Jam v. International Finance Corporation: Access to Remedy, but Only When We Say So

I. OVERVIEW

A fishing village in Gujarat, India, recently became the latest casualty of well-meaning, poorly executed Western development.[1] The construction of a coal powered plant in close proximity to the community resulted in the discharge of thermal pollution into the sea, thus, destroying the marine life on which the fishermen rely for their income.[2] Further, the construction of the plant contaminated the groundwater with salt, making the irrigation necessary for farming an impossibility.[3] The International Finance Corporation (IFC) provided the funding necessary for the power plant and does not deny any of these harms; it merely claims immunity.[4]

In 2012, construction began on the IFC funded Tata Mundra coal powered plant via a US$450 million loan, destroying much of the local fishing industry on which Jam and the other plaintiffs relied.[5] They responded by bringing a suit challenging the immunity of the IFC, the private lending arm of the International Bank for Reconstruction and

1. Jam v. Int'l Fin. Corp., 860 F.3d 703, 704 (D.C. Cir. 2017).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

Development (more commonly known as the World Bank Group).[6] In alleging such harms, the community properly submitted a claim to the Compliance Advisor, Ombudsman (CAO), the independent accountability mechanism of the IFC.[7] After determining the veracity of the claims, the CAO made recommendations to the IFC consistent with the claims of the fishermen only for the IFC to ignore the recommendations and proceed with project funding as scheduled.[8] The U.S. Court of Appeals for the District of Columbia Circuit *held* that a proper interpretation of the International Organizations Immunity Act (IOIA) awards "virtual absolute" immunity, except when declined via express waiver and that the express waiver in the charter of the IFC only waives immunity when doing so benefits the functional purpose of the IFC. *Jam v. International Finance Corp.*, 860 F.3d 703 (D.C. Cir. 2017).

II. BACKGROUND

A. International Organizations, Generally

International Organizations (IOs) rose to the position they currently enjoy following World War I.[9] The League of Nations remains the first significant IO (others existed prior to the League of Nations but none relevant to the current discussion),[10] and though its failure has been duly noted, it paved the way for future IOs, especially the United Nations (U.N.), to materialize as necessary apolitical actors in an increasingly globalized community.[11] They represent the answer of the international community to the increasing need for transnational cooperation and the belief that such cooperation will enhance welfare and ensure peace and security.[12] An entity is characterized as an IO when it arises via some sort of treaty or organic founding document and has states, among other entities, such as IOs as constituent members; a permanent administration or institutional structure distinct from its Member States; and

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6. *Id.*
7. *Id.*
8. *Id.*
9. Robert Kolb, *History of International Organizations or Institutions*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2011).
10. *Id.*
11. *Id.*; *see also* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 38 (2d ed. 2009); August Reinisch, *Privileges and Immunities*, *in* RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 133, 134 (Jan Klabbers & Asa Wallendahl eds., 2011) [hereinafter RESEARCH HANDBOOK].
12. Tarcisio Gazzini, *Personality of International Organizations*, *in* RESEARCH HANDBOOK, *supra* note 11, at 33, 39-40.

international legal personality.[13] Legal personality under international law is understood as the capacity to engage in relations with states and other organizations with legal personality, as well as being subject to the responsibilities that accrue under international law.[14] When the U.N. was created, states were typically thought of as the only entities with international legal personality; as such, the maneuver to include IOs in this category was significant and should be understood in this context.[15]

B. A History of Foreign Sovereign Immunity in U.S. Domestic Law

Historically, the United States granted immunity to foreign states for actions taken in their official capacities.[16] Immunity operated as an affirmative defense on the merits and not as a procedural bar to jurisdiction.[17] As of the enactment of the IOIA in 1945, the U.S. State Department would make recommendations to the presiding court in specific situations concerning the applicability and scope of immunity; however, such grants were common and virtually absolute.[18] Due to the political nature of such grants, as well as the occasional inconsistency of such grants, the 1952 "Tate Letter" from the Department of State detailed a restrictive view of immunity, which would hold as the basis of the Foreign Sovereign Immunities Act (FSIA).[19] The FSIA established a commercial activities exception to sovereign immunity whereby immunity is unavailable when a state or one of its agencies or instrumentalities acting in an official capacity engages in an activity that is commercial in nature.[20]

As mentioned above, the passage of the IOIA in 1945 attributed the immunity of foreign states to IOs for purposes of domestic U.S. law.[21] The IOIA did not directly state the scope of the immunity of IOs but simply stated that IOs "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments,

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13. Kolb, *supra* note 9 (noting that the requirement of international legal personality is a recent addition and less settled than the other three).

14. *See* Reparations for Injuries Suffered in Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 179 (Apr. 11).

15. *See* Kolb, *supra* note 9 (what is meant by this is to say that IOs were conceived on the notion that they would be interacting with states and would avoid any legal interaction with non-state actors). *See generally* Gazzini, *supra* note 12.

16. Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471, 490-91 (2008).

17. *Id.* at 490.

18. *Id.*

19. *Id.* at 490-91.

20. *Id.*

21. *Id.* at 488-89.

except to the extent that such organizations may expressly waive their immunity."[22] An exception for commercial activity, *jure gestionis*, was contemplated, though Congress decided to remain silent on the issue.[23] The State Department Office of the Legal Advisor wrote in a letter in 1980 that the exceptions of the FSIA apply to IOs in U.S. domestic courts; however, this has not been followed by the D.C. Circuit Court.[24] It is generally considered to be the case that IOs have immunity under public international law via the doctrine of functional necessity,[25] but this issue is far from settled and was not taken up by the D.C. Circuit Court in the noted case.[26] It is important to note that the grant of immunity remains predicated upon the existence of a duty to provide alternative access to remedy, though it is unclear whether this rises to the level of an obligation crystallized in customary international law.[27]

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22. International Organization Immunity Act, 22 U.S.C.A. § 288a (b) (1945).

23. Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998).

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

25. Immunity deriving from functional necessity is difficult to define, as by nature IOs only have a functional mandate under which they operate, thereby making most acts those of function. While in theory functional necessity offers no support for broad, absolute immunity, strict adherence to a functional mandate has often (though not always, and somewhat controversially) resulted in grants of absolute immunity from the courts. *See generally* Reinisch, *supra* note 11, at 138-41; Carson Young, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889, 901-02 (2017).

26. Reinisch, *supra* note 11, at 135 (stating that "[w]hether there is customary international law on privileges and immunities of international organizations and, if so, the precise content of such customary law has remained controversial and led to divergent answers by different courts").

27. Professor Bradlow contends in his Amicus to the court that the "obligation to provide a right of access to an effective remedy is so widely recognized by states that it has become part of customary international law." Brief of Amicus Curiae Professor Daniel Bradlow in Support of Plaintiffs-Appellants at 12, Jam v. Int'l. Fin. Corp., 860 F.3d 703 (D.C. Cir. 2017) (No. 15-cv-00612) [hereinafter Bradlow]. In support he notes the International Covenant on Civil and Political Rights states at article 2, section 3(a)-(b) that any person suffering a violation of international human rights "shall have an effective remedy" "determined by competent judicial, administrative . . . authorities, or by any other competent authority provided for by the legal system of the state." International Covenant on Civil and Political Rights art. 2, § 3(a)-(b), Dec. 19, 1966, 999 U.N.T.S. 171; *see also* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 182 (1999). *But see* GÜNTHER HANDL, MULTILATERAL DEVELOPMENT BANKING 52 (2000) (stating that "treaty practice as such arguably does not yet provide a sufficiently broad basis for the conclusion that today access to effective judicial or administrative proceedings is an entitlement enshrined in general, i.e., customary international law"). Further to this point as a specialized agency of the U.N., the IFC is required to provide for "appropriate modes of settlement" for, *inter alia*, "disputes of a private law character" to which it is a party. Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations art. IX, Nov. 21, 1947, 33 U.N.T.S. 521 (also noting that the United States is not a party to this convention).

C. Immunity and the International Finance Corporation

The IFC is the private lending arm of the World Bank Group, with its mandate being to further economic development by providing loans for private enterprise to less developed areas of its 180 Member States.[28] The organization maintains a supervisory role over these projects, though project level management is delegated to the entity receiving the loan.[29] When complaints arise throughout the course of a project, they are submitted to the CAO, the independent accountability mechanism of the IFC.[30] The CAO then makes recommendations to the IFC based on its findings; however, the Board of the IFC ultimately makes the decision on whether to act in accordance with the recommendations.[31] The CAO is both appointed by and accountable to the Board of the IFC.[32]

While different international organizations enjoy different levels of legal personality, the IFC enjoys juridical personality as one of the specialized agencies of the U.N.[33] President Dwight Eisenhower granted the IFC status as an IO pursuant to U.S. domestic law in 1956, thereby conferring upon it all the privileges, exemptions, and immunities contemplated in the IOIA.[34] The IFC itself contemplates only necessary functional immunity in its charter[35] and provides procedural stipulations for claims against it.[36] A certain level of immunity is necessary in order to fulfill its function of operating without political influence in an increasingly globalized community.[37] Similar to other multilateral development banks, the IFC has a waiver of immunity in its charter, allowing those suits to move forward that further the purpose of its objective.[38] In many cases this has taken the form of a broad waiver of immunity that leaves it up to the presiding court to determine whether an IO is immune in any particular instance.[39] Courts usually interpret this

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28. IFC Articles of Agreement art. I, Dec. 5, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117.

29. OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN(CAO), OPERATIONAL GUIDELINES 21 (Apr. 2007), http://www.cao-ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf.

30. *Id.* at 12.

31. *Id.* at 15.

32. *Id.* at 7.

33. Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, *supra* note 27, art. II, § III.

34. Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 5, 1956).

35. IFC Articles of Agreement, *supra* note 28, art. VI, § 1.

36. *Id.* art. VI, § 3.

37. Reinisch, *supra* note 11, at 134; *see also* Mendaro v. World Bank, 717 F.2d 610, 615 (1983).

38. *See* IFC Articles of Agreement, *supra* note 28.

39. *Id.*

waiver of immunity to concern the functional purpose of the IO and will waive immunity when allowing the suit to proceed furthers the purpose of the IO.[40]

D. Atkinson and IO Immunity Under U.S. Domestic Law

U.S. courts have generally interpreted the IOIA in such a way that IOs are awarded virtually absolute immunity, as enjoyed by sovereign states in 1945.[41] The U.S. Supreme Court has been relatively quiet on the issue, with its only decision of note coming in *Verlinden B.V. v. Central Bank of Nigeria*.[42] There, the Court exegetically set forth the history of sovereign immunity with respect to states, noting that up until 1952, the State Department often authorized full immunity at which point the Tate Letter dictated the restrictive theory of sovereign immunity would prevail.[43] To this point, the language in *Verlinden* was somewhat qualified and does not fully support the historic view of absolute immunity.[44]

After the Supreme Court's decision in *Verlinden*, it has remained quiet for the most part while the case law established has come primarily from the D.C. Circuit Court of Appeals.[45] Three years prior to the *Verlinden* decision, the D.C. Circuit declined to draw a distinction between absolute or restrictive immunity in *Broadbent v. Organization of American States* because the facts alleging breach of contract via the defendant's termination of petitioner's employment did not constitute commercial activity.[46] Whatever the implications of the decision may have been, *Atkinson v. Inter-American Development Bank* has been the determining case when construing IO immunity since 1988.[47]

In *Atkinson* the D.C. Circuit Court found the Inter-American Development Bank immune from garnishment proceedings under the IOIA by its former employee's wife.[48] The wife alleged a de minimis exception to the IOIA immunity and that her claim qualified as de minimis because the IADB could reallocate her husband's wages without any impact to their functional objectives.[49] The court rebutted the

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40. Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1338 (D.C. Cir. 1998).
41. *Id.*
42. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983).
43. *Id.* at 486-88.
44. *Id.* at 487.
45. Broadbent v. Org. of Am. States, 628 F.2d 27 (1980).
46. *Id.* at 28, 33.
47. Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1342 (D.C. Cir. 1998).
48. *Id.* at 1336.
49. *Id.* at 1339.

argument, noting that there is no mention of an exception in the IOIA, instead the IOIA makes clear it bars all obtrusive juridical processes.[50] Furthermore, the court said that while a difference exists between immunity as it was conceived in 1945, and now given the enactment of the FSIA, the reference to sovereign immunity represented Congress legislating in shorthand.[51] The reason given for this is that 22 U.S.C.A. § 288a provides an alternative mechanism for updating and modifying the scope of immunity by relying on the president.[52] As recently as 2014, the D.C. Circuit took the opportunity to reaffirm *Atkinson* by noting in its decision in *Nyambal v. International Monetary Fund* that *Atkinson* is still valid and robust as case law.[53]

The primary dissenting voice is represented by a single case in the Court of Appeals of the Third Circuit, noting in *OSS Nokalva, Inc. v. European Space Agency* that where a software company sued the European Space Agency for failure to compensate, the resulting breach of contract constituted commercial activity, and the agency was not protected from suit under the IOIA.[54] The predominant reason given is a policy one—prospective business partners must be assured of judicial recourse or they will cease to do business with IOs, thus, frustrating their functional mandates.[55]

E. The Mendaro Test and Waiver of IO Immunity Under U.S. Domestic Law

If case law concerning immunity has been slightly misconceived, the case law concerning waiver of immunity has been equally skewed.[56] In *Lutcher v. Inter-American Development Bank*, the complainant sought injunctive relief and damages for allegedly wrongful acts by the IADB in loaning to a plaintiff-borrowers' competitors in the lumber and paper processing industry.[57] The Inter-American Development Bank responded by saying that its waiver of immunity only intended to allow suits from bondholders, creditors, and guarantee beneficiaries.[58] The D.C. Circuit

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50. *Id.*
51. *Id.*
52. *Id.*
53. *See generally* Nyambal v. Int'l Monetary Fund, 772 F.3d 277, 281 (D.C. Cir. 2014).
54. Oss Nokalva Inc. v. European Space Agency, 617 F.3d 756, 762-64 (3d Cir. 2010).
55. *Id.* at 766.
56. *See* Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank, 382 F.2d 454 (1967).
57. *Id.* at 455.
58. *Id.* at 456.

Court held that the Inter-American Development Bank had waived its immunity under the IOIA by virtue of a provision in the agreement establishing the bank, which provided procedural outlines for an action that might be brought against the bank.[59] Further, this waiver did not make any distinction as to who could bring suit; it only made distinctions as to the subject matter of the suit.[60] Thus, while the case was ultimately dismissed due to the failure of the plaintiff to state a claim upon which relief could be granted, the D.C. Circuit adopted a view of restrictive immunity, determining that immunity is not waived for suits that furthered the functional aim of the bank.[61]

Lutcher was followed by *Mendaro v. World Bank*, though it was not expressly overturned.[62] As a starting point, the D.C. Circuit Court said it is not enough that the waiver expressly exists, but it must expressly state the circumstances in which immunity is waived.[63] The court construed the waiver to apply only to situations where waiving immunity would further the functions of the bank.[64] In doing so, it applied a two-part analysis to determine whether immunity was waived.[65] The first element demonstrates the functional necessity of immunity in determining whether the party concerned would enter into negotiations or contract with the organization absent waiver.[66] These parties contemplated are the same discussed by the court in *Lutcher*, namely debtors, creditors, and bondholders.[67] Effectively then, immunity via functional necessity becomes broader than that of the restrictive immunity contemplated in the FSIA.[68]

Indeed, it goes one step further; for claims that survive the first step, the *Mendaro* court then denies waiver of immunity to those claims that affect its internal operations policy.[69] The rationale behind the decision is quite clear, as the court conceives of an administrative headache if the IFC must adhere to the domestic law of a wide range of states.[70] This

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59. *Id.* at 459.
60. *Id.*
61. *Id.* at 460.
62. Mendaro v. World Bank, 717 F.2d 610, 614 (1983).
63. *Id.* at 617.
64. *See also* Osseiran v. Int'l Fin. Corp., 552 F.3d 836, 840 (D.C. Cir. 2009) (holding organization's facially broad waiver of immunity effective only as to types of plaintiffs and claims that "would benefit the organization over the long term").
65. *Mendaro*, 717 F.2d at 617-18.
66. *Id.* at 615.
67. *Id.*
68. *Id.* at 618.
69. *Id.*
70. *Id.* at 619.

interpretation of waiver of immunity has been recently upheld by the D.C. Circuit in *Vila v. Inter-American Investment Corp.*, appellee's motion to dismiss a claim of unjust enrichment brought by Vila was denied because the plaintiff exemplified one of the third-party contractors with whom the Inter-American Investment Corporation must work.[71] In short then, a waiver of immunity has been construed to apply only to those third parties with whom the IO must engage to fulfill its function, and then only to actions outside the internal operations policy of the IO.[72]

III. THE COURT'S DECISION

In the noted case, the U.S. Court of Appeals for the D.C. Circuit relied heavily on the precedent set by *Mendaro* and *Atkinson*, holding the IOIA grants absolute immunity and that the express waiver of this immunity occurs only when doing so benefits the IO.[73] The first holding reads the IOIA as granting immunity fixed in time to that enjoyed by sovereign states in 1945, upholding the D.C. Circuit's 1967 decision in *Atkinson*, as opposed to changing as the immunity of nation states changes.[74] The second part of the holding then relies on the *Mendaro* decision by interpreting the express waiver of immunity functionally so that the waiver only applies when doing so furthers the objectives of the IO.[75]

The first part of the holding relies on statutory interpretation of the IOIA.[76] Enacted in 1945, the IOIA has been held by the D.C. Circuit to award IOs virtually absolute immunity, the level of immunity afforded to foreign nation states at the time of passage.[77] The appellants offer effectively the same argument put forth in *Atkinson*, namely that Congress intended the immunity of IOs to rise and fall with that of nation states.[78] The court rather brutishly mentions that this argument failed in *Atkinson* (which has since been reaffirmed in *Nyambal*) primarily because in the view of the court, Congress explicitly delegated the responsibility of altering or updating immunity of IOs to the President.[79] Appellants then claim that Supreme Court dicta notes

71. Vila v. Inter-Am. Inv. Corp., 570 F.3d 274, 281-82 (D.C. Cir. 2009).
72. *Id.*
73. *See* Jam v. Int'l Fin. Corp., 860 F.3d 703 (D.C. Cir. 2017).
74. *Id.* at 706.
75. *Id.* at 708.
76. *Id.* at 705.
77. *Id.*
78. *Id.*
79. *Id.*

immunity was not absolute in 1945 because the State Department would recommend immunity for foreign sovereigns.[80] However, the court to this point draws a distinction, noting that this merely denotes the mechanism of awarding immunity and not the scope of immunity awarded.[81] As such, IO immunity remains tied to the IOIA as conceived in 1945.[82]

Further, and consistent with prior case law, the noted case held that the waiver provision in the IFC's charter is subject to a very strict and narrow interpretation.[83] This effectively determines that immunity is waived to only allow lawsuits that would benefit the organization over the long term.[84] The court noted that it was somewhat bizarre that organizations defer to the judiciary to determine what is best for the IO in question but asserts that in any case the *Mendaro* test is necessarily stricter than the commercial activities exception to the FSIA.[85] This is due to the fact that the IFC only engages in commercial activities and, as such, would have no immunity were it subject to the FSIA.[86] The *Mendaro* test then waives immunity in situations where it enables the organization to fulfill its function, such as providing waiver of immunity in situations where the other party would not otherwise enter into contractual relations with the IFC.[87] All the claims for which immunity has been waived have been claims born out of business relations with outside companies.[88]

The appellants then put forward another claim, arguing that waiving immunity in this case does benefit the IFC and that by holding them to their stated environmental and social standards, they are engendering necessary community support and furthering the mission of the IFC.[89] To this point, the court responds with the second *Mendaro* distinction, namely that between core, internal operations and external business relations.[90] Declining to comment on the internal policy decisions of the IFC, the court claims that reviewing internal compliance reports would both create a disincentive to use such mechanisms, as well as open the

80. *Id.* at 706.
81. *Id.*
82. *Id.*
83 *Id.*
84. *Id.*
85. *Id.* at 707.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 707-08.
90. *Id.* at 708.

floodgates to massive amounts of litigation.[91] Given this, the appellants' argument fails the *Mendaro* test.[92]

Though Judge Nina Pillard agreed with the application of the binding case law in her concurring opinion, she expressed regret at its existence calling for an en banc review.[93] Regarding immunity, the learned judge notes that statutory cross reference is usually done through dynamic incorporation of the cross reference, meaning that immunity should have been directly tied to that of the foreign state and the restrictive view should prevail today.[94] However, she laments the fact that in *Atkinson*, the court misinterpreted section I of the IOIA to award the U.S. President exclusive control over the immunity of IOs, instead of merely empowering him to make such decisions.[95] Moreover, legislative history shows that the House of Representatives balked at directly including language awarding absolute immunity and that in a 1980 letter, then-Legal Adviser Robert Owen opined that by "virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities."[96] Further, given that states can act through IOs in a way that circumvents immunity, it makes no sense to grant such commercial actions immunity.[97] Given the foregoing reasons, Judge Pillard would opt to follow the decision of the Third Circuit Court of Appeals in *OSS Nokalva*.[98]

Regarding the waiver of immunity, *Lutcher* governed until the *Mendaro* decision because the bank thought it appropriate to look at the interrelationship between the functions of an IO to determine its waived liability.[99] In setting an internal versus external decision, the court tried to draw a line taking into consideration what would advance the World Banks's ability to perform its functions.[100] If IOs, or similar organizations, only go to a court when they deny a claim, perhaps a facially clear reading of the charter is a better indication of their long-term goals (i.e., what is best for them) than trying to second guess the IOs themselves and treating their emotional reactions to lawsuits as indicative of their best interest.[101] D.C. Circuit cases "seem to construe

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 708-09.
95. *Id.* at 709.
96. *Id.* at 710 (citing Nash, *supra* note 24).
97. *Id.*
98. *Id.*
99. *Id.* at 711.
100. *Id.*
101. *Id.*

charter-document immunity waivers to allow suits only by commercial parties likely to be repeat players, or by parties with substantial bargaining power," which is hard to fathom as today corporate transactions usually include immunization clauses.[102]

IV. ANALYSIS

The D.C. Circuit Court put forward the argument that the IOIA should be interpreted in light of the context at the time it was written.[103] However, as properly pointed out by the concurrence, such a line of reasoning is illogical, as the canons of statutory interpretation call for dynamic incorporation of statutory references.[104] It simply does not follow that the IOIA should ignore the exceptions to immunity laid out in the FSIA, thus affording IOs more immunity than national governments.[105] IOs were established to allow the global implementation of operations to be free from politics, not free from liability.[106] To be sure, a substantial grant of immunity is necessary, as IOs occasionally operate in politically tense regions and are doing important work; however, when the implementation of the project in question undermines the very development mandate behind the project, a grant of immunity should not be at the ready to fend off those injured.[107]

Even to this point, it would seem that the court incorrectly relies on *Mendaro* when, in fact, the distinction elucidated in *Lutcher* should have prevailed.[108] Indeed, the *Mendaro* court draws an internal versus external decision in denying comments on the employment practices of the International Development Bank (World Bank), while accepting the waiver of immunity in *Lutcher* by noting that external relations must have guarantees or else the World Bank will find it difficult to do business.[109] By ignoring this distinction, the concurrence points out that the D.C. Circuit effectively interprets "external relation" to mean empowered external relation that could actually impede future bank operations.[110] This is doubly evident by the strict reading given to the language from *Mendaro*, allowing waiver of immunity only when it

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102. *Id.* at 712.
103. *Id.*
104. *Id.* at 708-09.
105. *Id.* at 710.
106. Kolb, *supra* note 9.
107. Bradlow, *supra* note 27.
108. *See* Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank, 382 F.2d 454 (1967).
109. Mendaro v. World Bank, 717 F.2d 610, 618 (D.C. Cir. 1983).
110. *Jam*, 860 F.3d at 712.

"benefit[s] the organization over the long term."[111] The argument advanced by the appellants, noting that project level community support is not only required but begs the question of the very mandate behind which the bank operates, fits the *Lutcher* distinction and raises one last item of note.[112]

It is worth pointing out the altered international legal climate in which the IFC operates; the scope of actors with acknowledged international legal personality has changed over the last fifty years.[113] By this, I primarily wish to draw attention to the increased role and capacity of individuals and other non-state actors in the international legal sphere, as it bears on two key points.[114] When only contemplating state actors, such a robust grant of immunity makes sense because (1) the state actors would also be members of the IFC or governments working with the IFC to implement projects within their own borders; and (2) the IOs were created to be teleologically apolitical to the extent that immunity from suits from nation states made sense.[115] However, the increased role of individuals in international law has created new relationships not previously contemplated.[116] Further, for most of these individuals the IO is the only avenue of redress available, as often their own government is complicit in actions alleged through either allowing the IFC to operate in the country or by directly supporting the IFC.[117] "[A] growing discomfort with exempting governments from the rule of law has led to a more restrictive understanding of the proper scope of sovereign immunity," and the same should hold true for IOs.[118]

By arguing that they do not want to create a disincentive to maintain Independent Accountability Mechanisms, the court misses the point; IOs enjoy immunity under international law *only* because they provide alternative access to remedy.[119] In his amicus brief, Professor Daniel Bradlow of Pretoria University, in Pretoria, South Africa, persuasively argues that access to remedy has risen to the status of customary international law.[120] For contractual entities, such as the Member States,

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111. Osseiran v. Int'l Fin. Corp., 552 F.3d 836, 840 (D.C. Cir. 2009) (citing Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1338 (D.C. Cir. 1998) and *Mendaro*, 717 F.2d at 618).

112. *Id.*

113. Kolb, *supra* note 9; KLABBERS, *supra* note 11, at 38.

114. KLABBERS, *supra* note 11, at 38.

115. Herz, *supra* note 16.

116. Bradlow, *supra* note 27, at 7.

117. *Id.* at 10.

118 Herz, *supra* note 16, at 481.

119. Bradlow, *supra* note 27, at 22.

120. *Id.* at 13-14.

employees, business partners, etc., access to remedy is no problem, as they are part of the group making decisions, and there are other internal control mechanisms available to them.[121] However, for noncontractual third parties, such as those directly or indirectly impacted by development projects, proper redress can be variable at best, as IO interaction with non-state actors, such as individual persons, was not really contemplated in the 1940s.[122] In particular, the CAO, according to Bradlow, seems to fail standards of impartiality, independence, and ability to provide meaningful redress.[123] The shield of immunity has evolved to something far more perverse since the inclusion of individuals as international legal subjects, denying justice to those who need it most.[124]

V. CONCLUSION

In an era where environmental and social safeguards are occupying an increasingly important place in the development finance field, the inability of the D.C. Circuit Court to break from precedent represents a step back. Though Judge Pillard called for an en banc hearing, this was denied and the appellants have subsequently appealed the noted case to the Supreme Court.[125] With the new World Bank Group's Environmental and Social Framework published 4 August 2016, the Group's slow introduction of Tier 2 Guidance documents focusing on intersectionality and an increasing number of similar studies being undertaken by various other Multilateral Development Banks (MDBs), the field is trending very strongly in a direction that lends itself to more cautious, socially conscious development.[126] The World Bank has recently stated that by 2019 they will no longer fund upstream natural gas or oil extraction.[127]

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121. *Id.* at 18.

122. *Id.*

123. *Id.* at 23.

124. *Id.* at 24.

125. Budha Ismail Jam v. Int'l Fin. Corp., No. 16-7051, 2017 U.S. App. LEXIS 18598, at *2 (D.C. Cir. Sep. 26, 2017).

126 *See*, *e.g.*, Geeta Rao Gupta & Katherine Sierra, *Working Together to Prevent Sexual Exploitation and Abuse: Recommendations for World Bank Investment Projects* (English) (The World Bank, Working Paper No. 117192, 2017). This paper is one example of the bank's attempt to provide accompanying "tier 2" guidance documents to their revamped Environmental and Social Framework (ESF). *See also* Herz, *supra* note 16, at 486 (stating that "[t]hus, the [World] Bank has become more willing to discuss the human rights implications of its work, and has even suggested in a general way that it may have responsibilities to respect those rights").

127 Larry Elliot, *World Bank to End Financial Support for Oil and Gas Extraction*, GUARDIAN (Dec. 12, 2017), https://www.theguardian.com/business/2017/dec/12/uk-banks-join-multinationals-pledge-come-clean-climate-change-risks-mark-carney.

However, the lack of independence and authority afforded to independent accountability mechanisms within these MDBs suggests that a legal change must accompany the policy change to effectively achieve truly sustainable development.[128] Indeed, a change is necessary to properly restore a view of legitimacy to independent accountability mechanisms as effective avenues to justice and jumpstart development that is socially conscious in practice, not just policy.

Anthony Cooper*

128 GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE (C. Daniel, K. Genovese, M. Van Huijstee & S. Singh eds., 2016).

* © 2018 Anthony Cooper. J.D. candidate 2018, Tulane University Law School; M.A. 2015 Loyola University Chicago; B.A., 2013, Waynesburg University. I would like to thank all the members of the *Tulane University Journal of International and Comparative Law* for their hard work and support, as well as Professor Günther Handl for his comments and suggestions. I would also like to thank my parents, Tony and Elizabeth Cooper, for their continued support and encouragement.