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 AMICI CURIAE FORMER EXECUTIVE BRANCH ATTORNEYS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are former high-ranking attorneys in the Executive Branch of the United States Government.[1] Amicus Ambassador **C. Boyden Gray** worked in the White House for twelve years, first as counsel to the Vice President during the Reagan administration and then as White House Counsel to President George

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

H.W. Bush. He has also served as the United States Ambassador to the European Union and the United States Special Envoy to Europe for Eurasian Energy.

Amici **John B. Bellinger III**, **Davis Robinson**, Judge **Abraham D. Sofaer**, and **Edwin D. Williamson** each served as Legal Adviser at the United States Department of State. Mr. Bellinger also served as Senior Associate Counsel and Legal Adviser to the National Security Council. Judge Sofaer also served as the George P. Shultz Senior Fellow in Foreign Policy and National Security Affairs at the Hoover Institution, Stanford University, and as a United States District Judge in the Southern District of New York.

In their Executive Branch roles, amici were involved in advising with respect to the immunities of international organizations ("IOs") subject to the International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.* (the "IOIA"), and with respect to issues of executive power in national security and foreign policy matters. Amici have filed this brief because they believe the current position of the United States, as reflected in its brief in this case, misinterprets the IOIA and fails to appreciate the national security and foreign policy concerns that underlie that statutory scheme. For more than 70 years, the United States has cooperated with other partner nations as a member of IOs, particularly the World Bank, the International Finance Corporation ("IFC"), and other members of the World Bank Group, in order to leverage its financial contributions to them to further its military, humanitarian, economic and

other interests throughout the world by ending extreme poverty and boosting shared prosperity.[2] Given the inherently diplomatic nature of these coalitions, Congress expressly directed that any decisions to restrict their immunity from suit in this Nation's courts be made by the President, in an exercise of the constitutional power to conduct foreign affairs.

Congress never altered that determination. Yet the United States now contends that when Congress enacted the Foreign Sovereign Immunities Act ("FSIA") three decades later, it decreed that the immunities of IOs would henceforth be governed by that statute, thereby restricting *sub silentio* the discretion Congress delegated to the President in 1945 to limit immunities of IOs in appropriate cases. That is wrong. The FSIA was enacted to address specific problems that had arisen in the context of foreign sovereign immunity and has no application or relevance to IOs. Unlike foreign sovereign immunity, which is based on comity and reciprocity, the immunities of IOs to which the United States is a party have always been predicated on functional and

[2] This brief uses the phrase "MDB" to refer to the following multi-lateral development banks of which the United States is a member: the International Bank for Reconstruction and Development (generally known as the World Bank), IFC, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development. *See* U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks* (https://tinyurl.com/y7or656w). IFC supports the World Bank's twin goals of "end[ing] extreme poverty and promot[ing] shared prosperity in every country," and is "the largest global development institution focused exclusively on the private sector in developing countries." *See* Int'l Fin. Corp., *Overview* (https://tinyurl.com/ybwfn6g4). It is, in effect, the World Bank's private-sector arm.

policy concerns particular to specific organizations, with the view of not permitting individual member-state interference with their functions and operations.

Contrary to the views of the current Administration, amici believe that application of the FSIA to IOs is inconsistent with both the IOIA's and the FSIA's plain texts and the national security and foreign policy concerns that underlie the IOIA. Whereas the purpose and effect of the FSIA was to place outside the Executive Branch's domain immunity decisions regarding foreign states, the IOIA expressly vested in the President—and, unless Congress says otherwise, the President alone—the power to make such decisions with respect to multilateral organizations of which the United States is a member. Congress has not altered that delegation, in the FSIA or elsewhere.

Amici believe adoption of petitioners' view would undermine United States foreign policy by compromising the Nation's role as a member, rather than a watchdog, of the IOs in which it participates. In this case, for example, petitioners seek to impose radical lenders' liability and detailed operating requirements on IFC, largely as a result of its policy of holding borrowers accountable to stringent environmental standards. IFC formulated that policy—and those standards—with the input of the United States and other IFC members, pursuant to a detailed, agreed-upon governance rubric that was the product of multilateral negotiation. If, suddenly, the imposition of such standards on borrowers leads to a risk of liability in, and the imposition of operating criteria by, U.S. courts, IFC may be restrained from undertaking activities that its members expect it to take in the fulfillment of its agreed-upon functions and purposes.

Any legitimate concerns about existing immunities of IFC or other IOs should be addressed by the President, on an entity-by-entity basis, as the IOIA contemplates, following diplomatic consultation with the foreign nations that are our partners in carrying out the important missions IOs pursue. That is what Congress intended. If the United States truly believes that restricting IO immunity is warranted notwithstanding the damage it would likely cause to our Nation's standing with its allies, then it should manifest that judgment by Executive Order after consultation with its partners, rather than by asking this Court to impose the result with a one-size-fits-all judicial decree.

ARGUMENT

I. UNLIKE SOVEREIGN IMMUNITY, IO IMMUNITY EXISTS TO ADVANCE THE UNITED STATES' FOREIGN POLICY INTERESTS.

Historians trace to a 1795 essay by Immanuel Kant the idea that each nation's interest in peace and prosperity could be furthered by participation in international organizations. *See* Gunnar Skirbekk & Nils Gilje, *A History of Western Thought: From Ancient Greece to the Twentieth Century* 287-88 (7th ed. 2001) (discussing Kant, *Perpetual Peace: A Philosophical Sketch* (1795)). Although regional organizations of states arose shortly after Kant wrote, his vision began to come to fruition on a worldwide scale in 1919, with the founding of the League of Nations. In the wake of World War II, after the failures of that institution had manifested themselves, the nations of the world—including, this time, the United States—came together to create a

broad array of IOs intended to advance their member nations' common interests.

Unlike foreign sovereign immunity, which rests on comity and reciprocity,[3] IO immunity exists to further each member's ***own*** direct interest in the effective functioning of the IOs in which it participates. *See*, *e.g.*, *Mendaro* v. *World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) ("The strong foundation in international law for the privileges and immunities accorded to international organizations denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action through multinational organizations with specific missions."). For that reason, as early as 1983, the D.C. Circuit recognized as a "well established" principle of international law that IOs are "entitled to such privileges and such immunity * * * as are necessary for the fulfillment of the[ir] purposes." *Id.* (quoting Restatement of the Foreign Relations Law of the U.S. (Revised) § 464(1) (Tentative Draft No. 4) (1983)).

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[3] *See*, *e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (May 1, 2017) ("FSIA's objective is to give 'protection from the inconvenience of suit as a gesture of comity[.]'") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); *Garb* v. *Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006) (observing that the United States grants other nations immunity in its courts because it wishes to receive the same treatment abroad). Restatement (Third) of The Foreign Relations Law of the U.S., pt. IV, ch. 6, subchap. B intro note (1987) ("The privileges and immunities of international organizations are 'functional,' and, though modeled after those of states, differ from them in some measure, both in conception and content. * * * State and diplomatic immunities apply equally and reciprocally between one state and another; the immunities of an international organization are claimed, without reciprocity, by an organization vis-a-vis a state, generally a member state.").

International law makes clear that because this immunity is merely a tool to further the interests of member states, it need be conferred only by member states themselves. *Id.* at 615.

The IOIA reflects that instrumentalist view. With limited exceptions, all of which long postdate the enactment of the statutory language at issue here,[4] the Act provides immunity only to "organization[s] in which the United States participates pursuant to [a] treaty or under the authority of an[] Act of Congress." 22 U.S.C. § 288; *see also Mendaro*, 717 F.2d at 613. The Act also states that its immunities will exist regardless whether immunity granted to foreign governments is based on reciprocity. *See* 22 U.S.C. § 288f.[5] And the legislative history makes clear that a primary impetus for the IOIA's enactment was the specific, self-interested aim of empowering the United States by encouraging the fledgling United Nations to locate its headquarters here.[6]

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[4] *See* 22 U.S.C. § 288f-l.

[5] *See* Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L.J. 1167, 1170-71 (1982) ("Because the IOIA immunities were * * * tailored to specific organizations and situations, they are different from the immunities of foreign governments, which are laid down by general international or national law, and are grounded on considerations such as reciprocity that do not apply to IGOs.") (citations omitted).

[6] *See* 91 Cong. Rec. 10,866 (1945) (statement of Rep. Cooper) ("[I]f we are to hope to have the United Nations Organization's headquarters to be located in the United States, it will be absolutely essential for [some form of immunity granting] legislation to be passed."); H.R. Rep. No. 79-1203, at 2 (1945) ("[T]he probability that the United Nations Organization may establish its headquarters in this country, and the practical certainty in any case that it would carry on certain activities in

When the United States acts as an IO member, it is engaged in core foreign policy conduct. The Nation's engagement with MDBs provides a prime example. The MDBs were conceived, with the United States often at their center, to help "rebuild European countries devastated by World War II." The World Bank, *History* (https://tinyurl.com/y9a3bne5). They have since branched out to provide support and funding for the development of other regions around the world. *See generally* U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks* (https://tinyurl.com/y7or656w) ("Together, the MDBs provide support to the world's poorest in every corner of the globe, strengthening institutions, rebuilding states, addressing the effects of climate change, and fostering economic growth and entrepreneurship."). The relative power and importance of member states within each organization is carefully negotiated, and the United States plays a particularly prominent role. *See*, *e.g.*, The World Bank, *United States: Overview* (https://tinyurl.com/y962nwfk) ("As the only World Bank shareholder that retains veto power over changes in the Bank's structure, the United States plays a unique role in influencing and shaping development priorities."). The Nation takes on that mantle in order to "ensure[] that the United States can help shape the global development agenda, leveraging its investments to ensure effectiveness and on-the-ground impact." U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks* (https://tinyurl.com/y7or656w).

Much of the United States' influence over MDBs is wielded through Treasury Department

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this country, makes it essential to adopt this type of legislation promptly.").

representatives. In their roles, such officials face difficult decisions not only about whether to support certain loans, projects, and policies, but also about how forcefully to exert the United States' leverage given its competing priorities and desire for smooth diplomatic relationships both within and outside the IO. Thus, hundreds or thousands of times a year, Executive Branch officials make judgments about whether to support or oppose particular projects or loans (and how quietly or emphatically to do so); what conditions should or should not be placed on participation in those projects; and—most relevant here—how grave the sanctions for failure to satisfy those conditions should be.[7]

Thus, in the IO context, unlike the foreign sovereign context, the United States has a seat at the table at which policy decisions are made. And the United States often uses that seat to advance its specific foreign policy aims. For instance, U.S. representatives at each MDB are required to "exercise" the United States' "voice and vote" in a "manner

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[7] *See*, *e.g.*, U.S. Dep't of the Treasury, *Press Center: Report on Multilateral Development Bank Projects that Support Extractive Industries* (May 15, 2006) (https://tinyurl.com/y7cdc2fe) (United States "support[ed]" $7M Asian Development Bank loan "to facilitate development of * * * forestry plantations" in Laos while "expressing considerable reservations about the project not addressing illegal and unsustainable logging"); *id.* (United States voted "no" on "extending a $25 million loan" to "a mid-size Russian oil company" pursuant to general policy of "oppos[ing] any IFC investments in the Russian oil and gas sector"); *id.* (United States supported $5M investment in Guinean mining industry, but "circulated a statement underlining the need for improvements in governance and transparency prior to mine construction and operation" and advocating that IFC "look closely at political development and government support for needed reforms").

consistent with" promoting "universal access to affordable, reliable, sustainable and clean energy"; helping "countries access and use fossil fuels more cleanly and efficiently"; helping "deploy renewable and other clean energy sources"; and supporting "development of robust, efficient, competitive, and integrated global markets for energy." U.S. Dep't of the Treasury, *Resource Center: Treasury Guidance for U.S. Positions on Multilateral Development Banks Engaging On Energy Projects and Policies* (https://tinyurl.com/y9fbcgvd). Similar requirements exist in other policy areas—and even where no written policy exists, a review of the United States' positions reveals the sensitive policy tradeoffs inherent in every decision it makes as an IO member.[8] By providing immunity, member nations ensure that such policy decisions, rather than member nations' domestic laws, maintain primacy in determining each IO's conduct.

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[8] *See generally United States Position: Proposed IFC Investment in Landmark Myanmar* (Sept. 4, 2014) (https://tinyurl.com/yaxdwgy3) (United States supported IFC investment in Myanmar hotel project, but emphasized importance of ensuring that "IFC investments in hotel-related projects * * * meet robust standards of additionality and development impact linked to the World Bank Group's poverty and shared prosperity goals"); *United States Position: Proposed IFC Investment in Yoma Bank* (July 1, 2014) (https://tinyurl.com/yb39xt2l) (United States supported project and expressed "appreciat[ion]" for IFC's decision to "preclude [a] client from using IFC resources to support activities involving, for example, involuntary resettlement, degradation of critical habitat, unsustainable forestry, or adverse impact on cultural heritage").

II. PETITIONERS' VIEW INVITES UNDUE INTERFERENCE IN SENSITIVE MATTERS OF FOREIGN POLICY.

As respondent ably demonstrates, there is no evidence that Congress, in 1945 or 1976, actually intended to alter the manner in which new exceptions to immunity under the IOIA would be recognized. In light of that void, petitioners' argument rests largely on the notion that the reasons Congress had for altering foreign sovereign immunity must have applied equally to IOs. Indeed, petitioners argue that it would have been "anomalous" for Congress to legislate with respect to foreign sovereigns while leaving to the Executive Branch the creation of new exceptions to IO immunity. *Cf.* Pet. Br. 32-33.

In fact, Congress had both historical and practical reasons for altering only the immunity of foreign sovereigns, while leaving that of IOs in place. Most critically, IOs—unlike foreign sovereigns—are instruments of their member states' foreign policies. Given that the Executive Branch generally conducts its foreign policy without the oversight of domestic courts, there is nothing peculiar about a regime in which the United States exerts influence over IOs through the voice and vote of the Executive Branch, rather than through the coercive influence of the judicial process. *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976) (decisions on matters that "may implicate our relations with foreign powers" are "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary"). Devolving IO immunity decisions to the Judiciary, as petitioners and the United States now ask this Court to do, would threaten to interfere with the Executive's foreign

policy prerogatives and the diplomatic relationships upon which IOs depend.

This case illustrates the point. In early 2008, the United States supported IFC's investment in the Coastal Gujarat Power Limited project. The United States pointed to its view that the project would "add 3 percent to total [power] generation capacity" in the regions it served, "benefit an estimated 16 million customers," "generat[e] an estimated 5,000 jobs during construction and another 700 during operation," and provide "cost competitive electricity to industry and agriculture, supporting potential increases in output and further contributing to growth and job creation." U.S. Dep't of the Treasury, *Treasury Position on IFC Investment in Coastal Gujarat Power Limited* (Apr. 8, 2008) (https://tinyurl.com/ybqpf4j7). However, the United States also exhibited some trepidation, warning IFC that the project had certain shortcomings and counseling it to "make greater effort" with respect to environmental requirements if it hoped to retain support for future, similar projects. *Id.*

Judicial oversight of IFC's conduct on that project would speak with a far different—and far louder—voice. Indeed, because petitioners seek specific, equitable relief in addition to damages, the judgment they seek is a plea for the courts to regulate IFC, by dictating to it what specific environmental policies and practices it must adopt. *See*, *e.g.*, Compl. at 79-80, *Jam* v. *IFC*, No. 15-612 (D.D.C.) (seeking "[i]njunctive relief" ordering IFC to, among other things, "[e]nsure that the coal conveyer belt is fully enclosed with piping technology for all 14 km to prevent fugitive coal dust"; "[e]nsure that stack emissions do not exceed allowable capacity and

particulate emission limits, per applicable laws and regulations"; and "[h]ave the Plant retrofitted with a closed cycle cooling system, or other system, that will be less damaging to the environment").

Such judicial prescriptions are at odds with the role the United States plays as but one member state. To begin with, as noted above, the Executive Branch takes great care in exerting influence over IO policies when they are formulated, through its "voice and vote." *See supra* at 8-10. In so doing, the Executive weighs competing tenets of the nation's foreign policy—including, as relevant here, concerns about environmental impacts—to determine whether a given project, policy, or IO action serves the United States' interests. *Cf. Munaf* v. *Geren*, 553 U.S. 674, 702 (2008) (courts should "not assume the political branches are oblivious to" humanitarian concerns when formulating foreign policy) (internal quotation marks omitted). Permitting federal courts to second-guess those determinations after the fact would violate the tenet that the Nation must speak with "one voice" on matters of foreign policy. *See id.* ("The Judiciary is not suited to second-guess" judgments of the "political branches" with respect to "sensitive foreign policy issues"). Moreover, entertaining petitioners' desire to subject IFC to litigation over its attempt to implement socially and environmentally beneficial loan conditions will necessarily reduce IFC's ability to undertake otherwise-desirable projects in the future.

Inviting litigation against IOs in U.S. courts also risks compromising this Nation's influence within the IOs in which it participates. The United States has long "accepted without qualification the principles that international organizations must be free to

perform their functions and that no member state may take action to hinder the organization." *Broadbent* v. *Org. of Am. States*, 628 F.2d 27, 34 (D.C. Cir. 1980); *Mendaro*, 717 F.2d at 615 (observing the "need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory").[9] If the United States may influence IO policy through use of its courts, other members are likely to assume that they may do the same.

Judicial interference as requested by petitioners would also frustrate our allies' expectations. As they well know, the United States is uniquely able to exert influence, as it hosts (and is the largest shareholder in) many of the world's most influential IOs. But if a court in Washington, D.C., can enjoin the 184-member IFC to require a power plant in Gujarat, India to "retrofit[]" a "closed cycle cooling system," see *supra* at 13, allies would naturally question our commitment to the principle that "United States law * * * does not rule the world." *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454 (2007). To impose a judicial veto over IO policies would double-count the United States' membership, undermine bargained-for balances of power, and risk turning the American courts into a *de facto* international regulator. Absent clear authorization from Congress, this Court should resist petitioners' invitation to take on that role. *See*

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[9] IFC's Articles of Agreement provide regulatory immunity by providing that "[t]o the extent necessary to carry out the operations [of IFC as] provided for in" the Articles, IFC's assets and property "shall be free from all restrictions, regulations, controls and moratoria of any nature." Articles of Agreement of the Int'l Fin. Corp., art. VI, § 6, *entered into force* July 20, 1956, 7 U.S.C. 2197, T.I.A.S. No. 3620.

Morrison v. *Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 255 (2010) (courts must presume "that Congress ordinarily legislates with respect to domestic, not foreign matters").

Rather than seeking to regulate IOs through its judiciary, the United States has always striven to influence these organizations through the Executive's participation. Because IOs are multilateral coalitions of sovereign states, all decisions of the United States involving them are necessarily diplomatic in nature. That includes the extraordinarily sensitive decision regarding immunity from suit, which Congress expressly vested with the President alone.

III. THE FSIA REFLECTS NO INTENTION TO ALTER EITHER THE EXECUTIVE'S ROLE UNDER THE IOIA OR THE IMMUNITIES THE ACT SETS FORTH.

It is undisputed that when the 1945 Congress provided that international organizations would receive the "same immunity from suit and every form of judicial process as is enjoyed by foreign governments," 22 U.S.C. § 288a, it necessarily intended and understood that it was granting IOs the same "virtually absolute" immunity, *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)), that foreign governments had received since this Nation's founding.

The question for the Court, then, is how Congress intended for limitations on the high standard of immunity to be recognized, if that standard was not appropriate for a particular IO. The IOIA answers that question explicitly. Given the critical role that IOs play in the foreign policy of the United States, the

IOIA expressly delegates to ***the President*** the power to determine whether to limit the absolute immunity of any IO. *See* 22 U.S.C. § 288. That decision makes obvious sense. The conduct of foreign affairs is, after all, the "unique responsibility" of the President. *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-15 (2003). And by granting as a statutory baseline the "virtually absolute" immunity that had been applied to foreign sovereigns for over 130 years, Congress ensured that ***the President*** would have primary control over the manner in which U.S. courts exercise control over IOs' operations.

By contrast, petitioners and their amici argue that when it enacted the FSIA, Congress implicitly revoked a large swath of that Executive discretion, providing that exceptions to IO immunity would be governed instead by broad statutory provisions that do not refer to IOs and were never intended to apply to the unique circumstances of specific IOs. But there is no evidence that Congress intended to do so. Although the FSIA was enacted for the precise purpose of withdrawing the Executive Branch from determinations of immunity with respect to foreign sovereigns, nothing in that statute even makes reference to, much less repeals, the provisions of the IOIA that ***expressly delegate*** that very authority in the IO context. Nor can petitioners point to any evidence that the Congress that passed the FSIA intended to alter the substantive rules that governed IO immunity.

A. The IOIA Vests In The President—Not The Courts—The Power To Limit The Immunity Of IOs.

In this case, petitioners repeatedly attack a straw man, contending that when Congress enacted the

IOIA in 1945, it was not "freezing" an absolute immunity rule "in place for all time." Pet. Br. 19.[10] But that is not amici's argument, nor is it what the IOIA provides. The question in this case is not ***whether*** Congress intended that limitations on IO immunity could be imposed in the future, but ***when*** and ***how*** it intended for that to be accomplished. And the statute provides a clear answer: Congress delegated to ***the President*** the power to limit the "virtually absolute" immunity of IOs in specific cases, taking into account the functions performed by the particular IO. *See Atkinson* v. *Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (holding that Congress "delegate[d] to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances").

To begin with, the Act delegates to the President the sole power to designate by Executive Order an entity that meets certain requirements "as being entitled to enjoy the privileges, exemptions, and immunities provided in [the IOIA]." 22 U.S.C. § 288. Once the President issues such an order, the entity becomes an "international organization," and, unless the President says otherwise, is entitled to enjoy the immunity the IOIA provides. *Id.*

Petitioners and their amici fail to acknowledge the importance of the President's ability to tailor IO immunity. In plain terms, the Act authorizes the

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[10] *See also id.* at 21 (arguing that Congress did not intend "to freeze in the particulars of [immunity] law that existed in 1945"); *id.* at 25 (statute was not drafted "to freeze the law as of 1945"); *id.* at 27 (Congress did not intend to grant IOs "static absolute immunity from suit"); *accord* Pet. App. 15a (IO immunity is "not frozen as of 1945") (Pillard, J., concurring).

President to "withhold or withdraw" recognition of a particular international organization entirely. 22 U.S.C. § 288. And, in sweeping language suggestive of a nearly unqualified delegation, the IOIA also authorizes the President,

> in the light of the functions performed by any * * * 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 [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.

Id. The legislative history reinforces that these are "broad powers granted to the President," which "will permit prompt action in connection with any abuse of the privileges and immunities granted [under the IOIA] or presumably for other reasons such as the conduct of improper activities by international organizations in the United States." H.R. Rep. No. 79-1203, at 3 (1945). Consistent with the statute's text and legislative history, Presidents have invoked section 288 throughout the IOIA's history to limit and to restore IO immunity.[11]

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[11] *See*, *e.g.*, Exec. Order No. 12,425, 48 Fed. Reg. 28069 (June 16, 1983) (granting the International Criminal Police Organization ("INTERPOL") only limited immunities under the IOIA); Exec. Order No. 13,524, 74 Fed. Reg. 67803 (Dec. 16, 2009) (extending full immunity to INTERPOL in light of its establishment of a United States office); Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) (granting International Food Policy Research Institute only limited immunities); Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 16, 1973) (granting the INTELSAT only limited immunities).

The President's ability to deviate downward from absolute immunity is critical to the IOIA's structure. Recent experience had shown that the case-by-case procedure the State Department and courts had employed for determining foreign sovereign immunity was inherently unpredictable, *see* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 134-45 (1999), and individual congressmen were concerned about abuses of immunity by rogue IOs and their officers. By adopting the substantive law of absolute immunity but incorporating a new, structured procedure for the President to alter it by Executive Order, the IOIA guarded against abuses while also assuring IOs they would receive adequate protection from judicial oversight of their U.S.-based operations.

B. The FSIA Does Not Silently Reduce IO Immunity Or Revoke The President's Power To Tailor That Immunity.

There is no indication that when Congress passed the FSIA, it intended to alter—much less dramatically reduce—the President's role in defining IO immunities. Congress did not incorporate IOs into the FSIA's detailed definition of "foreign states," which includes agencies and instrumentalities of such states. *See* 28 U.S.C. § 1603(a), (b). Indeed, as the United States has previously acknowledged, the FSIA mentions IOs only once, and solely for the purpose of ***safeguarding*** their immunities. *See* Br. for the United States as Amicus Curiae at 17 & n.*, *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463 (2d Cir. 2006) (No. 06-403) ("*EM* Br.") ("Congress did not want the FSIA to conflict with the immunity accorded to [international] organizations under pre-existing law."). The FSIA's legislative history confirms that

intention. H.R. Rep. No. 94-1487, at 31 (1976) (FSIA's sole "reference to 'international organizations' * * * [was] ***not intended to restrict any immunity accorded to such international organizations*** under any other law or international agreement") (emphasis added).

The absence of any indication that Congress intended to limit IO immunity speaks volumes. The IOIA's delegation to the President of the sole discretion to withdraw, modify, or condition the immunity of international organizations composed of foreign states unquestionably involves the President's foreign affairs powers. And unless Congress "clearly manifest[s]" its "intent," this Court does not presume that it has restricted the President's "unique" role in that area. *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993). Because Congress has never indicated any intention to withdraw or limit the powers it delegated to the President in the IOIA, this Court should reject petitioners' view.

Moreover, the IOIA and the FSIA are at cross purposes. In Section 288, the IOIA provides the President the maximum possible discretion in deviating downwards from a default of near-complete immunity.[12] The FSIA's effect, by contrast, is to take

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[12] Amici Bipartisan Members of Congress argue that the discretion afforded the President "potentially raises serious constitutional concerns," insofar as the power to adjust IO immunities carries with it the ability to alter the jurisdiction of federal courts. *See* Members Br. 13-16. But this Court has already deemed an analogous delegation "entirely unremarkable," since "the granting or denial of * * * immunity" to foreign entities "was historically the case-by-case prerogative of the Executive Branch." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 857 (2009). Regardless, if the delegation did pose such a problem, petitioners' interpretation would not avoid it. *See*, *e.g.*, Pet. Br.

those same determinations out of the Executive's hands in the context of foreign sovereign immunity. *See* Note, 91 Yale L.J. at 1176-77 ("[T]he FSIA's stated goal of depoliticizing immunities is incompatible with the broad powers given the Executive in the IOIA."). Thus, if petitioners are correct, the FSIA does not merely ***update*** the IOIA; it ***impliedly repeals*** much of section 288's delegation of discretion to the President. Yet the FSIA gives no indication that Congress intended such a repeal. *Cf. Branch* v. *Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.").

Indeed, Congress's reasons for enacting the FSIA did not apply to IOs. Those reasons arose from inefficiencies associated with the "two-step" process for foreign sovereign immunity under which foreign states sued in U.S. courts applied to the State Department for a suggestion of immunity that the courts would then recognize. *See Samantar*, 560 U.S. at 311-12. After the 1952 Tate Letter, the State Department applied the "restrictive" theory only inconsistently, and often deviated from it on the basis of "political considerations." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004). Moreover, "foreign nations did not always make requests to the State Department," so the responsibility often "fell to the courts to determine whether sovereign immunity

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5 (acknowledging President's authority "to limit any of the IOIA's privileges, exemptions, and immunities"); *see also* Members Br. 3 (When IOIA was enacted, "courts generally deferred to the political branches about the scope of immunity, and foreign sovereigns often enjoyed absolute immunity from suit.").

existed," generally by reference to those same, inconsistent State Department decisions. *Verlinden*, 461 U.S. at 487-88. The result was that "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations," and, "[n]ot surprisingly, the governing standards were neither clear nor uniformly applied." *Id*. at 488.

Congress passed the FSIA for the specific purpose of eliminating that problem.[13] But the problem had no relevance to the IOs. The IOIA bestows upon the President the sole authority to modify, withdraw or otherwise condition the immunities of IOs ***by Executive Order***, rather than by suggestion of immunity. Therefore, the difficulties in discerning Executive Branch policy caused by the two-step process did not apply to the IO context, where courts well understood that once an IO was designated, immunity attached without any further input from the political branches. *See Lutcher S.A. Celulose e Papel* v. *Inter-American De*v. *Bank*, 382 F.2d 454, 456 (D.C. Cir. 1967) (Burger, J.) ("In 1960 President Eisenhower designated the Bank as an international organization entitled to immunity, hence the question of the Bank's immunity turns on whether it has waived immunity from suit."); *Soucheray* v. *Corps of Eng'rs of U.S. Army*, 483 F. Supp. 352, 355 (W.D. Wis.

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[13] *See* H.R. Rep. No. 94-1487, at 8 (1976) (statute's purpose was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch"); *see also* Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal For Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 903 (1969) (codification would make it "possible to eliminate completely the participation of the Executive Branch * * * from the process of adjudication of claims against foreign states").

1979) (holding, without reference to FSIA or a two-step process, that "the [International Joint] Commission and its employees or representatives are immune from suit under" IOIA).

It is not surprising, then, that petitioners cite no evidence that IOs routinely sought State Department suggestions of immunity before enactment of the FSIA. The parties and amici in this case have identified only a single instance from between 1945 and 1976 in which an IO sought or obtained a suggestion of immunity. *See* Resp. Br. 33 n.13. And the letter that the United States relies on to allege that the two-step process continued to govern IOs, *see* U.S. Br. 30, reveals precisely the opposite. *See* Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., OAS 1 (Mar. 24, 1977) ("Vagts Ltr.") (clarifying that in the sixteen years immediately preceding the FSIA's passage, the State Department did not author a single suggestion of immunity in an IO case).[14]

Because there is no evidence that either the 1945 Congress or the 1976 Congress intended to effect the sweeping revision of the IOIA that Petitioners seek, this Court should decline to hold that the FSIA governs the immunity of IOs.

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[14] The United States stretches to interpret the letter as "indicating" that before 1960, the State Department was in the habit of authoring such suggestions. *See* U.S. Br. 30. But a more likely reading is that the letter's author determined that an unsuccessful search through seventeen years' worth of files sufficed. Vagts Ltr. at 1 ("A search of our files and the published cases indicates that since 1960 we have not been filing suggestions of immunity in international organization cases.").

IV. NEITHER PETITIONERS NOR THEIR AMICI OFFER A JUSTIFICATION FOR REJECTING THE D.C. CIRCUIT'S LONGSTANDING RULE.

Given that application of the FSIA to IO immunity would transform the separation of powers in a critical area of the foreign policy of the United States, this Court should resist petitioners' invitation to wade into these sensitive diplomatic matters without invitation. *See*, *e.g.*, *Kiobel* v. *Royal Dutch Petrol. Co.*, 569 U.S. 108, 116 (2013) (guarding against "unwarranted judicial interference in the conduct of foreign policy" by requiring "clear indication" from Congress before passing on matters of foreign affairs). Petitioners and their amici offer a number of arguments to the contrary, but none is persuasive.

A. "Deference" To The Executive Branch Is Unnecessary Where, As Here, The Court Of Appeals' Rule Affords The President Discretion To Enact His Preferred View.

The United States repeatedly urges this Court to "defer[]" to the United States' interpretation "of the privileges and immunities afforded by the IOIA in order to fulfill the United States' international obligations." U.S. Br. 29; *see also id.* at 12, 24. To be sure, due regard for the Executive Branch's views in sensitive matters of foreign policy is ordinarily appropriate. But deference to the current administration's views is neither necessary nor appropriate here, because the court of appeals' longstanding rule will in no way hinder the United States' ability to fulfill its international obligations.

In fact, Congress has already provided the Executive Branch near-absolute discretion on this issue.

Pursuant to the IOIA's delegation, the President has virtually limitless authority to deviate downward from the broad immunity the IOIA sets forth. *See* 22 U.S.C. § 288 (authorizing the President to "withhold," "withdraw," "condition," or "limit the enjoyment of" any IOIA immunity by "any" IO "in the light of the functions" it performs). That authority is not merely hypothetical. As noted above, Presidents have, when necessary, altered the immunities available to particular organizations under the IOIA. *See supra* note 11. Indeed, in certain instances, Presidents have limited IO immunity in a manner that overlaps substantially with the "commercial activities" exception that petitioners hope to impose here. *See*, *e.g.*, Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 9, 1997) (designating World Trade Organization an IO, but withholding immunity from taxation for WTO property that is leased or rented for profit). And, to the extent the statute expresses a preference for individualized consideration of IO immunities (as petitioners and the United States argue, and as Judge Pillard suggested below), that is all the more reason to reject the conclusion that Congress later restricted the immunities of all IOs in a single stroke.[15] If

[15] Petitioners argue that while the President may alter the immunities of individual IOs, he lacks the authority to reduce immunity for IOs as a class. Pet. Br. 30; *see also* Pet. App. 13a-14a (Pillard, J., concurring). The United States, however, does not endorse that argument. *See* U.S. Br. 22-23. And with good reason: The Act, which delegates to the President the authority to reduce the immunity of "***any***" IO, 22 U.S.C. § 288 (emphasis added), cannot possibly be interpreted to prohibit him from changing the rules as to all of them. *See, e.g.*, *Beaty*, 556 U.S. at 856 ("Of course the word 'any' * * * has an expansive meaning."). If some previously unknown foreign-policy exigency or other event would lead the President to favor according restrictive immunity to IOs in the future, he could simply do so by Executive

legitimate concerns existed regarding the scope of immunity for IFC or other IOs, any limitations should be crafted, as Congress intended, through tailored Presidential action after diplomatic consultation and discussions, rather than through the one-size-fits-all application of a tangled statute that was never intended for the purpose.

B. Neither Congress Nor The Executive Branch Has Consistently Endorsed Petitioners' View.

Even if deference were otherwise appropriate, petitioners and the United States fail to establish that either the Executive Branch or Congress has consistently endorsed petitioners' position. *See, e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (rejecting Executive Branch interpretation of statute where it had been inconsistent over time).

1. *The Executive Branch*. The United States has scarcely spoken to the issue of IO immunity in the wake of the D.C. Circuit's decision in *Atkinson,* 156 F.3d 1335. When it has done so, it has taken precisely the opposite position from the one it advances here. *See EM* Br. 17 & n.* (arguing that the 1976 Congress did not "want the FSIA to conflict with the immunity accorded to [IOs] under pre-existing law," and citing *Atkinson* as "explaining that the [IOIA] provides for absolute immunity of covered organizations").

Indeed, amici are unaware of any instance in which the United States has advocated for restrictive IO immunity in a circumstance in which the distinction was material. To the contrary, in each of the cases

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Order, without enlisting this Court in the cause—provided, of course, he took account of "the functions performed by [the] * * * international organization[s] * * * ." 22 U.S.C. § 288.

cited by petitioners and their amici in which the United States advocated that view, it nevertheless argued that the IO was immune from the claim there at issue.[16] Only in *EM*, where the United States took the same position with respect to the IOIA that respondents take here, were its views on IOIA immunity material to its conclusion. *See supra* at 19.

Even the Owen Letter, which is quoted and relied on by petitioners, their amici, and the concurrence below, did not rest its conclusion on Owen's observation about the IOIA's relationship to the FSIA. *See* Letter from Roberts B. Owen, State Department Legal Adviser, to Leroy D. Clark (June 24, 1980) ("Owen Ltr."), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980) ("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***.") (emphasis added). Rather, Owen's conclusion was that the

[16] *See* Br. for the United States as Intervenor at *2-3, *11-12, *Veiga* v. *WMO*, 368 F. App'x 189 (2d Cir. May 1, 2009) (No. 08-3999-cv), 2009 WL 8186687 (advocating for immunity while expressing no position as to whether IOIA incorporates FSIA); Br. for the United States as Amicus Curiae at *5 n.3, *Taiwan* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 128 F.3d 712 (9th Cir. 1997) (No. 97-70375), 1997 WL 33555046 (IO immunity not at issue in immediate proceeding); Br. for the United States as Amicus Curiae at *15, *Corrinet* v. *United Nations*, No. 96-17130 (9th Cir. Mar. 12, 1997), 1997 WL 33702375 (acknowledging that "FSIA does not" govern UN's immunities); Br. for the United States as Amicus Curiae at 11-18, *Broadbent* v. *Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) (immunity should be afforded with respect to internal personal matters).

World Bank was immune from regulation and claims in respect of internal personnel matters.

Amici believe the Owen letter is more complex and thoughtful than as presented for two reasons. First, it contains two important qualifications to the flat statement that IOs' immunities are the same as sovereigns' immunities.[17] Those qualifications, which are critical to understanding the Owen letter, reflect important insights about the difference between IO and foreign sovereign immunity. And, second, the letter provides the context in which IOs are given immunities.

The letter's first qualification—providing that IOs receive restrictive immunity "unless otherwise specified in their constitutive agreements"—is more than a mere reference to other immunities that an IO might enjoy. Rather, it is an indication that, as the IOIA requires, the functions and purposes of an IO must be taken into consideration before subjecting an IO to the jurisdiction of our courts in respect of its commercial activities. Likewise, the second qualification—the reference to "acts of a public character"—is unlikely to be a reference strictly to acts *de jure imperii* (acts that only a sovereign may perform), excluding all acts *de juris gestionis* (commercial acts). Rather, it is a reference to acts performed to fulfill the functions that an IO would be expected, as indicated in its constitutive agreements, to perform on behalf of its sovereign members. In amici's considered view, the IOIA means, and Owen meant, that the immunity of an IO such as IFC, whose functions (as outlined in its Articles of Agreement)

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[17] The qualifications were replaced by ellipses when quoted by petitioners and Judge Pillard below, Pet Br. 9, Pet. App. 15a.

require it to engage in commercial activities with the private sector, cannot be limited across-the-board in respect of commercial activities without a review of the impact of such a limitation on the IO's ability to perform its functions. The issue is much more complicated and fraught with difficulties than a simplistic assertion that henceforth IFC shall not have immunity in respect of its commercial activities. The irony is that petitioners' position, which would permit American courts to impose liability on IFC for a supposed failure to enforce environmental conditions on development loans and falls well short of what Owen envisioned, eliminates the careful scrutiny of an IO's functions, as required by the IOIA and the Owen Letter, before an IO's immunities may be limited, replacing it with a wholesale, across-the-board limitation of all IOs' immunities, regardless of how that limitation will impact their functions.

Amici also believe Owen's admonition that "the privileges and immunities enjoyed by public international organizations impose a special responsibility on them and their Member States to ensure that internal procedures provide effective methods of addressing and resolving 'labor-management' disputes," Owen Ltr. at 920, is a reminder that the constitutive agreements of IOs create a ***single***, ***collective*** governance system through which their sovereign members control. It is through that system that appropriate rules and practices, such as financial controls, employment rules, and environmental standards and practices, are imposed and monitored by those sovereign members. Owen found that the members had determined that the World Bank recognized and met this "special responsibility." *Id.* Whether IFC has done the same

with respect to enforcement of the environmental requirements attached to its loans should be determined by its member states—not by a court of one of them.

2. *Congress*. Nor has Congress provided the requisite "clear indication" that it intended to restrict the President's power in all cases involving IOs. *See Kiobel*, 569 U.S. at 116. The United States suggests that by occasionally passing legislation providing absolute immunity to particular IOs, Congress has endorsed petitioners' view. *See* U.S. Br. 25-27. That is incorrect. As the United States itself observes, there is no anomaly in Congress's enshrining in a statute an immunity that previously existed as a matter of Executive grace. *See*, *e.g.*, U.S. Br. 6, 23-24 (discussing FSIA's codification of restrictive theory). Far from being "redundant," *cf. id.* at 27, such legislation has the tangible effect of withdrawing the President's authority to delist or otherwise restrict a particular IO's immunity.

The United States' extensive reliance on 19 U.S.C. § 3511(b), in which Congress authorized the President to "implement article VIII of the WTO Agreement," U.S. Br. 25-26, is not to the contrary, because respondent's view plainly does not render that delegation duplicative. The power to "implement article VIII" was not merely the power to grant absolute immunity from litigation (in which case the delegation might have been duplicative of the IOIA), but ***also*** the ability to confer on the WTO a wide range of rights, privileges, and immunities guaranteed by the twelve-page, forty-nine-section Convention on the Privileges and Immunities of the Specialized Agencies (the "Specialized Agencies Convention"). *See* Marrakesh Agreement Establishing the World Trade

Organization, art. VIII(4), *entered into force* Jan. 1, 1995, 1867 U.N.T.S. 154 (requiring members to provide the privileges and immunities provided by the Specialized Agencies Convention, *entered into force* Dec. 2, 1948, 33 U.N.T.S. 261).

C. The Supposed "Practical Problems" The United States Invokes Have Not Appeared In The 35 Years Since *Mendaro* Or The 20 Years Since *Atkinson*.

Finally, the United States offers two "practical difficulties" it associates with the court of appeals' rule. U.S. Br. 29-31. Neither one justifies application of the FSIA to IOs.

First, the United States argues that supposed "uncertainties" in the historic law of immunity counsel in favor of adopting petitioners' view. *Cf.* U.S. Br. 30-31. But this Court has never held that uncertainty about the outer reaches of a particular statutory rule justifies disregarding what Congress has enacted. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359 (1993) (Court cannot simply "throw up [its] hands" in lieu of applying complex statute). And in any event, determining the "contours" of an IO's immunity under the methodology of *Mendaro* and *Atkinson* has not proven difficult in practice. This case proves the point: The blind application of the "commercial activity" exception would present knotty issues as applied to a multilateral development bank that exists solely to advance public policies through commercial transactions with the private sector. By contrast, petitioners do not (and cannot) argue that the application of the *Mendaro* and *Atkinson* methodology is at all uncertain. Indeed, they point to no case, from either the 20 years since *Atkinson* or the 70 years since the IOIA was enacted, in which any

court has had any difficulty discerning the contours of any IO's immunity under the rule *Atkinson* endorsed.[18]

Even if one could hypothesize a case in which it might be difficult to determine the contours of absolute immunity, such a difficulty could plainly be addressed, as Congress intended, by the President under the IOIA's delegation of power. Moreover, the hypothetical nuisance to which the United States points pales in comparison to the difficulty of trying to graft onto IOs the FSIA's notoriously vague provisions. To take one example, the clumsy language of the FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2), has proved exceedingly difficult for courts to apply even to the foreign states it was ***intended*** to govern.[19] It promises to raise even greater uncertainty in the IO context, where numerous institutions were specifically designed to effectuate important public policy objectives through activities, such as borrowing and lending, that might otherwise seem commercial. Indeed, in a testament to the FSIA's poor drafting, this Court has often sought clarity in the same common-law history the United States now derides. *See Weltover*, 504 U.S. at 612-614 (disregarding as useless the FSIA's definition of "commercial," and resorting instead to State

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[18] The Third Circuit's opinion in *OSS Nokalva, Inc.* v. *European Space Agency,* 617 F.3d 756 (3d Cir. 2010), is no exception, because that court did not even purport to apply the *Atkinson* rule. *Id.* at 761-66.

[19] *See*, *e.g.*, *Nelson*, 507 U.S. at 358-59 (decrying FSIA's definition of "commercial activity" as "distinguished only by its diffidence," insofar as it "leaves the critical term 'commercial' largely undefined"); *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 612 (1992) (same).

Department's pre-FSIA policy). In view of the challenges associated with interpreting the FSIA in its intended context, this Court should view with skepticism the United States' invitation to expand the statute's reach more broadly.

Second, the United States argues that under the court of appeals' view, it is unclear whether the IOIA simply incorporated the two-step approach that governed foreign sovereign immunity in 1945. U.S. Br. 12-13, 29-30 (faulting court of appeals for "assum[ing]" that "Section 288a(b) incorporates" only "***substantive***" standards," and "not the two-step procedure"); *see also* Pet. Br. 37-43 (arguing that FSIA represents the view of the political branches, which Court would be bound to respect under two-step approach). But to the extent the ad hoc, two-step procedure existed in 1945, the IOIA ***replaced*** it, by the operation of section 288's plain text, with a new regime for IOs under which immunities were established (and could be modified) in Executive Orders, rather than State Department suggestions. *See* 22 U.S.C. § 288; *supra* at 22-23. Thus, petitioners' alternative argument fails for the very same reason as its principal one: The IOIA codifies as the default standard "virtually absolute" immunity unless Congress or the President says otherwise, and neither has done so in any legally cognizable manner. If the Executive Branch is now saying otherwise, the President should change the immunities of IFC using the authority given to him under the IOIA, rather than by passing the chore to the Judiciary.

CONCLUSION

For the foregoing reasons, and those in respondent's brief, the judgment below should be affirmed.

Respectfully submitted,

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September 17, 2018