ORAL ARGUMENT SCHEDULED FOR FEBRUARY 6, 2017

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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December 21, 2016

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the District Court and in this Court are listed in the Brief for Plaintiffs-Appellants:

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 (collectively, "*Amici Curiae* World Bank *et. al.*" or "Bank *Amici*")

Plaintiff Plaintiff Machimar Adhikar Sangharsh Sangathan (Association for the Struggle for Fisherworkers' Rights) 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.

B. Rulings Under Review

The ruling under review is the March 24, 2016 decision of Judge John D. Bates of the U.S. District Court for the District of Columbia, dismissing Plaintiffs' complaint. *Jam v. International Finance Corporation,* No. 1:15-cv-612, 2016 U.S. Dist. LEXIS 38299 (D.D.C. Mar. 24, 2016)(JA1413).

C. Related Cases

This case has not previously been before this Court or any other court except for the proceedings in the district court below.

In *Smith v. World Bank*, No. 16-7003 (D.C. Cir.), Appellant copied verbatim arguments Plaintiffs raised here. Plaintiffs filed an *amicus* brief in *Smith*. The World Bank, an *amici* here, presented defenses in *Smith* that, if accepted, would obviate the need to consider the overlapping arguments in that case. This Court invited Plaintiffs to participate in the *Smith* oral argument, scheduled for January 12, 2017. ECF No. 1646035.

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GLOSSARY

CAO	Compliance Advisor Ombudsman
DB	Defendant-Appellee Appeal Brief
DOS	United States Department of State
FSIA	Foreign Sovereign Immunities Act
IFC	International Finance Corporation
IFC Articles	Articles of Agreement of the International Finance Corporation
JA	Joint Appendix
IMF	International Monetary Fund
IOIA	International Organizations Immunities Act
OAS	Organization of American States
PB	Plaintiffs-Appellants Opening Appeal Brief

STATUTES, REGULATIONS, TREATIES

Except for those included in the Addendum to this brief, all pertinent statutes, regulations and treaties are included in the Addendums to Plaintiffs-Appellants' Opening Brief and Defendant-Appellee's Brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

According to IFC, when Congress granted international organizations only the "the same immunity . . . as is enjoyed by foreign governments," it actually granted them automatic, absolute immunity, forever. That is a surprising claim, because IFC concedes, based on recent Supreme Court cases, that in 1945, courts assessing foreign sovereign immunity deferred to the policy of the political branches. When the circumstances-specific policy of the political branches did not favor immunity, courts in 1945 did not grant it. Regardless, deference to the political branches requires deference to *current* policy, which denies immunity for commercial acts.

IFC insists *Atkinson v. Inter-American Development Bank,* 156 F.3d 1335 (D.C. Cir. 1998), is consistent with the recent Supreme Court cases, but it found immunity in 1945 was automatic and did not defer to political branch policy.

The best interpretation, however, is that the International Organizations Immunities Act (IOIA) incorporates sovereign immunity law as it changes. IFC's plea for standards all three branches have rejected for at least sixty years cannot be squared with the IOIA's text. The holding in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478

(2003), that jurisdictional statutes written in the present tense are applied as of the time of suit controls here. Indeed, in passing the IOIA, Congress rejected words that would have granted absolute immunity from suit, instead tying organizational immunity to sovereign immunity.

IFC and its *amici* complain, as *amici* put it, that Plaintiffs ask the Court to "treat international organizations like foreign sovereigns." *Amici Curiae* World Bank *et. al.* ("Bank *Amici*") 1. We do. The IOIA explicitly requires that.

IFC does not dispute that it lacks immunity under the restrictive theory. Since that theory applies, IFC is not immune.

Even if the IOIA provided immunity, under *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (D.C. Cir. 1967), IFC broadly waived it. IFC's reliance on *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983) is futile; one panel cannot ignore the rule announced by another. Regardless, this suit meets *Mendaro*'s "corresponding benefit" test. IFC's only chartered purpose is to further economic development to reduce poverty. It recognizes that protecting host communities is central to that mission. IFC benefits by being held to its own goals.

But here, IFC management denies this. It pretends IFC's *means* for achieving its purpose—loaning money to corporations, primarily—are its purpose. And it dismisses the people it is chartered to serve as "unknown masses" whose interests IFC need not consider. By ignoring IFC's purpose, denying its commitments, and

disparaging its chartered beneficiaries, IFC management only highlights how much the *institution* needs suits like this one.

ARGUMENT

I. The IOIA does not provide IFC with immunity here.

A. *Atkinson* has been superseded by later Supreme Court cases.

IFC asks this Court to disregard all five post-*Atkinson* Supreme Court cases holding that 1945-era foreign sovereign immunity was not absolute and depended solely on the will of the political branches. Brief of Defendant-Appellee ("DB") 22; *see* Brief of Plaintiffs-Appellants ("PB") 26-29. It claims these cases "ha[ve] nothing to do with" the IOIA. DB 22. But IOIA immunity from suit is the "same" as foreign sovereign immunity. 22 U.S.C. § 288a(b). *Atkinson* is based on a determination that in 1945, foreign sovereigns were always immune. PB 27; *infra* § I.B. The Supreme Court cases "resolve[d] th[is] issue" by showing that to be mistaken. *See* DB 22 (quoting *Fla. Bankers Ass'n v. Dep't of Treasury*, 799 F.3d 1065, 1079 (D.C. Cir. 2015)(Henderson, J., dissenting)). That eviscerated *Atkinson*. PB 24-25.

B. Foreign sovereigns were not automatically immune.

IFC concedes Plaintiffs' point: after *Atkinson*, the Supreme Court and this Court have held that 1945-era courts deciding foreign sovereign immunity questions deferred to political branch policy. DB 23 (citing *Republic of Argentina v. NML Capital, Ltd.,* 134 S. Ct. 2250, 2255 (2014); *Manoharan v. Rajapaksa*, 711 F.3d 178, 179 (D.C.

Cir. 2013)). That ends the matter; *Atkinson*'s grant of immunity without reference to specific policy contradicts that precedent. PB 27.

IFC implies that the political branches' role was pure formality; that in 1945 they always granted immunity. DB 23-24, 37. That would be irrelevant, because courts must defer to *current* policy: restrictive immunity. PB 32-33. Regardless, the political branches did not merely punch immunity tickets.

In *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945), the Executive did not request immunity, and the Court held that where it did not, and there was no basis for immunity in existing policy, the Court would deny it. *Accord Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010). There is no indication in *Atkinson* that the Court ever considered *Hoffman*. IFC claims that *Hoffman* "reaffirmed" "absolute" immunity but declined to "stretch" it to cover the facts. DB 38. But *Hoffman* never used the word "absolute" and it *denied* immunity, so immunity was necessarily less than absolute. Regardless of labels, *Hoffman* denied immunity, specifically because there was no U.S. policy supporting it. 324 U.S. at 38.[1]

IFC selectively quotes recent Supreme Court cases, DB 23, but they support

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[1] In *Ex parte Peru*, immunity was not automatically granted simply because Peru had not waived it. DB 37. The DOS had recognized immunity following a negotiation that settled the claims. 318 U.S. 578, 581, 586-89 (1943); *accord Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 355 (D.C. Cir. 2007).

Plaintiffs. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016) reiterated that courts would not "allow an immunity on new grounds which the government has not seen fit to recognize." Similarly, *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009), held that the executive had the "case-by-case prerogative" to grant "or den[y]" immunity.

IFC ignores that immunity changed over time, from *automatic* immunity to the 1945-era deference to the political branches. Thus, IFC plucks from *Samantar* the observation that foreign states were "extend[ed] virtually absolute immunity," DB 23 (quoting 560 U.S. at 311), and cites *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983), DB 24, which *Samantar* was quoting. But these cases were referring to *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926), which granted immunity even though the Department of State ("DOS") declined to request it and DOS policy was to *not* request immunity in like cases. *The Pesaro*, 277 F. 473, 480 n.3 (S.D.N.Y. 1921). Both *Samantar*, 560 U.S. at 311-12, and *Verlinden*, 461 U.S. at 486, recognized that by 1945, courts deferred to political branch policy. *Accord* PB 26-27. "[T]he authority of [*Berizzi Bros.*] [was] severely diminished by later cases such as [*Hoffman*]." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 699 (1976). Indeed, *Hoffman* questioned *Berizzi*'s grant of an immunity DOS declined to recognize. *Id.* at 700 (citing *Hoffman*, 324 U.S. at 35 n.1). For IFC to ask this Court to apply an automatic immunity rule rather than *Hoffman* and the recent Supreme Court cases is like asking it to apply *Plessy* rather than *Brown*.

IFC's claim that *Atkinson*'s 1945 immunity holding is consistent with post-*Atkinson* Supreme Court cases, DB 23, only helps Plaintiffs. This Court can clarify that *Atkinson* means what the Supreme Court later held: that immunity depends on political branch policy. That would reconcile *Atkinson* with those cases, but would not grant immunity here, where there is no immunity request and the political branches' policy is to not extend immunity to commercial activity. IFC wants this Court to do what *Atkinson did*—grant *automatic* immunity. But that conflicts with Supreme Court caselaw.

IFC claims immunity was absolute "once conferred," idiosyncratically using "absolute" to describe something conditional. DB 24. But here again, labels do not matter. Absolute immunity *if* the political branches so choose is not *automatic* immunity. PB 27. And the "scope of [] immunity, once conferred," DB 24, is irrelevant here, because political branch policy does not "confer" it. PB 29.

C. No IOIA provision expands organizational immunity beyond the "same" immunity enjoyed by foreign sovereigns.

IFC insists there is jurisdiction only if the President himself expressly permits it by Executive Order. DB 18-19. This ignores the statute and *assumes* a background rule of automatic immunity that the recent Supreme Court cases preclude.

IFC cites Section 288, DB 18, but it does not grant immunity. It merely authorizes the President to withhold the immunities "provided for in [the IOIA.]" The section "provid[ing] for" immunity from suit, Section 288a(b), grants *only* the

"same immunity" as foreign governments. Governments were not entitled to automatic immunity in 1945 and they are not today. PB 26-27, 29; *supra* § I.B. Where Section 288a(b) does not grant immunity, the President need not create an "exception." There is no immunity to abrogate.

Moreover, IFC argues the IOIA barred the political branches from exercising the same authority they had with respect to foreign sovereigns. Even in 1945, the Executive could deny immunity without Presidential action, and deny a novel immunity by remaining silent. But IFC proposes that for organizations, the President would have had to personally intervene. That is not the "same" immunity foreign nations received.

By granting authority to withdraw immunities "from any such organization," the text contemplates that the President would do so individually; this was not the means to update immunities generally. *See* PB 39-40. This authority serves important functions that have nothing to do with constricting political branch flexibility regarding immunity from suit. *Id.*

Although *Atkinson*'s holding that Section 288 is the only mechanism for "updating" immunities, 156 F.3d at 1341, cannot withstand recent Supreme Court precedent, PB 33-34; *infra* § I.E, it would not help IFC here anyway. DB 19. *Atkinson* did not suggest Section 288 *provides* immunity, and its holding regarding the scope of immunity is no longer tenable.

Since IFC's assertion that jurisdiction requires Presidential permission is precluded by Section 288a(b)'s text, legislative history is immaterial. DB 19-20; *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (plain text controls). Regardless, it indicates the Presidential authority was primarily intended to address situations where a particular organization, or its employees, might engage in *unauthorized* activity, such as starting a side business, without paying taxes. *See e.g.* DB 19-20 (quoting S.Rep. No. 861 at 4); 91 Cong. Rec. 12,530 (President handles "law enforcement" and withdraws privileges if organization "violat[es] the terms under which they were permitted to enter" and "starts into business here."); *Id.* at 12,531-32 (if Russian Communists "come over to aid in the General Motors strike, they lose their immunity"). And these concerns were about *other* IOIA privileges like tax exemptions, *not* immunity from suit. *See e.g. id.* at 12,530-31. Concerns about abuse of official status say nothing about the general scope of immunity from suit, including for claims arising out of official commercial activity like IFC engaged in here.

Atkinson did *not* find that the Foreign Sovereign Immunities Act (FSIA) expresses an intent to preclude restrictive immunity for organizations. DB 20 (citing 156 F.3d at 1342). Indeed, in rejecting the argument that the FSIA expressed the contrary intent, to apply restrictive immunity to organizations, *Atkinson* explicitly discounted the 1976 Congress's will as to the meaning of the earlier IOIA. 156 F.3d at 1342. *Atkinson*'s statement that the FSIA sought to clarify that "organizations deserve

special protection" referred to a specific attachment provision that has no bearing here. *Id.*

The *IOIA*'s text is clear; sovereign and organizational immunity are the "same." Under the 1945 approach, the IOIA looks to the FSIA because it is U.S. policy. PB 29-30. To show the FSIA changed that, IFC would need the FSIA to have expressly amended the IOIA. *Kappus v. Comm'r*, 337 F.3d 1053, 1058 (D.C. Cir. 2003) (repeals by implication disfavored).

IFC cannot assume an immunity the IOIA's text does not provide. Since none of IFC's arguments show there was automatic immunity, none show jurisdiction requires an Executive Order.

D. Under the political branches' policy, organizations receive only restrictive immunity.

The "restrictive theory" has been official U.S. policy regarding sovereign immunity since 1952. PB 29-30. Since the IOIA affords the "same" immunity as foreign states, this *alone* shows it does not shield commercial acts. PB 29. But the Executive's specific policy regarding international organizations is also restrictive immunity, PB 30-33; that has not changed.

1. The Executive adopted restrictive organizational immunity.

According to IFC, when the DOS Legal Adviser refused an immunity request by the Organization of American States' (OAS), it "recognize[d]" that DOS "no

longer had a role in" conferring immunity "since the IOIA's passage." DB 31. Nonsense. DOS refused to "change [its] practice" of not filing suggestions of immunity for organizations "in the face of the [*FSIA*]." JA1054-1055; PB 30. DOS asserted what IFC denies: the *FSIA* applies.

The United States reiterated in *Broadbent v. OAS,* 628 F.2d 27 (D.C. Cir. 1980), that DOS no longer had a role in organizational immunity determinations because the *FSIA* precluded it. PB 31-32. IFC says this Court "was not persuaded," DB 32, but the Court found it "need not decide" the question. 628 F.2d. at 32-33 (adopting government's alternative argument).

When the Acting Secretary of State endorsed restrictive organizational immunity in a letter to the President, this was not just "Kanter's view." DB 33. He was describing the "usual United States practice." PB 31 (quoting Letter from Acting Sec'y of State Kanter (Sept. 21, 1992)).

Applying political branch policy does not "abrogate" the statute, DB 33; it is required under the 1945 approach.

2. There has been no recent change in the U.S. position.

IFC's suggestion that *Atkinson*'s "absolute immunity" holding is now U.S. policy is false. DB 28-30. In *Lempert v. Rice*, the Government principally argued that the United Nations (UN) is immune under the Convention on Privileges and Immunities of the United Nations (CPIUN), which *does* provide absolute immunity,

Art. II, §2 (UN "shall enjoy immunity…"), unlike the IOIA or the IFC's Articles of Agreement ("Articles"). *See* Reply in Support of U.S. Statement of Interest at 2, *Lempert v. Rice,* No. 12-01518 (D.D.C. June 10, 2013).

The Government argued that the IOIA was therefore irrelevant, but also included an alternative argument that "the D.C. Circuit has determined" that IOIA immunity "is 'absolute' and subject only to limitation by Executive Order." *Id.* at 7 (quoting *Atkinson*, 156 F.3d at 1341). Unlike its prior statements—including that "we know of no reason why" restrictive immunity should not apply to international organizations, U.S. *Amicus Curiae* Brief at 9-10, *Broadbent v. OAS* (D.C. Cir. 1978) ("*Broadbent amicus*")—this was a legal argument, not a policy statement. In the Second Circuit, the U.S. argued for UN immunity *without* advancing *Atkinson*'s position. *See e.g.* Brief for United States at 9 n.2, *Georges v. UN,* No. 15-455 (2d Cir. Aug. 26, 2015). The U.S. did not reverse its policy that the IOIA provides only restrictive immunity.

It is not probative that the President has not intervened by Executive Order to reverse *Atkinson*, DB 29-30, any more than that there has been no Executive action to reverse *OSS Nokalva v. European Space Agency,* 617 F.3d 756, 762 (3d Cir. 2010), which rejected *Atkinson.*

IFC, and its *amici*, refer to recent designations of organizations under the IOIA, but cite nothing indicating a policy change to absolute immunity. DB 30; Bank *Amici* 9. Mere designation does not afford absolute immunity. Executive Order 10680

entitled IFC only to the immunity "conferred by" the IOIA, which is not absolute.

IFC's designation in 1956—four years *after* the "Tate Letter"—at best gives IFC the same immunity governments enjoyed then, which was restrictive. *See OSS Nokalva,* 617 F.3d at 764 (making this point regarding the FSIA).

E. The IOIA's plain text incorporates sovereign immunity law as it stands today.

The IOIA's plain text extends only the immunity from suit *currently* enjoyed by foreign states. The two most recent Supreme Court precedents hold that jurisdictional immunities are determined at the time of suit. *Dole*, 538 U.S. at 478; *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004); PB 33-35. The IFC fails to distinguish *Dole*, and ignores *Altmann*.

Under *Dole*, a *jurisdictional* provision "expressed in the present tense[]" is applied as of the time of suit. 538 U.S. at 478. Section 288a(b) is such a provision. Since *Dole*'s holding was a matter of "plain text," 538 U.S. at 478, the inquiry ends there. *Hughes*, 525 U.S. at 438.

IFC argues that the Court can ignore *Dole*, because meaning can vary with context. DB 26. But *Dole* considered context—that the FSIA is jurisdictional—and noted "the longstanding principle" that jurisdiction "depends upon the state of things at the time of [suit]." 538 U.S. at 478. The context *Dole* found relevant is equally true of the IOIA. And if more context is needed, *immunity* is determined by "current political realities." *Altmann*, 541 U.S. at 696; PB 35.

IFC cannot interpose *Atkinson* or *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277 (D.C. Cir. 2014), DB 25, because the former predated *Dole* and the latter did not consider it. 772 F.3d at 281.[2]

IFC incorrectly suggests that *Belhas v. Ya'Alon*, 515 F.3d 1279 (D.C. Cir. 2008), departed from *Dole*'s present-tense interpretation in granting FSIA immunity to former foreign officials. But it declined to decide the issue, *id.* at 1284-85, and *Samantar* later denied such immunity. 560 U.S. at 320-21. Moreover, *Belhas*'s *dicta* turned on whether immunity was consistent with international law, which Congress codified in the FSIA. 515 F.3d at 1285. A "primary purpose[] of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law." *Samantar*, 560 U.S. at 319-20. This Court cannot ignore *Dole* to enshrine an immunity international law and Congress disfavor.

The plain text also confirms that immunity under Section 288a(b) is *not* automatic. Congress *rejected* language that would have explicitly provided such immunity. PB 36-37. So IFC asks this Court to disregard another post-*Atkinson* Supreme Court holding; that courts should not read into a law words Congress deleted. *Chickasaw Nation v. United States,* 534 U.S. 84, 93 (2001). Plaintiffs never

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[2] *Nyambal* did not find the holding in *OSS Nokalva*, 617 F.3d 756, "unpersuasive." DB 20-21. It did not consider the merits. Even if it had, that would not help IFC, because *OSS Nokalva* rejected *Atkinson* without considering *Dole*.

claimed this rule was "new," and it does not matter that the Court applied it before *Atkinson*. DB 27. This may suggest *Atkinson* was incorrect when decided, but it hardly gives this Court license to issue a decision here that conflicts with controlling post-*Atkinson* authority. In fact, *Chickasaw Nation* is particularly significant, because *Atkinson* did not address the rule it applied.[3]

IFC argues about what two Congressmen said, DB 27, but that cannot erase the fact that Congress drafted, then *deleted,* absolute immunity language. Regardless, Rep. Robertson's description of the initial draft as "too broad" did not apply only to "tax exemptions." DB 27. He expressly stated that "*all* of the [Senate's] amendments limited provisions…passed by the House." 91 Cong. Rec. 12,531. That included the amendment to Section 288a(b), tying immunity to foreign sovereign immunity. PB 36.

Likewise, the concerns "taken care of" by § 288's grant of authority, DB 28, were that organizations might abuse their status by engaging in unauthorized activity, and were not about immunity from suit. *Supra* § I.C.

Indeed, IFC does not even try to rebut Plaintiffs' showing that the IOIA's use

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[3] Plaintiffs did not forfeit this argument. DB 27. Plaintiffs argued below that the Supreme Court has eviscerated *Atkinson*, the IOIA's text controls, and the IOIA incorporates changes in immunity law. A party need not present every case supporting it. Regardless, this Court considers new arguments in cases involving "uncertainty in the law," or "novel, important, and recurring" federal questions. *Flynn v. CIR*, 269 F.3d 1064, 1068-69 (D.C. Cir. 2001). Both are present here.

of absolute immunity language in other contexts—including the next paragraph—precludes reading Section 288a(b) as granting absolute immunity from suit. PB 37.

F. IFC's efforts to avoid the plain text of the IOIA are meritless.

1. IFC's Articles do not limit the IOIA's plain language.

IFC's assertion that the IOIA must be read consistent with its Articles does not help it. The clear expression principle IFC cites, DB 34, supports Plaintiffs. IFC's Articles were adopted 10 years *after* the IOIA. DB 35. A "later treaty" cannot "repeal[] an earlier statute by implication, unless the two are absolutely incompatible." *Kappus*, 337 F.3d at 1059. To overcome the IOIA's plain text, *IFC* would have to show that the Articles clearly abrogate the IOIA.

But regardless of where the clear expression burden lies, IFC's argument that Article VI, Section 3 "alone" "provide[s] IFC with immunity" conflicts with Circuit precedent. DB 35. *Mendaro* is clear that the IOIA determines the scope of *immunity*, and a provision identical to Section 3 is not a *grant* of immunity but a "waiver" that "limited" immunity. 717 F.2d at 613-14, 618 n.54.

Atkinson rejected IFC's argument, finding a lack of IOIA immunity and waiver are *alternative* bases of jurisdiction. The Court held that although there was no waiver, it was required to consider whether the IOIA provided immunity in the first place. 156 F.3d at 1339. Where there is no immunity, there is no need for waiver. IFC's argument that jurisdiction depends entirely on its Articles asks this Court to disregard

the IOIA.

Far from requiring absolute immunity, IFC's waiver provision *allows any* suit, except those by member states. IFC Articles, Art, VI, Sec. 3 ("*Actions may be brought* against the Corporation…."). It does so while the Articles provide other immunities without qualification. *E.g. id.* Sec. 9 ("shall be immune from all taxation"); Sec. 4 ("Property and assets…shall be immune from search"). To be sure, the "corresponding benefit" test, which appears nowhere in the Articles, "read a qualifier into" the waiver provision. *Osseiran v. Int'l Fin. Corp.,* 552 F.3d 836, 839 (D.C. Cir. 2009). But a judicially-created "qualifier" creates no conflict between the IOIA and the Articles' text, let alone one sufficient to repeal Section 288a(b) by implication.

IFC's suggestion that Plaintiffs would "cast aside" treaties that provide immunity to other organizations like the International Monetary Fund (IMF) ignores the critical difference. DB 36. IMF's Articles, "absolutely reserve its immunity from suit." *Mendaro*, 717 F.2d at 618 n.53; IMF Articles, Art. IX, Sec. 3 (IMF "*shall enjoy immunity* from every form of judicial process….")(emphasis added).[4] IFC did not

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[4] Other organizations expressly reserve immunity from suit in materially identical language. *E.g.,* Agreement Establishing the Asian Development Bank, Art 50, 571 U.N.T.S. 123 (1965); Agreement Establishing Caribbean Development Bank, Art. 49(1), 712 U.N.T.S. 217 (1969); Agreement Establishing the African Development Bank, Art 52(1), 1276 U.N.T.S. 3 (1963).

reserve any such immunity.[5] This Court cannot rewrite IFC's Articles to provide the same immunity other charters provided for *expressly*. *Lutcher*, 382 F.2d at 459 (deeming this "quite impossible"); *accord* Bradlow *Amicus* 5.

Reading 288a(b) to mean what it says—the "same" immunity as foreign sovereigns—is consistent with IFC's Articles.

2. IFC's speculation about Congress's intent does not overcome the IOIA's plain text.

IFC denies the reference canon applies, DB 36-37, but that is irrelevant. Section 288a(b)'s plain text requires that the IOIA incorporates changes to sovereign immunity law. *Supra* § I.E.

IFC's claim that, when in 1952, DOS designated restrictive immunity as official policy, immunity law went off in a direction the 1945 Congress would not have liked or contemplated, is unavailing. DB 38. The "provisions of our laws rather than the principal concerns of our legislators" control. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998). This Court cannot revise the statute based on speculation today about what the 1945 Congress would have hoped sovereign immunity law

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[5] *Amici* cite *International Bank for Reconstruction and Development v. District of Columbia,* 171 F.3d 687 (D.C. Cir. 1999). Bank *Amici* 6-7. But it addressed Article VII, § 9(a), which states that IBRD "*shall be immune* from *all* taxation." This highlights the markedly different language defining IFC's immunity from suit. *World Bank Group v. Wallace*, 2016 SCC 15 (Can.), addressed another *unqualified* immunity, *see* Bank *Amici* 7-8, and held that Section 3 "confirms that the [Bank]… can be [sued]." *Wallace* ¶ 55.

would be now.

Regardless, immunity was not "thought to be immovable." DB 38. Congress would have expected sovereign immunity to evolve. In 1945, the political branches could change immunity at their whim.

That restrictive immunity would be enshrined as official policy was no surprise. Indeed, as of 1929, it had "long been the view of the Department of State" that agencies of foreign governments engaged in commercial activities in the United States did not enjoy immunity. *United States v. Deutsches Kalisyndikat Gesellschaft,* 31 F.2d 199, 200 (S.D.N.Y. 1929). Other countries had adopted the restrictive theory by 1945. Its increasingly widespread acceptance, especially in Europe by the 1920s, was a major reason for the official U.S. restrictive immunity policy. *Alfred Dunhill of London*, 425 U.S. at 711-715 (excerpting Tate Letter).

IFC and its *amici* argue that the rationale for restrictive immunity applies to states but not international organizations, so IFC should be treated differently. DB 34; Bank *Amici* 1. That ignores not only the plain meaning of "is," but also of "same."

Regardless, Congress had good reasons to want sovereign and organizational immunity to be the same. Before the IOIA, the U.S. resisted demands that organizations receive *any* immunities, asserting that organizational immunity had no basis in international or U.S. law. Lawrence Preuss, *The International Organizations Immunities Act,* 40 Am. J. Int'l L. 332, 333 (1946). But international organizations

demanded to be treated *like governments*, noting that they are associations of states. *Id.* at 333-34. Congress gave them what they asked for. There is "no compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone." *OSS Nokalva,* 617 F.3d at 764. Not surprisingly, the United States has explicitly rejected IFC's position. *Broadbent amicus* at 9-10.

The cases IFC suggests recognized absolutely immune after the Tate Letter, DB 38-39, do not address the scope of immunity. *Lutcher* held that the organization's charter broadly waived immunity. 382 F.2d at 457. The others were not suits against an international organization, and noted organizations have IOIA immunity without considering its scope or whether the claims involved commercial activity. *Miller v. United States*, 583 F.2d 857, 868 n.42 (6th Cir. 1978); *Edison Sault Elec. Co. v. United States,* 552 F.2d 326, 336 (Ct. Cl. 1977). The organization in both cases decided transboundary water control questions, *Edison*, 552 F.2d at 328, which is not commercial activity.

II. IFC has waived whatever immunity it might have.

A. IFC has broadly waived immunity.

The waiver provision in IFC's Articles expressly allows suits: "[a]ctions may be brought . . . ." Art. VI, § 3. IFC does not dispute that *Lutcher*, 382 F.2d at 457, interpreted identical language as a "broad" waiver.

IFC insists *Mendaro* "distinguished *Lutcher* on its facts." DB 41. Not so. The *Mendaro* panel "[r]eject[ed] . . . the view that the type of waiver" at issue "provides 'a blanket waiver of immunity.'" *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009) (quoting 717 F.2d at 615); *accord Vila v. Inter-Am. Inv. Corp.*, 583 F.3d 869, 870 (D.C. Cir. 2009) (statement of Rogers, J.). Repetition of this error where *Lutcher* was not argued—in *Atkinson* and *Osseiran*—does not correct it.

IFC is wrong in suggesting that *Mendaro* could ignore *Lutcher* because it arose out of "external" lending activities, and *Mendaro* did not. DB 42. An earlier panel's "construction of a statute" is binding; later panels must "respect" earlier courts' determination of "the appropriate legal norms." *Brewster v. Comm'r*, 607 F.2d 1369, 1373-74 (D.C. Cir. 1979). *Lutcher* interpreted the waiver provision's *text*. 382 F.2d at 457.[6] A later panel could not ignore *Lutcher*'s clear rule, even if it is applied to different facts.[7]

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[6] *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999), distinguished the "narrow holding" of an earlier case – it did not give a conflicting interpretation to the same text, as *Mendaro* did.

[7] *Mendaro* acknowledged that an organization's immunities are tied to what it needs to function. 717 F.2d at 617. That is consistent with the "functional necessity" doctrine's presumption *against* immunity unless the organization needs it. *Mendaro*, however, adopted the "reverse" presumption *for* immunity, unless it needs *waiver*. *Id.* That conflicts with international law. *See* Bradlow *Amicus* 4-8.

B. This suit furthers IFC's chartered purpose.

Plaintiffs agree this Court must look to IFC's Articles. DB 43; PB 9-10, 23, 43. That supports Plaintiffs. IFC fails to mention its only chartered purpose: "to further economic development." IFC Articles, Art. 1. That is, IFC's "mission is to fight poverty." JA0732 ¶ 8. Time and again, IFC has officially promised to protect communities, noting this is essential to its "development mission." PB 9-11. The Court must consider this, because it shows immunity "would interfere with [IFC's] mission." *Osseiran,* 552 F.3d at 840; PB 52-54.

IFC management urges the Court to ignore IFC's commitments and consider only what it *calls* IFC's "chartered objectives," DB 43, but which are actually means for "carrying out [IFC's] purpose[.]" IFC Articles, Art. 1. Thus, management suggests loaning money is an end in itself, as if IFC were a commercial bank.

Management's claim that IFC's commitments "say nothing of IFC's charter," DB 55, is false. IFC's policies note that they serve IFC's "development" objectives, the "purpose" in its charter. *E.g.* JA0794 ¶ 1 ("IFC uses the Sustainability Framework … to achieve its overall development objectives."); *accord* JA0731 ¶¶ 1-2 (IFC's environmental and social "commitments are based on IFC's mission"); PB 9-11. IFC admits *here* that improving its environmental and social requirements and performance "further[s] . . . IFC's development mission." JA0320 ¶ 23. And the World Bank Group's President notes these standards are "the only way" to ensure projects serve

IFC's "overarching goal." PB 12 (quoting JA0465).

Management nonetheless asserts IFC's policies cannot be essential to its mission because IFC operated for years without them. DB 55. But IFC adopted the policies *because* it became clear they are essential. JA1079 ¶¶ 8-9 (Hunter Decl.); Bradlow *Amicus* 9.

While IFC's Articles do not explicitly enshrine its commitments to host communities, DB 54, they do not enshrine IFC's commitments to pay its consultants either, yet immunity is waived. *Vila*, 570 F.3d at 276; *Mendaro*, 717 F.2d at 618. There as here, it is enough that IFC's commitments further its purpose.

Plaintiffs noted that IFC *especially* benefits from suit where it has disregarded CAO's findings. PB 43, 48-52. That would narrow waiver, permitting IFC to fix what it broke on its own. The Court cannot defer to management's speculation that this would undermine the CAO. DB 58; *infra* §II.D. And it would not; the compliance function only considers *IFC*'s compliance. PB 19. But if it did undermine the CAO, that would only suggest waiver should not depend on whether IFC ignores CAO. Waiver would still promote IFC's mission.

Mendaro never held that a grievance procedure bars waiver. DB 56-57. It held that the World Bank Administrative Tribunal's inability to hear that plaintiff's case was, standing "alone," "insufficient" for waiver. 717 F.2d at 616 n.41. But CAO's inability to provide a remedy here is not remotely the only reason for waiver. And

Mendaro found that allowing suit would not improve the Bank's ability to attract staff, since the Tribunal could "resolve" employment grievances. *Id.* at 619 n.56. It issues enforceable decisions and can provide "an effective remedy." Bradlow *Amicus* 15, 18. But CAO cannot. Waiver here provides the benefit it did not in *Mendaro*. PB 18-20, 48-52.

This Court has never imposed a "commercial-relationship requirement" or assumed that suits by plaintiffs without such a relationship inherently "pose *no* benefit." DB 55-56; PB 45-46. That would be an odd assumption to make about suits by parties IFC was chartered to serve. *See* PB 49-50.

IFC's denial that this case "relat[es] to its external activities." *Mendaro*, 717 F.2d at 621, is unpersuasive. IFC's ignoring the CAO does not make IFC's relationship with Plaintiffs "internal." DB 52. If the relationship between IFC and a third-party host community is not external, nothing is. PB 46-47.

This case is nothing like *Mendaro*. DB 52. The employee relations there were "internal." 717 F.2d at 619. And international organizations "owe their primary allegiance" not to local employment law but "to the principles and policies established by their organic documents." *Id.* Here, that is precisely what Plaintiffs seek to *uphold*.

Waiver provides management with incentives, now inadequate, to ensure that projects follow IFC's mission. That benefits IFC.

C. The "costs" IFC claims do not outweigh the benefits.

IFC's claim that the lower court's "factual findings" must be upheld "unless clearly erroneous" DB 46, is incorrect, because the court's deference to IFC's assertions was based on legal error. PB 47; *infra* § II.D. And the weighing of costs and benefits is reviewed *de novo*. PB 24.

Regardless, IFC's doomsday predictions are unsupported. IFC speculates that this suit "would impose significantly more onerous economic costs" than cases that have recognized waiver. DB 44. But IFC has not refuted that those cases are potentially for hundreds of millions of dollars or denied that, here, IFC has full indemnification. PB 54-56.

Zeidan's opinion that waiver would harm IFC's ability to further economic development is baseless. DB 46-47. This suit would *vindicate* policies IFC recognizes are indispensable to its development mission. PB 53-55. Likewise, Plaintiffs—and Professor Gould, relying on social science and institutional practice—refuted management's "chilling effect" argument. *Id.* 55-56; Gould *Amicus* 11-19. IFC complains that Professor Gould's sources concern the World Bank. DB 48. But IFC is part of the World Bank Group and the "pressure to lend" comes from the top. Gould *Amicus* 11, n.2. IFC cannot deny her conclusions; it argues here that lending, not its chartered purpose to reduce poverty, is its primary goal. DB 43.

Plaintiffs need not prove the obvious point that, absent waiver, communities may hesitate to deal with IFC, DB 50; this Court has never required such proof. PB 44. But Plaintiffs provided it anyway. *See e.g.* JA1091 ¶ 13, JA1093 ¶ 15 (Watters Decl.) (Russian and Kazak "communities are unlikely to willingly host the IFC" because doing so means "effectively giving up [the] right to… recourse in the event the project fails to meet … environmental and social standards.").

IFC's community support requirement is not solely the client's obligation, DB 50; IFC must verify such support "through its own investigation." JA0736 ¶ 30. Management insists that it is not "accountable to unknown masses," DB 49-50, but these are the very people IFC is chartered to help. Its rules require their support before high-risk projects like Tata Mundra can proceed. *See* PB 14, 54.

IFC again belittles those it is supposed to serve when it dismisses the idea that local people will fight to save their communities. DB 50. But IFC knows communities will not simply accept whatever IFC chooses. Community opposition has shuttered harmful projects around the globe, including IFC projects.[8]

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[8] For example, community opposition forced an IFC project in Peru to be abandoned in 2016. *See* Cecilia Jamasmie, *Community opposition forces Newmont to abandon Conga project in Peru*, Mining.com (Apr. 18, 2016) http://www.mining.com/community-opposition-forces-newmont-abandon-conga-project-peru/.

Management can hardly claim this case imposes new burdens, interferes with its internal administration, or "threaten[s] its independence," DB 49, 51; IFC *already* requires its projects to comply with IFC policies and applicable law. PB 53-54, 56.

That refutes management's insistence that whether it must follow these mandatory standards should be "left to IFC alone." DB 51. Management lacks the "discretion" to violate IFC policy, let alone the law. PB 47-48, 54. And immunity is not intended "to permit [parties] to shape their conduct in reliance" on immunity, *Altmann*, 541 U.S. at 696; it is not meant promote lawlessness. While management asserts that it will account for communities' rights and interests only if it wants to, such hubris is at odds with IFC's mission.

Last, IFC's conjecture that allowing those harmed a remedy will release a flood of other lawsuits is unavailing. PB 55; Gould *Amicus* 20-26 (refuting that argument with IFC and CAO data). IFC points to Plaintiffs' declarations describing instances in which IFC flouted its mandate. DB 45. But that just raises troubling questions. Is management claiming it does so regularly? And that it is committed to doing so even if it can be sued? That is not a compelling immunity argument.

Juliana Bird's Declaration, for example, describes how IFC funded an infamous Honduran palm oil tycoon and drug trafficker whose agents murdered over 120 poor farmers who hindered his palm oil development goals, "generally in death squad style assassinations." JA0693-95 ¶¶ 12-18. Does IFC fund this sort of thing elsewhere, too?

And is IFC claiming it receives no benefit from suit even if management is funding the murder of people IFC is supposed to serve?

If IFC generally follows its own policies, there is no flood to release. PB 55. If Plaintiffs' declarations indicate widespread management disregard for IFC's mission, immunity perpetuates the problem. Either way, waiver benefits the institution.

D. This Court has never deferred to management's self-interested position on whether immunity is waived.

To avoid IFC's own mission, management seeks a new rule: that this Court must *defer* to its litigation position. DB 57. The district court gave IFC management such deference, holding it "ha[d] little reason to doubt IFC's assessment of its concerns." JA1422. That was error.

This Court does not give organizations such deference. PB 44. If it did, there would *never* be waiver. IFC analogizes to federal agencies interpreting rules, DB 57, but deference there is based on a "presumption that Congress delegates [to the agency] interpretive lawmaking," *i.e.* the power to determine *generally applicable* law. *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006). IFC management wants the power to determine whether *IFC itself* can be sued. This Court has never let the fox guard the coop, in either context, and should not now.

IFC cites *Osseiran*'s *dicta* – that "[o]ne might suppose" an organization "could mount a case" that it deserved deference – but that cannot overrule *Osseiran*'s holding

that waiver is "for the federal judiciary to decide." 552 F.3d at 840; PB 44.

III. There is no basis for *forum non conveniens* dismissal.

Forum non conveniens is a discretionary doctrine involving multiple factors; it is generally inappropriate for a Court of Appeals to rule on it where the district court did not. *See, e.g., Yavuz v. 61 MM, Ltd*, 465 F.3d 418, 425-26 (10th Cir. 2006). Regardless, IFC's argument is based on a material omission and a series of false statements.

Although IFC must prove it can be sued in India, *El-Fadl v. Cent. Bank of Jordan* 75 F.3d 668, 676-77 (D.C. Cir. 1996), it fails to mention recent Indian law affording it immunity. In July 2016, India specifically extended the United Nations (Privileges and Immunities) Act of 1947, No. 46, Central Government Act, 1947 (India) ("UN Act") to IFC. Ministry of External Affairs, Notification, S.O.2448(E), Gazette of India, Sec. II(3)(ii) (July 18, 2016). Absent express waiver in a particular case, the Act provides "immunity from every form of legal process" UN Act, Schedule, Art. II, § 2. IFC has not agreed to waive immunity for this case in India, so it cannot show India is an available forum.

Plaintiffs never "argue[d] that India may exercise jurisdiction over IFC." DB 61. They merely referenced "IFC's claimed belief that it can be sued." PB 55 (citing Def. Reply, JA1116).

Nor did Plaintiffs "essentially concede[] below" the private and public interest

factors. DB 61. Plaintiffs noted there is significant evidence here in D.C., where IFC is headquartered and made its decisions. And Plaintiffs refuted IFC's claim that the district court must decide conflict of law issues, pointing out IFC had shown no conflict between D.C. and Indian law. In addition, Plaintiffs' expert stated that the statute of limitations would be highly contested in India, JA0702 ¶ 10; IFC's claim he conceded otherwise is false. Plaintiffs further explained there was no reason to address these factors, since IFC had not met its threshold burden. JA0678 (citing *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005)).

While IFC's *forum non conveniens* argument is meritless, it undermines IFC's claim to immunity. Prior to the recent expansion of immunity, IFC argued that Indian law incorporates IFC's Articles, and admitted its waiver provision *permits* Plaintiffs' claims. JA1116. It does so here too.

CONCLUSION

IFC's claim that the IOIA granted it absolute immunity from suit, forever, would require this Court to accept *all* of the following: 1) that despite the Supreme Court's holding that sovereign immunity in 1945 was determined by deferring to the political branches, it was actually granted automatically; 2) that deference to the political branches looks to 1945 policy, rather than today's, even though immunity has always been determined by current political realities; 3) that Congress intended immunity to be automatic even though it actually *deleted* such absolute language; and 4)

that Congress grandfathered in archaic immunity principles by tying organizational immunity to sovereign immunity, which could change, and by flouting the plain meaning of the word "is." IFC offers no basis to accept these anomalies.

In any event, IFC has waived any immunity, because immunity would thwart IFC's own goals. To accept otherwise, this Court would have to ignore, as management does, IFC's very purpose. It cannot.

The decision below must be reversed.

Dated: December 21, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) 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.

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CERTIFICATE OF SERVICE

I, Richard Herz, hereby certify that on December 21, 2016, I caused the foregoing Reply Brief of Plaintiffs-Appellants 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.

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ADDENDUM

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**Articles of Agreement of the International Monetary Fund, Art. IX, Sec. 3
2 U.N.T.S. 39 (1945)**

Section 3. Immunity from judicial process

The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

**Agreement Establishing the Asian Development Bank, Art 50,
571 U.N.T.S. 123 (1965)**

Article 50. Immunity from judicial proceedings

1. The 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, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

2. Notwithstanding the provisions of paragraph 1 of this Article, no action shall be brought against the Bank by any member, or by any agency or instrumentality of a member, or by any entity or person directly or indirectly acting for or deriving claims from a member or from any agency or instrumentality of a member. Members shall have recourse to such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank, or in contracts entered into with the Bank.

3. Property and assets of the Bank, 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 Bank.

Agreement Establishing the Caribbean Development Bank, Art. 49, 712 U.N.T.S. 217 (1969)

Article 49. Legal Process

1. The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connexion with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a member in which the Bank has its principal or a branch office, or in the territory of a member or non-member State where it has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

2. Notwithstanding the provisions of paragraph 1 of this Article, no action shall be brought against the Bank by any member, or by any agency of a member, or by any entity or person directly or indirectly acting for or deriving claims from a member. Members shall have recourse to such special procedures for the settlement of disputes between the Bank and its members as may be provided for in this Agreement, in by-laws and regulations of the Bank, or in contracts entered into with the Bank.

3. The Bank shall also make provision for appropriate modes of settlement of disputes in cases which do not come within the provisions of paragraph 2 of this Article and which are subject to the immunity of the Bank by virtue of paragraph 1 of that Article.

4. The Bank and its property and assets, wheresoever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before the delivery of final judgement against the Bank.

Agreement Establishing the African Development Bank, Art 52, 1276 U.N.T.S. 3 (1963)

Article 52. Judicial proceedings

1. The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of a member in which the Bank has its principal office, or in the territory of a member or non-member State where it 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.

2. The property and assets of the Bank shall, wherever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgement against the Bank.

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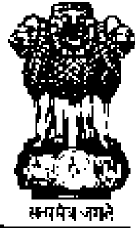
रजिस्ट्री सं० डी० एल०-33004/99 REGD. NO. D. L.-33004/99



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The Gazette of India

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अधिसूचना

नई दिल्ली, 13 जुलाई, 2016

का.आ. 2448(अ).—संयुक्त राष्ट्र (विशेषाधिकार और उन्मुक्ति) अधिनियम, 1947 (1947 का 46) की धारा 3 द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए केंद्रीय सरकार एतद्वारा घोषणा करती है कि उक्त अधिनियम की अनुसूची के अनुच्छेद I की धारा 1, अनुच्छेद II की धारा 2, 3, 4, 5, 6, 7 तथा धारा 8, अनुच्छेद III की धारा 9 और अनुच्छेद V की धारा 18 के खंड (क), (ख), (ग), (घ) एवं (ड.) के प्रावधान यथावश्यक परिवर्तन सहित अंतर्राष्ट्रीय वित्त निगम तथा उसके प्रतिनिधियों एवं अधिकारियों पर लागू होगें।

[फा. सं. डी-II/451/12(21)/2009]

संजय वर्मा, संयुक्त सचिव

MINISTRY OF EXTERNAL AFFAIRS

NOTIFICATION

New Delhi, the 13th July, 2016

S.O. 2448(E).—In exercise of the power conferred by section 3 of the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), the Central Government hereby declares that the provisions of section 1 of Article I, sections 2, 3, 4, 5, 6, 7 and section 8 of Article II, section 9 of Article III and clauses (a), (b), (c), (d) and (e) of section 18 of Article V of the Schedule to the said Act shall apply, *mutatis mutandis,* to the International Finance Corporation and its representatives and officials.

[F. No. D-II/451/12(21)/2009]

SANJAY VERMA, Jt. Secy.

3604 GI/2016

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THE UNITED NATIONS (PRIVILEGES AND IMMUNITIES) ACT, 1947

ACT NO. 46 OF 1947 1*

An Act to give effect to the Convention on the Privileges and Immunities of the United Nations.

WHEREAS it is expedient to give effect to the Convention on the Privileges and Immunities of the United Nations, and to enable similar privileges and immunities to be enjoyed by other international organisations and their representatives and officials:--

It is hereby enacted as follows:--

1. Short title.-

This Act may be called the United Nations (Privileges and Immunities) Act, 1947.

2. Conferment on United Nations and its representatives and officers of certain privileges and immunities.-

(1) Notwithstanding anything to the contrary contained in any other law, the provisions set out in the Schedule to this Act of the Convention on the Privileges and Immunities, adopted by the General Assembly of the United Nations on the 13th day of February, 1946, shall have the force of law in India.

(2) The Central Government may, from time to time, by notification in the Official Gazette, amend the Schedule in conformity with any amendments, duly made and adopted, of the provisions of the said Convention set out therein.

3. Power to confer certain privileges and immunities on other international organisation and their representatives and officers.-

Where in pursuance of any international agreement, convention or other instrument it is necessary to accord to any international organisation and its representatives and officers privileges and immunities in India similar to those contained in the provisions set out in the Schedule, the Central Government may, by notification 2* in the Official Gazette, declare that the provisions set out in the Schedule shall, subject to such modifications, if any, as it may consider necessary or expedient for giving effect to the said agreement, convention or other instrument, apply mutatis mutandis to the international organisation specified in the notification and its representatives and officers, and thereupon the said provisions shall apply accordingly and, notwithstanding anything to the contrary contained in any other law, shall in such application have the force of law in India.

4. Power to make rules.-

1*[(1)] The Central Government may 2*[, by notification in the Official Gazette,] make rules for carrying out the purposes of this Act.

1*[(2) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.]

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1. Extended to the Union territory of Pondicherry by Act 26 of 1968, s. 3 and Schedule.

2. Extended to the State of Sikkim (w.e.f. 12.1.1976) vide Notifcn. No. G. S. R. 19 (E), dt.12.1.1976.

1 Provisions set out in the Schedule have been extended with certain modifications to the following organisations by various notifications:--

(1) International Civil Aviation Organisation.

(2) World Health Organisation.

(3) International Labour Organisation.

(4) Food and Agriculture Organisation of the United Nations.

(5) United Nations Educational, Scientific and Cultural Organisation.

(6) International Monetary Fund.

(7) International Bank of Reconstruction and Development.

(8) Universal Postal Union.

(9) International Telecommunication Union.

(10) World Meteorological Organisation.

(11) Permanent Central Opium Board.

(12) International Hydrographic Bureau (vide Notifen. No. S. 2480 dt. 10.10.60 Gazetta of India, Pt II Sec 3 (ii) P. 3001.

(13) Commissioner for Indus Waters, Govt. of Pakistan and to his Advisers and Assistants (Artich IV) bide.

SCHEDULE

CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Adopted by the General Assembly of the United Nations on 13 February 1946

Whereas Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes and

Whereas Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization;

Consequently the General Assembly by a Resolution adopted on the 13 February 1946, approved the following Convention and proposed it for accession by each Member of the United Nations.

Article I

JURIDICAL PERSONALITY

Section 1. The United Nations shall possess Juridical personality. It shall have the capacity:

(a) to contract;

(b) to acquire and dispose of immovable and movable property;

(c) to institute legal proceedings.

Article II

PROPERTY, FUNDS AND ASSETS

Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, Judicial or legislative action.

Section 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

Section 5. Without being restricted by financial controls, regulations or moratoria of any kind,

(a) the United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

(b) the United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

Section 6. In exercising its rights under section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member insofar as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

Section 7. The United Nations, its assets, income and other property shall be:

(a) exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(b) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemptions will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;

(c) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

Section 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article III

FACILITIES IN RESPECT OF COMMUNICATIONS

Section 9. The United Nations shall enjoy in the territory Of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

Section 10. The United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV

THE REPRESENTATIVES OF MEMBERS

Section 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their Journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) immunity from personal arrest or detention and from seizure of their personal baggage, and, ill respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) inviolability for all papers and documents;

(c) the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also

(g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

Section 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shell continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

Section 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a state for the discharge of their duties shall not be considered as periods of residence.

Section 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of Justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

Section 15. The provisions of sections 11, 12 and 13 are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative.

Section 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V

OFFICIALS

Section 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

Section 18. Officials of the United Nations shall:

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(c) be immune from national service obligations;

(d) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;

(f) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(g) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

Section 19. In addition to the immunities and privileges specified in section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of Justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

Section 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of Justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this article.

Article VI

EXPERTS ON MISSIONS FOR THE UNITED NATIONS

Section 22. Experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period Of their missions,

including the time spent on Journeys in connection with their missions. In particular they shall be accorded:

(a) immunity from personal arrest or detention and from seizure of their personal baggage;

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) inviolability for all papers and documents;

(d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the-same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit Of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of Justice and it can be waived without prejudice to the interests of the United Nations.

Article VII

UNITED NATIONS LAISSEZ-PASSER

Section 24. The United Nations may issue United Nations laissez-passer to its officials. These laissez-passer shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of section 25.

Section 25. Applications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

Section 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders Of United Nations laissez-passer, have a certificate that they are travelling on the business Of the United Nations.

Section 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations laissez-passer on the business of the United Nations sham be granted the same facilities as are accorded to diplomatic envoys.

Section 28. The provisions of this article may be applied to the comparable officials Of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article VIII

SETTLEMENT OF DISPUTES

Section 29. The United Nations shall make provisions for appropriate modes of settlement of:

(a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Section 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

FINAL ARTICLE

Section 31. This convention is submitted to every Member of the United Nations for accession.

Section 32. Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations and the Convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

Section 33. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

Section 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention.

Section 35. This Convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for 80 long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

Section 36. The Secretary-General may conclude with any Member or Members supplementary agreements adjusting the provisions of this Convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.