

Case Nos. 20-7092, 20-7097

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUDHA JAM, *et al.*,

Plaintiffs–Appellants,

v.

INTERNATIONAL FINANCE CORPORATION,

Defendant–Appellee.

–and–

MANJALIYA IKBAL, *et al.*,

Plaintiffs–Appellants,

v.

INTERNATIONAL FINANCE CORPORATION,

Defendant–Appellee.

(Consolidated Case)

On Appeal from the United States District Court
for the District of Columbia
No. 15-cv-00612

**BRIEF OF AMICI CURIAE CENTER FOR INTERNATIONAL
ENVIRONMENTAL LAW, ACCOUNTABILITY COUNSEL,
CENTER FOR CONSTITUTIONAL RIGHTS, INTERNATIONAL
ACCOUNTABILITY PROJECT, INCLUSIVE DEVELOPMENT
INTERNATIONAL, NAMATI, WILLIAM EASTERLY, ERICA R.
GOULD, AND JENNIFER M. GREEN IN SUPPORT OF
PLAINTIFFS-APPELLANTS AND REVERSAL**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the amici curiae listed below certify as follows:

A. Parties and Amici.

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Opening Brief of Plaintiffs-Appellants. The amici curiae appearing through the submission of this brief are, in alphabetical order:

Accountability Counsel, Center for Constitutional Rights, Center for International Environmental Law, William Easterly, Erica R. Gould, Jennifer M. Green, Inclusive Development International, International Accountability Project, and Namati.

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, the following amici curiae further state as follows:

Accountability Counsel is a non-profit organization incorporated in the State of California and is not owned by any parent corporation. No publicly held company has a 10% or greater ownership interest in Accountability Counsel.

The Center for Constitutional Rights is a non-profit organization incorporated in the State of New Jersey and is not owned by any parent corporation. No publicly held company has a 10% or greater ownership interest in the Center for Constitutional Rights.

The Center for International Environmental Law is a non-profit organization incorporated in the District of Columbia and is not owned by any parent corporation. No publicly held company has a 10% or greater ownership interest in the Center for International Environmental Law.

Inclusive Development International is a non-profit organization incorporated in the State of North Carolina and is not owned by any parent corporation. No publicly held company has a 10% or greater ownership interest in Inclusive Development International.

International Accountability Project is a non-profit organization incorporated in the State of New York and is not owned by any parent corporation. No publicly held company has a 10% or greater ownership interest in the International Accountability Project.

Namati is a non-profit organization incorporated in the State of Delaware and is not owned by any parent corporation. No publicly held company has a 10% or greater ownership interest in Namati.

B. Rulings Under Review.

References to the rulings at issue appear in the Opening Brief of Plaintiffs-Appellants. Amici curiae are unaware of any other rulings at issue in this appeal.

C. Related Cases.

This case has previously been before this Court and the United States Supreme Court. It was before this Court in *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017) (No. 16-7051). This Court's decision was reversed and remanded by the Supreme Court in *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019) (No. 17-1011), and subsequently vacated and remanded by this Court. *Jam v. Int'l Fin. Corp.*, 760 F. App'x 11 (D.C. Cir. Apr. 5, 2019).

Amici curiae are unaware of any other related cases.

Dated: January 26, 2021

/s/ Henry C. Su

Henry C. Su

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**STATEMENT OF THE IDENTITIES
AND INTERESTS OF AMICI CURIAE¹**

Since 1989, the **Center for International Environmental Law (CIEL)** has used the rule of law to protect the environment, promote human rights, and ensure a just and sustainable society. In fulfilling its mission to protect the environment and communities against the adverse impacts of development CIEL was instrumental in creating the Inspection Panel at the World Bank, as the first accountability mechanism within a development finance institution. In subsequent years CIEL has worked to strengthen safeguard policies and accountability mechanisms globally. CIEL provides assistance and accompaniment of people and communities who seek redress for harms caused by development projects by filing complaints at these mechanisms. Currently, CIEL supports communities from Colombia, Chile, Panama, and Nicaragua in their

¹ Amici curiae certify that no party or party's counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. They further certify that no person, other than themselves and their undersigned counsel, contributed money intended to prepare or submit this brief.

Plaintiffs-Appellants and Defendant-Appellee International Finance Corporation have consented to the filing of this brief.

cases at independent accountability mechanisms, three of which are at the IFC's mechanism, the Compliance Advisor Ombudsman.

CIEL's research and advocacy at international institutions is solidified with collaborations on reports such as GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE.

Accountability Counsel amplifies the voices of communities around the world to protect their human rights and environment. As advocates for people harmed by internationally financed projects, Accountability Counsel employs community driven and policy level strategies to access justice. For the past decade, Accountability Counsel has supported people in over 40 communities around the world in their complaints about the human rights and environmental abuses of international organizations. Among these are four complaints to the IFC's Compliance Advisor Ombudsman.

Accountability Counsel's policy advocacy focuses on enhancing the policy and practice of non-judicial accountability mechanisms, with deep expertise in the CAO, and the IFC response to CAO cases.

Through its research program, Accountability Counsel co-authored the joint report GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN

DEVELOPMENT FINANCE and has documented the 1,300 complaints filed to non-judicial accountability mechanisms over the past 25 years, analyzing them for trends and best practice. Through Accountability Counsel's case support, policy advocacy and research across these mechanisms, the organization has seen the CAO as a leader in delivering fair accountability processes in recent years, with repeated poor responses from the IFC that result in lack of remedy for complainants.

The **Center for Constitutional Rights** (CCR) is a non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Since its founding in 1966 out of the civil rights movement, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources. CCR brought the landmark case that, for the first time in the modern era, recognized claims under the Alien Tort Statute to remedy human rights violations, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), a decision ultimately endorsed by the Supreme Court in *Sosa v. Alvarez-Machain*,

542 U.S. 692 (2004). It brought cases that recognized that the ATS applies to non-state actors, *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert denied*, 518 U.S. 1005 (1996), including to corporations. *See Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *dismissed by stipulation pending reh'g en banc*, 403 F.3d 708 (9th Cir 2005); *Wiwa v. Royal Dutch Petroleum Corp.*, 226 F.3d 88 (2d Cir. 2000); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014). CCR regularly engages with various international human rights institutions and mechanisms, including the United Nations treaty review process, the Inter-American Commission on Human Rights, and various nation-states' universal jurisdiction statutes to advance accountability and right to a remedy for victims of international human rights violations.

For over 15 years, **International Accountability Project** has supported communities adversely impacted by development projects to assert their human and environmental rights and to identify processes with the greatest impact to improve people's ability to shape their own development and provide remedies when rights are violated. International Accountability Project has advocated to create

openings at influential decision-making spaces at international financial institutions, such as the World Bank Group, to advance development principles and projects that prioritize human and environmental rights. Pertinent to the instant matter, we have worked with communities adversely impacted by International Finance Corporation projects through various stages of the project cycle, assisting communities to: obtain critical project information that could impact their lives, improve the design of a project, and mitigate, or wholly avoid, environmental and human rights risks; document and amplify concerns about existing and future project harms; raise awareness of existing avenues for recourse; and provide technical and strategic support in the complaint process before the Compliance Advisor Ombudsman.

Inclusive Development International (IDI) is a human rights organization working to make the international economic system more just and inclusive. We support and build the capacity of local organizations and affected communities to defend their land, environment and human rights in the face of harmful investment and development projects, including through both judicial remedies and

non-judicial grievance mechanisms. Through research, casework and policy advocacy, IDI works to strengthen the human rights regulation and accountability of corporations, financial institutions and development agencies. IDI's policy research and advocacy focuses on improving environmental and human rights due diligence processes of private investors, financiers and multilateral development banks and on advancing the right to effective remedy when harms occur. IDI's research has highlighted widespread and systemic flaws in the IFC's approach to environmental and social due diligence and supervision in its financial sector investments, which make up over half of the institution's total portfolio. IDI also collaborated on the joint report *GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE*. Since 2012, IDI has advised and supported dozens of communities in Asia and Africa in complaints to the CAO against the IFC and its corporate clients.

Namati supports communities in six countries (India, Myanmar, Kenya, Mozambique, Sierra Leone, and the United States) to pursue social and environmental justice. Namati also convenes the

Legal Empowerment Network, a movement of over 2,400 grassroots justice groups from nearly every country.

William Easterly has spent 35 years researching foreign aid and economic development, and he is among the top four most cited academics in that field worldwide. He is a Professor of Economics at New York University and Co-director of the Development Research Institute, which won the 2009 BBVA Frontiers of Knowledge in Development Cooperation Award. He worked for 16 years at the World Bank and has written extensively about its operations. He is the author of more than 70 academic articles, as well as three books: *The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor* (March 2014), *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (2006), which won the FA Hayek Award from the Manhattan Institute, and *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* (2001). Foreign Policy Magazine named him among the Top 100 Global Public Intellectuals in 2008 and 2009. He has written columns and reviews for the *New York Times*, *Wall Street Journal*, *Financial Times*, *New York Review*

of Books, and *Washington Post*, and has served as Co-Editor of the development field's leading academic journal, the *Journal of Development Economics*.

Dr. **Erica R. Gould**, PhD, has substantial professional interest in the issues addressed in this brief, and these issues fall within her area of expertise. Dr. Gould is the director of the International Relations Honors Program and a Lecturer in International Relations and International Policy Studies at Stanford University. She has previously served as an Assistant Professor at the University Virginia and a Visiting Assistant Professor at Johns Hopkins University. For over ten years, she has taught undergraduate and graduate-level courses on international organizations at the University of Virginia, Johns Hopkins University, and Stanford University. Dr. Gould is a political scientist and an expert on international organizations. In particular, she has studied international financial institutions extensively, and conducts research on mechanisms of control of international organizations. Her numerous publications include *MONEY TALKS: THE INTERNATIONAL MONETARY FUND, CONDITIONALITY AND SUPPLEMENTARY FINANCIERS* (2006). In addition to her research

and teaching expertise, Dr. Gould also serves on the Board and Strategy Committee of Accountability Counsel, a San Francisco-based non-profit organization. She submitted an amicus brief in support of the Petitioners in the United States Court of Appeals for the District of Columbia Circuit.

Jennifer M. Green is a Clinical Professor of Law at the University of Minnesota and Director of the Law School's Human Rights Litigation and International Legal Advocacy Clinic. She also teaches a seminar on Business and Human Rights. She has two decades of experience working on questions of accountability and remedies for alleged human rights violators both in the U.S. courts and in international fora such as international criminal tribunals, and the United Nations and Inter-American human rights systems and her scholarship focuses on the right to remedy. She is also on the international steering committee of Amnesty International's Business and Economic Relations Network. She was counsel for amicus curiae Erica Gould in support of Plaintiffs-Appellants in *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017) (No. 16-7051).

SUMMARY OF THE ARGUMENT

The International Finance Corporation (IFC) markets and provides commercial-rate financial products and services to clients on the premise that such products and services will positively influence the environmental and social impacts of their clients' projects.

Allowing judicial scrutiny of negative environmental and social impacts stemming from such projects would not impede or chill IFC's financing activities. On the contrary, it would reinforce the institution's stated mission, advance its avowed development objectives, and uphold a hallmark of its business model. Although this Court previously expressed concern about opening courthouse doors to lawsuits alleging harms associated with IFC-financed projects, such fears are unfounded. Data show that only a small fraction of IFC-financed projects give rise to complaints before the institution's internal accountability mechanism, the Office of Compliance Advisor Ombudsman. Moreover, IFC can always improve its environmental and social compliance and grievance redress systems to prevent lawsuits from emerging in the first place. Indeed,

prompted in part by this litigation, IFC is in the process of doing just that.

As discussed below, applying either an immunity exception or an immunity waiver to the commercial conduct at issue would not jeopardize IFC's mission or its operations. Instead, subjecting IFC to potential legal liability for the social and environmental impacts of the projects it finances would advance its institutional objectives, thereby satisfying the "corresponding benefit" test under *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983).

An institution's intergovernmental structure cannot mask the commercial nature of its conduct, or shield it from the same potential liability to which its private-sector counterparts are subject. The Supreme Court has made clear that IFC does not enjoy absolute immunity under the International Organizations Immunity Act of 1945. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 772 (2019). For this Court to conclude nonetheless that, in practice, IFC's financing operations are insulated from judicial scrutiny would perpetuate an indefensible and unproductive accountability gap. That gap, premised on a fiction about the nature of development finance institutions that

does not accord with the reality of their conduct, only hampers the achievement of their mission and impedes remediation of the sometimes unfortunate and dire consequences that the projects they finance have on peoples' lives and the planet.

ARGUMENT

I. Environmental and Social Considerations Are an Essential Feature of IFC's Commercial Activity in Providing Development Finance

As part of the World Bank Group, the preeminent development finance institution, IFC doesn't just fund projects. It is charged with financing private sector activities that promote economic development and reduce poverty in countries and regions around the world. To ensure that the commercial projects it funds not only do no harm, but also result in a net benefit to the surrounding communities, IFC engages in environmental and social due diligence as part of its approval process. It summarizes this required assessment to its clients in a two-page document entitled "Understanding IFC's Environmental and Social Due Diligence Process." Int'l Fin. Corp., *Understanding IFC's Environmental and Social Due Diligence Process* (undated), <https://www.ifc.org/wps/wcm/connect/aa10e586->

be7e-46b8-91c3-

cc5e98af6f3d/IFC+Process.pdf?MOD=AJPERES&CVID=jUzk.Hj

(copy attached to this brief).

As this document highlights, IFC advertises the benefits of its environmental and social due diligence system to its clients, emphasizing that implementing the IFC Performance Standards (the set of environmental and social policies the IFC has promulgated to govern its own and its clients' activities) will improve project outcomes, and reduce conflict around adverse risks and impacts. *Id.*; *see also* Int'l Fin. Corp., Performance Standards on Environmental and Social Sustainability (Jan. 1, 2012), <https://bit.ly/3caQqHr> (last visited Jan. 26, 2021) (*see also* JA1275–1312 (Apr. 30, 2006 version); Int'l Fin. Corp., Policy on Environmental and Social Sustainability (Jan. 1, 2012), <https://bit.ly/3onQ3M1> (last visited Jan. 26, 2021) (JA1246–63). For any prospective financing relationship, IFC assembles an Environmental and Social Team to evaluate the environmental and social risks and impacts of the project to be financed. *Understanding IFC's Environmental and Social Due Diligence Process supra*. This team generates an Environmental and

Social Review Summary and an Environmental and Social Action Plan, which are reviewed and approved by the client. *Id.*

Furthermore, IFC publicly discloses these due diligence documents on its website to inform local communities affected by the project of its potential adverse risks and impacts, and to solicit their input. *Id.*; *IFC Project Information & Data Portal*, INT'L FIN. CORP.

<https://bit.ly/3ceT4Mk> (last visited Jan. 26, 2021).

When the World Bank Group Board of Directors in Washington, D.C. approves financing for an IFC project, the finalized investment agreement incorporates the terms of the Environmental and Social Action Plan prepared by IFC's due diligence team, as well as any other client commitments relating to the environmental and social aspects of the project. *Understanding IFC's Environmental and Social Due Diligence Process supra*. According to the IFC's stated procedures, as the financed project proceeds, IFC monitors its client's compliance with the environmental and social terms of the investment agreement and discloses its client's performance of these terms to affected local communities. *Id. See also IFC Performance*

Standards on Environmental and Social Sustainability (Jan. 1, 2012), <https://bit.ly/3caQqHr> (see also JA1275–1312 (Apr. 30, 2006 version)).

IFC’s own explanation of its due diligence process thus underscores that environmental and social risks and impacts are assessed whenever IFC provides commercial financing to its private sector clients. IFC’s involvement in projects, directed from the institution’s headquarters in the United States, affects—and is indeed advertised to positively affect—the social and environmental outcomes of the projects it finances. IFC cannot both tout these impacts as part of the services it offers to clients and other stakeholders and contend that being held accountable for failing to deliver the marketed benefits would impede its financing business.

IFC prides itself in making consideration of environmental and social impacts a hallmark of its business. Indeed and relatedly, it dedicates a webpage to its status as a sustainable bond issuer. *IFC: A Sustainable Bond Issuer*, INT’L FIN. CORP., <https://bit.ly/369WHPy> (last visited Jan. 25, 2021). On this page, IFC proudly states that it “holds itself as a bond issuer embedding the highest standards of Environmental, Social and Governance practices.” *Id.* And it

trumpets that in 2020, it received as a bond issuer the highest Environmental, Social, and Governance rating—AAA—from MSCI, Inc. *Id.* According to MSCI, this rating is “designed to measure a company’s resilience to long-term, industry material environmental, social and governance risks.” *ESG Ratings*, MSCI, INC., <https://bit.ly/3ojmfQw> (last visited Jan. 25, 2021). In other words, this rating assesses the degree to which IFC’s financing products are attuned to environmental and social risks and impacts.

On its webpage, IFC goes on to explain that the “overarching goals” of its financial operations, namely ending extreme poverty by 2030 and boosting shared prosperity, are aligned with the Sustainable Development Goals. *IFC: A Sustainable Bond Issuer*, INT’L FIN. CORP., <https://bit.ly/369WHPy> (last visited Jan. 25, 2021). To this end, it markets its financing products as “socially responsible investments.” *Id.*

Given that IFC’s business enjoys strong environmental and social branding, lawsuits alleging environmental and social harms arising from the projects it finances fall well within the ambit of its commercial activity. As reflected in its AAA bond rating from MSCI,

IFC prides itself in being able to assess and address such risks associated with the projects that it finances. If it miscalculates or fails to properly address such risks, and those risks mature into lawsuits, then that is an expected consequence of its business.

IFC sells its social and environmental added value—and reaps substantial financial earnings in so doing. Losses associated with the unprecedented global economic crisis of 2020 notwithstanding, IFC's portfolio size and earnings have steadily increased since its inception and it has recorded operating profits every year since its founding.

INT'L FIN. CORP., IFC INVESTING FOR IMPACT (FY 2019),

<https://bit.ly/2NGGlrt>. It cannot simultaneously place its amelioration of projects' environmental and social impacts at the center of its business model and disclaim its responsibility for those impacts, or contend that judicial scrutiny thereof would impede its financing business. If, as IFC repeatedly emphasizes in its own marketing materials, the services it offers to its clients at commercial rates yield positive environmental and social outcomes, then there is no reason that IFC should not bear responsibility when the projects it finances lead to adverse social and environmental outcomes.

II. Recognizing Liability for IFC's Project Finance and Supervision Benefits IFC by Advancing Its Mission

Accountability is a centerpiece of IFC's financing activities and core to its stated development mission. As IFC succinctly describes on one of its [webpages](#):

At IFC, we work with the private sector to create markets and jobs for people in developing countries who urgently need them. We strive to unlock new, innovative opportunities for the communities in which we work, *but we are also accountable to the people that are affected by the projects we finance. We are accountable to our partners, clients and communities as we aim to achieve our development objectives in an environmentally and socially responsible manner.*

Accountability, INT'L FIN. CORP., <https://bit.ly/2YbXb3g> (last visited Jan. 25, 2021) (emphases added). In other words, IFC recognizes that it—apart from its development partners and clients—is itself accountable to the communities that are affected by the projects it finances, and that its accountability to those communities includes ensuring that the projects it finances do not cause adverse environmental and social impacts.

IFC's CEO, Philippe Le Houérou, reaffirmed this recognition in an April 15, 2019 blog post:

All of us at IFC are accountable to the people benefiting from and affected by projects we finance, as well as to our creditors and borrowers, and to our development partners. We are accountable for monitoring our clients' projects, anticipating the impact on communities and the environment, and doing our best to meet our development objectives in an environmentally and socially responsible manner.

Philippe Le Houérou, *At IFC, accountability is of utmost importance*, IFC BLOG (Apr. 15, 2019), <https://bit.ly/36cMoKO> (emphases added).

He acknowledged that “[t]he projects we finance impact people and the environment, and because development is not a science, sometimes things do not go as expected. We must recognize this reality and do our best to minimize potential negative impacts of development, just as we strive to maximize positive impact.” *Id.* In other words, an organization whose mission involves using private sector growth to bring about positive economic change to a developing country must be just as concerned with any negative ramifications of such growth to the surrounding communities.

Recognizing the necessity of accountability to development effectiveness, which is the institution’s stated mission, IFC’s shareholders saw fit to create the Office of the Compliance Advisor

Ombudsman to serve as an independent accountability mechanism for IFC (as well as its sister World Bank Group entity, the Multilateral Investment Guarantee Agency (MIGA)):

Those impacted must have a place to turn to when outcomes are not as expected. Our clients must put in place effective grievance mechanisms to allow employees, communities, and other stakeholders to voice their concerns. *But our shareholders recognized this might not be enough and created the Office of the Compliance Advisor and Ombudsman [sic], or CAO.*

Id. (emphasis added). The Compliance Advisor Ombudsman thus operates in parallel with whatever grievance procedures an IFC client may have put into place—making clear that IFC recognizes its own obligations to affected communities for adverse environmental and social impacts caused by client projects that it finances. While a client certainly has responsibility if its project harms the welfare of a neighboring community, IFC's shareholders wisely recognized and concluded that it is in the organization's business interest to be accountable to the community as well.

However, as discussed *infra*, and as the Plaintiffs in this case experienced, the Compliance Advisor Ombudsman is not always able to provide effective remedy. The office has no power to compel IFC to

act. The effectiveness of the processes it oversees is contingent on IFC management addressing the complaints of the communities affected and responding to the findings of the Compliance Advisor

Ombudsman. CAITLIN DANIEL, KRISTEN GENOVESE, MARIETTE VAN

HUIJSTEE & SARAH SINGH (EDS.), GLASS HALF FULL? THE STATE OF

ACCOUNTABILITY IN DEVELOPMENT FINANCE 17-18 (Amsterdam:

SOMO, Jan. 2016), <https://bit.ly/2vnPZ5A> (noting that Independent

Accountability Mechanisms “make up only half of the accountability

system.... The [International Financial Institution’s] management

also plays a critical role in the system by, inter alia, responding to the

[mechanism’s] findings, consulting with complainants ... on the

development of an action plan to address instances of non-compliance,

and applying lessons learned from cases to future projects. The

system only functions if both halves of the [accountability framework]

work and work well.”). Exposure to potential liability can only help

guarantee the institutional accountability that IFC’s shareholders

intended in creating the Compliance Advisor Ombudsman office, and

ensure delivery of effective remedy when the institution's own processes fall short.²

To summarize, IFC's long-term interests and mission are well served by deterring environmental and social abuses through its independent accountability mechanism—and, if necessary, judicial relief—so that the organization operates in a legitimate, law-abiding, and responsible way. *See* INT'L FIN. CORP., IFC THE FIRST SIX DECADES 91 (2d ed. Nov. 2016) (stressing that “the lessons from [the Pangué Ralco Dam Project in Chile] and other projects proved invaluable, leading to improved environmental and social guidelines that became standard practice not just for IFC, but for the global commercial banking industry as a whole”), <https://bit.ly/2OvLIpj>;

² Allowing for judicial scrutiny of the impacts of IFC's financing operations is also necessary to uphold the obligation of IFC's Member States to guarantee the right to remedy, as enshrined in international law. *See, e.g., Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No.17, at 29 (Order of Sept. 13) (“[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

INT'L FIN. CORP., THE IFC WAY DEFINING OUR CULTURE BUILDING OUR BRAND 4 (2009) (reciting as a corporate value, *We do what we say we will do, and we hold ourselves accountable*), <https://bit.ly/2LGqtU6>.

Ironically, however, in balking at judicial scrutiny of its conduct, IFC betrays a lack of confidence regarding the outcomes of the activities it finances, as it evidently fears being sued by the very people whom it is supposed to benefit. The prospect of legal liability and judicial remedy for the adverse consequences of the projects it finances reinforces IFC's accountability, which the institution itself has recognized is central to its mission.

Political science literature confirms the benefits to international organizations of effective third-party constraints on their institutional conduct, such as being subject to suit. *See, e.g.*, Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005); Alexandry Grigorescu, *The Spread of Bureaucratic Oversight Mechanisms Across Intergovernmental Organizations*, 54 INT'L STUDIES Q. 871, 872 (2010); Ngaire Woods, *Holding Intergovernmental Institutions to Account*, 17 ETHICS & INT'L AFFAIRS 69, 69–70 (2003). Moreover, there

is no basis for concerns that lifting or waiving the IFC's immunity for business conduct like that at issue here would have adverse effects on the institution's financing operations. The strength of the institutional incentives to lend and the deal-making culture at the IFC show fears of any chilling effect are likely overblown. *See, e.g.*, WILLI WAPENHANS ET AL., REPORT OF THE PORTFOLIO MANAGEMENT TASK FORCE—EFFECTIVE IMPLEMENTATION: KEY TO DEVELOPMENT IMPACT 33–35 (1992); MAC DARROW, BETWEEN LIGHT AND SHADOW, THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 196 (2003) (describing the “systemic nature of the ‘approval culture’ problem” at the World Bank and the drive to “keep money moving through the pipeline or pushing money out the door, reflecting a pervasive emphasis on loan approval” (internal citations and quotation marks omitted)); GALIT SARFADY, VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK 87 (2012) (discussing the pressure to lend); Roland Vaubel, *Bureaucracy at the IMF and the World Bank: A Comparison of the Evidence*, 19 THE WORLD ECONOMY 195, 205 (1996).

In contrast, shielding IFC's development finance activities from judicial scrutiny and legal liability would undermine both the institution's own credibility, especially with the communities it intends to benefit, and the notion that sustainable development benefits from application of the rule of law. *Justice and Development*, THE WORLD BANK, <https://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety> (last visited Jan. 26, 2021).

III. Exposure to Liability for Project Finance Activity Will Not Flood IFC with Lawsuits But Instead Will Fuel Institutional Improvements

Both this Court and the District Court have previously noted concerns that holding IFC liable for project finance activity will trigger a floodgate of lawsuits. *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 708 (DC. Cir. 2017) ("Should appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the subject of a suit in Washington. Appellee's suggestion that the floodgates would be open does not seem an exaggeration."), *rev'd and remanded*, 130 S. Ct. 759 (2019); *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 2d 104, 111 (D.D.C. 2016) ("Since this type of suit is aimed at IFC's

internal decisionmaking process, the Court has little reason to doubt IFC's assessment of its concerns [about a floodgate of lawsuits].”), *aff'd*, 860 F.3d 703 (D.C. Cir. 2017), *rev'd and remanded*, 130 S. Ct. 759 (2019). There is no empirical basis for this concern.

Since its establishment 20 years ago, the Compliance Advisor Ombudsman registry lists only 199 complaints relating to 116 distinct projects. Compliance Advisor Ombudsman Cases, COMPLIANCE ADVISOR OMBUDSMAN, <https://bit.ly/2vp3RfT> (last visited January 25, 2021). According to Dr. Erica Gould, the number of projects for which complaints were registered with the Compliance Advisor Ombudsman (155 in FY2001–15) is but a small fraction (less than 3%) of the total projects that the IFC financed during that same time period (5702). *See* Br. Amicus Curiae Dr. Erica R. Gould at 21–24, *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017). Even counting complaints filed but not deemed eligible, which are not reflected in the Compliance Advisor Ombudsman's data, the number of formal grievances is far short of a flood. Accountability Console, <https://bit.ly/3ohmPhH> (last visited Jan. 26, 2021) (last visited Jan. 26, 2021) (indicating that the number of cases filed is 365). Moreover,

in recent years, private banks have increasingly engaged in development finance activities despite their lack of immunity from suit. *See, e.g., Development Finance Institution, JP MORGAN*, <https://bit.ly/3ppGDkk> (last visited January 26, 2021) (JA1461–79, JA1483–84). Those banks’ exposure to potential legal liability has neither resulted in a flood of litigation nor impeded their work.

As noted in Sections I and II above, IFC has recognized its own accountability to affected communities for adverse environmental and social impacts stemming from projects that it finances. It anticipates that affected communities, as key stakeholders in these projects, may have complaints and grievances that need to be heard and resolved. For this very reason, IFC has relied on the Compliance Advisor Ombudsman to function as an independent accountability mechanism. It conducts its lending business with full knowledge that the projects it finances could have negative risks and impacts. *See Le Houérou, At IFC, accountability is of utmost importance, supra.*

Independent accountability mechanisms like the Compliance Advisor Ombudsman, as currently constituted, may lack the power to hold IFC accountable and grant complainants an effective remedy.

See Benjamin M. Saper, *The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective*, 44 N.Y.U. INT'L L. & POL. 1279, 1325 (2012)

("The procedural measures [within the Compliance Advisor Ombudsman] alone, however, without some 'hard' force, are insufficient to allow project-affected people to hold the IFC/MIGA accountable[.]"); see also Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 TEMPLE INT'L & COMP. L.J. 45, 67 (2017)

("[I]t is not assured that the [World Bank Group's accountability mechanisms] can provide the complainants with a meaningful remedy because they only have investigatory and/or advisory powers, and their findings and recommendations are nonbinding."); Carson Young, Note, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889, 907 (2017) (noting that accountability mechanisms fail to produce enforceable judgments and therefore fail to guarantee any remedial or corrective measures). Complainants

therefore need to be able to resort to judicial relief if a satisfactory resolution cannot be obtained through the independent accountability mechanisms' process.

Even if the concern about a raft of cases were warranted – and it is not – the IFC could staunch any flood before it happens. If the IFC wants to avoid complaints ending up in the courts, the way to do that is not to erect legal barriers to reaching the courts, but to strengthen the IFC's own environmental and social due diligence and accountability system.

The prospect of lawsuits by aggrieved communities and individuals will have the salutary effect of motivating IFC to work harder to achieve out-of-court resolutions. The IFC has various options at its disposal to investigate, resolve grievances, and provide remedy without litigation, including by strengthening the power of the Compliance Advisor Ombudsman and improving the IFC's response to its findings. Indeed, the ruling from the Supreme Court, *Jam v. Int'l Fin. Corp.*, 130 S. Ct. 759 (2019), has already spurred some such actions by IFC.

As Mr. Le Houérou notes in his blog post:

Recently, in the context of IFC's strategy to engage in more challenging markets and litigation questioning the extent of our accountability, our board has decided to review our environmental and social accountability framework, including the role and effectiveness of CAO.

Le Houérou, *At IFC, accountability is of utmost importance, supra.*

Specifically, in June 2019 IFC's board (and MIGA's board) jointly requested an external review of their organizations' environmental and social accountability, including the role of the IFC itself in the accountability process as well as the role and effectiveness of the Compliance Advisor Ombudsman. Brief, The World Bank, Review Team Conducting the External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness (Oct. 8, 2019), <https://bit.ly/3qPp2CF>. The external review team completed and submitted its final report in June 2020, which awaits further consideration and action by IFC's and MIGA's boards. Brief, The World Bank, External Review of IFC/ MIGA Environmental & Social (E&S) Accountability, including CAO's Role and Effectiveness (Aug. 12, 2020), <https://bit.ly/3a4rIpf>.

If the IFC were willing to address promptly and proactively the instances of noncompliance identified by its independent accountability mechanism, then legal action may be unnecessary. As a result of the *Jam* litigation, IFC has recognized that it is better to deal with complaints and concerns from affected communities proactively and early, without necessarily waiting for findings from the Compliance Advisor Ombudsman:

IFC has adopted a systematic approach of engaging when we first become aware of complaints or concerns. Early-stage prevention and proactive problem-solving are always better. In parallel, IFC's accountability and oversight mechanisms continue to address the risks associated with the complexity of our operations, including working in challenging, fragile, and extremely poor environments.

Accountability, INT'L FIN. CORP., *supra*. IFC's CEO confirmed this approach in his blog post:

In particular, we need to be more proactive in solving issues when we become aware of them and quicker at identifying mistakes and course correcting.

Going forward, when we become aware of complaints or concerns, we will look into them more systematically. This does not preclude the CAO process, but early-stage prevention and proactive problem solving are always better.

Le Hou  rou, *At IFC, accountability is of utmost importance, supra*.

Such initiatives taken by IFC, if successful, have a positive potential of forestalling future lawsuits like this one and at the same time furthering IFC's core mission to advance the economic interests of the communities that its financed projects are meant to serve.

Recognizing that IFC can be sued in the United States for adverse environmental and social harms caused by overseas projects that it decided to finance appropriately incentivizes IFC to take a hard look at the effectiveness of its environmental and social due diligence and complaint resolution processes. No one, certainly not the Plaintiffs in this case nor similar affected communities and individuals, wants to resort to filing a lawsuit against IFC in the United States if a satisfactory out-of-court resolution can be reached with IFC and the client responsible for the project.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the Court should reverse the judgment of the District Court.

Dated: January 26, 2021

Respectfully submitted,

/s/ Henry C. Su

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 4,144 words, excluding the parts of the brief exempted by D.C. Cir. R. 29-3.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared with Microsoft Word 2016, using a proportionally spaced, serif typeface (Century Schoolbook) in 14-point size, with boldface and italics reserved for emphasis (e.g., headings) or distinction (e.g., case names).

Dated: January 26, 2021

/s/ Henry C. Su

Henry C. Su

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2021, I electronically filed a true and correct copy of the foregoing document with the Clerk of this Court using the appellate CM/ECF system, which in turn effectuates service by sending a notice of electronic filing to all counsel participating in this appeal who are registered CM/ECF users.

Dated: January 26, 2021

/s/ Henry C. Su

Henry C. Su

Counsel for Amici Curiae

Understanding IFC's Environmental and Social Due Diligence Process



IFC and client agree to work together



Review and Agree on Next Steps

The client receives copies of:

- IFC's Performance Standards,
- Relevant World Bank Group Environmental, Health and Safety (EHS) Guidelines, and
- Other supporting documents.

The IFC Environmental and Social (E&S) team:

- Asks the client to provide key information regarding assets and management of E&S risks and impacts.
- Assesses the project against the Performance Standards and EHS Guidelines.
- May meet with company, government, and local stakeholders to discuss E&S aspects of the project.
- Generates an E&S Review Summary (ESRS) and an E&S Action Plan (ESAP). The ESRS and ESAP are reviewed and approved by the client.



Publicly disclose the project and consult with local community

IFC discloses its ESRS along with relevant sponsor E&S documentation on the IFC website. The client discloses project E&S assessment information locally. Projects will engage and consult with Affected Communities to ensure their awareness of the project, and provide for an ongoing constructive relationship.

For projects with potential significant adverse impacts on Affected Communities and projects involving Indigenous Peoples, IFC will make a determination of the level of community support for the project.



Finalize the investment agreement

Once the World Bank Group Board of Directors approves the project:

- The investment agreement is mutually agreed and finalized.
- The final agreement reflects the terms of the ESAP plus any other E&S commitments.
- Funds are disbursed once the client meets disbursement conditions.



Ongoing monitoring and disclosure

Monitoring occurs on two levels:

- Site visits from IFC staff.
- Submission of the client's Annual Monitoring Report on progress in meeting the E&S terms of the investment agreement.

Engagement between the client and Affected Communities should be ongoing. IFC will disclose the client's progress against the ESAP.

During monitoring, IFC and the client may identify opportunity for project enhancement through IFC Advisory Services.

IFC's Compliance Advisor/Ombudsman (CAO) may also provide additional oversight. The CAO is an independent office that impartially responds to E&S concerns of Affected Communities, and aims to enhance IFC accountability and outcomes.



IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY

Performance Standard 1:

ASSESSMENT AND MANAGEMENT OF ENVIRONMENTAL AND SOCIAL RISKS AND IMPACTS

Underscores the importance of identifying E&S risks and impacts, and managing E&S performance throughout the life of a project.

Performance Standard 2:

LABOR AND WORKING CONDITIONS

Recognizes that the pursuit of economic growth through employment creation and income generation should be balanced with protection of basic rights for workers.

Performance Standard 3:

RESOURCE EFFICIENCY AND POLLUTION PREVENTION

Recognizes that increased industrial activity and urbanization often generate higher levels of air, water and land pollution, and that there are efficiency opportunities.

Performance Standard 4:

COMMUNITY HEALTH, SAFETY AND SECURITY

Recognizes that projects can bring benefits to communities, but can also increase potential exposure to risks and impacts from incidents, structural failures, and hazardous materials.

Performance Standard 5:

LAND ACQUISITION AND INVOLUNTARY RESETTLEMENT

Applies to physical or economic displacement resulting from land transactions such as expropriation or negotiated settlements.

Performance Standard 6:

BIODIVERSITY CONSERVATION AND SUSTAINABLE MANAGEMENT OF LIVING NATURAL RESOURCES

Promotes the protection of biodiversity and the sustainable management and use of natural resources.

Performance Standard 7:

INDIGENOUS PEOPLES

Aims to ensure that the development process fosters full respect for Indigenous Peoples.

Performance Standard 8:

CULTURAL HERITAGE

Aims to protect cultural heritage from adverse impacts of project activities and support its preservation.

WHAT ARE THE BENEFITS OF THE PERFORMANCE STANDARDS

GUARD AGAINST UNFORESEEN RISKS AND IMPACTS

Implementing the Performance Standards helps companies identify and guard against interruptions in project execution, legal claims, brand protection, and accessing international markets.

IMPROVE FINANCIAL AND OPERATIONAL PERFORMANCE

IFC believes that meeting the Performance Standards helps clients improve their bottom line. Implementation of the Standards can help optimize the management of inputs such as water and energy, and minimize emissions, effluents, and waste, leading to a more efficient and cost-effective operation.

SOCIAL LICENSE TO OPERATE

In addition, the Standards help clients find ways to maximize local development benefits and encourage the practice of good corporate citizenship. This often results in greater acceptance of the project by local communities and governments, allowing companies to acquire a social license to operate. Enhanced brand value and reputation may also be attractive to new investors or financiers.

GAIN AN INTERNATIONAL STAMP OF APPROVAL

The "Equator Principles," which have been adopted by more than 70 of the world's leading investment banks in developed and developing countries, are based on IFC's Performance Standards. These principles are estimated to cover nearly 90% of project financing in emerging markets.