

July 7, 2016

Office of the Compliance Advisor/Ombudsman (CAO)
2121 Pennsylvania Avenue, NW
Washington, DC 20433, USA

Re: CAO Approach to Complainant Protection

Dear Mr. Gratacós and colleagues,

Thank you for the opportunity to contribute to the CAO Approach to Complainant Protection. We value your leadership in raising awareness about the dangers that many community members you work with face, and in working to prevent and respond to reprisals against complainants, their representatives, other community members, and others associated with the CAO process. We welcome this draft, which our suggestions seek to strengthen.

Please see our collective edits and comments. These edits are designed to ensure that the complainants and people who are at risk are at the center of decisions regarding risk mitigation and response, to clarify elements that we thought were unclear, and to be as specific as possible about the range of tools that are at the CAO's disposal. In providing our views, we have drawn on our experience working with complainants, the guidelines of the UN human rights treaty bodies against intimidation or reprisals, international human rights law, and our practical experience working in high risk situations.

1. More than an approach

We encourage you to make it clear that staff and consultants are expected to follow this approach. An alternative title may be necessary to achieve this, as well as specific language in the document explaining this.

2. Include language to support the creation of a safe environment, to allow people to use the mechanism without fear of reprisals, and emphasize the roles of the IFC and IFC clients

The CAO has an important role to play in fostering a safe environment for those seeking to work with it. As drafted, the approach only kicks in once a complaint is filed. We urge you to broaden this focus. The IFC and IFC clients also have responsibilities to create a safe environment for people to participate in and criticize their projects and investments. We encourage you to emphasize this.

Suggested language:

By becoming a client of IFC or MIGA, a company undertakes to cooperate with the CAO in good faith. A component of this is exercising due diligence to ensure that people who seek to cooperate with the CAO can do so safely. Any form of reprisal against people or groups providing information to the CAO or otherwise obstructing their interaction with the CAO undermines the functioning of the CAO with which companies have committed to cooperate in good faith.

The CAO believes:

- Community participation and effective avenues to hold development actors, including the IFC and its private sector clients, to account are central to sustainable development. An environment in which views are welcomed irrespective of their critical nature is necessary to facilitate meaningful participation and accountability.

- Everyone has the right to unhindered access to the CAO and should be able to communicate with the CAO without interference or risk of reprisal;
- Everyone should be free from any form of intimidation or reprisal, or fear of intimidation or reprisal, when seeking to cooperate or cooperating with the CAO;
- The IFC has the responsibility to take all reasonable measures to prevent reprisals against members of affected communities, civil society groups, or others for participating in the development of, criticizing, or otherwise attempting to express opinions or concerns about IFC-financed activities; and
- IFC clients bear responsibility to avoid contributing to or overlooking acts constituting intimidation or reprisals and to prevent, protect against, investigate, ensure accountability, and to provide effective remedies to victims of such acts or omissions.

3. Ensure that all linked to the CAO process are covered and broaden the language regarding causation

As you know, it is not only the direct complainants that can be at risk in a CAO process, but any community members or organizations that engage with the process or are thought to be involved. We urge you to ensure that all such people and groups are covered by your approach. In addition, as you note, CAO consultants may be at risk, though their vulnerabilities are very different to those of community members.

It is often challenging to identify the direct cause of a threat or reprisal. As such, it is important to cast the net wide and ensure that the CAO will act to prevent and respond to threats—even when the link to the complaint is unclear or the person or organization making the threat suggests that it is unrelated to the CAO complaint. For example, in the case of the arrest and prosecution of Pastor Omot Agwa, the Inspection Panel’s facilitator and interpreter in Ethiopia, under the antiterrorism legislation, the government contends that his prosecution is unrelated to his work for the Inspection Panel. Yet the timing is highly suspect and there are reasons for the government to distance the prosecution from the World Bank. In cases like this, the CAO should take action.

Suggested language:

Introduction: CAO’s work with complainants is sensitive by nature, and in some circumstances, complainants, their children or others in their households, other community members, community groups or NGOs, or others may experience threats or reprisals that may be linked to their involvement or perceived involvement in the CAO process as a result of having lodged a complaint. Similarly, Equally, CAO consultants (mediators, interpreters, investigators etc.) may be at risk.

4. Enhance language regarding confidentiality

We welcome the CAO’s inclusion of confidentiality as a principle and safeguarding confidentiality as a preventive measure. We suggest you integrate into this commitment an undertaking to seek informed consent from complainants and others involved in CAO processes and to commit to being cautious not to intentionally or unintentionally encourage people to share information that they would prefer to keep confidential. This can be included under the principle of confidentiality or under the preventive measure of safeguarding confidentiality. Alternatively, you may wish to include an additional principle of informed consent.

Suggested language:

Principles, Confidentiality: CAO's Operational Guidelines set out its commitment to safeguard individual identities or confidential information shared by the parties. CAO operates on a presumption of confidentiality and respects the confidentiality of identities of complainants in a process for as long as they choose. This confidentiality protection starts with inquiries to the office before lodging a complaint, and carries through the eligibility, assessment, dispute resolution and/or compliance process, and any related advisory work. CAO will seek the informed consent of relevant parties (be it complainants, interviewees, or others) before it publishes or refers to information provided to it. It will be cautious not to unintentionally encourage people to agree to have information shared beyond the CAO that they would prefer to remain confidential.

5. Commit to taking a proactive approach

We are pleased to see that the CAO will discuss and agree its protection approach with the complainants throughout the process and that key decisions will be taken jointly with the complainants. We encourage you to ensure that this is a routine discussion with all complainants and not only "When CAO finds that complainants may be at risk."

Suggested language:

Principles: *Proactive prevention of security risks* [or add to Complainant participation]: CAO will expressly discuss the security situation with complainants, their representatives, and others linked to the process from their initial contact and then throughout the process. CAO will proactively ask complainants and others what security concerns they may have and work with them to develop an approach to prevent and respond to risks of retaliation. CAO will also consult with entities that monitor such risks, including the UN Office of the High Commissioner on Human Rights, other UN or human rights bodies, and both international and national nongovernmental organizations. The CAO acknowledges that complainants may not feel secure sharing information to the CAO on all risks and recognizes that risks may exist even if a complainant is asked and doesn't share.

CAO will identify a focal point to coordinate its work preventing and responding to allegations of reprisals.

6. Risk assessment

It is important that you flesh out the CAO's approach to risk assessment. We encourage you to emphasize that the CAO will assess the risk as soon as it is approached, throughout the process, and at its conclusion. We further encourage you to provide more detail on the CAO's process for assessing risk by clarifying what the risk assessment will be based on.

Suggested language:

CAO will assess the risk context as soon as it is approached, continuously throughout the process, and at its conclusion. In assessing the risk context, CAO will consider information provided by the complainant, complainants' representatives, and NGOs of their own accord and in response to CAO questioning about the security environment and risks of retaliation, as well as CAO's own research into the human rights situation in the country.

CAO will expressly discuss the security situation with complainants and their representatives throughout the process, asking them what concerns they have, prompting them to think about security issues, agreeing upon a process for reassessing risks routinely throughout the CAO

process and beyond, encouraging them to report to the CAO every threat, show of intimidation, security issue, or something similar experienced by them, or other affected persons, or others somehow linked to the process, and agreeing preliminarily on how the complainants would like CAO to respond should problems arise.

~~Throughout CAO's process, CAO continuously assesses the risk context of the complainant, both by consulting independent open sources and through interactions with the parties. CAO pays particular attention to:~~

- The environment for public participation, including for human rights defenders and people who are critical of or participate in development projects in the country;
- Whether the complainants have previously faced retaliation or threats of retaliation in the past;
- Risk factors such as the presence of formal or informal security forces;
- Risk factors related to digital security – and the need to use safe, secure means of communications, including verified encryption technologies; and
- ~~and seeks to identify~~ Whether specific groups within the affected population that may be at higher risk based on their gender, religion, or otherwise minority or ~~vulnerable~~ marginalized status.

Risks are recorded in CAO documentation. The CAO will review and update this risk assessment at each stage of its process, when new risks emerge, or when an event increases the likelihood of reprisal.

7. Preventive measures

Rather than only working with complainants to identify appropriate preventive measures “where relevant,” we encourage you to do it in every case unless it becomes clear in discussions with complainants or their representatives that it is not necessary because the risks are negligible. We also think it is important to commit to implementing those measures, to recognize that it may be necessary to consult with specialists to design the appropriate measures, and that the measures will be sensitive to gender, race, ethnicity, age, disability, sexual orientation or gender identity, or other status.

Suggested language:

~~Where relevant,~~In every case except where CAO and complainants or their representatives agree that it is not necessary, CAO will work closely with the complainants to identify appropriate preventive measures adapted to the specific circumstance. When necessary, CAO will consult other organizations that have specific expertise on protecting at risk individuals to identify appropriate preventive measures, including the UN Office of the High Commissioner on Human Rights, other UN or human rights bodies, civil society organizations, or national authorities. Preventive measures will be sensitive to gender, race, ethnicity, age, disability, sexual orientation or gender identity, or other status. CAO will implement those measures as agreed with the complainants, especially where security concerns are present.

Safeguarding confidentiality

We value the detail that you have provided to show how the CAO will safeguard confidentiality. In addition to the comments discussed above, we encourage you not to use photographs of anyone without their express consent, not only those with confidentiality protection.

Suggested language:

CAO does not use photographs or other identifying materials of anyone ~~with confidentiality protection~~ without their express consent, and only after providing detailed information about how the photographs may be used...

We also encourage you to include language that requires the CAO, even in internal documents, to withhold names and other identifying information. Such information should only be used when absolutely necessary.

In addition, there is a risk whenever visiting project areas that the complainants will be revealed. We encourage you to outline measures that you will take to minimize this risk, either within this document or a protocol.

Digital Security

In addition to confidentiality, secure communications are an increasing source of concern related to the safety and security of complainants. CAO should develop an online secure form by which complaints can be filed, using encryption technology, and should develop protocols by which direct communications with a complainant can utilize secure communications tools. This risk should be assessed on a country-by-country basis, and any information regarding potential for digital surveillance must be made known to complainants, so that they may take necessary steps to utilize secure technology tools when communicating with the CAO.

Addressing power imbalances

The current text addresses power imbalances only with respect to dispute resolution. We encourage the CAO also to commit to addressing power imbalances in situations of compliance review, including site visits, and to outline what steps it will take to mitigate the power imbalances.

Additional preventive measures

We appreciate that the CAO emphasizes that it may be appropriate to approach other actors, including the World Bank Group, to help create an environment conducive to the CAO process. We encourage you to go beyond this by actively working with World Bank country offices to develop an early warning system to identify threats or other security issues, particularly for those who have filed or are considering filing a complaint or are otherwise critical of a project, to analyze the risks and to promptly implement protection measures.

Suggested language:

After consultation with the complainant or relevant person/people, CAO will work with World Bank country offices to develop an early warning system to identify threats or other security issues particularly for those who have filed or are considering filing a complaint or are otherwise critical of a project, to analyze the risks and to promptly implement protection measures.

Sometimes, it may be appropriate to approach other actors for assistance in creating an environment conducive for the CAO process, such as government agents ~~or the World Bank Group~~, as appropriate, after consultation with the affected party.

We encourage you to provide additional detail outlining precautionary measures that you will take during site visits, information gathering, and in communication with complainants. It will be helpful to have clearer information on what the CAO can and cannot do in different scenarios, including detail regarding phone calls, interpreters, and transportation.

8. Require CAO to monitor for reprisals

Following discussion of preventive measures, we encourage you to include discussion of how the CAO will monitor for reprisals.

Suggested language:

Monitoring: Throughout and following the process, CAO will actively monitor for reprisals including by asking complainants and others that they are working with whether they or people closely associated with them had any security concerns or had faced any problems whatsoever, particularly following community visits. CAO will provide all interviews with the contact details of an appropriate CAO staff member and urge them to contact that person, either directly or indirectly, should any security issue develop. When there are risks of reprisal following the conclusion of the process, CAO will visit affected communities at the conclusion of its process provided that the risks of reprisal would not be exacerbated by such a visit.

9. Response to security incidents

We welcome the CAO's emphasis on agreeing with the affected party the appropriate response. However, on occasion, the CAO will not be able to do so because the reprisal will make the affected person unreachable. Therefore, we encourage you to agree upon the appropriate response in advance with complainants and others, as outlined above. It is important for the CAO to remain engaged and implement protection measures in close cooperation with those they are intended to protect until the reprisals have ceased and the person affected can resume their regular activities including, if relevant, their activism. We also encourage you to outline some of the measures that the CAO may take should reprisals occur.

Some complainants, particularly human rights defenders, community leaders, and journalists, work on a number of issues that put them at risk of reprisal. The CAO should adopt the position that any attack—physical or otherwise—against a complainant, family member, fellow community members, or other related person will be presumed to be related to concerns about the IFC project and the complaint, until and unless otherwise established. In all such cases, the CAO should work with the affected party to respond appropriately. Too often we see governments or others responsible for reprisals claim the attack was due to a 'personal dispute' or otherwise unrelated to the affected party's activism.

We urge you to include discussion of all instances of threats, intimidation, or other reprisals in CAO reports, while respecting the confidentiality of complainants and interviewees, as well as including the steps that the CAO took to respond. Further, unless there are compelling security or similar grounds not to, the default position of the CAO should be to publicly denounce all instances of reprisals, using messaging that emphasizes the links to sustainable development and accountability, consistent with its mandate. These public statements should maintain confidentiality of the individuals facing reprisals should those individuals so choose.

Suggested language:

Should security incidents or threats occur in the context of CAO engagement, or should the CAO become aware of such security threats, CAO will give immediate priority to the situation and discuss with the affected party what the appropriate course of action should be. Should the affected party be unreachable, CAO will implement the planned response that was developed with the complainants or their representatives should a reprisal occur. CAO will also consult with experts (including UN Office of the High Commissioner on Human Rights, UN Special Procedures, and nongovernmental organizations, particularly those that work with human rights defenders) to identify other strategies to remedy the reprisal that has occurred and to stop any ongoing reprisals. CAO will develop a protection plan with concrete escalatory steps, remaining

engaged and working to address the security issues until reprisals have ceased and the person or people affected can resume their regular activities including, if relevant, their activism.

Some complainants, such as human rights defenders, community leaders, or journalists, work on a number of issues that put them at risk of reprisals. CAO recognizes that any threat or attack—physical or otherwise—against a complainant, a family member, or a fellow community member could be linked to the complaint. CAO will respond to any such threat or attack on the presumption of such a link until and unless otherwise established.

Action that CAO may take ~~This may~~ includes discussing ~~what~~ options ~~there may be~~ for legal redress ~~and~~ raising the incident ~~with~~ ~~to~~ the relevant authorities, or ~~with~~ ~~to~~ the World Bank Group management. Unless those affected request CAO not to do so, CAO ~~may~~ will also reflect any significant security concerns or incidents in CAO reports as appropriate, while respecting the confidentiality of complainants and interviewees, as well as the steps that the CAO took to respond. Taking into consideration security and similar concerns, CAO's default position will be to publicly denounce all instances of reprisals and maintaining confidentiality of the individuals facing reprisals should those individuals so choose.

CAO will include information on all allegations of intimidation or reprisals in their annual reports, with identifying information removed as appropriate, together with information on how CAO responded.

10. Commit to press the IFC on reprisals

As previously discussed, while the CAO has an important role to play in preventing and responding to reprisals, commitment from the IFC itself is also key. We urge the CAO to press the IFC, perhaps in part through its advisory arm, to take meaningful steps to prevent reprisals at a systemic level. The CAO should also press the IFC to implement necessary measures to prevent reprisals in particular cases. The CAO's role in this respect should be outlined in the approach.

11. Easy access guide for communities

In addition to your formal document, we ask that you draft a note designed for community members that guides them through assessing the risks prior to filing a complaint. Such a document should be in clear, accessible language and should outline what CAO can do to prevent reprisals—including its limitations—as well as what it can offer should reprisals occur. This guidance should be translated into local languages where IFC and MIGA operate.

12. Provide financial assistance to communities facing reprisals

Financial assistance is key for complainants, communities, and others to be able to implement emergency measures to protect themselves when facing reprisals. The fund should consider both preventative security measures as well as restorative measures. The CAO should work with the Board to create such a fund, administered by the CAO and financed by the IFC, which communities can access to finance emergency protection measures. This fund could be used by complainants and others, for example, for:

- Emergency travel/relocation to escape a high risk situation;
- Public communications work to challenge defamatory or smear campaign efforts;
- Legal services when facing retaliatory trumped up charges; or
- Private security.

Other options for a fund could be to utilize existing funding mechanisms via NGOs to establish dedicated funds for complainants, so as to facilitate rapid response.

13. Review clause

Considering that this is a new area, we ask that you build in a review clause requiring the CAO to review the approach and its implementation in consultation with civil society three years after the approach is adopted. In the course of this review, the CAO will consider what has been effective, what has not, and accountability for implementation, including responsibility for breaches of the approach.

We welcome the opportunity to discuss our input with you further and look forward to working with you to finalize and implement these guidelines.

All the best,

Accountability Counsel
Bretton Woods Project
CEE Bankwatch Network
Center for International Environmental Law (CIEL)
Forest Peoples Programme
Frontline Defenders
Human Rights Watch
International Accountability Project
Lumière Synergie pour le Développement (LSD)
MiningWatch Canada
Observatoire d'Etudes et d'Appui à la Responsabilité Sociale et Environnementale (OEARSE)
Protection International
Social Justice Connection
Stichting Onderzoek Multinationale Ondernemingen (SOMO)