No. 16-7051

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Budha Ismail Jam, Kashubhai Abhrambhai Manjalia,
Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, and
Machimar Adhikar Sangharash, Sangathan
Plaintiffs-Appellants

v.

International Finance Corporation
Defendant-Appellee

On Appeal from the United States District Court
for the District of Columbia, No. 15-cv-00612
The Honorable John D. Bates

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING *EN BANC*

Richard L. Herz
Marco Simons (D.C. Bar No. 492713)
Michelle Harrison (D.C. Bar No. 1026592)
Zamira Djabarova (D.C. Bar No. 1035009)
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 401
Washington, D.C. 20006
Tel: (202) 466-5188
Fax: (202) 466-5189

July 24, 2017

Counsel for Plaintiffs-Appellants

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GLOSSARY

AOB	Appellants' Opening Brief
DOS	United States Department of State
FSIA	Foreign Sovereign Immunities Act
IFC	International Finance Corporation
IOIA	International Organizations Immunities Act
JA	Joint Appendix

RULE 35(b) STATEMENT

The panel's decision defies the foreign policy judgment of both Congress and the Executive by giving an international organization comprised of foreign nations unparalleled immunity from suit, far greater than any nation acting alone has had for decades. The International Organizations Immunities Act (IOIA) provides that such organizations have only the "same immunity. . . as is enjoyed" by foreign states. 22 U.S.C. § 288a(b). But the panel here concluded that the International Finance Corporation (IFC) is entitled to "absolute immunity" from suit, even though that is "not at all the same" as the restrictive immunity afforded to foreign governments. Pillard Op. 1 (concurring). And the panel, by its own admission, failed to give a "literal[]" reading to IFC's own immunity waiver. Op. 7.

This decision extends a circuit split over immunity law and ignores multiple Supreme Court precedents. It shields supra-national organizations even in cases where foreign governments could be sued, even where the organization has violated its *own* mission, and despite the fact that the U.S. government has indicated that it does not favor absolute immunity. This is contrary to the intent of Congress and of the signatories to IFC's founding treaty, and it is dangerous not just for those harmed by IFC's actions, but for IFC's own legitimacy.

The panel felt bound by Circuit caselaw: *Atkinson v. Inter-American Development*

Bank, 156 F.3d 1335 (D.C. Cir. 1998), regarding IOIA immunity and *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), regarding waiver. But as Judge Pillard noted, those cases left international organization immunity law in a "perplexing state" and were "wrongly decided"; "the full court should revisit [them]." Pillard Op. 1, 9. *See also Vila v. Inter-Am. Inv. Corp.,* 583 F.3d 869, 870-71 (D.C. Cir. 2009) (statement of Williams, J.) (inviting litigants to seek *en banc* review of waiver question).

The panel's conclusion that the IOIA provides absolute immunity, rather than incorporating the restrictive immunity of the Foreign Sovereign Immunities Act (FSIA), directly conflicts with the Third Circuit's decision in *OSS Nokalva v. European Space Agency,* 617 F.3d 756, 762-63 (3d Cir. 2010). It also conflicts with Supreme Court precedent in three ways.

First, the holding that the IOIA gives organizations the immunity foreign governments enjoyed *in 1945*, when the IOIA was enacted, conflicts with the Supreme Court's determination that a jurisdictional statute expressed in the present tense must be applied as of *the time of suit*. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). The IOIA affords IFC "the same immunity . . . as *is* enjoyed," 22 U.S.C. § 288a(b) (emphasis added), and therefore refers to current sovereign immunity law: the FSIA, which allows suits based on commercial activity.

Second, even if 1945 immunity were relevant, the panel's decision conflicts with

at least seven Supreme Court cases holding that sovereign immunity in 1945 was not absolute. Instead, foreign states received immunity *only* where the Department of State ("DOS") suggested it, or, if DOS was silent, where political branch policy required it – and immunity was *not* always granted. *E.g. Republic of Mexico v. Hoffman*, 324 U.S. 30, 36-38 (1945); *see also Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016); *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014); *Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010); *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004); *Ex parte Peru*, 318 U.S. 578, 587 (1943). The panel's decision also conflicts with two D.C. Circuit cases confirming this point. *See Hourani v. Mirtchev*, 796 F.3d 1, 9 (D.C. Cir. 2015); *Manoharan v. Rajapaksa*, 711 F.3d 178, 179 (D.C. Cir. 2013). And it conflicts with the Supreme Court's holding that deference looks to *current* policy. *Altmann*, 541 U.S. at 696.

Third, the panel's decision conflicts with *Chickasaw Nation v. United States,* 534 U.S. 84, 93 (2001), by impermissibly "read[ing] back into the Act the very word[s]. . . [Congress] deleted." Congress considered but *rejected* language in the IOIA that would have provided absolute immunity from suit, while retaining absolute language for other immunities. Pillard Op. 3.

En banc review is separately warranted regarding waiver of immunity, because this Court has adopted inconsistent tests. In *Lutcher S.A. Celulose e Papel v. Inter-*

American Development Bank, 382 F.2d 454, 457 (D.C. Cir. 1967), the Court held that the plain text of a waiver provision identical to IFC's waives immunity "in broad terms." But *Mendaro* read the same language "narrowly," allowing waiver only when the type of suit would "benefit" the organization over the long term. Op. 7. As Judge Williams has noted, *Mendaro* and *Lutcher* are "impossible to reconcile." *Vila*, 583 F.3d at 870 (statement of Williams, J.). The panel's opinion also conflicts with *Mendaro*, because it requires a commercial relationship that is "ancillary" to the organization's mission, Op. 9-10, which would deny waiver for suits *Mendaro* expressly allowed.

The scope of both IOIA immunity and waiver are unusually important issues. This Circuit's caselaw clashes with the plain language of a statute and a treaty – IFC's Articles of Agreement, Dec. 5, 1955, 7 U.S.T. 2197 – and defeats their purposes. And it affords a group of states immunity for purely commercial activity, even though all three branches of Government reject such immunity for individual states. *See OSS Nokalva*, 617 F.3d at 764.

The panel's opinion diverges from its sister circuit, from other D.C. Circuit cases, from numerous Supreme Court cases, and from the official policies of the political branches. It presents two issues on which judges of this Court have already indicated that *en banc* review is appropriate. This is a textbook case for *en banc* review.

STATEMENT OF THE CASE

The facts alleged "paint[] a dismal picture." Op. 2 n.1. The IFC-financed Tata Mundra coal-fired power plant ("the Project") has destroyed Plaintiffs' livelihoods and threatens their health. The Project has devastated fisheries that families depend on, and destroyed freshwater sources, leaving farmers unable to grow crops on their land. AOB 7-9. IFC knew the Project would harm the very people it is supposed to help, given its mission of reducing poverty. *Id.* at 14-15. And IFC's own internal complaint mechanism found that IFC violated its own policies. *Id.* at 17-19. Yet IFC has taken no steps to remedy the harms, *id.* at 16-17, leaving Plaintiffs no recourse but to sue.

The district court found IFC immune under *Atkinson*, JA1425, and – applying *Mendaro*'s "corresponding benefit" test – also concluded that IFC had not waived immunity. JA1424.

The panel affirmed, finding itself bound by *Atkinson* and *Mendaro*. As to waiver, the panel recognized that this case *would* "in some sense. . . 'benefit'" IFC, Op. 10, but restricted waiver only to suits by parties with "commercial relationship[s]" arising out of "ancillary business transactions." *Id.* at 9-10.

Judge Pillard concurred, believing the panel was bound by *Mendaro* and *Atkinson*, but sharply criticized both as "wrongly decided." Pillard Op. 1, 9-10. She found *Atkinson*'s interpretation of the IOIA was "misguided from the start," and the

"amorphous waiver-curbing doctrine that has developed under *Mendaro*" had only "deepened" "the doctrinal tangle." *Id.* at 9. Accordingly, Judge Pillard suggested that this Court reconsider both cases *en banc*. *Id.* at 9-10.

REASONS FOR *EN BANC* REVIEW

I. *Atkinson*'s holding that the IOIA provides "absolute" immunity from suit conflicts with Supreme Court precedent.

A. *Atkinson*'s holding that the IOIA locked in the immunity foreign sovereigns enjoyed in 1945 conflicts with Supreme Court authority that jurisdictional and immunity statutes apply as of the time of suit.

The IOIA's plain language – organizations enjoy the "same immunity . . . as is enjoyed" by foreign states, 22 U.S.C. § 288a(b) – indicates that organizations should receive the same immunity foreign states currently enjoy. That is restrictive immunity under the FSIA. The Supreme Court's clear instructions for interpreting jurisdictional and immunity statutes require this. And the Third Circuit and the Executive Branch have reached the same conclusion. *Atkinson*'s contrary interpretation, that antiquated immunity standards control, fails to give effect to Congress' intent. *En banc* review is necessary to cure the circuit split and correct this error.

Atkinson conflicts with the Supreme Court's subsequent holding that – as a matter of "plain text" – a jurisdictional provision "expressed in the present tense" is applied as of the time of suit. *Dole*, 538 U.S. at 478 (interpreting the FSIA). IOIA

immunity from suit is jurisdictional, *Nyambal v. International Monetary Fund,* 772 F.3d 277, 280 (D.C. Cir. 2014), and in the present tense: the "same . . . as is enjoyed." This plain language reading is also compelled by the Supreme Court's holding that sovereign immunity has "[t]hroughout history" been determined by "current political realities." *Altmann*, 541 U.S. at 696. The panel failed to consider either *Dole* or *Altmann*, and both require that current immunity law applies.

So too does the "familiar rule" that a statute that incorporates another body of law by reference is "dynamic, not static" – it incorporates subsequent modifications of the referenced law. Pillard Op. 1-2 (citing *Atkinson*, 156 F.3d at 1340). Since the IOIA defines organizational immunity by reference to sovereign immunity law, *Atkinson*, 156 F.3d at 1340, it incorporates sovereign immunity law as it develops. Pillard Op. 1-2; *OSS Nokalva*, 617 F.3d at 764.

Yet *Atkinson* brushed this rule aside, and attempted to discern legislative intent from a provision authorizing the President to revoke any IOIA immunity from a particular organization. 156 F.3d at 1341. But nothing about Presidential authority "to make organization- and function-specific exemptions" suggests Congress intended to preclude organizational immunity from suit from evolving with sovereign immunity. Pillard Op. 2-3; *accord OSS Nokalva*, 617 F.3d at 763-64. More importantly, legislative intent is irrelevant, since the text is clear. *Hartford Underwriters Ins. Co. v. Union Planters*

Bank, 530 U.S. 1, 6 (2000).

Atkinson's reasoning was "particularly strained" because it assumed Congress intended "unchanging absolute immunity" but chose an "obscure route to freezing international organizations' immunity" instead of just stating immunity is absolute. Pillard Op. 3; *accord OSS Nokalva*, 617 F.3d at 764.

Accordingly, the Third Circuit explicitly rejected *Atkinson*, finding that "the [IOIA's] language" and "[w]ell-established rules of statutory interpretation" demonstrate that the IOIA incorporates the commercial activity exception to immunity in the FSIA. *OSS Nokalva,* 617 F.3d at 762, 765.

The State Department reached the same conclusion. Pillard Op. 3-4; AOB 29-33. That puts *Atkinson* at odds with another Supreme Court precedent: courts should not override an immunity provision's "apparent statutory text supported by executive interpretation in favor of speculation" about what Congress "*would have wanted*." *Beaty*, 556 U.S. at 860 (emphasis original). Given DOS's role in drafting the IOIA, the Court should give "weight" to its "considered view" that IOIA immunity "was not frozen as of 1945." Pillard Op. 3-4; *accord OSS Nokalva*, 617 F.3d at 764.[2]

[2] The panel thought that under the commercial activity exception, IFC would never be immune, "since its operations are *solely* 'commercial.'" Op. 8. But some IFC activities, like guiding countries through legal reforms, might well be public functions. And this Court has recognized sovereign immunity for certain employment disputes, *El-Hadad*

In light of *Dole*, *Altmann*, *Beaty* and the Third Circuit's "persuasive[ ]… contrary construction" of the IOIA, *en banc* review is warranted to reexamine *Atkinson*. *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871, 876 (1992).

B. The panel's opinion conflicts with the Supreme Court's holding that, in 1945, foreign sovereign immunity was not absolute.

Even assuming 1945 immunity mattered, the Supreme Court has repeatedly held – contrary to *Atkinson* – that in 1945, foreign sovereigns did *not* enjoy automatic, absolute immunity from suit. *E.g.*, *Republic of Argentina*, 134 S. Ct. at 2255. Instead, courts "deferred to the decisions of the political branches." *Altmann*, 541 U.S. at 689. If DOS did not suggest immunity, a court would "'decide for itself,'" *Samantar*, 560 U.S. at 311-12 (quoting *Ex parte Peru*, 318 U.S. at 587), and 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). *Atkinson*'s holding that immunity in 1945 was absolute is unsustainable.

The panel shrugged off the Supreme Court precedent as *dicta*, and implied that the political branches' role was pure formality, *i.e.* that DOS *always* requested immunity in 1945. Op. 6. Neither is correct. *Altmann* held the FSIA applies to pre-

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v. United Arab Emirates, 496 F.3d 658, 664 (D.C. Cir. 2007), and other internal administrative functions. *Atkinson*, 156 F.3d at 1342-43. Regardless, DOS does not share the panel's concern, and if IFC is to be afforded *more* immunity than states, it is for Congress to amend the IOIA's plain text.

FSIA conduct *because* courts have long deferred "to the [immunity] decisions of the political branches." 541 U.S. at 689, 696. And the rule that courts would not allow immunity the government had not recognized was "[p]articularly pertinent" in *Bank Markazi*, 136 S. Ct. at 1328, and "controlling" in *Hoffman*, 324 U.S. at 38.

DOS did *not* always suggest immunity. In *Hoffman*, decided mere months before the IOIA was passed, DOS rejected immunity. *Id.*[3] Indeed, DOS repeatedly declined to suggest it, *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 due to policies of *not* seeking immunity in the relevant commercial contexts. *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 courts denied immunity where DOS did not suggest it. *E.g. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d at 203; *Hannes v. Kingdom of Roumania Monopolies Inst.*, 20 N.Y.S.2d 825, 828 (App. Div. 1940); *Ulen & Co. v. Bank Gospodarstwa Krajowego (Nat'l Econ. Bank)*, 24 N.Y.S.2d 201, 204 (App. Div. 1940). Since DOS did not merely punch immunity tickets, immunity from suit was not absolute.

[3] The majority suggested *Hoffman* is distinguishable because it was "not a suit against Mexico." Op. 6. But *Mexico* claimed immunity and DOS refused to suggest immunity for *Mexico*. *Hoffman,* 324 U.S. at 31-32.

Regardless, DOS's *general* practice *in 1945*, Op. 6, is irrelevant. Since DOS has not suggested immunity, under *Hoffman* IFC is not immune unless a *specific* policy requires it. Since courts defer to "the most recent" policy, that means looking to the FSIA. *Altmann,* 541 U.S. at 696, 702 n.23. Executive policy is in accord that the IOIA incorporates the FSIA. Pillard Op. 3-4. The full Court should align Circuit caselaw accordingly, as the Supreme Court requires.

C. Under Supreme Court precedent, Congress' express rejection of language that would have provided unqualified immunity precludes absolute immunity.

Part of the reason *Atkinson*'s reasoning is "strained" is that Congress expressly *rejected* absolute immunity from suit, while retaining absolute language for other IOIA immunities. Pillard Op. 3.

Courts do "not assume that Congress intended to enact statutory language that it has earlier discarded." *Chickasaw Nation*, 534 U.S. at 93. Originally, section 288a(b) would have granted unqualified "immunity from suit." H.R. 4489, 79th Cong. (as introduced, Oct. 24, 1945; referred to H. Comm. on Ways and Means). But the Senate amended it to provide the "same immunity… as is enjoyed by foreign governments." H.R. 4489, 79th Cong. (as reported by S. Comm. on Finance, Dec. 18, 1945). It did so, with DOS's "endorsement," because the original language was "a little too broad." 91 Cong. Rec. 12,531 (1945); Pillard Op. 3. *Atkinson* impermissibly "read back in[ ]…

the very word[s]… [Congress] deleted." *Chickasaw Nation*, 534 U.S. at 93.[4]

Atkinson also failed to follow the Supreme Court's rule that, where "Congress includes particular language in one section of a statute but omits it in another," it is "generally presumed" that Congress did so purposefully. *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452 (2002). Although Congress qualified immunity *from suit* by tying it to foreign sovereign immunity, it used the unqualified "shall be immune" or "shall be exempt" elsewhere in the IOIA. 22 U.S.C. §§ 288a(c); 288c; Pillard Op. 3. Had Congress intended to provide unqualified and unchanging immunity from suit, "it presumably would have done so expressly as it did in the immediately following subsection[.]" *Russello v. United States*, 464 U.S. 16, 23 (1983).

II. The panel's test for whether an organization's charter waives immunity conflicts with prior Circuit precedent.

A. *Mendaro*'s "narrow," judicially-created test conflicts with the "broad" waiver *Lutcher* found based on plain text.

Regardless of the scope of IOIA immunity, IFC's charter waives immunity from suit: except for suits by member states, "[a]ctions may be brought against the Corporation." JA0343, Art. VI, § 3. *Lutcher* held that identical charter language means what it says; the drafters, "manifest[ing] full awareness," "purposeful[ly]" waived

[4] Even if immunity in 1945 was absolute, the change in language refutes any suggestion that Congress meant to enshrine absolute immunity forever.

immunity "broad[ly]." 382 F.2d at 457-58.[5] Under *Lutcher*, "IFC. . . may be sued." Pillard Op. 6.

But *Mendaro* later announced a fundamentally inconsistent rule. It concluded that the "facially broad waiver of immunity … must be narrowly read," 717 F.2d at 611, and "[r]eject[ed] . . . the view" that the provision "provides a 'blanket waiver.'" *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009) (quoting *Mendaro*, 717 F.2d at 615)).

"Although the waiver provision contained no exceptions for different types of suits, [*Mendaro*] read a qualifier into it" – the "corresponding benefit" test. *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 839 (D.C. Cir. 2009). It asks whether "this *type* of suit, by this *type* of plaintiff, would benefit the organization over the long term." *Id.* at 840 (emphasis original). But that requires exactly the "case-by-case" analysis of whether the claim would "contribute[] to the [institution's] effectiveness" that *Lutcher* rejected. 382 F.2d at 456-57, 459-60.

Downplaying the conflict, the panel asserted that *Lutcher* was limited to its facts and that *Mendaro* simply "declined to extend *Lutcher*'s holding to the suit before it." Op. 7 n.3. But that could only be so if *Lutcher* had *applied* the *Mendaro*-like balancing

[5] Other sections use different language to *reserve* immunities. *Compare, e.g.* JA0344, Sec. 9 ("shall be immune from all taxation"); Sec. 4 ("shall be immune from search").

test it expressly rejected. 382 F.2d at 457.[6]

Plain text aside, *Mendaro* subverts the principle it relied on, the internationally-accepted doctrine of "functional necessity." That doctrine contains a presumption *against* immunity unless the organization *needs* immunity to fulfill its chartered purposes. *See e.g.* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns,* 36 Va. J. Int'l L. 53, 128 (1995). But *Mendaro* adopted "the same rationale *in reverse*": a presumption *favoring* immunity, unless the organization benefits from waiver. 717 F.2d at 617 (emphasis added). Under the functional inquiry, IFC is not immune. It does not *need* to violate its own policies to fulfill its mission, so it does not need immunity from this suit.

Regardless, *Lutcher* and *Mendaro* directly conflict. As all panel members agreed, "read literally," IFC's waiver provision is "categorical." Op. 7; Pillard Op. 5. Given this, *Mendaro* "second-guess[es] international organizations' own waiver decisions," and "lacks a sound legal foundation." Pillard Op. 5, 7. The full Court should stand by *Lutcher*'s plain text reading.

B. The panel's test conflicts with *Mendaro*.

The panel failed to faithfully apply the corresponding benefit test, instead

[6] The panel asserted that the *Mendaro* test "emerged in part from *Lutcher*'s discussion," Op. 7-8 n.3, but it cited *the Bank's* arguments – which *Lutcher rejected.* 382 F.2d at 456.

barring waiver where *Mendaro* would allow it. Under *Mendaro*, IFC waives immunity where the type of case "would further the organization's goals," 717 F.2d at 617, and particularly where it needs an external party's trust. *Vila*, 570 F.3d at 279. The panel was "convince[d]" Plaintiffs' claims *would* "in some sense. . . 'benefit'" IFC by holding it to its mission and allowing it to gain the trust of communities whose support it requires before it can fund high-risk projects like Tata Mundra. Op. 3, 9-10. *See also* Pillard Op. 8.

But the panel held that "the term 'benefit' is something of a misnomer," and that plaintiffs must have a "commercial relationship" with IFC that relates to "ancillary business transactions," *not* IFC's "core operations." Op. 9, 10. That conflicts with *Mendaro*. Far from requiring a commercial relationship, *Mendaro* recognized waiver encompasses claims by "debtors, creditors," *and* "*other* potential plaintiffs" where needed "to achieve [the organization's] chartered objectives"; it applies to *both* "external activities *and* contracts." 717 F.2d at 615, 621 (emphasis added). And while waiver was "clear" for borrowers' suits, *id.* at 615, 618, even though they go to the "core" of the organization's function and "policy discretion," Op. 10, the panel's "ancillary" transaction requirement would bar such suits.

Under *Mendaro*, if the borrower for this project had a dispute with IFC, immunity would be waived. That same transaction cannot be "external" for the

borrower, but "internal," *id.*, where it harmed project neighbors. Plaintiffs do not challenge any "discretion"; their claims vindicate IFC's *own* policies, which IFC management lacks discretion to violate.

The panel accepted IFC's "floodgates" argument. *Id.* But a narrow waiver where IFC violates its own policies would encourage management to follow policy; if it does, there is no flood to release. It is management's failure to follow IFC policy, not amenability to suit, that endangers IFC's mission. Regardless, any flood of litigation would rise only because "IFC's own [waiver] opened the gate." Pillard Op. 8.

The panel limited waiver to parties who can negotiate for immunity waivers, but "the opposite would make more sense." *Id.* Parties that "fail to bargain" for waiver are "less entitled to benefit from broad immunity waivers than victims of torts or takings who lacked any bargaining opportunity." *Id.* This is particularly true since IFC exists to help people like Plaintiffs, not sophisticated counterparties.

III. The panel's approach to precedent is internally inconsistent.

Atkinson and *Mendaro* are all the more difficult to defend, since doing so required conflicting approaches to precedent. As to *Atkinson*, the panel ignored the narrow question presented (immunity in a garnishment proceeding) and adopted the stated rule: absolute immunity. Op. 6. But it distinguished *Hoffman* by doing the opposite – focusing on the narrow question (immunity in a suit *in rem*), and ignoring

its rule of deference to political branch policy. *Id.*

So too with waiver. The panel focused on *Mendaro*'s corresponding benefit test while ignoring its factual context, but limited *Lutcher* to its facts, while ignoring *Lutcher*'s rule – broad waiver. *Id.* at 7 & n.3.

This Court's organizational immunity jurisprudence should be grounded in a consistent approach. No one could read this opinion and determine whether an announced rule is really a rule, or whether a case is precedential for those facts only. The full Court should sort out this mess.

CONCLUSION

The panel's holding that the IOIA bestows absolute immunity perpetuates a Circuit split and conflicts with numerous Supreme Court precedents. The IOIA's plain text gives IFC only the same "restrictive" immunity as foreign states.

The panel's holding that IFC has not waived immunity conflicts both with this Circuit's original holding that the waiver provision waives immunity broadly, and with the later-adopted corresponding benefit test.

These are important issues. The panel decision is at odds with the political branches' foreign policy judgment, and with the plain language of a treaty. *En banc* review is necessary to resolve these conflicts.

Dated: July 24, 2017

Respectfully submitted,

/s/ Richard L. Herz
Richard L. Herz[7]
Marco Simons (D.C. Bar No. 492713)
Michelle Harrison (D.C. Bar No. 1026592)
Zamira Djabarova (D.C. Bar No. 1035009)
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 401
Washington, D.C. 20006
Tel: (202) 466-5188
rick@earthrights.org

Counsel for Plaintiffs-Appellants

[7] Based in CT; admitted in NY; does not practice in DC's courts.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A), because this brief contains 3,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word (2013) in 14-point Garamond font.

Date: July 24, 2017

/s/ Richard L. Herz
Richard L. Herz
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 401
Washington, D.C. 20006
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I, Richard Herz, hereby certify that on July 24, 2017, I caused the foregoing Plaintiffs-Appellants' Petition for Rehearing *En Banc* to be filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF electronic filing system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: July 24, 2017

/s/ Richard L. Herz
Richard L. Herz
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 401
Washington, D.C. 20006
Counsel for Plaintiffs-Appellants

ADDENDUM

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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 the 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]

[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.

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

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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.

[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

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 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.

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indicated waiver where "vulnerability to suit contributes to the effectiveness of the [organization's] operations." *Lutcher*, 382 F.2d at 456.

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 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

[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 non-contract 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.

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.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7051 **September Term, 2016**

FILED ON: JUNE 23, 2017

BUDHA ISMAIL JAM, ET AL.,
APPELLANTS

v.

INTERNATIONAL FINANCE CORPORATION,
APPELLEE

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

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

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: June 23, 2017

Opinion for the court filed by Senior Circuit Judge Silberman.
Concurring opinion filed by Circuit Judge Pillard.

CERTIFICATE OF PARTIES AND AMICI

Pursuant to D.C. Circuit Rule 35(c) and Rule 28(a)(1), Plaintiffs-Appellants Budha Ismail Jam, *et al.*, certify as follows:

A. Parties and Amici

Plaintiffs-Appellants in this matter are Budha Ismail Jam, Kashubhai Abhrambhai Manjalia, Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, and Machimar Adhikar Sangharash Sangathan (Association for the Struggle for Fisherworkers' Rights). Defendant-Appellee in this matter is the International Finance Corporation.

Amici for Plaintiffs-Appellants: Dr. Erica R. Gould and Prof. Daniel Bradlow

Amici for Defendant-Appellee: African Development Bank Group, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, Council of Europe Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Inter-American Investment Corporation, International Bank for Reconstruction and Development, International Monetary Fund, Multilateral Investment Guarantee Agency, Nordic Investment Bank, West African Development Bank, Professor David P. Stewart, and Professor Don Wallace.

B. Rulings Under Review

Plaintiffs-Appellants' Petition seeks review of the June 23, 2017 panel opinion in *Jam v. International Finance Corporation*, 860 F.3d 703 (D.C. Cir. 2017). The panel's

Opinion and Judgment are attached in the addendum to this Petition.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants further certify, pursuant to D.C. Circuit Rule 35(c) and Rule 26.1, that Plaintiff Machimar Adhikar Sangharsh Sangathan (MASS) is a non-profit organization and is not owned by any parent corporation. No publicly-held company has a 10% or greater ownership interest in MASS.