

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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BUDHA ISMAIL JAM, et al.,)	
)	
<i>Plaintiffs,</i>)	
)	Civil Action No: 1:15-CV-00612-JDB
v.)	
)	
INTERNATIONAL FINANCE)	
CORPORATION,)	
)	
<i>Defendant</i>)	
_____)	

DECLARATION OF DAVID B. HUNTER

I, David B. Hunter, declare and state:

1. I am Professor of Law and Director of the International Legal Studies Program at American University Washington College of Law in Washington, D.C.
2. Since 1993, I have promoted, monitored, and evaluated independent accountability mechanisms (IAMs) at international financial institutions (IFIs), including the Compliance Advisor/Ombudsman (CAO) at the International Finance Corporation (IFC). I have written extensively on IAMs and have also served as a consultant in the development or restructuring of IAMs at the Asian Development Bank, the Overseas Private Investment Corporation, the United Nations Development Programme, and the United Nations Environment Programme.
3. I have closely followed the evolution of the CAO’s office since its establishment in 1999. For approximately ten years, I have served as a member of the Strategic Advisors Group to the CAO.
4. I am a member of the Board of Directors of Earth Rights International, which is counsel in this litigation. This is a voluntary position and I receive no compensation from Earth Rights International for serving on the Board of Directors.
5. I am providing my objective and independent view of the matters set forth below to the best of my knowledge and understanding. I have not been paid any compensation or received any other benefit for providing this declaration.

The Context for the Establishment of the CAO

6. Since 1993, when the World Bank established the World Bank Inspection Panel as the first IAM, most IFIs have established similar citizen-based accountability mechanisms. The World Bank President announced the creation of the CAO in 1999 to cover claims relating to the operations of the IFC and the Multilateral Investment Guarantee Agency (MIGA), neither of which was covered by the previously established Inspection Panel.

7. Although each of the IAMs is different, they all provide citizens with the right to complain about the environmental or social performance of the associated financial or development institution. The establishment of the IAMs, including the CAO, reflected a growing understanding that communities had a right to participate in development issues that affect their lives and that development decisions are better and more sustainable when made with the active involvement of the affected public. *See, e.g.*, Principle 10 of the Rio Declaration on Environment and Development (1992) (“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”). The former World Bank General Counsel, for example, noted that “[d]evelopment is no longer confined to economic development narrowly defined, but encompasses broad areas of human development, social development, education, governance and institutions, as well as issues such as inclusion and cohesion, participation, accountability and equity.” *See, e.g.*, Roberto Dañino, Senior Vice President and General Counsel of the World Bank, ‘Legal Opinion on Bank Activities in the Criminal Justice Sector,’ (31 January 2006), para. 9; Roberto Dañino, Senior Vice President and General Counsel, ‘Legal Opinion on Human Rights and the Work of the World Bank,’ (27 January 2006), para. 7.

8. The increasing recognition that transparency, inclusion, and accountability were linked to effective development led to public calls for stronger environmental and social policies and associated accountability mechanisms to provide assurances that the policies were followed. At the World Bank Group, including at the IFC, it was recognized that providing redress and remedy for communities affected by development was central to ensuring effective development and was understood as “good development practice”.

9. The importance of a remedy, including compensation, for those adversely affected by IFC-financed projects is specifically reflected in the IFC’s own Policy on Environmental and Social Sustainability. Through the Policy, “IFC seeks to (i) enhance the predictability, transparency, and accountability of its actions and decision making; (ii) help clients manage their environmental and social risks and impacts and improve their performance; and (iii) enhance positive development outcomes on the ground.” IFC Policy on Environmental and Social Sustainability, para. 7 (Jan. 1, 2012). The Policy is thus viewed as critical to promoting IFC’s development mission. It achieves this purpose in part by promoting a “mitigation hierarchy to anticipate and avoid adverse impacts on workers, communities, and the environment, or where avoidance is not possible, to minimize, and where residual impacts remain, *compensate/offset for the risks and impacts, as appropriate.*” IFC Policy, para. 6 (emphasis added). In this way, IFC has recognized how the right to remedy, including compensation, furthers its development mission.

10. The IFIs established the IAMs (including the CAO) in the context of this broader discussion of the need to increase transparency, inclusion, and accountability, including the right to remedy. The basic idea was that the IAMs (including the CAO) would provide a means for ensuring compliance with the associated IFI's environmental and social standards. Strong environmental and social standards, reasonably well enforced through the IAMs, were perceived as central to the development missions of the IFC and other IFIs. But none of the IAMs, including the CAO, have the power to compel compensation as a remedy. In this way, they are not a substitute for access to the courts.

11. Defendant IFC quotes my work as suggesting that IFC's claimed immunity was a central factor in the establishment of the IAMs, including the CAO. *See* Defendant IFC's Memorandum of Law in Support of Its Motion to Dismiss, at p. 5, 12. In the debates leading up to the creation of the IAMs, including the CAO, whether the IFC had waived immunity for law suits from affected communities was not a significant topic of discussion. Although potential claims of immunity provided an implicit backdrop for the political discussions, the overwhelming reason for the establishment of the IAMs was the view that good development outcomes required the participation of affected communities and that IFIs needed to have mechanisms for engaging those citizens. This view was particularly important to major donor governments, including the United States, Japan and most European governments. Continued political support for the development mandates of the IFC and other IFIs depended on the establishment of effective citizen-based accountability mechanisms.

12. Moreover, whatever the discussions were in the 1990s regarding immunity as it related to the creation of the CAO, the experience with the CAO (and other IAMs) confirms that they are no substitute for access to judicial processes and redress.

The Purpose and Operations of the CAO

13. In response to growing pressure to extend the Inspection Panel to the private sector operations of the IFC and MIGA, the World Bank President James Wolfensohn announced his intention to create the CAO. The CAO was subsequently established in 1999 "as the independent recourse and accountability mechanism" of the IFC and MIGA for environmental and social concerns. According to the CAO's original Terms of Reference, "IFC and MIGA have decided to create a position of environmental and social Compliance Advisor Ombudsman as an additional pillar in building a credible and responsive structure to ensure that projects are environmentally and socially sound and enhance IFC's and MIGA's contribution to sustainable development." The creation of the CAO thus reflected the IFC's view that providing rights and remedies to communities is necessary for the successful fulfillment of its development mission.

14. The CAO's mandate reflects this link between its activities and better development outcomes:

"CAO is an independent office that reports directly to the President of the World Bank Group (the President). CAO's mandate is to:

- Address complaints from people affected by IFC/MIGA projects... in a manner that is fair, objective and equitable; and
- Enhance the environmental and social outcomes of IFC/MIGA projects (or projects in which those organizations play a role).”

CAO Operational Guidelines, p. 4, para. 1.1 (2013).

15. The establishment of the CAO was not dependent on any particular view of the rights of communities to bring actions against the IFC in judicial forums or on the potential immunity of IFC to community-based lawsuits. CAO was never intended to reflect, nor does it change, any underlying rights of judicial access that complainants may or may not have toward the IFC. As stated in the CAO Guidelines: “CAO has no authority with respect to judicial processes. CAO is not an appeals court or a legal enforcement mechanism, nor is CAO a substitute for international court systems or court systems in host countries.” CAO Operational Guidelines, p. 4, para. 1.1. The CAO has effectively and independently worked at implementing its mandate, but as noted above it is not intended to replace actions brought in national court systems.

16. The CAO serves three roles: (1) a dispute resolution role; (2) compliance review; and (3) an advisory role.

17. CAO’s dispute resolution role is triggered by a complaint from a locally affected community. According to the CAO’s Operational Guidelines: “Engaging in a dispute resolution process is a voluntary decision, and requires agreement between the complainant and client, at a minimum.” CAO Operational Guidelines, p. 18, para. 3.1. Nothing in the CAO’s authority or procedures can compel IFC to participate in the dispute resolution process. IFC’s participation is voluntary. Although IFC frequently states in its response to CAO cases that it is supportive of the dispute resolution process, it has only rarely participated substantively in the process. Moreover, the IFC has never provided any significant financial support or other remedy to affected communities as part of any agreement reached through the CAO process.

18. As a result, the CAO’s dispute resolution function in practice has primarily involved the affected community and the private business who is the IFC/MIGA client. The IFC’s absence in dispute resolution limits the CAO’s effectiveness in providing remedies to communities affected by IFC lending decisions. The IFC’s absence also limits the dispute resolution process as a means for local communities to assert their rights and interests as against IFC.

19. The CAO’s compliance review function can be triggered by a complaint from a locally affected community (as well as directly by the CAO Vice President). The CAO’s compliance review results in a “compliance investigation” which is a “systematic, documented verification process ... to determine whether {IFC’s} environmental and social activities, conditions, management systems, or related information are in conformance with ... [IFC] policies, Performance Standards, guidelines, procedures and requirements whose violation might lead to adverse environmental and/or social outcomes.” CAO Operational Guidelines, p.23, para. 4.3.

20. The outcome of a CAO compliance investigation is an Investigation Report, which includes the findings of the investigation. After the CAO completes its final report, IFC has twenty working days to submit a written response. CAO forwards the Investigation Report and the IFC response to the President of the World Bank Group. Once the President is satisfied with IFC's response, the President clears both the CAO final report and the IFC response for release to the complainant and to the public.

21. Through the compliance review process, the CAO has no authority to compel IFC to take any steps in response to its reports. The only authority the CAO has with respect to influencing the IFC is that it can "keep the compliance investigation open and monitor the situation until actions taken by IFC assure CAO that IFC is addressing the noncompliance." CAO Operational Guidelines, at p. 25, para. 4.4.6. CAO also publicizes the current status of all compliance cases so in this way the complainants and public can be made aware of whether the CAO is satisfied with the IFC response. Of the thirteen investigation reports completed to date, the IFC kept the investigation open for monitoring in ten following publication of the initial investigation report and IFC response.

22. Unlike the result of a judicial decision, IFC's response to the CAO compliance findings is completely discretionary. The IFC can, and at times has, ignored the findings of CAO reports. In fact, IFC has produced an action plan in only four of the eleven CAO Investigation Reports issued since 2000. As with dispute resolution, IFC's failure to respond substantively to the CAO's compliance findings limits the remedies that are provided to affected communities.

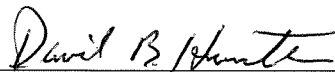
23. As suggested by the above, an eligible complaint can trigger either a dispute resolution process or a compliance review. The two processes cannot occur simultaneously. Moreover, while a claim can start in the dispute resolution phase and subsequently proceed to a compliance review, there is no express provision in the CAO guidelines that allows a case to proceed from compliance review to the dispute resolution phase. *See* CAO Operational Guidelines, p. 12-13, paras. 2.3, 2.4, p. 9, Fig. 1. No case has ever proceeded from the compliance review phase to the dispute resolution phase. Instead, a claimant who is not satisfied with the outcome of the compliance review and wants to pursue dispute resolution would have to file an entirely new claim.

24. The CAO's third function—its advisory role—enables the CAO to provide the President of the World Bank Group or IFC/MIGA management with advice relating to broader environmental and social guidelines. Nothing in the CAO's mandate or authorities requires IFC to respond or take any measures in response to the CAO's advice.

25. As suggested by the above, the CAO's mandate and its role are to help the IFC improve on its development outcomes. It does not, however, have the power to compel IFC to provide remedies to affected communities nor can it compel IFC to take any other measure to alleviate alleged violations of communities' rights and interests. IFC's general reluctance to respond proactively and substantively to cases filed with the CAO means that in practice the mechanism does not operate, nor was it ever intended to operate, as a substitute for the vindication of affected parties' legal rights in a court of law.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 17th day of September, 2015 in Washington, DC.



David B. Hunter