No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,
v.
INTERNATIONAL FINANCE CORPORATION,
Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a(b)—confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11.

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs below, are Budha Ismail Jam, Kashubhai Abhrambhai Manjalia, Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, and Machimar Adhikar Sangharash Sangathan.

Respondent, defendant below, is the International Finance Corporation.

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BRIEF FOR PETITIONERS

Petitioners Budha Ismail Jam, et al., respectfully request that this Court reverse the judgment of the U.S. Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 860 F.3d 703 (D.C. Cir. 2017) and reprinted at Pet. App. 1a-22a. The district court's opinion granting respondent's motion to dismiss is reported at 172 F. Supp. 3d 104 (D.D.C. 2016) and reprinted at Pet. App. 23a-38a.

JURISDICTION

The court of appeals issued its decision on June 23, 2017. Pet. App. 1a. The court denied rehearing on September 26, 2017. *Id.* 39a. On December 11, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 25, 2018. The petition for a writ of certiorari was filed on January 19, 2018 and granted on May 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The provision of the International Organizations Immunities Act (IOIA) directly at issue here provides that designated international organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

The entirety of the IOIA is reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Petitioners sued an international organization, the International Finance Corporation, alleging injuries caused by its commercial activity. The International Organizations Immunities Act (IOIA) provides that such organizations are entitled only to "the same immunity" from suit that "is enjoyed by foreign governments." 22 U.S.C. § 288a(b). And for more than sixty-five years (initially as a matter of executive policy, and since 1976 under the Foreign Sovereign Immunities Act (FSIA)), foreign states have *not* enjoyed immunity for their commercial acts. Yet the D.C. Circuit held that the IOIA requires dismissal of this lawsuit. According to the court of appeals, international organizations are entitled to "'virtually absolute immunity'"—a different and significantly greater form of immunity than foreign governments currently enjoy. Pet. App. 4a (quoting *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998)).

The question presented is whether the D.C. Circuit's construction of the IOIA's "same immunity" provision is correct.

A. Legal Background

1. *International Organizations Immunities Act*

a. Over the past several decades, the public and commercial landscape has become populated with dozens of "international organizations"—that is, public organizations in which multiple countries are members pursuant to treaties or similar foundational laws. *The Oxford Handbook of International Organizations*, at v-vi (Jacob Katz Cogan, et al. eds.,

2016); Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 World Pol. 333, 333 (1973). These organizations pursue a range of ends—from providing health care to managing fisheries to financing private economic development. Examples to which the United States belongs include the World Tourism Organization, *see* Exec. Order No. 12,508, 50 Fed. Reg. 11,837 (Mar. 22, 1985); the Great Lakes Fishery Commission, *see* Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962); and the Inter-American Investment Corporation, *see* Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986); *see also* 22 U.S.C. § 288 app. (listing all designated organizations). Many international organizations are headquartered in the United States, and some—such as the North American Development Bank and the Border Environmental Cooperation Commission—develop and finance projects on U.S. soil.

The founding agreements of some international organizations provide organization-specific privileges and immunities. The charters of the United Nations and the International Monetary Fund, for example, give them absolute immunity from suit. *See, e.g.*, *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014); *Brzak v. United Nations*, 597 F.3d 107, 110-12 (2d Cir. 2010). Other organizations' charters do not address such immunity. To the extent an organization's founding agreement is silent respecting immunity from suit—or any other privilege or immunity—the IOIA establishes an array of default rules.

b. The IOIA was enacted in 1945. At the time, U.S. law recognized the legal personhood of international organizations, but it provided no jurisdictional immunity for them or their personnel. S. Rep. No. 79-861, at 2 (1945); H.R. Rep. No. 79-1203, at 2 (1945); Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332, 333 (1946). Indeed, the United States asserted that organizational immunity from suit had no basis in international or U.S. law. *See* Preuss, 40 Am. J. Int'l L. at 333. Consequently, international organizations were vulnerable to suit in circumstances where their constituent foreign governments would otherwise be accorded immunity. S. Rep. No. 79-861, at 2; H.R. Rep. No. 79-1203, at 2; Preuss, 40 Am. J. Int'l L. at 333-34.

The State Department and Congress determined that this disparity was inconsistent with the United States' interest in treating international organizations like public entities. S. Rep. No. 79-861, at 2; H.R. Rep. No. 79-1203, at 2. Accordingly, the State Department proposed and Congress adopted the IOIA. *See* Br. for the United States as Amicus Curiae at 5, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) [hereinafter "U.S. *Broadbent* Brief"].[1] The "basic purpose" of the legislation was "to confer upon international organizations, and officers and employees thereof, privileges

[1] *See also* Letter from Harold D. Smith, Dir. of the Bureau of the Budget, to James F. Byrnes, U.S. Sec'y of State (Nov. 6, 1945), *reprinted in* H.R. Rep. No. 79-1203, at 7 (describing State Department's role in drafting and advocating for IOIA).

and immunities of a governmental nature." S. Rep. No. 79-861, at 1; *accord* H.R. Rep. No. 79-1203, at 1.

c. The IOIA applies to any "public international organization in which the United States participates . . . and which [has] been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in" the statute. 22 U.S.C. § 288.

With respect to protection from lawsuits, Congress initially considered granting international organizations unqualified immunity. The House Bill would have granted international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. § 2(b) (as introduced, Oct. 24, 1945). But the Senate set aside this language, and Congress instead adopted a default rule that ties international organization immunity directly to foreign sovereigns' immunity. *See* Pet. App. 14a-15a (Pillard, J., concurring). The operative provision—22 U.S.C. § 288a(b)—provides that, absent waiver of immunity, such organizations shall enjoy "the same immunity" from suit that "is enjoyed by foreign governments."

The IOIA also contains a provision allowing the President to limit any of the IOIA's privileges, exemptions, and immunities on an organization-by-organization basis. That provision authorizes the President to "withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in [the IOIA] or to condition or limit the enjoyment by any such organization or its officers or employees

of any such privilege, exemption, or immunity." 22 U.S.C. § 288.

2. *Immunity Of Foreign States*

"The doctrine of foreign sovereign immunity developed as a matter of common law." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). When the IOIA was enacted in 1945, that common law doctrine had recently transitioned from a substantive regime into a rule of deference. That is, courts at that time "'deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction' over particular actions against foreign sovereigns." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

Under this system, when the State Department requested (or a clear executive policy dictated) immunity, courts would grant it. *Samantar*, 560 U.S. at 311-12 (citing *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943)). But sometimes no political actor had expressed a case-specific preference or pronounced a rule for courts to apply. In those circumstances, courts themselves made case-by-case determinations according to their best perceptions of political branch policy. *See, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36-38 (1945) (denying immunity where foreign sovereign owned, but was not in possession of, a vessel being used for commercial purposes).

Shortly after the IOIA was enacted, the political branches adopted a broad substantive policy provid-

ing considerably more guidance. In a 1952 letter written by State Department Acting Legal Adviser Jack B. Tate (the "Tate Letter"), the United States announced that the Executive Branch endorsed what is widely known as the "restrictive theory" of sovereign immunity. Under this conception, foreign sovereigns are immune from suit based on public acts, but not based on commercial activities. *See Verlinden*, 461 U.S. at 487 (citing Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) (App. 2 to opinion of the Court)). The Executive Branch retained the authority to file suggestions of immunity even "'where immunity would not have been available under the restrictive theory.'" *Altmann*, 541 U.S. at 690 (quoting *Verlinden*, 461 U.S. at 487-88). But absent such a suggestion, courts applied the rules articulated in the Tate Letter. *Id.*

In 1976, Congress enacted the FSIA. The Act "'codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity'" and "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Altmann*, 541 U.S. at 691 (quoting *Verlinden*, 461 U.S. at 488); *see* 28 U.S.C. § 1602. The FSIA provides that a "foreign state is normally immune from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in [Sections] 1605 and 1607." *Verlinden*, 461 U.S. at 488. Those exceptions include actions based upon "commercial activity" of the foreign sovereign "car-

ried on in the United States" or "caus[ing] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "When one of these or the other specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" *Verlinden*, 461 U.S. at 488-89 (quoting 28 U.S.C. § 1606).

3. *Executive Branch Construction Of The IOIA*

The Executive Branch's longstanding, "considered view" is that the scope of international organization immunity from suit "under the IOIA [is] not frozen as of 1945, but follows developments in the law of foreign sovereign immunity." Pet. App. 15a (Pillard, J., concurring).

Before the FSIA, when the Tate Letter controlled, the State Department retained the ability to make suggestions of immunity for international organizations. *See* D. Ct. Dkt. 22-7, Herz Decl., Ex. 11, Letter from Detlev F. Vagts, Off. of the Legal Adviser, U.S. Dep't of State, to Robert M. Carswell, Jr., Org. of Am. States, at 1-2 (Mar. 24, 1977). But the year after the FSIA was enacted, the State Department concluded that such suggestions were no longer appropriate because the IOIA "links" its immunity rules to the FSIA. *Id.* Shortly thereafter, the Government explained to the D.C. Circuit that the "express language and the statutory purposes underlying the [IOIA] bring international organizations within the terms of the [FSIA]." U.S. *Broadbent* Brief, *supra*, at 8-9 (quotation omitted); *see also Broadbent*, 628 F.2d at 31 (acknowledging this view). Any argument to the contrary, the Government

maintained, was "devoid of substance." U.S. *Broadbent* Brief, *supra*, at 8-9.

The Government has reiterated this position numerous times, across multiple administrations. In 1980, the State Department Legal Adviser explained: "By virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities . . . ." Letter from Robert B. Owens, Legal Adviser, U.S. Dep't of State, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980). In 1992, the Department stated that the United States typically "afford[s]" only "restrictive immunity" to international organizations. Letter from Arnold Kanter, Acting Sec'y of State, to President George H.W. Bush (Sept. 12, 1992), *in* 1 Digest of United States Practice in International Law, 1991-1999, at 1016 (Sally J. Cummins & David P. Stewart eds., 2005), http://bit.ly/2EKesoE. And in 1997, the United States twice filed appellate briefs maintaining that international organizations' immunity from suit tracks that of foreign states under the FSIA.[2]

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[2] *See* Br. for the United States as Amicus Curiae at *5 n.3, *Taiwan v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 1997 WL 33555046 (9th Cir. May 28, 1997) (No. 97-70375) ("The [IOIA] provides that international organizations have the same immunity from suit as foreign governments, and the immunity of foreign governments is, in turn, defined by the FSIA." (citation omitted)); Br. for the United States as Amicus Curiae at *14, *Corrinet v. United Nations*, 1997 WL 33702375 (9th Cir. Mar.

B. Factual Background

This case arises out of a commercial development project financed by respondent, the International Finance Corporation (IFC or "the Corporation"). The IFC was established and designated as an international organization in 1956. It is headquartered in the District of Columbia, where its directors sit and nearly half of its more than 3,800 employees work. IFC, *Annual Report 2017*, at 84, 86 (2017). Its purpose is "to further economic development" and "fight poverty" around the world. Pet. App. 3a, 24a; IFC, *Policy on Environmental and Social Sustainability* 2 (2012), http://bit.ly/2mJbbiR. To carry out this mission, the Corporation provides loans to private businesses for projects in developing countries that otherwise could not attract private capital. Pet. App. 3a, 24a.

In 2008, the IFC's directors approved a loan of $450 million to Coastal Gujarat Power Limited (CGPL), to help finance the construction of the Tata Mundra Ultra Mega, a coal-fired power plant in Gujarat, India. Pet. App. 3a, 23a-25a. The project entailed significant social and environmental risks. Consequently, the IFC retained "supervisory authority" over the venture, and the loan agreement expressly conditioned ongoing disbursements on CGPL's compliance with various conditions. *Id.* 3a.

12, 1997) (No. 96-17130) ("Since Section 2 of the [IOIA] grants international organizations the same immunities as 'foreign governments,' the FSIA in effect defines the immunities that international organizations as institutions enjoy under the IOIA." (citations omitted)).

In particular, the loan agreement included an Environmental and Social Action Plan designed to ensure that the plant complied with the IFC's performance standards and to mitigate potential harms. Pet. App. 3a, 24a-25a. The loan agreement required quarterly reporting on compliance issues, including any remedial steps, "in form and substance satisfactory to the" IFC. D. Ct. Dkt. 10-6, Suratgar Decl., Ex. 1, Part 2, at 41. The IFC also retained authority to actively manage the project and to require corrective action, including changing CGPL's board of directors and senior management. *Id.* at 18-19, 21. Finally, the agreement gave IFC the power to "revoke financial support for the project" should CGPL fail to live up to its obligations. Pet. App. 3a.

The IFC, however, "inadequate[ly] supervis[ed] . . . the project," and "the plant's construction and operation did not comply with the Plan." Pet. App. 3a. As a result, the very risks that the Corporation anticipated occurred. The plant has had—and continues to have—a "devastat[ing]" environmental and social impact on the community in which it was built. *Id.* 2a & n.1. Yet the IFC has taken no meaningful steps to address the situation. *See id.* 3a.

C. Procedural History

1. Petitioners are farmers and fishermen who have been harmed by the power plant, a local fisherman's association, and a nearby village. Pet. App. 2a, 25a-26a. In 2015, they sued the IFC in the U.S. District Court for the District of Columbia, alleging various common law claims, including negligent supervision and breach of contract. *Id*. 28a.

The IFC moved to dismiss the complaint, arguing (as relevant here) that the IOIA bars the suit. Pet. App. 28a. Petitioners responded that the IOIA's "same immunity" provision grants international organizations the same immunity—and nothing more—than the FSIA grants foreign states. And under the FSIA, foreign states are amenable to suit for "commercial activities" performed in or relating to the United States, such as the financing actions and supervisory duties at issue. *See id.* 3a-5a; 28 U.S.C. § 1605(a)(2).

The district court granted the IFC's motion. The court observed that in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998), the D.C. Circuit had held that (i) the IOIA incorporates the law of foreign sovereign immunity only as it existed in 1945, and (ii) at that time, foreign sovereigns were entitled to "absolute" immunity. Pet. App. 33a, 37a-38a (citing *Atkinson*, 156 F.3d at 1340). The district court acknowledged that the Third Circuit has rejected *Atkinson*, concluding that the IOIA "incorporate[s] subsequent changes in the law of foreign sovereign immunity (like the Foreign Sovereign Immunity Act's commercial activity exception)." *Id.* 37a (citing *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756 (3d Cir. 2010)). But the district court was without authority to deviate from controlling precedent in its own circuit. *Id.* 38a.

The district court also concluded that the IFC had not waived its immunity. Although the IFC's founding charter contains "broad language" providing that the organization may be sued, D.C. Circuit precedent construes such waivers to be operative on-

ly insofar as a court believes the particular type of lawsuit "'would benefit the organization over the long term.'" Pet. App. 31a-32a (quoting *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009)). The district court found that test unsatisfied here. *Id.* 36a-38a.

2. The D.C. Circuit affirmed, declaring that its *Atkinson* decision stood "as an impassable barrier" to petitioners' suit. Pet. App. 7a. The panel majority acknowledged that, in the years leading up to 1945, courts merely ""deferred to the decisions of the political branches"" on questions of foreign sovereign immunity, rather than automatically affording absolute immunity. *Id.* 6a (quoting *Altmann*, 541 U.S. at 689 (quoting in turn *Verlinden*, 461 U.S. at 486)). But the panel stressed that "the *holding* of *Atkinson*—regardless how one characterizes the immunity of foreign sovereigns in 1945—was that international organizations [a]re given complete immunity by the IOIA." *Id.*

The D.C. Circuit also concluded that the IFC had not waived its immunity. The panel majority conceded that petitioners' claims would "in some sense . . . 'benefit'" the IFC because allowing the claims to go forward would assure communities considering future projects that the Corporation can be held accountable for causing harms. Pet. App. 8a, 10a-11a. But, being "obliged to apply" its waiver test to preclude at least some claims that the FSIA's commercial activity exception would allow, the court of appeals held that the IFC's waiver did not encompass petitioners' claims. *Id.* 8a, 11a.

Judge Pillard wrote separately to say that were the panel "not bound by *Atkinson*, [she] would hold"—like the Third Circuit—"that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states." Pet. App. 16a. Judge Pillard explained that, "[w]hen a statute incorporates existing law by reference," as the IOIA does, "the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up." *Id.* 12a. And that canon, Judge Pillard concluded, "makes sense" here. *Id.* 16a. "Neither the IOIA nor [the D.C. Circuit's] cases interpreting it explain why nations that collectively breach contracts or otherwise act unlawfully through organizations should enjoy immunity in our courts when the same conduct would not be immunized if directly committed by a nation acting on its own." *Id.*

Judge Pillard also registered her disapproval of the D.C. Circuit's waiver jurisprudence. Rather than establishing an absolute immunity rule and then creating case-by-case exceptions according to an "amorphous" waiver-curbing doctrine, she maintained it would be far better to consider assertions of immunity using the "time-tested body of law under the FSIA." Pet. App. 21a.

SUMMARY OF ARGUMENT

The D.C. Circuit is incorrect that the IOIA gives international organizations absolute immunity from suit. Rather, by its plain terms, the IOIA tracks the rules established in the FSIA.

I. The IOIA gives international organizations "the same immunity" from suit "as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). Under the time-honored reference canon, a statutory directive to apply another general body of law dictates that the statute incorporates that body of law as it exists at the time of suit. And the current law of foreign sovereign immunity is governed by the FSIA. The IOIA's use of the present tense—"as *is* enjoyed"—reinforces that analysis, for a statute expressed in that tense must be applied as of the time of suit.

The IOIA's structure, purpose, and drafting history confirm what the plain text of the "same immunity" provision requires. Various subsections of the Act give international organizations and their officers complete immunity from certain actions. Other subsections expressly distinguish international organizations' privileges or exemptions from those of foreign states. But the provision dealing with organizational immunity *from suit* does neither. Congress's decision to take a different tack in that context demonstrates its desire to eschew either absolute protection or differential treatment. And that legislative determination makes perfect sense. International organizations are compilations of sovereigns, so the rules governing the latter's amenability to suit ought to govern the former's. Put another way, foreign states should not be able to evade legal accountability for private endeavors, such as commercial activities, simply by pursuing them through international organizations.

Lest there be any doubt, the Congress that enacted the IOIA specifically considered and rejected pro-

posed language that would have given international organizations complete immunity from suit. The House version of the Act would have afforded international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. § 2(b) (as introduced, Oct. 24, 1945). Yet the Senate rejected that proposal in favor of the "same immunity" language ultimately enacted. The D.C. Circuit erred in reading into the IOIA the very rule Congress set aside.

II. Even if the court of appeals were correct that the IOIA locks in the approach to foreign sovereign immunity that prevailed in 1945, when the IOIA was enacted, that interpretation would still lead right back to the FSIA. As this Court has repeatedly recognized, the rule in 1945 was that courts deferred to the political branches' current views regarding whether foreign states were entitled to immunity. And for decades, the political branches have consistently endorsed the restrictive theory of sovereign immunity that the FSIA codifies. Accordingly, the law of 1945—if it applied here—would require this Court to apply the FSIA.

ARGUMENT

The IOIA's "same immunity" provision does not place international organizations uniquely beyond the reach of the law. Instead, it incorporates the current law of foreign sovereign immunity, which is governed by the FSIA.

I. THE IOIA'S "SAME IMMUNITY" PROVISION TRACKS THE CURRENT LAW OF FOREIGN SOVEREIGN IMMUNITY, WHICH IS GOVERNED BY THE FSIA

A. The Text Of The "Same Immunity" Provision Requires Tracking The Current Law Of Sovereign Immunity

The Court "must enforce plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). The IOIA affords international organizations only the "same immunity . . . as is enjoyed by" foreign governments. 22 U.S.C. § 288a(b). That text incorporates the law of foreign sovereign immunity as currently codified in the FSIA.

1. Congress frequently drafts statutes that refer to another body of law. And under the "reference canon," statutes that "refer[] to the law on a subject generally" are "construed to [incorporate] the law . . . as it reads thereafter at any given time including amendments subsequent to the time of adoption." 2B Sutherland Statutory Construction § 51:7 (7th ed., West 2012) (quotation omitted). Only when a statute "refers specifically to a particular statute" does it exclude subsequent amendments. *Id.*

The reference canon was established long before the IOIA was enacted. In 1924, for instance, this Court explained that "adopt[ion] by a generic reference" was a "recognized mode" of statutorily latching one body of law to another, thereby allowing the statute to incorporate "new rules" in the referenced body of law as they come into being. *Panama R. Co.*

v. Johnson, 264 U.S. 375, 391-92 (1924); *see also Hassett v. Welch*, 303 U.S. 303, 314 (1938) (recognizing the canon); *In re Heath*, 144 U.S. 92, 93-94 (1892) (same); *Kendall v. United States ex rel. Stokes*, 37 U.S. (1 Pet.) 524, 622-25 (1838) (same). By 1945, a multitude of lower federal courts, state courts, and commentators had recognized the reference canon as well.[3]

The canon also makes eminent sense. As Justice Gorsuch explained shortly before joining this Court, when a statute refers to a general body of law, its ordinary meaning directs people to that law as it exists "on any given day, today included." *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016). Indeed, as years and decades pass from the statute's original enactment, it would become increasingly irrational to require lawyers and judges—not to mention lay persons—"to become experts in

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[3] For lower federal courts, *see, e.g.*, *In re Argyle-Lake Shore Bldg. Corp.*, 78 F.2d 491, 494 (7th Cir. 1935); *United States v. Manahan Chem. Co.*, 23 C.C.P.A. 332, 333-36 (1936). For state courts, *see, e.g.*, *George Williams Coll. v. Vill. of Williams Bay*, 7 N.W.2d 891, 894-95 (Wis. 1943); *People ex rel. Kell v. Kramer*, 160 N.E. 60, 67-68 (Ill. 1928); *Boise City v. Baxter*, 238 P. 1029, 1033 (Idaho 1925); *State v. Beckner*, 198 N.W. 643, 644 (Iowa 1924); *Corkery v. Hinkle*, 217 P. 47, 49 (Wash. 1923); *In re Guenthoer's Estate*, 83 A. 617, 618-19 (Pa. 1912); *Culver v. People*, 43 N.E. 812, 814-15 (Ill. 1896); *Gaston v. Lamkin*, 21 S.W. 1100, 1103-04 (Mo. 1893); *Kugler's Appeal*, 55 Pa. 123, 124-25 (1867); *Jones v. Dexter*, 8 Fla. 276, 288-89 (1859). For commentators, *see, e.g.*, Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 Minn. L. Rev. 261, 273 (1941); John W. Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, 5 Geo. Wash. L. Rev. 198, 203 (1937).

the vestigial esoterica" of bygone legal eras. *Id.* By tethering the law governing one matter to the general law governing another, Congress uses an effective shorthand that enables the referential statute to update itself according to evolving developments and necessities.

Section 288a(b) is a textbook general reference statute. It refers to a body of law generally—*viz.*, the law governing "immunity from suit . . . enjoyed by foreign governments," 22 U.S.C. § 288a(b)—not to any identifiable statutory provision. The plain text of the statute thus "incorporate[s] by reference a large body of potentially evolving federal law." *United States v. Kozminski*, 487 U.S. 931, 941 (1988); *see also El Encanto*, 825 F.3d at 1164 (the "plain language" of a statute referencing the Federal Rules of Civil Procedure as a whole required application of the Rules as they existed at the time of suit, not at the time of the statute's enactment).

Two aspects of the IOIA's "same immunity" provision make its dynamic incorporation of foreign sovereign immunity law particularly apparent.

First, when the IOIA was enacted, *there was no specific foreign sovereign immunity statute* to which Congress could have referred. Rather, "[t]he doctrine of foreign sovereign immunity" was "a matter of common law." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). Common law, of course, is inherently evolving. No legislator referring to a general body of common law could reasonably think he or she is freezing a rule in place for all time.

That is why courts of appeals routinely construe federal statutes referencing state common law as incorporating that law on an evolving basis. For instance, the Federal Tort Claims Act (FTCA) provides that "[t]he United States shall be liable [in tort] . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Courts have made clear that this provision incorporates state tort law as it currently stands. *See, e.g.*, *Burnham v. United States*, 400 F. App'x 190, 191-92 (9th Cir. 2010); *Winchell v. U.S. Dep't of Agric.*, 961 F.2d 1442, 1443-45 (9th Cir. 1992); *see also Devlin v. United States*, 352 F.3d 525, 530-32 (2d Cir. 2003) (FTCA provision making United States liable "in accordance with the law of the place where the act or omission occurred" ties Government's liability to the "evolving tort law of the several states").

Similarly, it would be absurd to construe the Rules of Decision Act, which provides that "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply," 28 U.S.C. § 1652, to require federal courts sitting in diversity to adjudicate cases based upon the common law rules extant when that statute was enacted in 1789. To the contrary, "the Act require[s] application of future state laws" too. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 163 (1987) (Scalia, J., concurring in the judgment); *see generally Erie R.R. Co. v. Tompkin*s, 304 U.S. 64 (1938).

There is no basis to read the IOIA's "same immunity" provision differently. That provision's gen-

eral reference to the law governing "immunity from suit . . . enjoyed by foreign governments" can be read only to incorporate the evolving body of foreign sovereign immunity law, not to freeze in the particulars of that law that existed in 1945. That is all the more true because the common law of foreign sovereign immunity itself was in a period of recalibration at the time, having shifted from a regime in which courts made their own policy assessments to one in which the Executive's views had primacy. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 134-45 (1999) (summarizing shift). Congress thus would have been acutely aware both that the common law of sovereign immunity itself was prone to change, and that the then-extant rule of deference would itself produce changing results as the political branches' foreign policy evolved.

Second, the word "same" in the IOIA's "same immunity" provision reinforces that the scope of international organization immunity continually tracks that of foreign sovereign immunity. As numerous authorities recognized before the passage of the IOIA, a statute that treats one thing "the same as" another is "intended 'as a rule for future conduct . . . always to be found, when it is needed[,] by reference to the law . . . existing at the time when the rule is invoked.'" *Corkery*, 217 P. at 49 (third alteration in original) (quoting G.A. Endlich, A Commentary on the Interpretation of Statutes § 483 (1888)).[4] Con-

[4] *See also Manahan Chem. Co.*, 23 C.C.P.A. at 333-36 (statute giving import appraisal authorities "the same jurisdiction, powers, and duties . . . as in the case of appeals and protests

gress's declaration that two forms of protection are "the same" reflects a determination that they are by nature equivalent, and should move together.

For example, Congress used a nearly identical formulation in the Civil Rights Act of 1866, which Congress enacted to put black and white citizens on equal footing after the Civil War. *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). That statute provides that "[a]ll persons within the jurisdiction of the United States shall have *the same* right . . . to make and enforce contracts, to sue, be parties, give evidence, . . . *as is enjoyed* by white citizens." 42 U.S.C. § 1981(a) (emphasis added); *see also id.* § 1982 ("All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."). Congress obviously did not mean to guarantee black citizens nothing more than the rights that whites enjoyed in 1866. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429 (1968). Rather, the statute mandates continuing legal equality between citizens.

So too here. Congress determined that for purposes of immunity from suit, international organizations and foreign governments should be treated "the same." That is an unambiguous directive that inter-

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relating to customs duties under existing law" referred to law in force when merchandise was imported, not when statute was enacted); *Kugler's Appeal*, 55 Pa. at 124-25 (statute providing that proceeding for alteration of election district boundaries "shall be the same as in the erection or alteration of the lines of townships" referred to township division law existing when rule was invoked).

national organizations and foreign sovereigns should be treated equally for such immunity purposes, today as in 1945.

2. That conclusion is confirmed by the fact that the IOIA is written in the present tense: International organizations are afforded the same immunity "as *is* enjoyed" by foreign governments. 22 U.S.C. § 288a(b) (emphasis added). This Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010). Where, as here, a statute is "expressed in the present tense," its "plain text" requires applying the law "at the time suit is filed." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003).

In *Dole Food*, for instance, the Court construed the FSIA's requirement that an entity seeking to remove a lawsuit to federal court show that "'a majority of [its] shares . . . *is* owned by a foreign state.'" 538 U.S. at 473 (emphasis added) (quoting 28 U.S.C. § 1603(b)(2)). The Court held that "because it is expressed in the present tense," the provision "requires that instrumentality status be determined at the time suit is filed." *Id.* at 478. Similarly, in *Stafford v. Briggs*, 444 U.S. 527 (1980), the Court held that, given its use of the word "is," the expanded venue provided by the Mandamus and Venue Act of 1962 applies only to actions in which the officer was acting in his official capacity or under color of legal authority at the time of suit. *Id.* at 535-36; *see also, e.g.*, *Carr*, 560 U.S. at 449 (adopting a "forward-looking construction of 'travels'"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S.

49, 59 (1987) (Clean Water Act citizen-suit provision's "pervasive use of the present tense" was a "striking indic[ator]" of its "prospective orientation").

Indeed, the U.S. Code itself codifies the present-tense principle. The Dictionary Act commands that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. "By implication, then, the Dictionary Act instructs that the present tense generally does *not* include the past." *Carr*, 560 U.S. at 448 (emphasis added).

Applying the present-tense principle to Section 288a(b)'s phrase "as is enjoyed" makes clear that international organizations have the same immunity that foreign governments enjoy *today*, not the immunity they enjoyed when the IOIA was enacted.

3. Had Congress meant to deviate from the reference and present-tense canons—and thus to dictate that international organizations enjoy the immunity that foreign sovereigns enjoyed in 1945—it had several readily available alternatives to accomplish that result. The fact that it used none of them further demonstrates the court of appeals' error.

Most obviously, Congress could have simply enshrined into law the specific level of immunity it thought existed at the time. Or Congress could have pegged Section 288a(b)'s immunity reference to a particular date or some other linguistic equivalent, as it has done in other statutes. Pet. App. 14a (Pillard, J., concurring); *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 764 (3d Cir. 2010). A

provision of the Energy Policy Act, for instance, provides that "[p]atents issued pursuant to this subsection shall provide for surface use to the same extent as is provided under applicable law prior to October 24, 1992, with respect to oil shale mining claims." 30 U.S.C. § 242(c)(1). Similarly, in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Court held that a 1934 statute defining "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction" referred only to those under federal jurisdiction when the statute was enacted. *Id.* at 382 (emphasis added). Had Congress wished the statute to incorporate the law "at the time of application," this Court explained, it "could have omitted the word 'now.'" *Id.* at 391.

Alternatively, if Congress wanted the IOIA's "same immunity" provision to freeze the law as of 1945, Congress could have styled the provision as a "reception statute." A tool many states used dating back to the Founding era, reception statutes adopted only those parts of the English common law that were "in force" at the time of the statutes' enactment. *See generally* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791 (1951). A typical reception statute provides that "[a]ll such parts of the common law as *were heretofore in force* and use within this State . . . are hereby declared to be in full force within this State." N.C. Gen. Stat. § 4-1 (emphasis added). The contrast between that language and the IOIA's "same immunity . . . as is enjoyed" wording is evident.

Finally, had Congress wanted to incorporate the foreign sovereign immunity law of 1945, it otherwise "could have phrased [the IOIA] in language that looked to the past." *Gwaltney*, 484 U.S. at 57. The fact that "it did not choose this readily available option," *id.*, confirms its intent to incorporate the *current* law of foreign sovereign immunity, rather than the sovereign immunity law of long ago.

B. The Statute's Structure Reinforces That It Incorporates The FSIA

The D.C. Circuit has acknowledged that the text of the "same immunity" provision implicates the reference canon. *See Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340-41 (D.C. Cir. 1998). But the court of appeals deemed this "factor" to be "outweighed" by the overall structure of the IOIA, which it has taken to signal that "Congress' intent was to adopt th[e] body of [foreign sovereign immunity] law only as it existed in 1945." *Id.* at 1341. This reasoning is erroneous. "[L]ook[ing] to the provisions of the whole law," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quotation omitted), only reinforces that the IOIA's "same immunity" provision incorporates the current law of foreign sovereign immunity.

1. For starters, the general reference to the law of foreign sovereign immunity in Section 288a(b)'s immunity-from-suit provision contrasts sharply with other IOIA provisions governing other privileges and immunities that do *not* refer to another body of law, but instead expressly establish absolute immunity for international organizations.

For example, the subsection that comes right after the immunity-from-suit provision—which lays out various *other* privileges and immunities—provides that international organizations' "[p]roperty and assets . . . shall be immune from search . . . and from confiscation," and that "[t]he archives of international organizations shall be inviolable." 22 U.S.C. § 288a(c). Section 288c similarly provides, without qualification, that international organizations "shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress." *Id.* § 288c.

This difference between Section 288a(b)'s referential immunity and the absolute immunities found elsewhere in the IOIA shows that Section 288a(b) *does not* establish a complete immunity rule. After all, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (applying this canon in context of immunity statute); *Samantar*, 560 U.S. at 317 (same). Had Congress intended to grant international organizations static, absolute immunity from suit, it would simply have used language it used elsewhere—e.g., "shall be immune" or "shall be inviolable." It did not.

Indeed, this distinction between static and referential immunity is replicated within another section of the statute—Section 288d—confirming beyond question that Congress's use of one or the other was

deliberate. Section 288d deals with the immunities of international organizations' officers and employees. Subsection (a) of that provision, just like Section 288a(b), links immunity to the body of law covering foreign governments: It provides that "insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents," the officers and employees of international organizations are "entitled to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees . . . of foreign governments." 22 U.S.C. § 288d(a). But subsection (b) provides that international organizations' officers and employees "shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such . . . officers[] or employees," full stop. *Id.* § 288d(b).

The use of these strikingly different formulations in neighboring subsections means that the Congress that enacted the IOIA saw a clear distinction between the two approaches—for officers and employees, a static rule of immunity; and for organizations themselves, a referential, dynamic rule that changes along with the body of law to which it refers. Congress's choice to use the latter formulation in Section 288a(b) must be given effect.

2. Another structural element of the IOIA points in the same direction. While Section 288a(b) treats international organizations and foreign sovereigns the "same" as to immunity from suit, other IOIA provisions treat them differently. Section 288f, for

example, provides that while "privileges, exemptions, and immunities granted to a foreign government . . . may be conditioned upon the existence of reciprocity by that foreign government," the "privileges, exemptions, and immunities of international organizations" under the IOIA generally are not. 22 U.S.C. § 288f; *see also id.* § 288d(b) (distinguishing between foreign governments and the persons they designate to serve as their representatives in or to international organizations).

The IOIA thus reflects Congress's deliberate determination that international organizations and foreign governments are equivalent with respect to immunity from suit (and various other purposes) but distinct for certain others. Treating them differently for purposes of immunity from suit—as the court of appeals' decision would do—would contravene that textually explicit sorting.

3. The D.C. Circuit has never addressed either of the two contextual indicators just discussed. Instead, its contrary assessment of the IOIA's structure in *Atkinson* was based entirely on a different feature of the IOIA: the President's authority to withdraw, limit, or condition any of the privileges and immunities that "any [international] organization" would otherwise enjoy under the IOIA. *See* 22 U.S.C. § 288. According to the court of appeals, this provision suggests "that Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F.3d at 1341.

This inference is flawed. The presidential-authority provision does not grant the President the authority to establish default immunity rules. Instead, as its text indicates, Section 288 addresses *departures* from the generally applicable default rules—authorizing the President to make "organization- and function-specific exemptions." Pet. App. 13a (Pillard, J., concurring); *accord OSS Nokalva*, 617 F.3d at 763. And that is how the President has exercised the Section 288 authority—on a case-by-case basis, and never as a mechanism for updating the background rules applicable to international organization immunity.[5] In short, the default rules governing international organizations' immunity from suit follow the rules for foreign governments (as currently codified in the FSIA), whereas Section 288 authorizes the President to withdraw, limit, or condition privileges and immunities of specific organizations, as particular circumstances warrant.

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[5] *See, e.g.*, Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) (granting to INTERPOL the privileges, exemptions, and immunities conferred by the IOIA, except those provided by Sections 2(c), portions of Sections 2(d) and 3, and Sections 4 through 6); Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) (granting to the International Food Policy Research Institute the privileges, exemptions, and immunities conferred by the IOIA except those provided by Sections 2(a), 2(b), 2(c), part of 2(d), and 7(b)); Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 14, 1973) (granting to INTELSAT only certain privileges, exemptions, and immunities provided by the IOIA); Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) (designating and withholding certain immunities from the Inter-American Tropical Tuna Commission, the Great Lakes Fishery Commission, and the International Pacific Halibut Commission).

That dichotomy serves salutary purposes. Some of the IOIA's default rules, as noted above, confer static, absolute immunity on international organizations. Others, such as the "same immunity" provision, may evolve over time and provide less than complete immunity. Either way, there are good reasons to authorize the President to make organization-specific exceptions. Section 288 itself identifies some—namely, "abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities" provided in the IOIA. 22 U.S.C. § 288. The "functions" performed by a particular organization may also render some aspect of the IOIA's default regime inappropriate. *Id.* But none of this overcomes the plain text of the "same immunity" provision or otherwise renders it unnecessary for the IOIA's default rule regarding immunity from suit to track the current law of foreign sovereign immunity.

C. The IOIA's Purpose And Drafting History Confirm That The "Same Immunity" Provision Incorporates The Current Law Of Foreign Sovereign Immunity

Given the clarity of the IOIA's text and structure, there is no need to consult other sources of statutory meaning. But insofar as the Court chooses to inspect the "same immunity" provision's purpose and drafting history, those sources "confirm[]" what "the text alone" expresses—that the provision incorporates the law of foreign sovereign immunity as it currently stands. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012).

1. Congress's "basic purpose" in enacting the IOIA was "to confer upon international organizations, and officers and employees thereof, privileges and immunities *of a governmental nature*." S. Rep. No. 79-861, at 1 (1945) (emphasis added); *accord* H.R. Rep. No. 79-1203, at 1 (1945). "With respect to immunity from suit" in particular, "the privileges, exemptions, and immunities extended international organizations are those accorded foreign governments under similar circumstances." S. Rep. No. 79-861, at 4; *see also* 91 Cong. Rec. 12,432 (Dec. 20, 1945) ("[O]rganization[s] made up of a number of foreign governments, as well as our own . . . should enjoy the same status as an embassy of . . . [a foreign] government.").

The logic of Congress's decision to link international organizations with foreign governments, and to provide that they should enjoy equivalent immunity from suit going forward, is apparent. International organizations are created by sovereign states and are comprised "entirely or principally of states." Restatement (Third) of Foreign Relations Law § 221 (1987); *see also The Oxford Handbook of International Organizations*, at v-vi (Jacob Katz Cogan, et al. eds., 2016). A foreign state should be treated the same in U.S. courts whether it acts on its own or through an organization it helped to create.

Indeed, Congress's conclusion that the "same" rules should govern international organization and foreign sovereign immunity from suit ensures that as the latter law evolves, states cannot evade legal accountability merely "by acting through international organizations." *OSS Nokalva*, 617 F.3d at

764. Under the D.C. Circuit's interpretation of Section 288a(b), for instance, the "Canadian government" would be "subject to suit in United States courts for disputes arising from its commercial activities here, but the Great Lakes Fishery Commission—of which the United States and Canada are the sole members—[would be] immune from suit." Pet. App. 16a (Pillard, J., concurring). Or, to take another example, a compilation of states acting through the IFC would be immune from suit based on a bad loan that it made in tandem with a bank owned by a single state, while the state-owned partner could be held liable in a U.S. court for the same transaction. *See, e.g.*, *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 102, 117 (2d Cir. 2016) (sovereign wealth fund not immune under FSIA from securities fraud claim); *Batra v. State Bank of India*, 2016 WL 3029957, at *5 (S.D.N.Y. May 25, 2016) (state-owned bank may be sued for taking unlawful debt-collection actions "a private commercial bank" might take).

As the United States has explained, there is "no reason" for such incongruities. Br. for the United States as Amicus Curiae at 10, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465); *see also OSS Nokalva*, 617 F.3d at 764 (denouncing such "anomalous result[s]"). "[A] group of states acting through an international organization" should not be "entitled to a broader immunity than its member states enjoy when acting alone." *OSS Nokalva*, 617 F.3d at 764. International organizations have no right to be uniquely above the law.

2. The court of appeals in *Atkinson* brushed aside these concerns. Quoting a fragment of the IOIA's legislative history—in which a Senate committee stated that the IOIA would allow the President to adjust the immunity a designated organization enjoys if it "'engage[d], for example, in activities of a commercial nature'"—the court of appeals hypothesized that Congress intended Section 288 to be the sole mechanism for "updating the immunities of international organizations in the face of changing circumstances," such as commercial activity of the kind the FSIA later exempted from protection. *Atkinson*, 156 F.3d at 1341 (quoting S. Rep. No. 79-861, at 2).

As an initial matter, the court of appeals simply misread the sentence it quoted. The Senate Committee was not "speaking about 'commercial activities' as that term is now defined in the FSIA"—that is, "either a regular course of commercial conduct or a particular commercial transaction or act." *See* Aaron I. Young, *Deconstructing International Organization Immunity*, 44 Geo. J. Int'l L. 311, 343 & n.215 (2012) (citing 28 U.S.C. § 1603(d) (2006)). Rather, Congress intended for the President to be able to respond where a designated international organization (or its employees) engaged in *unauthorized* activity, such as starting a side business unrelated to its official function. *See, e.g.*, 91 Cong. Rec. 12,530 (Dec. 21, 1945) ("It is a very hypothetical case, . . . that representatives of Great Britain, for instance, who would be assigned to headquarters of the [United Nations] would open up a shipping business in Boston or San Francisco. They just do not operate that way."); *id.* (President handles "law enforcement" and

"can withdraw the privileges from the employees of [a] foreign organization" if it "starts functioning here and goes beyond the scope for which it was created, let us say starts into business over here"). That Congress intended the President to police abuses of official status sheds no light on whether or when Congress believed international organizations should be immune from suit based on what we now consider to be legitimate commercial conduct, let alone whether organizational immunity from suit should track foreign sovereign immunity.

But even if the Senate Report had been referring to "commercial activity" as that term is used in the FSIA, it would not support the court of appeals' theory. After all, the decisional law of foreign sovereign immunity in 1945 did not include any categorical exception for commercial acts. Thus, Congress at the time could have believed that "commercial activities" were an "example" of an area in which the President might limit a particular designated organization's immunity compared to the immunity a foreign sovereign would receive. S. Rep. No. 79-861, at 2. But that obviously does not mean that if foreign sovereigns were later deemed subject to suit based on their commercial activities, the default rule for international organization suit immunity would not move along with that development.[6]

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[6] Congress, in fact, later noted its understanding that the IOIA tracked that development. When amending the Foreign Corrupt Practices Act (FCPA), Congress explained that "international organizations . . . generally have the same immunity as foreign governments, and the [FSIA] provides that foreign governments are not immune for actions taken in connection

3. Indeed, the Congress that enacted the IOIA specifically rejected a proposal to lock in a rule that international organizations were entitled to absolute immunity from suit, subject only to the President's Section 288 authority. The original House version of the Act would have provided international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. § 2(b) (as introduced, Oct. 24, 1945). The Senate, however, rejected this phrasing in favor of the "cross-reference" to the law of foreign sovereign immunity that appears in the "current formulation of [Section 288a(b)]." *See* Pet. App. 14a-15a (Pillard, J., concurring) (citing H.R. 4489, 79th Cong. § 2(b) (as reported by S. Comm. on Fin., Dec. 18, 1945)). The Court should not "read back into [a statute] the very . . . statutory language that [Congress] discarded in favor of other language." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (quotation omitted).

This Court's decision in *Trammel v. United States*, 445 U.S. 40 (1980), cements this analysis. In that case, the Court considered the scope of the evidentiary privilege established by Federal Rule of Evidence 501. The Judicial Conference Advisory Committee on the Rules of Evidence had proposed that Congress adopt a set of nine specific privileges that would have codified then-existing common law rules. *Id.* at 47. But Congress rejected that proposal. In-

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with their commercial activities." H.R. Rep. No. 105-802, at 13 (1998) (citation omitted) (describing the impact of an amendment to the FCPA); *see also Bell v. New Jersey*, 461 U.S. 773, 784 (1983) (view of a later Congress can have "persuasive value").

stead, Congress provided in Rule 501 that privilege claims are governed by "[t]he common law—as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. The Court understood this drafting history to "manifest[] an affirmative intention [by Congress] *not* to freeze the law of privilege." *Trammel*, 445 U.S. at 47 (emphasis added). "Its purpose rather was . . . to leave the door open to change." *Id.* Here, by rejecting specific, absolute immunity language, that was likewise Congress's obvious intent regarding the IOIA.

II. EVEN IF THE IOIA LOCKED IN THE LAW OF FOREIGN SOVEREIGN IMMUNITY AS OF 1945, THAT LAW WOULD REQUIRE TRACKING THE FSIA

Even if the court of appeals were right that the IOIA gives international organizations "the same" suit immunity "as [was] enjoyed by foreign governments" in 1945, that would not change the ultimate outcome here. Applying the law of 1945—which required judicial deference to the political branches' views at the time of the lawsuit—would lead right back to the FSIA.

A. The Immunity Rule For Foreign Governments In 1945 Was Not Absolute Immunity But Deference To The Political Branches

1. Until the period between the two World Wars, courts in the United States generally "regarded themselves as free to decide" questions about foreign sovereign immunity "as they would any other issue of common law, basing their judgments on domestic,

maritime, and international law principles." G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 27-28 (1999) (citing *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 135-47 (1812), and *Underhill v. Hernandez*, 168 U.S. 250, 252-54 (1897)). And courts making such assessments almost always held that "a sovereign c[ould] []not, without [its] consent, be made a respondent" in our courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004) (quotation omitted). Thus, for example, this Court held in 1926 that "a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire" enjoyed sovereign immunity, *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 570 (1926), despite "the view of the [State] Department" to the contrary, *The Pesaro*, 277 F. 473, 479-80 n.3 (S.D.N.Y. 1921).

By the time the IOIA was enacted, however, the law of foreign sovereign immunity had changed from a substantive doctrine to a rule of deference to the political branches. In *Ex parte Republic of Peru*, 318 U.S. 578 (1943), the Court granted the Republic of Peru's motion to prohibit a district court from continuing to exercise jurisdiction over a Peruvian vessel. *Id.* at 581-82. The Court held that after the State Department requested immunity on behalf of the vessel, the district court should have "relinquished" jurisdiction. *Id.* at 588. Bowing to suggestions "to shift responsibility for determining foreign sovereign immunity issues from the federal and state courts to the State Department," White, 85 Va. L. Rev. at 138, the Court held that a State Depart-

ment suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of Government" that the case may not proceed. *Ex parte Peru*, 318 U.S. at 589.

Two years later, in *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court reaffirmed that political-branch immunity determinations controlled. *Hoffman* presented a fact pattern materially identical to that in *Berizzi Bros.* But although the Court in *Berizzi Bros.* had granted sovereign immunity to a merchant ship owned by a foreign government, the Court in *Hoffman* denied such immunity. *Id.* at 38. Stressing that the State Department had "[n]ever allowed a claim of immunity" where a foreign sovereign owned but was not in possession of a vessel that was being used for commercial purposes, the Court concluded that it was "not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 36.

2. This Court's later explication of this IOIA-era precedent confirms that deference to the political branches—not any particular substantive rule, let alone an absolute-immunity rule—was the operative law of foreign sovereign immunity when the IOIA was enacted. As the Court recently put it, courts at the time "'consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction' over particular actions against foreign sovereigns." *Altmann*, 541 U.S. at 689 (alteration in original) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)); *see also Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009) (*Ex parte Peru* and

Hoffman established that granting or denying immunity was "the case-by-case prerogative of the Executive Branch"); *Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010) (similar).

Faced with this recent case law, the majority below dismissed it as mere "dicta." Pet. App. 6a. But that is plainly incorrect. In *Altmann*, for instance, this Court held that the FSIA applies to pre-FSIA conduct partly *because* courts have long "'deferred to the [immunity] decisions of the political branches.'" 541 U.S. at 689, 696 (quoting *Verlinden*, 461 U.S. at 486). At any rate, *Ex parte Peru* and *Hoffman* speak for themselves. They make clear that at the time the IOIA was enacted, the rule of deference to the political branches was "controlling." *Hoffman*, 324 U.S. at 38; *accord Ex parte Peru*, 318 U.S. at 589.

B. Deference To The Political Branches Would Require Application Of The FSIA

Applying the "same" framework that prevailed in 1945 for deciding foreign sovereign immunity claims—namely, deference to the political branches' views—would dictate that the FSIA governs whether international organizations are immune from suit.

1. Since the Tate Letter's issuance in 1952, the "official policy" of the Executive Branch has been the "restrictive theory" of sovereign immunity. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698, 703 (1976) (opinion of White, J.). Congress codified that restrictive theory in the FSIA, which is now the political branches' authoritative statement of the scope of foreign sovereigns' immunity from suit. And because a court applying 1945

immunity law must "defer" to that political branch determination, 1945 law would direct the court to the FSIA.

2. The court of appeals suggested that even if the courts in 1945 granted the political branches primacy over foreign sovereign immunity, the IOIA still confers "complete immunity" on international organizations because the Executive Branch at that time always requested immunity "whenever a foreign sovereign was sued." Pet. App. 6a. That is a puzzling assertion in light of the Court's 1945 *Hoffman* decision, which denied claimed immunity because the State Department did not recognize it. *See supra* at 6, 39. Nor is *Hoffman* the only pre-1945 example of the State Department declining to request immunity on behalf of a foreign government. *See, e.g.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 71 (1938); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200, 203 (S.D.N.Y. 1929); *The Pesaro*, 277 F. at 479 n.3; *Lamont v. Travelers Ins. Co.*, 24 N.E.2d 81, 86 (N.Y. 1939). And where the State Department did not suggest immunity, courts denied it. *See, e.g.*, *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d at 200, 203; *Ulen & Co. v. Bank Gospodarstwa Krajowego (Nat'l Economic Bank)*, 24 N.Y.S.2d 201, 204, 206 (App. Div. 1940).

More fundamentally, the court of appeals' suggestion that applying a rule of deference to the political branches would require courts to follow the State Department's view as of 1945—as opposed to the political branches' view as of today—flies in the face of precedent. This Court has held that when applying

the rule of deference, courts must defer to "the most recent [political branch] decision—namely, the FSIA." *Altmann*, 541 U.S. at 696.

The court of appeals' position also makes no sense. Recall the *reason* that courts in 1945 deferred to the political branches' positions on immunity from suit: Immunity then (as now) was viewed as a foreign policy question reflecting "*current* political realities." *Altmann*, 541 U.S. at 696 (emphasis added). That being so, what should matter even under the court of appeals' construction of the IOIA are *today's* political realities—not those that prevailed more than a half century ago.

A rule requiring courts to ascertain what the Truman Administration's State Department would have thought about a modern claim of sovereign immunity by a particular international organization in a particular case would also be inherently unworkable. It would demand "rarified historical speculation," *Altmann*, 541 U.S. at 713 (Breyer, J., concurring), with guess stacked on top of guess. Courts confronted with commercial activities in which foreign sovereigns never engaged before 1945—for instance, maintaining investment funds to participate in emerging securities markets—would first have to imagine whether the political branches would have thought such activities deserving of immunity in general. If so, courts would then have to surmise whether the State Department would have deemed the specific defendant worthy of immunity. This inquiry would be especially fanciful with respect to the majority of international organizations (like the IFC) that did not even exist in 1945, and were not created

or designated under the IOIA until after the State Department had adopted the "restrictive" view of sovereign immunity in 1952. No rational Congress would have enacted such a regime.

* * *

In the end, the notion that courts in 2018 should attempt to determine what Executive Branch officials in 1945 would have thought about a particular claim of immunity simply illuminates why the IOIA rejects a static view of sovereign immunity from suit in the first place. Congress instead sensibly adopted a rule requiring courts to apply the law in existence *at the time of suit*—a task for which courts are fully equipped and that accords with sovereign immunity's nature as a doctrine that tracks contemporary realities. The IOIA accomplishes that objective by providing that international organizations enjoy "the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The "immunity from suit" that "is enjoyed by foreign governments" is set forth in the FSIA, which means that the FSIA likewise governs the IFC's claim of immunity here.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

RELEVANT STATUTES

22 U.S.C. § 288:

"International organization" defined; authority of President.

For the purposes of this subchapter, the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.

22 U.S.C. § 288a:

Privileges, exemptions, and immunities of international organizations.

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, 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.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions,

and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

22 U.S.C. § 288b:

Baggage and effects of officers and employees exempted from customs duties and internal revenue taxes.

Pursuant to regulations prescribed by the Commissioner of U.S. Customs and Border Protection with the approval of the Secretary of the Treasury, the baggage and effects of alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation.

22 U.S.C. § 288c:

Exemption from property taxes.

International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories.

22 U.S.C. § 288d:

Privileges, exemptions, and immunities of officers, employees, and their families; waiver.

(a) Persons designated by foreign governments to serve as their representatives in or to international organizations and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, and employees residing with them, other than nationals of the United States, shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents, be entitled to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families.

(b) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.

22 U.S.C. § 288e:

Personnel entitled to benefits.

(a) Notification to and acceptance by Secretary of State of personnel

No person shall be entitled to the benefits of this subchapter, unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted or designated representatives, officers, or employees.

(b) Deportation of undesirables

Should the Secretary of State determine that the continued presence in the United States of any person entitled to the benefits of this subchapter is not desirable, he shall so inform the foreign government or international organization concerned, as the case may be, and after such person shall have had a reasonable length of time, to be determined by the Secretary of State, to depart from the United States, he shall cease to be entitled to such benefits.

(c) Extent of diplomatic status

No person shall, by reason of the provisions of this subchapter, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein.

22 U.S.C. § 288f:

Applicability of reciprocity laws.

The privileges, exemptions, and immunities of international organizations and of their officers and employees, and members of their families, suites, and servants, provided for in this subchapter, shall be granted notwithstanding the fact that the similar privileges, exemptions, and immunities granted to a foreign government, its officers, or employees, may be conditioned upon the existence of reciprocity by that foreign government: *Provided,* That nothing contained in this subchapter shall be construed as precluding the Secretary of State from withdrawing the privileges, exemptions, and immunities provided in this subchapter from persons who are nationals of any foreign country on the ground that such country is failing to accord corresponding privileges, exemptions, and immunities to citizens of the United States.

22 U.S.C. § 288f-1:

European Space Agency and Organization of Eastern Caribbean States; extension of privileges, exemptions, and immunities to members.

The provisions of this subchapter may be extended to the European Space Agency and to the Organization of Eastern Caribbean States (including any office established in the United States by that organization) in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such

participation or making an appropriation for such participation.

22 U.S.C. § 288f-2:

African Union; extension of privileges, exemptions, and immunities.

(a) The provisions of this subchapter may be extended to the African Union and may continue to be extended to the International Labor Organization and the United Nations Industrial Development Organization in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

(b) Under such terms and conditions as the President shall determine, consistent with the purposes of this subchapter, the President is authorized to extend, or enter into an agreement to extend, to the African Union Mission to the United States of America, and to its members, the privileges and immunities enjoyed by diplomatic missions accredited to the United States, and by members of such missions, subject to corresponding conditions and obligations.

22 U.S.C. § 288f-3:

Immunities for International Committee of the Red Cross.

The International Committee of the Red Cross, in view of its unique status as an impartial humanitarian body named in the Geneva Conventions of 1949 and assisting in their implementation, shall be considered to be an international organization for the purposes of this subchapter and may be extended the provisions of this subchapter in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-4:

International Union for Conservation of Nature and Natural Resources; extension of privileges, exemptions, and immunities.

The International Union for Conservation of Nature and Natural Resources shall be considered to be an international organization for the purposes of this subchapter and may be extended the provisions of this subchapter in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-5:

European Central Bank; extension of privileges, exemptions, and immunities.

The provisions of this subchapter may be extended to the European Central Bank in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-6:

Global Fund to Fight AIDS, Tuberculosis and Malaria; extension of privileges, exemptions, and immunities.

The provisions of this subchapter may be extended to the Global Fund to Fight AIDS, Tuberculosis and Malaria in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-7:

Office of the High Representative in Bosnia and Herzegovina and the International Civilian Office in Kosovo; extension of privileges, exemptions, and immunities.

The provisions of this subchapter may be extended to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation. Any such extension may provide for the provisions of this subchapter to continue to extend to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) after that Office has been dissolved.

22 U.S.C. § 288g:

Organization of American States; extension of privileges and immunities to members.

Under such terms and conditions as he shall determine, the President is hereby authorized to extend, or to enter into an agreement extending, to the representatives of member states (other than the United States) to the Organization of American States and to permanent observers to the Organization of American

States, and to members of the staffs of said representatives and permanent observers, the same privileges and immunities, subject to corresponding conditions and obligations, as are enjoyed by diplomatic envoys accredited to the United States.

22 U.S.C. § 288h:

Commission of European Communities; extension of privileges and immunities to members.

Under such terms and conditions as he shall determine and consonant with the purposes of this section, the President is authorized to extend, or to enter into an agreement extending, to the Mission to the United States of America of the Commission of the European Communities, and to members thereof, the same privileges and immunities subject to corresponding conditions and obligations as are enjoyed by diplomatic missions accredited to the United States and by members thereof. Under such terms and conditions as the President may determine, the President is authorized to extend to other offices of the Commission of the European Communities which are established in the United States, and to members thereof—

(1) the privileges and immunities described in the preceding sentence; or

(2) as appropriate for the functioning of a particular office, privileges and immunities, equivalent to those accorded consular premises, consular officers, and consular employees, pursuant to the Vienna Convention on Consular Relations.

22 U.S.C. § 288i:

Liaison Office of the People's Republic of China; extension of privileges and immunities to members.

Under such terms and conditions as he shall determine and consonant with the purposes of this section, the President is authorized to extend to the Liaison Office of the People's Republic of China in Washington and to the members thereof the same privileges and immunities subject to corresponding conditions and obligations as are enjoyed by diplomatic missions accredited to the United States and by members thereof.

22 U.S.C. § 288j:

International Development Law Institute.

For purposes of the International Organizations Immunities Act (22 U.S.C. 288 and following), the International Development Law Institute shall be considered to be a public international organization in which the United States participates under the authority of an Act of Congress authorizing such participation.

22 U.S.C. § 288k:

Extension of certain privileges, exemptions, and immunities to Hong Kong Economic and Trade Offices.

(a) Application of International Organizations Immunities Act

The provisions of the International Organizations Immunities Act (22 U.S.C. 288 et seq.) may be extended to the Hong Kong Economic and Trade Offices in the same manner, to the same extent, and subject to the same conditions as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

(b) Application of international agreement on certain State and local taxation

The President is authorized to apply the provisions of Article I of the Agreement on State and Local Taxation of Foreign Employees of Public International Organizations, done at Washington on April 21, 1994, to the Hong Kong Economic and Trade Offices.

(c) "Hong Kong Economic and Trade Offices" defined

The term "Hong Kong Economic and Trade Offices" refers to Hong Kong's official economic and trade missions in the United States.

22 U.S.C. § 288l:

The Holy See.

Under such terms and conditions as the President shall determine, the President is authorized to extend, or to enter into an agreement to extend, to the Permanent Observer Mission of the Holy See to the United Nations in New York, and to its members, the privileges and immunities enjoyed by the diplomatic missions of member states to the United Nations, and their members, subject to corresponding conditions and obligations.