
\item Id.
\item Id. Most often, this issue arose with respect to demands by international organizations that their alien personnel should enjoy the same exemptions from United States tax law enjoyed by foreign diplomats. Lawrence Preuss, The International Organization Immunities Act, 40 AM. J. INT’L L. 332, 333-34 (1946).
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was going to require the United States to afford the United Nations “such privileges and immunities as are necessary for the fulfillment of its purposes.”

The State Department, however, was concerned that existing federal law would not allow the United States to extend any privileges or immunities to the United Nations or the other institutions. Until that point, the United States government had consistently taken the position that there was no basis in the law or treaties of the United States or in customary international law to extend the privileges and immunities of foreign diplomats to the personnel of international organizations. The State Department therefore concluded that Congressional authorization would be needed to grant them any special legal consideration, and drafted and sponsored the International Organization Immunity Act. The IOIA was signed into law in December, 1945.

The IOIA grants certain international organizations a measure of immunity from suit in United States courts. The nature and scope of this immunity, however, is not specified. Rather, the IOIA provides that eligible international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.” Eligibility for this immunity is limited to public international organizations that include the United States as a participant, and that have been designated by the

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73 U.N. Charter art. 105, para. 1.
77 22 U.S.C. section 288a (b).
President through Executive Order. In addition, the President is also empowered to withhold or condition any of the immunities conferred by the Act, or to revoke the designation entirely.

It is not entirely clear why the State Department and Congress chose to resolve the immunity problem by reference to the immunities of foreign states. Some commentators have argued that this construction was chosen simply as a matter of convenience. Others have suggested that it may have been intended to preempt the General Assembly from insisting upon the full panoply of diplomatic rights for U.N. personnel. But whatever the motivation, the effect of tethering the immunity of international organizations to that of foreign governments was to infuse the IOIA with a measure of ambiguity. As with all such “reference statutes,” it raised the question whether the statute should be read to incorporate only foreign sovereign immunity as it existed at the time the statute was enacted, or whether it should also be understood to incorporate subsequent changes in that body of law.

**B. THE FOREIGN SOVEREIGN IMMUNITY ACT OF 1976**

As will be discussed in greater detail below, the parameters of foreign sovereign immunity were not fixed by law when the IOIA was ratified. Rather, the immunity that could be claimed by foreign governments was entirely a matter for the political branches of government to decide in accordance with their assessment of imperatives of international diplomacy. Moreover, at the time, the long-standing presumption that foreign governments were entitled to

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79 Id.
expansive or near absolute immunity in the courts of other nations was in global decline. A number of countries had already declared that they would only shield foreign governments from jurisdiction for their sovereign, but not their commercial activity. Indeed, the State Department had long since expressed its preference for restrictive immunity and, in 1952, issued the “Tate Letter” formally announcing that it would not request immunity in cases that arose out of a foreign sovereign’s commercial activity.83

Over time, this arrangement in which the courts deferred to the political judgments of the State Department proved problematic. The State Department’s discretion to depart from the policy it set out in the Tate Letter all but invited foreign governments to lobby for special dispensations. As a result, the State Department was often forced to factor diplomatic pressures into its decision-making. Consistency in application predictably suffered. Moreover, the Supreme Court eventually began to bridle at the notion that the Executive Branch could define the judiciary’s subject matter jurisdiction in such an *ad hoc* and unconstrained fashion. Thus, Justice Powell, addressing the application of the act of state doctrine, expressed his discomfort with a rule that required the courts to “receive the Executive’s permission before invoking its jurisdiction. . . . Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.”84

To resolve these issues, Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976. The FSIA affords foreign governments immunity from the jurisdiction of U.S. courts,

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83 Atkinson, 156 F.3d at 1340, citing Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952).
except where (1) the foreign sovereign has waived immunity;\(^8^5\) (2) the action is based upon commercial activity of the sovereign that has a specified connection to the United States;\(^8^6\) or (3) the action is based upon property rights taken in violation of international law and that property has a specified connection to the United States.\(^8^7\) In addition, the FSIA is limited by the terms of any international agreements that were in place at the time of the FSIA was enacted. By establishing statutory guidelines for foreign sovereign immunity, the FSIA abrogated the Executive’s discretion to decide whether to recognize immunity claims on a case-by-case basis, and codified the prevailing restrictive view of foreign sovereign immunity, in which foreign sovereigns are not entitled to immunity for their commercial acts.

IV. **Judicial Interpretation of the IOIA and FSIA**

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\(^8^6\) 28 U.S.C. § 1605(a)(2) (1976). Section 1605(a)(2) denies immunity in any case: in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

“Commercial activity” for purposes of the FSIA means “either a regular course of commercial conduct or a particular commercial transaction or act.” The commercial character of an activity is determined by reference to the nature of the conduct, transaction or act, rather than by reference to its purpose. 28 U.S.C. § 1603(d) (1976).

\(^8^7\) 28 U.S.C. § 1605(a)(3) (1976). Section 1605(a)(3) denies immunity in any case: in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States.
The D.C. Circuit, which has venue over suits filed against international organizations headquartered in Washington, D.C.,88 has developed virtually all of the important jurisprudence on the IOIA. The D.C. Circuit has employed a two-step analysis to determine whether an international organization is entitled to immunity under the IOIA. The first step is to establish the baseline standard of immunity authorized by the IOIA. As a threshold matter, this requires the court to decide whether the IOIA permanently adopts “the same” foreign sovereign immunity rules that existed in December 1945 when the IOIA was ratified, or whether it incorporates subsequent changes, so that the two immunities remain “the same” over time. Then it must elaborate the substantive standards that govern foreign sovereign immunity at that time. The second stage of the D.C. Circuit’s analysis is to determine whether an international organization has waived any immunity that it may be entitled to under the IOIA. This includes specific waivers that may be made in the context of a given case or contract, and more general waivers that may be found in an organization’s charter or headquarters agreement.

Under this approach, the D.C. Circuit has developed an extremely expansive understanding of the immunity provided by the IOIA. It has concluded that the “same immunity” language refers only to immunity as it existed in 1945, and has assumed (without meaningful historical analysis) that immunity of foreign sovereigns at that time was “virtually absolute.” At

88 See e.g. 22 U.S.C. § 286(g) (1945). July 31, 1945 Section 286g provides:

For the purpose of any action which may be brought within the United States or its Territories or possessions by or against the [International Monetary] Fund or the [World] Bank in accordance with the Articles of Agreement of the Fund or the Articles of Agreement of the Bank, the Fund or the Bank, as the case may be, shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which either the Fund or the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action. When either the Fund or the Bank is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the
the same time, the Court has come to interpret the waiver provisions of the charters or headquarter agreements quite parsimoniously. The following sections review the D.C. Circuit’s treatment of immunity and waiver issues in turn, and critique the conclusions the Court has reached.

A. THE SCOPE OF INTERNATIONAL ORGANIZATION IMMUNITY

1. ATKINSON V. INTER-AMERICAN DEVELOPMENT BANK

No Circuit Court directly addressed the question of the scope of international organization immunity under the IOIA until 1980, when the D.C. Circuit decided *Broadbent v. Organization of American States*. The appellants in *Broadbent* were former staff members of the Organization of American States (OAS) who sought damages for wrongful termination. They argued that since the IOIA granted international organizations the “same immunity” as foreign governments, the FSIA restrictions should apply and the OAS should not enjoy immunity for its commercial activity, including its employment arrangements. The OAS responded that the restrictive immunity provisions of the FSIA should not be applied to international organizations, and that the OAS should be afforded absolute immunity.

The D.C. Circuit, however, elided the issue of which immunity standard should apply by concluding that the OAS would be immune even under the FSIA’s restrictive approach. It reasoned that the employment of civil service personnel was not the sort of commercial activity...
that was exempted from immunity by the FSIA. In so holding, the Court observed that it was
critical for international organizations to have the latitude to “perform their duties free from the
peculiarities of national politics,” and expressed its concern that adjudicating employment
disputes could entangle the courts in internal administration in a way that was not contemplated
by Congress, and that might impair the United States’ obligations not to impede the smooth
functioning of the organization.

The question of whether an international organization should enjoy absolute or restrictive
immunity under the IOIA and FSIA was first addressed by the District Court for the District of
Columbia in *Rendell-Speranza v. Nassim*. Like *Broadbent* and several other earlier cases,
*Rendell-Speranza* arose out of an employment related dispute. The plaintiff had sued her
supervisor and her employer, the International Finance Corporation (IFC), for damages arising
out of an alleged assault and battery. Unlike the previous cases, however, the Court did not treat
the allegations as purely a matter of internal employment administration that would be immune
under either theory of liability. Instead, it concluded that the alleged conduct would fall under
Section 1605 (a)(5) of the FSIA, which denies immunity to foreign states for claims for money
damages for personal injury caused by a tort committed in the United States.

Since the IFC would not be immune under the restrictive immunity of the FSIA, the
Court was required to resolve the question of which immunity standard applied. It concluded that
the “same immunity” language of the IOIA should be read to incorporate the changes to foreign

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92 628 F.2d at 33.
93 628 F.2d at 34-35.
Bank*, 717 F.2d 610, 618 n.54 (D.C. Cir. 1983). *Chiriboga v. International Bank for Reconstruction and
Development*, 616 F.Supp 963, 967 (D.D.C. 1985); *Morgan v. International Bank for Reconstruction and
sovereign immunity enacted in FSIA.\textsuperscript{97} The Court found support for this conclusion in the traditional canon of statutory construction that “[a] statute which refers to the law of a subject generally adopts the law on the subject as of the time the law was invoked… includ(ing) all the amendments and modifications of the law subsequent to the time the reference statute was enacted.”\textsuperscript{98} The Court also reasoned that if Congress had wanted a more expansive immunity to apply to international organizations than to foreign sovereigns, it could have amended the “same immunity” language when it enacted the FSIA.\textsuperscript{99} That it chose to retain the “same immunity” language implied to the Court that it intended for international organizations to enjoy only the restricted immunity provided to foreign governments.\textsuperscript{100}

Soon thereafter, the D.C. Circuit reached the opposite conclusion in \textit{Atkinson v. Inter-American Development Bank}.\textsuperscript{101} Atkinson had brought an action against the IDB to garnish the wages of her ex-husband, who had defaulted on a judgment for alimony and child support.\textsuperscript{102} The IDB responded that it was absolutely immune from such actions under the IOIA. For the Court, the answer to this question depended on whether Congress intended the “same immunity” provisions of the IOIA to adopt the law of foreign sovereign immunity only as it existed in 1945, when the IOIA was ratified, or to incorporate subsequent changes in that law.\textsuperscript{103} The Court reasoned that since the text of the IOIA did not provide any explicit guidance as to whether Congress intended the IOIA to incorporate subsequent changes to the law of foreign sovereign immunity, it needed to consider other indicia of Congressional intent.

\textsuperscript{96} 932 F.Supp. at 24-25.
\textsuperscript{97} 932 F.Supp. at 24.
\textsuperscript{98} \textit{Rendell-Speranza}, 932 F.Supp. at 24, \textit{citing Broadbent}, 628 F.2d at 31 (quoting J. Sutherland \textit{STATUTORY CONSTRUCTION} § 51.08 (4\textsuperscript{th} ed. 1975)).
\textsuperscript{100} 932 F.Supp. 19 at 24.
\textsuperscript{101} 156 F.3d 1335 (D.C. Circuit) (1998).
\textsuperscript{102} 156 F.3d at 1336.
In searching for this intent, the Court first took note of the canon of interpretation regarding reference statutes relied on by the District Court in *Rendell-Speranza*. But unlike the *Rendell-Speranza* Court, the *Atkinson* Court did not find it to be determinative. Rather, the Court found contrary evidence in the text and history of the statute that persuaded it not to follow the guidance of the canon. First, the Court noted that the IOIA provided for the evolution of international organization immunity in another way—by empowering the President to modify, condition, limit, or even revoke the immunity of the designated organizations. Second, the Court cited a Senate Report that described this delegation to the President 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.” The Court found this passage in the Senate Report to be particularly persuasive, since it recognized the President’s power to limit the immunity of international organizations for commercial activity.

Based upon this evidence, the Court concluded that Congress intended to incorporate the rules of foreign sovereign immunity only as they existed at the time of the ratification of the IOIA, and to delegate to the President the authority to update the immunities of international organizations. Without analyzing the contemporary case law or other historical sources, the Court asserted that foreign sovereign immunity in 1945 was “virtually absolute,” and “contingent only upon the State Department’s making an immunity request to the court.”

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103 156 F.3d at 1341.
104 156 F.3d at 1340-41.
105 156 F.3d at 1341.
107 *Id.*
108 156 F.3d at 1341.
109 156 F.3d at 1340.
2. Critique of Atkinson’s Interpretation of the Scope of International Organization Immunity

a. Problems of Statutory Interpretation

As a general rule, courts look first to the language of the text to determine statutory meaning. Only if the language is ambiguous, incomplete or otherwise unclear, do courts look to legislative history, purpose, structure, context, and other sources of meaning. Following this precept, the Atkinson Court began its analysis by concluding that the “same immunity” language of the IOIA was too ambiguous to be dispositive, and therefore looked for other indicia of Congressional intent to determine its meaning.

While the Atkinson Court may have been correct that the “same immunity” language of the IOIA is not entirely unambiguous with respect to whether it incorporates subsequent changes in foreign sovereign immunity law, it surely went too far in assuming that the text equally supports either potential interpretation. In ordinary usage, a speaker who says that one thing should be “the same” as another does not usually mean “the same at the time of the statement.” For example, if my four-year old daughter tells me after dinner that she always wants the “same” dessert as her older sister, she would be greatly surprised to receive the same cookie her sister was eating that night every evening thereafter, regardless of what dessert her sister subsequently chose. By the same token, the Atkinson Court should have recognized that a natural reading of the “same immunity” language in the IOIA dictates that the immunity of international organizations evolve in parallel with that of foreign governments. By interpreting the IOIA to exclude subsequent changes in the law of foreign sovereign immunity, then, the Atkinson Court

rejected the normal understanding of the statutory language in favor of a rather idiosyncratic and uncommon usage.

The Atkinson Court also declined to apply the established canon of interpretation for reference statutes that prescribed that the IOIA be understood to incorporate subsequent changes in foreign sovereign immunity.\(^{111}\) At the time of the ratification of the IOIA, it was already a well-settled principle of statutory construction that a statute that refers generally to the law of a subject adopts not only the body of law as it existed at the time the reference statute was enacted, but also any subsequent amendment or modification to that law.\(^{112}\) Rather than apply this canon, however, the Atkinson Court noted that canons of construction are but one source of guidance for courts in interpreting unclear statutes, and should not be consulted until the inquiry into legislative intent was complete.\(^{113}\)

By treating the canon as a judicial tool that is largely unrelated to the question of Congressional intent, the Atkinson Court overlooked the extent to which the canon likely informed the drafting the IOIA. When Congress uses a phrase like “same…as” for which there is a well-settled, directly controlling canon of interpretation, a court should presume that Congress was aware of the canon and that it understood that it would be used to interpret the provision, unless there is explicit evidence that it did not intend for the canon to apply.\(^{114}\) The contrary

\(^{111}\) 156 F.3d at 1341.

\(^{112}\) On the other hand, statutes that reference specific acts or legislative provisions do not incorporate subsequent changes. J. SUTHERLAND, STATUTORY CONSTRUCTION § 5108 (3\(^{rd}\) ed. 1943). As early as the middle of the nineteenth century, courts had rejected the contrary view that reference statutes cannot incorporate subsequent changes. See e.g., Jones v. Dexter, 8 Fla 276, 282-83 (1859); Read, Is Referential Legislation Worth While?, 25 MINN. L. REV. 261, 270-276 (1941).

\(^{113}\) 156 F.3d at 1340-41, citing J. Sutherland, STATUTORY CONSTRUCTION § 51.08, at 192.

\(^{114}\) DANIEL A. FARBER, ECOPRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD, 125 (1999) (“One justification of canons of interpretation is that they mirror the likely intentions of the legislature. Courts assume that the legislature would have been explicit if it had wanted to deviate sharply from well-established principles. After all, legislators are likely to share in the
presumption—that Congress was heedless of the canon in drafting the statutory language—
entails a remarkably dismissive view of legislative craftsmanship, and one that can not easily be
reconciled with the judicial search for either original meaning or legislative intent. Accordingly, courts should not treat a canon as merely a secondary guide to understanding the
purpose and meaning of the provision, but rather as an indispensable determinant of that purpose
and meaning.

In enacting the IOIA, Congress must have been aware that reference statutes entailed an
undesirable measure of ambiguity, that they were therefore viewed as a relatively disfavored
means of legislative expression, and that their clarity depended upon the use of an established
canon of interpretation to remove this ambiguity. The fact that Congress still chose to use
reference language without qualification would therefore seem to clearly signal its intent that the
statute would be interpreted in accordance with the canon to incorporate subsequent changes in
the law of foreign sovereign immunity. The Atkinson Court therefore should have recognized that
Congress was crafting legislative language in light of an established rule of interpretation, and
presumed that the rule reflected Congress’ intent absent explicit evidence to the contrary.

No such evidence of Congressional intent to depart from the understanding prescribed by
the canon is apparent in the IOIA. Indeed, had Congress actually wanted to tether international
organization immunity to the law of foreign sovereign immunity as it existed at the time the IOIA
was passed, it could have used a range of alternative phrasings that would have more clearly

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115 WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY, AND ELIZABETH GARRETT, LEGISLATION AND STATUTORY
INTERPRETATION, 371 (2000) ("If the canons are background rules known (or imputed) to legislators and
citizenry, don’t the ideas of original intent and plain meaning depend on the canons? If the canons reflect
shared assumptions about statutory meaning, wouldn’t it be negligent to ignore them?").
116 Id.
conveyed this intent without contravening a well-established canon of construction. It could have simply stated that international organizations would be entitled to the “same immunity as of the date of this Act.” Or it could have specified the substantive parameters of immunity it was conferring. The fact that Congress opted to use the reference language rather than such simple and clear constructions provides strong textual support that such language would not have captured its legislative objectives.


As a matter of textual interpretation, the Atkinson Court almost certainly erred in concluding that the IOIA adopted only the law of foreign sovereign immunity as it existed in 1945. But this error would have been of little consequence had the Court not compounded the mistake by misconstruing the state of the law of foreign sovereign immunity at that time. Without conducting any meaningful inquiry into the nature and scope of the immunity foreign sovereigns actually enjoyed in 1945, the Atkinson Court concluded that such immunity was “virtually absolute,” and “contingent only upon the State Department’s making an immunity request to the court.” In the Court’s analysis, the interpretation of the “same immunity” language determined whether international organizations would receive the “virtually absolute”

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119 156 F.3d at 1340. The Atkinson Court erroneously cited Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983), as support for this proposition. In fact, citing Hoffman and Ex Parte Peru, the Verlinden Court noted that “this Court consistently has deferred to the decisions of the political branches…on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.” It further noted that where the foreign entity did not petition the State Department to intervene on its behalf, “responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions.” Verlinden, 461 U.S. at 486-87.
immunity enjoyed by foreign sovereigns in 1945, or the more restrictive immunity currently afforded to foreign governments under the FSIA.

In fact, it is extremely unlikely that Congress intended to adopt absolute immunity using such oblique language. Only six months before the IOIA was passed, Congress had adopted enabling legislation for the Bretton Woods agreements that specified venue and provided jurisdiction for any suit against a Bretton Woods Institution that was brought in accordance with its Articles of Agreement.\footnote{22 U.S.C. § 286(g) (1945). July 31, 1945 Section 286g provides:}

For the purpose of any action which may be brought within the United States or its Territories or possessions by or against the [International Monetary] Fund or the [World] Bank in accordance with the Articles of Agreement of the Fund or the Articles of Agreement of the Bank, the Fund or the Bank, as the case may be, shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which either the Fund or the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action. When either the Fund or the Bank is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law.


Since at least the World Bank’s Articles of Agreement clearly contemplated broad amenability to suit, it would be truly surprising if Congress had set out to supplant the enabling legislation so indirectly.

Moreover, at the time the IOIA was passed, there was a clear trend away from absolute sovereign immunity. Increased concern with the rule of law and fairness to private litigants had engendered a growing skepticism of expansive sovereign immunities of all kinds. Thus, Congress had already (or would soon) limit the government’s judicial immunity in a variety of circumstances.\footnote{22 U.S.C. § 286(g) (1945). July 31, 1945 Section 286g provides:} Soon after the passage of the IOIA, the Supreme Court took note of the growing perception of sovereign immunity as “an archaic hangover not consonant with modern morality,” and explained that it would generally countenance Congress’s increased willingness to
allow suits against a sovereign to go forward.\textsuperscript{122} At the same time, these due process concerns, and the expanded involvement of state entities in international commerce was moving the international community towards a “restrictive” view of foreign sovereign immunity, in which only acts of a sovereign nature would be immune from legal process.\textsuperscript{123} Foreign countries were increasingly adopting this restrictive view,\textsuperscript{124} and it had been incorporated into several important international conventions.\textsuperscript{125} Indeed, the State Department had long believed that foreign sovereign immunity should not be available for commercial activity,\textsuperscript{126} and had declined to assert immunity for U.S. government-owned merchant vessels in foreign courts.\textsuperscript{127}

\textsuperscript{122} \textit{Larson v. Domestic and Foreign Commerce Corp.}, 337 U.S. 682, 703-4 (1949); See also \textit{National City Bank v. Republic of China}, 348 U.S. 356, 359 (1955) (sovereign immunity “has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgement”).


\textsuperscript{124} von Mehren, 17 \textit{COL. J. TRANSNAT’L L.} at 38, fn 22.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} “It has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, and individuals doing business here, and should conform to the laws of this country governing such transactions.” Secretary of State Kellogg to Attorney General Sargent, July 7, 1927, quoted in 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 481 (1941). See also, Secretary Lansing to the Atty. Gen., Nov. 8, 1918, 2 HACKWORTH’S DIGEST OF INTERNATIONAL LAW 429; Department of State to the Italian Embassy, March 31, 1921, \textit{id.} at 437; Solicitor of the Department of State (Nielsen) to Judge Julian W. Mack, August 2, 1921, \textit{id.} at 438-439, also quoted in \textit{The Pesaro}, 277 Fed. 473 (S.D.N.Y 1921); Secretary Hughes to American diplomatic and consular offices, Jan. 11, 1923, 2 HACKWORTH’S DIGEST OF INTERNATIONAL LAW 439-40; Secretary Hughes to Minister to Portugal, Aug. 26, 1924, \textit{id.} at 441; Secretary Lansing to the Italian Ambassador, April 2, 1918, 2 Hackworth’s Digest of International Law 465; Acting Secretary Polk to the Russian charge d’affaires, March 6, 1919, id. at 467. Bernard Fensterwald, Jr., \textit{Sovereign Immunity and Soviet State Trading}, 63 \textit{HARV.L.REV.} 614, 618 (1950); William W. Bishop, Jr., \textit{New United States Policy Limiting Sovereign Immunity}, 47 \textit{AM. J. INT’L L.} 93, 97 (1953). The State Department’s suggestion of immunity for commercial activity in some cases from this period can be attributed to the fact that the Supreme Court had made it quite clear it would not follow the State Department’s restrictive view of immunity. See, \textit{Ex Parte Peru}, 318 U.S. at 581; Michael H. Cardozo, \textit{Sovereign Immunity: The Plaintiff Deserves a Day in Court}, 67 \textit{HARV. L. REV.} 608, 609 (1954).

\textsuperscript{127} \textit{The Pesaro}, 277 F. 473, 479-80 n.3 (1921) (“…government-owned merchant vessels…employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character.”).
But most importantly, absolute immunity was no longer the guiding principle of foreign sovereign immunity law at the time the IOIA was passed in 1945. Over the course of the 1930s and 1940s, the Supreme Court had delivered a series of opinions that transformed foreign sovereign immunity from a legal question for the courts to decide into a political question for the Executive Branch to resolve in accordance with its understanding of the imperatives of international diplomacy. These opinions culminated in *Republic of Mexico v. Hoffman*, issued just months before the IOIA was passed, in which the Court unanimously disclaimed any judicial role in defining the immunities to be afforded to foreign sovereigns, and gave full discretion to the “political branch” to do so. *Hoffman* therefore completely abrogated the substantive rules of sovereign immunity that the courts had derived under the old common law order—including the presumption of absolute immunity—in favor of a commitment to treat sovereign immunity as a question for the political branches to decide.

Foreign sovereign immunity was first established as a common law doctrine by the Supreme Court in *The Schooner Exchange v. McFaddon*. In *The Exchange*, the Court considered whether the owners of a ship that had been seized by the French navy could bring a suit in admiralty to recover the vessel after it docked in Philadelphia harbor. Chief Justice Marshall began his analysis by noting that the United States, by virtue of its sovereignty, had the unquestioned authority to determine the jurisdiction of its own courts. This necessarily included the power to exercise jurisdiction over visiting foreign sovereigns, their ambassadors, and their military forces. But Chief Justice Marshall argued that due respect for the “equal rights and

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128 324 U.S. 30 (1945). *Hoffman* was decided on February 5, 1945. The IOIA was ratified on December 29, 1945.
130 7 Cranch 116 (1812).
131 *Id.* at 138-39.
equal independence” of foreign sovereigns required the courts to consider jurisdiction over foreign sovereigns to be impliedly waived unless the United States government had expressed its intention to subject them to jurisdiction “in a manner not to be misunderstood.” Thus, jurisdiction could only be properly exercised pursuant to a statute, treaty, or a forcible seizure of the vessel by the government; it did not arise out of the general statutory provisions that confer admiralty jurisdiction on the federal courts. The Exchange therefore articulated a common law presumption in favor of foreign sovereign immunity where the political branches of government had not acted in contrary fashion. In dicta, however, the Court suggested that this presumption of immunity might not extend to commercial activities of foreign governments.

The Supreme Court first considered the question of whether this common law presumption of sovereign immunity applied to the commercial activity of foreign governments in Berizzi Bros. Co. v. The Pesaro in 1926. In The Pesaro, the Court held that in the absence of a treaty or statute to the contrary, the logic of The Exchange applied with equal vigor to merchant ships as to ships of war. The Court reasoned that naval ships were entitled to immunity “not because they are instruments of war, but because they are instruments of sovereignty.” The manner in which the foreign government chose to use the vessel was beside the point; the critical question was whether the vessel was engaged in a public purpose. Since a country’s pursuit of national wealth through the maintenance of a merchant marine was a public enterprise in the

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132 Id., at 146.
133 Id. at 145.
134 “[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [in that country].” Id. at 145.
135 271 U.S. 562 (1926).
136 Id. at 574.
137 Id. at 575, quoting Briggs v. Light Boats, 11 Allen (Mass.) 157, 165.
same sense as the pursuit of national security through the maintenance of a naval force, sovereign immunity for commercial activity was appropriate.138

In addition to articulating a presumption in favor of absolute immunity, The Pesaro also implicitly established that the existence and scope of foreign sovereign immunity was a question for the judiciary, not the executive branch, to decide. In the Circuit Court below, the Department of State had expressed its view that sovereign immunity was not appropriate for commercial activity.139 The Court, however, did not discuss the State Department’s intervention, or suggest that the Executive Branch’s view of the appropriate parameters of foreign sovereign immunity should influence the Court’s analysis in any way. The Pesaro, then, seemed to suggest that the judicially created presumption of absolute foreign sovereign immunity was independent of, and should even supersede, the State Department’s determination of whether immunity advanced the nation’s diplomatic objectives.

The Pesaro’s rather expansive assertion of judicial supremacy over the law of foreign sovereign immunity proved to be short-lived. In a quartet of cases authored by Chief Justice Stone between 1938 and 1945, the Court gradually abandoned The Pesaro’s understanding of sovereign immunity as a judicial question of law in favor of a new approach in which the foreign policy concerns of the State Department were dispositive.140 This revolution in the law of foreign sovereign immunity was driven by three broad trends in the jurisprudence and practice of international relations. First, the demise of judicial formalism in the New Deal Court undermined the legitimacy of the kind of deductive, common law rule-making that animated the Court’s decision in The Pesaro. In its stead, the Court increasingly adopted a more “realist” approach that

138 Id. at 575.
139 The Pesaro, 277 F. 473, 479-80 n.3 (1921).
was more expressly evidence-based, political and deferential to the elected branches of government.\textsuperscript{141} Accordingly, \textit{The Pesaro’s} assertion of a judicial prerogative to define the scope of sovereign immunity over the objections of the State Department lost its persuasive force.

Second and more importantly, the expansion of executive authority to define sovereign immunity was part and parcel of the Supreme Court’s increasing deference to the Executive Branch in all facets of foreign affairs. Throughout the 1930s and 1940s, the Court consolidated the power of the President to speak with “one voice” in foreign affairs by transferring competencies previously enjoyed by other branches of government to the Executive.\textsuperscript{142} Importantly, this included a considerable diminution in the judiciary’s own authority to articulate and interpret international law and the law of foreign affairs.\textsuperscript{143} Third, it reflected a profound change in the way in which many states actually exercised sovereignty. With the advent of Soviet-style socialism and the decline of \textit{laissez-faire} economic policies in response to the Great Depression, many governments were no longer as reluctant as they once were to “descend” into the commercial arena. As a result, the question of whether a country that was acting in frankly commercial ways should enjoy the traditional prerogatives of sovereignty took on new importance.\textsuperscript{144}


\textsuperscript{142} Koh, at 2357. \textit{United States v. Curtiss-Wright Exp. Corp.}, 299 U.S. 304, 320 (1936) (the President is “the sole organ of the federal government in the field of international relations”); \textit{United States v. Pink}, 315 U.S. 203, 222-23 (1942) (“[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government . . . [and] the propriety of the exercise of that power is not open to judicial inquiry…”); \textit{Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.}, 333 U.S. 103, 111 (1948) (“The very nature of executive decisions as to foreign policy is political, not judicial…They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility…”).

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} Bernard Fensterwald, Jr., \textit{Sovereign Immunity and Soviet State Trading}, 63 \textit{Harv.L.R.} 614 (1950).
The Court’s new deference to political decision-makers began almost imperceptibly with *Compania Espanola de Navegacion Maritima v. The Navemar.*\(^{145}\) In *The Navemar,* a Spanish shipping company brought suit to recover a merchant vessel from her crew, which had taken possession of the ship pursuant to an attachment order issued by the Spanish Government.\(^{146}\) The Spanish Government attempted to intervene, asserting that it had taken the vessel for public use, that the vessel was now in its possession, and that it was therefore immune from process.\(^{147}\) The Spanish Government also asked the Department of State to intervene on behalf of its claim for immunity, but the Department declined.\(^{148}\) The Court concluded that in the absence of adequate evidence that the vessel was actually in Spain’s possession, the District Court was not required to accept Spain’s suggestion as conclusive. Rather, Spain would have to litigate its claim for immunity.\(^{149}\) However, the Court observed in *dicta* that the adequacy of Spain’s representation was appropriate for judicial resolution only because the State Department had declined to intervene. Had the State Department “recognized and allowed” Spain’s claim for immunity, the Court would have been required to accept this representation and dismiss the action.\(^{150}\)

Later that term, in *Guaranty Trust Co. of New York v. United States,*\(^{151}\) the Court more clearly delineated the differing roles of the judicial and executive branches in determining the scope and application of foreign sovereign immunity. *Guaranty Trust* involved a claim by the United States, as assignee of the government of the Soviet Union, to recover funds that had been deposited with the Guaranty Trust bank by the tsarist Government of Russia. The bank sought to

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\(^{145}\) 303 U.S. 68 (1938).

\(^{146}\) 303 U.S. at 70.

\(^{147}\) 303 U.S. at 70-71.

\(^{148}\) 303 U.S. at 71.

\(^{149}\) 303 U.S. at 75.

\(^{150}\) 303 U.S. at 74-75.
defeat this claim by arguing that New York’s statute of limitations had run. In response, the
United States argued that the common law rule of *quod nullum tempus occurrit regi*—“time does
not run against the sovereign”—should apply to foreign as well as domestic governments. In the
alternative, it argued that even if the statute of limitations did apply, it should have been tolled
during the period in which the Soviet government could not have brought suit because it was not
recognized by United States.152

In rejecting these arguments, the Supreme Court made clear that it was for the political
branches, not the judiciary, to displace or limit New York’s statute of limitations as it applied to
foreign governments.153 Thus, although it refused to apply the *nullum tempus* rule to restrict the
application of state statute of limitations against foreign governments, it noted that the political
branches of government could do so by treaty or other appropriate action.154 Similarly, the Court
concluded that the statute of limitations should not have been tolled while the United States
Government did not recognize the Soviet regime, because the State Department had continued to
recognize its predecessor, the Provisional Government of Russia, which could have brought suit.
The Court’s unwillingness to second-guess the State Department’s recognition of the Provisional
Government illustrates just how far it was now willing to go in deferring to State Department
decision-making, since the Provisional Government was largely a fictitious entity that did not
govern any territory or possess any of the traditional accouterments of sovereign authority.155

151 304 U.S. 126 (1938).
152 304 U.S. at 131.
153 304 U.S. at 133-34.
154 304 U.S. 136.
155 See, C. J. GREENWOOD, LAUTERPACHT, ELIHU LAUTERPACHT, INTERNATIONAL LAW REPORTS, Vol
After Guaranty Trust, courts still had the authority to decide what legal consequences of State Department recognition should be. But beginning five years later in *Ex parte Peru*, the Court expanded its deference to the factual determinations of the State Department to transfer the judiciary’s authority to define the legal scope of foreign sovereign immunity to the Executive Branch. In that case, the Court considered whether to grant Peru’s claim for immunity that the State Department had “recognized and allowed,” even though Peru had taken other actions that the lower court interpreted as a waiver of immunity. Following the *dicta* in *The Navemar*, the Court concluded that the State Department’s suggestion was dispositive. But rather than simply rest its decision on *The Navemar* and other precedents that counseled deference to State Department factual findings, the Court took the opportunity to formulate a new theoretical basis for a stronger role for the Executive Branch in resolving sovereign immunity questions. The Court asserted that it was an “overriding principle of substantive law” that “courts may not so exercise their jurisdiction…as to embarrass the executive arm of the government in conducting foreign relations.” To justify this deference, the Court reasoned that the national interest would be better served by resolving grievances involving friendly foreign nations through diplomatic channels rather than through adversarial judicial proceedings. Accordingly, it concluded that the judicial seizure of the vessel of a friendly foreign state was such an inherent affront to national dignity, and could so imperil amicable relations, that courts must defer to the executive determination that a vessel is immune.

Thus, while the outcome in *Peru* was consistent with that in *The Pesaro*, the assumptions and analytical approaches of the two cases were decidedly different. The Court in *The Pesaro*

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156 304 U.S. 137-38.
157 318 U.S. 578 (1943).
158 318 U.S. at 588.
159 318 U.S. at 588.
was primarily concerned with preventing judicial usurpation of the sovereign prerogatives of a foreign government. The *Peru* Court, on the other hand, was far more concerned with preventing judicial usurpation of the political prerogatives of our own Department of State. Indeed, there is no indication in *Peru* that foreign governments, by virtue of their sovereignty, are entitled to any judicial immunities other than those that the State Department chooses to recognize. Moreover, while *Peru* did not explicitly repudiate *The Pesaro*’s assumption that the parameters of sovereign immunity were a question of common law, it clearly heralded the demise of such a robust judicial role. Certainly after *Peru*, it would have been difficult (if not unthinkable) for a court to simply disregard the preferences of the State Department, as *The Pesaro* court had done when it first decided that sovereign immunity extended to commercial activity.

The Court completed the transformation of the law of foreign sovereign immunity from a judicial question of law to a political question of diplomacy two years later in *Republic of Mexico v. Hoffman*.\(^{161}\) *Hoffman* presented the question of whether a merchant vessel that was owned, but not possessed, by the Mexican government was entitled to immunity, where the State Department had not formally “recognized and allowed” the claim, or adopted any guiding policy on the issue.\(^{162}\) The Court reasoned that in the absence of recognition of the claimed immunity by the State Department, the courts must determine whether the factual predicate of immunity existed.\(^{163}\) But they must do so “in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations.”\(^{164}\) Thus, it was “not for the

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\(^{160}\) 318 U.S. at 588.

\(^{161}\) 324 U.S. 30 (1945).

\(^{162}\) 324 U.S. at 30.

\(^{163}\) The courts must decide “whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity…” 324 U.S. at 34-35.

\(^{164}\) 324 U.S. at 35. This approach is problematic, in that it seems to discount the implications of the State Department’s refusal to “recognize and allow” the immunity. If the State Department declined to recognize the claim for immunity despite a having previously done so in analogous situations, it seems
courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” 165 Since the State Department had never recognized immunity for a vessel that was not in the possession of a foreign sovereign (despite numerous invitations to do so), the Court concluded that it was the government’s policy not to recognize immunity in such circumstances. It therefore denied Mexico’s request for immunity.166

In so holding, the Hoffman Court explicitly repudiated The Pesaro’s conclusion that immunity for commercial activity could be found where the State Department had refused to recognize it.167 But because the specific legal questions presented in each case were distinct, the Court maintained that it had no occasion to overturn The Pesaro.168 In concurrence, however, Justices Frankfurter and Black read the majority decision as an “implied recession” of The Pesaro, an outcome that they heartily welcomed.169 They noted that the Court’s willingness in The Pesaro to impose its own understanding of the demands of sound diplomacy over the objections of the State Department was irreconcilable with the new approach articulated by the majority.

After Hoffman, then, absolute immunity was no longer the governing principle of foreign sovereign immunity law. It was rather a discarded artifact of the old common law regime.

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165 324 U.S. at 35.
166 324 U.S. at 38.
167 324 U.S. at 35. fn 1.
168 324 U.S. at 35. fn 1.
169 324 U.S. at 39 (Frankfurter, J. concurring).
Indeed, it was well understood at the time that after *Hoffman*, the old rules no longer applied. Most notably, in a scathing assessment of *Hoffman* in the *American Journal of International Law*, Philip Jessup accused the Court of abdicating its role in determining the legal principles governing foreign sovereign immunity.170 Jessup complained that a reader of the opinion “might well assume that this is a subject with regard to which no body of law exists, a subject governed entirely by political considerations.”171

Three conclusions about the *Atkinson* decision follow from the fact that the Court had transformed foreign sovereign immunity into a political question by the time the IOIA was ratified. First, *Atkinson* misinterpreted the original understanding of the “same immunity” language of the IOIA. *Hoffman* made clear that it was the province of the Executive to “recognize and allow” immunity in any given case, and that where the Executive had not expressed its preferences, courts should make immunity determinations in conformity with the principles and policies accepted by the State Department.172 If the *Atkinson* Court believed that the IOIA adopted foreign sovereign immunity as it existed in 1945, then, it should have concluded that IOIA required the courts to give the same deference to political judgments regarding international organization immunity. Instead, *Atkinson* substituted absolute immunity for State Department policies and practice as the default rule of international organization immunity. Moreover, by determining that only the President, acting by Executive order, could alter an international organization’s immunity from the default rule of absolute immunity, *Atkinson* essentially stripped the Executive branch of the discretion under *Hoffman* to “recognize and allow” claims of

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172 324 U.S. at 35.
immunity based on situational judgments about whether organizational immunity would serve
the nation’s international interests.

Second, Atkinson’s determination that the IOIA adopted the law of foreign sovereign
immunity only as it existed in 1945 cannot be reconciled with Hoffman’s insistence that
politically accountable decision-makers should define the rules and application of foreign
sovereign immunity. Atkinson’s originalism makes little sense when the law at the time expressly
disapproved any fixed standard of immunity, and directed courts to defer to the determinations of
the political branches.

Third, contrary to Atkinson, the current meaning of the IOIA should be essentially the
same whether the “same immunity” language is understood to refer to the law of foreign
sovereign immunity in 1945 or the law today. On the one hand, if the IOIA is read to mean that
international organizations enjoy the same immunity that foreign sovereigns enjoyed in 1945,
then Hoffman requires courts to defer to the contemporary judgments of the political branches.173
The current expression of those judgments is found in the FSIA, which Congress intended to be
“the sole basis for obtaining jurisdiction over a foreign state in our courts.”174 Following
Hoffman, then, the FSIA’s rules regarding when foreign relations require judicial abstention
should apply to international organizations as well.175 On the other hand, if the IOIA requires

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173 While Hoffman speaks of the judgments of the “political branch” of government, it emphasizes the
role of the Executive Branch. In concurrence, however, Justices Frankfurter and Black make clear that
Congress retains the authority to determine when foreign relations required judicial abstention Court.
Republic of Mexico v. Hoffman, 324 U.S. at 41-42 (Frankfurter, J. concurring).
174 Republic of Austria v. Altmann 541 U.S. 677 (2004); Argentine Republic v. Amerada Hess Shipping
175 Indeed, the State Department has already taken the position that the IOIA should be interpreted to
provide only the more limited immunity afforded by the IOIA: “By 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.” Roberts B. Owen, Legal Advisor of the State Department to Leroy Clark,
General Counsel of the Equal Employment Opportunity Commission, June 24, 1980; reprinted in Marian
that international organization immunity evolve in accordance with changes in foreign sovereign immunity, international organization immunity should also be determined by the FSIA.

c. Inconsistencies with Subsequent Supreme Court Precedent.

Atkinson’s holding that the IOIA should be read to adopt the law of foreign sovereign immunity as it existed in 1945 is further undermined by Supreme Court’s recent decision in Republic of Austria v. Altmann. In Altmann, the Supreme Court considered whether the Foreign Sovereign Immunity Act applied to conduct that occurred prior to its 1976 enactment. Ms. Altmann had sued the government of Austria to recover several exceedingly valuable Klimt portraits that had been seized from her uncle by the Nazis and given to the Austrian National gallery. In response, the Government of Austria asserted sovereign immunity. It claimed that as of 1948, when the gallery refused to return the paintings to the family, they would have enjoyed immunity in United States courts, and that the FSIA act should not be read to breach that immunity retroactively. The Supreme Court agreed with Ms. Altmann that the FSIA should be applied to pre-enactment conduct. It reasoned that since immunity has traditionally been determined by contemporary “political realities and relationships” as expressed by the political branches of government, it would defer to Congress’s most recent pronouncement, the FSIA, absent compelling evidence that Congress did not intend it to apply retroactively. After considering the evidence of Congressional intent, the Court found no such evidence; indeed it found “clear evidence” that Congress actually intended the FSIA to apply pre-enactment conduct.

177 Id.
Altmann may be read to implicitly supersede Atkinson in two respects. First, Altmann reiterated Hoffman’s conclusion that contemporary political actors should have the discretion to resolve foreign sovereign immunity questions in accordance with their judgments about the imperatives of international relations. As noted above, this conclusion that immunity is a political question is incompatible with Atkinson’s recognition of a fixed standard of immunity rooted in the law of 1945. Second, Altmann’s holding that the law of foreign sovereign immunity is the law at the time of the filing of the suit, not the law at the time the conduct at issue occurred, further undermines Atkinson’s originalist interpretation of the “same immunity” language of the IOIA. Altmann suggests a simple syllogism for interpreting the “same immunity” language: if (1) the law of IOIA is the same as the law of foreign sovereign immunity, and (2) the law of foreign sovereign immunity is determined at the time of filing; then (3) the law of international organization immunity should be the same as the law of foreign sovereign immunity at the time the suit is filed.

B. WAIVER OF INTERNATIONAL ORGANIZATION IMMUNITY

1. CHARTER-BASED WAIVERS

Under the IOIA, international organizations that would otherwise be entitled to immunity will not be shielded from process “to the extent that such organizations may expressly waive their immunity for the purpose of any proceeding or by the terms of any contract.”178 The D.C. Circuit has interpreted this provision to apply not only to waivers that are made in the context of a specific case or contract, but also to more general waivers that may be found in an organization’s charter agreement. Thus, it has concluded that organizations have waived their

statutory immunity where the immunity provisions of their charter agreements contemplate more limited protections from suit than the IOIA provides.

The founding agreements of many international organizations contemplate broad amenability to suit in the domestic courts of their members. For example, the Articles of Agreement of the key financing institutions of the World Bank—IBRD, IDA, and IFC—each provide:

Actions 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. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

The charters of the Inter-American Development Bank and the European Bank for Reconstruction and Development define the circumstances in which they agree to be sued in nearly identical terms. By contrast, the Asian Development Bank’s Articles of Agreement specifically defines the circumstance in which it will submit to the jurisdiction of domestic courts:

The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities…

179 Perhaps the only exception is the IMF, whose Articles of Agreement provides:

The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract. International Monetary Fund, ARTICLES OF AGREEMENT, § IX (3).


2. **Atkinson’s Treatment of Waiver**

Over time, there has been a marked evolution in the D.C. Circuit’s approach to interpreting charter provisions. Its early jurisprudence gave full effect to the plain meaning of these provisions. Subsequent cases, however, have interpreted them narrowly to waive immunity only where doing so will advance the organization’s chartered objectives. The first Circuit Court case to address the scope of an organization’s waiver in its foundational agreement was *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, which the D.C. Circuit decided in 1967.  

Lutcher, a Brazilian paper company, was an IDB borrower that sued to enjoin the Bank from issuing a loan to a rival pulp manufacturer. Lutcher argued that the competitor’s loan would undermine its ability to repay its own loan, and would therefore violate IDB’s obligation to act prudently when considering loans to its competitors. The IDB responded that it was immune from such suits under both the International Organization Immunities Act and its charter agreement. In a decision by then-Judge Burger, the D.C. Circuit rejected the IDB’s claims to broad immunity. The Court assumed without discussion that the IDB was entitled to immunity under the IOIA, but concluded that the IDB had waived its statutory immunity in the Agreement that established the bank. The Court noted that the language of the Agreement that described the scope of its immunities provides, in pertinent part:

> Actions 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 guaranteed securities.

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183 382 F.2d 454 (D.C. Cir. 1967).
184 382 F.2d at 456.
185 Although it also dismissed Lutcher’s substantive claims on the merits.
186 382 F.2d at 456.
187 *Inter-American Development Bank, ARTICLES OF AGREEMENT, Art. XI, § 3, in Lutcher*, 382 F.2d at 456.
Given the clarity with which this provision anticipated that the Bank would be subject to suit, the Court concluded that the drafters of the Agreement “must have been aware that they were waiving immunity in broad terms….” Accordingly, the Court read the waiver provision to allow a plaintiff to assert any cause of action for which relief is available.

IDB had argued that that this provision should be read narrowly, as a partial waiver that applied only to suits that would enhance the effectiveness of the institution—i.e., those that were brought by bondholders, creditors, and beneficiaries of its guarantees. The Court offered four reasons for rejecting this implied limitation on the language of the provision. First, it noted that the explicit limitations included in the waiver suggested that “when [the drafters] wanted to make an exception to waiver of immunity they knew how to do so.” For instance, the drafters specifically precluded member states from bringing suit, to ensure that they would not improperly meddle in the governance of the institution. Second, the Court also noted that the provision specified that the Bank would be amenable to suit in member states in which the Bank operated, not just those where it had issued or guaranteed securities. The Court reasoned that this provision must have been intended to facilitate suits by plaintiffs other than creditors and bondholders, since plaintiffs who sought to enforce bond obligations would most likely sue in U.S. courts.

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188 382 F.2d at 457. The Court also cited evidence in the legislative history of the authorization of US participation in the Bank, and in the Executive Orders that qualified the Bank for the immunities provided under the IOIA, to support its understanding that this provision contemplated that legal action could be brought against the Bank.
189 382 F.2d at 457.
190 382 F.2d at 456.
191 Id. at 458
192 Id. at 458.
193 Id.
Third, the Court contrasted the expansive language in the IDB provision with the much narrower formulation adopted by the Asian Development Bank in its Agreement.\(^\text{194}\) The Court noted that while the ADB’s charter explicitly reserved its immunity except in carefully delineated circumstances, the IDB’s provision contained no reservation of immunity and “mentions no category of cases… in which the Bank cannot be sued.”\(^\text{195}\) In light of the marked differences between the two waivers, the Court refused to read the IDB’s Agreement to implicitly afford the same level of immunity that the ADB’s Agreement explicitly provided.\(^\text{196}\) Fourth, the Court questioned the policy basis for allowing suits by creditors, but not borrowers or other plaintiffs. It found no reason to believe that creditor suits would be any less disruptive of operations or expensive to defend than claims brought by other plaintiffs. And, it noted that borrower suits may be just as necessary to the effective operation of the Bank, since borrowers, no less than creditors, might be reluctant to conduct business with the Bank without the option to seek legal remedies if the Bank should renege on its obligations.\(^\text{197}\)

The *Lutcher* Court’s common-sense, text-centered approach to reading the IDB’s charter was eventually disapproved by the D.C. Circuit in *Mendaro v. World Bank*. \(^\text{198}\) *Mendaro*

\(^\text{194}\) The Asian Development Bank’s waiver provides:

The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

\(^\text{195}\) 382 F.2d at 459.

\(^\text{196}\) 382 F.2d at 459.

\(^\text{197}\) 382 F.2d at 459-60.

\(^\text{198}\) 717 F.2d 610 (1983).
involved a claim against the World Bank by a former employee who alleged that she was subjected to a pattern of sexual harassment and discrimination during the course of her employment. While conceding that the employment dispute would ordinarily be immune from judicial review, she argued that since the World Bank’s waiver provisions were identical to those of the IDB, *Lutcher’s* broad reading of the provision should apply to internal employment disputes. The *Mendaro* Court, however, refused to interpret the World Bank’s facially broad waiver so expansively. The Court noted that it was well-established under international law that an international organization is entitled to such immunity from the jurisdiction of a member state as is necessary to fulfill its organizational purposes. It therefore reasoned that the “unclear” scope of the waiver provision should be interpreted so as to advance the objectives of the institution. Thus, a waiver that would enable the organization to pursue its goals more effectively should be liberally construed, while a waiver that would subject the organization to suits that could frustrate its efforts are “inherently less likely to have been intended,” and should be carefully scrutinized.

Reading the Bank’s waiver provision in the context of the objectives set out in the Articles of Agreement, the Court concluded that waiving immunity from suits arising out of its internal administrative affairs would not advance the Bank’s organizational objectives, and would in fact be likely to impede them. For the Court, judicial scrutiny of the Bank’s employment practices would yield little in terms of improving the organization’s ability to recruit and retain qualified staff, since it already had an administrative grievance mechanism in place. Yet such scrutiny could impose onerous administrative costs by obligating the organization to

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199 717 F.2d at 614.
201 *Id.* at 617.
adhere to a patchwork of potentially conflicting national employment laws.\textsuperscript{203} The Court therefore concluded that claims that arose out of internal administrative or employment disputes were not contemplated in the general waiver.\textsuperscript{204} Reversing \textit{Lutcher}, it reasoned that the Bank’s members “could only have intended to waive the Bank’s immunity from suits by its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives.”\textsuperscript{205} These other potential plaintiffs included vendors and other external service providers, who might be reluctant to provide their services on credit if they had no prospect for judicial redress.\textsuperscript{206} Thus, it limited the application of the waiver to “actions arising out of [the Bank’s] external contracts and activities.”\textsuperscript{207}

The D.C. Circuit reaffirmed these narrow criteria for finding an immunity waiver in the constituent agreement of an international organization in \textit{Atkinson v. Inter-American Development Bank}.\textsuperscript{208} In that case, the appellant had sought to have the IDB comply with a garnishment order against her ex-husband, which she characterized as a “simple, clerical operation” that would not impair the Bank’s ability to fulfill its chartered objectives.\textsuperscript{209} But for the Court, even a showing of such a \textit{de minimis} impact on the Bank’s internal operations would not satisfy the \textit{Mendaro} test. Rather, it read \textit{Mendaro} to require that “the Bank’s immunity

\begin{footnotes}
\item \textsuperscript{202} 717 F.2d at 616.
\item \textsuperscript{203} 717 F.2d at 619.
\item \textsuperscript{204} 717 F.2d at 615, 618.
\item \textsuperscript{205} 717 F.2d at 615.
\item \textsuperscript{206} 717 F.2d at 618.
\item \textsuperscript{207} 717 F.2d at 619-20.
\item \textsuperscript{208} 156 F.3d 1335 (D.C. Circuit) (1998).
\item \textsuperscript{209} 156 F.3d at 1338.
\end{footnotes}
should be construed as not waived unless the particular type of suit would further the Bank’s objectives.”

3. **CRITIQUE OF ATKINSON’S TREATMENT OF WAIVERS**

The D.C. Circuit’s treatment of the waiver issue, like its treatment of the scope of international organization immunity under the IOIA, is not terribly persuasive. First, the plain language of most immunity provisions strongly supports *Lutcher*’s broad reading over *Mendaro*’s and *Atkinson*’s more constrained interpretation. As a matter of textual interpretation, *Lutcher*’s observations that the drafters of the IDB’s charter “must have been aware that they were waiving immunity in broad terms,” and that “when they wanted to make an exception to waiver of immunity they knew how to do so” are surely more persuasive than *Mendaro*’s conclusion that the drafters “could only have intended” to waive immunity to the extent necessary to achieve its chartered objectives. *Lutcher* was also correct to conclude that the existence of narrower waivers in the foundational agreements of some organizations strongly suggested that the broader waivers in other agreements should be given their full effect. As *Lutcher* noted with respect to the Asian Development Bank, “[I]t is quite impossible to argue in the face of it that the [World Bank]’s Agreement implicitly provides an immunity which the Asian Bank’s Agreement explicitly sets forth.”

The second problem with the D.C. Circuit’s constrained interpretation of these provisions is that it reverses the presumption against immunity that is inherent in the doctrine of “functional necessity”, the internationally accepted approach to defining the immunity of international organizations. Under the “functional necessity” analysis, international organizations are entitled

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210 156 F.3d at 1338.
211 382 F.2d at 457, 458.
212 717 F.2d at 615.
213 382 F.2d at 459.
to the immunities that they need to effectively discharge their delegated functions and to achieve their organizational objectives. This mainly includes immunities that shelter the institution from undue external interference and the potential burdens of divergent or politically motivated judgments. By definition, however, the concept of necessity is restrictive and should exclude those immunities that are merely desirable or convenient. Accordingly, most observers agree that an international organization should be entitled to no more immunity than is “strictly necessary” to fulfill its organizational purposes. The “functional necessity” doctrine therefore implies a presumption in favor of jurisdiction. Indeed, this was clearly the expectation that animated the General Assembly’s original efforts to define the immunities of the United Nations and its Specialized Agencies. Recognizing that the United Nations Charter afforded it immunities necessary to fulfill its purposes, the General Assembly resolved that:

the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfillment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for.

*Mendaro* and *Atkinson* properly recognized that in accordance with the doctrine of “functional necessity,” an organization’s charter should not be read to waive immunities that the organization truly needs to achieve its objectives. However, they then proceeded to stand this

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analysis on its head. Instead of asking whether the organization needed to be granted immunity to achieve its chartered objectives, *Mendaro* and *Atkinson* presumed that the organization should have immunity unless it needed to waive that immunity to fulfill its purposes. In so holding, *Mendaro* and *Atkinson* essentially conflated functional necessity with a presumption of absolute immunity.

Even more problematically, they all but nullified organizational charters as determinant of immunity, since a charter provision that waives immunity only as necessary to advance the organization’s objectives serves no practical purpose. If a borrower, creditor or contractor of an organization believes that it needs the right to sue as a condition precedent to doing business with the organization, it will insist on an immunity waiver in its contract agreement. Similarly, if an organization finds immunity to be counterproductive in a given transaction or dispute, it does not need the Court to interpret its charter to waive immunity, it can simply waive its immunity by contract or by declining to assert it in court. In fact, after *Mendaro* and *Atkinson*, it is hard to imagine that a court would find a functional need for a charter-based general waiver of immunity where the institution has not specifically waived immunity in the case or controversy at bar. For all intents and purposes, then, *Mendaro* and *Atkinson* commit the courts to follow the organizations’ determinations of functional necessity on a case-by-case basis.

By interpreting functional necessity immunity so expansively, *Mendaro* and *Atkinson* failed to pay due regard to countervailing normative and policy considerations that require more restricted immunity. Given its limited scope, the functional necessity doctrine should provide a framework to balance the operational requirements of international organizations against other important social values, such as fairness to private litigants, equal access to justice, and

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218 General Assembly Resolution of 13 Feb 1946, A/Res/22A (I), §D.
accountability under the rule of law. But the Court’s approach affords the opportunity to sue only to those persons or entities that have the leverage to retaliate if they are not given fair process. That is, creditors, bondholders, vendors and borrowers are given the right to sue because it is presumed that they will decline to do business with the organization, or at least demand more favorable contractual terms, if they are denied recourse to the courts to resolve disputes. On the other hand, tort claimants who may not have any consensual relationship with the organization, and therefore may not be in a position to impede its operations by withdrawing their cooperation, are denied access to court. In many cases these claimants may be poor and politically disenfranchised persons who have been harmed precisely because they were unable to politically vindicate their rights and interests in the local political process, or through the governance structure of the institution. Thus, the current approach may deny a judicial remedy to precisely those stakeholders that have the least leverage to assert their rights in other ways.

There is no small irony in the Mendaro and Atkinson courts’ willingness to overrule Lutcher and accept the defendant organizations’ assertions that they needed expansive immunity after Congress had passed the FSIA, and after absolute foreign sovereign immunity had been repudiated by virtually all other countries. Since judicial scrutiny of the conduct of States has been expanded in both domestic and foreign courts, it is not obvious why international organizations should need to be broadly and presumptively exempted from similar review. There is no compelling jurisprudential or policy reason why a collection of states acting through an international organization should require substantially broader immunity than its member states enjoy when they act alone. Indeed, since it is well-accepted that states may not evade their

\[219\] See, Donoghue, 17 YALE J. INT’L L. at 498;
international obligations by acting through international organizations,\textsuperscript{220} granting an international organization much broader immunities than their member states enjoy may create perverse incentives for member countries to try to use them to circumvent their own international law obligations.\textsuperscript{221}

The argument that international organizations need expansive immunities to achieve their organizational purposes also overlooks the current size, stature, and influence of many of these institutions. Expansive jurisdictional immunity arguably may have been a functional requirement a half century ago, when these international organizations were fledgling, under-resourced, and politically precarious. But this is hardly the case today. The most prominent international organizations are now well-funded and firmly established in the international system, and have considerable legal and political resources at their disposal to defend their independence and organizational prerogatives. In fact, the power and influence of the more prominent organizations have expanded to the point where they are largely insulated from overreaching by most of their members states.

For example, countries that have come to depend on multi-lateral development banks (MDB) for budgetary support, debt forgiveness, technical assistance, or private-sector development are unlikely to jeopardize their relationship with those banks by abusing their

\textsuperscript{220} Matthews v. United Kingdom, Application No.24833/94, Judgment of 18 February 1999, para. 32 (European Convention on Human Rights does not exclude the transfer of competences to international organisations provided that states continue to “secure” Convention rights). See also I. Brownlie, State responsibility: the problem of delegation, in Völkerrecht zwischen normativen Ansprüchen und politischer Realität, Ginther K. et al. Eds, 1994, pp. 300-301. (…[A] “State cannot by delegation (even if this be genuine) avoid responsibility for breaches of its duties under international law…”)

\textsuperscript{221} Lest one think that this is merely a hypothetical concern, consider the analogous case of Mohammed v. Harvey, (2006 U.S. Dist. LEXIS 75717), in which a United States District Court declined to hear the habeas corpus petition of an American citizen detained by the Multi-national Force in Iraq. Although the petitioner was physically being held by American soldiers, the Court concluded that he could not invoke the Court’s jurisdiction because he was in the nominal custody of the Multi-national Forces “who derive
judicial processes to gain leverage in any particular case. On the other hand, the countries that do have the wherewithal to take on an MDB—the large donor countries and major borrowers—already wield such disproportionate influence within the formal governance structures that they have little need to circumvent them to advance their national interests. However much these institutions may still find it desirable or convenient to retain the full measure of their current immunities, it is increasingly difficult for them to maintain that it is a necessary prerequisite of their effective operation.

Indeed, the purported functional necessity of absolute immunity is belied by the practice of the European Investment Bank (EIB), the European Union’s main financing institution, which submits to legal process as a matter of course. According to its charter, most disputes between the Bank and “creditors, debtors or any other person,” are decided by national courts in the member states where the dispute arises. In other specified circumstances, jurisdiction is conferred on the European Court of Justice.

Even if we assume for the sake of argument that Mendaro was correct that an MDB’s charter should only be read to waive immunity from “suits by... potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives,” it is not clear that this list should include only bondholders, creditors and other parties to formal

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222 Indeed, in many cases IFI have the bargaining power to require borrowing countries to agree to assume responsibility for any third-party claims against the bank as a condition of financing. See, Suzuki and Nanwani, at 194, fn. 79; Arsanjani, at 140, nn 26-27.

223 Statute of the European Investment Bank (2004) http://www.eib.org/Attachments/general/statute/eib_statute_en.pdf. The European Court of Justice has jurisdiction over disputes that (a) arise between the Bank and its Member States; (b) raise the issue of the legality of the decisions taken by the Board of Governors or Board of Directors; (c) arise between the Bank and a borrower or lender where the parties have contractually agreed to submit to the Court’s jurisdiction; and (d) arise between the EIB and its staff. http://www.eib.org/about/dynamic.asp?cat=100

224 717 F.2d at 615.
contracts. Amenability to suit from other parties may also be necessary for an MDB to achieve its current objectives. For example, MDBs are increasingly emphasizing the importance of governance and the rule of law for achieving their institutional objectives of helping borrowing countries achieve good development outcomes. In no small part, an MDB’s effectiveness in this mission depends on its credibility and legitimacy. As the imbroglio that precipitated President Wolfowitz’s resignation from the World Bank demonstrated, an MDB’s legitimacy and therefore its effectiveness can be critically impeded when it is seen to be operating by a different set of rules than it requires of its borrowers. Broad assertions of immunity that are difficult to defend in terms of strict necessity may incur significant reputation harms and therefore compromise an MDB’s ability to achieve its objectives in this area. Similarly, MDB’s are increasingly recognizing that the success of the projects that they finance often depend on the participation and support of locally-affected communities.\textsuperscript{225} Those who will be directly affected by a project, no less than those with a financial or contractual relationship with the MDB, may be deterred from engaging with an MDB if they will not be able to vindicate their rights and interests or enforce mitigation and benefit sharing agreements in a court of law.\textsuperscript{226}

V. APPLYING FSIA IMMUNITY TO INTERNATIONAL ORGANIZATIONS

In light of the shortcomings in the D.C. Circuit’s interpretation of the IOIA discussed above, it is worth considering how the immunity enjoyed by international organizations would be different if the restrictive immunity of the FSIA were incorporated into the IOIA. Under the

\textsuperscript{225} See, e.g., International Finance Corporation, \textit{Policy on Social and Environmental Sustainability}, at 3 (April, 2006) (“In the case of projects with significant adverse impacts on affected communities, IFC also assures itself that there is broad community support for the project within the affected communities…”)

\textsuperscript{226} Steve Herz, Antonio La Vina, Jon Sohn, \textit{Development Without Conflict: The Business Case for Community Consent} (World Resources Institute, 2007) (describing the risks of community opposition to development projects).
FSIA, foreign governments are presumed to be immune from the jurisdiction of US courts unless one of the specific statutory exceptions applies.\textsuperscript{227} For present purposes, the most important of these is the “commercial activity” exception. The FSIA recognizes that “under international law, States are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned.”\textsuperscript{228} As a result, it denies immunity to foreign governments from claims based upon acts that have one of three specified connections with the United States: (1) commercial activity that is carried on in the United States; (2) an act performed in the United States in connection with a commercial activity elsewhere; or (3) an act performed outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere, if that act causes a direct effect in the United States.\textsuperscript{229} In addition, the FSIA also withdraws immunity where the claim is based upon property rights taken in violation of international law and that property has a specified connection to the United States.\textsuperscript{230} The FSIA makes clear, however, that it does not displace any international agreements to which the United States is a party at the time of the enactment of the FSIA.\textsuperscript{231}

Rather than specifically defining “commercial activity,” the FSIA notes only that it is “either a regular course of commercial conduct or a particular commercial transaction or act,” and that the commercial character of an activity should be determined by the nature of the

\textsuperscript{230} 28 U.S.C. § 1605(a)(3) (1976). Section 1605(a)(3) denies immunity in any case:

\begin{itemize}
  \item in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States.
\end{itemize}

conduct, not by its purpose.\textsuperscript{232} This definitional vagueness appears to have been deliberate. As the House Report on the bill explained, Congress wanted the courts to have substantial latitude to define the parameters of “commercial activity.”\textsuperscript{233} The Supreme Court took on this task in \textit{Republic of Argentina v. Weltover}.\textsuperscript{234} In that case, a creditor of the Government of Argentina sued for breach of contract after Argentina unilaterally rescheduled some of its public debt in order to stabilize its currency.\textsuperscript{235} The Supreme Court unanimously concluded that Argentina’s bond obligations were commercial activity under the FSIA. It held that an act is commercial for FSIA purposes when it can be undertaken by a private citizen, and non-commercial when it entails the exercise of powers that are peculiarly sovereign.\textsuperscript{236} Thus, “when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.”\textsuperscript{237} The Court found that since the bonds at issue were essentially “garden-variety debt instruments” that could have been issued by private actors, they were inherently commercial in nature.\textsuperscript{238}

Much of the activity of international organizations is commercial under this interpretation. MDBs, for example, exercise no regulatory or other inherently sovereign powers when they provide financial or technical assistance to their clients. Rather, they provide the same kinds of financial and advisory services that private-sector actors commonly provide in the commercial marketplace.\textsuperscript{239} Under \textit{Weltover}, then, all or virtually all MDB lending and technical assistance programs are commercial activity, notwithstanding their economic development and poverty

\textsuperscript{235} 504 U.S. at 609-10.
\textsuperscript{237} 504 U.S. at 614.
\textsuperscript{238} 504 U.S. at 615.
alleviation purposes. Indeed, even MDB concessionary lending—credits to the poorest governments that are extended on very favorable terms—would still be considered commercial under Weltover. The Weltover Court found Argentina’s argument that its debt restructuring should be characterized as sovereign because it did not receive full consideration in the transaction to be irrelevant, since “engaging in commercial activity does not require the receipt of fair value…”

On the other hand, even under Weltover’s expansive reading, Broadbent was probably correct that the commercial activity exception should not apply to claims that arise out of the employment of civil service personnel. Although there is nothing peculiarly sovereign about hiring employees, the legislative history of the FSIA makes clear that Congress understood that the employment of diplomatic, military, and civil service personnel would be considered inherently governmental in nature. Accordingly, several circuits have held that civil service employment is a sovereign activity. And while the Supreme Court has not had occasion to address this question directly, it has approvingly cited Circuit Court precedent that foreign sovereigns are entitled to immunity for their “internal administrative acts” under the restrictive theory of immunity.

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239 504 U.S. at 614-15 (issuance of public debt is a commercial activity because it is analogous to a private transaction); Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987).


241 504 U.S. at 616.

242 628 F.2d at 33; see also Tuck v. Pan American Health Organization, 668 F.2d 547 (C.A.D.C. 1981).

243 H.R. Rep. No. 94-1487, p.16 (1976); S.Rep. No.94-1310, p. 16 (1976). These reports also manifest Congress’s intent that other employment relationships would be included within the definition of commercial activity.

244 Kato v. Ishihara, 360 F3d 106 (C.A. 2nd 2004) (employment of diplomatic, civil service or military personnel is governmental); Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996) (same); Segni v. Commercial Office of Spain, 835 F.2d 160, 165 (7th Cir. 1987) (same).

The fact that an international organization’s actions meet the threshold test of commercial activity, however, is obviously not the end of the inquiry. Two other requirements must be met for the commercial activity exception to apply. First, the claim must be “based upon” the commercial activity. In *Saudi Arabia v. Nelson*, the Supreme Court adopted a rather cramped reading of the “based upon” standard.\(^{246}\) *Nelson* involved an American employee of a Saudi state hospital who sued to recover damages after being detained and tortured by the Saudi police in retaliation for reporting safety violations at the hospital.\(^{247}\) The Supreme Court concluded that Saudi police’s tortious conduct did not qualify as commercial activity because the abuse of power by the police was a purely sovereign act.\(^{248}\) That it was committed in retaliation for the respondent’s conduct on the job was a question of purpose that was irrelevant to the determination of whether the act was commercial or sovereign in nature.\(^{249}\) After *Nelson*, for a claim to be “based upon” commercial activity within the meaning of the FSIA, the activity must be one of the elements of a claim that, if proven, would entitle the plaintiff to relief.\(^{250}\) *Nelson*, however, should not be understood to foreclose all claims in which the alleged harm is proximately caused by a sovereign act. The *Nelson* analysis should allow a claim “based upon” commercial acts that aided and abetted a tortfeasor in abusing sovereign authority. Since aiding and abetting liability is distinct from liability for the commission of the underlying act,\(^{251}\)

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\(^{247}\) 507 U.S. at 352-53.

\(^{248}\) 507 U.S. at 358, 361.

\(^{249}\) 507 U.S. at 363.

\(^{250}\) 507 U.S. at 357; *see also Kirkham v. Societe Air France*, 429 F.3d 288 (C.A.D.C. 2005) (“so long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies…”)

\(^{251}\) *Central Bank v. First Interstate Bank*, ___ U.S. ___ (1994)(“[A]iding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.”) This principle is also broadly accepted in the criminal context, both in the United States and internationally. *See, Model Penal Code § 2.06(3) (1962); Statute of the International Criminal Tribunal*
such assistance would satisfy *Nelson’s* requirement that the commercial activity comprise one of the elements of the claim. Indeed, although a number of decisions under the Alien Tort Claims Act have held that a private corporation can be liable for aiding and abetting human rights abuses by state actors, I am aware of no such case finding the corporation to be immune. Thus, for example, while *Nelson* would likely preclude a US court from hearing a claim against an MDB based upon human rights violations perpetrated by state authorities against local communities for opposition to an MDB-financed projects, it should allow a claim that an MDB had contributed to the violations by providing assistance to the official perpetrators.

Second, in order to be actionable under the FSIA, the commercial activity of an international organization must also have one of the three specified connections with the United States. Thus, a claim can be based upon commercial activity that is carried on in the United States. This would include the kind of banking transactions conducted by MDBs that are headquartered in the United States. A claim can also be based upon an act performed in the United States in connection with a commercial activity elsewhere. This might include a claim based upon tortious conduct in the United States that relates to foreign commercial activity. Finally, a claim can be based upon an act outside the United States in connection with

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252 See, e.g. *Doe v. Unocal* (affirming FSIA dismissal of claims against a state oil company, but finding that Unocal could be held liable for aiding and abetting) (subsequently taken en banc).


commercial activity elsewhere that causes a direct effect in the United States.\(^{256}\) In \textit{Weltover}, the Court held that an act has a direct effect if it “follows as an immediate consequence of the defendant’s activity.”\(^{257}\) Argentina’s rescheduling of its public debt had a “direct effect” in the United States because money that was supposed to be deposited in a New York bank was not delivered.\(^{258}\) Whether or not a claim meets one of these criteria will necessarily entail a case by case inquiry to determine if the nexus with the United States can be satisfied. As a general proposition, however, the mere fact that financing was arranged or bonds were sold in the United States probably would not be sufficient to establish a nexus.

Finally, the FSIA is limited by the terms of any international agreements that were in place at the time of the FSIA was enacted. In \textit{Argentine Republic v. Amerada Hess}, the Supreme Court held that this exception only applies to international agreements that “expressly conflic[t]” with the immunity provisions of the FSIA.\(^{259}\) The immunity clauses of the charter agreements of international organizations to which the United States was a party in 1976 should be given full effect under this provision. Accordingly, an organization whose charter affords it immunity for its commercial activities should continue to enjoy that immunity notwithstanding the commercial activity exception of the FSIA.\(^{260}\) Conversely, an organization whose charter waives immunity in expansive terms should not be insulated from jurisdiction by the FSIA.

The World Bank’s Articles of Agreement, for example, predates the FSIA, and should therefore take precedence over conflicting provisions of the FSIA. The Articles place few limitations on the kinds of suits that may be brought against the Bank, other than explicitly

\(^{257}\) \textit{Weltover}, 504 U.S. at 617.
\(^{258}\) \textit{Weltover}, 504 U.S. at 619.
\(^{260}\) See e.g., Articles of Agreement of the International Monetary Fund.
precluding claims that are brought by, or on behalf of, the Bank’s members. Since its charter contemplates broad amenability to suit, the Bank should not be able to claim the broader immunity protections provided by the FSIA. For example, a plaintiff bringing suit against the Bank should not be required to meet the FSIA’s requirement that the claim have a specified nexus with the United States. In my view, the Bank’s charter should still be read in light of the “functional necessity” doctrine to implicitly provide immunities that are strictly necessary for the Bank to achieve its organizational purposes. But it is not at all clear how a court would reconcile the tension between the “functional necessity” doctrine’s implicit narrowing of amenability to jurisdiction with Amerada Hess’s conclusion that only expressly conflicting international agreements take precedence over provisions of the FSIA.

In sum, if the IOIA were understood to incorporate the provisions of the FSIA, the initial determinant of an international organization’s immunity would be the language of its Articles of Agreement. Where the Articles of Agreement expressly conflicts with the FSIA by affording greater immunity, the organization would be entitled to the full measure of its charter immunities. And where it conflicts with the FSIA by asserting more limited immunities than the FSIA provides, the organization should not be able to invoke the FSIA’s broader immunity protections—except, potentially, where immunity was “strictly necessary” for the organization to achieve its purposes. On the other hand, where there was no express conflict between the agreement establishing the institution and the FSIA, or where the Agreement post-dates the FSIA, the provisions of the FSIA should determine immunity. In that circumstance, since much international organization (and virtually all MDB) activity, would meet the test of “commercial

261 World Bank, ARTICLES OF AGREEMENT, Art. VII, §3; see also International Development Agency, ARTICLES OF AGREEMENT, Art. VII, §3; International Finance Corporation, ARTICLES OF AGREEMENT, Art. VI, §3.
activity”, the availability of immunity would usually come down to whether the commercial activity had one of the specified connections with the United States.

VI. CONCLUSION

The D.C. Circuit’s decision in Atkinson interpreted the IOIA to provide extremely broad jurisdictional immunity to international organizations. The Court concluded that international organizations were entitled to “virtually absolute” immunity under the IOIA. It also found that even a facially broad waiver of immunity in the charter of an international organization should only be given effect to the extent that allowing suit would advance the institutional objectives of the organization.

Atkinson’s expansive interpretation of IOIA immunity, I have argued, is incompatible with developments in international law and practice that counsel more limited protections from judicial scrutiny. These include (1) the global renunciation of absolute sovereign immunity in domestic courts; (2) the increased recognition of individuals as rightsholders under international law; (3) the current consensus that international organizations have obligations under international law and should be accountable when they transgress them; (4) public expectations that international organizations will be governed in accordance with democratic principles and be accountable to those who are directly affected by their actions; and (5) the principle that individuals are entitled to fair process in resolving claims against public institutions.

Atkinson’s narrow limitations on jurisdiction over international organizations should be fundamentally reconsidered in light of these principles. Nothing in the text or history of the IOIA compels such a limited understanding of jurisdiction under the IOIA. Rather, the better reading of the “same immunity” language of the IOIA is that it requires that international organizations
be afforded the restrictive immunity from suit that is currently extended to foreign governments by the FSIA.

It is widely agreed that in order to ensure their effectiveness and autonomy, international organizations should be shielded from excessive judicial scrutiny in their host countries. Towards this end, the “functional necessity” doctrine has emerged in international practice to ensure that international organizations have the independence from judicial review that are strictly necessary for them need to achieve their organizational objectives. The broad immunity afforded by *Atkinson* far exceeds the legitimate functional needs of international organizations. On the other hand, the FSIA, read in conjunction with the functional necessity doctrine, strikes a workable balance between protecting the legitimate functional needs of international organizations, ensuring that international agreements are given appropriate effect, and providing limited opportunities for those aggrieved by the actions of international organizations to seek legal redress.