

**Bank Information Center  
Center for International Environmental Law  
Pacific Environment & Resources Center**

March 2, 2000

Meg Taylor  
Compliance Advisor Ombudsman  
International Finance Corporation  
2121 Pennsylvania Avenue, N.W.  
Washington, DC 20433  
cao-compliance@ifc.org

Dear Meg:

We would like to thank you for the opportunity to comment on the *Draft Operational Guidelines for the Office of the Compliance Advisor Ombudsman* (Draft Guidelines). The Center for International Environmental Law (CIEL) has prepared these comments on behalf of ourselves, the Bank Information Center (BIC), and the Pacific Environment and Resource Center (PERC). We believe the Guidelines are an important first step in bringing greater accountability to the World Bank Group's private sector activities. We would like to commend the CAO's office for the thorough consultative process you have gone through in developing these Guidelines and in particular your efforts to consult with NGOs outside of Washington. We hope the seriousness we have taken in commenting on the Draft Guidelines is proportionate to the seriousness you have shown in preparing them.

This letter contains general comments on the CAO's Draft Guidelines. In addition, we have attached more specific comments on the Draft Guidelines in the form of a redlined version of the Guidelines. Our purpose in doing this was to provide detailed comments in a relevant and helpful way.

***The Guidelines need to be more accessible***

The Guidelines should be a short and simple document to guide affected communities in preparing a complaint. The current document is an all-encompassing description of the CAO's roles – mission, limitations, etc. – rather than purely Guidelines for complaints. Either a shorter document addressed solely to potential complainants should be created, or the Guidelines themselves should be streamlined and simplified. We were glad to see that the CAO plans to publish informational brochures in a variety of languages.

***The Guidelines should clearly and succinctly define the mandate of the CAO***

Several places in the Guidelines refer to the mandate of the CAO. The CAO's mandate is referenced, for example, in determining whether a complaint will be accepted by the CAO (section 4.2) and what the complaint's priority will be (section 4.3) and yet the Guidelines do not explicitly define the mandate of the CAO. The mandate of the CAO should be defined at the beginning of the Guidelines to make transparent to all stakeholders what the mandate is, especially if it is one of the criteria for accepting and prioritizing complaints.

***The Ombudsman Function can and should go beyond compliance***

The CAO should not seek to avoid claims that may signal the need for policy changes. At points in the Guidelines it appears that the two options envisioned by the Guidelines are either a settlement agreement or a compliance audit. The Ombudsman, however, ought to be able to go beyond issues of compliance. Harm to communities on the ground may be caused either by failure to fully comply with policies, or by weak policies. Because the Ombudsman Function is a flexible mechanism with the power to recommend solutions to enhance the functioning of the IFC and MIGA – the Ombudsman ought to have the power to make recommendations that go further than simply compliance with IFC and MIGA policies. Recommendations that address the concerns of local communities might go to issues such as the development impact of a project or benefits sharing. Such recommendations if implemented would improve projects and conditions on the ground, although they are not specifically required by any policy. The CAO's guidelines should fully reflect this aspect of the Ombudsman Function and take full advantage of the Ombudsman's ability to make creative and far-reaching recommendations.

***The ability to foresee a positive outcome should not be a criterion for selecting complaints***

The Draft Guidelines seem overly concerned with only addressing those complaints that can be identified from the start as likely to lead to a positive outcome. The ability to foresee a positive outcome should not be a criterion for acceptance of a complaint. The ability to bring a complaint and have it investigated may be important to affected people and communities as a way of raising their concerns within the institution. Even where an agreement is not reached the fact that a claim is brought and the CAO becomes involved may help to improve conditions on the ground. Moreover, the CAO may be able to make recommendations for improving conditions on the ground even where agreement is not reached. Complainants with hard cases should not be denied this opportunity.

***The Ombudsman Function must be driven by the needs of complainants – complainants should not be required to mediate or conciliate.***

For the Ombudsman function, complainants should play an active role in controlling the process. While it may be useful for the Ombudsman to facilitate mediation and dialogue, complainants should not be required to mediate in order for the Ombudsman to engage on a project. Even where complainants do not want to mediate, the Ombudsman can still engage in fact-finding. Fact finding has an independent value – even where it may not lead to mediation or conciliation. Even where the parties do not negotiate an agreement, fact-finding may provide relief to communities on the ground. Such fact finding will greatly aid the CAO in making recommendations to the President, regardless of whether a settlement agreement is reached. Fact-finding is a broader concept than a compliance audit. Fact-finding can address the question of what is the problem and what will improve things on the ground, which are a separate set of issues (albeit related) from compliance.

***The Guidelines should not permit referrals of complaints to other CAO functions.***

Complaints received under the Ombudsman function should be dealt with under that function until they are completed – i.e. until a final settlement agreement is reached or a report and recommendations are delivered to the President. Some complaints – for example, those alleging policy violations or raising questions as to the adequacy of IFC or MIGA policies – may trigger parallel processes in the compliance or advisory functions. In other words, a complaint may trigger a process of policy dialogue on a policy issues raised in a complaint under the advisory function, but the investigation and resolution of the complaint must proceed at the same time. While a broader policy dialogue on the adequacy of a particular policy is beneficial to IFC and MIGA, it does little to provide relief on the ground to complainants. Complainants should be assured that their actual complaint will be investigated and at a minimum a report and recommendations on the situation presented to the President.

The Guidelines state that where the CAO finds non-compliance with IFC or MIGA policies, the matter will be referred to IFC or MIGA management (sec. 3.3). They also state that where the adequacy of an IFC policy is in question, the matter will either be referred to management or to the CAO's advisory function. Most complaints, however, will either allege a failure to comply with policies, or raise issues and problems not addressed by the policies – which could easily be interpreted as policy-adequacy issues. Therefore it is not totally clear what remains of the Ombudsman's jurisdiction. Potential complainants need to have some clarity and reassurance the complaints filed will be addressed.

In terms of referral to management, since one of the requirements for bringing a complaint is that the complainants demonstrate that they have raised the issue with management prior to lodging a complaint (sec. 3.4), management will already have had an opportunity to resolve the issue. That a complaint is being filed is evidence that

resolution was not reached by referring the issue to management. Requiring the complainants to demonstrate that they have raised their issues and concerns with management before going to the Ombudsman is a reasonable requirement, but telling complainants that even after they meet this requirement that their complaint may nonetheless be referred back to management is not.

The referral process also raises significant issues in relation to confidential complaints. If in the course of her investigation the CAO determines that the project raises significant issues of policy compliance, the issue may be referred to the compliance role. According to the confidentiality section of the procedures, where “the basis for investigation has changed” – i.e. when it moves from being an Ombudsman complaint to a compliance audit – “future communications will no longer be privileged” and thus not entitled to the presumption of confidentiality (Section 8.2). What assurances will complainants have in this case that their identity will be protected? If their identities and communications are no longer protected, what role can they now have in the investigation?

For all these reasons, the Guidelines should not permit referral of complaints to either the advisory or compliance functions. To the extent that a complaint raises issues relevant to those functions, the CAO should initiate parallel processes, independent of the Ombudsman Function.

***The Guidelines should set out benchmarks for disclosure***

The CAO did not exist when the IFC’s disclosure policy was drafted. Obviously the creation of the CAO will require the IFC to revisit that policy. The CAO’s Guidelines should, however, set out benchmarks for the CAO’s own disclosure. The CAO should determine what at a minimum will always be disclosed, establish a presumption in favor of disclosure with limited exceptions, and clarify the timing for the disclosure of information. Establishing a set of rules on disclosure that are not discretion-based will be an important way for the CAO’s office to insulate itself from political pressure.

***The Guidelines should better reassure confidential complainants that their identity will be protected and their complaint taken seriously***

The section dealing with confidential complaints (3.6) should provide sufficient reassurance to complainants who feel compelled to file a confidential complaint that their identity will be protected. For example the Guidelines should specify that information that is designated as confidential will not be disclosed to project sponsors or IFC/MIGA staff. The Guidelines might also reassure local communities by specifying what sorts of precautions will be taken to safeguard confidential information.

The emphasis in the current language that confidentiality may limit the Ombudsman’s ability to resolve the issues raised by the complaint may deter communities considering a complaint, but who feel they can only do so on a confidential basis, from filing a complaint. Confidential complaints may certainly present a unique set of issues in resolving problems. The decision to lodge a complaint is not a step most communities

will enter into lightly. The ability to submit confidential claims may in many cases make the difference between a community being able to seek redress of their grievances, and being left with no remedy. To point out that confidentiality will impair the process may discourage communities from exercising this vital option and bringing legitimate complaints.

### ***The Guidelines vest too much discretion in the CAO***

The Guidelines vest a great deal of discretion in the CAO. While the Ombudsman role in particular requires a certain degree of flexibility, vesting too much discretion in the CAO may open the office up to criticism that the CAO's choices are motivated by political or other concerns and that the CAO is not objective. Creating more structure, especially in the area of the decision to pursue a complaint, may be useful for the Ombudsman – providing “political cover” within the institution in deciding to pursue an unpopular complaint. Leaving less discretion to the Ombudsman may actually help the Ombudsman when it comes time to deal with the hard cases – the Ombudsman may need to be able to say to management – “I must deal with this complaint, I don't have the discretion not to.” Having greater discretion may place the Ombudsman under greater pressure not to deal with controversial or politically sensitive projects.

The sections of the Guidelines dealing with acceptance of complaints (4.2) and prioritization of complaints (4.3) demonstrate the problems with the discretion vested in the Ombudsman. Both these sections state that the Ombudsman has the discretion to determine which complaints will be accepted and how they will be prioritized and then lists criteria that the Ombudsman will use in making those decisions. Instead, the Guidelines should lay out the criteria for acceptance and prioritization of a complaint and make it clear that the criteria determine whether a complaint will be accepted and how it will be prioritized. The Ombudsman should be the one who determines whether a complaint fulfills the eligibility criteria, and should justify that decision in writing when a complaint is found not to be eligible, but the criteria are the only relevant consideration in determining eligibility of a complaint – the Guidelines should make this clear.

### ***The Guidelines should give the CAO a “preliminary injunction” power***

Where a complaint raises concerns of a credible threat of serious or irreversible harm to human health, the community or the environment if the project goes forward as is, then project implementation should be stopped while the CAO investigates. In the section of the Guidelines dealing with prioritization of claims (4.3), one of the criteria is the degree to which the project has progressed and the implications to the project of intervention and delay. The converse, however, is also true – as a project progresses it is more likely to cause irreversible harm and thus the need to slow the project pending the CAO's investigation is also warranted.

If a project with serious impacts is likely to escape scrutiny by the CAO because it has progressed *too* far – then project sponsors will have an incentive to move toward implementation quickly and quietly. For example, a frequent complaint about IFC

projects is the project sponsor's failure to fully inform and consult with the local communities. Communities may not become aware of the project and its potential impacts until it is in implementation – trees are cut, roads are built etc.

If the advanced stage of project implementation permits the project to escape scrutiny, then the project sponsor essentially benefits from their failure to inform and consult local communities. Where a community files a complaint, or even makes inquiries of the CAO about bringing a complaint, the project sponsor has an incentive to immediately step up implementation, so that the complaint becomes moot by the time a complaint has been lodged and the CAO process has moved through all its steps. For this reason the CAO should implement the notion of a temporary or preliminary injunction – suspending project implementation while the CAO investigation proceeds where failure to stop implementation without addressing the issues raised in the complaint is likely to lead to serious or irreversible adverse impacts.

Thank you again for this opportunity to comment.

Regards,

Kay Treakle  
Bank Information Center

Claudia Saladin  
Center for International Environmental Law

Doug Norlen  
Pacific Environment & Resources Center