

# The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA\*

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### Introduction

As the world has grown increasingly interconnected over the past century, issues that were once addressed nationally now represent international concerns. Professor Niels Blokker has described the issue thusly: “An increasing number of State functions can no longer be performed in splendid isolation. World trade, sustainable development, human rights, not to forget the maintenance of peace and security, have all outgrown the national legal order and have become the subject of international regulation.”<sup>1</sup>

Indeed, hundreds of international organizations have emerged since the end of the Second World War to address the numerous areas requiring international cooperation. Though comprised solely of sovereign nations, these international organizations are recognized as having distinct legal personalities. Accordingly, much thought has been devoted to implementing laws that assist these organizations in fulfilling their lofty goals.

In the United States, the International Organizations Immunities Act of 1945 (IOIA) grants international organizations “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.”<sup>2</sup> However, two circuit courts are split concerning whether subsequent changes in the law of foreign sovereign immunity should be reflected in the IOIA.<sup>3</sup> Consequently, international organizations may be entitled to either the absolute immunity afforded to foreign states in 1945 or the restrictive immunity afforded to foreign states today. This Note will argue that Congress intended for the IOIA to incorporate changes in foreign sovereign

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1. Niels Blokker, *Proliferation of International Organizations: An Exploratory Introduction*, in *PROLIFERATION OF INTERNATIONAL ORGANIZATIONS* 1, 11–12 (Niels M. Blokker & Henry G. Schermers eds., 2001) (“The fundamental nature of globalization makes international cooperation inevitable.”).

2. 22 U.S.C. § 288a(b) (2012).

3. *Compare* *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (holding that “Congress’ intent was to adopt that body of law only as it existed in 1945—when immunity of foreign sovereigns was absolute”), *with* *OSS Nokalva, Inc. v. E. Space Agency*, 617 F.3d 756, 764 (3d Cir. 2010) (“Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity.”).

immunity and that the purposes of international organizations are best served by restrictive rather than absolute immunity.

It is well established under international law that an international organization should enjoy such immunity as is “necessary for the fulfilment of the purposes of the organization.”<sup>4</sup> In the United States, however, international organizations enjoy far more immunity than that—the D.C. Circuit, which has venue over the majority of suits filed against international organizations,<sup>5</sup> has ruled that such organizations are entitled to absolute immunity under the IOIA.<sup>6</sup> Accordingly, international organizations are generally entitled to greater immunity in U.S. courts than foreign governments. However, there exists one prominent exception—the Third Circuit has held instead that the IOIA incorporated subsequent changes in the law of foreign sovereign immunity, most notably the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>7</sup> Thus, in the Third Circuit, international organizations may be subject to jurisdiction for claims arising out of their commercial activities, tortious actions, or violations of international law.

In Part I, this Note discusses the theoretical foundations and history of international organization immunity as well as the scope of foreign sovereign immunity prior to and after the enactment of the IOIA. Part II outlines the current split between the D.C. Circuit and Third Circuit regarding the level of immunity provided to international organizations under the IOIA. Also introduced in Part II is the current standard for waiver of immunity under the IOIA. In Part III, the Note concludes with an argument for why international organizations should not be entitled to absolute immunity and why a system of restrictive immunity would produce a more preferable outcome. Changes to the standard for waiver and various policy proposals are offered as additional methods for reining in the amount of immunity currently enjoyed by international organizations. Additionally, the varying approaches taken by Austria, Italy, and the United Kingdom regarding international organization immunity are briefly discussed.

## I. Historical Underpinnings of International Organization Immunity

### A. *The Genesis of International Organizations*

A small number of international organizations began emerging as far back as the early nineteenth century. The oldest existing international organization is the Central Commission for Navigation of the Rhine (Rhine

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4. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 467(1) (AM. LAW INST. 1986).

5. This is by virtue of the fact that “the vast majority of those organizations are based in the District of Columbia.” Charles H. Brower, II, *United States*, in THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 303, 311 (August Reinisch ed., 2013).

6. *Atkinson*, 156 F.3d at 1341.

7. *OSS Nokalva*, 617 F.3d at 765.

Commission).<sup>8</sup> Established in 1815, the Rhine Commission was created by the Rhine River's bordering states to improve navigability and the condition of towpaths.<sup>9</sup> Similarly, the European Commission of the Danube was formed in 1856 to ensure freedom of navigation, thereby promoting commerce on the Danube River.<sup>10</sup> Other examples of pioneering international organizations include the Universal Postal Union<sup>11</sup> and International Telegraph Union.<sup>12</sup> However, these organizations constitute an exception to the general rule—international cooperation through the creation of multilateral institutions was exceedingly rare prior to 1900.<sup>13</sup>

Over time, states increasingly began to recognize the potential benefits of cooperation through international organizations. The end of the First World War brought with it the first truly global international organization—the League of Nations (the League). Founded in 1920, the League was created “to promote international co-operation and to achieve international peace and security.”<sup>14</sup> There existed forty-eight member states by the end of the League's first year, and by 1934 the League was comprised of fifty-eight members.<sup>15</sup> Though the League's Covenant did not initially grant the organization immunity from suit, a subsequent agreement was reached with Switzerland—the host nation of the League—stipulating that “the League possessed international personality and . . . could not in principle, according to the rules of international law, be sued before the Swiss courts without its consent.”<sup>16</sup>

### B. *The International Organizations Immunities Act of 1945*

Toward the end of World War II, there existed a growing understanding amongst the United States and its allies that an increasing number of state

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8. Dale S. Collinson, *The Rhine Regime in Transition—Relations Between the European Communities and the Central Commission for Rhine Navigation*, 72 COLUM. L. REV. 485, 485 (1972).

9. *History: Introduction*, CENT. COMMISSION FOR THE NAVIGATION OF THE RHINE, <http://www.ccr-zkr.org/11010100-en.html> [https://perma.cc/ASE3-KWR3].

10. Edward Krehbiel, *The European Commission of the Danube: An Experiment in International Administration*, 33 POL. SCI. Q. 38, 39, 44 (1918).

11. The Universal Postal Union was established in 1874. *The UPU*, UNIVERSAL POSTAL UNION, <http://www.upu.int/en/the-upu/the-upu.html> [https://perma.cc/6WYN-7PZJ].

12. The International Telecommunication Union was established in 1865. *History*, INT'L TELECOMM. UNION, <http://www.itu.int/en/about/Pages/history.aspx> [https://perma.cc/R66R-U2LA].

13. See Blokker, *supra* note 1, at 1 (noting that “[i]n the year 1900 only a few international organizations existed”).

14. Covenant of the League of Nations pmbl.

15. *National Membership of the League of Nations*, IND. U. CTR. FOR THE STUDY OF GLOBAL CHANGE, <http://www.indiana.edu/~league/nationalmember.htm> [https://perma.cc/3JLY-B5J5].

16. August Reinisch, *Privileges and Immunities*, in RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 132, 133 (Jan Klabbers & Åsa Wallendahl eds., 2011) (internal quotations omitted).

functions could no longer be accomplished unilaterally.<sup>17</sup> Indeed, concerns regarding international security, economic development, the settlement of disputes, and cultural misunderstandings led to the creation of the United Nations in 1945.<sup>18</sup> Contemporaneous with the founding of the United Nations, numerous other international organizations were created to govern “international co-operation in all kinds of areas, both at the global and the regional level.”<sup>19</sup> Notably, the two Bretton Woods organizations—the International Monetary Fund (IMF) and World Bank—were established in 1944 in an effort to finance postwar reconstruction and promote free trade.<sup>20</sup>

Even before this burgeoning of international organizations, scholars and courts alike recognized the need to grant such institutions the immunity necessary to effectively achieve their organizational purposes.<sup>21</sup> Known as the “functional necessity” doctrine, this underlying belief in the purpose of international organization immunity is still internationally accepted.<sup>22</sup> Until 1945, however, the United States had enacted no law that conferred any privileges, immunities, or exemptions on international organizations.<sup>23</sup> This proved problematic for the United States because, absent some guarantee of organizational immunity, the United Nations seemed likely to locate its headquarters elsewhere.<sup>24</sup> Accordingly, the State Department drafted the

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17. See PAUL KENNEDY, *THE PARLIAMENT OF MAN* 25–30 (2006) (discussing the motivations of the United States and its Allies behind the creation of the United Nations); Blokker, *supra* note 1, at 1 (explaining that the “reluctance to create international organizations came to an end during and immediately after the Second World War”).

18. *Id.* at 31–32.

19. Blokker, *supra* note 1, at 1.

20. M.J. Stephey, *A Brief History of Bretton Woods System*, TIME (Oct. 21, 2008), <http://content.time.com/time/business/article/0,8599,1852254,00.html> [<https://perma.cc/NLB2-4FB2>].

21. See, e.g., Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT’L L. 828, 836 (1947) (explaining that international organization immunity “always had and has today basically the same reason and purpose: to secure for [international organizations] both legal and practical independence, so that these international organizations should be able to fulfill their task”).

22. See Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT’L L. REV. 471, 519 (2008) (noting that the functional necessity doctrine is “the internationally accepted approach to defining the immunity of international organizations”).

23. Lawrence Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT’L L. 332, 333 (1946); see also H.R. REP. NO. 79-1203, at 2 (1945) (“[T]here exists at the present time no law of the United States whereby this country can extend privileges of a governmental character with respect to international organizations.”).

24. See 91 CONG. REC. 10,866 (1945) (statement of Rep. Cooper) (“[I]f we are to hope to have the United Nations Organization’s headquarters to be located in the United States, it will be absolutely essential for [some form of immunity granting] legislation to be passed.”); 91 CONG. REC. 10,865 (1945) (statement of Rep. Robertson) (“The State Department has called to our attention that other members of the United Nations Organization have taken similar action, and it is very important for us to take this action.”).

IOIA to assure the United Nations sufficient immunity to achieve its intended purpose.<sup>25</sup> Congress promptly passed the IOIA in December 1945.<sup>26</sup>

The IOIA provides that designated international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.”<sup>27</sup> The Act’s grant of immunity is limited to organizations in which the United States is a participant and that have been designated as “entitled to enjoy the privileges, exemptions, and immunities [of the statute]” by the President through executive order.<sup>28</sup> Additionally, the President may “withhold or withdraw” from an organization any privilege or immunity otherwise afforded to it by the Act.<sup>29</sup>

Importantly, there exists little explanation regarding why Congress chose to grant international organizations immunity by reference to foreign sovereign immunity.<sup>30</sup> This ambiguity has led both courts and scholars to question whether the IOIA intended to incorporate subsequent changes in foreign-sovereign-immunity law or only such immunity as it existed in 1945.<sup>31</sup>

### C. *The Evolution of Foreign Sovereign Immunity*

Until the middle of the nineteenth century, U.S. courts granted foreign states absolute immunity with respect to all activities, both governmental and commercial.<sup>32</sup> Over time, however, the suggestions of the State Department played an increasingly influential role in judicial determinations of whether a foreign state was entitled to immunity in a particular case.<sup>33</sup> In the 1930s,

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25. Letter from Harold D. Smith, Dir. of the Bureau of the Budget, to James F. Byrnes, U.S. Sec’y of State (Nov. 6, 1945), *reprinted in* H.R. REP. NO. 79-1203, at 7 (1945); *see also* H.R. REP. NO. 79-1203, at 2 (“[T]he probability that the United Nations Organization may establish its headquarters in this country, and the practical certainty in any case that it would carry on certain activities in this country, makes it essential to adopt this type of legislation promptly.”).

26. International Organization Immunities Act, Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified as amended in scattered sections of Titles 8, 22, 26, and 44 U.S.C.); H.R. 4489, 79th Cong. (1945) (enacted).

27. 22 U.S.C. § 288a(b) (2012).

28. *Id.* § 288.

29. *Id.*

30. *See* Herz, *supra* note 22, at 489 (“It is not entirely clear why the State Department and Congress chose to resolve the immunity problem by reference to the immunities of foreign states.”).

31. *See id.* (“The IOIA fails, however, to specify the nature and scope of this immunity.”). *Compare* Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (noting that IOIA intended only such immunity as it existed in 1945), *with* OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 762–64 (3d Cir. 2010) (noting that IOIA intended to incorporate subsequent changes in foreign sovereign immunity).

32. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 232 (5th ed. 2011).

33. *Id.* at 232–33; *see also* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53, 59 (1995)

mounting judicial deference to the Executive Branch clearly signaled a trend away from the absolute theory of foreign sovereign immunity.<sup>34</sup> Indeed, in *Republic of Mexico v. Hoffman*,<sup>35</sup> decided just prior to the passage of the IOIA, the Supreme Court held that determinations of foreign sovereign immunity are inherently political in nature and rightfully within the sole discretion of the political branches.<sup>36</sup>

With the “Tate Letter” in 1952, the State Department officially renounced absolute immunity in favor of a restrictive theory of foreign sovereign immunity.<sup>37</sup> However, the State Department’s subsequent erratic, and occasionally disingenuous, decisions regarding sovereign immunity led to the passage of the FSIA, which codified the restrictive theory of foreign sovereign immunity.<sup>38</sup> Under the FSIA, foreign states are entitled to immunity unless their actions fall under one of several listed exceptions.<sup>39</sup> Notably, the FSIA denies immunity in cases where states have engaged in certain commercial activities.<sup>40</sup> Specifically, a foreign state is subject to jurisdiction where an action is based upon (1) the state’s commercial activity in the United States, (2) an act performed in the United States in connection with the state’s commercial activity elsewhere, or (3) an act outside the United States in connection with the state’s commercial activity that causes a direct effect in the United States.<sup>41</sup> While the FSIA resolved much of the uncertainty surrounding foreign sovereign immunity, it was notably silent regarding its effect on the immunity of international organizations.

## II. Judicial Interpretations of International Organization Immunity

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(“[E]xecutive pronouncements, often during consideration of the individual case, strongly influenced the courts.”).

34. See Herz, *supra* note 22, at 501 (“Soon after the passage of the IOIA, the Supreme Court took note of the growing perception of sovereign immunity as ‘an archaic hangover not consonant with modern morality,’ and explained that it would generally countenance Congress’s increased willingness to allow suits against a sovereign to go forward.”) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949)).

35. 324 U.S. 30 (1945).

36. See *id.* at 35–36 (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”); *supra* note 26 and accompanying text.

37. BORN & RUTLEDGE, *supra* note 32, at 233.

38. See *id.* at 234 (noting that defects in Executive Branch application of the restrictive theory generated pressure for reform and Congress enacted the FSIA after a lengthy legislative process).

39. *Id.*

40. 28 U.S.C. § 1605(a)(2) (2012).

41. *Id.*

A. *The Circuit Split in IOIA Interpretation*

1. *The Atkinson Approach.*—With its decision in *Atkinson v. Inter-American Development Bank*,<sup>42</sup> the D.C. Circuit became the first circuit court to interpret the scope of immunity provided to international organizations under the IOIA.<sup>43</sup> *Atkinson* brought suit against the Inter-American Development Bank (IDB), a designated international organization, to garnish the wages of her ex-husband, an IDB employee who had failed to pay child support and alimony.<sup>44</sup> When the IDB asserted it was immune from the garnishment proceedings, *Atkinson* sought declaratory judgment that the Bank was not entitled to immunity under the IOIA.<sup>45</sup>

After determining that the IDB had not waived its immunity, the court was then tasked with determining whether “Congress intended to incorporate in the IOIA post-1945 changes to the law governing the immunity of foreign sovereigns.”<sup>46</sup> The court began by noting a well-known canon of statutory interpretation regarding reference statutes (the reference 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.”<sup>47</sup>

Although the court felt that the statute was ambiguous, it nonetheless found use of the reference canon unnecessary because “the IOIA sets forth an explicit mechanism for monitoring the immunities of designated international organizations: the President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization.”<sup>48</sup> The court reasoned that future changes in the immunity of international organizations were tethered to the decisions of the President rather than developments in the law of foreign sovereign immunity.<sup>49</sup>

Additionally, the court pointed to the IOIA’s legislative history as supporting its interpretation that international organization immunity may only be altered through the exercise of presidential discretion.<sup>50</sup> Indeed, the Senate Report on the IOIA states that the President was granted the authority

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42. 156 F.3d 1335 (D.C. Cir. 1998).

43. See *Brower*, *supra* note 5, at 315 (noting that *Atkinson* “finally delivered a definitive opinion on whether the FSIA curtailed the availability of immunity for international organizations under the IOIA”).

44. *Atkinson*, 156 F.3d at 1336–37.

45. *Id.* at 1337.

46. *Id.* at 1338–39, 1340.

47. *Id.* at 1340 (quoting 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Norman J. Singer & J.D. Shambie Singer eds., 5th ed. 1992)).

48. 22 U.S.C. § 288 (2012); *Atkinson*, 156 F.3d at 1341.

49. *Atkinson*, 156 F.3d at 1341.

50. *Id.*

to modify an organization's immunity to address "the event that any international organization should engage, for example, in activities of a commercial nature."<sup>51</sup>

Accordingly, the court ruled that Congress intended for the immunity of international organizations to reflect the immunity of foreign sovereigns as it existed in 1945, notwithstanding any subsequent changes in the law of foreign sovereign immunity.<sup>52</sup> In so holding, the court also determined that in 1945 foreign sovereigns enjoyed "virtually absolute immunity," contingent only upon the State Department making a request to the court.<sup>53</sup> Thus, international organizations are currently afforded absolute immunity in the D.C. Circuit.

2. *The OSS Nokalva Approach.*—*Atkinson* remained the sole interpretation of the IOIA's grant of immunity for over a decade. However, the Third Circuit eventually offered a competing interpretation with its decision in *OSS Nokalva, Inc. v. European Space Agency*.<sup>54</sup> Prior to *OSS Nokalva*, district courts in the Third Circuit followed *Atkinson*, holding that the IOIA afforded international organizations absolute immunity.<sup>55</sup> However, *OSS Nokalva* explicitly rejected *Atkinson*, holding instead that Congress intended the IOIA to "adapt with the law of foreign sovereign immunity."<sup>56</sup>

In *OSS Nokalva*, a New Jersey software corporation sued the European Space Agency (ESA), a designated international organization, over a contract dispute.<sup>57</sup> The district court held that international organizations are generally entitled to absolute immunity but that the ESA had waived its immunity in this case under the "corresponding benefit" test.<sup>58</sup> However, on appeal, the Third Circuit held that addressing the issue of waiver was unnecessary because the ESA was not entitled to absolute immunity in the first place.<sup>59</sup>

While the Third Circuit agreed with the D.C. Circuit that the IOIA is facially ambiguous regarding its incorporation of subsequent changes in the law of foreign sovereign immunity, the two courts took completely disparate

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51. S. REP. NO. 79-861, at 2 (1945); see also H.R. REP. NO. 79-1203, at 3 (1945) ("The broad powers granted to the President will permit prompt action in connection with any abuse of the privileges and immunities granted . . .").

52. *Atkinson*, 156 F.3d at 1341.

53. *Id.* at 1340 (quoting *Varlinden B.V. v. Cent. Bank of Nigeria*, 46 U.S. 480, 486 (1983)).

54. 617 F.3d 756 (3d Cir. 2010).

55. See, e.g., *Bro Tech Corp. v. Eur. Bank for Reconstruction and Dev.*, 2000 WL 1751094, at \*3 (E.D. Pa. Nov. 29, 2000) (adopting "the reasoning of the D.C. Circuit, and find[ing] that the EBRD is entitled to absolute immunity under the IOIA").

56. *OSS Nokalva*, 617 F.3d at 764.

57. *Id.* at 758–59.

58. *Id.* at 760. For a discussion of the "corresponding benefit" test, see *infra* subpart II(B).

59. *OSS Nokalva*, 617 F.3d at 761.

paths of statutory construction. Contrary to the reasoning in *Atkinson*, the Third Circuit found “nothing in the statutory language or legislative history that suggests that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the immunity of foreign sovereigns.”<sup>60</sup> Accordingly, the court found the reference canon to be persuasive in its suggestion that a reference statute “will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.”<sup>61</sup> Moreover, the court reasoned that Congress could have easily inserted language in the statute to negate such an interpretation.<sup>62</sup>

Additionally, the court gave substantial weight to the 1980 pronouncement of the State Department that “[b]y virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities.”<sup>63</sup> The position of the State Department was viewed as particularly persuasive because of the Department’s role in drafting and supporting the IOIA.<sup>64</sup>

Finally, the court found the policy implications of absolute organizational immunity to be untenable.<sup>65</sup> If an international organization is guaranteed broader immunity than its member states enjoy when acting alone, there would exist a perverse “incentive for foreign governments to evade legal obligations by acting through international organizations.”<sup>66</sup> Accordingly, in the Third Circuit, international organizations are subject to the same restrictions as foreign governments under the FSIA.<sup>67</sup>

#### B. *Waiver of Immunity Under the IOIA*

The immunity provided by the IOIA is limited to the extent that organizations “may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.”<sup>68</sup> Apart from waivers made in specific cases or contracts, the D.C. Circuit has held that an organization’s

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60. *Id.* at 763.

61. *Id.* (emphasis omitted) (quoting 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Norman J. Singer & J.D. Shambie Singer eds., 5th ed. 1992)).

62. *Id.* at 764 (“Congress could have simply stated that international organizations would be entitled to the ‘same immunity as of the date of this Act.’”).

63. *Id.* at 763–64 (emphasis omitted) (quoting Letter from Roberts B. Owen, Legal Adviser, State Dep’t, to Leroy D. Clark, Gen. Counsel, Equal Emp’t Opportunity Comm’n (June 24, 1980), reprinted in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT’L L. 917, 918 (1980)).

64. *Id.* at 764.

65. *Id.*

66. *Id.*

67. *Id.* at 765.

68. 22 U.S.C. § 288a(b) (2012).

charter may also effect a waiver of its immunity otherwise available under the IOIA.<sup>69</sup>

The charters of many international organizations clearly consider the possibility of facing legal action in the courts of its member states. For instance, the charters of the IDB and the International Bank for Reconstruction and Development (World Bank) each contain the following provision: “Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.”<sup>70</sup>

Initially, the D.C. Circuit construed such provisions as broad waivers of immunity, subjecting organizations with similar charters to a wide range of lawsuits.<sup>71</sup> Indeed, in *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*,<sup>72</sup> the court held that the IDB’s charter “permitt[ed] the assertion of a claim against the Bank by one having a cause of action for which relief is available.”<sup>73</sup> The court reasoned that the phrase “actions may be brought against the Bank” clearly evidenced an awareness by the drafters that “they were waiving immunity in broad terms.”<sup>74</sup>

Over fifteen years later in *Mendaro v. World Bank*,<sup>75</sup> the D.C. Circuit rejected the *Lutcher* court’s expansive approach to charter-based waiver. Mendaro, a former World Bank employee, sued the Bank, alleging sexual harassment and discrimination during her employment.<sup>76</sup> Because the World Bank’s charter contained an identical provision to that at issue in *Lutcher*, Mendaro argued that the Bank had waived its immunity under the IOIA.<sup>77</sup> However, the court refused to follow *Lutcher*, holding instead that the Bank’s “facially broad waiver of immunity . . . must be narrowly read.”<sup>78</sup>

Rather than hold that such provisions effect a blanket waiver of immunity, the court ruled that they should be narrowly construed as waiving immunity only in cases where the organization would gain a “corresponding benefit which would further [its] goals.”<sup>79</sup> The court duly noted the

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69. Herz, *supra* note 22, at 513.

70. Agreement Establishing the Inter-American Development Bank art. XI, § 3, Apr. 8, 1959, 10 U.S.T. 3029, 3095, 389 U.N.T.S. 69, 128; Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 3, Dec. 27, 1945, 60 Stat. 1440, 1447, 2 U.N.T.S. 134, 180.

71. See Herz, *supra* note 22, at 514 (noting that the D.C. Circuit’s “early jurisprudence gave full effect to the plain meaning” of provisions waiving immunity).

72. 382 F.2d 454 (D.C. Cir. 1967).

73. *Id.* at 457.

74. *Id.*

75. 717 F.2d 610 (D.C. Cir. 1983).

76. *Id.* at 612–13.

77. *Id.* at 613.

78. *Id.* at 611.

79. *Id.* at 617.

functional necessity doctrine,<sup>80</sup> reasoning that an organization would only effect a waiver that benefited its organizational objectives.<sup>81</sup> Accordingly, because exposure to employment suits would not further the “purposes and operations of the Bank . . . [and] would lay the Bank open to disruptive interference with its employment policies,” the court held that the World Bank had not waived its immunity in regard to Mendaro’s claim.<sup>82</sup>

The standard for waiver laid out in *Mendaro*, referred to as the “corresponding benefit” test, has been consistently applied to insulate international organizations from claims that do not benefit the foundational purposes of an organization.<sup>83</sup> Conversely, the corresponding benefit test has been equally effective in waiving immunity where waiver is viewed as benefiting an organization’s goals. In *Vila v. Inter-American Investment Corp.*,<sup>84</sup> an independent consultant sued the Inter-American Investment Corporation (IIC) for unjust enrichment from services provided without compensation.<sup>85</sup> The D.C. Circuit held that the IIC had waived its immunity because such a waiver provides the organization a corresponding benefit: consultants would be more willing to negotiate and enter into contracts with the IIC if given the guarantee that “they would be fairly compensated for any benefit they have provided that the IIC has unjustly retained.”<sup>86</sup> Additionally, the court considered it important to note that the “services were related to the furtherance of the IIC’s stated objectives in the commercial marketplace.”<sup>87</sup>

Similarly, in *Osseiran v. International Finance Corp.*,<sup>88</sup> Osseiran alleged that the International Finance Corporation (IFC) had broken its promise to sell him its shares in a Guersney corporation.<sup>89</sup> The D.C. Circuit held that the IFC was not immune from such a promissory estoppel suit because it “might help attract prospective investors by reinforcing expectations of fair play.”<sup>90</sup> However, the court indicated that an organization’s own “judgment about the need for immunity in certain classes of cases [might be] deserving of judicial deference.”<sup>91</sup>

While the corresponding benefit test may deny immunity to international organizations for many commercial activities, the scope of

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80. See *supra* notes 21–22 and accompanying text.

81. *Mendaro*, 717 F.2d at 617.

82. *Id.* at 611, 618.

83. See, e.g., *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1338–39 (D.C. Cir. 1998) (holding that the IDB’s immunity was not waived in respect to wage garnishment proceedings because such suits “provide[] no conceivable benefit in attracting talented employees”).

84. 570 F.3d 274 (D.C. Cir. 2009).

85. *Id.* at 277–78.

86. *Id.* at 276.

87. *Id.* at 280.

88. 552 F.3d 836 (D.C. Cir. 2009).

89. *Id.* at 837–38.

90. *Id.* at 840.

91. Importantly, the court noted that the IFC failed to make such an argument. *Id.*

immunity for such activities is still far broader than that provided to foreign states under the FSIA. Indeed, in *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*,<sup>92</sup> the D.C. Circuit unequivocally stated that “[b]ecause the immunity conferred upon international organizations by the IOIA is absolute, it does not contain an exception for commercial activity such as the one codified in the Foreign Sovereign Immunities Act.”<sup>93</sup> *Inversora* held that the World Bank was immune from a nonwage garnishment proceeding initiated by a judgment creditor of one of the Bank’s contractors.<sup>94</sup> The court reasoned that such a proceeding, although arising out of commercial activities, proved more costly than beneficial to the Bank’s objectives.<sup>95</sup>

### III. Restricting International Organization Immunity

The functional necessity doctrine, which was central to the intention of the IOIA,<sup>96</sup> does not condone absolute immunity; rather, it counsels against it. Though most international organizations and some scholars contend that absolute immunity is the only way to ensure the effective fulfillment of organizational purposes,<sup>97</sup> these opinions are rooted in a time when international organizations were far smaller and more fragile.<sup>98</sup> Indeed, it seems wholly unnecessary—if not counterproductive—to afford international organizations absolute immunity for routine contractual arrangements that do not relate to a foundational purpose, like purchases of travel arrangements, office supplies, or food.<sup>99</sup>

In fact, the doctrine of functional necessity, when properly applied, precludes absolute immunity. The concept of necessity is, by definition, restrictive, meaning that an international organization should be entitled *only* to the immunity it unequivocally requires to accomplish its organizational goals.<sup>100</sup> This restrictive view of functional necessity suggests a presumption

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92. 264 Fed. Appx. 13 (D.C. Cir. 2008).

93. *Id.* at 15.

94. *Id.* at 15–16.

95. *Id.* at 15.

96. See Preuss, *supra* note 23, at 332 (explaining that the IOIA “constitutes belated recognition of the need for granting to international organizations . . . a legal status which is adequate to ensure the effective performance of their functions and the fulfillment of their purposes”).

97. See *Broadbent v. Org. of Am. States*, 628 F.2d 27, 28–32, 28 n.1 (D.C. Cir. 1980) (noting that, apart from the defendant’s brief, “[a]mici [c]uriae briefs were submitted by the International Bank for Reconstruction and Development and the Inter-American Development Bank, the International Telecommunications Satellite Organization, [and] the United Nations” arguing that “Congress granted international organizations absolute immunity in the IOIA”); Finn Seyersted, *Jurisdiction Over Organs and Officials of States, the Holy See and Intergovernmental Organisations* (2), 14 INT’L & COMP. L.Q. 493, 526 (1965) (arguing that international organizations are subject exclusively to the “legislative, executive and judicial power” present within the organizations, unless those powers are delegated to an external authority).

98. Herz, *supra* note 22, at 522; Singer, *supra* note 33, at 66–67.

99. Singer, *supra* note 33, at 141.

100. Herz, *supra* note 22, at 519.

of jurisdiction rather than immunity.<sup>101</sup> Accordingly, the foundational principle of international organization immunity favors restrictive rather than absolute immunity.

Conversely, the strongest argument in favor of granting international organizations absolute immunity is the effect that such policies have in attracting organizations to establish their headquarters in the United States. If immunity were restricted, many international organizations might leave the United States for a nation with a more favorable legal climate. While the desire to host international organizations undeniably underlies political decisions granting absolute organizational immunity,<sup>102</sup> it seems a stretch to conclude that organizations based in the United States for over half a century would simply shutter their facilities if denied immunity in cases unrelated to fulfilling their goals. However, because it is difficult to know with any certainty how international organizations would react, the ongoing relations between the United States and the organizations it hosts should be carefully evaluated before any permanent change in policy.

The remainder of Part III explores the misguided approach the D.C. Circuit has taken concerning international organization immunity by first explaining why courts should implement a restrictive theory of international organization immunity under the IOIA. This is followed by an analysis of why the corresponding benefit test is an undesirable standard for waiver under the IOIA. Additionally, for means of comparison, a brief accounting of international organization immunity in Austria, Italy, and the United Kingdom is also provided. Finally, Part III concludes with several alternative solutions to the concerns posed by absolute international organization immunity.

A. *The IOIA Should Not Afford International Organizations Absolute Immunity*

1. *The IOIA Did Not Intend to Grant Absolute Immunity.*—In *Atkinson*, the D.C. Circuit provided little support for its determination that foreign sovereigns enjoyed absolute immunity in 1945.<sup>103</sup> However, a proper historical analysis of foreign sovereign immunity leads to the conclusion that, while immunity was much broader than it is today, foreign states did not enjoy absolute immunity. The judiciary's trend of deferring to executive determinations of immunity had slowly eroded absolute immunity for years

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101. *Id.* at 519–20.

102. *See supra* notes 24–26 and accompanying text; *infra* notes 139–40 and accompanying text.

103. *See Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (citing two sources for its conclusion: the 1983 Supreme Court decision in *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983), and Robert B. von Mehren's *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978)).

prior to the enactment of the IOIA.<sup>104</sup> Indeed, as early as the 1920s, the State Department had denied immunity to foreign states engaged in “ordinary commercial transactions.”<sup>105</sup>

Though the precise level of immunity provided to foreign states in 1945 is difficult to ascertain, history makes clear that foreign states were denied absolute immunity in at least several cases. Therefore, even if the IOIA fails to incorporate subsequent changes in foreign sovereign immunity, international organizations should nonetheless be granted something less than absolute immunity. If, as the D.C. Circuit ruled, international organizations are entitled to the immunity that foreign states enjoyed in 1945, then their immunity should properly be tethered to the case-by-case determinations of the State Department, as was the immunity of foreign states at the time.<sup>106</sup> Ironically, given the subsequent pronouncements of the State Department, such determinations would likely subject international organizations to the same exceptions as foreign states under the FSIA.<sup>107</sup>

*2. The IOIA Intended to Incorporate Subsequent Changes in Foreign Sovereign Immunity.*— Between the competing interpretations of the IOIA in *Atkinson* and *OSS Nokalva*, the reasoning in *OSS Nokalva* proves more persuasive. Perhaps the most perplexing aspect of the *Atkinson* decision is the D.C. Circuit’s insistence that use of the reference canon was unnecessary in light of the authority delegated to the President.<sup>108</sup> As the Third Circuit correctly noted, nothing about this delegation of authority to the President “precludes incorporation of any subsequent change[s] to the immunity of foreign sovereigns.”<sup>109</sup> Accordingly, the statute is wholly ambiguous regarding whether subsequent changes should be incorporated, and the reference canon resolves this ambiguity by stipulating that the IOIA

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104. See *supra* notes 33–36 and accompanying text.

105. See *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929) (referring to a letter from the Secretary of State, which stated “that it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here”); see also *The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921) (noting the State Department’s suggestion “that government-owned merchant vessels . . . employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war”).

106. See *Atkinson*, 156 F.3d at 1340 (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)) (“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.’”).

107. See Letter from Roberts B. Owen, Legal Adviser, State Dep’t, to Leroy D. Clark, Gen. Counsel, Equal Emp’t Opportunity Comm’n (June 24, 1980), as 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) (“By virtue of the FSIA . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities.”).

108. *Atkinson*, 156 F.3d at 1340–41.

109. *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 763 (3d Cir. 2010).

“includes all amendments and modifications [of foreign-sovereign-immunity law] subsequent to the reference statute’s enactment.”<sup>110</sup>

Moreover, Congress was more than likely aware of the reference canon, given its use as far back as the late nineteenth century.<sup>111</sup> Consequently, Congress’s failure to use express language to negate the reference canon is quite revealing. Contrary to the D.C. Circuit’s assertion that Congress was merely “legislating in shorthand,”<sup>112</sup> Congress should have been well aware of the implications tied to the passage of a reference statute. Thus, both the reference canon and congressional intent lend themselves to the interpretation that the IOIA incorporates subsequent changes in the law of foreign sovereign immunity.

*3. Restrictive Immunity Would Benefit International Organizations and the Public.*—The primary consequence of merging modern foreign-sovereign-immunity law with the IOIA would be the application of the FSIA to international organizations. Indeed, in *OSS Nokalva*, the ESA was denied immunity because “the Agreements at issue . . . constituted . . . ‘commercial activity’ and . . . the IOIA . . . incorporate[s] the exceptions to immunity set forth in the FSIA.”<sup>113</sup>

Some commentators have argued that full application of the restrictive doctrine of immunity would negatively impact the successful operation of many international organizations.<sup>114</sup> While it is true that the core activities of organizations like the World Bank and International Monetary Fund would generally be subject to jurisdiction under the commercial-activities exception, they may still be insulated from such suits pursuant to their underlying treaties. Importantly, agreements establishing international organizations supersede the IOIA, allowing organizations like the World Bank to assert immunity from the commercial-activities exception because of the need “[t]o enable the Bank to fulfill the functions with which it is entrusted.”<sup>115</sup> This charter-by-charter approach would be more consistent

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110. 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Norman J. Singer & J.D. Shambie Singer eds., 5th ed. 1992) (emphasis omitted).

111. See, e.g., *Culver v. People ex rel. Kochersperger*, 43 N.E. 812, 814 (Ill. 1896) (“Where . . . the adopting statute makes no reference to any particular act . . . but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken or proceedings are resorted to.”).

112. *Atkinson*, 156 F.3d at 1340.

113. *OSS Nokalva*, 617 F.3d at 765.

114. See Singer, *supra* note 33, at 63–64 (“[A]pplying the restrictive doctrine to international organizations would have severe adverse consequences.”).

115. Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 1, Dec. 27, 1945, 60 Stat. 1440, 1447, 2 U.N.T.S. 134, 180; see *Sadikoğlu v. United Nations Dev. Programme*, No. 11 Civ. 0294 (PKC), 2011 WL 4953994, at \*4 (S.D.N.Y. Oct. 14, 2011) (holding that the UN Charter and the Convention on Privileges and Immunities of the United Nations superseded any lack of immunity the UN might have been exposed to under the IOIA).

with the doctrine of functional necessity by making international organizations specifically define which immunities are required for them to accomplish their organizational purposes. Moreover, as discussed below, removing international organizations from the auspices of absolute immunity would directly benefit the businesses they interact with and the public they serve.

The argument that restrictive immunity is better for international organizations inevitably gives rise to the question: then why do international organizations consistently argue in favor of absolute immunity? First, international organizations most frequently advocate for absolute immunity *after* a lawsuit has already been brought.<sup>116</sup> Predictably, the risk of liability in the instant suit would prevent an organization from then advocating for less immunity. Second, taking immunity away from organizations would likely expose their management to a great deal more scrutiny. By shielding employment discrimination, sexual harassment, and other disputes from domestic courts, those that run international organizations are protected from any aspersions the judicial system may cast on their leadership abilities. Accordingly, these directors may have a vested interest in preserving their organizations' unfettered immunity.

The remainder of this subsection will address the several benefits that would accrue to international organizations and the public if a system of restrictive immunity were implemented.

*a. Lower Transaction Costs.*—In the late 1980s, the International Monetary Fund entered into negotiations with the Western Presbyterian Church over the purchase of the church's land, which happened to be situated on the one plot of real estate adjoining the IMF's Washington headquarters.<sup>117</sup> Although the church would normally possess a significant bargaining advantage in such a situation, it was reluctant to enter into any contract with the IMF because the organization's absolute immunity would allow it to renege on the agreement with impunity.<sup>118</sup> To assuage these concerns, the IMF bore significant up-front costs, which included the construction of a new church, the purchase of a new plot of land, the provision of a \$4 million endowment, and even payment for the church's lawyers and architects, against whom the IMF would be negotiating.<sup>119</sup> Though the deal ultimately

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116. See, e.g., *Polak v. Int'l Monetary Fund*, 657 F. Supp. 2d 116, 119–21 (D.D.C. 2009) (invoking immunity for the International Monetary Fund under the IOIA after the plaintiff filed suit for negligence); *OSS Nokalva, Inc. v. Eur. Space Agency*, No. 08–3169 (MLC), 2009 WL 2424702, at \*1, \*3–4 (D.N.J. Aug. 6, 2009) (considering the European Space Agency's claim of absolute immunity, raised in a breach of contract suit).

117. Anne Swardson, *A Celebrated Separation of Church and State: Western Presbyterian Reaches Agreement to Move Out of the IMF's Long Shadow*, WASH. POST, Dec. 24, 1990, at 1, 14.

118. *Id.* at 15.

119. *Id.*

benefited both sides, a lawyer for the church understandably characterized the negotiations as “a time-consuming and expensive process.”<sup>120</sup>

This scenario illustrates the substantial transaction costs that often attend day-to-day contractual dealings with international organizations simply because of their broad grant of immunity. Because the budgets of international organizations are zero sum, the payment of high transaction costs—like the IMF’s costly provisions to the Western Presbyterian Church—necessarily drains funds that could otherwise be spent on accomplishing organizational objectives. By removing immunity for routine transactions unrelated to an organization’s purpose, not only will organizations be able to dedicate more resources to that purpose, but businesses will also be more confident in their negotiations with organizations by knowing that a proper remedy is available for any potential dispute.

*b. Increased Accountability.*—Inherent in any grant of immunity is the risk of potential abuse. Even apart from outright abuses of immunity, there necessarily exists the likelihood of an avoidance of justice. These concerns have led most international organizations to establish internal procedures for oversight and dispute resolution.<sup>121</sup> However, some international organizations still have yet to establish any mechanism for the settlement of disputes.<sup>122</sup> Moreover, even if such procedures exist, they are nonetheless viewed skeptically because of the absence of an independent, external authority.

For instance, the World Bank established its Inspection Panel in 1993 amid harsh criticisms leveled against the Bank by international environmental and human rights organizations.<sup>123</sup> The stated objective of the Panel is to determine “whether the Bank is complying with its own policies and procedures, which are designed to ensure that Bank-financed operations provide social and environmental benefits and avoid harm to people and the environment.”<sup>124</sup> Despite the Panel’s promise of greater accountability, many contend that it has failed to provide a fair and adequate procedure for those adversely affected by the Bank’s actions.<sup>125</sup> Indeed, in just the last three

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120. *Id.* at 15.

121. Reinisch, *supra* note 16, at 140 (noting that “administrative tribunals exist for most international organizations”).

122. *Id.*

123. Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 GLOBAL GOVERNANCE 279, 279 (2000).

124. THE INSPECTION PANEL, THE WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL AT 15 YEARS 2 (2009), <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf> [<https://perma.cc/8K7U-WTLK>].

125. See, e.g., Jeff Tyson, *Is the World Bank’s Inspection Panel Working the Way It Should?*, DEVEX (Nov. 10, 2015), <https://www.devex.com/news/is-the-world-banks-s-inspection-panel->

years, critics have derided the Panel for declining to investigate the Bank's alleged support of child labor in Uzbekistan and the displacement of over 9,000 slum residents in Nigeria.<sup>126</sup>

While internal procedures like the World Bank's Inspection Panel are a step toward greater organizational accountability, they are still a far cry from the scrutiny imposed by domestic litigation. Crucially, administrative tribunals like the Inspection Panel fail to guarantee any remedial or corrective measures—they do not produce enforceable judgments.<sup>127</sup> Thus, international organizations should be subjected to judicial scrutiny to ensure that they are not achieving their organizational objectives at the expense of those they intend to serve.

*c. Better Public Perception.*—Generally, Americans tend to view international organizations much more negatively than citizens of other countries.<sup>128</sup> Though it is unclear whether this view stems from the immunity provided to international organizations in America, the United Nations Development Programme has noted that “[l]arge parts of the public no longer believe that . . . [international] institutions are adequately accountable for what they do.”<sup>129</sup> Thus, the increased accountability that would flow from less immunity could potentially increase public approval of international organizations. Better public perception would clearly benefit organizational goals by providing increased influence, cooperation, and political support.

*d. Preserving Limitations on Foreign Sovereign Immunity.*—Somewhat paradoxically, subjecting international organizations to the exceptions of the FSIA would also ensure that foreign states remain susceptible to those same exceptions. In *OSS Nokalva*, the Third Circuit noted that granting international organizations absolute immunity creates a perverse “incentive

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working-the-way-it-should-86973 [https://perma.cc/9CU6-SCR8] (describing the Inspection Panel's refusal to conduct a formal investigation into alleged abuses in Nigeria and Uzbekistan and critics' claims that the Panel was failing to adequately educate communities about their rights to compensation).

126. *Id.*

127. See Sabine Schlemmer-Schulte, *The World Bank Inspection Panel: A Model for Other International Organizations?*, in *PROLIFERATION OF INTERNATIONAL ORGANIZATIONS*, *supra* note 1, at 483, 510 (explaining that “[t]he Panel does not provide for a right to remedial measures or any other corrective measures [and] . . . [t]he result of the Panel process is not an enforceable judgment but findings by the Panel”).

128. See COUNCIL ON FOREIGN REL., PUBLIC OPINION ON GLOBAL ISSUES 7–8 (2009), <http://i.cfr.org/content/publications/attachments/USPOPCH10Institutions.pdf> [https://perma.cc/A3C5-AELH] (noting that Americans' favorability ratings for the World Bank and IMF are “well below the global average”).

129. SAKIKO FUKUDA-PARR ET AL., UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 112 (2002), [http://hdr.undp.org/sites/default/files/reports/263/hdr\\_2002\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/263/hdr_2002_en_complete.pdf) [https://perma.cc/R2R2-HXAD].

for foreign governments to evade legal obligations by acting through international organizations.”<sup>130</sup> This tactic creates a loophole in the FSIA, granting state action absolute immunity when it is disguised through the decisions of an international organization. Such a loophole breathes life into a theory of immunity that has been disavowed since the middle of the twentieth century.<sup>131</sup>

*B. Waiver Should Be Predicated on Functional Necessity, Not Corresponding Benefit*

Along with its decision in *Atkinson*, the D.C. Circuit’s treatment of waiver by international organizations is ultimately misguided. The “corresponding benefit” test outlined in *Mendaro* misinterprets the functional necessity doctrine, resulting in blanket immunity for international organizations that is wholly unnecessary. In holding that charter provisions like that of the World Bank<sup>132</sup> waive immunity only in cases where immunity would hinder the organization’s objectives, the Court effectively *reverses* the doctrine of functional necessity.<sup>133</sup> Proper application of the functional necessity doctrine would lead to the opposite conclusion—that such provisions waive immunity in all cases unless immunity is necessary to achieve the organization’s objectives.

While *Lutcher* may provide too lenient of a standard for waiver, its conclusion that full effect should be given to facially broad waivers of immunity in an organization’s charter is persuasive. Indeed, where a charter states, for instance, that “actions may be brought against the Bank,”<sup>134</sup> a plain reading supports the notion that the organization has made itself amenable to suit, thus waiving its immunity “in broad terms.”<sup>135</sup> However, it should not be assumed that an organization intended to waive the immunity necessary for it to achieve its intended purpose. Contrary to *Lutcher*, which permitted the assertion of any claims for which relief is available,<sup>136</sup> functional necessity dictates that any claim may be asserted unless it impedes the fulfillment of an organizational purpose.

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130. *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 764 (3d Cir. 2010).

131. *See BORN & RUTLEDGE*, *supra* note 32, at 232–33 (discussing the departure from absolute immunity theory, according to which all actions of a sovereign are afforded sovereign immunity).

132. *See supra* note 70 and accompanying text.

133. *See Herz*, *supra* note 22, at 519 (“[I]t reverses the presumption against immunity that is inherent in the doctrine of ‘functional necessity,’ the internationally accepted approach to defining the immunity of international organizations.”); *Singer*, *supra* note 33, at 136 (“The organization will face undue burdens in the exercise of its functions unless it is vulnerable to suit on certain kinds of claim. This is a doctrine of functional necessity in reverse.”).

134. This was the language used in the IDB charter provision at issue in *Lutcher*. *Agreement Establishing the Inter-American Development Bank*, *supra* note 70, 10 U.S.T. at 3095, 389 U.N.T.S. at 128; *see supra* note 70–72 and accompanying text.

135. *Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967).

136. *Id.*

Simply reforming the jurisprudence currently applied to waiver would greatly curtail much of the unnecessary immunity currently provided to international organizations. Indeed, facially broad waivers of immunity are contained in many international organization charters, with only a few exceptions.<sup>137</sup> If such provisions were construed as making these organizations susceptible to suits unrelated to organizational goals, many of the issues inherent in the IOIA's grant of absolute immunity would be resolved or substantially mitigated.

C. *Approaches in Other Countries to International Organization Immunity*

While this Note does not purport to extensively document all the various methods dealing with international organizations, it is worth noting some of the differing approaches abroad. Specifically, this subpart details the levels of immunity provided to international organizations in Austria, Italy, and the United Kingdom. These are not random selections—each of these countries hosts numerous international organizations and, therefore, faces many of the same policy considerations as the United States. Though imperfect, the approaches taken by these three countries are still preferable to the American approach and provide a useful point of comparison. Indeed, aspects of each approach could easily be adopted in the United States to curtail the degree of immunity provided to international organizations.

1. *Austria.*—In Austria, “[i]t is settled case law that international organizations enjoy absolute immunity,” provided that they act within their assigned functions.<sup>138</sup> Austria provides privileges and immunities to more than forty international organizations, many of which are seated in Vienna.<sup>139</sup> Similar to the United States, Austria's broad grant of immunity may flow from “the political interest of states to attract international organizations in their choice of headquarters.”<sup>140</sup> Indeed, the Austrian government described the presence of international organizations in the country as an “important

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137. See, e.g., Agreement Establishing the Inter-American Development Bank, *supra* note 70, 10 U.S.T. at 3095, 389 U.N.T.S. at 128. One such exception is contained in the Asian Development Bank's Articles of Agreement, which specifies that “[t]he Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.” Articles of Agreement Establishing the Asian Development Bank art. 50, Dec. 4, 1965, 17 U.S.T. 1418, 1449, 571 U.N.T.S. 123, 192.

138. Kirsten Schmalenbach, *Austrian Courts and the Immunity of International Organizations*, 10 INT'L ORG. L. REV. 446, 457–58 (2013).

139. Gregor Novak & August Reinisch, *Austria*, in THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS, *supra* note 5, at 31, 31 n.2.

140. See Schmalenbach, *supra* note 138, at 448 (suggesting that immunity concessions can be used to entice organizations to settle within states' borders).

goal [that] . . . positively affects the country's reputation and influence in international relations."<sup>141</sup>

Perhaps due to the futility of pursuing a claim against an international organization in Austrian courts, most disputes are settled through a mediation procedure, with the Austrian Foreign Ministry serving as mediator.<sup>142</sup> Though this necessarily requires the acquiescence of the organization, such a procedure might prove useful in the United States, where grievances against an organization would be mediated by the State Department. The mediation process would allow international organizations to retain their immunity but also provide some measure of remediation for aggrieved parties. Additionally, an independent mediator avoids the issue of bias implicit in any administrative tribunal set up by the organization.

2. *Italy*.—In Italy, courts “have consistently interpreted the jurisdictional immunity of international organizations restrictively” by applying the distinction between *acta iure gestionis* and *acta iure imperii*.<sup>143</sup> Italian courts only grant organizations immunity for *iure imperii* acts—i.e., actions that flow from some degree of sovereignty and that cannot ordinarily be carried out by private entities.<sup>144</sup> Consistent with this approach, Italian courts frequently rely on the principles of foreign-sovereign-immunity law in cases concerning the scope of international organization immunity.<sup>145</sup>

In *Food and Agriculture Organization v. INPDAI*,<sup>146</sup> a landlord brought suit against the FAO for failing to pay the rent on one of the buildings it occupied.<sup>147</sup> Rent had been increased on the property pursuant to a provision in the lease agreement; however, the FAO felt the provision was inapplicable.<sup>148</sup> In denying immunity to the FAO, the Italian Supreme Court of Cassation held that “whenever [international organizations] acted in the private law domain, they placed themselves on the same footing as private persons with whom they had entered into contracts, and thus forewent the right to act as sovereign bodies.”<sup>149</sup> The Italian Supreme Court has since reversed the *INPDAI* decision, holding that Italy's Headquarters Agreement with the FAO prevents suits against the organization in Italian courts,

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141. Novak & Reinisch, *supra* note 139, at 31 (quoting the response of the Federal Minister of European and International Affairs to a parliamentary request).

142. Schmalenbach, *supra* note 138, at 447.

143. A.S. MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES 61 (1995).

144. *Id.*

145. Riccardo Pavoni, *Italy*, in THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS, *supra* note 5, at 155, 158.

146. Cass., sez. un., 18 ottobre 1982, n. 5399, 87 ILR 1982, 1 (It.).

147. MULLER, *supra* note 143, at 172.

148. *Id.*

149. *Id.*

resulting in a much-more-absolute grant of immunity.<sup>150</sup> However, absent such headquarters agreements, Italian courts are still quick to apply customary principles of sovereign immunity to international organizations.<sup>151</sup>

3. *United Kingdom*.—Like the United States and Austria, the United Kingdom (UK) has been the host country for numerous international organizations, including the International Maritime Organization, the World Bank, and the International Tin Council.<sup>152</sup> In the UK, international organizations are generally granted some degree of immunity pursuant to the International Organisations Act 1968 (IOA).<sup>153</sup> Under the IOA, an international organization may be granted any of seven privileges and immunities listed in the Act to such extent as is specified by an “Order in Council.”<sup>154</sup>

Though the Act commonly grants organizations “[i]mmunity from suit and legal process,”<sup>155</sup> the IOA is still preferable to the American approach. Ostensibly, the IOA vests in the Queen authority to determine the extent of immunity granted to international organizations through an Order in Council, similar to the President’s authority under the IOIA.<sup>156</sup> In practice, however, Orders in Council are “subject to parliamentary procedure,”<sup>157</sup> and royal assent is a mere formality.<sup>158</sup> Thus, determinations of organizational immunity in the UK are subject to public debate and not solely within the discretion of a single individual.

#### D. Other Potential Solutions to the Absolute Immunity Problem

1. *Presidential Declaration of Activities Subject to Jurisdiction*.—One method of reining in international organization immunity absent judicial decree would be for the President to limit the immunity of organizations pursuant to his express authority under the IOIA.<sup>159</sup> Presently, of the eighty-

150. Pavoni, *supra* note 145, at 168.

151. *Id.* at 170.

152. Dan Sarooshi & Antonios Tzanakopoulos, *United Kingdom, in THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS*, *supra* note 5, at 275, 275.

153. International Organisations Act 1968, c. 48 (U.K.).

154. *Id.* § 1(2)(c), sch. 1.

155. *Id.*; see Sarooshi & Tzanakopoulos, *supra* note 152, at 276 (explaining that “[i]t is relatively rare for cases against international organizations to be brought before the UK courts since these organizations will often enjoy immunity from legal process” pursuant to the IOA).

156. Sarooshi & Tzanakopoulos, *supra* note 152, at 290.

157. CABINET OFFICE, *THE CABINET MANUAL DRAFT 19* (2010), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60645/cabinetdraftmanual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60645/cabinetdraftmanual.pdf) [<https://perma.cc/W66F-HNG4>].

158. “[U]nder the modern constitutional convention,” the Queen may not refuse to give assent. Francis Bennion, *Modern Royal Assent Procedure at Westminster*, 1981 *STATUTE L. REV.* 133, 138 (1981). Royal assent has not been refused since 1707. *Id.* at 138 n.25.

159. 22 U.S.C. § 288 (2012).

four international organizations designated by executive order, only one has had its immunity under the IOIA limited by the President to any degree.<sup>160</sup> Professor Michael Singer has proposed that the President reduce organizational immunity through a specific list of activities subject to jurisdiction, with the U.K. State Immunity Act of 1978 serving as one prominent example of such a list.<sup>161</sup> A primary benefit of this method would be the ability of the President to address immunity on an organization-by-organization basis, allowing specific determinations of when immunity would benefit an organization's goals.

*2. Requirement of Express Notice of Immunity.*—International organization immunity could also be limited by reversing the presumption that immunity exists unless expressly waived. Indeed, many of the negative effects of absolute immunity may be obviated if there were the presumption that immunity does not exist unless expressly asserted by an international organization in a given transaction. While this change in jurisprudence would have to be limited to contractual dealings, requiring organizations to give notice of their immunity might eliminate many of the uncertainties and transaction costs that currently exist when businesses negotiate with international organizations.

Though international organizations may currently waive their immunity in any given contract, they are incredibly loath to do so.<sup>162</sup> Thus, by reversing the presumption of immunity in contractual dealings, organizations may be more willing to forgo the imposition of immunity and all the attendant difficulties. At the very least, businesses dealing with international organizations would be put on notice regarding an organization's willingness to submit to jurisdiction over a given contract.

*3. Amendment of the FSIA or IOIA.*—The simplest and most obvious method of restricting international organization immunity is by legislative amendment of either the FSIA or IOIA. All Congress need do is expressly state that either: (a) the FSIA applies to international organizations or (b) the IOIA provides international organizations the same immunity that foreign states currently enjoy and incorporates any subsequent changes in foreign-sovereign-immunity law.

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160. The one organization with limited immunity is the International Food Policy Research Institute. Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 26, 1982). Additionally, INTERPOL had limited immunity for nearly thirty years until President Obama removed all such limitations in 2009. Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009).

161. Singer, *supra* note 33, at 145.

162. *See id.* at 137 (“[A]ny international organization can waive its own immunity in any case, yet such waivers are rare.”).

### Conclusion

When Congress passed the IOIA in 1945, it likely did not intend the substantial gap in the relative immunities of international organizations and foreign states that exists today. Indeed, it is somewhat anomalous that international organizations are afforded greater immunity from suit than the individual states that comprise them. However, conventional international law supports a grant of immunity only insofar as it is necessary for an international organization to fulfill its intended purposes.

The D.C. Circuit's interpretation of the IOIA misconstrues not only the theoretical foundation of international organization immunity but also the intent of the Act. This is evidenced by a widely accepted canon of interpretation, which counsels that the statute likely intended to keep international organization immunity at a level commensurate with that of foreign states. Moreover, the D.C. Circuit has also erred by so narrowly construing facially broad waivers of immunity contained in organizational charters.

Most importantly, implementing a system of restrictive immunity in regard to international organizations would be preferable to one of absolute immunity. Not only is such an approach consonant with the principles of international law, but it also increases the efficacy of international organizations through reduced transaction costs, greater accountability, and improved public perception. Additionally, restrictive immunity gives businesses greater confidence in dealing with international organizations and prevents foreign states from cleverly avoiding the exceptions present within the FSIA.

—Carson Young