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

## OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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

*Counsel for Plaintiffs-Appellants*

December 21, 2016

## 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

Plaintiffs-Appellants in this matter are Budha Ismail Jam, Kashubhai Abhrambhai Manjalia, Sidik Kasam Jam, Ranugha Jadeja, Navinal Panchayat, and Machimar Adhikar Sangharash Sangathan (MASS). Defendant-Appellee in this matter is the International Finance Corporation.

Plaintiff 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.

### 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.

# TABLE OF CONTENTS

**Page**

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... v

GLOSSARY ..... x

INTRODUCTION ..... 1

STATEMENT OF JURISDICTION ..... 5

ISSUES PRESENTED ..... 5

STATUTES AND REGULATIONS ..... 6

STATEMENT OF THE CASE ..... 7

I. Statement of Facts ..... 7

A. The IFC-funded Tata Mundra Project has substantially harmed these Plaintiff ..... 7

B. The IFC's mission includes a commitment to protect the environment and local people ..... 10

C. The IFC provided keystone funding to the Tata Mundra Project despite knowing the project's risks to local people and the environment ..... 13

D. The IFC did not use its legal authority to require CGPL to remediate the project's harms ..... 15

E. The CAO found that, with respect to Tata Mundra, IFC violated its own standards ..... 17

F. The CAO lacks the power to ensure a remedy to those harmed by IFC projects ..... 19

II. Procedural History ..... 20

SUMMARY OF THE ARGUMENT ..... 21

ARGUMENT ..... 24

I. Standard of Review ..... 24

II. The IOIA does not immunize the IFC ..... 24

A. A panel of this Circuit cannot follow a prior panel decision that has been undermined by the Supreme Court ..... 25

B. Under the "immunity . . . enjoyed by foreign governments" when the IOIA was enacted, the IFC is not immune ..... 26

1. In 1945, immunity was not absolute; courts deferred to the judgement of the political branches ..... 26

2. Deference to both Congress's and the Executive's policy requires that organizations are not immune for their commercial activity ..... 29

C. *Atkinson*'s conclusion that immunity is to be determined as it was in 1945 cannot withstand subsequent Supreme Court authority. ..... 33

D. Supreme Court statutory interpretation caselaw indicates that Congress did not provide absolute immunity ..... 36

E. Congress intended that international organization immunity incorporate developments in sovereign immunity. ..... 37

F. The restrictive theory does not permit immunity here. ..... 40

III. The IFC has broadly waived immunity ..... 41

IV. Even under the "corresponding benefit" test, immunity is waived here because a suit vindicating the IFC's own core principles, by an outside party whose trust the IFC needs, benefits the IFC ..... 43

A. Under *Mendaro*, the IFC has waived immunity wherever the particular type of case would benefit the IFC ..... 43

B. The district court applied the wrong standard, unduly limiting the *Mendaro* corresponding benefit test ..... 44

C. Suits like this one further the IFC's organizational goals. ..... 48

1. The IFC needs third-parties to believe its promises, just as in the cases in which this Court has found waiver ..... 48

2. Holding IFC management to the IFC's own core policies also benefits the IFC ..... 52

CONCLUSION ..... 57

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

# TABLE OF AUTHORITIES*

**Cases** **Page(s)**

*Alfred Dunhill of London, Inc., v. Republic of Cuba,*
425 U.S. 682 (1976) ..... 29

*Atkinson v. Inter-American Development Bank*,
156 F.3d 1335 (D.C. Cir. 1998) ..... 1, 5, 24, 27, 30, 33, 35, 36, 37, 38, 39

**Bank Markazi v. Peterson*,
136 S. Ct. 1310 (2016) ..... 26, 27, 28, 29, 33

*Barnhart v. Sigmon Coal Co.,*
534 U.S. 438 (2002) ..... 37

*Chickasaw Nation v. United States,*
534 U.S. 84 (2001) ..... 36, 37

*Corkery v. Hinkle,*
125 Wash. 671 (1923) ..... 38

*Davis v. United States Sentencing Comm'n*,
716 F.3d 660 (D.C. Cir. 2013) ..... 25, 26

*Dellums v. U.S. Nuclear Regulatory Comm'n,*
863 F.2d 968 (D.C. Cir. 1988) ..... 25

**Dole Food Co. v. Patrickson,*
538 U.S. 468 (2003) ..... 33-34, 35, 36

*Hartford Underwriters Ins. Co. v. Union Planters Bank*,
530 U.S. 1 (2000) ..... 33

*Hourani v. Mirtchev*,
796 F.3d 1 (D.C. Cir. 2015) ..... 28

---

* Authorities upon which Appellants chiefly rely are marked with an asterisk.

*Indep. Comm. Bankers of Am. v. Board of Governors of the Fed. Reserve Sys.*,
195 F.3d 28 (D.C. Cir. 1999) ..... 42

**Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*,
382 F.2d 454 (D.C. Cir. 1967) ..... 2-3, 5, 6, 41, 42, 43, 49, 54

*Manoharan v. Rajapaksa*,
711 F.3d 178 (D.C. Cir. 2013) ..... 28, 29

*McMellon v. United States*,
387 F.3d 329 (4th Cir. 2004) ..... 42-43

*McNary v. Haitian Refugee Ctr., Inc.*,
498 U.S. 479 (1991) ..... 38

**Mendaro v. World Bank*,
717 F.2d 610 (D.C. Cir. 1983) ..... 3, 6, 41, 43, 45, 46, 48, 49

*Nyambal v. International Monetary Fund,*
772 F.3d 277 (D.C. Cir. 2014) ..... 24, 28, 35

*OSS Nokalva v. European Space Agency,*
617 F.3d 756 (3rd Cir. 2010) ..... 28, 34, 35, 38-39

**Osseiran v. Int'l Fin. Corp.*,
552 F.3d 836 (D.C. Cir. 2009) ..... 41, 43, 44 & n.5, 48, 49

*Ralpho v. Bell*,
569 F.2d 607 (D.C. Cir. 1977) ..... 25

*Razzoli v. Federal Bureau of Prisons,*
230 F.2d 371 (D.C. Cir. 2000) ..... 25, 26

**Republic of Argentina v. NML Capital, Ltd.*,
134 S. Ct. 2250 (2014) ..... 26, 29, 33

*Republic of Argentina v. Weltover, Inc.*,
504 U.S. 607 (1992) ..... 40

*Republic of Austria v. Altmann*,
541 U.S. 677 (2004) ..... 26, 29, 30, 32, 33, 35

*Republic of Iraq v. Beaty*,
556 U.S. 848 (2009) ..... 26, 29, 33, 34

*Republic of Mexico v. Hoffman*,
324 U.S. 30 (1945) ..... 27, 32

*Russello v. United States*,
464 U.S. 16 (1983) ..... 37

*Samantar v. Yousuf*,
560 U.S. 305 (2010) ..... 26, 27, 29, 33

*The Schooner Exchange v. M'Faddon*
7 Cranch 116 (1812) ..... 27

*Sierra Club v. Jackson*,
648 F.3d 848 (D.C. Cir. 2011) ..... 42

*Taiwan v. United States Dist. Court*,
128 F.3d 712 (9th Cir. 1997) ..... 34-35

*United States v. Villanueva-Sotelo*,
515 F.3d 1234 (2008) ..... 37

*Verlinden B.V. v. Central Bank of Nigeria*,
461 U.S. 480 (1983) ..... 27

*Vila v. Inter-American Investor Corp.*,
570 F.3d 274 (D.C. Cir. 2009) ..... 6, 44, 46, 47, 48, 49, 54

*Vila v. Inter-Am. Inv. Corp.*,
583 F.3d 869 (D.C. Cir. 2009) ..... 42, 43 n.4

**Statutes**

22 U.S.C. § 288 ..... 38

22 U.S.C. § 288a ..... 1, 2, 6, 7, 34, 37, 41

22 U.S.C. § 288c ..... 37

28 U.S.C. § 1603 ..... 40

28 U.S.C. § 1605 ..... 40

Consolidated Appropriations Act 2014,
Pub. L. 113-76, 128 Stat. 5 ..... 50

Foreign Sovereign Immunities Act of 1976,
Pub. L. No. 94-583, 90 Stat. 2891 ..... 21

**Legislative History**

H.R. 4489, 79th Cong. (1945) ..... 36

91 Cong. Rec. 12,531 (1945) ..... 36

**Other Authorities**

Br. *Amicus Curiae* of the United States in *Broadbent v. Organization of American States*
No. 79-1465 (D.C. Cir. 1978) ..... 31, 32, 34

D.C. Circuit Policy Statement on En Banc Endorsement
of Panel Decisions (Jan. 17, 1996) ..... 24-25

Digest of United States Practice in International Law 2009
(Elizabeth R. Wilcox, ed.). ..... 39

Exec. Order No. 12425,
48 Fed. Reg. 28069 (June 16, 1983) ..... 39

Exec. Order No. 13524,
74 Fed. Reg. 67803 (Dec. 21, 2009) ..... 39

Horace Emerson Read, *Is Referential Legislation Worthwhile*?
25 Minn. L. Rev. 261 (1941) ..... 38

Letter from Acting Secretary of State Arnold Kanter to President George H.W. Bush
(Sept. 21, 1992), *reprinted in* the Digest of United States Practice in International
Law: 1991-1999 at 1016 (Sally J. Cummins & David P. Stewart, eds.) ..... 31

Letter from Detlev F. Vagts, Office of the Legal Adviser, Dep't of State, to Robert M. Carswell, Jr., OAS (March 24, 1977) ..... 30-31

Letter from Robert B. Owen, State Department Legal Adviser, to Leroy D. Clark, EEOC General Counsel (June 24, 1980), *reprinted in* 74 AM. J. INT'L L. 917 (Oct. 1980) ..... 31

## GLOSSARY

| | |
|---|---|
| A | Addendum |
| Audit Report | CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India (2013) |
| CAO | Compliance Advisor Ombudsman |
| CAO Guidelines | CAO Operational Guidelines |
| CGPL | Coastal Gujarat Power Limited |
| DOS | United States Department of State |
| ESS Policy | IFC Policy on Environmental and Social Sustainability |
| FSIA | Foreign Sovereign Immunities Act |
| IDB | Inter-American Development Bank |
| IFC | International Finance Corporation |
| IOIA | International Organizations Immunities Act |
| JA | Joint Appendix |
| MASS | Plaintiff Machimar Adhikar Sangharsh Sangathan (Association for the Struggle for Fisherworkers' Rights) |
| OAS | Organization of American States |
| Performance Standards | IFC's Performance Standards on Environmental and Social Sustainability |
| TOR | CAO Terms of Reference |

## INTRODUCTION

This case concerns the circumstances in which the International Finance Corporation (IFC), an international organization that finances development projects by private corporations, is entitled to immunity from suit under the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288a(b). The district court held that the IFC is automatically entitled to absolute immunity, and is thus immune from *any* suit, based on this Court's interpretation of the IOIA in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998). *Atkinson*'s reasoning has been thoroughly refuted by numerous subsequent Supreme Court cases, which the district court did not consider. JA1425.

The IOIA entitles the IFC only to "the same immunity from suit. . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). Foreign governments, of course, enjoy only restrictive immunity pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA). But *Atkinson* held that 1) at the time of the IOIA's enactment in 1945, foreign sovereign immunity was automatically absolute, and 2) the phrase "as is enjoyed" permanently enshrined immunity as of 1945. 156 F.3d at 1340-41. Both of those conclusions conflict with the Supreme Court's subsequent decisions, and removing either one is enough to undermine *Atkinson*'s ultimate holding of absolute immunity.

The first necessary holding – that foreign sovereign immunity in 1945 was

automatically absolute – conflicts with at least five post-*Atkinson* Supreme Court cases holding that immunity in 1945 was a matter of political branch case-by-case discretion.

The second necessary holding – that IOIA immunity depends on foreign sovereign immunity principles extant in 1945 rather than those recognized today – is also contradicted by more recent Supreme Court caselaw. The Supreme Court has held, in interpreting a sovereign immunity statute, that a phrase written in the present tense – like the IOIA's immunity provision – means that the provision must be applied as of the time of suit.

In any event, under the IOIA, the IFC is not immune when it has "expressly waive[d] [its] immunity." 22 U.S.C. § 288a(b). The district court erred in holding that the "waiver provision" in Article VI § 3 of the IFC's Articles of Agreement does not waive immunity here. Like its ruling on the scope of immunity, the court's waiver ruling also depends on two necessary but erroneous propositions. The district court held that 1) waiver can be found only where the suit would provide a "corresponding benefit" to the IFC; and 2) such a benefit is not present here, because allowing this type of lawsuit would interfere with the IFC's mission, not further it. Both holdings conflict with this Court's controlling caselaw.

The district court's application of the "corresponding benefit" test – its third necessary holding – conflicts with this Court's decision in *Lutcher S.A. Celulose e Papel*

*v. Inter-American Dev. Bank*, 382 F.2d 454 (D.C. Cir. 1967). Interpreting identical waiver language, the Court in *Lutcher* ruled that the waiver provision waives immunity "in broad terms," for all suits by anyone "having a cause of action for which relief is available." *Id.* at 457. While the district court relied on a second Circuit decision – *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983) – in applying the "corresponding benefit" test, JA1419-20, *Mendaro* does not control because it clearly conflicts with *Lutcher*.

The last necessary holding – that, even if the *Mendaro* "corresponding benefit" test applies, Plaintiffs do not meet it – conflicts with *Mendaro* and other cases that have elaborated this test. A "corresponding benefit" should be found where allowing suit would further the IFC's own goals. That is the case here.

Plaintiffs sued the IFC because an IFC-financed project, the Tata Mundra Ultra Mega coal-fired power plant ("the Plant" or "the Project"), has destroyed their meager livelihoods and threatens their health. The fish populations that fishermen like Plaintiffs Budha Ismail Jam and his family have depended on to scratch out a subsistence living have plummeted because of the Plant. Salt-water intrusion has ruined many wells in the neighboring town of Navinal, leaving farmers like Plaintiff Ranubha Jadeja unable to irrigate and grow crops on their land. The IFC knew that the Project would harm the very people that are supposed to benefit from the IFC's mission, and the IFC's own complaint mechanism, the Compliance Advisor

Ombudsman (CAO), found that the IFC violated its own policies and recommended remedial action. Yet the IFC ignored those findings and has taken no action, leaving Plaintiffs with no recourse but to sue.

Plaintiffs' suit benefits the IFC in two ways. It vindicates the IFC's own objectives of helping impoverished people like Plaintiffs and promoting sustainable development without harming the environment or its project's neighbors. Additionally, it gives assurances to other communities that they can trust the IFC, because it can be held accountable. By its own rules, the IFC cannot proceed with high-risk projects, like Tata Mundra, absent "broad community support," and it will be unlikely to obtain that support if it can ignore the law and its own standards and leave communities with no avenue to seek redress. Where IFC management refuses to provide relief its own CAO found warranted, it is in the IFC's long-term interests to permit suit by the very people the IFC was established to protect, and whose support it needs, to vindicate rights that the IFC requires itself to respect.

In short, the district court's decision depends on four necessary holdings; Plaintiffs need to prevail on only one of them in order to reverse the district court's judgment and allow this suit, and all four of these holdings are wrong. The IFC – an international organization made up of member nations – seeks a blanket immunity that no individual nation enjoys and that the Supreme Court, Congress and the Executive have rejected for decades. There is no basis to extend such immunity to the

IFC, and doing so does not benefit the IFC.

## STATEMENT OF JURISDICTION

All suits against the IFC arise under the laws of the United States, with original jurisdiction in U.S. district courts. 22 U.S.C. § 282f. Since Appellants timely filed a notice of appeal on April 15, 2016, from the district court's March 25, 2016, final order of dismissal, this Court has jurisdiction under 28 U.S.C. § 1291.

## ISSUES PRESENTED

The district court found that it was bound by *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998). That case held that immunity from suit under the IOIA, 22 U.S.C. § 288a(b), is absolute because the IOIA looks to foreign sovereign immunity as it existed in 1945 when the law was passed and foreign sovereign immunity in 1945 was absolute. The questions presented are:

1. In construing the IOIA, must this Court follow the Supreme Court's post-*Atkinson* holdings that immunity in 1945 was not absolute?

2. In construing the IOIA, must this Court follow the Supreme Court's post-*Atkinson* holding that an immunity statute written in the present tense, like the IOIA, is applied as of the time of suit?

Article VI, Section 3 of the IFC's Articles of Agreement waives immunity from suit. This Court held in *Lutcher S.A. Celulose e Papel v. Inter-American Dev. Bank,* 382 F.2d 454, 457 (D.C. Cir. 1967), that an identical waiver provision "waiv[es] immunity

in broad terms," allowing all suits except those by member states. A subsequent panel applied a narrow interpretation of the same provision, concluding that despite the broad language, immunity should only be deemed waived where the type of suit at issue would further the organization's goals. *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983). The question presented is:

3. Is this Court's broad waiver holding in *Lutcher* the controlling law of this Circuit, since *Mendaro* purported to overturn *Lutcher* without intervening *en banc* or Supreme Court authority, and one panel cannot overrule another?

Even if the narrow interpretation of waiver in *Mendaro* applies, immunity is waived for "actions relating to [an organization's] external activities," because third parties whose trust the organization needs may hesitate to trust the organization if they could not enforce its promises in court. *Mendaro,* 717 F.2d at 621; *Vila v. Inter-Am. Investor Corp.*, 570 F.3d 274, 279, 281 (D.C. Cir. 2009). The question presented is:

4. Does allowing a lawsuit by local people whose support the IFC is required to obtain before it can fund development projects like Tata Mundra, and that would vindicate rights that the IFC's mission and standards require it to protect, further the IFC's goals, where Plaintiffs have no other avenue for redress?

## STATUTES AND REGULATIONS

The primary statute at issue is 22 U.S.C. § 288a(b):

> International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from

> suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

Additional relevant statutes pertinent to this appeal are included in the Addendum.

## STATEMENT OF THE CASE

### I. Statement of Facts

The IFC knowingly financed a project that caused serious harms to the Plaintiffs and their families. The IFC's funding enabled Coastal Gujarat Power Limited ("CGPL") to develop the Tata Mundra Plant. The IFC knew the Project posed a substantial risk of serious harms to Plaintiffs – harms that have now materialized, as the CAO has recognized. Although the IFC's own criteria require strict adherence to environmental standards and the loan agreement with CGPL gives the IFC control over Project compliance, the IFC has utterly failed to remedy the situation.

#### A. The IFC-funded Tata Mundra Project has substantially harmed these Plaintiffs.

Plaintiffs are four impoverished individuals who live near the Tata Mundra Plant, the Association for the Struggle for Fisherworkers' Rights (Machimar Adhikar Sangharsh Sangathan, "MASS"), and Navinal village. JA0013 ¶ 6, JA0015 ¶¶ 13-15, JA0017 ¶ 24 (Compl.). The Plant has severely harmed Plaintiffs and their neighbors. The individual Plaintiffs can no longer sustain their livelihoods, and face increasing

threats to their health.

Plaintiffs Budha Ismail Jam, Kashubhai Manjalia and Sidik Kasam Jam are traditional fishermen who have long lived and fished with their families on Tragadi and Kotadi "bunders" (fishing harbors), which are now located in the Plant's shadow. JA0017 ¶ 23. The Plant has caused their fish catch to decline, and accordingly, their already meager incomes. JA0029 ¶ 82, JA0055 ¶ 183, JA0062 ¶ 214, JA0064 ¶ 227, JA0065 ¶¶ 235-37. Fishermen are forced to travel further out to sea, JA0028 ¶ 77, and fishing from shore has become virtually impossible. JA0029 ¶ 78, JA0062 ¶ 216, JA0065 ¶ 238.

The plummeting fish stocks are a direct result of the fact that the Plant has fundamentally altered the local marine environment. JA0028 ¶¶ 74, 76, JA0029-30 ¶¶ 80-81, 83-85. The Plant's cooling system dumps large quantities of hot and possibly chemically-laden water into the Gulf of Kutch through a man-made river, directly next to Tragadi bunder, at a rate of up to 630,000 cubic meters per hour – nearly half the average volume of the Potomac River at Washington, D.C. JA0020 ¶¶ 37-38, 40, JA0031 ¶¶ 90, 92. This water is up to 5°C (9°F) above ambient water temperature and well above the temperature limits set by the Project's loan agreement. JA0030 ¶¶ 86-87, JA0052 ¶¶ 168-69.

The IFC knew the risks. It identified the cooling system and its impacts on the marine environment, specifically fish populations, as critical issues from the outset,

JA0022-23 ¶¶ 48-50, and reviewed the system's projected impact, which showed significant risk of ecological damage. JA0030 ¶ 85.

Similarly, although the Plant's environmental clearance required lining the cooling system's intake channel to prevent salt water intrusion, this was not done, and salt water has leaked into the groundwater. JA0020 ¶ 36, JA0035 ¶ 110, JA0056 ¶ 185. This has rendered many nearby wells unsuitable for drinking or irrigation. JA0035 ¶¶ 111-12. Drinking water must now be purchased from outside, JA0035 ¶ 115, JA0070 ¶ 271, and farmers in Navinal, including Plaintiff Jadeja, can no longer grow many crops and, at best, are forced to rely only on less-valuable crops they can grow during the short monsoon season. JA0035 ¶ 113, JA0067 ¶ 249. Farm laborers have been forced to leave their families to find work elsewhere. JA0013 ¶ 8, JA0068 ¶ 254.

The Plant also pollutes the air beyond legal limits, and has significantly degraded local air quality. JA0014 ¶ 10, JA0032 ¶¶ 99-101. Coal dust, fly ash, and other coal combustion byproducts escape from the Plant and its uncovered coal storage yards, ash ponds, and nine-mile-long coal conveyor belt. JA0014 ¶ 9, JA0019 ¶¶ 32-33, JA0034 ¶ 105. Residents increasingly suffer respiratory problems. JA0014 ¶ 10, JA0033-34 ¶¶ 103-104, JA0034 ¶ 109. Coal dust and fly ash regularly cover homes and property, damage crops, contaminate drying fish, and harm the health of nearby residents. JA0034 ¶¶ 106-109.

### B. The IFC's mission includes a commitment to protect the environment and local people.

The IFC was created "to further economic development," JA0334 Art. I (Articles of Agreement), and its "mission is to fight poverty," JA0732 ¶ 8 (Policy on Environmental and Social Sustainability (2012) ("2012 ESS Policy"); JA0059 ¶ 203 (Compl.). "Central to IFC's development mission" is its "intent to 'do no harm' to people or the environment." JA0747 ¶ 8 ((Policy on Environmental and Social Sustainability (2006) ("2006 ESS Policy")); JA0732 ¶ 9 (2012 ESS Policy); JA0059 ¶ 203. "Environmental and social issues are among the most critical components of the [IFC's] mission…." JA0351 (CAO Terms of Reference ("TOR")). *Accord* JA0746 ¶ 2 (2006 ESS Policy). IFC is "committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process," and that "natural resources" are managed "sustainably." JA0747 ¶ 8 (2006 ESS Policy); JA0732 ¶ 9 (2012 ESS Policy); JA0060 ¶ 204 (Compl.). Thus, the IFC's "triple bottom line" approach measures not just "profit" but also "people" and "planet." JA0858 (CAO, *A Review of the IFC's Safeguard Policies* (2003)).

The IFC lends to companies, not governments. It only does so where there would otherwise be insufficient private capital. JA0336 Art. III § 3(i) (Articles of Agreement); JA0022 ¶ 46 (Compl.).

To ensure its loans promote its mission, the IFC's "Sustainability Framework"

lays out policies and standards that define the social and environmental duties of the IFC and its corporate clients. JA0022 ¶ 45, JA0036 ¶ 117 (Compl.). The IFC's environmental and social policies "lie at the core" of its goals. JA0585 (Statement of CEO Jin-Yong Cai).

The Framework includes the IFC's Policy on Environmental and Social Sustainability, which "defines IFC's responsibilities in supporting project performance," JA0467 (CAO 2014 Annual Report), and "outline[s] the outcomes that IFC must achieve." JA0910 (Environmental & Social Review Procedures Manual); JA0036 ¶ 117 (Compl.). By adhering to this Policy, IFC seeks to "enhance the . . . accountability of its actions" and "positive development outcomes." JA0732 2 ¶ 7 (2012 ESS Policy). This Policy is "viewed as critical to promoting IFC's development mission." JA1079 ¶ 9 (Declaration of David Hunter ("Hunter Decl.")).

The Framework also includes the Performance Standards on Environmental and Social Sustainability, which define the clients' responsibilities and the "requirements for receiving and retaining IFC support." JA0467 (CAO 2014 Annual Report); JA0036 ¶ 117. *See* JA0756 (2006 Performance Standards); JA0794 (2012 Performance Standards). The IFC is obligated to ensure from the outset that the projects it funds are able to comply with the Performance Standards. *See* JA0746 ¶ 5, JA0748 ¶ 17 (2006 ESS Policy); JA0735 ¶ 22, JA0736 ¶ 28 (2012 ESS Policy); JA0036 ¶ 117, JA0039 ¶ 126, JA0041 ¶¶ 131, 135 (Compl.). The IFC also takes on obligations

to supervise compliance throughout the life of the loan, and to take remedial action regarding any breach of the environmental and social commitments. JA0747 ¶ 11, JA0750-51 ¶ 26 (2006 ESS Policy); JA0732 ¶ 7, JA0735 ¶ 24, JA0739 ¶ 45 (2012 ESS Policy); JA0036 ¶ 117, JA0042 ¶¶ 136-138 (Compl.).

The IFC's internal complaints mechanism, the CAO, considers complaints by people harmed by IFC projects and reviews the IFC's compliance with its social and environmental obligations. JA0043 ¶ 141 (Compl.). The CAO was created to promote the IFC's development mission by "ensur[ing] that projects are environmentally and socially sound." JA1080 ¶ 13 (Hunter Decl.) (quoting TOR). Both civil society and IFC's own Board pushed for an accountability mechanism. *Id.*; JA1021 (*CAO at 10: Annual Report FY2010 and Review FY2000–10* (2010) ("*CAO at 10*")). The IFC recognized that "the internal organization, however strong and independent, should be subject to *outside* scrutiny." JA0351 (TOR) (emphasis added).

The IFC's credibility depends on accountability. The CAO was intended to ensure that the IFC has "[c]learly established and enforced [environmental and social] policies, procedures and guidelines," *id.,* and "credible mechanisms that can provide the independent oversight and verification necessary to ensure that [the IFC] meet[s its] publicly stated standards and commitments." JA1039 (*CAO at 10*). As the World Bank Group's President recently explained, "[r]obust implementation of these standards is the only way we can guarantee that project outcomes are consistent with

our overarching goal, and that those who host our projects – local communities – do not bear an undue burden of risk." JA0465 (CAO 2014 Annual Report).

Communities are "genuine partners in development," JA1007 (*CAO at 10*), and their "participation and partnership" are "essential." JA0465 (CAO 2014 Annual Report). Thus, the IFC recognizes that complaints must be "addressed in a manner that is fair, constructive and objective." JA0351 (TOR). The CAO's creation "reflected the IFC's view that providing rights and remedies to communities is necessary for the successful fulfillment of its development mission." JA1080 ¶ 13 (Hunter Decl.). Indeed, the IFC explained below that any "remedial measures" taken in response to the CAO process "are designed to improve the IFC's own environmental and social requirements and performance as they apply to the borrower, all in furtherance of getting results in the pursuit of the IFC's development mission and objectives." JA0320 ¶ 23 (Declaration of Fady Zeidan). Strong, enforced environmental and social policies are thus critical to IFC's mission. *See* JA1080 ¶ 10 (Hunter Decl.).

### C. The IFC provided keystone funding to the Tata Mundra Project despite knowing the project's risks to local people and the environment.

The IFC provided $450 million to CGPL to develop the 4,150 mega-watt Tata Mundra Plant; without IFC's funding, the Project could not have gone forward. JA0011 ¶ 2, JA0025 ¶¶ 56-59 (Compl.).

From the outset, the IFC knew that the Project posed a risk of serious harm, including the very harms that ultimately materialized. The IFC classified the proposed Plant as a "category A" project – the highest risk – for its "potential significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented." JA0523 (Audit Report); JA0022-23 ¶ 48, JA0040 ¶ 129 (Compl.). IFC recognized that "improper mitigation or insufficient community engagement" could trigger "unacceptable environmental impacts" and substantially harm local communities. JA0530 (Audit Report); JA0022-23 ¶ 48. The critical issues that needed to be addressed included selection of an appropriate cooling system, the large volume of seawater intake, impacts on the marine environment and fish, cumulative air quality impacts, the adequacy of the air pollution control measures, and restoration of livelihoods. JA0530; JA1048 (Summary of Proposed Investment); JA0012 ¶ 4, JA0022-23 ¶ 48 (Compl.). The harms Plaintiffs have suffered were both foreseeable and largely foreseen by the IFC. JA0012 ¶ 4.

The IFC told its Board of Directors that it would add value to this Project by requiring adherence to stricter standards than the national requirements – including the Performance Standards – and thus would improve the Project's environmental and social performance. *See* JA0550-51 (Audit Report); JA0053 ¶¶ 172-73 (Compl.). The Board subsequently approved the investment, and the IFC-CGPL Loan Agreement was executed in April 2008. JA0025 ¶ 56 (Compl.).

Because this was a high-risk "category A" project, the IFC was required to assure the Board, prior to Board approval, that the project had "Broad Community Support" in potentially affected communities. JA0535-36 (Audit Report); JA0040 ¶ 130, JA0060 ¶ 207 (Compl.); JA0749 ¶ 20 (2006 ESS Policy); JA0940-46 (Environmental & Social Review Procedures Manual). The IFC identified local fishing communities as "project affected," but did not consider whether there was the necessary support in these communities, JA0535-37; JA0050 ¶ 162 – even though these communities had been raising concerns since 2006. JA0532 n.9 (Audit Report); JA0023 ¶ 50 (Compl.).

Despite knowing that unacceptable harms were likely, the IFC approved the Project's funding without taking reasonable steps to prevent injury. JA0012-13 ¶ 5, JA0050-53 ¶¶ 163-172 (Compl.). When these harms predictably occurred, the IFC knew, or should have known, of the impacts Plaintiffs were suffering and still endure. In addition to its pre-commitment visits, the IFC made at least *nine* "supervision visits" to the Plant. *See* JA0556 (Audit Report).

### D. The IFC did not use its legal authority to require CGPL to remediate the project's harms.

Despite contractual authority allowing the IFC to require CGPL to remediate the project's environmental and social harms and prevent further injury, the IFC has never invoked this authority or enforced these provisions.

The IFC's loan provisions require CGPL to remediate the damage and prevent

further injury to Plaintiffs and the environment. JA0012-13 ¶ 5, JA0050 ¶ 163, JA0052 ¶ 169, JA0054 ¶ 175 (Compl.). The Loan Agreement contains "standard provisions requiring adherence to Environmental and Social Requirements," JA0555 (Audit Report), including applicable environmental law, the Performance Standards, and IFC's Environmental Health and Safety Guidelines. JA0190-91 (Loan Agreement). The Agreement also requires compliance with the project-specific Environmental and Social Action Plan, which identifies measures CGPL must take in order to mitigate and prevent harm to local communities and the environment and ensure compliance with the Performance Standards. *Id.*; JA1051 (Action Plan).

These are binding contractual obligations, which the IFC has authority to enforce. *See, e.g.* JA0190-91, JA0269-70, JA0282, JA0301 (Loan Agreement); *see also* JA0538 (Audit Report). CGPL must report regularly on compliance, *e.g.* JA0292, and all loan disbursements are expressly conditioned on CGPL meeting IFC's standards. JA0254, JA0264, JA0301 (Loan Agreement). These provisions, which give the IFC a central role in the Plant's environmental performance, were specifically intended to protect the Plaintiffs and the environment.

The IFC has overall control over the Project's impacts. The IFC retains substantial authority to actively manage the project, including to change CGPL's board of directors and senior management. JA0272. Also, any changes to the binding Environmental Management Plan require IFC approval. JA0270, JA0282. CGPL is

required to report any environmental and social issues quarterly, including any remedial steps "in form and substance satisfactory to the" IFC. JA0292. The IFC has the right to conduct its own assessments of the Project's environmental and social compliance and require corrective action. JA0269-70. Noncompliance with the environmental and social conditions can result in default. JA0301.

Although the IFC's environmental and social conditions went unmet, IFC continued to dole out project funding and has not enforced the conditions, or taken any other remedial or enforcement action. JA0012-13 ¶ 5, JA0048 ¶ 156, JA0049 ¶ 159, JA0052 ¶ 169, JA0054 ¶¶ 174-75, JA0057 ¶¶ 190-91 (Compl.).

### E. The CAO found that, with respect to Tata Mundra, IFC violated its own standards.

In June 2011, Plaintiff MASS filed a complaint with the CAO describing the Project's harmful impacts and noting that the IFC had failed to comply with its obligations. JA0045 ¶ 149 (Compl.). The CAO concluded that a full audit was warranted. *Id.* ¶ 150.

The CAO visited the site in February 2013 – when construction was still underway and the Plant was operating at only partial capacity – and in October 2013 released its Audit Report. JA0046 ¶ 153. The CAO found "evidence that validate[d] key aspects of the MASS complaint." JA0518 (Audit Report); *see generally* JA0046-48 ¶ 154 (Compl.). CAO concluded that the IFC had failed to meet its social and environmental obligations, and in key respects had failed to meet its due diligence

requirements. JA0544 (Audit Report).

With respect to directly affected fishing communities, IFC failed to ensure "pre-project consultation requirements were met," and that the Project's risks and impacts were adequately considered. JA0534, JA0536-37 (Audit Report); JA0047 ¶ 154(b)(Compl.). The CAO rejected IFC's view that impacts had been minimal, noting, for example, evidence that bunder households had been displaced. JA0552-54; JA0047 ¶ 154(c).

The CAO found significant shortcomings in the IFC's review and supervision of impacts on the marine environment and the air quality. *See* JA0519-20, JA0534, JA0544-45, JA0550-51 (Audit Report); JA0047-48 ¶¶ 154(d)-(g) (Compl.). For example, the IFC failed to ensure the outflow channel's heated discharge complied with limits set by the Loan Agreement, despite projections showing significant risks to the environment and fishing communities' livelihoods. JA0544; JA0047 ¶ 154(e). The IFC's treatment of air quality standards was both "noncompliant" and "at odds" with its "stated rationale for its involvement in the project," *i.e.* improving environmental and social performance through compliance with "more stringent" standards. JA0550-51; JA0053-54 ¶ 173.

The IFC rejected most of the CAO's findings. JA0048 ¶ 155 (Compl.); JA0574-82 ¶¶ 7-9 (IFC Response to Audit). It subsequently pointed to a list of studies that CGPL is conducting, or "committed to" undertake. JA0585 (Statement of CEO Jin-

Yong Cai). The IFC never committed to take any responsive action in light of the CAO findings. *See id.*

In January 2015, the CAO released its first post-audit monitoring report, which found that the IFC had failed to effectively respond to *any* of the CAO's findings. JA0592, JA0609 (Monitoring Report); JA0048 ¶ 156 (Compl.). The IFC, for example, did not address displacement of fishing communities and land acquisition issues, JA0602-603, nor did it address the non-compliance with air pollution and thermal effluent standards. JA0604-606 (Monitoring Report). CAO emphasized "the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts." JA0592, JA0602, JA0609.

The IFC responded with a brief statement asserting it needed more time to complete studies. JA0611 (IFC Response to Monitoring Report).

### F. The CAO lacks the power to ensure a remedy to those harmed by IFC projects.

The CAO has two strictly limited functions, neither of which can compel the IFC to provide relief to those it has harmed.

"Dispute Resolution" is a voluntary process addressing disputes between an IFC client and the community. JA0358, JA0372 (CAO Guidelines). The CAO cannot make the IFC participate and the IFC rarely does. JA1081 ¶ 17 (Hunter Decl.); JA0720-21 ¶¶ 15-16 (Declaration of Kristen Genovese ("Genovese Decl.")). The IFC has "never provided any … remedy to affected communities" through this process.

JA1081 ¶ 17 (Hunter Decl.).

Through its "Compliance" process, which was triggered here by the MASS Complaint, the CAO reviews the IFC's compliance with its own standards. JA0376-77 (CAO Guidelines); JA0044 ¶¶ 143-44, JA0045 ¶ 150 (Compl.). The CAO can investigate a complaint, make a "finding of non-compliance" and issue recommendations (as it did here), but it has no remedial powers; it cannot compel the IFC to do anything. JA1082 ¶¶ 21-22, 25 (Hunter Decl.); JA0720 ¶ 15 (Genovese Decl.); JA0059 ¶ 202 (Compl.).

The CAO admits it is not a "legal enforcement mechanism" nor "a substitute for international court systems or court systems in host countries." JA0358 (CAO Guidelines); JA0059 ¶ 202. It "does not operate, nor was it ever intended to operate, as a substitute for the vindication of affected parties' legal rights in a court of law." JA1082 ¶ 25 (Hunter Decl.); *accord* JA1080-81 ¶¶ 10, 12, 15; JA0724 ¶ 30 (Genovese Decl.); JA0713 ¶ 24 (Declaration of Natalie Bridgeman Fields ("Fields Decl.")).

## II. Procedural History

The IFC moved to dismiss Plaintiffs' complaint, arguing, among other things, that it is entitled to absolute immunity under the IOIA. Without oral argument, the district court granted the motion, addressing only the immunity issue. JA1425. The court ruled that under *Atkinson*, the IFC is entitled to absolute immunity, expressly declining to consider the more recent Supreme Court authority that Plaintiffs asserted

supersedes *Atkinson*. *Id.* The district court, applying the *Mendaro* "corresponding benefit" test, also concluded that the IFC had not waived immunity in this case. JA1424. Plaintiffs timely appealed.

## SUMMARY OF THE ARGUMENT

The district court, relying on *Atkinson*, granted the IFC absolute immunity from suit. This was error, because the IOIA grants the IFC the *same* immunity that foreign governments currently receive, not absolute immunity.

*Atkinson*'s conclusion depends on two subsidiary holdings, both of which have been undermined by subsequent Supreme Court decisions. Neither *Atkinson*'s interpretation that the IOIA is locked in the past – entitling the IFC to the same immunity foreign states had in 1945 – nor its conclusion that such immunity was absolute, survives.

Five post-*Atkinson* Supreme Court cases make clear that by 1945, the Court had rejected absolute immunity. States received immunity *only* where the Department of State ("DOS") suggested it, or, if DOS was silent, where political branch policy required it.

Under the 1945 standard, there is no immunity in this case. DOS has not suggested immunity, and its approach to immunity does not allow immunity here. The IFC does not dispute that Plaintiffs' claims are based on IFC's commercial activity, not a governmental act. DOS formally announced in 1952, that sovereign immunity is

"restrictive": there is no immunity for commercial acts. Congress codified this approach with the Foreign Sovereign Immunities Act (FSIA) in 1976, Pub. L. No. 94-583, 90 Stat. 2891, and DOS has subsequently stated its position that international organizations' immunity is determined under the FSIA, rejecting absolute immunity. If the IOIA enshrines 1945-era immunity, that means deference to the political branches – and such deference requires that the IFC is not immune.

In fact, however, IOIA immunity is not frozen in time. Under post-*Atkinson* Supreme Court caselaw, an immunity statute expressed in the present tense, like the IOIA, must be applied as of the time of the suit, and immunity must be determined based upon current political realities. Accordingly, the IOIA incorporates the FSIA, with the same result as under the 1945 approach: the IFC is not immune from suit over its commercial acts.

Regardless, the IFC has waived immunity. In *Lutcher*, this Court ruled that the language of the IFC's waiver provision was broad, applying to all types of claims. Subsequent decisions applying a narrower interpretation of waiver cannot be considered precedential, because one panel cannot overrule another.

Even under the narrower *Mendaro* test, in which waiver is found whenever it is in IFC's long-term organizational interest, the IFC has waived immunity. This Court has found waiver where the organization needs the trust of an outside party. The IFC cannot fund projects like Tata Mundra without first obtaining the local community's

support, so it needs their trust. Community support and trust require a meaningful avenue for redress. If communities believe that the IFC may, as it did here, ignore its own standards, reject the CAO's findings and recommendations, and declare itself immune from suit, they would have little reason to trust the IFC, and good reason to resist a potentially harmful IFC-funded project. These circumstances – where the IFC needs the trust of a third party but likely cannot get it without the possibility of suit – are precisely those in which this Circuit has found waiver.

Allowing suits such as this provides other obvious benefits to the IFC. In creating the CAO, the IFC recognized that it needs outside accountability to fulfil its mission. When the IFC ignores the CAO's findings, however, that necessary accountability can only be provided by courts. Plaintiffs seek only to vindicate the IFC's own chartered objective to promote economic development without environmental and social harm. In this suit, the very people the IFC was established to help, and whose support the IFC needs to carry out its functions, are vindicating rights that the IFC requires itself to protect.

The district court erred by imposing new, unwarranted limits on the corresponding benefit test. It incorrectly concluded that waiver could *only* be found in commercial contract cases. The district court also found that Plaintiffs' claims – involving the IFC's harms to host communities – do not involve IFC external activities, contrary to this Court's precedents defining external activities as

distinguished from internal administration. Finally, the court discounted the benefits and inflated the costs to the IFC. Requiring that IFC management follow the IFC's own mandatory policies is not a cost; it *benefits* the IFC. Under this Court's caselaw, Plaintiffs easily meet the corresponding benefit test.

## ARGUMENT

### I. Standard of Review

The interpretation of the scope of an international organization's immunity "raises questions of law reviewable de novo." *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 280 (D.C. Cir. 2014). Whether *Atkinson* remains good law is a purely legal question subject to de novo review. As to waiver, the Court reviews for clear error findings of fact that bear upon immunity, but "decide[s] de novo whether those facts are sufficient to divest the foreign sovereign of its immunity." *Id.*

### II. The IOIA does not immunize the IFC.

*Atkinson*'s holdings that the IOIA's "same immunity from suit . . . as is enjoyed by foreign governments" language refers to immunity in 1945, and that such immunity was then absolute, 156 F.3d at 1340-41, are no longer good law. The Supreme Court has since clarified that in 1945, immunity was not absolute. Instead, immunity was granted, or not, based on the will of the political branches. Both DOS and Congress have rejected the absolute immunity that the IFC claims. *Atkinson*'s conclusion that the IOIA enshrines historical immunity principles that have long-

since been discarded also cannot withstand recent Supreme Court authority.

### A. A panel of this Circuit cannot follow a prior panel decision that has been undermined by the Supreme Court.

"[I]t is black letter law that a circuit precedent eviscerated by subsequent Supreme Court cases is no longer binding on a court of appeals." *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988). Thus, "a panel may . . . determine . . . that a prior holding has been superseded, and hence is no longer valid as precedent." D.C. Circuit Policy Statement on *En Banc* Endorsement of Panel Decisions 2-3 (Jan. 17, 1996). A prior panel decision is "no longer good law" where subsequent Supreme Court decisions have "undermined the [prior panel's] analysis." *Dellums*, 863 F.2d at 976.

While a panel has "no general license to undercut prior holdings of this circuit, [it] obviously cannot blindly follow prior rulings in the face of clearly contradictory doctrine later enunciated by the Supreme Court." *Ralpho v. Bell*, 569 F.2d 607, 629 (D.C. Cir. 1977). An *en banc* decision is not required; the *panel* should disregard the prior Circuit decision and follow the Supreme Court. *Dellums*, 863 F.2d at 978 n.11.

This rule applies where the subsequent caselaw, even if not directly controlling, has undermined the prior decision's reasoning. *Davis v. United States Sentencing Comm'n*, 716 F.3d 660, 664-66 (D.C. Cir. 2013). In *Davis*, the prior Circuit decision, *Razzoli v. Federal Bureau of Prisons,* 230 F.2d 371 (D.C. Cir. 2000), held that a federal prisoner was required to bring a challenge potentially implicating the length of his confinement by

means of a *habeas* petition. *Davis* overturned *Razzoli* based on two Supreme Court decisions involving *state* prisoners, which undercut the reasons for the *Razzoli* rule. 716 F.3d at 664-66.

### B. Under the "immunity . . . enjoyed by foreign governments" when the IOIA was enacted, the IFC is not immune.

#### 1. In 1945, immunity was not absolute; courts deferred to the judgment of the political branches.

After *Atkinson*, the Supreme Court has repeatedly held that foreign sovereign immunity in 1945 was not absolute. *E.g.*, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014). Instead, courts "'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 B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486 (1983)). *Accord Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009). Just this term, the Court reiterated that prior to the enactment of the FSIA, including in 1945, courts accepted the Executive's *case-specific* immunity determinations. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016).

A foreign sovereign could request a "suggestion of immunity" from the State Department. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). If DOS granted it, the court would find immunity. *Id.* at 311-312. If the foreign sovereign did not seek a suggestion or DOS remained silent, the court would "'decide for itself,'" *id.* at 311 (quoting *Ex*

*parte Peru*, 318 U.S. 578, 587 (1943)), based on the political branches' policy views. Courts determined "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 312 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945). If not, immunity was denied: courts would not "'allow an immunity on new grounds which the government has not seen fit to recognize.'" *Bank Markazi*, 136 S. Ct. at 1328 (quoting *Hoffman*, 324 U.S. at 35). In fact, in *Hoffman* – decided less than a year *before* the IOIA passed – the Supreme Court rejected Mexico's claim to immunity, belying any notion of automatic absolute immunity. 324 U.S. at 38.

These cases make clear that *Atkinson* misinterpreted the case that it relied on for the conclusion that immunity was absolute in 1945. Quoting *Verlinden*, 461 U.S. at 486, *Atkinson* stated that in 1945, "foreign sovereigns enjoyed – contingent only upon the State Department's making an immunity request to the court – 'virtually absolute immunity.'" 156 F.3d at 1340. *Atkinson* equated this with *automatic* absolute immunity, *id.* at 1341, but that is a far cry from immunity when DOS requests it. Furthermore, the *Verlinden* quote referred to a very early case, *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812); *Verlinden* noted that the rule in the 1940s was to "defer[] to the decisions of the political branches." 461 U.S. at 486. As the Supreme Court recently explained in *Samantar*, the rule of deference to the political branches developed *after The Schooner Exchange*. *See* 560 U.S. at 311. In rejecting *Atkinson*, the Third Circuit

recognized that "the notion that foreign governments necessarily enjoyed absolute immunity in 1945 is contravened by [*Verlinden*]." *OSS Nokalva v. European Space Agency*, 617 F.3d 756, 762 n.4 (3d Cir. 2010). Every post-*Atkinson* Supreme Court decision likewise confirms that immunity in 1945 was *not* absolute.

This Court too has recognized, after *Atkinson*, that 1945-era immunity was determined under the procedure described above. *Manoharan v. Rajapaksa*, 711 F.3d 178, 179 (D.C. Cir. 2013) (citing *Samantar*, 560 U.S. 305, and collecting authority from other circuits); *see also Hourani v. Mirtchev*, 796 F.3d 1, 9 (D.C. Cir. 2015) (noting that courts heard cases against foreign governments prior to the FSIA, including in 1945).

This Court has not considered *Atkinson*'s conflict with subsequent Supreme Court caselaw. In *Nyambal*, this Court concluded that *Atkinson* "remains vigorous as Circuit law," and so declined to reconsider *Atkinson* in light of the Third Circuit's holding in *OSS Nokalva* that *Atkinson* was wrongly decided. 772 F.3d at 281. *Nyambal* predated the Supreme Court's decision in *Bank Markazi*, and did not consider the fact that the other Supreme Court cases cited above held that immunity in 1945 was not absolute. Indeed, it recognized that it would not be bound if the Supreme Court had overturned *Atkinson*. *Id.*

*Manoharan* addressed the question at bar – immunity in 1945 in light of post-*Atkinson* Supreme Court case-law – and *Nyambal* and *Atkinson* did not. Accordingly, *Manoharan*'s conclusion that 1945 immunity was not absolute is the binding Circuit

precedent on this issue. 711 F.3d at 179.

Regardless, *Atkinson* no longer remains good law in the face of the Supreme Court's later decisions in *Altmann, NML Capital*, *Beaty*, *Samantar* and *Bank Markazi*. If immunity under the IOIA is as it was in 1945, it must be determined by deferring to the policy of the political branches.

**2. Deference to both Congress's and the Executive's policy requires that organizations are not immune for their commercial activity.**

Because the State Department has not requested immunity here, the 1945 rule directs the Court to look to Congressional and Executive policy. Both branches have concluded that immunity is restrictive, not absolute, and does not extend to commercial acts such as those here.

Since 1952, when DOS adopted the "Tate Letter," the "restrictive theory" of sovereign immunity has been the "official policy of our Government." *Alfred Dunhill of London, Inc., v. Republic of Cuba*, 425 U.S. 682, 698 (1976) (opinion of White, J.). Under that policy, immunity shields only a foreign nation's public acts, not its commercial acts. *NML Capital*, 134 S. Ct at 2255. Congress codified that policy in 1976 in the FSIA. *Altmann*, 541 U.S. at 691.

Thus, courts applying the immunity available to states in 1945 – the rule of deference to the political branches – must defer to the FSIA. This is so not because the FSIA is the statutory framework that now controls sovereign immunity, but

because it reflects the political branches' policy and the courts may not grant immunity not recognized by that policy. *Altmann* requires such deference. There, the Supreme Court held that the FSIA applies to acts that occurred before its passage, reasoning that since courts "[t]hroughout history" have deferred to the political branches' immunity decisions, it was appropriate "to defer to the most recent such decision – namely, the FSIA." 541 U.S. at 696. *Altmann*'s holding that deference to the political branches requires deference to the FSIA applies equally here.

*Atkinson* did not consider this rationale for deferring to the FSIA. The panel ignored the FSIA "because it does not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions of the IOIA." 156 F.3d at 1341-42 (internal quotation omitted). But under the rule of deference – as clarified by recent decisions – the FSIA's rules apply because they reflect political branch policy, regardless of whether the FSIA itself directly applies to the IOIA.

Executive policy is in accord with the FSIA, and rejects absolute immunity. In 1977, DOS refused a request by the Organization of American States (OAS), also designated under the IOIA, to suggest immunity in *Dupree Associates v. OAS,* No. 76-2335 (D.D.C.), and *Broadbent v. Orfile*, No. 77-1974 (D.D.C.), explaining that it no longer did so for international organizations, and had stopped doing so 17 years prior. JA1054 (Letter from Detlev F. Vagts, Office of the Legal Adviser, Dep't of State, to Robert M. Carswell, Jr., OAS (March 24, 1977)). DOS noted that "[t]o change that

practice in the face of the [FSIA] seems inappropriate, especially since the [IOIA] links the two types of immunities." JA1055.

The State Department, in 1980, reiterated to the Equal Employment Opportunity Commission: "By virtue of the FSIA . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities."[1] DOS confirmed its interpretation again in 1992, when the United States signed the OAS Headquarters Agreement. DOS stated that while that particular agreement granted the OAS "full immunity from judicial process," this was a departure from "the usual United States practice of affording restrictive immunity."[2]

The United States has asked this Court to apply the FSIA to suits against international organizations under the IOIA, stating that there is "no question that since the passage . . . of the [FSIA] international organizations are now fully subject to suit" for their private acts. JA1065-69 (Br. *Amicus Curiae* of the United States in *Broadbent v. OAS*, No. 79-1465 (D.C. Cir. 1978) ("U.S. *Broadbent amicus*")). The point of the FSIA was to "depoliticize[]" immunity, and end the DOS's role of making binding

---

[1] Letter from Roberts B. Owen, Legal Adviser, State Dep't, to Leroy D. Clark, General Counsel, EEOC (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law,* 74 Am. J. Int'l L. 917, 918 (1980).
[2] Letter from Acting Secretary of State Arnold Kanter to President George H.W. Bush (Sept. 21, 1992), *reprinted in* the Digest of United States Practice in International Law: 1991-1999 at 1016 (Sally J. Cummins & David P. Stewart, eds.).

immunity determinations. JA1066; *accord Altmann*, 541 U.S. at 690-91. In *Broadbent*, the Executive expressed agreement with this congressional policy –disclaiming any role in determining the immunity of international organizations. JA1066-1069.

The U.S. *Broadbent amicus* also agreed with Congress' conclusion, in the FSIA, that states are not immune for their commercial acts. JA1066. Such immunity had been rejected "by most members of the international community." JA1068-69 (citing *Dunhill*, 425 U.S. at 695-706 (opinion of White, J.)). There was "no reason" international organizations should be entitled to an immunity that states lack. JA1069.

The case for rejecting absolute immunity here is even stronger than it was in IOIA-era cases like *Hoffman*. There, immunity was denied because DOS had not *accepted* it. Here DOS, by adopting the restrictive theory, has *explicitly rejected* the immunity the IFC claims.

Courts must defer to current policy of the political branches. The question is not what immunity DOS would have granted in 1945. Trying to figure out what DOS would have thought seventy years ago about a particular case would be just "rarified historical speculation." *Altmann*, 541 U.S. at 713 (Breyer, J., concurring). Nor would it make sense to revert to the 1945 procedure of letting the Executive decide immunity case-by-case, since both Congress and the Executive have long-since rejected that approach.

Courts deferred to the political branches to get a contemporary political

judgment. Thus, the 1945 rule is deference to the currently-prevailing policy, which reflects "current political realities and relationships." *Altmann*, 541 U.S. at 696; *see also Beaty*, 556 U.S. at 864 (same). Our foreign policy has changed since 1945. It is current policy that matters. Thus, if immunity is decided under 1945 rules, *Altmann*, *NML Capital*, *Beaty*, *Samantar* and *Bank Markazi* require this Court to defer to the current policy of the political branches: restrictive immunity. International organizations are not immune for their commercial acts.

### C. *Atkinson*'s conclusion that immunity is to be determined as it was in 1945 cannot withstand subsequent Supreme Court authority.

So far, Plaintiffs have assumed that the IOIA adopts the law of foreign sovereign immunity as it existed in 1945. But it does not. Recent Supreme Court precedent undermines *Atkinson* by showing that the IOIA's plain text incorporates subsequent changes to sovereign immunity law.

Where a statute's plain language answers the question at bar, that language controls. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000). *Atkinson* stated that the IOIA "provides no express guidance on whether Congress intended to incorporate . . . subsequent changes" to immunity law. 156 F.3d at 1341. That is no longer tenable. After *Atkinson*, the Supreme Court clarified – in interpreting a sovereign immunity statute, the FSIA – that a term "expressed in the present tense" is applied *as of the time of suit*. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) (holding that because the phrase "is owned by a foreign state," is "expressed in the

present tense," that ownership status must "be determined at the time the suit is filed"). The IOIA's critical language refers to sovereign immunity in the present tense: the "same immunity . . . as *is* enjoyed." 22 U.S.C. § 288a(b) (emphasis added). Given this "plain text," *Dole*, 538 U.S. at 478, current immunity law applies. *Accord OSS Nokalva*, 617 F.3d at 764 (holding that "same immunity" does not mean "'same immunity as of the date of this Act,'" language Congress could have included if it wished).

Even if the plain language were not so clear, the Supreme Court's approach to immunity in post-*Atkinson* cases also indicates that the IOIA applies current sovereign immunity law. First, the Supreme Court requires that courts pay deference to the Executive's interpretation of an immunity statute. The Court held that, in interpreting foreign sovereign immunity provisions, "courts ought to be especially wary of overriding apparent statutory text supported by executive interpretation in favor of speculation about a law's true purpose." *Beaty*, 556 U.S. at 860. The United States has told this Court that the notion that the IOIA "somehow ossified" immunity law in 1945 "is devoid of substance." JA1067 (U.S. *Broadbent amicus*). Instead, the "express language and the statutory purposes underlying the [IOIA] bring international organizations within the terms of the [FSIA]." JA1068 (internal quotation omitted). Under *Beaty*, that position is entitled to deference. *Accord Taiwan v. United States Dist. Court,* 128 F.3d 712, 718 (9th Cir. 1997) (State Department's "interpretation of the

IOIA is entitled to substantial deference"); *OSS Nokalva*, 617 F.3d at 764.

Second, the Supreme Court's recent application of ordinary jurisdiction and sovereign immunity principles also dictates that the IOIA looks to today's immunity law. Immunity from suit under the IOIA is jurisdictional, *e.g. Nyambal,* 772 F.3d at 280, and *Dole* held that jurisdiction "depends upon the state of things at the time of the [suit]." 538 U.S. at 478.

Similarly, *Altmann*, in holding that the FSIA applies to cases filed after the law was passed (even if the conduct occurred before), relied on the fact that sovereign immunity has "[t]hroughout history" been determined by "current political realities and relationships" as expressed by the political branches. 541 U.S. at 696; *accord id.* at 708-09 (Breyer, J., concurring) (noting immunity "traditionally. . . is about a defendant's *status* at the time of suit"). That principle applies equally to the IOIA. Since IOIA immunity is the "same" as sovereign immunity, and since sovereign immunity is – and was in 1945 – determined under the law existing when the suit was filed, accordingly international organization immunity is the same as sovereign immunity at the time of suit.

*Atkinson* attempted to discern legislative intent about whether to apply current or past immunity law from the IOIA's grant of authority to the President to revoke immunity, and from legislative history, 156 F.3d at 1341, but these approaches are now irrelevant. Under *Dole*, the IOIA's plain text answers the precise question at

issue. And *Atkinson* cannot be reconciled with the rationale and methodology of *Dole*, *Beaty* and *Altmann*. IOIA immunity must be determined by current sovereign immunity law: the FSIA.

### D. Supreme Court statutory interpretation caselaw indicates that Congress did not provide absolute immunity.

Under recent Supreme Court statutory interpretation caselaw, the evolution of the language in § 288a(b) and the distinctly different language used in other provisions shows *Atkinson* conflicts with the language of the IOIA.

As the Supreme Court has made clear after *Atkinson*, courts do "not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language." *Chickasaw Nation v. United States,* 534 U.S. 84, 93 (2001). Here, Congress considered providing absolute immunity, but chose not to. The original House version of section 288a(b) would have granted international organizations "immunity from suit," H.R. 4489, 79th Cong. (as introduced, Oct. 24, 1945; referred to H. Comm. on Ways and Means)(A-4), thus providing absolute immunity, untethered to any other body of law. But the Senate amended it to provide instead for the "same immunity… as is enjoyed foreign governments." H.R. 4489, 79th Cong. (as reported by S. Comm. on Finance, Dec. 18, 1945)(A-16). The Senate amended the legislation, with the "endorsement" of DOS, because the original language was "a little too broad." 91 Cong. Rec. 12,531 (1945)(A-34). This Court should not interpret section 288a(b) to mean absolute immunity forever, because that would effectively

"read back into the Act the very word[s]… that [Congress] deleted." *Chickasaw Nation*, 534 U.S. at 93.

*Atkinson* also conflicts with the Supreme Court's repeated subsequent holding that where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *E.g. Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452 (2002). This Court has followed *Barnhart* and refused to give different language the same meaning. *United States v. Villanueva-Sotelo,* 515 F.3d 1234, 1248-49 (2008).

Although Congress limited organizational immunity from suit to "the same immunity… as is enjoyed by foreign governments," 22 U.S.C. § 288a(b), it used the unqualified "shall be immune" language elsewhere in the IOIA to describe immunities from search and confiscation, *id.* § 288a(c), and "shall be exempt" with respect to property taxes, *id.* § 288c. Had Congress intended to provide unqualified and unchanging immunity from suit in section 288a(b), "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).

### E. Congress intended that international organization immunity incorporate developments in sovereign immunity.

The above authorities compel the conclusion that international organizations now enjoy restrictive immunity. Since the IOIA's plain language precludes *Atkinson*'s

holding, there is no reason to attempt, as *Atkinson* did, to divine Congress' motives. *See* 156 F.3d at 1341. Regardless, an examination of Congressional intent through statutory interpretation shows Congress did not intend to apply obsolete law.

Under the "reference canon," statutes that refer generally to an entire body of law intend to incorporate future changes to that law. *See id.* at 1340 (quoting 2B Sutherland Statutory Construction § 51.08, at 192 (Norman J. Singer, 5th ed. 1992)). *Atkinson* deemed it "[o]bvious[ ]" that Congress was "referring to another body of law… to define the scope of [organizational] immunity." *Id.* The reference canon was well established in 1945. *See, e.g.* Horace Emerson Read, *Is Referential Legislation Worthwhile*?, 25 Minn. L. Rev. 261, 272-74 (1941) (collecting cases); *Corkery v. Hinkle,* 125 Wash. 671, 676-87 (1923) (collecting cases and authorities). Because Congress is presumed to "legislate[ ] with knowledge of [the] basic rules of statutory construction," *McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 496 (1991), this canon would have informed the IOIA's drafting.

No evidence points to a contrary interpretation. *Atkinson* found it significant that 22 U.S.C. § 288 gives the President authority to modify or revoke an organization's immunity, and concluded that this was the *only* manner by which immunities could change. 156 F.3d at 1341. That is a *non-sequitur*. There is "nothing in the statutory language or legislative history" suggesting that the President's authority to alter an organization's immunity precludes incorporation of subsequent changes to

foreign sovereign immunity. *OSS Nokalva,* 617 F.3d at 763. *Atkinson* cited a reference in the Senate Report to the President's authority to limit an organization's immunities if it engaged in "commercial" activities, 156 F.3d at 1341 (quoting S. Rep. No. 79-861, at 2 (1945)), from which it concluded the "concerns that motivated [the political branches to later] adopt the restrictive immunity approach to foreign sovereigns . . . were apparently taken into account by the 1945 Congress." *Id.* But the Senate Report merely provides "an example of the *kind* of change the President *could* make to the privileges enjoyed by an organization. It is silent as to whether that immunity is 'frozen' in time." *OSS Nokalva,* 617 F.3d at 763 n.5.

There are very good reasons for giving the President this authority that have little to do with the general approach to organizational immunity. The President can tailor the immunities of each organization individually, including immunities that extend beyond immunity from suit – such as the unqualified immunity from search in section 288a(c). For example, President Reagan initially granted INTERPOL only limited IOIA immunities, denying immunity from search and confiscation. *See* Exec. Order No. 12425, 48 Fed. Reg. 28069 (June 16, 1983). President Obama later expanded INTERPOL's immunities after it opened a U.S. office. *See* Exec. Order No. 13524, 74 Fed. Reg. 67803 (Dec. 21, 2009) (amending Exec. Order No. 12435); Digest of United States Practice in International Law 2009 at 406-407 (Elizabeth R. Wilcox, ed.). There is no indication that Congress expected the President to generally update

*all* organizations' immunities as the political branches' approach evolved over time; that is what the reference to sovereign immunity is for. There is nothing inconsistent about section 288a(b) incorporating generally-applicable changes to sovereign immunity from suit and the President's authority to modify any IOIA privilege with respect to a particular organization.

**F. The restrictive theory does not permit immunity here.**

The IFC below did not dispute that if restrictive immunity applies, there is no immunity here. Nor could it. The FSIA denies immunity, among other situations, where the suit is based on "commercial activity" in the United States, or based on an act in connection with commercial activity elsewhere that is performed in the United States. 28 U.S.C. § 1605(a)(2). Activity is "commercial" when a sovereign acts, not as market regulator, but rather in the manner in which a private party engages in commerce – even if the purpose was to fulfil a sovereign objective. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); 28 U.S.C. § 1603(d). Here, the IFC loaned money to a private entity, to build a private enterprise, JA0058 ¶ 194 (Compl.), and charged "market-based [interest] rates."[3] The IFC's loan decisions were made in

---

[3] International Finance Corporation, Information Statement, (Oct. 21, 2015) at 2, *available at:* http://www.ifc.org/wps/wcm/connect/533613804a4b16cba233bb10cc70d6a1/Information+Statement_RR+Donnelley_Clean+Proof.pdf?MOD=AJPERES. *See also* JA0161-62 (Loan Agreement).

the United States. JA0057-58 ¶¶ 193-99, JA0076-77 ¶ 292. This meets the immunity exception for commercial activity.

## III. The IFC has broadly waived immunity.

There is no immunity where the organization has waived it. 22 U.S.C. § 288a(b). The IFC's Articles of Agreement have an express immunity waiver, *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 838-39 (D.C. Cir. 2009), that provides that "[a]ctions 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." JA0343 Art. VI, § 3. It further provides that the IFC's member states may not sue it, *id.*, but this "broad language" otherwise "contain[s] no exceptions for different types of suit." *Osseiran*, 552 F.3d at 838-40.

In *Lutcher*, this Court, applying an identical waiver provision, concluded that the drafters "must have been aware that they were waiving immunity in broad terms." 382 F.2d at 457. In fact, *Lutcher* held that waiver was so broad that it allowed all suits by anyone "having a cause of action for which relief is available," except suits by member states. *Id. Lutcher* specifically rejected a "restrictive" reading of the provision and the notion that it required a "case-by-case" analysis of waiver. *Id.*

The subsequent decision in *Mendaro,* 717 F.2d 610, is fundamentally inconsistent with *Lutcher*. This Court described *Mendaro* as having "read a qualifier into" the waiver provision, *Osseiran,* 552 F.3d at 839 – the "corresponding benefit"

test. But *Lutcher*'s interpretation was expressly unqualified, finding a "broad" waiver that permitted *any* suit where the claimant had a cause of action. 382 F.2d at 457. The "corresponding benefit" test requires precisely the kind of "case-by-case" analysis that *Lutcher* rejected. *Id.* Indeed, the corresponding benefit test, as it has been applied, is similar to *Lutcher*'s characterization of the immunity test that it was *rejecting*, in which the court would consider whether different kinds of suits would be "harassing to Bank management," or "necessary . . . in order to raise its lending capital," or necessary for "responsible borrowers . . . to enter into borrowing contracts" with the institution. *Id.* at 460-61. As one judge of this Court recently suggested, *Mendaro* is "impossible to reconcile" with *Lutcher*. *Vila v. Inter-Am. Inv. Corp.*, 583 F.3d 869, 870 (D.C. Cir. 2009) (statement of Williams, J.); *see also id.* at 870 (discussing "*Lutcher*'s different interpretation") (statement of Rogers, J.).

*Mendaro* purported to overturn *Lutcher* without intervening *en banc* or Supreme Court authority, which it could not do. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). Although panels of this Court have applied the *Mendaro* test, this Court's treatment of an intra-circuit split is clear: "In the event of conflicting panel opinions . . . the earlier one controls, as one panel of this court may not overrule another." *Indep. Comm. Bankers of Am. v. Board of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (internal quotation omitted); *see also McMellon v. United States*, 387 F.3d 329,

333 (4th Cir. 2004) (collecting cases from seven circuits following this approach).[4] Faced with the conflict between *Lutcher* and *Mendaro*, *Lutcher* controls.

## IV. Even under the "corresponding benefit" test, immunity is waived here because a suit vindicating the IFC's own core principles, by an outside party whose trust the IFC needs, benefits the IFC.

This Court need not resolve the conflict between *Lutcher* and *Mendaro*, because even under the corresponding benefit test, the IFC is not immune. A narrow waiver where the IFC harms a host community, in violation of its own policies, but ignores the findings of the CAO, furthers the IFC's chartered objectives.

### A. Under *Mendaro*, the IFC has waived immunity wherever the particular type of case would benefit the IFC.

The corresponding benefit test allows suits "which would further the organization's goals," *i.e.* when immunity would "hinder the organization from conducting its activities." *Mendaro*, 717 F.2d at 617. The question is whether "this *type* of suit, by this *type* of plaintiff, would benefit the organization over the long term," *Osseiran*, 552 F.3d at 840.

Under this test, the IFC typically waives immunity for "actions relating to its external activities." *Mendaro*, 717 F.2d at 621. An important consideration is whether

---

[4] Senior Judge Williams, in his statement in *Vila*, suggested that a future panel "would have no choice but to apply" *Mendaro*, and that the conflict between the cases would require "en banc review." 583 F.3d at 871. However, Judge Williams's statement did not consider the rule regarding intra-circuit conflicts, which had not been briefed in that case.

outside parties with whom the IFC needs to engage will do so if the IFC cannot be sued. *Vila*, 570 F.3d at 279. "[P]arties may hesitate to do business with an entity insulated from judicial process; promises founded on good faith alone are worth less than obligations enforceable in court." *Id.*

This analysis does not require proof; *Osseiran* found a corresponding benefit without citing any evidence, noting only that parties "may" hesitate to deal with an entity that cannot be sued, that waiver "might" help attract investors and that the "potential" benefit of increased "expectations of fair play" was sufficient. 552 F.3d at 840; *accord Vila*, 570 F.3d at 281-82.

Whether immunity "would interfere with [the organization's] mission" is "for the federal judiciary to decide"; IFC management's litigation position is afforded no deference. *Osseiran,* 552 F.3d at 840; *see also Vila*, 570 F.3d at 281. Indeed, *Osseiran* explicitly noted that *Mendaro* and *Atkinson* had not "considered the organization's view conclusive." 552 F.3d at 840.[5] Instead, the Court must assess the IFC's institutional interests by reference to its mission and policies, as it has uniformly done.

### B. The district court applied the wrong standard, unduly limiting the *Mendaro* corresponding benefit test.

While the IFC typically waives immunity for external activities, the district

[5] While *Osseiran* did not foreclose the possibility of deference, it was not argued in that case. *See id.*

court erroneously concluded that waiver applies only where the parties have a "direct commercial relationship" and the claims sound primarily in contract, not tort. JA1421. It also found that this suit does not arise out of external activities at all. JA1421-22. Both conclusions conflict with this Court's caselaw.

Even under *Mendaro*, this Court has not limited waiver only to those with whom the institution has a commercial relationship. Waiver is not limited to "debtors, creditors, bondholders," but also includes "those *other* potential plaintiffs to whom the [organization] would have to subject itself to suit in order to achieve its chartered objectives." *Mendaro*, 717 F.2d at 615 (emphasis added). Waiver applies to *both* the institution's "external activities *and* contracts." *Id.* at 621 (emphasis added).

Although *Osseiran* and *Vila* found waiver in cases involving commercial relationships and contract principles, *cf.* JA1420-21 (citing 552 F.3d at 840-41; 570 F.3d at 276–78), finding that a commercial contract is *sufficient* does not imply it is *necessary*. And while *Mendaro* referred to an organization's "commercial transactions with the outside world," JA1420 (quoting 717 F.2d at 618), it did so only in explaining why there is waiver in those circumstances; nothing in that passage suggests a limit on waiver. No rule limits waiver to commercial contract, rather than tort, cases.

Nor should this Court create any new, categorical limit here. There is no reason to prejudge which categories of cases involving the IFC's external relations further its mission. As detailed below, *these* claims clearly benefit the IFC.

Likewise, Plaintiffs' claims arise out of the IFC's external activities – which is distinguished from the institution's "internal administrative affairs," like its "relationship with its own employees." *Mendaro*, 717 F.2d at 618, 620-21 (emphasis added). Plaintiffs are not IFC employees. The IFC's relationships with and negligence toward host communities, and its loan to a third-party, are "external activities." Indeed, if CGPL, a "debtor," had a dispute with the IFC over the loan, there would be waiver. *Id.* at 615. This case involves the same "activity." That activity cannot be "external" if IFC harmed CGPL, but "internal" where the IFC has harmed third-parties.

The district court's conclusion that the claim must arise "purely" from external activities, JA1421-22, would create an impossible bar to waiver. *No* activity is "purely external." Every IFC action is the product of some "internal" decision. The proper question is whether the case involves Plaintiffs who are inside or outside the organization.

While the district court characterized Plaintiffs' claim as "aimed at IFC's internal decision-making process," JA1422 – the IFC's negligent lending and supervision of its loan to CGPL – that could be said of any of the Court's waiver precedents. In *Vila*, for example, the organization's internal decision-making process presumably led to the decision not to pay the plaintiff for his services. 570 F.3d at 277-78. *Vila* nonetheless concluded that the challenged actions were not related to

"internal management" but rather involved external activities. *Id.* at 281. So too here. The claims are "aimed at" the IFC's negligence toward Plaintiffs. The activity – and the relationship between the IFC and Plaintiffs – is external.

The district court's miscategorization of Plaintiffs' claims led to further errors. Based on its mistaken premise that "this type of suit is aimed at IFC's internal decision-making process," the court held that it "has little reason to doubt IFC's assessment of its concerns." JA1422. Because the premise was wrong – these claims are no more "internal" than others that have been allowed to proceed – the court should not have deferred to IFC management's self-serving justifications.

The district court was also mistaken in suggesting that Plaintiffs' claims "invite[] . . . 'judicial scrutiny of the [IFC's] discretion to select and administer its programs,'" JA1421-22 (quoting *Vila*, 570 F.3d at 279), and that in such circumstances "[w]aiver of immunity is highly unlikely." JA1422. Plaintiffs do not challenge any "discretion"; their claims would vindicate the IFC's own policies and standards, which IFC management lacks discretion to violate.

Even if this case did invite such scrutiny, that would not make waiver "highly unlikely." JA1422. In such cases, immunity should be granted if "the burdens caused by [such] judicial scrutiny" "substantially outweigh[]" the "benefits" of waiver to the organization. *Vila*, 570 F.3d at 279 (internal quotations omitted). Thus, while this Court found that the costs of such scrutiny should be balanced, the district court, by

holding that such costs alone make waiver "highly unlikely," JA1422, essentially preempted the required balancing. Indeed, *Vila* specifically noted that an organization that provides loans can be sued for its obligations associated with those loans. 570 F.3d at 279. That goes to the heart of the organization's discretion to select and administer its programs, yet this Court recognized such a suit would involve external activities and that there would be waiver. *Id.*

In short, the district court applied the wrong standard. This Court should keep to its existing test, and simply determine whether this type of case furthers the IFC's institutional goals.

### C. Suits like this one further the IFC's organizational goals.

This type of suit benefits the IFC over the long term. Even more than in cases like *Vila* and *Osseiran*, the IFC's relations with people like *these* Plaintiffs, who the IFC is chartered to help and obligated to protect, and whose trust and consent the IFC needs, are critical to its mission. And unlike the indirect benefits in those cases, this case seeks to directly vindicate the IFC's core policies and objectives.

#### 1. The IFC needs third-parties to believe its promises, just as in the cases in which this Court has found waiver.

There is waiver here because Appellants are "plaintiffs to whom the [IFC] would have to subject itself to suit in order to achieve its chartered objectives." *Mendaro*, 717 F.2d at 618. Where the IFC needs the trust of an outside party, waiver is critical to the organization. *Osseiran* 552 F.3d at 840. The IFC requires "broad

community support" before funding projects like Tata Mundra. So it needs local communities to believe its promises. Just as parties may hesitate to do business with the IFC if they could not enforce the IFC's promises in court, *e.g. Vila,* 570 F.3d at 280; *Osseiran*, 552 F.3d at 840, local communities may hesitate to host a high-risk project if they know that the IFC can ignore its own promises and standards and they will have no recourse. Indeed, they may well fight such projects at every turn.

The IFC's relationships with and promises to host communities are more important than others that this Court has found merit waiver. If the IFC's office supply company alleged the IFC did not pay its bill, immunity is waived. *Mendaro*, 717 F.2d at 618. This is so even though, absent waiver, IFC could still buy supplies with cash, *see id.*, or waive immunity by contract to mitigate any hesitance. *See, e.g.*, *Lutcher*, 382 F.2d at 460. By contrast, for communities who are potential tort victims, only an institutional waiver of immunity could address their concerns. And unlike with its office supplier, the IFC needs community support before it can fund at least some development projects, its very mission. The IFC's promise to protect host communities is far more important to its objectives than a promise to pay Staples.

Because the IFC needs host community trust more than it needs the trust of other entities with respect to which this Court has held there is waiver, the benefits to the IFC are even greater. That justifies waiver here.

The IFC itself recognizes the benefits of providing victims like Plaintiffs access

to a remedy. The IFC's "mandate . . . and public trust demand" that it "meet the highest [accountability] standards." JA0465 (Foreword from World Bank Group President, 2014 CAO Annual Report). Indeed, the IFC has given its "commitment" to its government shareholders that it will do so. *Id.* Those governments, in particular the United States, have emphasized that meaningful remedies, including "just compensation," are essential. Consolidated Appropriations Act 2014, Pub. L. 113-76, § 7029(e), 128 Stat. 5, 508; JA0061 ¶¶ 210-11 (Compl.).

The CAO alone cannot provide the credibility with local communities that the IFC needs. As the district court noted, "the CAO cannot compel IFC to right its wrongs, or to provide remedies" to people "harmed by IFC-financed projects." JA1416-17. The CAO cannot make the IFC do anything. *Supra* Statement of the Case ("SOC") § I.F. Management can and does ignore the CAO at its whim. *Id.* Even when the CAO sides with complainants, they will be left without remedy if the IFC chooses not to respond. JA0721 ¶ 17 (Genovese Decl.); JA1082 ¶ 22 (Hunter Decl.); *accord* JA0697 ¶ 21, JA0699 ¶ 28 (Declaration of Annie Bird); JA0724 ¶ 29 (Genovese Decl.). Indeed, Plaintiffs' communities went to the CAO, which found that the IFC did not comply with its obligations, and the IFC has taken no remedial steps. JA1416; *supra* SOC § I.E. Communities may hesitate to engage with the IFC if the only available recourse is the CAO, which IFC may summarily ignore. *E.g.* JA1093 ¶ 15 (Declaration of Kate Watters).

The district court agreed that it "makes some intuitive sense" to find waiver where the CAO identifies a compliance failure but the IFC provides no remedy. JA1424. While the district court suggested that IFC projects are "likely to be more successful" when they have local support, JA1423, that substantially understates the benefit; the IFC actually *requires* such support before it can proceed.

This type of action provides the same benefits to the IFC that motivated the creation of the CAO, but which the CAO has been unable to deliver. The CAO was created in light of the IFC's inability to address complaints, to provide credibility and ensure its projects are environmentally sound and its policies enforced. *Supra* SOC § I.B. The CAO cannot meet those goals, however, because the IFC simply ignores its recommendations.

Accordingly, the benefits of waiver here – giving IFC management incentives to adhere to IFC policy – are anything but "marginal." JA1423. Contrary to the district court's suggestion that the CAO already provides "pressure" to do so, *id.*, the evidence shows that IFC management feels little if any pressure to follow the CAO's recommendations. A grievance procedure that IFC management can ignore provides no basis for parties to trust the IFC. As the CAO admits, it is not "a substitute for . . . court systems." SOC § I.F.

As in *Vila* and *Osseiran*, the IFC's word alone is not enough. Given the benefits of assuring communities that they will have a real avenue for accountability if the IFC

breaches its commitments, this is precisely the kind of case in which this Court has found waiver.

**2. Holding IFC management to the IFC's own core policies also benefits the IFC.**

Although waiver for claims for non-payment of a consultant, like in *Vila*, would help the IFC, the benefit to its mission is indirect. The case for waiver is, if anything, stronger here, because Plaintiffs seek to *directly* vindicate the IFC's mission. Environmental and social issues are a central part of that mission. SOC § I.B.; *see also* JA0713 ¶ 23 (Fields Decl.) ("Without accountability in [the Maple Energy] case, the IFC not only failed to alleviate poverty, but caused the Communities increased marginalization and ongoing suffering."). The IFC recognizes that "environmental and social performance matter as much as financial rate of return." JA0410 (External Review Team Report on CAO (2003)).

Here, IFC managers violated the IFC's policies, including its "do no harm" principle. The "corresponding benefit" test asks whether suit furthers the *IFC*'s interests, not its managers'. It is in the IFC's interests to waive immunity for this type of suit precisely *because* the IFC's managers may ignore IFC's commitments.[6]

---

[6] This binding pre-commitment to core values is no different than one standard reason given for why, in a democracy, we tolerate a Constitution through which previous generations constrain current majoritarian decision-making. Just as it was in our Nation's long-term interests to lash our democracy to the mast in order to enshrine fundamental values, so too is it in IFC's.

The IFC is incapable of enforcing its own standards; when it established the CAO, it recognized the need for "outside scrutiny." SOC § I.B. Yet even with the CAO, IFC management may fail to enforce its policies – which is what happened here – and nothing except access to courts will prevent management from doing so again. Where the IFC violates its own mandate, its mission of reducing poverty while avoiding harm is best met by allowing a viable forum for redress for those injured. JA0059 ¶ 200, JA0060 ¶ 204 (Compl.).

Litigation of this kind will not "open [IFC] to disruptive interference with its lending policies." JA1422 (quoting *Vila*, 570 F.3d at 281). What IFC policy could this type of suit disrupt? The IFC has no mandate to provide loans irrespective of the toll. *Supra* SOC § I.B. Funding projects that harm the environment and local people *violates* IFC's mission and policy. Indeed, "compliance with rules, standards, policies, and laws is fundamental to [the IFC]." JA1039 (*CAO at 10*). As the World Bank Group's President emphasized, ensuring that development projects are aligned with IFC's "core commitment to sustainable development" requires "[r]obust implementation" of IFC policies. JA0465 (CAO 2014 Annual Report). IFC management is not free to disregard IFC policies. This suit supports, not "disrupts," the IFC's mission.

Nor is this suit "interference." The IFC's own "do no harm" mandate is *more* restrictive than the ordinary tort standards at bar, and the IFC's official position is that it *needs* "community support." SOC § I.C.

The district court discounted these benefits, erroneously assuming that *any* "judicial scrutiny of the organization's discretion to select and administer its programs," no matter the context, is inherently a cost. JA1423 (citing *Mendaro*, 717 F.2d at 617). But the district court sought to preserve discretion IFC managers do not have. And it misread this Court's caselaw to prejudge what is a benefit and what is a cost, when courts instead must assess that in the context of the specific type of case. The "cost" to the IFC of implementing its own mission is no cost at all. Encouraging IFC's management to do what the IFC already requires benefits the IFC.

The other supposed "costs" that the district court identified likewise are either minimal, or actually benefit the IFC. The district court's assertion that this case would be "more costly" than those this Court has allowed, JA1424, is unsupported and wrong. The court cited no evidence about how much this case would cost, and the IFC presented none. The court could not assume that this kind of case is more costly than suits that are undisputedly allowed – like disputes over the IFC's own loans worth hundreds of millions of dollars. *See Vila,* 570 F.3d at 283, n.4 (organization had not "posited litigation costs distinguishable from those involved in . . . suits for which the court found a waiver of immunity"). *Cf. Lutcher,* 382 F.2d at 459 (finding that "there is no reason to believe suits by creditors are less harassing . . . or less expensive than are other kinds of suits").

There was also no reason for the district court to credit IFC management's

unsupported argument that waiver would "chill[]" IFC's "capacity and willingness to lend money in developing countries," by opening "a floodgate of lawsuits by allegedly aggrieved complainants." JA1422 (quoting Def.'s Reply, JA1109-10). Such loans are at the core of the IFC's mission; the IFC has not presented any evidence that it will abandon that mission. And the *only* way this suit could release a torrent of others is if the IFC harms local people, violates its own policies and ignores the CAO on a regular basis – which the IFC has not suggested is the case. Indeed, if it had, it would be fair to say that IFC management is completely out of control, and the IFC needs this type of suit all the more.

The IFC's own argument below further refutes its "chilling effect" claim. The IFC told the district court that it is *not* immune from suit everywhere: "Indian courts should be able to exercise jurisdiction over IFC." JA1116 (Def. Reply). And yet, even though IFC knew the Project would likely harm local people, the IFC's claimed belief that it can be sued had no "chilling effect" on its "willingness" to provide this loan. The IFC's actions speak louder than its words.

Moreover, any "chilling effect" is mitigated by the fact that IFC protects itself from liability to third parties through the Loan Agreement, which provides for full indemnification, including with respect to environmental harms. *See* JA0309-10 (Loan Agreement).

The fact that IFC already exercises control over its projects' social and

environmental performance further refutes the notion that this sort of case would impose some new administrative burden. IFC regularly requires binding environmental and social obligations in its contracts, as it did here, and supervises compliance over the life of the loan. *Supra* SOC §§ I.B, I.C; JA0037-38 ¶ 122, JA0040 ¶ 128 (Compl.). Indeed, the IFC's mission includes "[s]etting standards" for environmental and social risks. JA0740 ¶ 46 (2012 ESS Policy); JA0038-39 ¶ 125 (Compl.). And the IFC's justification for funding *this* project was that it would improve environmental and social performance because IFC's requirements were "more stringent" than India's. SOC § I.E. The Loan Agreement requires CGPL to comply not only with IFC standards, but also applicable law. SOC § I.D. The IFC has never claimed that it does not supervise or enforce the social and environmental provisions it puts in its own contracts. Absent such admission, IFC can hardly claim this case imposes some new burden.

This suit is not "very broad." JA1424. Plaintiffs' claims arise in the quite narrow circumstances in which IFC management 1) harms members of a host community in violation of tort standards while 2) violating the IFC's own core policies and 3) ignoring the CAO. In such circumstances, the interests of the IFC and its managers are not aligned. If the managers believe that following the IFC's mission impedes their lending priorities, that just confirms that allowing suits like this one is necessary to protect the organization.

* * *

Where the IFC has violated its own standards and disregards a CAO compliance report calling for remedial action, an enforceable remedy provides the IFC institutional benefits by assuring host communities – whose support IFC needs – that there is some real means of redress, thus increasing "expectations of fair play" and enforcing the IFC's own core principles. The IFC cannot deny how important these benefits are; they are the same benefits that IFC touted with respect to the CAO, but which the CAO does not provide.

## CONCLUSION

The district court's assumption that the IFC is entitled to absolute immunity conflicts with numerous recent and clear Supreme Court cases. That precedent precludes the IFC from claiming an immunity all three branches of Government have rejected. Instead, the IFC is entitled to the same "restrictive" immunity as foreign states. That immunity does not shield the IFC here.

Regardless of the scope of immunity, the IFC has waived immunity broadly. Even if immunity requires a corresponding benefit to the IFC, such benefits are present here; immunity from this suit undermines the IFC's own mission. In causing Plaintiffs' injuries, IFC management ignored the IFC's environmental and social policies. Impunity and special treatment do the IFC no favors. It has repeatedly recognized that accountability is in its own best interests. Since in that respect, the

IFC is right, the decision below must be reversed.

Dated: December 21, 2016

Respectfully submitted,

*/s/ Richard L. Herz*

Richard L. Herz[7]
Marco Simons (D.C. Bar No. 492713)
Michelle Harrison (D.C. Bar No. 1026592)
EARTHRIGHTS INTERNATIONAL
1612 K St. NW Suite 401
Washington, DC 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. 32(a)(7)(B), because this brief contains 13,792 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.

Date: December 21, 2016

*/s/ Richard L. Herz*

Richard L. Herz
EARTHRIGHTS INTERNATIONAL
1612 K St. NW Suite 401
Washington, DC 20006
*Counsel for Plaintiffs-Appellants*

## CERTIFICATE OF SERVICE

I, Richard Herz, hereby certify that on December 21, 2016, I caused the foregoing Opening Brief for 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.

Date: December 21, 2016

*/s/ Richard L. Herz*

Richard L. Herz
EARTHRIGHTS INTERNATIONAL
1612 K St. NW Suite 401
Washington, DC 20006
*Counsel for Plaintiffs-Appellants*

# ADDENDUM

# TABLE OF CONTENTS

**Addendum Page**

22 U.S.C. § 282f ..... A-1

22 U.S.C. § 288 ..... A-1

22 U.S.C. § 288a ..... A-2

22 U.S.C. § 288c ..... A-2

28 U.S.C. § 1603(d) ..... A-3

28 U.S.C. §1605(a)(2) ..... A-3

Consolidated Appropriations Act 2014,
Pub. L. 113-76, 128 Stat. 5, § 7029(e) ..... A-3

International Immunities Act of 1945, H.R. 4489, 79th Cong. (as introduced,
Oct. 24, 1945; referred to H. Comm. on Ways and Means) ..... A-4

International Immunities Act of 1945, H.R. 4489, 79th Cong.
(as reported by S. Comm. on Finance, Dec. 18, 1945) ..... A-16

91 Cong. Rec. 12,529 (1945) ..... A-31

**22 U.S.C. § 282f**

§ 282f. Jurisdiction and venue of actions

For the purpose of any action which may be brought within the United States or its Territories or possessions by or against the Corporation in accordance with the Articles of Agreement of the Corporation, the Corporation shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action. When the Corporation is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law.

**22 U.S.C. § 288**

§ 288 Definition of "international organization"; authority of President

For the purposes of this subchapter, the term “international organization” means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.

**22 U.S.C. § 288a**

§ 288a Privileges, exemptions, and immunities of international organizations

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity--

(i) to contract;
(ii) to acquire and dispose of real and personal property;
(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

**22 U.S.C. § 288c**

§ 288c Exemption from property taxes

International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories.

**28 U.S.C. § 1603(d)**

§ 1603 Definitions

For purposes of this chapter –

* * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

**28 U.S.C. § 1605(a)(2)**

§ 1605 General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

**Consolidated Appropriations Act 2014, Pub. L. 113-76, 128 Stat. 5, § 7029(e)**

§ 7029 International Financial Institutions

* * *

(e) The Secretary of the Treasury shall instruct the United States executive director of each international financial institution to seek to ensure that each such institution responds to the findings and recommendations of its accountability mechanisms by providing just compensation or other appropriate redress to individuals and communities that suffer violations of human rights, including forced displacement, resulting from any loan, grant, strategy or policy of such institution.

79TH CONGRESS
1ST SESSION

# H. R. 4489

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 24, 1945

Mr. DOUGHTON of North Carolina introduced the following bill; which was referred to the Committee on Ways and Means

# A BILL

To extend certain privileges, exemptions, and immunities to international organizations and to the officers and employees thereof, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, for the purposes of this Act, the term "international organizations" shall include only public international organizations of which the United States is a member and which shall have been designated by the President through appropriate Executive order or orders as being entitled to enjoy the privileges, exemptions, and immunities herein provided: *Provided,* That the President shall be authorized, if in his

judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke any such designation, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this Act.

SEC. 2. International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy immunity from suit and every form of judicial process except to the extent that they may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune

from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

SEC. 3. Pursuant to regulations prescribed by the Commissioner of Customs with the approval of the Secretary of the Treasury, the baggage and effects of alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation.

SEC. 4. The Internal Revenue Code is hereby amended as follows:

(a) Effective with respect to taxable year beginning after December 31, 1943, section 116 (c), relating to the

exclusion from gross income of income of foreign governments, is amended to read as follows:

"(c) INCOME OF FOREIGN GOVERNMENTS AND OF INTERNATIONAL ORGANIZATIONS.—The income of foreign governments or international organizations received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments or by international organizations, or from interest on deposits in banks in the United States or moneys belonging to such foreign governments or international organizations, or from any other source within the United States."

(b) Effective with respect to taxable years beginning after December 31, 1943, section 116 (h) (1), relating to the exclusion from gross income of amounts paid employees of foreign governments, is amended to read as follows:

"(1) RULE FOR EXCLUSION.—Wages, fees, or salary of any employee of a foreign government or of an international organization or of the Commonwealth of the Philippines (including a consular or other officer, or a nondiplomatic representative), received as compensation for official services to such government, international organization, or such Commonwealth—

"(A) If such employee is not a citizen of the United States, or is a citizen of the Commonwealth

of the Philippines (whether or not a citizen of the United States); and

"(B) If, in the case of an employee of a foreign government or of the Commonwealth of the Philippines, the services are of a character similar to those performed by employees of the Government of the United States in foreign countries or in the Commonwealth of the Philippines, as the case may be; and

"(C) If, in the case of an employee of a foreign government or the Commonwealth of the Philippines, the foreign government or the Commonwealth grants an equivalent exemption to employees of the Government of the United States performing similar services in such foreign country or such Commonwealth, as the case may be."

(c) Effective January 1, 1946, section 1426 (b), defining the term "employment" for the purposes of the Federal Insurance Contributions Act, is amended (1) by striking out the word "or" at the end of subparagraph (14), (2) by striking out the period at the end of subparagraph (15) and inserting in lieu thereof a semicolon and the word "or", and (3) by inserting at the end of the subsection the following new subparagraph:

"(16) Service performed in the employ of an international organization."

(d) Effective January 1, 1946, section 1607 (c), defining the term "employment" for the purposes of the Federal Unemployment Tax Act, is amended (1) by striking out the word "or" at the end of subparagraph (14), (2) by striking out the period at the end of subparagraph (15) and inserting in lieu thereof a semicolon and the word "or", and (3) by inserting at the end of the subsection the following new subparagraph:

"(16) Service performed in the employ of an international organization."

(e) Section 1621 (a) (5), relating to the definition of "wages" for the purpose of collection of income tax at the source, is amended by inserting after the words "foreign government" the words "or an international organization".

(f) Section 3468 (a), relating to exemption from communications taxes is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization".

(g) Section 3469 (f) (1), relating to exemption from the tax on transportation of persons, is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization".

(h) Section 3475 (b) (1), relating to exemption from

the tax on transportation of property, is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization".

(i) Section 3797 (a), relating to definitions, is amended by adding at the end thereof a new paragraph as follows:

"(18) INTERNATIONAL ORGANIZATIONS. — The term 'international organizations' means public international organizations of which the United States is a member and which are designated by the President by executive order as being entitled to enjoy privileges, exemptions, and immunities."

SEC. 5. (a) Effective January 1, 1946, section 209 (b) of the Social Security Act, defining the term "employment" for the purposes of title II of the Act, is amended (1) by striking out the word "or" at the end of subparagraph (14), (2) by striking out the period at the end of subparagraph (15) and inserting in lieu thereof a semicolon and the word "or", and (3) by inserting at the end of the subsection the following new subparagraph:

"(16) Service performed in the employ of an international organization."

(b) No tax shall be collected under title VIII or IX of the Social Security Act or under the Federal Insurance Contributions Act or the Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1946,

which are described in subparagraph (16) of sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any) shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. No payment shall be made under title II of the Social Security Act with respect to services rendered prior to January 1, 1946, which are described in subparagraph (16) of section 209 (b) of such Act, as amended.

SEC. 6. International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories; and shall be entitled to the same exemptions and immunities from State or local taxes as is the United States Government.

SEC. 7. (a) Persons designated by foreign governments to serve as their representatives in or to international organizations and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, and employees residing with them, other than nationals of the United States, shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, the registration of foreign

agents, and selective training and service, be entitled to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families.

(b) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.

(c) Section 3 of the Immigration Act approved May 26, 1924, as amended (U. S. C., title 8, sec. 203), is hereby amended by striking out the period at the end thereof and substituting the following language:

"(7) An alien officer or employee of an international organization, his family, attendants, servants, and employees."

(d) Section 15 of the Immigration Act approved May 26, 1924, as amended (U. S. C., title 8, sec. 215), is hereby amended to read as follows:

"SEC. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (1), (2), (3), (4), (5), (6), or (7) of section 3, or declared to be

a nonquota immigrant by subdivision (e) of section 4, shall be for such time and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3 and subdivision (e) of section 4, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States: *Provided*, That no alien who has been, or who may hereafter be, admitted into the United States under clause (1) or (7) of section 3, as an official of a foreign government, or as a member of the family of such official, or as an officer or employee of an international organization, or as a member of the family of such officer or employee, shall be required to depart from the United States without the approval of the Secretary of State."

SEC. 8. (a) No person shall be entitled to the benefits of this Act unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or

servant, of one of the foregoing accepted or designated representatives, officers, or employees.

(b) Should the Secretary of State determine that the continued presence in the United States of any person entitled to the benefits of this Act is not desirable, he shall so inform the foreign government or international organization concerned, as the case may be, and after such person shall have had a reasonable length of time, to be determined by the Secretary of State, to depart from the United States, he shall cease to be entitled to such benefits.

(c) No person shall, by reason of the provisions of this Act, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein.

SEC. 9. The privileges, exemptions, and immunities of international organizations and of their officers and employees, and members of their immediate families residing with them, provided for in this Act, shall be granted notwithstanding the fact that the similar privileges, exemptions, and immunities granted to a foreign government, its officers, or employees, may be conditioned upon the existence of reciprocity by that foreign government: *Provided*, That nothing contained in this Act shall be construed as precluding the Secretary of State from withdrawing the privileges,

exemptions, and immunities herein provided from persons who are nationals of any foreign country on the ground that such country is failing to accord corresponding privileges, exemptions, and immunities to citizens of the United States.

**Calendar No. 870**

79TH CONGRESS
1ST SESSION

# H. R. 4489

**[Report No. 861]**

IN THE SENATE OF THE UNITED STATES

NOVEMBER 23 (legislative day, OCTOBER 29), 1945
Read twice and referred to the Committee on Finance

DECEMBER 18 (legislative day, OCTOBER 29), 1945
Reported by Mr. TAFT, with amendments

[Omit the part struck through and insert the part printed in italic]

# AN ACT

To extend certain privileges, exemptions, and immunities to international organizations and to the officers and employees thereof, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* ~~That, for the purposes of this Act, the term "international organizations" shall include only public international organizations of which the United States is a member and which shall have been designated by the President through appropriate Executive order or orders as being entitled to enjoy the privileges, exemptions, and immunities herein provided:~~

~~*Provided,* That the President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke any such designation, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this Act.~~

*TITLE I*

*SECTION 1. For the purposes of this title, the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege,*

*exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.*

SEC. 2. International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy *the same* immunity from suit and every form of judicial process *as is enjoyed by foreign governments*, except to the extent that ~~they~~ *such organizations* may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

SEC. 3. Pursuant to regulations prescribed by the Commissioner of Customs with the approval of the Secretary of the Treasury, the baggage and effects of alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation.

SEC. 4. The Internal Revenue Code is hereby amended as follows:

(a) Effective with respect to taxable ~~year~~ *years* beginning after December 31, 1943, section 116 (c), relating to the exclusion from gross income of income of foreign governments, is amended to read as follows:

"(c) INCOME OF FOREIGN GOVERNMENTS AND OF INTERNATIONAL ORGANIZATIONS.—The income of foreign governments or international organizations received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments or by international organizations, or from interest on deposits in banks in the United States ~~or~~ *of* moneys belonging to such foreign governments or international organizations, or from any other source within the United States."

(b) Effective with respect to taxable years beginning after December 31, 1943, section 116 (h) (1), relating to the exclusion from gross income of amounts paid employees of foreign governments, is amended to read as follows:

"(1) RULE FOR EXCLUSION.—Wages, fees, or salary of any employee of a foreign government or of an international organization or of the Commonwealth of the Philippines (including a consular or other officer, or a nondiplomatic representative), received as compensation for official services to such government, international organization, or such Commonwealth—

"(A) If such employee is not a citizen of the

United States, or is a citizen of the Commonwealth of the Philippines (whether or not a citizen of the United States); and

"(B) If, in the case of an employee of a foreign government or of the Commonwealth of the Philippines, the services are of a character similar to those performed by employees of the Government of the United States in foreign countries or in the Commonwealth of the Philippines, as the case may be; and

"(C) If, in the case of an employee of a foreign government or the Commonwealth of the Philippines, the foreign government or the Commonwealth grants an equivalent exemption to employees of the Government of the United States performing similar services in such foreign country or such Commonwealth, as the case may be."

(c) Effective January 1, 1946, section 1426 (b), defining the term "employment" for the purposes of the Federal Insurance Contributions Act, is amended (1) by striking out the word "or" at the end of ~~subparagraph~~ *paragraph* (14), (2) by striking out the period at the end of ~~subparagraph~~ *paragraph* (15) and inserting in lieu thereof a semicolon and the word "or", and (3) by inserting at the end of the subsection the following new ~~subparagraph~~ *paragraph*:

~~"(16) Service performed in the employ of an international organization."~~

*"(16) Service performed in the employ of an international organization."*

(d) Effective January 1, 1946, section 1607 (c), defining the term "employment" for the purposes of the Federal Unemployment Tax Act, is amended (1) by striking out the word "of" at the end of ~~subparagraph~~ *paragraph* (14), (2) by striking out the period at the end of ~~subparagraph~~ *paragraph* (15) and inserting in lieu thereof a semicolon and the word "or", and (3) by inserting at the end of the subsection the following new ~~subparagraph~~ *paragraph*:

~~"(16) Service performed in the employ of an international organization."~~

*"(16) Service performed in the employ of an international organization."*

(e) Section 1621 (a) (5), relating to the definition of "wages" for the purpose of collection of income tax at the source, is amended by inserting after the words "foreign government" the words "or an international organization".

(f) Section 3466 (a), relating to exemption from communications taxes, is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization".

(g) Section 3469 (f) (1), relating to exemption from

the tax on transportation of persons, is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization".

(h) Section 3475 (b) (1), relating to exemption from the tax on transportation of property, is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization".

(i) Section 3797 (a), relating to definitions, is amended by adding at the end thereof a new paragraph as follows:

~~"(18) INTERNATIONAL ORGANIZATIONS. — The term 'international organizations' means public international organizations of which the United States is a member and which are designated by the President by executive order as being entitled to enjoy privileges, exemptions, and immunities."~~

*"(18) INTERNATIONAL ORGANIZATION. — The term 'international organization' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act."*

SEC. 5. (a) Effective January 1, 1946, section 209 (b) of the Social Security Act, defining the term "employment" for the purposes of title II of the Act, is amended (1) by striking out the word "or" at the end of ~~subparagraph~~ *paragraph* (14), (2) by striking out the period at the end of ~~sub-~~

~~paragraph~~ *paragraph* (15) and inserting in lieu thereof a semicolon and the word "or", and (3) by inserting at the end of the subsection the following new ~~subparagraph~~ *paragraph*:

"(16) Service performed in the employ of an international organization *entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act.*"

(b) No tax shall be collected under title VIII or IX of the Social Security Act or under the Federal Insurance Contributions Act or the Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1946, which are described in ~~subparagraph~~ *paragraph* (16) of sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any) shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. No payment shall be made under title II of the Social Security Act with respect to services rendered prior to January 1, 1946, which are described in ~~subparagraph~~ *paragraph* (16) of section 209 (b) of such Act, as amended.

SEC. 6. International organizations shall be exempt from all property taxes imposed by, or under the authority of, any

Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories~~; and shall be entitled to the same exemptions and immunities from State or local taxes as is the United States Government~~.

SEC. 7. (a) Persons designated by foreign governments to serve as their representatives in or to international organizations and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, and employees residing with them, other than nationals of the United States, shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, the registration of foreign agents, and selective training and service, be entitled to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families.

(b) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.

(c) Section 3 of the Immigration Act approved May 26, 1924, as amended (U. S. C., title 8, sec. 203), is hereby amended by striking out the period at the end thereof and ~~substituting the following language:~~

~~"(7) An alien officer or employee of an international organization, his family, attendants, servants, and employees."~~ *inserting in lieu thereof a comma and the following: "and (7) a representative of a foreign government in or to an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act, or an alien officer or employee of such an international organization, and the family, attendants, servants, and employees of such a representative, officer, or employee".*

(d) Section 15 of the Immigration Act approved May 26, 1924, as amended (U. S. C., title 8, sec. 215), is hereby amended to read as follows:

"SEC. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (1), (2), (3), (4), (5), (6), or (7) of section 3, or declared to be a nonquota immigrant by subdivision (e) of section 4, shall be for such time and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3 and subdivision (e) of section 4, the giving of

bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States: *Provided*, That no alien who has been, or who may hereafter be, admitted into the United States under clause (1) or (7) of section 3, as an official of a foreign government, or as a member of the family of such official, or as *a representative of a foreign government in or to an international organization or* an officer or employee of an international organization, or as a member of the family of such ~~officer~~ *representative, officer,* or employee, shall be required to depart from the United States without the approval of the Secretary of State."

SEC. 8. (a) No person shall be entitled to the benefits of this ~~Act~~ *title* unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted or designated representatives, officers, or employees.

(b) Should the Secretary of State determine that the continued presence in the United States of any person en-

titled to the benefits of this ~~Act~~ *title* is not desirable, he shall so inform the foreign government or international organization concerned, as the case may be, and after such person shall have had a reasonable length of time, to be determined by the Secretary of State, to depart from the United States, he shall cease to be entitled to such benefits.

(c) No person shall, by reason of the provisions of this ~~Act~~ *title*, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein.

SEC. 9. The privileges, exemptions, and immunities of international organizations and of their officers and employees, and members of their ~~immediate families residing with them~~ *families, suites, and servants*, provided for in this ~~Act~~ *title*, shall be granted notwithstanding the fact that the similar privileges, exemptions, and immunities granted to a foreign government, its officers, or employees, may be conditioned upon the existence of reciprocity by that foreign government: *Provided*, That nothing contained in this ~~Act~~ *title* shall be construed as precluding the Secretary of State from withdrawing the privileges, exemptions, and immunities herein provided from persons who are nationals of any foreign country on the ground that such country is failing to accord corresponding privileges, exemptions, and immunities to citizens of the United States.

*SEC. 10. This title may be cited as the "International Organizations Immunities Act".*

## *TITLE II*

### *SEC. 201. EXTENSION OF TIME FOR CLAIMING CREDIT OR REFUND WITH RESPECT TO WAR LOSSES.*

*If a claim for credit or refund under the internal revenue laws relates to an overpayment on account of the deductibility by the taxpayer of a loss in respect of property considered destroyed or seized under section 127 (a) of the Internal Revenue Code (relating to war losses) for a taxable year beginning in 1941 or 1942, the three-year period of limitation prescribed in section 322 (b) (1) of the Internal Revenue Code shall in no event expire prior to December 31, 1946. In the case of such a claim filed on or before December 31, 1946, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in section 322 (b) (2) or (3) of such code, whichever is applicable, to the extent of the amount of the overpayment attributable to the deductibility of the loss described in this section.*

### *SEC. 202. CONTRIBUTIONS TO PENSION TRUSTS.*

*(a) DEDUCTIONS FOR THE TAXABLE YEAR 1942 UNDER PRIOR INCOME TAX ACTS.—Section 23 (p) (2) of the Internal Revenue Code is amended by striking out the words "January 1, 1943" and inserting in lieu thereof*

*"January 1, 1942", and by striking out the words "December 31, 1942" and inserting in lieu thereof "December 31, 1941".*

*(b) EFFECTIVE DATE.—The amendment made by this section shall be applicable as if it had been made as a part of section 162 (b) of the Revenue Act of 1942.*

SEC. 203. PETITION TO THE TAX COURT OF THE UNITED STATES.

*(a) TIME FOR FILING PETITION.—The second sentences of sections 272 (a) (1), 732 (a), 871 (a) (1), and 1012 (a) (1), respectively, of the Internal Revenue Code are amended by striking out the parenthetical expression appearing therein and inserting in lieu thereof the following: "(not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day)".*

*(b) EFFECTIVE DATE.—The amendments made by this section shall take effect as of September 8, 1945.*

Passed the House of Representatives November 20, 1945.

Attest: SOUTH TRIMBLE,
*Clerk.*

He shall also make such study without drafting plans or sketches as he may deem desirable to permit him to determine whether a canal or canals at other locations, including consideration of any new means of transporting ships across land, may be more useful to meet the future needs of interoceanic commerce or national defense than can the present canal with improvements. He shall report thereon to the Congress, through the Secretary of War and the President, not later than December 31, 1947.

I have also talked to representatives of the War Department that handles it, and they tell me they are agreeable to this amendment.

Mr. RANKIN. Mr. Speaker, will the gentleman yield?

Mr. MICHENER. I yield to the gentleman from Mississippi.

Mr. RANKIN. Who does the gentleman say is authorized to make this investigation; the Secretary of War?

Mr. BLAND. The Governor of the Panama Canal, under the supervision of the Secretary of War.

Mr. RANKIN. I am speaking about reference to other canals. Did the gentleman say the Secretary of War?

Mr. BLAND. It will be under the Secretary of War, if I recall. I do not have the substance of the resolution, but it is the Governor of the Panama Canal, under the supervision of the Secretary of War.

Mr. RANKIN. Many Americans have held their breath, and many more have breathed a sigh of relief that the Japanese were too stupid to attack the Panama Canal at the time they attacked Pearl Harbor. It seems to me that the time has come when we should have a sea-level canal. The Panama Canal is 85 feet above sea level. One bomb dropped in one of those locks would have put the Canal out of commission for months, and one bomb dropped on the locks in the Chagres River would have put them out of commission for years. I am not opposing this, you understand. I think the Panama Canal at present is inadequate, but it seems to me that the time has come in this atomic age, and with the world generally wreaking with hatred and vengeance and threats from various sources, for us to construct a sea-level canal that we can protect at all times against attacks from the air.

Mr. BLAND. The purpose of this resolution is to authorize the Secretary of War to investigate the possibilities of doing that very thing.

Mr. RANKIN. I thank the gentleman.

Mr. BLAND. The gentleman recalls that the tidal range on the Pacific side is 15 feet at normal high water and about 2 feet on the Atlantic side. We do not want to dump the Pacific Ocean into the Atlantic Ocean.

Mr. RANKIN. The authorities at Panama told me that the tide on the Pacific side was 18 feet and on the Atlantic side 18 inches. I realize there is that difference that would have to be overcome in some way, but I think it could easily be done if we had a sea-level canal.

Mr. BLAND. It is the purpose of this very resolution to make a study of that situation.

Mr. REED of New York. Mr. Speaker, will the gentleman yield?

Mr. MICHENER. I yield to the gentleman from New York.

Mr. REED of New York. I do not intend to object to the request of the gentleman, but since the point has been raised of the necessity for a sea-level canal near Panama, may I call the attenion of the gentleman to another situation in this country, that is, that one bomb dropped on the Soo locks at Sault Ste. Marie would absolutely have lost this war for us.

Mr. BLAND. That is not within the jurisdiction of my committee.

Mr. REED of New York. It is time that was investigated, too.

Mr. RANKIN. May I say to the gentleman from New York that I was not advocating a sea-level canal at the Panama Canal, or on the Isthmus of Panama, because you would have to cut down 85 feet through those rocks, but I understand a survey has been made for a sea-level canal across Nicaragua.

Mr. REED of New York. I understand that.

Mr. RANKIN. That is not what I had in mind.

Mr. REED of New York. They made a survey there many years ago.

Mr. RANKIN. Just to show you the risk we ran this time, when I was down there in 1927 I protested to the authorities that we did not have an adequate air force. In 1937 I was in Hawaii and I protested then that we did not have an adequate air force in Hawaii. If they had knocked out one of those locks in the Panama Canal we would have had to go 13,000 miles farther to get around Cape Horn to get into the Pacific. It would have been a disaster that would probably have surpassed in importance the Pearl Harbor attack. If we are going to continue to spend money for this purpose, and I think we are, it seems to me we have reached the time when we need a sea-level canal that we can protect against such eventualities.

Mr. BLAND. This committee will make a report to the Congress for its decision.

Mr. REED of New York. If one bomb had dropped on the locks at Sault Ste. Marie you would not have built another battleship for this war. You would not have had the steel with which to do business in this war at all.

Mr. BLAND. That does not come within the jurisdiction of my committee.

Mr. REED of New York. I know it does not, but I am calling it to the attention of the House.

Mr. MICHENER. Mr. Speaker, since we are all agreed that this ought to be done, I withdraw my reservation of objection.

The SPEAKER. Is there objection to the request of the gentleman from Virginia?

There was no objection.

The Senate amendment was concurred in.

A motion to reconsider was laid on the table.

## OFFICERS OF INTERNATIONAL ORGANIZATIONS

Mr. ROBERTSON of Virginia. Mr. Speaker, I ask unanimous consent to take from the Speaker's desk the bill (H. R. 4489) an act to extend certain privileges, exemptions, and immunities to international organizations and to the officers and employees thereof, and for other purposes, with Senate amendments thereto, and concur in the Senate amendments.

The Clerk read the title of the bill.

The Clerk read the Senate amendments, as follows:

Page 1, strike out all after line 2, over to and including line 7 on page 2, and insert:

"TITLE I

"SECTION 1. For the purposes of this title, the term 'international organization' means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title."

Page 2, line 19, after "enjoy", insert "the same."

Page 2, line 20, after "process", insert "as is enjoyed by foreign governments."

Page 2, line 21, strike out "they" and insert "such organizations."

Page 3, line 24, strike out "year" and insert "years."

Page 4, line 9, strike out "or" and insert "of."

Page 5, line 20, strike out "subparagraph" and insert "paragraph."

Page 5, line 21, strike out "subparagraph" and insert "paragraph."

Page 5, line 24, strike out "subparagraph" and insert "paragraph."

Page 6, strike out lines 1 and 2 and insert:

"'(16) Service performed in the employ of an international organization.'"

Page 6, line 6, strike out "subparagraph" and insert "paragraph."

Page 6, line 7, strike out "subparagraph" and insert "paragraph."

Page 6, line 10, strike out "subparagraph" and insert "paragraph."

Page 6, strike out lines 11 and 12 and insert:

"'(16) Service performed in the employ of an international organization.'"

Page 7, strike out lines 6 to 11, inclusive, and insert:

"'(18) International organization: The term "international organization" means a public international organization entitled to

enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act.'"

Page 7, line 15, strike out "subparagraph" and insert "paragraph."

Page 7, line 16, strike out "subparagraph" and insert "paragraph."

Page 7, line 19, strike out "subparagraph" and insert "paragraph."

Page 7, line 21, after "organization" insert "entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act."

Page 7, line 1, strike out "subparagraph" and insert "paragraph."

Page 8, line 10, strike out "subparagraph" and insert "paragraph."

Page 8, strike out all in line 15 after "Territories" down to and including "Government" in line 17.

Page 8, line 25, after "fingerprinting", insert "and."

Page 9, line 1, strike out "and selective training and service."

Page 9, strike out lines 17, 18, and 19, and insert "inserting in lieu thereof a comma and the following: 'and (7) a representative of a foreign government in or to an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act, or an alien officer or employee of such an international organization, and the family, attendants, servants, and employees of such a representative, officer, or employee.'"

Page 10, line 14, after "as", insert "a representative of a foreign government in or to an international organization or."

Page 10, line 15, strike out "officer" and insert "representative, officer."

Page 10, line 19, strike out "act" and insert "title."

Page 11, line 5, strike out "act" and insert "title."

Page 11, line 12, strike out "act" and insert "title."

Page 11, lines 17 and 18, strike out "immediate families residing with them" and insert "families, suites, and servants."

Page 11, line 18, strike out "act" and insert "title."

Page 11, line 23, strike out "act" and insert "title."

Page 12, after line 4, insert:

"SEC. 10. This title may be cited as the 'International Organizations Immunities Act.'

"TITLE II

"SEC. 201. Extension of time for claiming credit or refund with respect to war losses.

"If a claim for credit or refund under the internal revenue laws relates to an overpayment on account of the deductibility by the taxpayer of a loss in respect of property considered destroyed or seized under section 127 (a) of the Internal Revenue Code (relating to war losses) for a taxable year beginning in 1941 or 1942, the 3-year period of limitation prescribed in section 322 (b) (1) of the Internal Revenue Code shall in no event expire prior to December 31, 1946. In the case of such a claim filed on or before December 31, 1946, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in section 322 (b) (2) or (3) of such code, whichever is applicable, to the extent of the amount of the overpayment attributable to the deductibility of the loss described in this section.

"SEC. 202. Contributions to pension trusts.

"(a) Deductions for the taxable year 1942 under prior income-tax acts: Section 23 (p) (2) of the Internal Revenue Code is amended by striking out the words 'January 1, 1943' and inserting in lieu thereof 'January 1, 1942', and by striking out the words 'December 31, 1942' and inserting in lieu thereof 'December 31, 1941.'

"(b) Effective date: The amendment made by this section shall be applicable as if it had been made as a part of section 162 (b) of the Revenue Act of 1942.

"SEC. 203. Petition to The Tax Court of the United States.

"(a) Time for filing petition: The second sentences of sections 272 (a) (1), 732 (a), 871 (a) (1), and 1012 (a) (1), respectively, of the Internal Revenue Code are amended by striking out the parenthetical expression appearing therein and inserting in lieu thereof the following: '(not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day).'

"(b) Effective date: The amendments made by this section shall take effect as of September 8, 1945."

The SPEAKER. Is there objection to the request of the gentleman from Virginia [Mr. ROBERTSON]?

Mr. MICHENER. Mr. Speaker, reserving the right to object, certainly these are formidable-sounding amendments. The bill comes from the Ways and Means Committee. The gentleman from New York [Mr. REED], and other members of the committee on this side are present. I hope the amendments will be thoroughly explained to the House.

Mr. ROBERTSON of Virginia. Mr. Speaker, the amendments sound formidable, but the meaning is simple when you get below the surface.

The essence of the amendments, except the three amendments put on as tax riders to this bill, limit the scope of the bill as passed by the House last month. It will be recalled that I explained when I called the bill up in November that the emergency for this legislation grew out of the prospects that the headquarters for UNO will probably be in this country. We do not know whether it will be Boston, San Francisco, Chicago, or "Tuskeehoma."

There is every evidence that the headquarters will be here, and when these foreign employees come we want to be in position to extend them what might be called southern hospitality. In other words, this legislation is absolutely essential to carry out the agreements we have made and which other nations have already extended to similar organizations. The Senate made these restrictions. We thought the language of the bill limited these privileges to these international organizations that had been specifically sanctioned by the Congress. The Senate thought we ought to make that plain, and one amendment makes that provision: They do not get the benefits, these tax exemptions and other perquisites, unless the Congress has sanctioned the organization. The next amendment provides that if some organization starts functioning here and goes beyond the scope for which it was created, let us say starts into business over here, the President by Executive order can withdraw the privileges from the employees of that foreign organization.

Mr. RANKIN. Ought not that to be written into law? Why should we wait for the Executive? Should not that be written into law, that if they come here and engage in other business these privileges should cease?

Mr. ROBERTSON of Virginia. We have written it into law. Somebody has got to act in all law enforcement and we designate the President because he handles our foreign affairs under the Constitution; he acts for the Congress and the American people. It is written into this law and he is directed to withdraw from them these privileges if he finds they are violating the terms under which they were permitted to enter and to do business presumably for some international organization. It is a very hypothetical case, though, that representatives of Great Britain, for instance, who would be assigned to headquarters of the UNO would open up a shipping business in Boston or San Francisco. They just do not operate that way.

Mr. RANKIN. I do not know. I saw in the papers the other day that the British Empire owns stock in General Motors, almost a controlling interest. I do not know whether that is true or not, but under the common law of England one corporation cannot own stock in another, and I do not believe the United States Government could own stock in a British corporation. Unless there is a great deal of hurry about this proposition——

Mr. ROBERTSON of Virginia. Well, there is.

Mr. RANKIN. Why?

Mr. ROBERTSON of Virginia. Simply because we are going to recess today, as the gentleman well knows, and we do not propose to come back until the 14th of January. In the meantime final action has got to be taken as to whether UNO will have its headquarters here or somewhere else. Everybody thinks it would be very fine to have the headquarters of this international organization in this country.

I communicated with the State Department today and was told that it was highly essential for us to complete action on this.

Here is a report that is unanimously presented by the Senate Finance Committee, the distinguished Senator from Ohio [Mr. TAFT] reporting for that committee. These amendments were unanimously adopted by the Senate. They restrict what we have already voted for, and the vote in the House on our bill was unanimous.

Mr. RANKIN. I still contend that it should be written into the law that if they come here and then violate their exemptions and engage in other business here or engage in any kind of propaganda against this Government that they should automatically have these privileges withdrawn and be subjected to taxation.

Mr. ROBERTSON of Virginia. The law does take care of that as fully as we know how to put it in the law.

Mr. FOLGER. Mr. Speaker, will the gentleman yield?

Mr. ROBERTSON of Virginia. I yield.

Mr. FOLGER. The Congress has spoken. All that this does is to give the

President the power to enforce it when it becomes necessary.

Mr. RANKIN. It does not make it the law.

Mr. FOLGER. That is the gist of it, is it not?

Mr. ROBERTSON of Virginia. Absolutely. It is provided that the President shall withdraw from such organization or its officers and employees their exemptions or immunities provided they do something they are not supposed to do. The situation is fully taken care of.

Mr. ROBSION of Kentucky. Mr. Speaker, will the gentleman yield?

Mr. ROBERTSON of Virginia. I yield.

Mr. ROBSION of Kentucky. I wish to inquire if the gentleman or his committee has taken any testimony as to how many organizations now in existence outside of UNO would come under the provisions of this bill?

Mr. ROBERTSON of Virginia. If UNRRA had to extend relief to us it would come under it. It also applies to certain foreign agencies of UNRRA. If the International Food and Agricultural Organization, which we have joined, should set up headquarters here, it would come under this. The only agency that we know of which would immediately function under this is UNO, but any international organization of which we are a member by action of the Congress and in which we participate, will come within the provisions of this act.

Mr. ROBSION of Kentucky. There are quite a number of them already. This provides for additional organizations that may be formed?

Mr. ROBERTSON of Virginia. I tried to explain that all of these amendments limited provisions that were unanimously passed by the House. It does not add any new organizations, it does not add any new powers. The language was deemed to be a little too broad in the items I have explained and the Senate limited them. I am asking that we accept the limitations adopted by the Senate. Those limitations, as I said, had the unanimous endorsement of the Senate committee, the Senate, the State Department, the Treasury Department, and the tax suggestions are approved by our committee and by our staff on internal revenue taxation.

Mr. ROBSION of Kentucky. But it does provide for the creation of additional organizations?

Mr. ROBERTSON of Virginia. It does not.

Mr. ROBSION of Kentucky. I mean for the recognition of such organizations?

Mr. ROBERTSON of Virginia. It limits what we have already done. The original bill provided that when there is an international organization which we have joined by act of Congress, we should extend to them the privileges of immunity in general that we extend to the diplomatic corps. One thing we did in this bill that the Senate took out was this: We gave them freedom from State and local taxation. That was taken out by the Senate committee and I am asking the House to agree to that. It limits what we have undertaken to do. Another thing, it takes out the provision in our bill about selective service because that is covered by section 5 of our Selective Service Act.

Mr. ROBSION of Kentucky. I hope the gentleman will not feel a little overanxious and irritated by these questions. You see, there is no report printed, there is no report before us, and we do not have the opportunity to know what is contained in this report. I should like to ask another question. Is there any estimate in the gentleman's mind as to how many persons this will grant these extraordinary privileges to in this country? How many persons?

Mr. ROBERTSON of Virginia. That question was asked last month when we had the bill before us and our answer was that we had no way of knowing how many persons, but we had no reason to believe that any foreign nation would send over here more persons than they needed to do the job, because they had to sustain them and pay them while they are here.

Mr. ROBSION of Kentucky. We went through that experience. It developed just before the war that Japan had 1 consul and 250 vice consuls with keen eyes, with keen minds, and with diplomatic immunity going about the people in this country and over in Hawaii. Who is going to be able to follow all of these organizations and all of these people with diplomatic immunities and find out where they are and what they are doing?

Mr. ROBERTSON of Virginia. The Senate thought that our bill was not strict enough on that score, so it put this first amendment in that if they brought more people over here than they ought to bring over here and they got to doing something which we did not approve, the President would withdraw these privileges from them.

Mr. ROBSION of Kentucky. It has only been a short time ago when the newspapers were full of reports that people came here without diplomatic immunity as visitors, and that they had engaged in business, and that their profits had amounted to $800,000,000, and escaped taxes.

Mr. ROBERTSON of Virginia. That was an entirely different category. They came over here not as representatives of their government engaged in an international organization of which we were members. They came over here as aliens on some kind of a temporary visa. Our tax laws did not reach them, and they participated, with a lot of others, in gambling on the stock market in New York, in which they made a good deal of money, I understand. But this bill has nothing to do with that.

Mr. ROBSION of Kentucky. They did not have diplomatic immunity?

Mr. ROBERTSON of Virginia. They did not have any kind of immunity.

Mr. ROBSION of Kentucky. Yet they were able to accomplish this merely as aliens; that which they did accomplish. Now, will all of this group coming in here be immune?

Mr. ROBERTSON of Virginia. I can say to my distinguished colleague that he has raised an entirely separate issue that is now being investigated by the Bureau of Internal Revenue as to whether these folks are taxable under existing law, and if not, whether legislation can be enacted to apply to them. The Ways and Means Committee expects to receive a report from the Bureau of Internal Revenue on this matter.

Mr. ROBSION of Kentucky. It has this to do with it: They did not have the authority that will be granted to these maybe thousands and thousands of people going over this country, some of them friendly, and perhaps some of them otherwise, to pry into and go about things——

Mr. ROBERTSON of Virginia. I just tried to explain to my colleague that this bill, if agreed to, would limit tax relief to the salaries paid by these organizations, and if they go into business they would not be exempt as to such income.

Mr. ROBSION of Kentucky. They would have to be caught first.

Mr. ROBERTSON of Virginia. Well, do you not have to catch any violator first?

Mr. MUNDT. Mr. Speaker, will the gentleman yield?

Mr. ROBERTSON of Virginia. I yield to the gentleman from South Dakota.

Mr. MUNDT. I believe that the gentleman said that the reason for urgency in connection with this bill was because the United Nations had accepted the invitation of this country to locate their international capital in the United States.

Mr. ROBERTSON of Virginia. That is correct.

Mr. MUNDT. As I recall, he listed the invitation of Boston and Tuskahoma and a couple of other Johnny-come-lately invitations——

Mr. ROBERTSON of Virginia. I did not mean to eliminate any great area like that which the gentleman represents.

Mr. MUNDT. I am sure if the United States uses sagacity they will adopt the Black Hills suggestion. The bill also covers that?

Mr. ROBERTSON of Virginia. Absolutely.

Mr. HOFFMAN. Mr. Speaker, will the gentleman yield?

Mr. ROBERTSON of Virginia. I yield to the gentleman from Michigan.

Mr. HOFFMAN. I thought I heard something about limiting the number of persons who were to come over. Should there not also be something in the legislation which would limit the kind of people who should be permitted to come here and be immune from our laws? I make that inquiry because I have in my hand here a letter dated December 10 written from Detroit in which it says, among other things:

> The enclosed is a statement by William Z. Foster, chairman of the Communist Party, urging support for the General Motors strike.

It is signed by Carl Winter, chairman of the Michigan Communist Party. Now are you going to let all those fellows come over here from Russia or any other place and join up with Thomas,

who has asked Attlee to aid in the General Motors strike, and let those people go on and do anything they want to?

Mr. ROBERTSON of Virginia. No. I tried to explain that if they come over to aid in the General Motors strike, they lose their immunity, but I do not think that we could tell Russia that they could not bring Communists over here to represent them.

Mr. HOFFMAN. Does the gentleman think that those Communists should be permitted to come over here and take part in these strikes?

Mr. ROBERTSON of Virginia. Absolutely not.

Mr. HOFFMAN. How are you going to stop it if this thing goes through?

Mr. ROBERTSON of Virginia. Because we put in a provision that they lose their immunity if they do anything outside of the purposes of the organization that they represent.

Mr. HOFFMAN. If and when the President makes a finding.

Mr. ROBERTSON of Virginia. That is right.

In conclusion I wish to summarize the substantive amendments as follows:

First. The benefits of the bill are extended only to those international organizations in which the United States participates with the sanction of Congress. That was our intention.

Second. The President is authorized in the light of functions performed by any particular international organization to withhold or withdraw from such organization, or its officers or employees, any of the privileges, exemptions, and immunities provided for in the title, or to condition or limit the enjoyment by any organization, or its officers or employees, of any of such privileges, exemptions or immunities. This will permit the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature. Provision is also made for withdrawal of the benefits of the title from organizations which abuse such benefits.

Third. The bill omits the provision of the House bill which provided that international organizations shall be entitled to the same exemptions and immunities from State and local taxes as is the United States Government. There is considerable doubt as to the authority of the Federal Government to extend such exemptions and immunities so far as State or local taxes are concerned.

Fourth. The House bill exempted from the provisions of selective training and service persons designated by foreign governments to serve as their representatives in or to international organizations, and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, or employees residing with them, other than nationals of the United States. The Senate bill omits reference to selective training and service, since this matter, so far as aliens are concerned, is already provided for in section 5 of the Selective Service Act.

The Senate bill also adds a separate title providing certain tax amendments of an administrative nature. It was necessary to act on these amendments before December 31, 1945.

Fifth. The first tax amendment extends the time for filing claims for refund or credit with respect to war losses for the years 1941 and 1942. In a previous act we had extended this period to December 31, 1945, with respect to the year 1941. Since the whole war-loss matter is going to be studied by our committee and changes recommended it was deemed advisable to grant a further extension for both 1941 and 1942 through December 31, 1946.

Sixth. Another amendment corrects an error in the Revenue Act of 1942 with respect to pension trusts which omitted reference to the year 1942 and thereby created a hiatus in the statute. It is necessary to correct this situation now to prevent unnecessary paper work on the part of the Bureau of Internal Revenue.

Seventh. The last amendment deals with the period for filing petitions with The Tax Court of the United States. A taxpayer at the present time must file his petition with The Tax Court within a period of 90 days. Where the ninetieth day falls on Sunday or a legal holiday such Sunday or legal holiday is not counted as the ninetieth day. Due to the fact that the Government does not now conduct business on Saturday, it is necessary to amend the statute so that where the ninetieth days falls on Saturday, Saturday will not be counted as the ninetieth day.

All of these tax amendments have the approval of the Treasury Department and the joint staff. The Tax Court of the United States is particularly interested in having the last amendment referred to adopted as soon as possible.

The SPEAKER. Is there objection to the request of the gentleman from Virginia?

There was no objection.

The Senate amendment was concurred in.

A motion to reconsider was laid on the table.

DECLARATION OF RECESS

Mr. RAMSPECK. Mr. Speaker, I ask unanimous consent that it be in order at any time today for the Chair to declare a recess, subject to the call of the Chair.

The SPEAKER. Is there objection to the request of the gentleman from Georgia?

Mr. MICHENER. Mr. Speaker, reserving the right to object, will the gentleman outline, if he can, the expected program for the rest of the day?

Mr. RAMSPECK. There is no further business so far as I know to be transacted by the House except to pass the sine die adjournment resolution when it comes over from the Senate.

Mr. MICHENER. As I understand, the Senate has passed the resolution fixing the 14th of January as the return date.

Mr. RAMSPECK. That is my understanding that they have adopted it, and the only thing left now is the sine die resolution.

Mr. HOFFMAN. Reserving the right to object, Mr. Speaker, does the gentleman mean that cuts off special orders?

Mr. RAMSPECK. Not at all.

Mr. MICHENER. I certainly would object if I thought the gentleman from Michigan or anybody else wanted to speak.

Mr. HOFFMAN. Certainly the gentleman from Michigan would not want to speak.

The SPEAKER. Is there objection to the request of the gentleman from Georgia?

There was no objection.

EXTENSION OF REMARKS

Mr. FARRINGTON asked and was given permission to extend his remarks in the RECORD in two instances and include in one an article from Life by Charles J. V. Murphy and in the other a letter by Mr. Abe Fortas, Under Secretary of the Interior.

Mrs. LUCE asked and was given permission to extend her remarks in the RECORD in two instances and include in one a letter from a friend in Austria and in the other some facts about the workings of UNRRA abroad.

Mr. BENNETT of Missouri asked and was given permission to extend his remarks in the RECORD on the subject of the work of one of his committees.

Mr. HALE asked and was given permission to extend his remarks in the RECORD and include an editorial from the Honolulu Star-Bulletin of November 12 last.

Mr. WOLCOTT asked and was given permission to extend his remarks in the RECORD and include an editorial from the New York Times in respect to the death of the outstanding economist, Dr. Edwin C. Kemmerer.

Mr. MUNDT asked and was given permission to extend his remarks in the RECORD and include an editorial on the subject of the program of loans to foreign countries.

Mrs. ROGERS of Massachusetts. Mr. Speaker, I ask unanimous consent to extend my remarks in the RECORD and include an article which appeared in Yank magazine giving a description of the benefits to be given by Canada to the Canadian GI's. It shows there are some things, I think, whereby we can improve on what we are doing for our own GI's.

The SPEAKER. Is there objection to the request of the gentlewoman from Massachusetts?

There was no objection.

INTERNATIONAL INFORMATION PROGRAM

Mrs. BOLTON. Mr. Speaker, I ask unanimous consent to address the House for 1 minute and to revise and extend my remarks and include an article.

The SPEAKER. Is there objection to the request of the gentlewoman from Ohio?

There was no objection.

Mrs. BOLTON. Mr. Speaker, the Foreign Affairs Committee recently held hearings on a bill, H. R. 4982, which would authorize the Department of State to continue to carry on an international information program.