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Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations

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NOTES

PLAIN READING, SUBTLE MEANING: RETHINKING THE IOIA AND THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS

*George B. Adams III**

Immunity is freedom from liability, and as such, it can quite literally provide a “get out of jail free” card. In the United States, international organizations face uncertainty about the scope of their immunity, which is provided by the International Organizations Immunities Act (IOIA). The D.C. Circuit has found that international organizations enjoy absolute immunity under the IOIA. Conversely, the Third Circuit recently held that international organizations are only entitled to restrictive immunity, which limits immunity to claims involving an organization’s public acts and does not exempt them from suits based on their commercial or private conduct.

This Note contends that a plain reading of the IOIA, combined with a full understanding of the history and legislative purpose behind the immunity of international organizations, presents a third interpretation. It concludes that the IOIA requires judicial deference to immunity determinations by the executive branch, which provides the flexibility necessary to allow international organizations to operate without undue interference.

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INTRODUCTION

In May 2011, Dominique Strauss-Kahn, the former head of the International Monetary Fund (IMF), was arrested for allegedly sexually assaulting a housekeeper in his suite at the Sofitel Hotel in Manhattan.¹ Strauss-Kahn decided not to claim immunity during the criminal proceedings, explaining that “he wanted to clear his name.”² However, when the housekeeper later filed a civil suit, his lawyers argued to the court that his former status as the head of an international organization protected him from lawsuits, including those based upon “acts done in the executive’s personal capacity.”³ The court ultimately rejected the immunity claim because Strauss-Kahn had resigned from his post at the IMF before the suit was filed, and therefore any immunity that he might have enjoyed had expired.⁴ The decision thus left open the question of whether Strauss-Kahn would have enjoyed immunity had he not resigned. This larger question—whether international organizations and their employees enjoy absolute or restrictive immunity under U.S. law—is the subject of a current split among federal courts.⁵

Under the so-called “restrictive” theory of immunity, government entities enjoy full protection for their public acts, but surrender their privilege when acting as private parties.⁶ Congress formally adopted the theory of restrictive immunity with respect to foreign states when it passed the Foreign Sovereign Immunities Act of 1976⁷ (FSIA). However, while the FSIA clearly limited the immunity owed to foreign states, it does not speak to the immunity of international organizations.⁸ Although international organizations share some functional similarities to foreign states, they are granted immunity under a separate, older statute—the International Organizations Immunities Act of 1945⁹ (IOIA)—which, by its text, affords international organizations “the same immunity . . . as is enjoyed by foreign

1. See Russ Buettner, *Bronx Judge Rejects Strauss-Kahn’s Claim of Diplomatic Immunity in Sexual Assault Suit*, N.Y. TIMES, May 1, 2012, at A23.

2. See *id.*

3. See *id.*

4. See *Diallo v. Strauss-Kahn*, No. 307065/11 (N.Y. Sup. Ct. May 1, 2012), available at <http://www.nycourts.gov/press/DSK-30706511.pdf>.

5. See *infra* Part II.

6. See *infra* Part II.

7. See *infra* Part I.C.3.

8. See *infra* Part I.D.

9. See *infra* Part I.B.3.

governments.”¹⁰ However, a circuit split has developed concerning the immunity referenced by the IOIA, and whether it adopts revisions to U.S. law governing foreign sovereign immunity, most importantly the FSIA.¹¹

Part I of this Note examines the legislative history and policy interests behind both statutes. Part II analyzes the divergent approaches taken by the D.C. and Third Circuits regarding the relevance of post-IOIA foreign state immunity doctrine to the immunity of international organizations in U.S. courts. Finally, Part II suggests that both circuits formed their conclusions based on incomplete historical understandings of sovereign immunity at the time the IOIA was passed. Clarifying that history gives the IOIA’s reference to sovereign immunity a new meaning—one that conforms to a plain reading of the statute as a whole and also follows the intent expressed in the legislative history. This new reading, which advocates judicial deference to immunity determinations by the executive branch, would allow for the articulation of a clear standard of immunity for international organizations.

I. SAME AS WHAT? A HISTORY OF INTERNATIONAL ORGANIZATIONS AND FOREIGN SOVEREIGN IMMUNITY

Part I explores the development of foreign sovereign immunity and its relation to the IOIA. Part I.A traces the advancement of absolute sovereign immunity in U.S. courts up through the early twentieth century and then highlights the abandonment of that doctrine in favor of judicial deference to executive policy starting in the late 1930s. Part I.B describes the sudden prominence of international organizations in the aftermath of World War II, the United States’s leading role in forming and empowering these organizations, and the interplay between the United States’s new global prominence and the creation of the IOIA. Part I.C explains the State Department’s decision to adopt the restrictive theory of foreign sovereign immunity, the problems caused by State Department determination of sovereign immunity, and Congress’s intention to relieve these issues by passing the FSIA. Finally, Part I.D traces the initial post-FSIA treatments of the IOIA and the development of the corresponding benefit test.

A. *The Development of Sovereign Immunity in the United States, 1812 to 1945*

In *Atkinson v. Inter-American Development Bank*,¹² decided in 1998, the D.C. Circuit found that Congress’s intention when it passed the IOIA was to grant to international organizations the same immunity as foreign sovereigns “as it existed in 1945—when immunity of foreign sovereigns

10. See International Organizations Immunities Act, 22 U.S.C. § 288a(b) (2006); *infra* Part I.B.3.

11. See *infra* Part II.

12. 156 F.3d 1335, 1335 (D.C. Cir. 1998).

was absolute.”¹³ However, while sovereigns did enjoy absolute immunity in the United States for a time, that time had arguably passed when the IOIA was enacted in December 1945.¹⁴ The following discussion describes the evolution of foreign sovereign immunity law in U.S. courts, starting with the development of an absolute immunity standard from 1812 through the early 1930s. It then examines the expansion of executive authority over all matters of foreign policy in the late 1930s, and the corresponding shift away from judicial determination and absolute foreign sovereign immunity.

1. Recognition of Foreign Sovereign Immunity by the U.S. Supreme Court:
From *The Schooner Exchange v. McFaddon* to
Berizzi Bros. v. Steamship Pesaro

The immunity of a foreign state sued in the national courts of the United States has “long and uncritically” been understood as a sub-constitutional question and, therefore, fully subject to congressional determination and discretion.¹⁵ However, for much of U.S. history, foreign sovereign immunity was not regulated by congressional statute; rather, the U.S. Supreme Court determined immunity questions.¹⁶ In other words, up to the 1930s, foreign sovereign immunity was decided as a matter of federal common law, wherein the Court observed a strict absolute immunity standard for foreign states.¹⁷ Consequently, if a defendant qualified as a foreign sovereign in the nineteenth and early twentieth centuries, U.S. courts consistently found that it had immunity for all of its acts, including those that were commercial in nature.¹⁸

*The Schooner Exchange v. McFaddon*¹⁹ is generally regarded as the landmark decision on sovereign immunity in the United States.²⁰ The case involved a French warship that had taken shelter in the port of Philadelphia during a storm.²¹ The ship was alleged to be a converted U.S. merchantman, and its purported American owners brought an in rem

13. *See id.* at 1341.

14. *See* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT’L L. REV. 471, 502 (2008).

15. *See* Thomas H. Lee, *The World Balance of Power and the Evolution of U.S. Foreign-States Law* 33 (2006) (unpublished manuscript) (on file with the Fordham Law Review). Professor Lee argues that this question is open to criticism from a historical perspective, as evidence suggests that some framers believed that the Constitution required consent for suits against foreign states. *See id.* at 33–34.

16. *See id.* at 32.

17. *See id.*

18. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 572 (2003) (describing how the foreign sovereign immunity recognized by the Supreme Court in *The Schooner Exchange* was gradually extended to all government property and eventually to any suit against a foreign nation).

19. 11 U.S. (7 Cranch) 116 (1812).

20. *See* VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* 526 (2003); *see also* Steven R. Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 13 EMORY INT’L L. REV. 445, 448 (1999).

21. *See The Schooner Exchange*, 11 U.S. at 117; *see also* Lee, *supra* note 15, at 35.

admiralty action to reclaim it.²² In deciding *The Schooner Exchange*, Chief Justice Marshall found that a French ship of war was not subject to the jurisdiction of U.S. courts due to the international convention of “perfect equality and absolute independence of sovereigns.”²³ However, Chief Justice Marshall made clear that the court was following custom, not binding law: foreign sovereign states were not categorically immune from U.S. jurisdiction; rather, Congress could authorize courts to exercise jurisdiction over any property within its territory.²⁴ Instead, foreign sovereign immunity was a matter of mutual expectation between sovereign states that was necessary for nations to freely interact.²⁵ According to Chief Justice Marshall, sovereigns were bound “not to degrade the dignity of [their] nation,” and consequently, would never expose their sovereign rights to the jurisdiction of another by entering a foreign territory without an assurance that “the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.”²⁶

By its own terms, *The Schooner Exchange* applied only to the public property of a foreign sovereign destined for public use.²⁷ In fact, Chief Justice Marshall considered the distinction between the public and private actions of a foreign sovereign and suggested that only the former should be accorded immunity.²⁸ Over time, however, the public purpose of sovereign property received an expansive interpretation, extending immunity first to foreign ships that were not warships, then to foreign government property,

22. See *The Schooner Exchange*, 11 U.S. at 116–17; NANDA & PANSIUS, *supra* note 20, at 526; Lee, *supra* note 15, at 35.

23. *The Schooner Exchange*, 11 U.S. at 137; see also Swanson *supra* note 20, at 448.

24. See *The Schooner Exchange*, 11 U.S. at 137, 146 (“Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.”); see also NANDA & PANSIUS, *supra* note 20, at 527; Lee, *supra* note 15, at 36. Chief Justice Marshall’s assertion is often cited as the basis for the conclusion that foreign sovereign immunity in U.S. courts is fully subject to congressional control. See Lee, *supra* note 15, at 36.

25. See NANDA & PANSIUS, *supra* note 20, at 527.

26. *The Schooner Exchange*, 11 U.S. at 137; see also NANDA & PANSIUS, *supra* note 20, at 527.

27. See Richard J. Oparil, *Immunity of International Organizations in United States Courts: Absolute or Restrictive?* 24 VAND. J. TRANSNAT’L L. 689, 693 (1991).

28. See *The Schooner Exchange*, 11 U.S. at 145 (“[T]here is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.”); see also NANDA & PANSIUS, *supra* note 20, at 527.

and finally to any suit against a foreign nation.²⁹ Eventually *The Schooner Exchange* came to be regarded as granting absolute immunity to foreign sovereigns in almost any endeavor.³⁰

The extent of this expanded immunity was demonstrated in 1926 when the U.S. Supreme Court heard *Berizzi Bros. v. Steamship Pesaro*.³¹ In *Pesaro*, the Court considered whether sovereign immunity applied to the commercial actions of a foreign government.³² The Court's decision in *Pesaro* included two key conclusions: First, the Court held that sovereign immunity was absolute, finding that *The Schooner Exchange*'s rationale for the immunity of foreign sovereigns applied equally to a state's public acts and commercial acts.³³ Second, the Court made clear that the judiciary, not the executive, would decide the scope of sovereign immunity.³⁴ In the district court, the State Department had recommended that customary foreign sovereign immunity was not appropriate when foreign states engaged in commercial activities;³⁵ however, on appeal the Supreme Court declined to address that recommendation, thereby implicitly suggesting that the executive branch's view ought not to influence the Court's analysis in any way.³⁶ As a result, following *Pesaro*, foreign sovereigns could expect to enjoy absolute immunity in the United States, as the Supreme Court indicated that the scope of foreign sovereign immunity would be treated as a judicial inquiry, and precedent dictated that this immunity was absolute.³⁷

2. Judicial Deference to the Executive Branch: *Ex parte Republic of Peru* and *Republic of Mexico v. Hoffman*

The Great Depression and the New Deal era saw momentous changes in the relationship between the executive branch and the U.S. Supreme Court.³⁸ During this time, challenges to judicial formalism under the so-called "New Deal Court" gradually undermined the acceptance of the deductive, common-law-based rulemaking that constituted the Court's approach in decisions like *Pesaro*.³⁹ Instead, under the leadership of Chief Justice Hughes, the Court increasingly applied a "realist" approach that was

29. See Oparil, *supra* note 27, at 693–94; BRADLEY & GOLDSMITH, *supra* note 18, at 572.

30. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (citing *The Schooner Exchange* for the proposition that "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country").

31. 271 U.S. 562, 574 (1926).

32. See *id.*; see also Herz, *supra* note 14, at 503–04.

33. See *Pesaro*, 271 U.S. at 574; see also Herz, *supra* note 14, at 503–04.

34. Herz, *supra* note 14, at 504.

35. See *The Pesaro*, 277 F. 473, 479–80 (S.D.N.Y. 1921); see also Herz, *supra* note 14, at 504.

36. See *Pesaro*, 271 U.S. at 574; Herz, *supra* note 14, at 504.

37. See *Pesaro*, 271 U.S. at 574; Herz, *supra* note 14, at 503–04.

38. See Herz, *supra* note 14, at 504–05.

39. See *id.* at 504.

more politically conscious and deferential to the elected branches.⁴⁰ In particular, this approach was defined by a newfound respect for the executive branch in matters of foreign policy.⁴¹ In a series of cases throughout the 1930s and 1940s, the Court consolidated the authority of the President to speak with “one voice” in foreign affairs.⁴²

That authority included the ability to determine sovereign immunity. Between 1938 and 1945, the Court gradually abandoned *Pesaro*'s position that sovereign immunity was a judicial question in favor of a new approach in which the foreign policy considerations of the State Department were controlling.⁴³ Under this new approach, the determinations of the executive branch with regard to foreign sovereign immunity were binding on courts, regardless of what international custom might say.⁴⁴ This change in policy had important implications because, in the aftermath of the worldwide Great Depression, many governments were no longer hesitant to enter the commercial arena.⁴⁵ Consequently, the question of whether a sovereign, acting in a purely commercial manner, should enjoy immunity took on increasing importance.⁴⁶

By the end of 1945, two cases made clear that it was State Department policy, and not the courts, that determined sovereign immunity. Those cases also made it clear that sovereign immunity was no longer absolute. In *Ex parte Republic of Peru*,⁴⁷ the U.S. Supreme Court specifically addressed the executive branch's role in immunity decisions and, in a complete reversal of earlier opinions, concluded that the Court would follow the State Department's recommendation rather than risk embarrassment to U.S. foreign relations.⁴⁸

Ex parte Peru involved a claim against a vessel owned and operated by Peru,⁴⁹ who had obtained a letter from the State Department declaring that the United States “recognizes and allows the claim of immunity.”⁵⁰ The Court held that the State Department's determination of immunity was conclusive and that the ship was therefore immune from seizure: “[T]he judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune.”⁵¹

40. *See id.*

41. *See id.* at 505; *see also* BRADLEY & GOLDSMITH, *supra* note 18, at 573.

42. *See* Herz, *supra* note 14, at 505.

43. *See id.* at 504.

44. *See* BRADLEY & GOLDSMITH, *supra* note 18, at 573; *see also* NANDA & PANSIUS, *supra* note 20, at 529.

45. *See* Herz, *supra* note 14, at 505.

46. *See id.*

47. 318 U.S. 578 (1943).

48. *See id.* at 588; Oparil, *supra* note 27, at 694; Swanson, *supra* note 20, at 449.

49. *See Ex parte Peru*, 318 U.S. at 580.

50. *See id.* at 581; *see also* NANDA & PANSIUS, *supra* note 20, at 529.

51. *Ex Parte Peru*, 318 U.S. at 588; *see also* NANDA & PANSIUS, *supra* note 20, at 529.

In the second case, *Republic of Mexico v. Hoffman*,⁵² the U.S. Supreme Court applied the same rule of absolute deference to the executive branch as it did in *Ex parte Peru*, but this time it denied immunity.⁵³ *Hoffman* involved a claim for damages made against a merchant vessel owned by Mexico, but operated by a private company.⁵⁴ In response to Mexico's request for a statement of immunity, the State Department recognized Mexico's ownership of the vessel, but did not recommend that immunity be granted.⁵⁵ Instead, the State Department instructed the Court to refer to earlier statements and decisions relating to similar issues.⁵⁶ Accordingly, in light of prior determinations and in the absence of a new immunity recommendation by the executive branch, the Supreme Court held that it would be inappropriate to grant immunity to the vessel: "[I]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."⁵⁷

As a result of *Ex parte Peru* and *Hoffman*, by early 1945 U.S. foreign sovereign immunity law had clearly departed from an absolute immunity standard.⁵⁸ Instead, courts deferred to the State Department's foreign sovereign immunity determinations when deciding whether immunity was appropriate in a particular suit.⁵⁹ If no specific recommendation was made, courts restricted themselves to the level of immunity recommended by previous State Department determinations.⁶⁰

B. *The Rise of International Organizations and the Creation of the International Organizations Immunities Act*

The end of World War II witnessed a renewed, and more practical, emphasis on the importance of international governmental organizations—organizations consisting primarily or entirely of sovereign member states and that operate across national borders.⁶¹ This focus coincided with the

52. 324 U.S. 30 (1945).

53. See *Hoffman*, 324 U.S. at 35; NANDA & PANSIUS, *supra* note 20, at 529–30.

54. See *Hoffman*, 324 U.S. at 31.

55. See *id.* at 36–37.

56. See *id.*; see also Swanson *supra* note 20, at 449–50.

57. See *Hoffman*, 324 U.S. at 35; see also NANDA & PANSIUS, *supra* note 20, at 529–30.

58. See *Hoffman*, 324 U.S. at 35–36 (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. . . . [R]ecognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.”); Herz, *supra* note 14, at 510.

59. See NANDA & PANSIUS, *supra* note 20, at 529; see also Herz, *supra* note 14, at 508–10.

60. See *Hoffman*, 324 U.S. at 36–38; see also NANDA & PANSIUS, *supra* note 20, at 530.

61. See Herz, *supra* note 14, at 488; see, e.g., International Organizations Immunities Act, 22 U.S.C. § 288 (2006) (defining an international organization as “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

rise of the United States as a global power.⁶² The result was an understanding that the United States would play an essential role in these new organizations.⁶³ The following sections discuss this dynamic and explain how it led to the adoption of the IOIA.

1. The Growth of International Organizations in the Aftermath of World War II

As World War II drew to a close, the Allied Powers recognized a need for international cooperation to rebuild the devastated global economy and guard against another outbreak of violence.⁶⁴ While the League of Nations had failed to prevent the war, that failure had not produced a sense of futility about the effectiveness of international organizations.⁶⁵ Rather, the lesson drawn was that international organizations had to be given teeth, as the problem with earlier organizations was that they were too idealistic and lacked institutional heft.⁶⁶ The Allies' response was to create a multitude of international organizations whose purposes would be to deter aggression, facilitate the resolution of conflicts, provide financing for reconstruction, and stabilize global currencies and trade.⁶⁷ Some of these organizations, like the United Nations (U.N.), the IMF, the International Bank for Reconstruction and Development (World Bank), and the Organization of American States (OAS) have become household names, while others have received scant media attention.⁶⁸ But well known or not, these organizations have come to assume "massive importance" in international politics and the global economy.⁶⁹

A key factor in the post-World War II redevelopment of international organizations was the widespread acceptance of the "functional necessity" test in international theory and practice.⁷⁰ Under this test, international organizations possess the immunities that are "necessary for the fulfillment of [their] purposes" and for their independence from member states.⁷¹ Independence is generally understood as "the authority to act with a degree of autonomy, and often with neutrality, in defined spheres."⁷² The functional necessity test was viewed as a means of recognizing the interests

appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter").

62. See Herz, *supra* note 14, at 488; see also INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES* 61 (4th ed. 1984).

63. See CLAUDE, *supra* note 62, at 61.

64. See Herz, *supra* note 14, at 488.

65. See CLAUDE, *supra* note 62, at 57.

66. See *id.*

67. See *id.* at 57–58.

68. See Oparil, *supra* note 27, at 689.

69. See *id.*

70. See Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 *YALE L.J.* 1167, 1181 (1982) [hereinafter *Jurisdictional Immunities*].

71. See *id.* (internal citations omitted).

72. Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. CONFLICT RESOL.* 3, 9 (1998).

of member states—particularly the more powerful ones that were unlikely to join an organization they could not influence—without leaving an organization so exposed that it would be unable to achieve the ends for which it was formed.⁷³

Initially, concern for the independence of these new organizations that were established in the 1940s and 1950s led to a consensus that international organizations required complete jurisdictional immunity.⁷⁴ However, while the strength and durability of these organizations has since been proven over time, the basic purpose for granting immunity to international organizations remains the same: “to secure for them both legal and practical independence, so that these international organizations should be able to fulfill their task.”⁷⁵ This goal is reflected in the U.N. Charter, adopted in June 1945, which provides: “The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”⁷⁶ Similar provisions are included in the charters or basic instruments of most other international organizations.⁷⁷

2. U.S. Supremacy After World War II and Its Leadership in the Formation of International Organizations

Among the nations working to form a new system of international organizations in the aftermath of World War II, the United States was generally regarded as the indispensable participant.⁷⁸ The primacy of the United States in this undertaking was due to at least two factors: The first was the nation’s “unequaled” military and economic power.⁷⁹ The second was the global prestige of President Franklin D. Roosevelt, whose efforts to build a lasting peace brought him recognition as “the spiritual father of the United Nations.”⁸⁰ Because of the United States’s prominence, it was considered a “practical certainty” that many of these organizations would be located, or at least conduct substantial activity, within its borders.⁸¹

73. *See id.* at 16.

74. *See Jurisdictional Immunities, supra* note 70, at 1181.

75. JOSEF L. KUNZ, *Privileges and Immunities International Organizations*, in *THE CHANGING LAW OF NATIONS: ESSAYS ON INTERNATIONAL LAW* 509, 522–23 (1968).

76. U.N. Charter art. 104; *see* THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* 506 (2d ed. 1987). Unlike foreign sovereign immunity, which could extend to any activity that a foreign nation chooses to engage in, the functional immunity of international organizations only applies to those limited activities that the organization was formed to perform. *See id.*

77. *See, e.g.*, Marrakesh Agreement Establishing the World Trade Organization art. 8, Apr. 15, 1994, 1867 U.N.T.S. 154; Articles of Agreement of the International Development Association art. 8, Sept. 24, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249; *see also*, FRANCK & GLENNON, *supra* note 76, at 506.

78. *See Herz, supra* note 14, at 488; *see also* CLAUDE, *supra* note 62, at 61.

79. *See* CLAUDE, *supra* note 62, at 61.

80. *See id.*

81. *See Herz, supra* note 14, at 488. For example, in 1945 Congress invited the U.N. to establish its permanent base in the United States, and soon thereafter the organization settled

However, locating international organizations within the United States left them more vulnerable to actions and pressures by the U.S. government than by other nations.⁸² As a result, in order to host these organizations the United States had to assure the international community that suitable conditions were in place to protect their legal and practical independence.⁸³

3. The Creation and Enactment of the International Organizations Immunities Act

The IOIA was enacted in 1945 to provide international organizations with the necessary immunity under U.S. law to enable them to fulfill their proper functions when operating in the United States.⁸⁴ The key provision of the IOIA, section 2, specifies:

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.⁸⁵

Before the IOIA was enacted, U.S. law made no provision for the immunity of either international organizations or their personnel.⁸⁶ However, the United States did generally recognize international organizations as having legal capacity, and as a result, those organizations were left vulnerable to suits on the same basis as private parties.⁸⁷

The driving force behind the IOIA was a report submitted by the Secretary of State to the President after the San Francisco Conference on the U.N. Charter.⁸⁸ The report concluded that Article 105 of the U.N. Charter required the United States to enact appropriate immunity legislation to ensure the organization's independence.⁸⁹ Due to the high probability that the U.N. would locate within the United States, or at the very least, carry out substantial activities there, it became "essential to adopt this . . .

into its current headquarters in New York City. *See* BOB REINALDA, ROUTLEDGE HISTORY OF INTERNATIONAL ORGANIZATIONS 286 (2009).

82. *See Jurisdictional Immunities*, *supra* note 70, at 1185.

83. *See id.*

84. *See* H.R. REP. NO. 79-1203, at 2 (1945); S. REP. NO. 79-861, at 2 (1945).

85. International Organizations Immunities Act, 22 U.S.C. § 288a(b) (2006).

86. *See* H.R. REP. NO. 79-1203, at 2; S. REP. NO. 79-861, at 2; *see also Jurisdictional Immunities*, *supra* note 70, at 1168.

87. *See Jurisdictional Immunities*, *supra* note 70, at 1168.

88. *See Jurisdictional Immunities*, *supra* note 70, at 1169.

89. *See id.*; *see also* U.N. Charter art. 105, para. 1-3 ("1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.").

legislation promptly.”⁹⁰ Of particular concern was ensuring that the extension of suitable privileges and immunities to international organizations like the U.N. did not “embarrass” the United States in its foreign relations.⁹¹ Consequently, the State Department drafted and sponsored a bill granting judicial immunity to international organizations and presented it to Congress for further action.⁹²

According to congressional reports discussing the bill, the basic purpose of the IOIA was to “confer upon international organizations . . . privileges and immunities of a governmental nature.”⁹³ Those privileges were to be “similar to those granted by the United States to foreign governments and their officials,”⁹⁴ but not identical, as the reasons behind granting immunity to international organizations differed from those for recognizing sovereign immunity.⁹⁵ While sovereign immunity reflected the concerns of international custom and national dignity,⁹⁶ the immunity of international organizations reflected America’s foreign policy decision to surrender some of its sovereign jurisdiction in exchange for membership in the growing body of international organizations.⁹⁷ The congressional reports provide a justification for why the United States would willingly surrender jurisdiction, explaining that the IOIA reflected the “self-interest” of the United States by not only protecting the official actions of international organizations in the United States, but also “strengthen[ing] the position” of other organizations of which the United States was a member, but which were located or acting in other countries.⁹⁸

Furthermore, in considering the IOIA, Congress relied on an assertion from the State Department that the immunity granted to international organizations and their officials would be “somewhat more limited than those which are extended by the United States to foreign governments.”⁹⁹ For example, the immunity of officers and officials of international organizations would be limited to acts performed in their official capacity, whereas the diplomatic officers of foreign nations enjoyed full immunity from legal process.¹⁰⁰

Moreover, the immunities provided for by the IOIA could easily be limited by Presidential action.¹⁰¹ In recommending the bill’s passage, the House Committee on Ways and Means found that the “interests of the

90. See H.R. REP. NO. 79-1203, at 2.

91. See *id.*

92. See *Jurisdictional Immunities*, *supra* note 70, at 1169.

93. See H.R. REP. NO. 79-1203, at 1; S. REP. NO. 79-861, at 1 (1945).

94. H.R. REP. NO. 79-1203, at 6; see also S. REP. NO. 79-861, at 1.

95. See *Jurisdictional Immunities*, *supra* note 70, at 1168.

96. See *supra* notes 24–26 and accompanying text.

97. See H.R. REP. NO. 79-1203, at 2; S. REP. NO. 79-861, at 2; see also *Jurisdictional Immunities*, *supra* note 70, at 1168.

98. See H.R. REP. NO. 79-1203, at 2; S. REP. NO. 79-861, at 2.

99. See H.R. REP. NO. 79-1203, at 6; S. REP. NO. 79-861, at 3.

100. See H.R. REP. NO. 79-1203, at 6.

101. See International Organizations Immunities Act, 22 U.S.C. § 288 (2006).

United States are adequately protected . . . [by] the broad powers granted to the President.”¹⁰² Section 1 of the IOIA provides that:

The President [is] 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 . . . or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.¹⁰³

According to congressional reports, those powers allowed the President to rectify any abuse of the immunities granted by the IOIA and, most importantly, permitted the President to limit an organization’s immunity in “the event that any international organization should engage . . . in activities of a commercial nature.”¹⁰⁴

C. Getting to FSIA: The Restrictive Theory of Sovereign Immunity in the United States

The twentieth century witnessed a shift in international custom away from absolute sovereign immunity and towards a new theory of restrictive immunity.¹⁰⁵ This theory was first introduced into U.S. law by the State Department,¹⁰⁶ but was eventually codified in the FSIA.¹⁰⁷ The following discussion covers the State Department’s adoption of restrictive immunity in the Tate Letter. It then analyzes the political and procedural problems created by the State Department’s determination of foreign sovereign immunity and illustrates how those unique problems motivated Congress to pass the FSIA.

1. Changing International Custom and the Tate Letter

In the wake of the Great Depression, many sovereign states were no longer reluctant to enter the commercial arena.¹⁰⁸ As a result, throughout the twentieth century, sovereign nations assumed increasingly prominent roles in activities that had historically been the purview of private actors.¹⁰⁹ For example, state-sponsored trading companies and manufacturing interests became commonplace.¹¹⁰ However, this trend created a serious problem: when states engaged in commercial transactions with private parties, the customary recognition of absolute immunity allowed foreign

102. See H.R. REP. NO. 79-1203, at 3.

103. 22 U.S.C. § 288.

104. See S. REP. NO. 79-861, at 2; see also H.R. REP. NO. 79-1203, at 6.

105. See Swanson, *supra* note 20, at 450–51.

106. See Oparil, *supra* note 27, at 694.

107. See Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1602 (2006); H.R. REP. NO. 94-1487, at 45 (1976).

108. See Herz, *supra* note 14, at 505.

109. See Swanson, *supra* note 20, at 450.

110. See *id.* at 450–51.

sovereigns to breach contractual obligations with impunity.¹¹¹ Consequently, a corresponding movement naturally developed within international custom whereby foreign sovereign immunity was restricted to exclude certain activities.¹¹² The purpose of this shift was to protect private parties from injury due to the acts of a foreign sovereign operating as a business, while preserving the sovereign's privilege to act with immunity in an official manner.¹¹³ Under this new approach—termed the restrictive theory of sovereign immunity—a state retained immunity for its public acts but surrendered immunity when acting as a private party.¹¹⁴ Nearly all states adopted the restrictive theory of immunity by the latter half of the twentieth century.¹¹⁵

As the restrictive theory of sovereign immunity gained prominence abroad, the State Department attempted to clarify the standard for sovereign immunity under U.S. law by publishing the Tate Letter in 1952.¹¹⁶ The Tate Letter is a memo that was written to the U.S. Attorney General by the Acting Legal Advisor for the State Department, Jack Tate.¹¹⁷ It indicated that the State Department would no longer recognize immunity for the private acts of foreign sovereigns and explained the key reasons for adopting this position.¹¹⁸ Those reasons included that a substantial number of states had already adopted the restrictive theory, that the United States no longer asserted immunity in foreign courts over its commercial activities abroad, and that U.S. citizens dealing with the increased number of states involved in commercial transactions deserved access to the courts.¹¹⁹

111. See *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 384 (5th Cir. 1991) (noting that the restrictive theory of immunity developed in response to the “harsh and inequitable results” caused by the vision of absolute foreign sovereign immunity endorsed by *The Schooner Exchange*).

112. See Swanson, *supra* note 20, at 451.

113. See NANDA & PANSIUS, *supra* note 20, at 525.

114. See *id.*; see also FRANCK & GLENNON, *supra* note 76, at 226.

115. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987) [hereinafter U.S. FOREIGN RELATIONS LAW]; FRANCK & GLENNON, *supra* note 76, at 226. For example, a 1952 study by the State Department determined that the restrictive theory of sovereign immunity originated in Belgium and Italy and had since become the prevailing theory under international custom. Other countries that had rejected absolute immunity and accepted the new theory of restrictive immunity by 1952 included Switzerland, France, Austria, and Greece. See William W. Bishop, Jr., *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 93–94 (1953).

116. See Letter from Jack B. Tate, Acting Legal Advisor to the Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), in 26 DEP'T ST. BULL. 969, 984 (1952) [hereinafter Tate Letter]; see also Oparil, *supra* note 27, at 694. While *Ex parte Peru* and *Hoffman* signaled that the United States no longer recognized absolute sovereign immunity, the extent of the new limitations was unclear. The denial of immunity in *Hoffman* only implied that a state could be subject to U.S. jurisdiction absent a suggestion by the State Department that immunity was appropriate, whereas under the restrictive theory a state was liable when it chose to act as a private party. See *supra* notes 52–60 and accompanying text.

117. See Swanson, *supra* note 20, at 451.

118. See *id.*; Oparil, *supra* note 27, at 694.

119. See Tate Letter, *supra* note 116, at 984–85; see also Swanson *supra* note 20, at 451.

2. Politics in the Courts: The State Department, Foreign Governments, and Private Citizens

In principle, the Tate Letter meant that the restrictive theory was now the standard for determining sovereign immunity under U.S. law.¹²⁰ The reality, however, was not as straightforward. The courts continued to show deference to specific State Department determinations when they were made, but when the State Department was silent, courts interpreted the Tate Letter as the current expression of U.S. foreign policy and, within those parameters, applied their own understanding of restrictive immunity.¹²¹ Consequently, two branches of government made sovereign immunity determinations based on a variety of factors with uneven results.¹²² The outcome was an inconsistent standard whereby courts would honor the State Department's suggestion of immunity even when their own understanding of the Tate Letter would have led them to deny it.¹²³

Complicating this system was the inescapable reality that the executive branch and the State Department were political institutions responsive to the pressures and requirements of foreign relations.¹²⁴ Foreign states were well aware that the responsibility for deciding questions of immunity rested primarily with the State Department, and that courts would grant immunity when it was recommended by the executive branch.¹²⁵ Therefore, sovereign nations often placed diplomatic pressure on the State Department to encourage a recommendation of immunity regardless of whether immunity would be available under the restrictive theory.¹²⁶ As a result, the State Department found itself having to factor diplomacy into its immunity considerations, on top of legal judgments about the customary international law of immunity.¹²⁷ Understandably, the decisions made in many of these cases reflected politics more than the merits of the case, with inconsistent results for the private citizens bringing the claims.¹²⁸

120. See Swanson, *supra* note 20, at 451.

121. See *id.* at 451–52.

122. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

123. See Swanson, *supra* note 20, at 451–52.

124. See *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 385 (5th Cir. 1991) (remarking that State Department determinations after the Tate Letter were complicated by diplomatic pressure exerted by foreign states).

125. See *Verlinden*, 461 U.S. at 487–88; see also Herz, *supra* note 14, at 490–91.

126. See Herz, *supra* note 14, at 490–91.

127. See *id.*

128. See Swanson *supra* note 20, at 452; see, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) (dismissing a private claim against India based upon a formal suggestion of immunity by the State Department and noting that once the State Department has issued its ruling, the judiciary will follow that recommendation regardless of whether the court's independent analysis might suggest a contrary result).

3. A Single, Fair Standard: FSIA, Judicial Determination, and the Removal of Diplomatic Pressure

Congress passed the FSIA in 1976 in order to establish a reliable and definitive statutory baseline for when a foreign state could be subject to U.S. jurisdiction.¹²⁹ The Act defines a foreign state as “not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state.”¹³⁰ Today, the FSIA is the standard for determining foreign sovereign immunity under U.S. law.¹³¹

Technically, the FSIA was a reaffirmation of the principles first expressed in the Tate Letter, as its explicit purpose was to codify the restrictive theory of sovereign immunity.¹³² Under the FSIA’s terms, foreign states are generally immune from the jurisdiction of U.S. courts, unless one of the Act’s exceptions applies.¹³³ In discussing international organizations and the IOIA, the two most important exceptions have been waiver by foreign states and actions involving commercial activities.¹³⁴ Under the FSIA, a foreign state surrenders its immunity from the jurisdiction of U.S. courts when it “has waived its immunity either explicitly or by implication,” or the “action is based upon a commercial activity carried on in the United States by the foreign state” or is otherwise connected to the United States.¹³⁵

An express waiver is generally understood to be a “clear and unambiguous intent to waive immunity,” so that the determination to surrender immunity is unmistakable.¹³⁶ By comparison, Congress suggested that an implicit waiver would exist under the FSIA where a foreign state enters into a contract and agrees that the laws of another state should govern the agreement, or when a foreign state files a responsive pleading in an action without raising immunity as a defense.¹³⁷

Regarding the commercial activities exception, the FSIA provides that any determination should be based on the nature—not the purpose—of the

129. See H.R. REP. NO. 94-1487, at 6–7 (1976); NANDA & PANSIUS, *supra* note 20, at 525.

130. H.R. REP. NO. 94-1487, at 15.

131. See *id.* at 6; Swanson *supra* note 20, at 445.

132. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); see also FRANCK & GLENNON, *supra* note 76, at 224.

133. See Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1602 (2006); see also Swanson, *supra* note 20, at 445.

134. See, e.g., *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010) (determining that the FSIA does apply to the IOIA and that international organizations can be held liable for their commercial activities); *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998) (holding that international organizations are entitled to absolute immunity under the IOIA and can only surrender immunity by waiver); *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983) (finding that a constructive waiver of immunity may exist when the waiver would provide a corresponding benefit to the organization); *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (discussing whether the wrongful termination of employees qualified as a commercial activity under the FSIA).

135. See 28 U.S.C. § 1605.

136. See NANDA & PANSIUS, *supra* note 20, at 677.

137. See H.R. REP. NO. 94-1487, at 18 (1976).

conduct.¹³⁸ Courts have established that a state engages in commercial activity when it enters into the transactions that are generally open to private parties, as opposed to performing the public acts of a government that can only be done by a sovereign state.¹³⁹ In developing the commercial exception, Congress suggested that “a foreign government’s sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation,” would all be considered commercial activities.¹⁴⁰

While the FSIA can formally be viewed as a codification of the principles first expressed in the Tate Letter, the Act was also a direct attempt to remedy the problems of the former doctrine.¹⁴¹ The legislative history specifies that the FSIA would accomplish four goals: First, it would codify the restrictive theory of sovereign immunity.¹⁴² Second, it would remove the executive branch from sovereign immunity decisions and instead allow the judiciary to fairly evaluate claims without the pressures of foreign relations.¹⁴³ Third, it would specify procedures for establishing jurisdiction over a foreign state.¹⁴⁴ Fourth, it would create a mechanism for executing any judgment obtained against a foreign state.¹⁴⁵

Of these four goals, the legislative history suggests that removing foreign sovereign immunity determinations from the State Department’s control was the most important.¹⁴⁶ Congress was concerned about the impact of foreign policy and diplomatic pressure on the State Department’s immunity determinations.¹⁴⁷ By transforming those determinations into cases of statutory interpretation by the judiciary, Congress hoped that the FSIA would free the State Department from diplomatic pressure to recognize the immunity of foreign governments,¹⁴⁸ and thereby assure litigants that immunity decisions involving foreign states would be made on purely legal grounds.¹⁴⁹

The only direct reference to international organizations in the FSIA can be found in 28 U.S.C. § 1611(a), which precludes attachment and execution against the funds and other property of certain international

138. See Swanson, *supra* note 20, at 455.

139. See *id.* at 457.

140. See H.R. REP. NO. 94-1487, at 16.

141. See *id.* at 7.

142. See *id.* at 7–8; see also Swanson, *supra* note 20, at 453.

143. See *id.* at 7–8; see also Swanson, *supra* note 20, at 453.

144. See *id.* at 7–8; see also Swanson, *supra* note 20, at 453.

145. See *id.* at 7–8; see also Swanson, *supra* note 20, at 453.

146. See H.R. REP. NO. 94-1487, at 7; see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487–88 (1983); *Stena Rederi v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana*, S.C., 923 F.2d 380, 385 (5th Cir. 1991); Herz, *supra* note 14, at 492.

147. See H.R. REP. NO. 94-1487, at 7.

148. See *id.*; see also Jared Sher, Case Comment, *Immunity Under the IOIA: An “Absolute”-ly Airtight Defense*, 68 GEO. WASH. L. REV. 769, 773 (2000).

149. See H.R. REP. NO. 94-1487, at 7.

organizations.¹⁵⁰ According to the legislative history, this reference was “not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.”¹⁵¹ Instead, the purpose of the subsection was to protect international organizations designated by the President as deserving protection under the IOIA from “hindrance by private claimants seeking to attach the payment of funds to a foreign state.”¹⁵²

D. *The FSIA and the IOIA: Uncertainty in the Law*

The enactment of the FSIA sparked a debate over the level of immunity provided to international organizations under the IOIA.¹⁵³ On the one hand, nothing in the language or legislative history of the FSIA suggests that it was intended to apply to the IOIA.¹⁵⁴ However, some courts and scholars have highlighted the IOIA’s reference to “the same immunity . . . as is enjoyed by foreign governments,”¹⁵⁵ and pointed to a canon of statutory construction, which provides that a statute referring generally to an area of law adopts that law as it exists, including any subsequent amendment or modification.¹⁵⁶ This section begins with a summary of scholarly opinion on the impact of the FSIA on the IOIA. It then discusses a proposed amendment to the IOIA that would have directly incorporated the FSIA’s restrictive immunity standard. Next, this section identifies subsequent State Department recommendations for the immunity of international organizations. Finally, it discusses the initial post-FSIA IOIA decisions by the D.C. Circuit, which led to the development of the corresponding benefit test.

1. Scholars Debate the IOIA After the FSIA

The FSIA makes only one reference to the IOIA, and that reference is silent on the standard of immunity the IOIA provides.¹⁵⁷ Notwithstanding this silence, however, the IOIA’s general reference to sovereign immunity has led scholars to debate the FSIA’s impact on the immunity of international organizations.¹⁵⁸ Some scholars have argued that when the 79th Congress referenced “the same immunity . . . as is enjoyed by foreign

150. See Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1602 (2006); H.R. REP. NO. 94-1487, at 30–31.

151. See H.R. REP. NO. 94-1487, at 31.

152. See *id.* at 30.

153. See Herz, *supra* note 14, at 497; Oparil, *supra* note 27, at 706; Sher, *supra* note 148, at 773.

154. See H.R. REP. NO. 94-1487, at 29–30; see also Oparil, *supra* note 27, at 706; *supra* notes 150–52 and accompanying text.

155. See International Organizations Immunities Act, 22 U.S.C. § 288a (2006).

156. See *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 763–64 (3d Cir. 2010); Herz, *supra* note 14, at 497.

157. See *supra* notes 150–52 and accompanying text.

158. See 22 U.S.C. § 288.

governments,”¹⁵⁹ it intended to adopt subsequent developments in sovereign immunity doctrine.¹⁶⁰ This conclusion is often based on a well-established canon of statutory construction that a “statute which refers to the law of a subject generally adopts the law on the subject as of the time the law was invoked . . . includ[ing] all the amendments and modifications of the law subsequent to the time the reference statute was enacted.”¹⁶¹ Therefore, according to this interpretation, the IOIA should adopt the FSIA as a modification of sovereign immunity.¹⁶²

By contrast, other scholars point to the plain language of the FSIA and its legislative history to argue that the FSIA was enacted to address concerns unrelated to the immunity of international organizations.¹⁶³ These scholars focus on two points: First, the FSIA expressly lists the entities and activities that it meant to affect.¹⁶⁴ And second, Congress’s concerns about the impact of diplomatic and foreign policy pressure on the State Department’s immunity determinations do not apply equally to international organizations.¹⁶⁵

Regarding the first point, these scholars argue that the FSIA applies, on its face, only to “foreign states” or to “agenc[ies] or instrumentalit[ies] of a foreign state.”¹⁶⁶ The FSIA includes specific definitions for these entities, and these definitions do not include international organizations.¹⁶⁷ Therefore, a plain reading of the FSIA demonstrates the express intent to alter sovereign immunity, while the FSIA’s silence on international organizations indicates that Congress did not intend to disturb the IOIA.¹⁶⁸ This conclusion is supported by the FSIA’s primary purpose, which was to adopt the restrictive theory of immunity and thereby address the increased commercial activities of foreign governments.¹⁶⁹

Turning to their second point, these scholars assert that the FSIA was passed in order to establish a default rule for sovereign immunity that would apply equally to all foreign countries and remove the effect of political calculations by the State Department.¹⁷⁰ However, because the United States is a member, if not the leading member, of every organization covered by the IOIA, the impact of politics in determining the

159. *See id.* at § 288(a).

160. *See, e.g.,* Herz, *supra* note 14, at 497.

161. *Broadbent v. Org. of Am. States*, 628 F.2d 27, 31 (D.C. Cir. 1980) (quoting SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Sands ed., 4th ed. 1975); *see also OSS Nokalva*, 617 F.3d at 763; *Rendall-Speranza v. Nassim*, 932 F. Supp. 19, 24 (D.D.C. 1996); Herz, *supra* note 14, at 497).

162. *See* Herz, *supra* note 14, at 532.

163. *See, e.g.,* Oparil, *supra* note 27, at 706; Sher, *supra* note 148, at 770.

164. *See, e.g.,* Oparil, *supra* note 27, at 706–07.

165. *See, e.g.,* Sher, *supra* note 148, at 770–73.

166. *See, e.g.,* Oparil, *supra* note 27, at 706.

167. *See* Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1602, 1603 (2006); *see also* Oparil, *supra* note 27, at 706.

168. *See, e.g.,* Oparil, *supra* note 27, at 706.

169. *See supra* notes 141–49 and accompanying text.

170. *See, e.g.,* Sher, *supra* note 148, at 773.

organization's immunity is very different than the pressures created by the lobbying of foreign governments.¹⁷¹ Therefore, these scholars assert that Congress entrusted the task of monitoring the immunity of international organizations to the President, rather than transferring those determinations to the judiciary.¹⁷²

However, despite disagreement over the FSIA's impact on the IOIA, there is a growing acknowledgement that the immunity of international organizations should be subject to some limitations.¹⁷³ Specifically, there appears to be a consensus among scholars that international organizations should adhere to the general principles and customs of international law, which increasingly include the theory of restrictive immunity.¹⁷⁴

2. Working Toward a Solution: A Legislative Proposal to Amend the IOIA

In 1990, a bill was proposed that would have expressly amended the IOIA so that international organizations would be entitled to immunity under the FSIA.¹⁷⁵ Senator Roth of Delaware introduced the bill, which specified that, "[f]or purposes of [the IOIA], the phrase 'same immunity from suit and every form of judicial process as is enjoyed by foreign governments' means the same immunity to which foreign states are entitled under [the FSIA]."¹⁷⁶ The bill also would have amended the FSIA so that it would clearly apply to recognized international organizations.¹⁷⁷ In introducing the bill, Senator Roth stated, "I believe that restrictive immunity as defined [in the FSIA] is in the best interest of domestic corporations For this reason I am introducing a bill to amend the [IOIA] to restrict the jurisdictional immunity to which certain international organizations are entitled."¹⁷⁸ The bill never passed and was not proposed again.¹⁷⁹

3. The State Department Weighs In

In 1980, four years after the FSIA was passed, the General Counsel of the Equal Employment Opportunity Commission, Leroy D. Clark, requested an opinion from the State Department regarding U.S. jurisdiction over an

171. *See id.*

172. *See id.*

173. *See, e.g.,* Herz, *supra* note 14, at 472; *Jurisdictional Immunities, supra* note 70, at 1181–83.

174. *See, e.g.,* Herz, *supra* note 14, at 472; *Jurisdictional Immunities, supra* note 70, at 1183.

175. *See* Oparil, *supra* note 27, at 707.

176. S. RES. 2715, 101st Cong. (1990); Oparil, *supra* note 27, at 707.

177. *See* Oparil, *supra* note 27, at 707.

178. 136 Cong. Rec. 13409 (1990); *see also* Oparil, *supra* note 27, at 708.

179. *See* Oparil, *supra* note 27, at 708. The bill was introduced to the Senate Judiciary Committee, but was not reported by the Committee in 1990 and was not subsequently re-introduced. *See id.*

employee discrimination proceeding involving the World Bank.¹⁸⁰ In response, Robert Owen, the Legal Advisor of the State Department, issued a statement recommending that the same restrictive immunity conferred on foreign governments in the FSIA should be applied to international organizations.¹⁸¹ His letter acknowledged the widespread adoption of the restrictive theory of immunity under international law, as codified in the United States by the FSIA, by virtue of which “international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character.”¹⁸² The State Department has issued similar statements in response to all subsequent requests.¹⁸³

4. The D.C. Circuit and the Development of the Corresponding Benefit Test

The D.C. Circuit has played a central role in the development of the IOIA.¹⁸⁴ Due to its location, the D.C. Circuit has jurisdiction over all suits filed against international organizations that are headquartered in Washington, D.C.¹⁸⁵ As a result, it has heard almost all of the cases involving IOIA immunity claims.¹⁸⁶

Though the FSIA was passed in 1976, its impact on the immunity of international organizations was not addressed by a federal appellate court until 1980, when the D.C. Circuit decided *Broadbent v. Organization of American States*.¹⁸⁷ However, the court sidestepped the question of which immunity standard should apply by concluding that the OAS was immune from the suit under either standard.¹⁸⁸

The claim in *Broadbent* was brought by former employees of the OAS, who were dismissed as part of a general downsizing effort by the organization.¹⁸⁹ The employees argued that the “same immunity” language of the IOIA tied the immunity of international organizations to that of foreign sovereigns, including all subsequent amendments and modifications.¹⁹⁰ In contrast, the OAS asserted that the IOIA granted absolute immunity, and that Congress did not modify that grant when it

180. Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917 (1980).

181. See Letter from Robert Owen, Legal Advisor to the Dep't of State, to Leroy D. Clark, Gen. Counsel to the Equal Emp't Opportunity Comm'n (June 24, 1980), in Nash, *supra* note 180, at 917–18 [hereinafter Owen Letter].

182. See *id.* at 918.

183. See, e.g., *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 763–64 (3d Cir. 2010).

184. Herz, *supra* note 14, at 492.

185. See *id.*

186. See *id.*

187. 628 F.2d 27 (D.C. Cir. 1980); see also Herz, *supra* note 14, at 493.

188. See Herz, *supra* note 14, at 494.

189. See *Broadbent*, 628 F.2d at 28.

190. See *id.* at 31.

passed the FSIA.¹⁹¹ The court agreed with the OAS and highlighted several arguments in support of this position: First, the FSIA generally fails to mention international organizations.¹⁹² Second, the text of the IOIA clearly provides for modification of an organization's immunity by the President, who is empowered to withdraw or restrict the privileges granted by the statute.¹⁹³ And third, the legislative history suggests that the policies and considerations that led Congress to pass the FSIA do not apply to international organizations like the OAS.¹⁹⁴

However, the court found that it did not have to resolve the impact of the FSIA on the IOIA; rather, it reasoned that under either theory of immunity—absolute or restrictive—the OAS was insulated from the employees' suit.¹⁹⁵ In the court's view, employment of internal clerical personnel by either a foreign sovereign or international organization was not a commercial activity, and therefore, the FSIA exception did not apply.¹⁹⁶ Instead, the court turned to the waiver prong of the IOIA and found that the OAS had clearly intended claims by employees to be resolved through its Administrative Tribunal.¹⁹⁷ Therefore, the OAS had therefore not waived its immunity, and the case was dismissed without a ruling on the FSIA's impact on the IOIA.¹⁹⁸

191. *See id.*

192. *See id.* Only one section, § 1611, makes any explicit reference to international organizations. It discusses the attachment of an organization's property—which could equally be the result of restrictive immunity under FSIA or a waiver by the organization itself. *See id.*; *see also* Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1611 (2006).

193. *See Broadbent*, 628 F.2d at 32. The statute states:

The President [is] 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 . . . or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.

International Organizations Immunities Act, 22 U.S.C. § 288 (2006).

194. *See Broadbent*, 628 F.2d at 32. Historically, the court noted, the absolute immunity granted to foreign sovereigns was justified by a need to avoid adjudication that might insult a foreign nation and consequently embarrass the executive branch's management of foreign relations. *See id.* at 32 n.20. However, as nations became involved in the marketplace, they distinguished claims arising from commercial transactions from those concerning traditional areas of activity, and restrictive immunity was widely accepted as the standard for liability. *See id.* But, the court emphasized, these rationales did not seem to justify the application of restrictive immunity to international organizations, as the commercial activities of those organizations remained limited to those necessary for the organizations' chartered functions, and other nations did not generally apply the concept of restrictive immunity to them. *See id.* at 33.

195. *See id.* at 32–33.

196. *See id.* at 35.

197. *See id.*

198. *See id.* at 35–36. The court determined that the OAS Tribunal was competent to determine the lawfulness of an employee's termination and to provide adequate relief. Because the OAS clearly intended to handle all employee suits internally, there was no question that they had not expressly waived that right. *See id.*

The D.C. Circuit was faced with a similar situation three years later, when it heard *Mendaro v. World Bank*.¹⁹⁹ In *Mendaro*, a former employee brought a suit against the World Bank, which claimed immunity.²⁰⁰ In its decision, the D.C. Circuit avoided the FSIA altogether. Building on *Broadbent*, the court found that it was a well-established principle of international law that an international organization is entitled to “such privileges and such immunity from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization.”²⁰¹ The court further determined that the immunity of international organizations from suits by employees arising from the employee relationship, was “[o]ne of the most important protections granted to international organizations.”²⁰² This immunity served an essential and additional purpose beyond functional necessity—to protect international organizations from control by one member state over the internal activities of the organization.²⁰³ Therefore, the court found that the World Bank was immune from employment suits regardless of the FSIA’s impact on the IOIA, and turned instead to whether that immunity had been waived.²⁰⁴

The court interpreted the IOIA’s requirement of an express waiver to imply that courts should be “reluctant” to find that an organization had waived immunity.²⁰⁵ The court acknowledged that the World Bank had not expressly waived its immunity to “this particular suit.”²⁰⁶ The court next reasoned that because the purpose for according immunity to international organizations is to enable them to fulfill their chartered functions, it followed that “most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization’s goals.”²⁰⁷ Because an organization was unlikely to intend a waiver that could “significantly hamper” its proper functions,²⁰⁸ the court distinguished a waiver of immunity for commercial activities, which would allow the World Bank to enter into contracts and agreements by creating liability for breach, from an employment-based exception, which would create liability without a corresponding benefit. For example, the World Bank’s credibility as a guarantor of securities would be meaningless without a right to sue to enforce the World Bank’s contracts.²⁰⁹ By comparison, a waiver of immunity for suits by employees over internal operations presented no corresponding benefit and would actually harm the World Bank’s ability to operate by subjecting its internal operations to the

199. 717 F.2d 610 (D.C. Cir. 1983).

200. *See id.* at 612.

201. *See id.* at 615 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464(1) (Tentative Draft No. 4, 1983)).

202. *See id.*

203. *See id.* at 613–14.

204. *See id.* at 614.

205. *See id.* at 617.

206. *See id.* at 614.

207. *See id.* at 617.

208. *See id.*

209. *See id.* at 618.

judicial scrutiny of a member state.²¹⁰ Consequently, the court found that the World Bank had not intended to limit its immunity to suits involving the internal administration of its employees.²¹¹

5. Breaking the Silence: *Rendall-Speranza v. Nassim*

In the aftermath of *Broadbent* and *Mendaro*, the impact of the FSIA on the IOIA remained unresolved for over a decade.²¹² Finally, in 1997 the District Court for the District of Columbia provided the first explicit answer when it heard an employee's claims of assault and battery and intentional infliction of emotional distress against the International Finance Corporation (IFC) in *Rendall-Speranza v. Nassim*.²¹³ The court ultimately denied the IFC's motion to dismiss, asserting that "the 'same immunity' language of the IOIA should be read to incorporate the changes to foreign sovereign immunity enacted in FSIA."²¹⁴

The court began with a determination that the IOIA's operative language provided "broad" immunity for organizations at the time the Act was passed.²¹⁵ The court next highlighted that, since 1976, the FSIA has provided the "sole basis for obtaining jurisdiction over a foreign government in a United States court."²¹⁶ As a result, the FSIA currently defines the immunity of foreign states.²¹⁷ The court further acknowledged that the impact of the FSIA on the IOIA was an "unsettled question," and that the D.C. Circuit had so far avoided a decision because the international organizations at issue had been immune from suit whether or not the FSIA applied.²¹⁸ But here, the court asserted that the IFC would not be entitled to immunity under the FSIA because the suit fell within one of the Act's exceptions, and therefore, the court had to decide whether the FSIA applies to international organizations like the IFC through the IOIA.²¹⁹

The court recognized that there were "sound reasons" for affording absolute immunity to international organizations.²²⁰ However, it found itself ultimately "constrained" by the plain language of the IOIA.²²¹ In support of its holding, the court evoked the canon of statutory interpretation

210. *See id.* at 618–19.

211. *See id.* at 621.

212. *See Herz, supra* note 14, at 494.

213. *See Rendall-Speranza v. Nassim*, 932 F. Supp. 19, 19 (D.D.C. 1996).

214. *See Herz, supra* note 14, at 494–95.

215. *See Rendall-Speranza*, 932 F. Supp. at 23 (quoting International Organizations Immunities Act, 22 U.S.C. § 288a(b) (2006)).

216. *See id.*

217. *See id.*

218. *See id.* at 24; *see also Mendaro v. World Bank*, 717 F.2d 610, 618 n.54 (D.C. Cir. 1983); *Broadbent v. Org. of Am. States*, 628 F.2d 27, 32–33 (D.C. Cir. 1980).

219. *See Rendall-Speranza*, 932 F. Supp. at 24.

220. *See id.* (citing *Broadbent*, 628 F.2d at 31–33, and listing the reasons as: (1) the FSIA is generally silent about international organizations; (2) the IOIA permits immunity to be modified by the President; and (3) that the policies that lead Congress to enact the FSIA may not apply to international organizations).

221. *See id.*

cited in *Broadbent*, that “[a] statute which refers to the law of a subject generally adopts the law on the subject as of the time the law was invoked . . . includ[ing] all the amendments and modifications of the law subsequent to the time the reference statute was enacted.”²²² Furthermore, the court reasoned that Congress understood what it was doing when it passed the FSIA and could have revised the IOIA to reaffirm the absolute immunity of international organizations.²²³ Congress’s inaction signaled that the restrictive immunity provided under the FSIA “was to apply in like fashion to international organizations.”²²⁴

As a result of the district court’s decision in *Rendall-Speranza*, it appeared that the D.C. Circuit would finally have to address the impact of the FSIA on the IOIA. However, the circuit court again avoided a direct ruling²²⁵—opting instead to dismiss the claim on procedural grounds—thereby leaving the FSIA’s impact on the IOIA an open question.²²⁶

II. THE D.C. AND THIRD CIRCUITS SPLIT

Rendall-Speranza was not the last word, however; instead, two circuit courts are currently split over the meaning of the IOIA’s “same immunity” language. Part II examines this circuit split in detail. It begins with an examination of the D.C. Circuit’s ruling in *Atkinson*, which held that the IOIA created a baseline absolute immunity standard. It then addresses the Third Circuit’s decision in *OSS Nokalva, Inc. v. European Space Agency*,²²⁷ which held that the IOIA incorporated subsequent amendments to sovereign immunity, including the FSIA.

A. The D.C. Circuit: Qualifying Absolute

The following discussion examines *Atkinson*, the D.C. Circuit’s first direct ruling on the standard of immunity granted by the IOIA. It then briefly examines two subsequent cases—one also from the D.C. Circuit and one from the Eastern District of Pennsylvania—that reaffirmed and adopted *Atkinson*’s holding.

222. *See id.* (quoting *Broadbent*, 628 F.2d at 31).

223. *See id.*

224. *See id.*

225. *See Rendall-Speranza v. Nassim*, 107 F.3d 913, 921 (D.C. Cir. 1997).

226. *See id.* at 919–21. The court found that the action did not relate back to the date of the original complaint and was therefore barred by the statute of limitations. The court also found that Nassim was immune from the battery claim, as he was acting within the scope of his official capacity. *See id.* at 919–20. Further, because he was immune from the battery claim, the battery could not be used to save the otherwise time-barred emotional distress claim. *See id.* at 920. Therefore, the intentional infliction of emotional distress claim against Nassim was also barred by the statute of limitations and the whole action was dismissed. *See id.* at 921.

227. 617 F.3d 756 (3d Cir. 2010).

1. Absolute and Equivocal: The D.C. Circuit's Decision in *Atkinson v. Inter-American Development Bank*

In *Atkinson*, the D.C. Circuit court held that the World Bank was entitled to absolute immunity under the IOIA from a garnishment proceeding brought by the wife of a former employee to satisfy state judgments against the husband for child support and alimony.²²⁸ However, in contrast to the district court in *Rendall-Speranza*, the circuit court did not find the canon of statutory interpretation to be conclusive; rather, the court highlighted alternative theories in the IOIA's legislative history and text that persuaded the court that the IOIA was not tied to the FSIA.²²⁹

The court interpreted the IOIA's "same immunity" language as legislative shorthand for the doctrine of foreign sovereign immunity and consequently construed the phrase as a reference to the law governing the immunity of foreign states.²³⁰ Therefore, the main issue according to the D.C. Circuit was whether the 79th Congress intended the IOIA to refer only to foreign sovereign immunity law as it existed in 1945, or to also incorporate subsequent amendments including the FSIA.²³¹ Importantly, the court determined that foreign sovereigns enjoyed "virtually absolute immunity" when Congress enacted the IOIA in 1945.²³²

The court then addressed the statutory canon upon which the district court in *Rendall-Speranza* relied,²³³ finding that such a canon is only appropriate where the statutory language is ambiguous.²³⁴ The court acknowledged that the text of the IOIA provided no express guidance on whether Congress intended the Act to adopt subsequent changes to sovereign immunity.²³⁵ However, the court found that the IOIA's emphasis on Presidential oversight was persuasive evidence that Congress "was

228. See *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1336 (D.C. Cir. 1998).

229. See *id.* at 1340–41; Herz, *supra* note 14, at 495–96.

230. See *Atkinson*, 156 F.3d at 1340.

231. See *id.*

232. See *id.* (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)). The D.C. Circuit determined that foreign states had been entitled to absolute immunity under U.S. law in 1945, "contingent only upon the State Department's making an immunity request to the court." See *id.* However, this construction treats sovereign immunity as a single and identifiable legal standard to be applied by the courts, with a possible advisory role to be played by the State Department. See *supra* Part I.A(2). Instead, by 1945, absolute immunity had clearly ceased to be the governing principle of foreign sovereign immunity in the United States. See *supra* Part I.A(2). Even more importantly, *Ex parte Peru* and *Hoffman* had transformed foreign sovereign immunity from a judicial inquiry into a political determination made by the executive branch in accordance with U.S. foreign policy. See *supra* Part I.A(2).

233. See *supra* note 222 and accompanying text. The canon holds that a "statute which refers to the law of a subject generally adopts the law on the subject as of the time the law was invoked . . . includ[ing] all the amendments and modifications of the law subsequent to the time the reference statute was enacted." *Broadbent v. Org. of Am. States*, 628 F.2d 27, 31 (D.C. Cir. 1980) (quoting SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Sands ed., 4th ed. 1975)); *Rendall-Speranza v. Nassim*, 932 F. Supp. 19, 24 (D.D.C. 1996).

234. See *Atkinson*, 156 F.3d at 1340–41.

235. See *id.* at 1341.

content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances.”²³⁶ The court noted that the IOIA only applies to organizations designated by the President and that the President retains the power to withdraw or limit the immunity granted by the IOIA to international organizations.²³⁷ Consequently, the court found that the IOIA’s inclusion of an explicit mechanism for monitoring and updating the immunities of international organizations “by appropriate Executive Order” clearly undermined the claim that Congress intended the IOIA to be automatically revised in accordance with developments in foreign sovereign immunity law.²³⁸

In support of its position, the court pointed to the legislative history of the IOIA. The court cited a Senate report, which characterized the provision delegating authority to the President to modify an organization’s immunity as “permit[ting] the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature.”²³⁹ The court noted that the report clearly suggested that the responsibility for modifying the IOIA rested with the President—acting through a formal proclamation or executive order and not with a separate evolving body of law. Further, the court explained that the delegation of authority was done with the foresight that international organizations might engage in commercial activities.²⁴⁰

Consequently, the D.C. Circuit found that the IOIA accorded the same immunity to international organizations as was enjoyed by foreign sovereigns in 1945.²⁴¹ Furthermore, the court determined that the 1945 standard operated as a baseline, defined as absolute immunity by the court’s analysis of the history of U.S. foreign sovereign immunity law, which could subsequently be modified only by a formal executive order altering immunity under the IOIA.²⁴²

236. *See id.*

237. *See id.*

238. *See id.* at 1340–41.

239. *See id.* (quoting S. REP. NO. 79-861, at 2 (1945)).

240. *See id.*

241. *See id.*

242. *See id.* Despite the court’s emphasis on the role of the President under the IOIA, its ultimate formulation of the IOIA’s application is problematic for several reasons. Besides the fact that absolute immunity was no longer the standard for foreign sovereign immunity in 1945, *see supra* notes 58–60 and accompanying text, the court also failed to recognize any role to be played by the State Department. *See Atkinson*, 156 F.3d at 1341. Instead, the court distinguished Presidential orders from State Department determinations. *See id.* The court read the President’s ability to amend the IOIA as granting that power to the President alone, so that absent an executive order modifying the IOIA, international organizations would be entitled to absolute immunity regardless of any other body of law, even if that law was “heavily influenced by the President acting through the State Department.” *See id.* Consequently, the D.C. circuit in *Atkinson* granted the World Bank absolute immunity despite the fact that the State Department had issued a formal statement in June 1980 recommending that—absent a specific, alternative suggestion—international organizations

The court next looked to whether the FSIA was intended to modify the IOIA. First, it dismissed the argument, put forth in *Rendall-Speranza*, that by choosing not to revise the IOIA when it passed the FSIA, Congress expressed its intent to apply restrictive immunity to international organizations.²⁴³ The court's response was that Congress did not express its intent by failing to act and that, in any case, the will of a later Congress is of little relevance to the meaning of a law enacted by an earlier Congress.²⁴⁴ Second, the court addressed the claim that, by prohibiting "attachment or any other judicial process impeding the disbursement of funds [held by an IOIA-protected entity] to . . . a foreign state as the result of an action brought in the courts of the United States," the FSIA permits a negative inference that funds held by an international organization could be dispersed to a non-foreign state (such as a private individual).²⁴⁵ The court rejected this interpretation, finding that, if anything, Congress intended to clarify that international organizations deserved special protection.²⁴⁶ Therefore, the court determined that the FSIA had no impact on the IOIA.²⁴⁷

The D.C. Circuit also addressed whether the World Bank had waived any immunity it might be entitled to in defense of a garnishment action under the IOIA.²⁴⁸ The World Bank's charter provides: "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."²⁴⁹ The court noted that it rejected reading an identical provision as a blanket waiver of immunity in *Mendaro*.²⁵⁰ Instead, it again applied the corresponding benefit test to determine whether the Bank's charter should be construed as a waiver of immunity.²⁵¹ In doing so, the court reformulated the test to say that "the Bank's immunity should be construed as *not waived* unless the particular type of suit would *further* the Bank's objectives."²⁵² The court found that a waiver of immunity from garnishment proceedings provided "no conceivable benefit"

should be limited to the same restrictive immunity as sovereign foreign states. *See id.* at 1341–43; *supra* notes 181–82 and accompanying text; *see also infra* Part III.A and III.C.

243. *See Atkinson*, 156 F.3d at 1342; *see also supra* notes 223–24 and accompanying text.

244. *See Atkinson*, 156 F.3d at 1342.

245. *See id.* (quoting Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1611 (2006)).

246. *See id.* The court emphasized that the passage comes within a list of exceptions where the property of foreign states can be attached and therefore serves only to clarify that these exceptions do not apply to property held by international organizations where there is a foreign state judgment debtor. *See id.*

247. *See id.* at 1341–42.

248. *See id.* at 1337.

249. Agreement Establishing The Inter-American Development Bank art. 11, § 3, Apr. 8, 1959, 10 U.S.T. 3068, 389 U.N.T.S. 69.

250. *See Atkinson*, 156 F.3d at 1338 (citing *Mendaro v. World Bank*, 717 F.2d 610, 614–15 (D.C. Cir. 1983)).

251. *See id.*

252. *See id.*

to the World Bank, unlike a waiver for commercial transactions, which would allow an organization to perform the ordinary activities needed to operate.²⁵³ Therefore, the court concluded that the World Bank had not waived its absolute immunity against this suit.²⁵⁴

2. Living with *Atkinson*: Waiving Absolute Immunity Under the Corresponding Benefit Test

In 2009, the D.C. Circuit reaffirmed its *Atkinson* holding in *Osseiran v. International Finance Corporation*.²⁵⁵ In *Osseiran*, the IFC claimed immunity under the IOIA in an action for promissory estoppel and breach of confidentiality in a commercial transaction.²⁵⁶ The court did not challenge the IFC's claim that it was entitled to absolute immunity under the IOIA, but instead found that it had waived immunity through its charter under the corresponding benefit test.²⁵⁷ Examining the same charter language that it had in *Mendaro* and *Atkinson* and following its own arguments from those cases, the court reasoned that immunity from suits based on commercial transactions would harm an organization's ability to fulfill its fundamental goals by hindering its capacity to operate in the marketplace.²⁵⁸ By contrast, the court found that the IFC could identify no countervailing costs to suggest that immunity should not be waived.²⁵⁹ Therefore, the court found that the IFC had waived its absolute immunity under the IOIA for commercial transactions.²⁶⁰

In addition to the D.C. Circuit, the Eastern District of Pennsylvania also followed the *Atkinson* holding. In *BRO Tech Corp. v. European Bank for Reconstruction and Development*,²⁶¹ the district court addressed a dispute over an investment made in a Romanian corporation.²⁶² The court identified the major issue to be the level of immunity provided to the European Bank for Reconstruction and Development (European Bank) by the IOIA after the passage of the FSIA.²⁶³ In resolving the issue, the district court explicitly "adopt[ed] the reasoning of the D.C. Circuit, and [found] that the [European Bank was] entitled to absolute immunity under

253. *See id.* at 1338–39. Since *Atkinson*, the U.S. Supreme Court has clearly rejected the "constructive waiver" theory. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 687 (1999). Writing for the majority in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Justice Scalia found that a state's entry into lawful activity could not be construed as a waiver of its usual. *See id.*; RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 927 (6th ed. 2009).

254. *See Atkinson*, 156 F.3d at 1338–39.

255. 552 F.3d 836 (D.C. Cir. 2009).

256. *Osseiran*, 552 F.3d at 838.

257. *See id.* at 840–41.

258. *See id.* at 840.

259. *See id.*

260. *See id.* at 840–41.

261. No. CIV.A.00-2160, 2000 WL 1751094 (E.D. Pa. Nov. 29, 2000).

262. *See id.* at *1.

263. *See id.* at *3.

the IOIA, contingent on any waiver of that immunity.”²⁶⁴ The district court then applied the D.C. Circuit’s corresponding benefit test and found that the financial security provided by a waiver of immunity for commercial transactions was necessary for the European Bank to attract investors.²⁶⁵ As a result, the Eastern District of Pennsylvania found that the European Bank was entitled to absolute immunity, but had waived its immunity for commercial dealings.²⁶⁶

B. A Canon Is a Powerful Weapon: The Third Circuit Adopts Restrictive Immunity in OSS Nokalva, Inc. v. European Space Agency

Following more than a decade in which *Atkinson* was the authoritative word on the immunity of international organizations, the Third Circuit—weighing in on this issue for the first time—rekindled the debate when it rejected the *Atkinson* interpretation in *OSS Nokalva*.²⁶⁷ The following discussion examines the Third Circuit’s decision in that case and its holding that the FSIA’s restrictive immunity does extend to international organizations under the IOIA.²⁶⁸

OSS Nokalva concerned a breach of contract action brought by a software developer against the European Space Agency (ESA).²⁶⁹ In response, the ESA claimed that it was protected from the suit by the IOIA’s grant of absolute immunity.²⁷⁰

In evaluating the effect of the FSIA on the IOIA, the court observed that the “same immunity” language of the IOIA clearly showed that “Congress was legislating in shorthand.”²⁷¹ The result was to link the immunity of international organizations to the immunity of foreign governments provided by the FSIA.²⁷² In so finding, the Third Circuit contrasted its approach with the D.C. Circuit in *Atkinson*.²⁷³ The court recognized that *Atkinson* had dismissed the importance of the reference canon and had instead relied heavily on the President’s authority to regulate the immunity provided by the IOIA.²⁷⁴ However, the Third Circuit found “nothing in the statutory language or legislative history” to suggest that the President’s authority under the IOIA precluded incorporation of subsequent changes in sovereign immunity.²⁷⁵ According to the court, the Senate report cited in *Atkinson* merely evidenced the kind of changes that the President could

264. *See id.*

265. *See id.* at *4.

266. *See id.* at *7.

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

268. *See id.* at 765–66.

269. *See id.* at 758.

270. *See id.* at 760.

271. *See id.* at 762 (quoting *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998)).

272. *See id.*

273. *See id.* at 763–64.

274. *See id.* at 763.

275. *See id.*

make, but was silent as to whether the immunity granted by the IOIA was otherwise “frozen” in time.²⁷⁶

To support its interpretation, the Third Circuit pointed to the State Department’s support for applying the same restrictive standard of immunity provided under the FSIA to international organizations through the IOIA.²⁷⁷ Furthermore, the court highlighted the fact that nearly half of all international organizations designated by the President as receiving immunity under the IOIA came into existence after Congress enacted the FSIA in 1976.²⁷⁸ The court thus determined that it was illogical to grant absolute immunity to those international organizations that first received immunity under the IOIA after foreign sovereign immunity had already been limited to restrictive immunity by the FSIA.²⁷⁹ Likewise, the court found that it was unreasonable that a “group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone.”²⁸⁰ In addition, the court pointed out that Congress could have expressly tethered the immunity of international organizations to 1945 if it had actually intended the IOIA to be frozen in time.²⁸¹ However, without express language indicating such an intention, the Third Circuit found that the IOIA should be interpreted in light of the usual reference canon “to mean that Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity,” and therefore, that the IOIA incorporated the FSIA.²⁸²

Because the FSIA applied to international organizations, the court found that the ESA could be held liable for breach of contract because the suit met the FSIA’s commercial exception.²⁸³ The result was that the Third Circuit affirmed the district court’s holding, denying the ESA’s motion to dismiss.²⁸⁴

III. REREADING THE IOIA TO PROVIDE A FLEXIBLE STANDARD OF IMMUNITY FOR INTERNATIONAL ORGANIZATIONS

The split between the D.C. and Third Circuits ultimately comes down to a dispute over dates. In *Atkinson*, the D.C. Circuit argued that the IOIA’s reference to foreign sovereign immunity was frozen in time, so that international organizations were entitled to the same level of immunity

276. *See id.* at 763 n.5; *see also supra* notes 239–40 and accompanying text.

277. *See OSS Nokalva*, 617 F.3d at 763–64. The court quoted the letter written by Robert Owen, a State Department Legal Advisor, which read, “The [FSIA] amended [U.S.] law by codifying a more restrictive theory of immunity subjecting foreign states to suit in U.S. courts By virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities.” *See Owen Letter, supra* note 181, at 917–18.

278. *See OSS Nokalva*, 617 F.3d at 764.

279. *See id.*

280. *See id.*

281. *See id.*

282. *See id.* at 764–65.

283. *See id.* at 765.

284. *See id.* at 766.

granted to foreign sovereigns in 1945.²⁸⁵ By contrast the Third Circuit found that the IOIA was linked to the evolving doctrine of U.S. foreign sovereign immunity law, and therefore, that the restrictive theory of immunity adopted by the FSIA in 1976 applied to international organizations.²⁸⁶ Thus, behind each circuit's decision lies the same determination: that the IOIA must be defined through a specific application of U.S. foreign sovereign immunity law. However, a close reading of the historical record does not support this conclusion. Instead, the evidence suggests that when the IOIA referred to the "same immunity . . . as is enjoyed by foreign governments," it was not adopting a specific level of foreign sovereign immunity; rather, it was referring to the process by which a foreign government received its immunity.²⁸⁷ This interpretation not only reflects the understanding that foreign sovereign immunity was a political determination in 1945—rather than a specific legal standard—but more closely comports with the statute when read as a whole.

Part III.A evaluates the *Atkinson* decision and argues that foreign states were not entitled to absolute immunity in 1945. It also explains that the corresponding benefit test is inconsistent with the IOIA's requirement of an express waiver. Part III.B turns to *OSS Nokalva* and explains that the IOIA was not intended to reference foreign sovereign immunity as a body of law. Finally, Part III.C proposes a new interpretation of the IOIA, wherein courts would show deference to immunity determinations by the executive branch for international organizations. In the short term, this new conception would not disturb the general consensus that international organizations should be held liable for commercial transactions. However, unlike the current circuit decisions, it would allow the executive branch to alter immunity levels when necessary for the security or interests of the United States.

A. *Shifting Standards and Missing Words: Reevaluating the
D.C. Circuit's Decision in Atkinson*

The following sections reevaluate the D.C. Circuit's decision in *Atkinson*. First, the assertion that foreign sovereigns were entitled to absolute immunity in 1945 fails to take into account changes to U.S. foreign sovereign immunity law in the 1930s and 1940s. Second, the application of the corresponding benefit test to the IOIA is incompatible with the IOIA's requirement that waivers of immunity be express.

285. See International Organizations Immunities Act, 22 U.S.C. § 288a(b) (2006); *supra* notes 241–42 and accompanying text.

286. See *supra* note 282 and accompanying text.

287. See 22 U.S.C. § 288a(b); *supra* notes 58–60 and accompanying text.

1. Absolute Immunity Was Not the Standard for Sovereign Immunity in 1945

In reaching its decision in *Atkinson*, the D.C. Circuit found that when the IOIA was passed in 1945, foreign sovereigns were entitled to absolute immunity.²⁸⁸ This initial conclusion informed the rest of the decision and led the court to conclude that international organizations still enjoyed absolute immunity unless they had waived their privilege either expressly or through the corresponding benefit test.²⁸⁹ However, while sovereign immunity had been virtually absolute for most of the nineteenth and early twentieth centuries, the standard was markedly different by the time the IOIA was passed in December 1945.²⁹⁰

For most of the nineteenth and early twentieth centuries, U.S. foreign sovereign immunity law was common law set by federal courts.²⁹¹ Under this system, U.S. courts consistently granted absolute immunity to sovereign foreign states for all of their acts, including those that were commercial in nature.²⁹² This practice began with *The Schooner Exchange* and reached its height in the 1920s with *Pesaro*, when the Supreme Court ignored a State Department recommendation and determined that foreign sovereigns were entitled to absolute immunity for their public and private acts.²⁹³ It is likely that the *Atkinson* court looked to this compelling history when it determined that foreign governments enjoyed absolute immunity in U.S. courts in 1945.²⁹⁴

Foreign sovereign immunity underwent a significant change, however, between the start of the Great Depression and the end of World War II.²⁹⁵ During this time period, the Court gradually transitioned to a “realist” approach that was more politically conscious, as well as deferential to executive branch determinations in all matters of foreign policy.²⁹⁶ Specifically, in *Ex parte Peru* and *Hoffman* the Court effectively repudiated *Pesaro*’s conclusion that a sovereign government could be entitled to immunity without a positive determination by the executive branch.²⁹⁷ Consequently, by 1945, foreign governments no longer enjoyed absolute immunity under U.S. law; rather, courts deferred to executive branch (typically State Department) recommendations of foreign sovereign immunity in specific cases.²⁹⁸ Therefore, if the IOIA was intended to

288. See *supra* note 232 and accompanying text.

289. See *supra* notes 246–53 and accompanying text.

290. See *supra* notes 37, 43–44 and accompanying text.

291. See *supra* notes 16–17 and accompanying text.

292. See *supra* note 18 and accompanying text.

293. See *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926); see also *supra* notes 30–32 and accompanying text.

294. See *supra* note 242 and accompanying text.

295. See *supra* note 43 and accompanying text.

296. See *supra* notes 40–41 and accompanying text.

297. See *supra* notes 53–57 and accompanying text.

298. See *supra* notes 58–60 and accompanying text. The Third Circuit in *OSS Nokalva* and the U.S. Supreme Court in *Verlinden* explicitly endorsed this conclusion, as both

afford the same immunity as was extended to foreign states in 1945, it could not have been intended to provide absolute immunity.

2. The Requirement of Express Waiver: Addressing the Corresponding Benefit Test

While the D.C. Circuit determined that international organizations were still entitled to absolute immunity under the language of the IOIA, it also utilized the corresponding benefit test to determine when a constructive waiver was appropriate.²⁹⁹ Specifically, in *Atkinson* the court hypothesized that the corresponding benefit test would apply when international organizations engaged in commercial transactions, because private parties would be reluctant to trade without a legal remedy. Therefore, those organizations must necessarily have intended to include a commercial waiver in their charters.³⁰⁰

The problem with this test is fairly simple: necessary or not, you cannot have an implicit, express waiver. The IOIA states that international organizations are entitled to the same immunity as 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.”³⁰¹ Therefore, the IOIA only allows for the express waiver of immunity.³⁰² Unlike constructive or implicit waivers, which can be conveyed through actions or overall intentions, an express waiver is generally understood to require a “clear and unambiguous” desire to waive immunity, so that the waiver’s meaning is unmistakable.³⁰³ When a balancing test and judicial inquiry is needed to determine whether an organization intended to waive its immunity to a particular suit, such a waiver is not unambiguous. Instead, where an organization has been found to have immunity under the IOIA, that immunity has not been waived unless the organization has demonstrated an unmistakable intent—such as in a contract or other legal document—to surrender immunity for a given transaction, activity, or specific suit.³⁰⁴

decisions acknowledged that by 1943, the Supreme Court deferred to executive branch determinations when deciding sovereign immunity questions. *See* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 762 n.4 (3d Cir. 2010).

299. *See supra* notes 250–52 and accompanying text.

300. *See supra* note 253 and accompanying text.

301. *See supra* note 85 and accompanying text (emphasis added).

302. *See supra* note 83 and accompanying text. By comparison, the FSIA allows for both express and implicit waivers of immunity. *See* Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1605(a)(1) (2006). However, the D.C. Circuit found that the FSIA did not apply to the IOIA. *See supra* note 246 and accompanying text.

303. *See supra* note 136 and accompanying text.

304. *See supra* note 136 and accompanying text. In fact, the U.S. Supreme Court rejected the use of the “constructed waiver” theory to limit the sovereign immunity of U.S. states, finding that a state’s entry into a lawful activity cannot be construed as a waiver of its usual immunity, because such a practice amounts to coercion that destroys consent. *See supra* notes 136–40, 253 and accompanying text.

Furthermore, the corresponding benefit test is not necessary for organizations to properly function.³⁰⁵ Absent a general provision in the charter, private parties are free to insist that an immunity waiver is expressly included in their contract with the organization.³⁰⁶ Similarly, if an international organization were to find a particular immunity counterproductive, it could unilaterally waive that immunity either through an express provision or by declining to assert immunity in court.³⁰⁷

B. OSS Nokalva Take-Two: Distinguishing the IOIA from Foreign Sovereign Immunity

In contrast to the D.C. Circuit, the Third Circuit found that the IOIA was a reference statute tied to U.S. foreign sovereign immunity law and thereby adopted all subsequent amendments including the FSIA.³⁰⁸ However, the conclusion that the phrase, “same immunity . . . as is enjoyed by foreign governments” in the IOIA signaled the intention to adopt sovereign immunity law, cannot be reconciled with the legislative history of the IOIA and the purposes for granting immunity to international organizations.³⁰⁹ The following discussion explains why the IOIA was not intended as a pure reference statute; rather, the immunity of international organizations was intended to evolve separately from foreign sovereign immunity.

Congressional reports discussing the bill assert that the basic purpose of the IOIA was to “confer upon international organizations . . . privileges and immunities of a governmental nature.”³¹⁰ Therefore, it was expected that the privileges granted to international organizations would be “similar” to those granted to foreign governments and their officials.³¹¹ The immunities would not, however, be the same, because the purpose for granting immunity to international organizations was different than that for granting immunity to foreign sovereigns.³¹² Specifically, in considering the IOIA, Congress relied upon a State Department assurance that the immunities granted to international organizations and their officials would be “more limited” than those extended to foreign governments.³¹³ For example, the immunity of officers and officials of international organizations would be constrained to acts performed in their official capacity, whereas the diplomatic officers of foreign nations enjoyed full immunity from legal process.³¹⁴

305. See *supra* notes 251–54 and accompanying text; see also Herz, *supra* note 14, at 520–21.

306. See Herz, *supra* note 14, at 520.

307. See *id.*

308. See *supra* note 282 and accompanying text.

309. See International Organizations Immunities Act, 22 U.S.C. § 288 (2006); *supra* notes 93–95, 298 and accompanying text.

310. See *supra* note 93 and accompanying text.

311. See *supra* note 94 and accompanying text.

312. See *supra* note 95 and accompanying text.

313. See *supra* note 99 and accompanying text.

314. See *supra* note 100 and accompanying text.

These differences reflected two key factors. The first was that the IOIA reflected different policy concerns than those behind the enactment of the FSIA.³¹⁵ The FSIA was passed in order to establish a default rule for sovereign immunity that would apply equally to all foreign countries and free the State Department from the political liability of its immunity decisions.³¹⁶ But, the purpose for granting immunity to international organizations is to secure their legal and practical independence, so that they could operate without undue interference by the laws of member states.³¹⁷

This concern was particularly relevant in relation to the United States, whose role as the host nation for many these organizations left them especially vulnerable to pressures by the U.S. government and suits under U.S. law.³¹⁸ In effect, the FSIA was passed to free the U.S. government from pressure by foreign states, while the IOIA was passed to free international organizations from intrusion by the United States.³¹⁹ Specifically, the IOIA was passed to assure the international community that suitable conditions were in place to protect the legal and practical independence of these organizations from overly burdensome interference when the United States was the host country.³²⁰ In exchange, the IOIA served the self-interest of the United States by allowing it to host key organizations like the U.N., protecting it as a member-nation from liability for the organizations' actions within the United States and strengthening the position of other organizations of which the United States was a member, but not the host nation.³²¹

Another difference between the immunity of foreign governments and that of international organizations is that Congress expected the executive branch to manage immunity under the IOIA in a way that it explicitly rejected in the FSIA.³²² This different treatment is a reflection of the fact that the United States is a member of any organization covered by the IOIA, and therefore, immunity determinations under the IOIA involve different pressures and concerns than those created by foreign sovereign immunity determinations.³²³ Thus, rather than equating international organizations to foreign nations, a more appropriate analogy might be to U.S. agencies. Under U.S. law, federal agencies enjoy limited, functional immunity for their acts.³²⁴ Under the Federal Tort Claims Act³²⁵ (FTCA), U.S. agencies can generally be held liable for the negligent or wrongful acts of their

315. *See supra* notes 84, 96, 145 and accompanying text.

316. *See supra* note 145 and accompanying text.

317. *See supra* notes 70–73 and accompanying text.

318. *See supra* note 82 and accompanying text.

319. *See supra* note 82 and accompanying text.

320. *See supra* note 83 and accompanying text.

321. *See supra* note 104 and accompanying text.

322. *See supra* notes 101–04 and accompanying text.

323. *See supra* notes 146–47 and accompanying text.

324. *See* The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

325. *See id.*

employees acting within the scope of their employment, but they maintain immunity under the discretionary function exception for acts or omissions caused by the policy decisions of an agency.³²⁶ In *Dalehite v. United States*,³²⁷ the Supreme Court defined the discretionary function necessity as, “the discretion of the executive or the administrator to act according to one’s judgment of the best course Where there is room for policy judgment and decision there is discretion.”³²⁸ This conception of immunity is akin to the traditional understanding of the immunity of international organizations under the functional necessity doctrine, by which organizations enjoy those limited immunities necessary to provide organizations with the independence and discretionary authority “necessary for the fulfillment of their purposes,” without risking liability under the laws of its member states.³²⁹

Moreover, the idea that Congress intended to grant the President discretion to manage and, if necessary, to amend the immunity granted to international organizations under the IOIA is clear from the historical record. In recommending the bill’s passage, the House Committee on Ways and Means found that the “interests of the United States are adequately protected . . . [by the] broad powers granted to the President.”³³⁰ The IOIA authorizes the President “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 . . . or to condition or limit the enjoyment by any such organization” of immunity.³³¹ According to the legislative history, this language was intended to provide the President with the powers necessary to rectify any abuse of the immunities granted by the IOIA, including the ability to limit an organization’s immunity in “the event that any international organization should engage . . . in activities of a commercial nature.”³³² Therefore, by granting the authority to withhold or condition the immunity of international organizations to the executive branch, Congress clearly established a complete mechanism for amending the IOIA to reflect changes in domestic or international custom outside of U.S. foreign sovereign immunity law.³³³

326. *See id.* § 2680(a). The FTCA also contains a limited number of additional exceptions, such as for injuries sustained by military personnel in the course of their duties and for intentional torts. *See id.* §§ 2671–2680.

327. 346 U.S. 15 (1953).

328. *See id.* at 34, 36; HENRY COHEN & VANESSA K. BURROWS, CONG. RESEARCH SERV., 95-717, FEDERAL TORT CLAIMS ACT 9 (2007).

329. *See Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 464(1) (Tentative Draft No. 4, 1983)); *supra* notes 8–11 and accompanying text.

330. *See supra* note 102 and accompanying text.

331. *See supra* notes 101–03 and accompanying text.

332. *See supra* note 104 and accompanying text.

333. *See supra* note 59 and accompanying text.

C. *Simple, Workable, and Flexible: Executive Determination of the Immunity of International Organizations*

The current interpretations of the IOIA and the immunity of international organizations should be reworked. The D.C. Circuit's absolute immunity standard from *Atkinson* does not reflect the complicated reality of foreign sovereign immunity law when the IOIA was passed in 1945.³³⁴ Likewise, the Third Circuit's proposal improperly treats the IOIA's reference to the immunity of foreign governments as an intention to adopt a particular level of sovereign immunity and all subsequent amendments to that immunity, rather than an allusion to the general type of immunity being conveyed.³³⁵

Instead, the "same immunity" reference of the IOIA should be read as extending the judicial deference to executive branch determinations that defined foreign sovereign immunity in 1945.³³⁶ Under this interpretation, the FSIA has no direct effect on the IOIA. The following sections explain this Note's proposed interpretation of the IOIA.

1. The Proposed Standard Is Consistent with a Plain Reading of the IOIA

When the IOIA was passed in 1945, there was no single legal standard for foreign sovereign immunity.³³⁷ The changes in the Supreme Court's approach to foreign affairs from 1938 through 1945 transformed the immunity of foreign governments from a legal question answered by the courts independent of executive branch recommendations, into a political issue determined by the executive branch in accordance with U.S. foreign policy.³³⁸ Therefore, when the IOIA granted the "same immunity . . . as is enjoyed by foreign governments" to international organizations, it was not referencing a body of law, whether fixed or evolving.³³⁹ Instead, the IOIA's reference to foreign governments reinforced the overall intention that the immunity of international organizations should be determined through a similar type of executive branch or State Department scrutiny as was then applied to immunity requests by foreign states.³⁴⁰

This interpretation is consistent with a plain reading of the IOIA. Both *Atkinson* and *OSS Nokalva* treated the "same immunity . . . as is enjoyed by foreign governments" as the principal immunity language of the IOIA, while the President's authority to limit immunity was treated, like waiver, as an exception.³⁴¹ Put another way, the interpretations offered by the D.C. and Third Circuits read the IOIA as granting some specific level of foreign sovereign immunity, which can be further limited either by waiver or by

334. See *supra* notes 58–60 and accompanying text.

335. See *supra* notes 308–09 and accompanying text.

336. See *supra* note 59 and accompanying text.

337. See *supra* notes 43–44 and accompanying text.

338. See *supra* notes 56–60 and accompanying text.

339. See *supra* notes 56–60, 85 and accompanying text.

340. See *supra* notes 59–60 and accompanying text.

341. See *supra* notes 242, 248–53, 271–84 and accompanying text.

Presidential action.³⁴² Instead, courts should follow the natural construction of the statute and treat section 1 of the IOIA as the principal provision, which establishes that the President decides which organizations get immunity and in what circumstances that immunity should be withdrawn or limited.³⁴³ Section 2 then clarifies section 1 by defining what is meant by “international organizations,” and signaling that the President should apply the same type of analysis used to evaluate immunity requests by foreign governments when determining the immunity of international organizations.³⁴⁴

2. Current Executive Branch Determinations Would Hold International Organizations Accountable for Their Commercial Activities

In addressing the effect of the FSIA on the IOIA, some scholars have argued that there is an emerging consensus that international organizations should adhere to the general principles and customs of international law, including the theory of restrictive immunity.³⁴⁵ This conclusion is illustrated by the D.C. Circuit’s concern in *Atkinson* that international organizations be prevented from abusing their immunity when they engage in commercial agreements with private parties.³⁴⁶ Therefore, an obvious concern raised by the decision to transfer immunity determinations to the executive branch is that international organizations would be freed from the restrictions created either by the application of the FSIA or the corresponding benefit test.

These concerns ignore the fact that the executive branch has already expressed its opinion on the proper level of immunity that should be extended to international organizations.³⁴⁷ The 1980 State Department letter written by Robert Owen contained a clear statement recommending that the same restrictive immunity conferred on foreign governments in the FSIA should be applied to international organizations.³⁴⁸ Given that the State Department has consistently maintained this position, it is almost certain that if the judiciary were to show deference to immunity determinations by the executive branch for international organizations, those organizations would continue to be subject to the jurisdiction of U.S. courts for their commercial activities.³⁴⁹

342. See *supra* notes 242, 248–53, 271–84 and accompanying text.

343. See *supra* note 101 and accompanying text.

344. See *supra* note 85 and accompanying text. The same sentence of Section 2 that refers to foreign governments also clarifies that any immunity granted to international organizations also extends to “their property and their assets, wherever located, and by whomsoever held.” 22 U.S.C. § 288a(b).

345. See *supra* note 174 and accompanying text.

346. See *supra* notes 258–59 and accompanying text.

347. See *Broadbent v. Org. of Am. States*, 628 F.2d 27, 31 (D.C. Cir. 1980) (discussing an amicus brief submitted by the Justice Department); *supra* note 181 and accompanying text.

348. See *supra* notes 181–83 and accompanying text.

349. See *supra* notes 181–83 and accompanying text; see also *Broadbent*, 628 F.2d at 31.

3. The Proposal in Practice

Reinterpreting the IOIA to establish judicial deference to executive branch determinations for the immunity of international organizations would not be difficult or disruptive. As *Hoffman* illustrated, judicial deference does not require a recommendation by the President for each and every instance where immunity is asserted.³⁵⁰ Instead, the executive branch, or likely the State Department, would only need to issue an official determination when it wishes to depart from past policy; otherwise, courts can look to previous statements and precedent to determine whether an organization is in fact immune.³⁵¹ Therefore, given the current statements issued by the State and Justice Departments, adopting this new interpretation for the IOIA would likely simplify litigation by establishing a single, clear rule that international organizations are generally entitled to only restrictive immunity.³⁵²

At the same time, the new interpretation proposed by this Note would have the additional advantage of allowing the executive branch to play an active role in immunity determinations and to depart from a strict, restrictive immunity standard when necessary for U.S. security or interests.³⁵³ This ability touches upon the core difference between the immunity granted to foreign sovereigns and that extended to international organizations—unlike immunity requests by foreign governments, the United States has a direct investment in protecting international organizations.³⁵⁴ The United States is a member of every organization covered under the IOIA, and the immunity extended to these institutions has a direct effect upon the United States and its national interests in a way that the immunity of a foreign state never does.³⁵⁵ Therefore, adopting the interpretation of the IOIA proposed by this Note would allow the executive branch to actively monitor and protect both claims brought by its private citizens and its interests as a member of the organization involved.

CONCLUSION

When the 79th Congress established that the IOIA would extend “the same immunity . . . as is enjoyed by foreign governments,”³⁵⁶ to international organizations, it was not referencing sovereign immunity as a specific body of law.³⁵⁷ Instead, the purpose of the IOIA was to impose the same judicial deference to the immunity determinations of the executive branch and State Department, which defined foreign sovereign immunity

350. See *supra* notes 55–60 and accompanying text.

351. See *supra* notes 55–60 and accompanying text.

352. See *supra* notes 181–83 and accompanying text; see also *Broadbent*, 628 F.2d at 31.

353. See *supra* notes 101, 104 and accompanying text.

354. See *supra* note 98 and accompanying text.

355. See *supra* note 98 and accompanying text.

356. See International Organizations Immunities Act, 22 U.S.C. § 288a (2006).

357. See *supra* notes 47–60, 85 and accompanying text.

after *Ex parte Peru* and *Hoffman*, on suits involving claims against international organizations.³⁵⁸

Based on current statements and recommendations by the State Department, adopting this reinterpretation of the IOIA would simplify litigation by establishing that international organizations are only entitled to a baseline of restrictive immunity.³⁵⁹ However, this interpretation also offers an additional advantage, in that it would allow the executive branch, acting through the State Department, to easily monitor the IOIA's application. It would also allow the executive branch, when necessary to protect the interests of the United States, to adjust the immunity of international organizations either generally or for a specific suit.³⁶⁰

358. *See supra* notes 56–60, 85 and accompanying text.

359. *See supra* notes 181–83, 352 and accompanying text; *see also* *Broadbent v. Org. of Am. States*, 628 F.2d 27, 31 (D.C. Cir. 1980) (discussing an amicus brief submitted by the Justice Department).

360. *See supra* notes 1–5, 102–04, 353–55 and accompanying text.