No. 17-___

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 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.

2. If not, what are the rules governing the immunity to which international organizations are entitled?

PARTIES TO THE PROCEEDING

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

Respondent, the defendant in this case, is the International Finance Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Budha Ismail Jam, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in No. 16-7051.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit (Pet. App. 1a) is published at 860 F.3d 703 (D.C. Cir. 2017). The relevant opinion of the district court (Pet. App. 23a) is published at 172 F. Supp. 3d 104 (D.D.C. 2016).

JURISDICTION

The opinion of the court of appeals was issued on June 23, 2017. Pet. App. 1a. The court of appeals denied rehearing en banc on September 26, 2017. Pet. App. 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. *See* No. 17A606. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the International Organizations Immunities Act, 22 U.S.C. §§ 288-288a, are reproduced at Pet. App. 40a-42a.

INTRODUCTION

The past several decades have witnessed a proliferation of "international organizations"—that is, public organizations in which multiple countries are members pursuant to treaties or other foundational laws. *See generally* The Oxford Handbook of International Organizations, at v-vi (Jacob Katz Cogan et al. eds., 2016). These organizations pursue a wide range of ends—ranging from providing health care to managing fisheries to financing economic development. Examples (just to name a few to which the United States belongs) include the World Trade Organization, *see* Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 9, 1997); the Inter-American Investment Corporation, *see* Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986); and the International Pacific Halibut Commission, *see* Exec. Order. No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962). All told, there are currently over eighty formally designated international organizations of which the United States is a member. *See* 22 U.S.C. § 288 (providing process for presidential designation); *id.* app. (listing designated organizations).

Some of these international organizations are immune from suit in U.S. courts by virtue of their founding treaties. *See, e.g.*, *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014) (noting that the International Monetary Fund's Articles of Agreement expressly provide immunity from "every form of judicial process" (quoting Articles of Agreement of the IMF, Art. IX, § 3, Dec. 27, 1945, 60 Stat. 1401, 1413)); *Brzak v. United Nations*, 597 F.3d 107, 110-12 (2d Cir. 2010) (describing the

Convention on Privileges and Immunities of the United Nations, "which extends absolute immunity to the United Nations"). But most are not. For those organizations, immunity is governed by the International Organizations Immunities Act ("IOIA" or the "Act"). *See* Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified as amended at 22 U.S.C. §§ 288-288*l*).

Enacted in 1945, the IOIA affords international organizations certain privileges and immunities, including "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The Act also allows international organizations to "waive their immunity." *Id.*

When Congress enacted the IOIA, the question whether a foreign government was entitled to immunity from suit was a political one. Courts deferred to the judgment of the political branches, including the Executive's case-by-case determinations. *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945). Absent explicit instructions, courts implemented the State Department's views as best they could.

In the 1952 "Tate Letter," the State Department formally "announced its adoption of the restrictive theory of immunity, under which immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *See Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (citing Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952));

see also Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992). Congress later codified the restrictive theory of foreign sovereign immunity—and gave courts the sole authority to apply it—in the Foreign Sovereign Immunities Act of 1976 ("FSIA"). Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602-11).

The question presented here is whether the IOIA's language conferring the "same immunity from suit . . . as is enjoyed by foreign governments" means that the rules governing immunity for international organizations track those in the FSIA. The Third Circuit has held that, as a matter of plain language and common sense, the IOIA does so. *See OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010). Indeed, all but eighteen of the currently designated IOIA organizations—including respondent, the International Finance Corporation ("IFC")—were designated after 1952; it would be especially odd for them to be entitled to a form of immunity that no longer prevailed time of their designation. "The considered view of the Department of State" is likewise that "the immunity of international organizations under the IOIA was not frozen as of 1945, but follows developments in the law of foreign sovereign immunity under the FSIA." Pet. App. 15a (Pillard, J., concurring).

The D.C. Circuit, however, has squarely "rejected such an evolving notion of international organization immunity." Pet. App. 5a (citing *Atkinson*, 156 F.3d at 1341). And in the decision below, it reaffirmed its view that the IOIA gives international organizations "the immunity that foreign governments enjoyed *at the time the IOIA was passed*." *Id.* 4a (emphasis

added). Notwithstanding this Court's explanations that immunity law as of 1945 depended on case-by-case views of the Executive Branch, the D.C. Circuit has further held that the law at that time conferred "virtually absolute immunity" on foreign governments. *Id.* 4a (quoting *Atkinson*, 156 F.3d at 1340). Other courts agree. *See infra* at 14.

This Court should resolve this conflict. International organizations play an ever-increasing role in the economic landscape of this country and the world, and their actions "have far-reaching consequences." Jan Klabbers, *Contending Approaches to International Organizations*, *in* Research Handbook on the Law of International Organizations 3, 3 (Jan Klabbers & Åsa Wallendahl eds., 2011). Yet courts are generally the only available forum for holding such organizations to their legal obligations. Therefore, the question whether they are absolutely immune from any kind of lawsuit—no matter how strictly commercial their activities; no matter how egregiously unlawful their actions; and no matter the views of the Executive Branch—is extremely important. Even more to the point, no organization should be essentially above the law without this Court having at least considered the issue.

STATEMENT OF THE CASE

1. This case arises out of a commercial development project financed by respondent, the International Finance Corporation. Chartered in 1955 and headquartered in Washington, D.C., the IFC's stated "mission is to fight poverty." IFC, *Policy on Environmental and Social Sustainability* 2 (2012), http://bit.ly/2mJbbiR. Specifically, it provides loans in

the developing world to private corporations, at profit-generating interest rates, for projects that would otherwise have difficulty attracting private capital. Pet. App. 3a. The IFC is composed of 184 member countries, including the United States. *Id.* 24a. It is also "among the organizations that have been . . . designated" under the IOIA as "international organizations." *Id.* 29a (citing Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 2, 1956)).

In 2008, the IFC provided $450 million in loans "for construction of the Tata Mundra Power Plant in Gujarat, India." Pet. App. 2a-3a.[1] In accordance with the IFC's policy to prevent social and environmental damage, the loan agreement afforded the IFC "supervisory authority" over the project and "included an Environmental and Social Action Plan designed to protect the surrounding communities" from harm. *Id.* 3a. Should the local loan recipient fail to abide by these conditions, the IFC "could revoke financial support for the project." *Id.*

According to the IFC's own ombudsman, however, the IFC engaged in "inadequate supervision of the project." Pet. App. 3a. "[T]he plant's construction and operation did not comply with the Plan." *Id.* "Yet the IFC did not take any steps" to address the situation. *Id.* And it still has not taken any meaningful steps.

The result is a "dismal picture." *See* Pet. App. 2a n.1. The power plant has "devastated" the local environment—and, indeed, the local way of life. *Id.* 2a. To name just a few of the calamities, neighboring

[1] Because this appeal arises from a motion to dismiss, all allegations in the complaint must be taken as true. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1119 n.2 (2014).

villagers and farmers are no longer able to procure fresh water because the plant's construction caused "[s]altwater intrusion into the [local] groundwater." *Id.* 2a n.1. "[T]he plant's cooling system discharges thermal pollution into the sea, killing off marine life on which fisherman rely for their income" and local residents rely for nourishment. *Id.* And "coal dust and ash"—released from a conveyor system that brings coal to the plant—"disperse into the atmosphere and contaminate the surrounding land and air." *Id.*

2. Petitioners are farmers and fishermen who live near the plant, a trade union of fishworkers, and a local government entity. *See* Pet. App. 2a. In 2015, they sued the IFC in the U.S. District Court for the District of Columbia, where it is domiciled, *id.* 3a. Petitioners brought claims "for negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract." *Id.* 28a. They sought "injunctive relief running against [the] IFC or, in the alternative, compensatory and punitive damages." *Id.*

The IFC's Articles of Agreement—its founding treaty—contain an express waiver of immunity. Under that provision, "[a]ctions may be brought against the Corporation . . . in a court of competent jurisdiction in the territories of a member in which the Corporation has an office." IFC Articles of Agreement art. VI, § 3, Dec. 5, 1955, 7 U.S.T. 2197, 2214;[2] *see also* 22 U.S.C. § 282g (giving this provision of the IFC Articles of Agreement "full force and effect in the United States"). There is only one exception:

[2] The IFC Articles of Agreement, as amended through June 2012, are available at http://bit.ly/2bnPz4q.

Suits by *member states* are expressly prohibited. IFC Articles of Agreement, *supra*, art. VI, § 3.

Yet the IFC responded to petitioners' complaint by moving to dismiss based on absolute immunity, among other grounds. Pet. App. 28a. Petitioners responded that under the restrictive theory of sovereign immunity codified in the FSIA, *see* 28 U.S.C. § 1605(a)(2), the IFC is amenable to suit for commercial activities performed in the United States, including its financing of the Tata Mundra Plant. *See* Pet. App. 3a-5a. Petitioners also argued that the IFC had waived through its charter any immunity to which it might otherwise be entitled. *Id.* 4a, 7a.

The district court granted the IFC's motion, ruling "only" on its immunity argument. Pet. App. 28a, 38a. The district court noted that in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998), the D.C. had Circuit held that the IOIA affords international organizations the degree of immunity that foreign governments enjoyed in 1945, when the IOIA was enacted. Pet. App. 30a. That form of immunity, the D.C. Circuit had concluded, was "virtually absolute immunity." *Id.* (quoting *Atkinson*, 156 F.3d at 1340). Accordingly, the district court held that the IFC is absolutely immune from suit. *Id.*

The district court also held, despite "the broad language of [the IFC's] waiver," Pet. App. 31a, that the IFC Articles of Agreement had not waived the IFC's immunity, *id.* 37a. Stressing that D.C. Circuit precedent required it "to read such waivers . . . narrowly," the district court explained that "[t]he relevant question is . . . 'whether a waiver of immunity to allow this type of suit, by this type of

plaintiff, would benefit the organization over the long term.'" *Id.* 31a-32a (quoting *Osseiran v. IFC*, 552 F.3d 836, 840 (D.C. Cir. 2009)). Petitioners argued that their suit falls into this category because the IFC requires the support of the local community before financing potentially harmful projects like the Tata Mundra Plant. *See id.* 35a. The IFC, petitioners continued, would not be able to "credibly assuage any doubts that local communities may harbor" about the impacts of future projects if its promises to prevent injury were unenforceable. *Id.* 36a. The district court acknowledged that this argument "makes some intuitive sense." *Id.* But it ultimately deemed the argument foreclosed by D.C. Circuit precedent. *Id.* 37a-38a.

3. A panel of the D.C. Circuit, which included two of the three judges who decided *Atkinson*, affirmed. The court of appeals declared that *Atkinson* "stands as an impassable barrier" to any argument that the IOIA should be construed consistently with the FSIA. Pet. App. 7a. Under *Atkinson*, "international organizations [a]re given complete immunity by the IOIA." *Id.* 6a.

The court of appeals also ruled that even though the IFC Articles of Agreement, "read literally, would seem to include a categorical waiver" of immunity from suit, the IFC had not waived its immunity. Pet. App. 7a-11a. The D.C. Circuit acknowledged that "it is a bit strange" that its precedent requires courts to ask "when a claim 'benefits' the international organization." *Id.* 8a (citing *Osseiran*, 552 F.3d at 840). But, being "obliged to apply" that test, the court of appeals found the benefits of this suit would be outweighed by the burdens. *Id.* 10a-11a.

Judge Pillard wrote separately to express her opinion that *Atkinson* was "wrongly decided" and should be abrogated. Pet. App. 12a (Pillard, J., concurring). Noting that the Third Circuit has expressly rejected *Atkinson*, Judge Pillard maintained that were she "not bound by *Atkinson*, [she too] would hold that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states." *Id.* 16a (citing *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010)). "When a statute incorporates existing law by reference"—as the IOIA does—"the incorporation is generally treated as dynamic, not static." *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 added that the D.C. Circuit's waiver case law has "compounded" *Atkinson*'s error. Pet. 16a. Directing that courts "pare back an international organization's apparent waiver of immunity," according to the "amorphous" question whether a particular lawsuit would "benefit" an international organization, creates a "doctrinal tangle." Pet. App. 16a-17a, 21a. It would be far better, Judge Pillard proposed, to determine waiver issues according to organizations' own charters and the "time-tested body of law under the FSIA" that allows lawsuits based on commercial activity. *Id.* 21a.

4. Petitioners sought rehearing en banc, but the court of appeals denied the petition without comment. Pet. App. 39a.

REASONS FOR GRANTING THE WRIT

The International Organizations Immunities Act grants international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). This statute gives rise to two important questions. First, does the "same immunity . . . as is enjoyed" language incorporate immunity standards as they currently exist under the Foreign Sovereign Immunities Act, or does it continue to give international organizations the now-anachronistic immunity to which foreign governments were entitled in 1945? Second, if the statute does the latter, what rules govern the immunity to which international organizations are entitled? The Court should use this case to consider both these pressing questions.

I. This Court should resolve whether the IOIA cloaks international organizations with greater immunity than the FSIA affords to foreign states.

A. There is an entrenched circuit split over this issue.

1. The Third Circuit has held that "[w]ell-established rules of statutory interpretation demonstrate" that the IOIA confers no more immunity on international organizations than the FSIA affords to foreign states. *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762-63 (3d Cir. 2010). In particular, the Third Circuit has explained that the plain language of the IOIA's "same

immunity" language triggers the "Reference Canon." *Id.* at 762-63. Under that canon, "[a] statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted. *This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted*." *Id.* at 763 (emphasis in original) (quotation marks and citation omitted). Applying that canon here, the IOIA tracks the FSIA. *Id.* at 763-64.[3]

"The considered view of the Department of State" is likewise that "the immunity of international organizations under the IOIA was not frozen as of 1945, but follows developments in the law of foreign sovereign immunity under the FSIA." Pet. App. 15a (Pillard, J., concurring); *see also OSS Nokalva*, 617 F.3d at 763-64. The State Department Legal Advisor has 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 Roberts B. Owen, Legal Adviser, Dep't of State, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), *in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980).[4] Furthermore, the United

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[3] Before the D.C. Circuit's decision in *Atkinson*, the United States District Court for the District of Columbia also concluded that "the plain language of the International Organizations Immunities Act incorporates the terms of the Foreign Sovereign Immunities Act." *Rendall-Speranza v. Nassim*, 932 F. Supp. 19, 23 (D.D.C. 1996) (capitalization altered). But *Atkinson* abrogated this decision. *See* 156 F.3d at 1341 n.6.

[4] The State Department has similarly explained that the United States typically "afford[s] restrictive immunity" to

States has explained in a brief 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]," characterizing the contrary view as "devoid of substance." Brief for the United States as Amicus Curiae at 8-9, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465), *available at* 3 D.C. Cir. J.A. 1056-75 [hereinafter U.S. *Broadbent* Brief]; *see also Broadbent*, 628 F.2d at 31 (acknowledging this view).

"Although the State Department's interpretation of the IOIA is not binding on [courts], the Department's involvement in the drafting of the IOIA lends its view extra weight." Pet. App. 15a (Pillard, J., concurring).

2. In direct contrast, the D.C. Circuit reaffirmed its view here that the IOIA cloaks international organizations with "the immunity of foreign organizations in 1945." Pet. App. 6a (citing *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998)). In *Atkinson*, the D.C. Circuit opined that "the text of the IOIA unfortunately provides no express guidance on whether Congress intended to incorporate in the IOIA subsequent changes to the law governing the immunity of foreign sovereigns." 156 F.3d at 1341. The D.C. Circuit therefore turned to another provision of the Act giving the President the authority to modify or revoke any of the privileges

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international organizations. *See* Letter from Acting Secretary of State Arnold Kanter to President George H.W. Bush (Sept. 21, 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.

or immunities of any particular organization, *see* 22 U.S.C. § 288, and to the IOIA's legislative history. And from those sources, the D.C. Circuit surmised that "Congress' intent was to adopt the body of law only as it existed in 1945," under which the D.C. Circuit believed "immunity of foreign sovereigns was absolute." *Atkinson*, 156 F.3d at 1341.

Expressly acknowledging the conflict between the Third and D.C. Circuits, the Supreme Court of Alaska has also taken the D.C. Circuit's position, holding that "[t]he IOIA provides absolute immunity to international organizations." *Price v. Unisea, Inc.*, 289 P.3d 914, 920 (Alaska 2012). In addition, district courts in three circuits outside of the Third and D.C. Circuits have adopted the D.C. Circuit's holding in *Atkinson*. *See Enterasys Networks, Inc. v. Mexmal Mayorista, S.A. de C.V. (In re Dinastia, L.P.)*, 381 B.R. 512, 519-20 (S.D. Tex. 2007); *Banco de Seguros del Estado v. IFC*, Nos. 06 Civ. 2427(LAP) & 06 Civ. 3739(LAP), 2007 WL 2746808, at *3-4 (S.D.N.Y. Sept. 20, 2007); *Ashford Int'l, Inc. v. World Bank Grp.*, No. 1:04-CV-3822-JOF, 2006 WL 783357, at *2-3 (N.D. Ga. Mar. 24, 2006).

3. This conflict will not abate without this Court's intervention. The Third Circuit's *OSS Nokalva* decision rejecting the D.C. Circuit's position came from a unanimous panel (Sloviter, Barry, and Hardiman, JJ.) and is reinforced by the longstanding view of the State Department. There is no reason to think the Third Circuit will reconsider that ruling.

The D.C. Circuit is equally resolute in its contrary view. Before this case, it made clear that *Atkinson* "remains vigorous as Circuit law." Pet. App. 5a (quoting *Nyambal v. IMF*, 772 F.3d 277, 281 (D.C.

Cir. 2014), *cert. denied*, 135 S. Ct. 2587 (2015)).[5] Judge Pillard urged the court here to "revisit" that rule. Pet. App. 21a (Pillard, J., concurring). But the court, as it had done before, denied rehearing en banc without comment. *Id.* 39a; *see also Sampaio v. Inter-Am. Dev. Bank*, 468 Fed. Appx. 10 (D.C. Cir. 2012) (noting denial of rehearing en banc). The Supreme Court of Alaska similarly appears locked into its position: *Price* was a unanimous decision, and it has not been questioned by any subsequent opinion.

B. The D.C. Circuit's rule that international organizations have greater immunity than the FSIA allows is incorrect.

The D.C. Circuit's holding that the IOIA confers immunity according to the law of 1945 is wrong across every dimension.

1. *Text.* As the Third Circuit recognizes, the plain text of the IOIA incorporates the FSIA. *See OSS Nokalva*, 617 F.3d at 763. The IOIA entitles international organizations to the "same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). Foreign governments are entitled to immunity only under the terms of the FSIA. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under ordinary usage and the reference canon, that means international organizations are entitled to that "same immunity."

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[5] Although the petition for certiorari in *Nyambal* raised the question presented here, that case was a poor vehicle for resolving the issue. The defendant's articles of agreement gave it unqualified immunity from suit, "broader than the protection afforded by the IOIA's aegis alone." *Nyambal*, 772 F.3d at 281. So the defendant was entitled to immunity regardless of the scope of the IOIA. *See id.* Such is not the case here.

This conclusion is also compelled by the particular context in which the IOIA operates. The IOIA is a jurisdictional provision. *See Zuza v. Office of the High Representative*, 107 F. Supp. 3d 90, 93 (D.D.C. 2015). And where, as here, a jurisdictional provision is "expressed in the present tense," its "plain text" requires applying the law as of the time of suit. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). Furthermore, sovereign immunity has always been determined according to "current political realities." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004).

The D.C. Circuit brushed all this aside, focusing instead on another IOIA provision that gives the President the "authority to modify, condition, limit, and even revoke" the privileges or immunities of a designated organization. *Atkinson*, 156 F.3d at 1341 (citing 22 U.S.C. § 288). The D.C. Circuit has taken this provision as evidence that Congress intended post-1945 changes in immunity from suit to come only from the Executive, not from subsequent legislation. *See id.* But as Judge Pillard explained below, that provision "merely empowers the President to make organization- and function-specific exemptions from otherwise-applicable immunity rules." Pet. App. 13a (Pillard, J., concurring); *accord OSS Nokalva*, 617 F.3d at 763. It does not establish those otherwise-applicable immunity rules; that is what Section 288a(b) does.

2. *Drafting history*. The drafting history of the IOIA confirms what the plain text indicates. The original House version of the Act provided international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong.

§ 2(b) (1945). The Senate, however, rejected this phrasing. While retaining absolute immunity language with respect to "the *property* of international organizations," the Senate curbed the immunity-from-suit provision so that, as enacted, it provides merely the "same immunity . . . as is enjoyed by foreign governments." Pet. App. 14a-15a (Pillard, J., concurring) (alteration in original) (emphasis added) (citation omitted). A court may not "read back into the Act the very . . . 'statutory language that [Congress] ha[d] earlier discarded in favor of other language.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (citation omitted).

The D.C. Circuit's *Atkinson* decision overlooked this problem. Instead, the court fixated on a sentence of legislative history stating that the President retained the authority to adjust the immunity a designated organization enjoys if it "engage[d], for example, in activities of a commercial nature." 156 F.3d at 1341 (quoting S. Rep. No. 79-861, at 2 (1945)). From this the court concluded that the 1945 Congress had already "taken into account" the "concerns that motivated the State Department to adopt the restrictive immunity approach to foreign sovereigns in 1952" by giving the role of modifying immunity to the President. *Id.* But this single sentence of legislative history can hardly overcome the plain text of the IOIA. At any rate, the sentence offers no meaningful support to the D.C. Circuit's view. As noted just above, the President's power is to make organization-specific exceptions to immunity, not to change the default immunity rules.

Lest there be any doubt, Congress itself has since read the IOIA to provide only restrictive immunity.

Years after the United States adopted the restrictive theory, a congressional report confirmed that "international organizations . . . generally have the same immunity as foreign governments, and the [FSIA] provides that foreign governments are not immune for actions taken in connection with their commercial activities." H.R. Rep. No. 105-802, at 13 (1998) (citation omitted) (explaining the impact of an amendment to the Foreign Corrupt Practices Act).

3. *Consequences.* The D.C. Circuit's absolute immunity rule also produces "an anomalous result," *OSS Nokalva*, 617 F.3d at 764. As just noted, foreign states involved in commercial activities are subject to suits in this country based on those activities. *See* 28 U.S.C. § 1605(a)(2). Yet under the D.C. Circuit's rule, "a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone." *OSS Nokalva*, 617 F.3d at 764; *see also* Pet. App. 16a (Pillard, J., concurring). As the United States has explained, there is "no reason" for this incongruity. U.S. *Broadbent* Brief, *supra*, at 10. Worse yet, the rule "may create an incentive for foreign governments to evade legal obligations by acting through international organizations." *OSS Nokalva*, 617 F.3d at 764.

The D.C. Circuit has never answered this argument. At the very least, therefore, its counterintuitive and potentially subversive absolute immunity rule demands review by this Court.

C. This Court should resolve this important issue here and now.

1. The question whether the IOIA incorporates the restrictive theory of immunity codified in the

FSIA is a recurring issue. It has been embedded in D.C. Circuit cases in recent years involving claims ranging from bankruptcy, *see Kaiser Grp. Int'l, Inc. v. World Bank*, 420 Fed. Appx. 2 (D.C. Cir. 2011), to race discrimination in employment, *see Smith v. World Bank Grp.*, 694 Fed. Appx. 1 (D.C. Cir. 2017). Other decisions include *Sampaio*, 468 Fed. Appx. 10; *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*, 264 Fed. Appx. 13 (D.C. Cir. 2008); *Aguado v. Inter-Am. Dev. Bank*, 85 Fed. Appx. 776 (D.C. Cir. 2004); *Dujardin v. Int'l Bank for Reconstruction & Dev.*, 9 Fed. Appx. 19 (D.C. Cir. 2001); *Fazzari v. Inter-Am. Dev. Bank*, 254 F.3d 315 (D.C. Cir. 2000); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 187-89 (D.D.C. 2011), *aff'd per curiam*, 493 Fed. Appx. 107 (D.C. Cir. 2012); *Polak v. IMF*, 657 F. Supp. 2d 116, 120-21 (D.D.C. 2009), *appeal dismissed*, No. 09-7114, 2010 WL 4340534 (D.C. Cir. 2010). The question presented also regularly arises in other courts. *See supra* at 14 (citing cases from the past decade adjudicated in federal or state courts in Alaska, Georgia, New Jersey, New York, and Texas).

2. The question presented also has significant implications for individuals and international organizations alike. Individuals and companies doing business with international organizations have a strong interest in holding such organizations to their commercial and other private-law obligations. The same is true of others directly affected by the actions of such organizations. Insofar as the D.C. Circuit's absolute immunity rule is mistakenly impeding such legal accountability, this Court should reject that rule.

On the other hand, when the IOIA provides immunity, it provides protection from "every form of judicial process," 22 U.S.C. § 288a(b), no matter how preliminary or "unobtrusive," *Atkinson*, 156 F.3d at 1339. Accordingly, if the D.C. Circuit's absolute immunity rule is correct, then international organizations should be promptly relieved of the obligation to defend themselves in the Third Circuit, as well as in other courts where the question presented is unresolved.

3. The question whether the IOIA incorporates the restrictive theory of immunity codified in the FSIA is outcome-determinative here. The FSIA denies immunity where a lawsuit is based on "commercial activity" in the United States or on an act performed in the United States in connection with commercial activity elsewhere. 28 U.S.C. § 1605(a)(2); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). The IFC has not disputed that its activities at issue here meet this test. Nor could it. Loaning money at market-based interest rates to a private entity, to build a private enterprise, is quintessentially commercial activity. *See* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. 471, 529 (2008) ("banking transactions" constitute commercial activity for FSIA purposes). And the IFC made these loan decisions, as well as at least some subsequent supervisory choices, in the United States. Accordingly, if the IOIA tracks the FSIA, then the IFC is not entitled to immunity and the D.C. Circuit's judgment must be reversed.

II. If the IOIA confers greater immunity than the FSIA allows, this Court should settle the basic rules governing that immunity.

Even if the D.C. Circuit were correct that the IOIA entitles international organizations to immunity according to the rules that prevailed in 1945, this Court's intervention would still be warranted. This is so for two reasons. First, contrary to the D.C. Circuit's position, the law in 1945 did not afford absolute immunity to foreign governments. Second, the D.C. Circuit's test for determining whether an organization has waived its immunity is misguided. At the very least, the meaning of the IOIA is too important to be left to D.C. Circuit precedent that—as even members of that court endorsing the precedent concede—"is a bit strange" even on its own terms and requires demoting several decisions of this Court to mere "dicta." *See* Pet. App. 6a, 8a.

A. The D.C. Circuit's "absolute immunity" rule is mistaken.

1. This Court has repeatedly explained that as of 1945, sovereign immunity was not absolute. Instead, courts "'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." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (alteration in original) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)); *see also Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016). Accordingly, courts in 1945 would confer immunity if the State Department requested it. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010).

But if the Executive Branch remained silent, a court would "decide for itself" whether the immunity a foreign state sought was "one which it is the established policy of the [State Department] to recognize." *Samantar*, 560 U.S. at 311-12 (alteration in original) (first quoting *Ex parte Republic of Peru*, 318 U.S. 578, 587 (1943); then quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)). Courts would not "allow an immunity on new grounds which the government has not seen fit to recognize." *Bank Markazi*, 136 S. Ct. at 1328 (quoting *Hoffman*, 324 U.S. at 35). Indeed, less than a year *before* the IOIA was enacted, this Court in *Hoffman* denied immunity to Mexico because the State Department did not request it and no established ground supported it. 324 U.S. at 38.

Applying this framework leads to a straightforward conclusion: Even if the IOIA requires courts today to follow the immunity rules of 1945, courts should still not confer immunity upon international organizations where, as here, the FSIA would deny it and the Executive Branch has not asked for it. The "official policy of our Government"—reflected in the FSIA and, before that, in the 1952 Tate Letter—is 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.). And even more specifically, the State Department's view is that international organizations are not entitled to more immunity than the FSIA confers. *See supra* at 12-13 (setting forth the State Department's position). A court applying 1945 immunity law must "defer" to that political branch policy. *Cf. Altmann*, 541 U.S. at 696 (deferring to congressional judgment embodied in the FSIA).

2. The D.C. Circuit has rejected this logic on the ground that this Court's consistent description—beginning in 1943 and as recently as 2016—of the immunity rules that prevailed in 1945 has been mere "dicta." Pet. App. 6a. According to the D.C. Circuit, the law at that time instead bestowed "absolute immunity" on foreign governments—without ever expressly saying so. *Id.* 4a, 6a; *see also Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998).

This Court's statements respecting deference to the political branches, however, are not dicta. *Altmann* held 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). And this Court deemed the pre-1945 rule that courts would not allow immunity the government had not recognized "[p]articularly pertinent" in *Bank Markazi*, 136 S. Ct. at 1328, and "controlling" in *Hoffman*, 324 U.S. at 38. *See also OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762 n.4 (3d Cir. 2010) (noting that "considerable evidence" supports the conclusion that this Court's rule in 1945 was deference to the political branches, not absolute immunity).

Hedging its bets, the D.C. Circuit also suggested here that "virtually absolute" immunity existed in 1945 at least as "a matter of practice" because the State Department requested immunity back then "whenever a foreign sovereign was sued." Pet. App. 6a. But this assertion, too, is incorrect. In addition to the *Hoffman* case discussed above, the State Department either denied or declined to

suggest immunity in numerous pre-1945 cases, *see, e.g.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 71 (1938); *Lamont v. Travelers Ins. Co.,* 24 N.E.2d 81, 86 (N.Y. 1939), including some involving commercial activity, *see, e.g.*, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200, 203 (S.D.N.Y. 1929); *The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921). 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*, 24 N.Y.S.2d 201, 204, 206 (App. Div. 1940).

B. The D.C. Circuit's test for finding a waiver of immunity distorts the plain language of governing law.

The IOIA makes clear that international organizations "may expressly waive their immunity." 22 U.S.C. § 288a(b). Yet the D.C. Circuit's doctrine for assessing such waivers "lacks a sound legal foundation and is awkward to apply." Pet. App. 17a (Pillard, J., concurring). That doctrine, too, warrants this Court's review.

1. Analyzing under the IOIA whether an international organization has waived immunity to suit should be an uncomplicated task. All such organizations have founding agreements that reflect the judgment of the participating states—including the United States—as to the level of privileges and immunities necessary for the organization to carry out its particular functions. The IFC Articles of Agreement, like those of many other international organizations, state that except for suits by member states, "[a]ctions may be brought against the

Corporation." IFC Articles of Agreement, *supra*, art. VI, § 3. Where, as here, the plain terms of those documents waive immunity, those express waivers should be honored. *Cf., e.g.*, *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 & n.4 (1951) (explaining that the Federal Tort Claims Act, which gave district courts jurisdiction (subject to certain exceptions not pertinent here) to hear "any [tort] claim against the United States," "waive[d] the Government's immunity from suit in sweeping language" (quoting ch. 753, tit. IV, § 410(a), 60 Stat. 812, 844) (1946)).

The D.C. Circuit acknowledged that "read literally," the IFC's waiver provision "would seem to include a categorical waiver" of immunity. Pet. App. 7a. And that is how the State Department read identical language in the World Bank's Articles of Agreement when it was established. *See* Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 3, Dec. 27, 1945, 60 Stat. 1440, 1457-58. "[T]he Bank," the State Department explained, "will be subject to a suit." U.S. Dep't of State, *Constitutionality of the Bretton Woods Agreement Act* 90 (1945), http://bit.ly/2Dm0qwe. But instead of enforcing the text of the charter according to its plain terms, the D.C. Circuit has read the IOIA's waiver provision to insert "a qualifier into it." *Osseiran v. IFC,* 552 F.3d 836, 839 (D.C. Cir. 2009). The D.C. Circuit insists that under the IOIA, an international organization's express waiver of immunity "allow[s] only the type of suit by the type of plaintiff that 'would benefit the organization over the long term.'" Pet. App. 7a (emphasis omitted) (quoting *Osseiran*, 552 F.3d at 840); *see also Atkinson*, 156 F.3d at 1338.

The IOIA provides no license to engage in such picking and choosing. Its provision allowing international organizations to "expressly waive their immunity," 22 U.S.C. § 288a(b), contains no qualifier directing courts to assess whether an international organization will "benefit" in any given case from waiver of immunity from suit. Therefore, an organization's express, categorical waiver in its charter should be the end of the matter. At any rate, organizations' assessments of costs and benefits "are more reliably reflected in their charters and policies—here, in the broad waiver included in the IFC's Articles of Agreement—than in their litigation positions defending against pending claims." Pet. App. 19a (Pillard, J., concurring).

2. The D.C. Circuit's practice in applying its revisionist waiver test highlights the test's impropriety. The test assumes that an international organization's long-term goals are served by being amenable to suit based on commercial activity only when the party suing it "would not [have] enter[ed] into negotiations or contract with the organization absent waiver." Pet. App. 9a.

But, as Judge Pillard explained below, "the opposite would make more sense." Pet. App. 19a (Pillard, J., concurring). "Entities doing regular business with international organizations can write waivers of immunity into their contracts with the organizations." *Id.*; *see also OSS Nokalva*, 617 F.3d at 759 (referencing a contract clause allowing a software developer to sue an international organization). So perhaps the absence of a waiver of immunity in a contract negotiated by sophisticated parties might indicate something about the parties' intent. By

contrast, local people who "lack[] any bargaining opportunity" to obtain similar concessions—even regarding risky projects like this one—have no comparable protection. Pet. App. 20a (Pillard, J., concurring). All they have is the IOIA and its commitment to honor waivers of immunity in organizations' charters. Therefore, when such people bring suits against international organizations, the only way the organizations can demonstrate they are willing to be kept to their promises (and thereby benefit themselves in the long run) is to subject themselves to suit—at least insofar as foreign states would be subject to suit under the FSIA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 19, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 2017 Decided June 23, 2017

No. 16-7051

BUDHA ISMAIL JAM, ET AL.,
APPELLANTS

v.

INTERNATIONAL FINANCE CORPORATION,
APPELLEE

Appeal from United States District Court
for the District of Columbia
(No. 1:15-cv-00612)

Richard L. Herz argued the cause for appellants. With him on the briefs were *Marco B. Simons* and *Michelle C. Harrison*.

Deepak Gupta was on the brief for *amicus curiae* Daniel Bradlow in support of appellants.

Jennifer Green was on the brief for *amicus curiae* Dr. Erica Gould in support of appellants.

Francis A. Vasquez, Jr. argued the cause for appellee. With him on the brief was *Maxwell J. Hyman*.

Jeffrey T. Green and *Sena N. Munasifi* were on the brief for *amicus curiae* The International Bank for Reconstruction and Development, et al. in support of appellee.

Before: PILLARD, *Circuit Judge*, and EDWARDS and SILBERMAN, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* PILLARD.

SILBERMAN, *Senior Circuit Judge*: Appellants, a group of Indian nationals, challenge a district court decision dismissing their complaint against the International Finance Corporation (IFC) on grounds that the IFC is immune from their suit. The IFC provided loans needed for construction of the Tata Mundra Power Plant in Gujarat, India. Appellants who live near the plant alleged—which the IFC does not deny—that contrary to provisions of the loan agreement, the plant caused damage to the surrounding communities. They wish to hold the IFC financially responsible for their injuries, but we agree with the well-reasoned district court opinion that the IFC is immune to this suit under the International Organizations Immunities Act, and did not waive immunity for this suit in its Articles of Agreement.

I.

Appellants are fishermen, farmers, a local government entity, and a trade union of fishworkers. They assert that their way of life has been devastated by the power plant.[1]

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[1] Appellants' complaint paints a dismal picture. For example, the plant's cooling system discharges thermal pollution into the sea, killing off marine life on which fishermen rely for their income. Saltwater intrusion into the groundwater—a result of the plant's construction—means that farmers can no longer use that water for irrigation. (In fact, the villagers must purchase elsewhere freshwater necessary for consumption.) And because

The IFC, headquartered in Washington, is an international organization founded in 1956 with over 180 member countries. It provides loans in the developing world to projects that cannot command private capital. IFC Articles, art. III §3(i), Dec. 5, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117. The IFC loaned $450 million to Coastal Gujarat Power Limited, a subsidiary of Tata Power, an Indian company, for construction and operation of the Tata Mundra Plant. The loan agreement, in accordance with IFC's policy to prevent social and environmental damage, included an Environmental and Social Action Plan designed to protect the surrounding communities. The loan's recipient was responsible for complying with the agreement, but the IFC retained supervisory authority and could revoke financial support for the project.

Unfortunately, according to the IFC's own internal audit conducted by its ombudsman, the plant's construction and operation did not comply with the Plan. And the IFC was criticized by the ombudsman for inadequate supervision of the project. Yet the IFC did not take any steps to force the loan recipients into compliance with the Plan.

The appellants' claims are almost entirely based on tort: negligence, negligent nuisance, and trespass. They do, however, raise a related claim as alleged third party contract beneficiaries of the social and environmental terms of the contract. According to appellants, the IFC is not immune to these claims,

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the plant is coal-powered, coal must be transported from nine miles away on an open-air conveyor system. During that relocation, coal dust and ash disperse into the atmosphere and contaminate the surrounding land and air.

and, even if it was statutorily entitled to immunity, it has waived immunity.

II.

Appellants are swimming upriver; both of their arguments run counter to our long-held precedent concerning the scope of international organization immunity and charter-document immunity waivers.

The IFC relies on the International Organizations Immunities Act (IOIA), which provides that international organizations "shall enjoy the same immunity from suit . . . 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." 22 U.S.C. § 288a(b). The President determines whether an organization is entitled to such immunity. 22 U.S.C. § 288. The IFC has been designated an international organization entitled to the "privileges, exemptions, and immunities" conferred by the statute. Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 5, 1956).

In response to the IFC's claim of statutory entitlement under the IOIA, appellants rather boldly assert that *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998), our leading case on the immunity of international organizations under that statute, should not be followed. *Atkinson* held that foreign organizations receive the immunity that foreign governments enjoyed at the time the IOIA was passed, which was "virtually absolute immunity." *Id.* at 1340 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)). And that immunity is not diminished even if the immunity of foreign

governments has been subsequently modified, particularly by the widespread acceptance and codification of a "commercial activities exception" to sovereign immunity. *E.g.*, 28 U.S.C. § 1605(a)(2).

Attacking *Atkinson*, appellants make two related contentions. First, *Atkinson* was wrong to conclude that when Congress tied the immunity of international organizations to foreign sovereigns, it meant the immunity foreign sovereigns enjoyed in 1945. Instead, according to appellants, who echo the arguments pressed in *Atkinson* itself, lawmakers intended the immunity of the organizations to rise or fall—like two boats tied together—with the scope of the sovereigns' immunity. In other words, even assuming foreign sovereigns enjoyed absolute immunity in 1945, if that immunity diminished, as it has with the codification of the commercial activity exception, Congress intended that international organizations fare no better.

The problem with this argument—even if we thought it meritorious, which we do not—is that it runs counter to *Atkinson*'s holding, which explicitly rejected such an evolving notion of international organization immunity. *See* 156 F.3d at 1341. We noted that Congress anticipated the possibility of a change to immunity of international organizations, but explicitly delegated the responsibility to the President to effect that change—not the judiciary. *Id.* Morever [sic], when considering the legislation, Congress rejected a commercial activities exception—which is exactly the evolutionary step appellants wish to have us adopt. *Id.* As the district court recognized, we recently reaffirmed *Atkinson*, saying that the case "remains vigorous as Circuit law." *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014).

Recognizing that a frontal attack on *Atkinson*'s holding would require an en banc decision, appellants next argued that we can, and should, bypass its precedential impact because the Supreme Court has undermined its premise—that in 1945 the immunity of foreign sovereigns was absolute (or virtually absolute).

To be sure, the Court has said in dicta that in 1945, courts "'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 . . . ." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (quoting *Verlinden*, 461 U.S. at 486). But as a matter of practice, at that time, whenever a foreign sovereign was sued, the State Department did request sovereign immunity. *Id.* The only arguable exception involved a lawsuit in rem against a ship owned but not possessed by Mexico; it was not a suit against Mexico. *See Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). And, even if appellants are correct that the executive branch played an important role in immunity determinations in 1945, that does not diminish the absolute nature of the immunity those sovereigns enjoyed; although Supreme Court dicta refers to the *mechanism* for conferring immunity on foreign sovereigns in 1945, Executive Branch intervention does not speak to the *scope* of that immunity.

In any event, the *holding* of *Atkinson*—regardless how one characterizes the immunity of foreign sovereigns in 1945—was that international organizations were given complete immunity by the IOIA unless it was waived or the President intervened. And as we noted, that holding was reaffirmed in *Nyambal after* the Supreme Court dicta on which

appellants primarily rely. Therefore, we conclude our precedent stands as an impassable barrier to appellants' first argument.

III.

That brings us to the waiver argument. There is no question that the IFC has waived immunity for some claims. Indeed, its charter, read literally, would seem to include a categorical waiver.[2] But our key case interpreting identical waiver language in the World Bank charter, *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), read that language narrowly to allow only the *type of suit* by the *type of plaintiff* that "would benefit the organization over the long term," *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009)

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[2] The Articles of Agreement contains the following provision, titled "Position of the Corporation with Regard to Judicial Process":

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Corporation shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.

IFC Articles, art. 6, § 3(vi). That provision carries "full force and effect in the United States" under the International Finance Corporation Act. 22 U.S.C. § 282g.

(citing *Atkinson,* 156 F.3d at 1338 and *Mendaro*, 717 F.2d at 618).[3]

To be sure, it is a bit strange that it is the judiciary that determines when a claim "benefits" the international organization; after all, the cases come to us when the organizations *deny* the claim, and one would think that the organization would be a better judge as to what claims benefit it than the judiciary. Perhaps that is why *Osseiran*, when applying *Mendaro*, refers to long-term goals, rather than immediate litigating tactics.

But whether or not the *Mendaro* test would be better described using a term different than "benefit," it is the *Mendaro* criteria we are obliged to apply. Ironically, the line of cases applying *Mendaro* ended up tying waiver to commercial transactions, so there is a superficial similarity to the commercial activities test that appellants would urge us to accept. But whatever the scope of the commercial activities exception to sovereign immunity, that standard is necessarily broader than the *Mendaro* test; if that exception applied to the IFC, the organization would *never* retain

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[3] Appellants argue that *Mendaro* impermissibly overruled our earlier case, *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 832 F.2d 454 (D.C. Cir. 1967), without an intervening Supreme Court or en banc decision. Appellants rely on dicta in *Lutcher*, but its holding was that the Inter-American Development Bank waived immunity to a breach of contract suit by a debtor. 382 F.2d at 456-68. *Mendaro* expressly considered the rationale of *Lutcher* and declined to extend its holding to the suit before it. 717 F.2d at 614-17. Indeed, the *Mendaro* test emerged in part from *Lutcher*'s discussion that the charter language at issue indicated waiver where "vulnerability to suit contributes to the effectiveness of the [organization's] operations." *Lutcher*, 382 F.2d at 456.

immunity since its operations are *solely* "commercial," i.e., the IFC does not undertake any "sovereign" activities.

The *Mendaro* test instead focused on identifying those transactions where the other party would not enter into negotiations or contract with the organization absent waiver. *See* 717 F.2d at 617 (inferring waiver only insofar as "necessary to enable the [organization] to fulfill its functions"). *Mendaro* provided examples: suits by debtors, creditors, bondholders, and "those other potential plaintiffs to whom the [organization] would have to subject itself to suit in order to achieve its chartered objectives." *Id.* at 615.

We have stretched that concept to include a claim of promissory estoppel, *see Osseiran*, 552 F.3d at 840-41, and a quasi-contract claim of unjust enrichment, *see Vila v. Inter-Am. Invest. Corp.*, 570 F.3d 274, 278-80 (D.C. Cir. 2009). But all the claims we have accepted have grown out of business relations with outside companies (or an outside individual engaged directly in negotiations with the organization).[4] *Compare Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454 (D.C. Cir. 1967) (finding

[4] Appellants do present a third party beneficiary claim, which, unlike their other claims, sounds in principles of contract law. We have previously found the distinction between contract and noncontract claims relevant. See *Vila* 570 F.3d at 280 n.3. But even if appellants qualified as third party beneficiaries, a point we do not address, they were not a necessary negotiating party. Accordingly, inferring waiver in this case stands at odds with the reasoning in *Mendaro*, i.e., that *Mendaro* implies waiver when the parties negotiated with the background of international organization immunity.

waiver in debtors' suit to enforce loan agreement) *with Mendaro*, 717 F.2d at 611 (rejecting employee sexual harassment and discrimination claim); *Atkinson*, 156 F.3d at 1336 (rejecting garnishment proceeding against organization employee).

Appellants attempt to define "benefit" more broadly. They argue that holding the IFC to the very environmental and social conditions it put in the contract, conditions which the IFC itself formulated, would benefit the IFC's goals. Even though appellants had no commercial relationship with the IFC (other than, allegedly, as third party beneficiaries of the loan agreement's requirements), they contend that the IFC will benefit from their lawsuit because they are attempting to hold the IFC to its stated mission and to its own compliance processes. They argue that obtaining "community support" is a required part of any IFC project, and suggest that communities will be unlikely to support IFC projects if the IFC is not amenable to suit. Appellants' ability to enforce the requirement that the IFC protect surrounding communities is as central to the IFC's mission as a commercial partner's ability to enforce the requirement that the IFC pay its electricity bill.

But *Mendaro* drew another distinction between claims that survive and those that don't. Those claims that implicate internal operations of an international organization are especially suspect because claims arising out of core operations, not ancillary business transactions, would threaten the policy discretion of the organization. *Accord Vila*, 570 F.3d at 286-89 (Williams, J., dissenting).

That notion applies here. Should appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the subject of a suit in Washington.[5] Appellee's suggestion that the floodgates would be open does not seem an exaggeration. Finally, if the IFC's internal compliance report were to be used to buttress a claim against the IFC, we would create a strong disincentive to international organizations using an internal review process. So even though appellants convince us that the term "benefit" is something of a misnomer—its claim in some sense can be thought of as a "benefit"—it fails the *Mendaro* test.

Accordingly, the district court decision is affirmed.

So ordered.

[5] We need not reach appellee's alternative argument that this case may be dismissed under the doctrine of forum non conveniens.

PILLARD, *Circuit Judge*, *concurring*: I agree that *Atkinson* and *Mendaro*, which remain binding law in this circuit, control this case. I write separately to note that those decisions have left the law of international organizations' immunity in a perplexing state. I believe both cases were wrongly decided, and our circuit may wish to revisit them.

1. The International Organizations Immunities Act (IOIA), Pub L. No. 79-291, 59 Stat. 669 (1945) (codified at 22 U.S.C. § 288 *et seq.*), grants international organizations the same immunity "as is enjoyed by foreign governments." *Id.* § 2(b). When Congress enacted the IOIA in 1945, foreign states enjoyed "virtually absolute immunity," so long as the State Department requested immunity on their behalf. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). President Eisenhower designated the IFC as entitled to immunity under the IOIA in 1956. *See* Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 5, 1956). Congress and the courts have since recognized that foreign governments' immunity is more limited, as described by the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1604-05; *see Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). We took a wrong turn in *Atkinson* when we read the IOIA to grant international organizations a static, absolute immunity that is, by now, not at all the same "as is enjoyed by foreign governments," but substantially broader.

When a statute incorporates existing law by reference, the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up. *Atkinson* itself correctly acknowledged that a "statute [that] refers to a subject generally adopts the law on the

subject," including "all the amendments and modifications of the law subsequent to the time the reference statute was enacted." *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (emphasis omitted); *see El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016).

The IOIA references foreign sovereign immunity, but in *Atkinson* we did not apply the familiar rule of dynamic incorporation because we thought another IOIA provision showed that Congress intended that reference to be static. Section 1 of the IOIA authorizes the President to "withhold or withdraw from any such [international] organization or its officers or employees any of the privileges, exemptions, and immunities provided for" by the IOIA. IOIA § 1. We read that language to mean that Congress intended the President alone to have the ability, going forward, to adjust international organizations' immunity from where it stood as of the IOIA's enactment in 1945. *Atkinson*, 156 F.3d at 1341. That presidential power was, we thought, exclusive of any shift in international organizations' immunity that might be wrought by developments in the law of foreign sovereign immunity to which the IOIA refers.

Correctly read, however, section 1 merely empowers the President to make organization- and function-specific exemptions from otherwise-applicable immunity rules. It says that the President may "withhold or withdraw from *any such organization*"—note the singular—"or *its* officers or employees any of the privileges, exemptions, and immunities" otherwise provided for by the IOIA. IOIA § 1 (emphasis added). Section 1 thus empowers the President to roll back an

international organization's immunity on an organization-specific basis. *See, e.g.*, Elizabeth R. Wilcox, *Digest of United States Practice in International Law* 405 (2009) (describing President Reagan's 1983 exercise of section 1 authority to withhold immunity from INTERPOL, followed by President Obama's 2009 restoration of the immunity after INTERPOL opened a liaison office in New York). Nothing about section 1 suggests that Congress framed or intended it to be the exclusive means by which an international organization's immunity might be determined to be less than absolute.

The inference we drew from section 1 in *Atkinson* seems particularly strained because it assumes that Congress chose an indirect and obscure route to freezing international organizations' immunity over a direct and obvious one. If Congress intended to grant international organizations an unchanging absolute immunity (subject only to presidential power to recognize organization-specific exceptions) it could have simply said so. It might have expressly tied international organizations' immunity to that enjoyed by foreign governments as of the date of enactment. Or, even better, it might have avoided cross-reference altogether by stating that international organizations' immunity is absolute. As it happens, the original House version of the IOIA did just that, providing international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. (as introduced, Oct. 24, 1945; referred to H. Comm. on Ways and Means), but the Senate rejected that as "a little too broad," 91 Cong. Rec. 12,531 (1945), even as it retained the absolute immunity language in provisions granting the property of international organizations

immunity from search, confiscation and taxation. *See* IOIA §§ 2(c), 6. In lieu of the House version's broad language, the Senate adopted the current formulation of section 2(b), which provides international organizations the "same immunity . . . as is enjoyed by foreign governments." H.R. 4489, 79th Cong. (as reported by S. Comm. on Finance, Dec. 18, 1945).

The considered view of the Department of State, harking back to before *Atkinson*, is that the immunity of international organizations under the IOIA was not frozen as of 1945, but follows developments in the law of foreign sovereign immunity under the FSIA. In a 1980 letter, then-Legal Adviser Roberts Owen opined that, by "virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities." Letter from Roberts B. Owen, Legal Adviser, U.S. Department of State, to Leroy D. Clark, General Counsel, Equal Employment Opportunity Commission (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 917-18 (1980). Although the State Department's interpretation of the IOIA is not binding on the court, the Department's involvement in the drafting of the IOIA lends its view extra weight. *See* H.R. Rep. No. 79-1203, at 7 (1945) (referring to the draft bill as "prepared by the State Department"); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (citing a letter of the State Department's Legal Adviser and encouraging courts to "give serious weight to the Executive Branch's view" in cases that may affect foreign policy).

Reading the IOIA to dynamically link organizations' immunity to that of their member states makes sense. The contrary view we adopted in *Atkinson* appears to allow states, subject to suit under the commercial activity exception of the FSIA, to carry on commercial activities with immunity through international organizations. Thus, the Canadian government is 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—is immune from suit under *Atkinson*. *See* Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962); *see also* Convention on Great Lakes Fisheries, Can.-U.S., Sept. 10, 1954, 6 U.S.T. 2836. Neither the IOIA nor our 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.

Were I not bound by *Atkinson*, I would hold that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states. *Accord OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010) (declining to follow *Atkinson* and holding that restricted immunity as codified in the FSIA, including its commercial activity exception, applies to international organizations under the IOIA).

2. *Atkinson*'s error is compounded in certain suits involving waiver under the *Mendaro* doctrine. In *Mendaro v. World Bank*, we decided that courts should pare back an international organization's apparent

waiver of immunity from suit whenever we believe the waiver would yield no "corresponding benefit" to the organization. 717 F.2d 610, 617 (D.C. Cir. 1983); *see Osserian v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009) (holding organization's facially broad waiver of immunity effective only as to types of plaintiffs and claims that "would benefit the organization over the long term"). That doctrine lacks a sound legal foundation and is awkward to apply; were I not bound by precedent, I would reject it.

It is undisputed that IOIA immunity may be waived, 22 U.S.C. § 288a(b), and the majority recognizes that the IFC's charter "would seem to include a categorical waiver." Maj. Op. 6-7 & n.2; *see* IFC Articles of Agreement art. 6, § 3, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 118. Half a century ago, we read the Agreement establishing the Inter-American Development Bank (IADB) to effectuate a broad waiver of the Bank's immunity. *See Lutcher S. A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967) (Burger, J.). The IFC's Articles of Agreement, which use the same waiver language as did the IADB in *Lutcher*, would appear to waive the IFC's immunity here. Under the reasoning of *Lutcher*, the IFC, like the IADB in that case, may be sued in United States court.

But *Lutcher* was not our last word. As just noted, we decided in *Mendaro* to honor an international organization's "facially broad waiver of immunity" only insofar as doing so provided a "corresponding benefit" to the organization. 717 F.2d at 613, 617. We thought it appropriate to look to the "interrelationship between the functions" of the international organization and "the underlying purposes of international immunities"

to cabin a charter document's immunity waiver. *Id.* at 615. The member states, we opined in *Mendaro*, "could only have intended to waive the Bank's immunity from suits by its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives." *Id.* We decided the waiver did not apply to the claim of Mendaro, a former Bank employee challenging her termination, because recognizing employment claims had no "corresponding benefit" for the Bank. *Id.* at 612-14.

We saw *Mendaro* as distinguishable from *Lutcher*. Allowing the debtor's claims in *Lutcher* "would directly aid the Bank in attracting responsible borrowers," whereas complying with the law governing the Bank's "internal operations" in *Mendaro* would not "appreciably advance the Bank's ability to perform its functions." *Id.* at 618-20 (emphasis omitted). In other words, *Mendaro* assumes that business counterparties will be unwilling to transact with an international organization if they lack judicial recourse against it, but that making employees' legal rights unenforceable against such an organization will not affect their willingness to work there. We thus held that a facially broad waiver of an organization's immunity should be read not to allow employee claims.

The "corresponding benefit" doctrine calls on courts to second-guess international organizations' own waiver decisions and to treat a waiver as inapplicable unless it would bring the organization a "corresponding benefit"—presumably one offsetting the burden of amenability to suit. The majority acknowledges that "it is a bit strange" that *Mendaro* calls on the judiciary to re-determine an international

organization's own waiver calculus. Slip Op. at 8. I agree that the organization itself is in a better position than we are to know what is in its institutional interests. But, whereas my colleagues point to the fact that "the cases come to us when the organizations *deny* the claim," *id.*, I would be inclined to think that organizations' assessments of their own long-term goals are more reliably reflected in their charters and policies—here, in the broad waiver included in IFC's Articles of Agreement—than in their litigation positions defending against pending claims.

It is not entirely clear why we have drawn the particular line we have pursuant to *Mendaro*. Why are suits by a consultant, a potential investor, and a corporate borrower in an international organization's interest, but suits by employees and their dependents not? *Compare, e.g.*, *Vila v. Inter-American Investment, Corp.*, 570 F.3d 274, 276, 279-82 (D.C. Cir. 2009) (permitting suit by a consultant); *Osseiran*, 552 F.3d at 840-41 (permitting suit by a potential investor); *Lutcher*, 382 F.2d at 459-60 (permitting suit by a corporate borrower), *with, e.g.*, *Atkinson*, 156 F.3d at 1338-39 (barring suit by a former wife seeking garnishment of former husband's wages); *Mendaro*, 717 F.2d at 618-19 (barring suit by a terminated employee asserting a sex harassment and discrimination claim).

Our cases seem to construe charter-document immunity waivers to allow suits only by commercial parties likely to be repeat players, or by parties with substantial bargaining power. But the opposite would make more sense: Entities doing regular business with international organizations can write waivers of immunity into their contracts with the organizations.

See, e.g., *OSS Nokalva*, 617 F.3d at 759 (contract clause authorizing software developer to sue European Space Agency in state and federal courts in New Jersey). Sophisticated commercial actors that fail to bargain for such terms are surely less entitled to benefit from broad immunity waivers than victims of torts or takings who lacked any bargaining opportunity, or unsophisticated parties unlikely to anticipate and bargain around an immunity bar.

The IFC successfully argued here that it would enjoy no "corresponding benefit" from immunity waiver. The local entities and residents that brought this suit contend that giving effect here to the IFC's waiver would advance the Corporation's organizational goals. The "IFC requires 'broad community support' before funding projects" like the Tata Mundra power plant, and "local communities may hesitate to host a high-risk project," the appellants contend, "if they know that the IFC can ignore its own promises and standards and they will have no recourse." Appellants Br. at 48-49. Without directly addressing the benefits of legal accountability to the communities it seeks to serve, the IFC contends that treating the waiver in its Articles of Agreement as effective here would open a floodgate of litigation in United States courts. That argument has it backwards: The IFC persuaded the majority to stem a litigation flood it anticipates only because the immunity waiver in the IFC's own Articles of Agreement opened the gate.

The perceived need for *Mendaro*'s odd approach would not have arisen if we had, back in *Atkinson*, read the IOIA to confer on international organizations the same immunity as is enjoyed by foreign governments—*i.e.* restrictive immunity that, today,

would be governed by the FSIA. As the majority observes, Slip Op. at 8, the cases in which we have applied *Mendaro* to hold that claims are not immunity-barred look remarkably like cases that would be allowed to proceed under the FSIA's commercial activity exception. The activities we held to be non-immunized—such as suits by "debtors, creditors, [and] bondholders," *Mendaro*, 717 F.2d at 615, "suits based on commercial transactions with the outside world" affecting an organization's "ability to operate in the marketplace," *Osseiran*, 552 F.3d at 840, and unjust enrichment claims by commercial lending specialists, *Vila*, 570 F.3d at 276, 279-82—seem like just the kinds of claims that would be permitted under the commercial activity exception. We should have achieved that result, not via *Mendaro*'s "corresponding benefit" test, but by recognizing that the IOIA hitched the scope of international organizations' immunity to that of foreign governments under the FSIA. There is a time-tested body of law under the FSIA that delineates its contours—including its commercial activity exception. The pattern of decisions applying *Mendaro* may approximate some of the results that would have occurred had international organizations been subject to the FSIA, but *Mendaro* begs other important questions that assimilation of IOIA immunity to the FSIA would resolve.

Our efforts to chart a separate course under the IOIA were misguided from the start, and the doctrinal tangle has only deepened in light of the amorphous waiver-curbing doctrine that has developed under *Mendaro*. I believe that the full court should revisit both *Atkinson* and *Mendaro* in an appropriate case.

But because those decisions remain binding precedent in our circuit, I concur.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUDHA ISMAIL JAM, et al., Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	Civil Action No. 15-612 (JDB)

MEMORANDUM OPINION

Located in a coastal region of Gujarat, India, the coal-fired Tata Mundra Power Plant was constructed in order to supply much-needed power for India's continued economic growth. But according to plaintiffs, who live, fish, and farm in the shadow of the Plant, its main legacy has been environmental and social harm—to the marine ecosystem, to the quality of the air, to plaintiffs' health, and to their way of life. Plaintiffs believe that the International Finance Corporation (IFC), which provided $450 million for construction of the Plant, is primarily responsible for their injuries. They have sued IFC in this Court seeking several forms of equitable relief or, in the alternative, compensatory and punitive damages. IFC now moves to dismiss on several grounds, most notably that it is immune from this suit under the International Organizations Immunities Act. Because the Court agrees that IFC is immune from this suit, it will

dismiss plaintiffs' complaint in its entirety, without reaching IFC's other arguments.

BACKGROUND

IFC is an international organization with 184 member countries, including the United States and India. Def.'s Mot. to Dismiss [ECF No. 10-1] at 3. As described in its Articles of Agreement, IFC's purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries." Ex. 1 to Zeidan Decl. [ECF No. 10-8] (Articles of Agreement) Art. I. To fulfill that purpose, IFC may invest in privately run projects for which "sufficient capital is not available on reasonable terms." *Id.* The project at the center of this case, development of the Tata Mundra Power Plant, was carried out by Coastal Gujarat Power Limited (CGPL), a subsidiary of Tata Power, an Indian power company. IFC loaned CGPL $450 million for the development of the Plant. Total project cost was estimated to be $4.14 billion. Compl. [ECF No. 1] ¶¶ 56, 47.

Internal IFC policies demand careful attention to the environmental and social impacts of IFC-financed projects. IFC's "Performance Standards on Environmental and Social Sustainability" create a framework for the assessment, avoidance, minimization, and mitigation of environmental and social risks. *See* Ex. 5 to Herz Decl. [ECF No. 22-5] (2012 Performance Standards) at ¶¶ 1–8. "IFC will only finance investment activities that are expected to meet the requirements of the Performance Standards within a reasonable period of time." Ex. 2 to Herz Decl. [ECF No. 22-5] (2012 Policy on Environmental and Social Sustainability) ¶ 22. When IFC does invest in a

project, the resulting loan agreement requires the client to comply with the Performance Standards and other related policies. *See* 2012 Policy on Environmental and Social Sustainability ¶ 24. Thus, "managing environmental and social risks and impacts in a manner consistent with the Performance Standards [becomes] the responsibility of the client." *Id.* ¶ 7. But IFC retains responsibility for monitoring and supervising its clients' efforts. *Id.* "If the client fails to comply with its environmental and social commitments," then "IFC will work with the client to bring it back into compliance." *Id.* ¶ 24. "Persistent delays in meeting [those commitments] can lead to loss of financial support from IFC." *Id.* ¶ 22.

From the earliest stages of its involvement, IFC recognized that the development of the Plant entailed significant—and possibly irreversible—environmental and social risks. *See* Ex. 7 to Zeidan Decl. [ECF No. 10-14] (Compliance Advisory Ombudsman Assessment Report) at 4–5. Hence, before closing the deal on IFC's $450 million investment, IFC and CGPL developed an Environmental and Social Action Plan in an attempt to manage the risks they had identified. Compl. ¶¶ 49–51. Ultimately, the Action Plan was incorporated into the loan agreement, along with IFC's Performance Standards and other environmental guidelines. *See* Ex. 1 to Karim Decl. [ECF No. 10-5 & -6] (Schedule I to Loan Agreement) at 91–92 (requiring CGPL to comply with the "Environmental and Social Requirements"); *see also id.* at 13–14 (defining "Environmental and Social Requirements").

Plaintiffs include fishermen and farmers who live and work near the Plant, suing on behalf of themselves and others similarly situated; a local trade union

(MASS) dedicated to protection of fisherworkers' rights; and the local government of a nearby village. *See* Compl. ¶¶ 13–15. In plaintiffs' view, CGPL and IFC have failed to honor their commitments. They point to a host of negative environmental and social impacts allegedly caused by the operation of the Plant: hot water from the cooling system has substantially altered the marine environment, depressing the fish catch near the shore; the water intake channel has leaked saltwater into the groundwater, thereby making it unsuitable for drinking or irrigation; emissions have significantly degraded local air quality; local fisherman and farmers have been displaced. *See* Pls.' Opp'n [ECF No. 22] at 3–5; *see also* Compl. ¶¶ 74–115. Plaintiffs feel that, when these individual impacts are considered in the aggregate, their "way of life [has been] fundamentally threatened or destroyed by the Tata Mundra Plant." Compl. ¶ 6.

Plaintiffs blame IFC for the injuries they have suffered. In their view, if IFC had "follow[ed] its own policies and enforce[d] the conditions of the loan agreement," the negative environmental and social impacts caused by the Plant could have been avoided, minimized, or mitigated. Compl. ¶ 191; *see id.* ¶¶ 176–92. Based on that conviction, plaintiffs filed a complaint with IFC's Compliance Advisor Ombudsman (CAO). *See* Ex. 6 to Zeidan Decl. [ECF No. 10-13]. The CAO is IFC's "independent recourse and accountability mechanism . . . for environmental and social concerns." Ex. 3 to Zeidan Decl. [ECF No. 10-10] (CAO Operational Guidelines) at 4. But the CAO's compliance function is focused on IFC's environmental and social performance, not on the performance of IFC's clients. *Id.* at 22. CAO compliance investigations

focus on whether IFC has "fail[ed] to address environmental and/or social issues as part of [its] review process," and whether that failure has "resulted in outcomes that are contrary to the desired effect of the [IFC's] policy provisions." *Id.* at 24. The final investigation report, which is made available on the CAO's website, will detail any identified policy violations. *Id.* at 25. However, the CAO is not a court, has "no authority with respect to judicial processes," and creates no "legal enforcement mechanism." *Id.* at 4. Thus, the CAO cannot compel IFC to right its wrongs, or to provide remedies to individuals who have been harmed by IFC-financed projects.

Plaintiffs understand that well. The CAO investigation into their complaint concluded that IFC had failed adequately to consider the environmental and social risks to which plaintiffs would be exposed as a result of the Plant's development. *See* Ex. 11 to Zeidan Decl. [ECF No. 10-18] (CAO Audit Report) at 4. In the CAO's estimation, IFC then compounded that error by failing to perform an environmental and social impact assessment "commensurate with project risk," and by failing to "address [subsequent] compliance issues during [project] supervision." *Id.*; *see also id.* at 50–53 (summarizing the key compliance findings). IFC responded with a letter challenging some of the CAO's conclusions, *see* Ex. 12 to Zeidan Decl. [ECF No. 10-19], and with a statement laying out a ten-item action plan to address any compliance shortcomings, *see* Ex. 13 to Zeidan Decl. [ECF No. 10-20]. But the CAO was unimpressed. In a subsequent monitoring report, it explained that "a number of its findings suggest the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts

raised by [plaintiffs]." Ex. 14 to Zeidan Decl. [ECF No. 10-21] at 5. In the eyes of the CAO, the action plan proposed by IFC and CGPL fell short of that mark. *Id.* The matter remains open for continued monitoring. Def.'s Mot. to Dismiss at 7.

Seeking the relief they cannot obtain from the CAO, plaintiffs have filed a complaint in this Court. Their case is focused on "the irresponsible and negligent conduct of the International Finance Corporation in appraising, financing, advising, supervising and monitoring its significant loan to enable the development of the Tata Mundra Project in Gujarat, India." Compl. ¶ 2. That conduct, plaintiffs contend, gives rise to valid claims for negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract. *See id.* ¶¶ 294–332. As remedies, plaintiffs seek various forms of injunctive relief running against IFC or, in the alternative, compensatory and punitive damages. *See id.* ¶¶ 333–45. IFC has responded with a motion to dismiss. At the threshold, IFC believes plaintiffs' suit is barred by the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288 *et seq.* Alternatively, IFC asks the Court to dismiss on grounds of *forum non conveniens* or for failure to join indispensable third parties. Finally, IFC argues that some of the counts in plaintiffs' complaint fail to state a claim upon which relief can be granted. *See* Def.'s Mot. to Dismiss at 1–2. As the Court agrees that IFC is immune from plaintiffs' suit, it will address only IFC's threshold immunity argument.

LEGAL STANDARD

IFC's immunity claim seeks dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). As "[f]ederal courts are courts of limited jurisdiction[,] . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting" it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Thus, plaintiffs must establish jurisdiction by a preponderance of the evidence. *See* Gordon v. Office of the Architect of the Capitol, 750 F. Supp. 2d 82, 87 (D.D.C. 2010). In making this determination, "the Court must accept as true all of the factual allegations contained in the complaint," but those allegations "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 86–87 (internal quotation marks and citations omitted).

DISCUSSION

"It is well established that statutes like the IOIA that grant immunity to foreign nations and international organizations limit the District Court's jurisdiction over parties that are entitled to such protection." *Weinstock v. Asian Dev. Bank*, 2005 WL 1902858, at *3 (D.D.C. July 13, 2005). "The International Organizations Immunities Act applies to those international organizations which the President designates as entitled to [its] benefits . . . ." *Osseiran v. Int'l Finance Corp.*, 552 F.3d 836, 838 (D.C. Cir. 2009). IFC is among those organizations that have been so designated. *Id.* (citing Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 2, 1956)). Under the IOIA, IFC

generally "enjoy[s] the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). "When Congress enacted the IOIA in 1945, foreign sovereigns enjoyed—contingent only upon the State Department's making an immunity request to the court—'virtually absolute immunity.'" *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)). The IOIA thus confers that same absolute immunity upon international organizations like IFC. *Id.* at 1341. Immunity may be waived, however, "for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b).

IFC's Articles of Agreement contain such a waiver provision. Titled "Position of the Corporation with Regard to Judicial Process," it reads:

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Corporation shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.

Articles of Agreement, Art. VI, § 3.[1] Based on the broad language of this waiver, one might conclude that IFC retained immunity only from suits by its members. The D.C. Circuit, however, has instructed courts to read such waivers more narrowly, with careful attention to "the interrelationship between the functions of the [IFC] set forth in the Articles of Agreement and the underlying purposes of international immunities." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983).

"'Since the purpose of the immunities accorded to international organizations is to enable the organizations to fulfill their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization's goals.'" *Atkinson*, 156 F.3d at 1338 (quoting *Mendaro*, 717 F.2d at 617). Waivers should be more broadly construed only "when the waiver would arguably enable the organization to pursue more effectively its institutional goals." *Vila*, 570 F.3d at 278–89 (internal quotation marks omitted). On the other hand, "'when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization's discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity.'" *Id.* at 279 (quoting *Mendaro*, 717 F.2d at 617). The relevant question is

[1] IFC's waiver provision is identical to that of its parent entity, the World Bank, *Osseiran*, 552 F.3d at 839, and nearly identical to that of the Inter-American Investment Corporation, *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 278 (D.C. Cir. 2009).

thus "whether a waiver of immunity to allow this type of suit, by this type of plaintiff, would benefit the organization over the long term." *Osseiran*, 552 F.3d at 840. Hence, immunity "should be construed as not waived unless the particular type of suit would further [IFC's] objectives." *Atkinson*, 156 F.3d at 1338.

As a general matter, "promises founded on good faith alone are worth less than obligations enforceable in court." *Osseiran*, 552 F.3d at 187. International organizations, which must often participate in the marketplace in order to fulfill their chartered functions, may therefore waive their immunity from certain kinds of suits to enhance their credibility in dealings with certain counterparties. The World Bank, for example, waives its immunity for suits arising out of its "commercial transactions with the outside world," brought by "its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives." *Mendaro*, 717 F.2d at 615, 618. IFC has waived immunity for a suit by a prospective buyer of an IFC investment, who brought promissory estoppel and breach of confidentiality claims after the deal soured. *Osseiran*, 552 F.3d at 840–41. And the Inter-American Investment Corporation was not immune from the unjust enrichment claim of an independent consultant who had provided advisory services to the organization without being paid. *Vila*, 570 F.3d at 276–78.

Plaintiffs believe their suit fits comfortably within this precedent. Because their suit arises from IFC's "*external* activities and relationships with host communities," and because IFC "could not function without credible policies and promises" to those

communities, plaintiffs argue that a waiver would benefit IFC here. Pls.' Opp'n at 22. But plaintiffs' argument glosses over some material differences between those waiver of immunity cases and this one. International organizations have previously waived immunity for suits brought by individual plaintiffs with whom the organization had a direct commercial relationship. Here, on the other hand, plaintiffs are a would-be class of fishermen and farmers, and two institutional plaintiffs that represent their interests—none of whom have a commercial relationship with IFC. *See* Compl. ¶¶ 6, 13–15. Nor is this the type of suit for which waiver has previously been found. In both *Osseiran* and *Vila*, the underlying claims invoked principles of contract law. *See Vila*, 570 F.3d at 276. Plaintiffs' claims, however, sound primarily in tort. *See* Compl. ¶¶ 294–324 (asserting claims for negligence, negligent supervision, public nuisance, private nuisance, and trespass); *see also Banco de Seguros del Estado v. Int'l Finance Corp.*, 2007 WL 2746808, at *5–6 (S.D.N.Y. Sept. 20, 2007) (IFC did not waive immunity for negligent supervision claim by third-party). True, plaintiffs do bring one claim for breach of contract. *See* Compl. ¶¶ 325–32. But it is a stretch to characterize that claim, as plaintiffs attempt to do, as one arising purely from IFC's external activities. Plaintiffs' own complaint characterizes the suit as one that "arises out of" IFC's "irresponsible and negligent conduct . . . in appraising, financing, advising, supervising and monitoring its significant loan" to CGPL. *Id.* ¶ 2. By focusing on IFC's internal decision-making processes, the suit invites—indeed, demands—"judicial scrutiny of the [IFC's] discretion to select and administer its programs." *Vila*, 570 F.3d at 279 (internal quotation marks omitted). Waiver of

immunity is highly unlikely in such circumstances. *See Mendaro*, 717 F.2d at 617.

Nonetheless, in assessing the claim that immunity has been waived, the Court remains obliged to weigh the benefits and costs that a waiver may entail. *Vila*, 570 F.3d at 281. On the cost side of the ledger, the Court may appropriately consider the litigation costs inherent in defending this type of suit. *See Atkinson*, 156 F.3d at 1339. In cases where the D.C. Circuit has found a waiver, the organization has failed to come forward with robust arguments about costs. *See Osseiran*, 552 F.3d at 841 ("International Finance identifies no unique countervailing costs . . . ."); *Vila*, 570 F.3d at 281 (The Inter-American Investment Corporation "has not identified countervailing costs that are distinguishable from the costs associated with a claim for promissory estoppel."). But here, IFC argues that waiver would "produce a considerable chilling effect on IFC's capacity and willingness to lend money in developing countries," by opening "a floodgate of lawsuits by allegedly aggrieved complainants from all over the world." Def.'s Reply [ECF No. 23] at 9–10. Litigation of this kind, in other words, would "open [IFC] to disruptive interference with its lending policies." *Vila*, 570 F.3d at 281 (internal quotation marks and brackets omitted). Since this type of suit is aimed at IFC's internal decision-making process, the Court has little reason to doubt IFC's assessment of its concerns.

But plaintiffs take issue with IFC's cost contentions. IFC will only incur this cost, plaintiffs' argument goes, if it persists in providing loans "irrespective of the environmental and human toll." *See* Pls.' Opp'n at 26. To avoid litigation, IFC can

simply "choose projects and partners that follow IFC policy and obey the law." *Id.* at 27. If it fails to do so, some suits may be filed. But because each of these suits would seek only to encourage "IFC's management to do what the IFC already requires," plaintiffs assert, the suits would actually *benefit* IFC and further its development goals. *Id.* at 26. Thus, in plaintiffs' view, the "costs" identified by IFC are not costs at all. *Id.*

Plaintiffs cannot so easily blur the boundaries between cost and benefit. The D.C. Circuit has identified "judicial scrutiny of the organization's discretion to select and administer its programs" as a burden or cost, without regard to whether the underlying litigation is meritorious or in some other sense deserved. *See Mendaro*, 717 F.2d at 617. This Court will not completely dismiss the possibility that a waiver could provide some incentive for IFC to adhere more scrupulously to its policies, over and above the pressure already applied by the CAO. But that marginal benefit must be weighed against the relevant costs which, in suits like this by these kinds of plaintiffs, remain quite substantial.

Plaintiffs also offer a more modest theory regarding the benefits of waiver in cases where the CAO has identified a compliance failure but IFC has failed to deliver a remedy. *See* Pls.' Opp'n at 25–26. IFC-funded projects are likely to be more successful when they garner support from local communities, plaintiffs argue. If, however, IFC can breach its environmental and social policies without providing redress to those who are negatively impacted, that support will be difficult to secure. Local communities "may hesitate to do business with an entity insulated from judicial process," *Vila*, 570 F.3d at 279 (internal

quotation marks omitted), and may instead decide to "fight [IFC] projects tooth and nail," Pls.' Opp'n at 22. Waiver of immunity, plaintiffs contend, is the solution to this problem. By creating a legal avenue for the redress of environmental and social harms, IFC can credibly assuage any doubts that local communities may harbor about hosting IFC-funded projects.[2] *See id.* at 21–26.

Although plaintiffs' argument makes some intuitive sense, it is ultimately insufficient to support a finding of waiver here. As an initial matter, the Court hesitates to extend the "credibility" theory upon which plaintiffs rely outside the context of commercial transactions, where it was initially developed and has been exclusively applied. But even if the Court were to stretch that theory to reach this case, plaintiffs would not prevail. The preceding analysis has left plaintiffs with a daunting task. To support a finding of waiver, they must point to a benefit that would justify opening the courthouse doors to a new type of plaintiff, bringing a new and very broad type of suit, more costly than those that have previously been allowed and aimed squarely at IFC's discretion to select and administer its own projects. Plaintiffs' benefit argument simply cannot bear that substantial weight. Immunity "should be construed as *not waived* unless

[2] Plaintiffs also argue that waiver would help IFC maintain the support of donor governments like the United States. *See* Pls.' Opp'n at 24. But the United States government has adequate tools at its disposal to make its view on IFC's immunity known directly—specifically, the "President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization," *Atkinson*, 156 F.3d at 1341. In this setting, the Court thinks it unwise to speculate as to the United States government's views on IFC's immunity.

the particular type of suit would *further* [IFC's] objectives." *Atkinson*, 156 F.3d at 1338. Any "ties go to the organization." *Vila*, 570 F.3d at 286 (Williams, J., dissenting). In the Court's view, for all the reasons reviewed above, suits like plaintiffs' are likely to impose considerable costs upon IFC without providing commensurate benefits. Hence, IFC has not waived its immunity to this suit.

The Court can deal quickly with plaintiffs' remaining arguments, which urge several changes to the D.C. Circuit's immunity jurisprudence. First, plaintiffs believe *Atkinson* was incorrectly decided. Citing the Third Circuit's decision in *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010), plaintiffs argue that the IOIA was intended to incorporate subsequent changes to the law of foreign sovereign immunity (like the Foreign Sovereign Immunities Act's commercial activity exception), rather than to preserve the understanding of foreign sovereign immunity that prevailed in 1945. *See* Pls.' Opp'n at 19–20. Plaintiffs also argue, citing several FSIA decisions by the Supreme Court, that *Atkinson* mischaracterized the pre-1945 law by holding that it had provided absolute immunity for foreign sovereigns. *See id.* at 14–19. Finally, they intend to argue on appeal that *Mendaro*'s "corresponding benefit" test, which structured the preceding analysis, "unduly narrows the plain meaning of the IFC's waiver." *Id.* at 21 n.12.

But as plaintiffs recognize, this Court cannot overturn *Mendaro* or *Atkinson*. Nor will it authorize an end-run around *Atkinson*, which the D.C. Circuit said less than two years ago "remains vigorous as Circuit law." *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277,

281 (D.C. Cir. 2014). This Court's role is to apply Circuit law, not to "reconsider" it. *Cf.* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. 471 (2008) (making plaintiffs' arguments). Perhaps the D.C. Circuit will adopt plaintiffs' suggested approach to questions concerning waivers of international organization immunity. This Court, however, cannot do so. And plaintiffs' invitation to the Court to undertake such a revision of controlling case law simply underscores the conclusion that, under that precedent, plaintiffs' waiver claim fails.

CONCLUSION

Because IFC has not waived its immunity from this suit, its motion to dismiss will be granted, and plaintiffs' complaint will be dismissed in its entirety. A separate Order has issued on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: March 24, 2016

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7051 **September Term, 2017**
1:15-cv-00612-JDB
Filed On:
September 26, 2017

Budha Ismail Jam, et al.,
Appellants

v.

International Finance Corporation,
Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Edwards and Silberman, Senior Circuit Judges

O R D E R

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX D

Subchapter XVIII—Privileges and Immunities of International Organizations

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.

§ 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.