ORAL ARGUMENT NOT YET SCHEDULED

No. 16-7051

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Budha Ismail Jam, Kashubhai Abhrambhai Manjalia,
Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, and
Machimar Adhikar Sangharash Sangathan (MASS),
Plaintiffs-Appellants,
v.
International Finance Corporation, Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:15-cv-00612-JDB
The Honorable John D. Bates

BRIEF OF AMICUS CURIAE DR. ERICA R. GOULD IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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August 16, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amicus curiae certifies as follows:

(A) Parties and Amici: All parties and intervenors appearing in this Court are listed in the Brief of Plaintiffs-Appellants. There were no amici before the district court. Amicus is aware of one other amicus curiae seeking leave to file a brief before this Court: Professor Daniel Bradlow of American University and the University of Pretoria.

(B) Rulings Under Review: References to the rulings at issue appear in the Brief of Plaintiffs-Appellants.

(C) Related Cases: Amicus is unaware of any related cases.

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* Authorities upon which amicus chiefly relies are marked with an asterisk.

GLOSSARY

AOB	Appellants' Opening Brief
CAO	Compliance Advisor Ombudsman
IBRD	International Bank for Reconstruction and Development
IDA	International Development Association
IFC	International Finance Corporation
MIGA	Multilateral Investment Guarantee Agency
Performance Standards	IFC's Performance Standards on Environmental and Social Sustainability
TOR	Terms of Reference

STATEMENTS PURSUANT TO RULE 29

Plaintiffs-Appellants have consented to the filing of this brief. Defendant-Appellee has indicated that it will oppose the filing of this separate brief unless the combined length of all amicus curiae briefs does not exceed 7000 words. Accordingly, pursuant to Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29(b), the undersigned counsel for Dr. Erica R. Gould have submitted a Motion for Leave to File a Brief Amicus Curiae concurrently with this brief.

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for amicus curiae certify that a separate brief is necessary because this is the sole amicus brief filed on the subjects addressed herein. The one other amicus brief of which Dr. Gould is aware concerns international law and is beyond the scope of her expertise. It is therefore not practicable for amici to join in a single brief.

No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or her counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS CURIAE

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.

STATEMENT OF THE ISSUES ADDRESSED BY AMICUS CURIAE

Amicus concurs with Plaintiffs-Appellants that the district court erroneously discounted the benefits that would accrue to the International Finance Corporation (IFC) from waiving immunity in this case. *See* Appellants' Opening Br. (AOB) at 43–57. Drawing on social science literature and empirical data concerning IFC operations, amicus identifies the scholarly support for that institutional benefit argument, but then focuses the bulk of her brief on a related error in the district court's reasoning: its reliance on IFC's unsubstantiated arguments regarding the

costs that would ensue from waiving immunity in the instant case. *See* D. Ct. Op. at 12. Specifically, amicus addresses two issues relevant to analyzing the cost side of the ledger under the "corresponding benefit" test for waiver of an international organization's immunity, set forth in *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), and elaborated in *Atkinson v. Inter-Am. Dev't Bank*, 156 F.3d 1335, 1338 (D.C. Cir. 1998), *Osseiran v. Int'l Finance Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009), and *Vila v. Inter-Am. Inv. Corp.*, 570 F. 3d 274, 278 (D.C. Cir. 2009). First, amicus considers whether there is any scholarship supporting IFC's assertion that waiving immunity here would "produce a considerably chilling effect on IFC's capacity and willingness to lend money in developing countries." D. Ct. Op. at 10 (quoting Def's Reply Br. at 9–10). Second, amicus considers whether there is any support for IFC's argument that waiving immunity in this case would "open a floodgate to lawsuits by allegedly aggrieved complainants from all over the world." *Id*.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Brief of Plaintiffs-Appellants.

SUMMARY OF THE ARGUMENT

Social science scholarship documents the benefit that international organizations derive from third-party enforcement of credible constraints on their operations. Accountability mechanisms with third-party enforcers cause international organizations to adhere more closely to their mandates and act with greater efficacy and legitimacy. By binding themselves to rules subject to external checks, international organizations secure the trust of parties whose endorsement or participation is necessary to their operations. This literature supports Plaintiffs-Appellants' argument regarding the benefit that would accrue to IFC from being subject to legal liability in cases such as this one. *See infra* pp. 16–19; AOB at 43–57. Applying the waiver of immunity in Article VI § 3 of IFC's Articles of Agreement to the instant suit would further the organization's own objectives, by strengthening enforcement of IFC's stated commitments and member state directives to ensure that its projects are socially and environmentally sustainable and do no harm to the very populations in whose name they are undertaken. *See infra* pp.16–19; AOB at 48, 52–53.

IFC has not demonstrated that the costs of applying a waiver here outweigh this long-term benefit to the institution. Before the district court, IFC argued that "waiver would 'produce a considerable chilling effect on IFC's capacity and willingness to lend money in developing countries,' by opening 'a floodgate of

lawsuits by allegedly aggrieved complainants from all over the world.'" D. Ct. Op. at 10 (citing Def's Reply Br. at 9–10). But IFC provided no evidence, whether from its own experience or that of sister institutions, to show why allowing Plaintiffs-Appellants to pursue their claims in court would impose "devastating costs," Def's Reply. Br. at 9. The district court declined to analyze the bases for IFC's asserted concerns about the effect of allowing this suit to proceed, simply crediting IFC's contentions without citing any data or scholarship on the purported costs of waiver. D. Ct. Op. at 10, 12.

IFC's cost contentions do not withstand scrutiny; they are belied by both the operative incentives for institutional decision-making and data regarding IFC operations and CAO complaints to date. First, IFC has failed to show why applying a waiver here would chill its financing operations, given the strong institutional incentives and chartered mandate to lend, and in view of the institution's robust financial health.[1] The scholarship on decision-making within international organizations suggests that the possibility of future litigation in a handful of cases is unlikely to have any significant impact on IFC's financing of projects that fall within its mission and adhere to its mandatory policies. The institution has raised similar fears of chill in the past when faced with new forms of accountability for the environmental and social impacts of its operations, but these

[1] As of June 2015, IFC's total disbursed investment portfolio was over $36 billion. *See* IFC, *IFC Financials 2015*, at 7 (2015).

warnings have been shown to be false alarms. Far from curtailed, IFC's investments have grown steadily, and its profitability increased significantly, particularly since 2000. *See* IFC, *Investing for Impact* 6, 19 (2016).

Second, there is no evidence that a flood of lawsuits lies beyond the proverbial gate. Instead, figures published by IFC and CAO suggest that cases such as this one, involving identified violations of IFC's own social and environmental policies and a lack of remedial action by IFC, are small in number and concern a minute portion of the institution's multi-billion dollar investment portfolio.

Because the institutional incentives to lend and IFC's chartered mandate to finance projects in developing countries would overpower any chill imposed by potential liability for the types of claims at issue here, and because data show no impending flood of cases, IFC's unsupported arguments about costs do not justify denial of the waiver of immunity.

ARGUMENT

I. Political science scholarship demonstrates the benefit to institutions like IFC of third party enforcement of constraints on their conduct.

Studies in political science document the benefits of having third parties enforce constraints on international organizations. Scholars describe two models of accountability based on different assumptions regarding "who is entitled to hold

the powerful [international organization] accountable" and their reasons for needing to do so. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 Am. Pol. Sci. Rev. 29, 30 (2005). According to the first "delegation model," states that delegate authority to the international organization need enforceable accountability mechanisms to prevent and sanction "unauthorized or illegitimate exercises of power." *Id.* International organizations like the constituent branches of the World Bank Group have been able to achieve a degree of independence from their member states due to the technical nature of their work, the difficulty for member states of monitoring all international organizational activity *ex ante*, the expert nature of their authority, and the length of the delegation chains. *See* Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 Int'l Org. 241, 247–49 (2003); Michael Barnett & Martha Finnemore, *Rules for the World: International Organizations in Global Politics* 3–11, 20–34 (2004); Michael Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 Int'l Org. 699, 704–710 (1999). In response, member states have devised various mechanisms to constrain international organizational activity so that it better reflects their directives. *See, e.g.*, Nielson & Tierney, at 251–52, 266; *Delegation and Agency in International Organizations* 26–31 (Darren G. Hawkins et al. eds., 2006); Grant &

Keohane, at 36; Alexandry Grigorescu, *The Spread of Bureaucratic Oversight Mechanisms Across Intergovernmental Organizations*, 54 Int'l Studies Q. 871, 873–75 (2010); Jennifer Rubenstein, *Accountability in an Unequal World*, 69 J. of Pol. 616, 624 (2007).

Independent accountability offices, like IFC's Compliance Advisor Ombudsman (CAO), represent one such type of constraint mechanism. Those mechanisms "always operate after the fact: exposing actions to view, judging and sanctioning them;" hence their ability to deter or prevent violations depends on the credible threat of sanctions. Grant & Keohane, at 30. Given that the CAO "is not a court, has 'no authority with respect to judicial processes,' and creates no 'legal enforcement mechanism," D. Ct. Op. at 4 (citing *CAO Operational Guidelines* 4 (March 2013)), it requires third party enforcement to function as an effective constraint.

A second "participatory model" of accountability enables those who, like Plaintiffs-Appellants, are harmed by an international organization's activities to hold the institution accountable. If loans to private enterprises cause environmental and social harm, then IFC as a lender promoting sustainable private sector investment risks losing both its efficacy and its legitimacy. This legitimacy is an important factor in the continued success of the organization. In this context, scholars have observed that bureaucratic oversight and accountability mechanisms

adopted by international organizations "help improve perceptions of [inter-governmental organizations] as effective and legitimate institutions at times when such perceptions are badly needed." Grigorescu, at 872 ; *see also* Ngaire Woods, *Holding Intergovernmental Institutions to Account*, 17 Ethics & Int'l Affairs 69, 69–70 (2003).

Accordingly, waiving IFC's immunity here would produce institutional benefits under both the delegation and participatory accountability models: the credible threat of legal sanctions will help prevent future violations, constrain IFC to its state-mandated activity, and boost its legitimacy with external parties. In sum, allowing Plaintiffs-Appellants to pursue their claims in court would reinforce IFC's own objectives in establishing the CAO—namely, to ensure that its operations abide by member state preferences and objectives embodied in the Performance Standards on Environmental and Social Sustainability. *See* Compliance Advisor Ombudsman, *Office of the Compliance Advisor/Ombudsman (CAO) Terms of Reference* (n.d.); *see also* Alnoor Ebrahim & Steven Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society* 10 (2007); Grant & Keohane, at 30.

II. The idea that waiver of immunity would have a chilling effect on IFC ignores known institutional factors.

Neither the district court nor IFC specified what kinds of investment activities would be deterred if immunity were waived in this case. The threatened "chill" could mean that IFC would *reduce* its overall lending or it could mean that the institution would *shift* its financing away from the type of investments it is currently engaged in (support for private sector projects that would not otherwise be able to receive financing in less-developed countries) to other projects. The former is improbable, given the strength of the institutional incentives to lend. The latter is also improbable, given IFC's clear and narrow mandate—to finance private sector projects in less-developed countries that would not otherwise obtain financing. IFC, *Articles of Agreement (as amended through June 27, 2012)* art. I(i) (2012). IFC is not able to shift to "lower risk" commercial-grade projects, as a private bank might. If the waiver of immunity makes the institution reluctant to engage in environmentally and socially harmful projects that would not conform to IFC's own Board-approved Performance Standards, then such a "chill" is not in fact a cost to the institution at all, but an appropriate institutional constraint that benefits IFC, as discussed above.

A. The literature on institutional incentives and bureaucratic culture undercuts IFC's arguments.

The role of IFC is to provide and mobilize capital for private sector investments in developing countries. IFC, *Articles of Agreement*, arts. I, III § 3(i). Since its establishment, IFC, like its sister development finance institutions in the World Bank Group,[2] has faced great fluctuations in the political and economic riskiness of its lending. Nevertheless, IFC has continued lending and expanding its portfolio, *see* IFC, *Investing for Impact*, at 17, 29, because it is the institution's mandate, and in its bureaucratic interest, to do so, *see* Roland Vaubel, *A public choice approach to international organization*, 51 Public Choice, no. 1, 1986, at 52; *see also* Roland Vaubel, *Bureaucracy at the IMF and the World Bank: A Comparison of the Evidence*, 19 The World Economy 195, 209 (1996).

The academic literature on international organizations in general and the World Bank Group in particular reflects a consensus that the World Bank Group as an institution, its staff and its culture, is motivated to finance projects. The "pressure to lend" at the World Bank Group has been well documented. *See, e.g.*,

[2] The World Bank Group is comprised of five institutions, four of which provide development financing. In order of establishment, those institutions are: the International Bank for Reconstruction and Development (IBRD); IFC; the International Development Association (IDA); and the Multilateral Investment Guarantee Agency (MIGA). The fifth World Bank Group entity, the International Centre for the Settlement of Investment Disputes (ICSID), provides arbitration and conciliation services for disputes between member states and private investors. *About the World Bank*, World Bank (last visited Aug. 15, 2016), http://www.worldbank.org/en/about.

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); Vaubel, *Bureaucracy at the IMF*, at 205.

These institutional pressures toward the disbursement of resources at the World Bank Group and other international institutions are supported by two competing logics: one grounded in economic/ rationalist theory and a second rooted in sociological institutionalism. The former suggests that staff of international organizations act based on cost-benefit analyses to maximize their pay or job security. The latter suggests instead that staff have internalized the organizational mission and goals.

Under the economic/rationalist principal-agent theory, the incentives within the institution encourage staff members to provide loans: staff will continue to make loans to ensure their own financial security and career advancement. *See*,

e.g., Vaubel, *A public choice*, at 39, 52; *see generally* Vaubel, *Bureaucracy*, at 195–210; Terry M. Moe, *Politics and the Theory of Organization*, 7 J. of L., Econ. & Org. 106 (1991); Nielson & Tierney; *Delegation and Agency in International Organizations* (Darren G. Hawkins et al. eds., 2006). If IFC voluntarily reduced its loan portfolio, it would also need to reduce its staffing. *Cf.* Anthony Faiola, *IMF to Offer Buyouts to About 500 Employees*, Washington Post (April 30, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/29/AR2008042902604.html (reporting that the IMF was forced to cut its staff by about 13% due to a lack of demand for its loan programs). To preserve their own jobs, however, staff members will not be incented to reduce lending. Employees are viewed as more successful when they have a larger portfolio of loans; job security and career advancement are furthered when lending continues apace. *See* Sarfady, at 80. The World Bank's incentive system has been summarized as a culture of "getting a project to the board [of directors]." *Id.* at 79. And because it can be years before projects yield results, promotions are typically tied to lending targets rather than project performance or long-term outcomes. *Id.* at 79–81.

Some observers suggest that this "loan-approval culture" is "even more prevalent in the IFC than in the other parts of the Bank," due to IFC's "deal-making culture rooted in the private sector, where developmental and

environmental impacts are secondary priorities." Bruce Rich, *Foreclosing the Future: The World Bank and the Politics of Environmental Destruction* 56 (2013). According to this logic, the remote possibility of litigation against the institution is unlikely to outweigh the immediate pressures that IFC managers face to get deals done.

A second logic, grounded in sociological institutionalism, also refutes the notion that external factors such as potential legal liability will significantly influence IFC's financing decisions. Research shows that international organizations have very strong bureaucratic cultures that motivate staff activity. *See generally* Stephen Nelson & Catherine Weaver, *The Cultures of International Organizations*, *in* The Oxford Handbook of International Organizations (Jacob Cogan et al. eds., 2014); Catherine Weaver, *Hypocrisy Trap: The World Bank and the Poverty of Reform* (2008); Michael N. Barnett & Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (2004); Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 Int'l Org. (no. 4), 699–732 (1999). Under this theory, IFC's organizational culture will motivate staff to continue making loans to private enterprises in developing countries in order to help alleviate global poverty. The outside and (as will be shown below) small chance of a lawsuit will not deter

them from continuing their mission to assist private enterprises and ameliorate low growth rates and poverty around the world.

B. Past warnings about a chilling effect have proven false.

IFC's warning that waiver of immunity will unleash a chilling effect on its lending operations rings hollow in light of the fact that similar fears, though oft-repeated by World Bank Group management, have not materialized. Alarms have been sounded in the past about the drag that the institutions' social and environmental policies and internal accountability mechanisms would place on the Bank Group's business. The Inspection Panel, the corollary of the CAO at the World Bank, serves as an accountability mechanism for loans from the IBRD and IDA. *See The Inspection Panel: About Us*, World Bank (last visited Aug. 16, 2016), http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx. When the Panel issued a report in 2000 finding a particular Bank project in violation of the institution's social safeguard policies, the Bank's president remarked publicly that because of "so many rules and safeguards" it was "becoming very expensive for some borrowers to use us." Darrow, at 198. Indeed, "since the early 2000s, many Bank officials ha[ve]argued that environmental and social safeguards were hobbling the Bank's lending." Rich, at 132.

IFC staff members have likewise expressed concern in the past that IFC was losing business due to its approach to environmental and social issues. *See*, *e.g.*,

The World Bank and Governance: A Decade of Reform and Reaction 81 (Diane L. Stone & Christopher Wright eds., 2006). Precisely because of the "well-recognized internal incentives to lend money," discussed above, Bank Group staff "frequently view environmental and social concerns as impediments to their development role." David B. Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 Chi. J. Int'l L. 437, 461 & n.104 (2008) (citing Wapenhans, at 33–35); *see also* World Bank, *Making Sustainable Commitments – An Environment Strategy for the World Bank* (2001), at 22 (discussing staff concerns about "the chilling effect safeguard policies could have on complex development projects, particularly in sensitive sectors and areas"). In a note to the Bank's Board of Directors, managers described the safeguards as a "bottleneck" to lending. Rich, at 192.

But there is no indication that the financing activities of the World Bank Group, generally, or IFC's lending, in particular, have been curtailed as a result of increased social and environmental protections or accountability for the impacts of its operations. To the contrary, IFC's strong financial performance provides little reason to believe the institution would be vulnerable to such pressure now. To the extent that waiver of immunity would raise the prospect of legal liability for the same types of conduct already regulated by IFC's Performance Standards and

overseen by the CAO, IFC has not shown why this would amount to an additional cost or burden.

Moreover, there is no indication that other development finance institutions exposed to potential legal liability have experienced any sort of chilling effect. For example, the European Investment Bank (EIB), the European Union's principal financing institution and "the largest multilateral borrower and lender by volume," *see About*, European Investment Bank (last visited Aug. 15, 2016), http://www.eib.org/about/index.htm, does not enjoy absolute immunity from suit. Instead, the terms of reference of its internal complaint mechanism expressly state that the lodging of a complaint "is without prejudice to the rules under which the complainant may be allowed to institute court proceedings before the Court of Justice of the EU," and provide that, "disputes between the EIB on the one hand and its creditors, debtors *or any other person on the other*, are decided by the competent national courts, save where jurisdiction has been conferred on the Court of Justice of the EU." European Investment Bank, *European Investment Bank Complaints Mechanism Principles, Terms of Reference and Rules of Procedure* (Oct. 31, 2012); *see also* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. 471, 523 & n. 229 (2008) ("[T]he purported functional necessity of absolute immunity is belied by the practice of the European Investment Bank (EIB), the

European Union's main financing institution, which submits to legal process as a matter of course."); Nicolas Hachez & Jan Wouters, *A Responsible Lender? The European Investment Bank's Environmental, Social and Human Rights Accountability*, Working Paper No. 72, Leuven Center for Global Governance Studies, at 30–35 (Sept. 2011) (discussing the potential availability of legal recourse to the European Court of Justice for individuals seeking damages though not annulment of EIB activities, and explaining that while yet untested, actions challenging EIB decisions as illegal under EU law or contrary to the institution's environmental and social standards may be admissible before the court). The EIB's financing operations do not appear to have suffered as a result of this exposure to potential legal liability. In 2015, the EIB lent EUR 77.5 billion, *see* EIB, *The European Investment Bank at a Glance* (2016), up from EUR 40.9 billion in 2000, *see* EIB, *The EIB Group in the Year 2000*, at *i* (2001).

C. IFC's portfolio and profits have steadily grown.

By all measures, IFC is a thriving institution. IFC has consistently returned a profit every year since its inception in 1956, *see* IFC, *Investing for Impact*, at 19—reaching record levels in recent years: IFC's net income hit a high of nearly $2.5 billion in 2007, *see* IFC, *IFC Annual Report 2010: Where Innovation Meets Impact*, at *v* (2010), and was over $1 billion each year between 2011 and 2014, *see* IFC, *Management's Discussion and Analysis and Consolidated Financial*

Statements June 30, 2015, at 6 (2015). The volume of IFC's new commitments each year has nearly tripled over the past decade, from approximately $6.4 billion in 2005 to almost $18 billion in 2015. *See* IFC, *IFC Annual Report 2009: Creating Opportunity Where It's Needed Most* 1 (2009); IFC, *IFC Annual Report 2015: Opportunity, Capital, Growth, Impact* 22–23 (2015).[3] This trend has shifted the composition of the Bank Group's portfolio: while IFC's investments accounted for less than 13% of total World Bank Group commitments in 2000, its funding to the private sector made up over 20% of total commitments in 2013 and 20% of total disbursements in 2015. *See World Bank Group Summary Results 2015: World Bank Group Financing for Partner Countries*, World Bank (last visited Aug. 15, 2016), http://www.worldbank.org/en/about/annual-report/wbg-summary-results#2. In 2015, IFC's total committed investment portfolio was over $50 billion. *IFC Annual Report 2015*, at 23.

IFC's robust financial health does not reflect an institution likely to be "devastat[ed]," Def's Reply. Br. at 9, by the cost of allowing legal actions to enforce the compliance with the institution's own mandatory policies and standards for its lending operations.

[3] These figures include amounts mobilized by IFC as well as commitments for IFC's own account. For example, in 2015 IFC reported total new commitments of $17.7 billion, of which $10.539 billion were for IFC's account.

III. There is no evidence that waiving immunity in this case would unleash a flood of lawsuits.

In dismissing Plaintiffs-Appellants' suit, the district court relied on IFC's argument that waiver of immunity in this case would open "a floodgate of lawsuits by allegedly aggrieved complainants from all over the world," D. Ct. Op. at 10 (citing Def's Reply Br. at 9–10), stating that it had "little reason to doubt IFC's assessment of its concerns." *Id.* IFC's contention presupposes that a flood of potential cases sits outside of the proverbial gate. Data, however, show this argument to be far overblown. The number of cases comparable to Plaintiffs-Appellants' lawsuit is small both in absolute terms and as a proportion of IFC's overall portfolio.

A. Waiver would open the door to only a narrow set of cases.

Waiving immunity as to the Plaintiffs-Appellants' case does not mean that every complaint by a third party against IFC alleging environmental and social harms as a result of IFC-financed activities would be allowed to proceed in court. As Plaintiffs-Appellants have argued, AOB 56–57, the implications of allowing their claim to go forward are more limited: finding the waiver of immunity applicable here would mean that in cases, such as this one, where the CAO has found IFC to be in violation of its own mandatory environmental and social policies and IFC has failed to take remedial action, IFC's waiver of immunity in its

Articles of Agreement applies to suits brought by the very project-affected people whom IFC's policies were designed to protect.

B. The number of cases is extremely limited.

Data on IFC operations and cases that have come before the CAO to date make clear that there is no impending tide of lawsuits. The number of IFC projects about which complaints have been filed with the CAO represents a small fraction of IFC's overall portfolio, and those cases in which violations of IFC policies are found, an even smaller percentage still.

According to data publicly available on the websites of the IFC and CAO, between 2001 and 2015, the CAO received 242 complaints related to 155 IFC-financed projects.[4] Of those, only 147 complaints, concerning 83 separate IFC

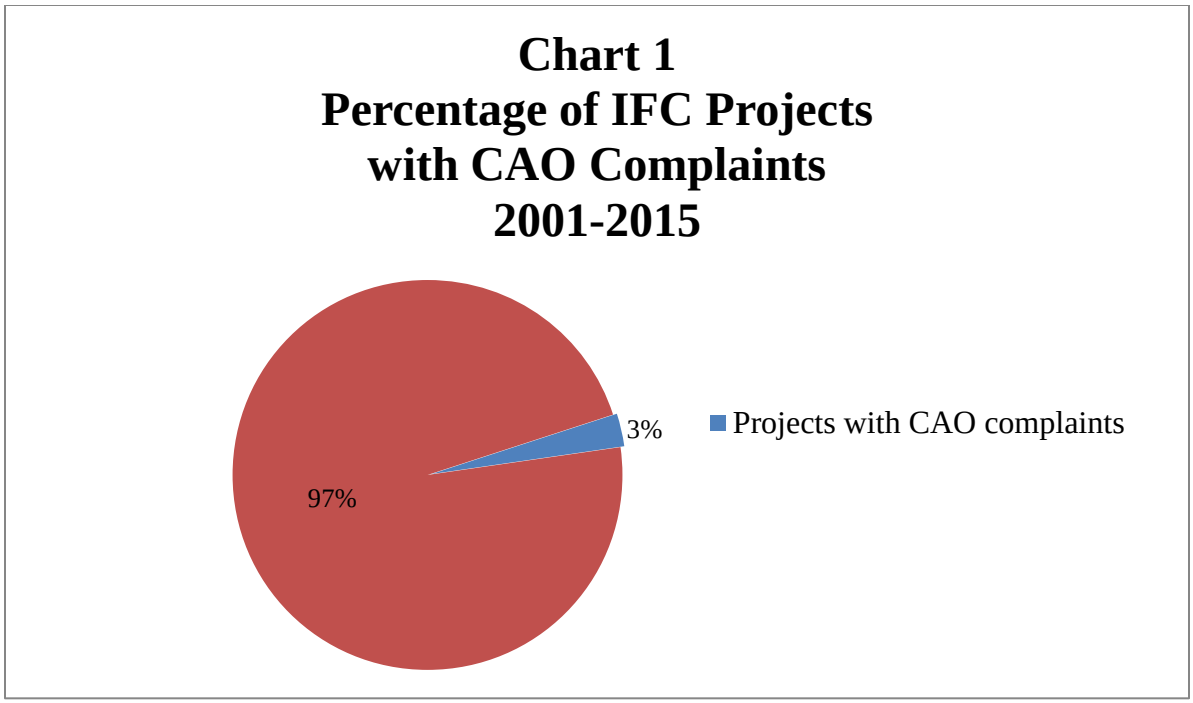
[4] The figures presented in this section are based on data compiled by Accountability Counsel from publicly available information in IFC's online project database, http://ifcextapps.ifc.org/ifcext/spiwebsite1.nsf/$$Search?openform, and the CAO's case database, http://www.cao-ombudsman.org/cases/, as well as IFC and CAO annual reports. *See also* Accountability Counsel et al., *Glass Half Full? The State of Accountability in Development Finance* 25–31, 46–47 (2016) (discussing the outcomes of cases brought before the CAO); *id.* Annex 12: The Compliance Advisor Ombudsman of the International Finance Corporation and the Multilateral Investment Guarantee Agency, *available at* http://grievancemechanisms.org/resources/brochures/glass-half-full. Figures reported in this brief do not include CAO complaints concerning projects financed solely by MIGA, so there may be some discrepancies with numbers in *Glass Half Full*?.

projects, were deemed eligible for CAO involvement.[5] On average, this amounts to fewer than 10 IFC projects per year that are the subject of complaints to the CAO, and nearly half of those complaints are considered ineligible for dispute resolution or compliance investigation. To put this number in context, over the same time period (FY2001–FY2015), IFC made new investment commitments in 5702 projects.[6] Chart 1, *infra*, shows that only 155 of those projects, amounting to less than 3%, were the subject of CAO complaints. To take just one year as an example, in 2015 only eight new IFC projects were the subject of complaints to the CAO,[7] representing *less than 2% of IFC's 406 investment projects that year*. *IFC Annual Report 2015*, at 23, 26.

[5] These figures are based on information included in the CAO's annual reports from FY2001 to FY2015 regarding the number of complaints deemed ineligible.

[6] This figure is based on data presented in IFC Annual Reports between FY2001 and FY2015 regarding the number of projects to which new investment commitments were made during each fiscal year. *See IFC Annual Report 2015*, at 26; IFC, *IFC Annual Report 2014: Big Challenges. Big Solutions* 25 (2014) (reporting project numbers for FY 2010 – FY 2014); *IFC Annual Report 2010*, at iii (reporting project numbers for FY2008-2009); IFC, *IFC Annual Report 2007: Creating Opportunity* 24 (2007) (reporting project numbers for FY 2003 – FY 2007); IFC, *Investing in Progress with Experience, Innovation, and Partnership: 2005 Annual Report* 63 (2005) (reporting project numbers for FY 2001 – FY 2002).

[7] While there were 12 complaints filed with the CAO in 2015, *see* http://www.cao-ombudsman.org/cases/, four concerned projects about which there were already pending CAO cases. The other complaints were the first pertaining to the projects involved.



The narrow circumstances in which Plaintiffs-Appellants' claims arise represent an even smaller subset of cases—those in which the CAO conducted a compliance audit, found that IFC's social and environmental standards had been abrogated, and required remedial action. *See* CAO, *CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India* (Aug. 22, 2013). As noted above, a large percentage of complaints brought to the CAO do not make it past the eligibility screening stage, or are resolved through agreement of the parties; it is only in a very small subset of cases that problems identified by the CAO remain unresolved by IFC and require continued monitoring. Indeed, of the 242 complaints regarding IFC-financed projects filed over the past 16 years, only *4%* (10 cases) continued to require monitoring to ensure adherence to a remedial action plan by the end of

2015.[8] The Tata Mundra project is one of those cases. Again, the "flood" that IFC claims waiver of immunity in this case would unleash is little more than a trickle.

C. Cases concern a fraction of IFC's overall investment portfolio.

In dollar terms, the small number of cases involving identified violations of IFC social and environmental policies and a lack of remedial action implicate only a small portion of IFC's overall investments. In FY2008, the year IFC's Board approved the Tata Mundra Ultra Mega project loan, Compl. ¶ 56, IFC invested $11.3 billion in a total of 372 projects. IFC, *IFC 2008 Annual Report: Creating Opportunity* 28 (2008). The $450 million Tata Ultra Mega project loan thus accounted for less than 4% of that fiscal year's new investment commitments, and only 1% of IFC's outstanding, committed portfolio, which was $32.4 billion in FY 2008, *id.*, and over $50 billion in FY 2015, *IFC Annual Report 2015*, at 23.

In that same year (FY2008), the CAO received 19 complaints of which only 11 were deemed eligible for further assessment. CAO, *The Office of the Compliance Advisor/Ombudsman 2007–2008 Annual Report* 4 (2008). And of those 11 complaints, none triggered a compliance audit like that undertaken in the Plaintiffs-Appellants' case. *Id.*

[8] This figure is based on information publicly available on the CAO's online case database. *See* CAO Cases, http://www.cao-ombudsman.org/cases.

These FY2008 figures are by no means anomalous. While the volume of the CAO's caseload has steadily increased since 1999 when it was first established, according to the CAO, the complaints it receives still concern less than 1% of the overall portfolios of IFC and the Multilateral Investment Guarantee Agency (MIGA). CAO, *CAO Annual Report: Fifteen Years of Impact* 6 (2015) [hereinafter *CAO Annual Report 2015*]. The percentage of these cases that go through a compliance audit and result in findings of noncompliance, as did Plaintiffs-Appellants' complaint, is miniscule. For instance, from FY2000 to FY2011, when the Tata Ultra Mega complaint was filed, over 50% of eligible complaints were settled during the CAO's dispute resolution process, without any compliance assessment or audit. CAO, *Independent Accountability Mechanism for IFC & MIGA Annual Report 2011*, at 7 (2011). Of the remaining cases, only 30% were transferred to CAO Compliance, and ultimately, less than 7% led to a full audit of IFC performance. *Id.* The CAO reports that, since FY2008, it has closed on average two-thirds of its compliance cases during the appraisal stage, without requiring an audit. *CAO Annual Report 2015*, at 36. Moreover, not all of those cases that do trigger an audit of IFC's environmental and social performance lead to the situation that occurred here, where IFC ignored the findings and recommendations made by the CAO.

IFC's "floodgates" argument simply fails in the face of these statistics. With just a fraction of a percentage of IFC project investments potentially implicated, comprising an even smaller fraction of a percentage of IFC's overall committed portfolio, the impact on IFC's financing operations of waiving immunity in this suit would be negligible.

D. IFC has the power to prevent any "flood" of cases.

The floodgate argument assumes not only that there are many other cases in which IFC will violate its own mandatory environmental and social standards, but also that IFC will ignore the recommendations of its own independent accountability mechanism, prompting the complainants to seek legal recourse. But IFC is already required to take, and presumably already builds into its business model, the measures necessary to avoid facing CAO complaints and audits of its environmental and social performance. These are the same measures that would help protect the institution from future litigation. Therefore, the possibility of legal liability should impose no new or additional costs on the institution. Rather than unleash a tide of litigation, waiving immunity in the instant case would more likely encourage greater compliance by IFC with its own mandatory policies and standards, increasing adherence to the findings and recommendations of its own accountability mechanism, the CAO, and thereby leading to fewer lawsuits overall.

CONCLUSION

For the foregoing reasons, this Court should reject IFC's speculative arguments regarding the costs of waiving immunity in this case and reverse the district court's decision.

Respectfully submitted,

Date: August 16, 2016

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 5864 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

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I, Jennifer Green, hereby certify that on August 16, 2016, I caused to be served a true copy of the Amicus Brief of Erica R. Gould in support of Plaintiffs-Appellants and Reversal via the Court's CM/ECF electronic filing system upon:

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