

2014 UN Forum on Business and Human Rights

Panel Summary Note

Title: Access to remedy at international financial institutions: challenges and opportunities of non-judicial grievance mechanisms

Date and time: 1 December, 2014 at 10:00-11:30am

Location: Palais de Nations, Room XXII

Participants:

- Moderator: Joanne Bauer (Adjunct Professor, SIPA, Columbia University)
- Mariëtte van Huijstee, Senior Researcher, SOMO
- David Pred, Managing Director, Inclusive Development International
- Alistair Clark, Managing Director of the Environment and Sustainability Department, EBRD
- Komala Ramachandra, South Asia Director, Accountability Counsel
- Norman Jiwan, Founder, TuK INDONESIA
- Lalanath deSilva, Panel Member, ADB Compliance Review Panel (*via conference call*)

Summary of presentations:

Mariëtte van Huijstee (Senior Researcher, SOMO): Landscape of non-judicial grievance mechanisms

- Presented SOMO paper on non-judicial grievance mechanisms, full text available at:
<http://grievancemechanisms.org/attachments/ThePatchworkofNonJudicialGrievanceMechanisms.pdf>
- Important to improve performance and effectiveness of grievance mechanisms because sometimes they are the only forum for affected groups to access remedy.
- Types of mechanisms: IFIs accountability mechanisms; Intergovernmental (attached to treaty bodies); NCPs of OECD; Regional bodies; National human rights institutions; Multi-stakeholder initiatives; Company level or operational grievance mechanisms.
- Outcomes
 - All have limitations, sometimes no coverage of the particular harm in play
 - Intergovernmental bodies apply to state bodies, not companies
 - Multi-stakeholder mechanisms – only complaints about their members
 - IFIs – only if IFI funding is involved
- Functions
 - Mediation/Dialogue-based – seeking compromise between company/government and community
 - Adjudicative/compliance – investigation and compliance findings
- Limitations
 - Outcomes are not guaranteed

- Guidelines provide criteria for mechanisms to meet, but not sole responsibility of mechanism to meet them; up to institution to do its part
- Recommendation: mechanisms need a mandate to initiate investigations and enforce consequences when standards not met.

David Pred (Managing Director, IDI): Accountability Derailed: A Community Experience Using the ADB Accountability Mechanism to Claim Their Rights (Case study – Cambodia)

- IFI mechanisms are generally the best that is available right now, but still limited and no mechanisms have fully implemented the UN Guiding Principles. They are also the only option for victims, given the legal immunity that IFIs enjoy.
- ADB-sponsored Cambodia Railway Rehabilitation Project. 4200 households living along tracks; displacement, impoverishment, development disaster, pressured to move without access to water resulting in two child deaths. Filed complaint to ADB's Accountability Mechanism (OSPF – problem solving function, CRP – compliance review panel).
- Rating the ADB (looking at Guiding Principle 21).
 - Accessible – IFI mechanisms do a poor job across the board, communities with legal representation have more luck, but we often have to struggle with the mechanisms to get them to respect the right to representation. For OSPF and CRP, the community only needs to draw link between harm and act/omission by the ADB, but still require “good faith efforts” to address the issue with the Operational Department. Railway complainants who tried to complain independently (without legal assistance) had their complaint rejected despite 2 years of good faith efforts.
 - Equitable – OSPF did not address power imbalances but rather entrenched them by requiring that there be no collective negotiations, requiring complainants to waive their confidentiality, not allowing NGO representation – the entire process was on the government's terms. CRP demonstrated impartiality, integrity, and engaged with complainants' representatives. Can make recommendations on remedial actions which become binding, and complainants/management can comment on draft report. This is more equitable process than other IFI mechanisms.
 - Rights-Compatible Remedy – no IFIs guarantee remedy in policy or practice, much less one that accords with human rights. Without remedy, there is no accountability.
 - OSPF limited scope of remedy on resettlement, no discussion of rights or systemic issues, limited to families who signed complaint, resulting in small amounts of additional compensation in exchange for signing away rights to complain further.
 - CRP – issued strong report validating complaints, robust recommendations. But original recommendations were watered down as a result of pressure from Management, and then

further watered down by the Board (e.g., ADB to establish compensation fund turned into government fund).

Alistair Clark (Managing Director of the Environment and Sustainability Department, EBRD): IFI Management Perspective

- Speaking as a representative of management of an IFI (European Bank for Reconstruction and Development) who invests in around 400 each year projects.
- EBRD has robust social and environmental requirements to which projects must conform, as well as policies with which the EBRD must comply.
- Accountability Mechanisms help banks be better institutions. Projects come in all shapes and sizes and it is hard to apply our robust policies and standards in many cases. We will make mistakes but we try to minimize and learn from these cases through grievance/accountability mechanisms.
- Every project has due diligence. Most projects that are existing facilities will not comply at first, so the process is that we apply conditions on the borrower. Mechanisms can be part of the negotiation process between the Bank and the client. They can be used as a stick, not a carrot, in order to get better resources to conduct full assessment). Banks do not want complaints; governments and companies do not want complaints. So I wouldn't agree that mechanisms are toothless tigers.
- Within EBRD we have 2 components of the mechanism: Problem-solving and Compliance Assessment. At the moment we do not see much interest from clients in problem solving. Most project complaints for us are going straight to Compliance Assessment, but results are binary:
 - Non-compliant: need Bank management action plan focusing on policy compliance but not on remedies
 - Compliant: can still be useful because we can use judgments in other settings to drive later policy/project decisions in other settings. Terms that come out of the compliance finding may shape other policy decisions.
- The government owners of IFIs want to minimize cost and harmonize policies/standards. However, the presence of Accountability Mechanisms with different structures and modus operandi is a perverse incentive for environmental and social standards harmonization as they hinder cooperation on projects. It would be good for Accountability Mechanisms also to consider some form of harmonization.
- In conclusion, Mechanisms are important in equalizing the power imbalance for project affected people but they are not well understood by clients, but they are important to all IFIs.

Komala Ramachandra (South Asia Director, Accountability Counsel): Recent Trends in IFI Accountability

- Significant difference in how IFIs publish results of their non-judicial grievance mechanisms (NJGMs). They differ in how they report numbers of complaints received, and how they handle the complaints. This hinders ability to track and analyze trends, and assess whether NJGMs are delivering remedy.

- General observations
 - Historically, there have not been a lot of complaints to IFI non-judicial grievance mechanisms (~550 reported since IFI NJGMs came into existence) and a small number of mechanisms getting most of complaints. Growing quickly because more people are becoming aware of them.
 - Of complaints filed, only one in every three is found eligible. Very few of those complaints are reaching a substantive stage, i.e., dispute resolution or compliance review. About one fifth of eligible complaints are not reaching EITHER substantive stage.
 - Role of support for complainants – those with representation (either legal or by a civil society organization) had higher chance of reaching substantive stage.
 - Why? Possible reasons: CSOs understand rules better and can formulate a complaint that is more likely to be accepted. CSOs can do background investigations. They have access to certain modes or styles of communication (e.g., in the “language” of the IFIs)
- Recommendations:
 - IFI NJGMs need to be more transparent: they need to provide information about incoming cases and how they are handled. Important for being able to track progress and outcomes.
 - IFIs need to work with communities and recognize that CSOs can help get substantive outcomes.

Norman Jiwan (Founder, TuK INDONESIA): IFC’s Client Cases in Palm Oil

- Palm oil is important component in many industries, including cosmetics, biodiesel, cooking oil. Indonesia to be world’s largest palm oil producer (40 million tons by 2020). Government of Indonesia dispersed land permits; looking to develop 30 million hectares. Major expansion resulted in land-grabbing and serious resettlement issues.
- Focus: IFC supported multinational company Wilmar International. In 2007, complaint filed to Compliance Advisor/Ombudsman, grievance mechanism of the IFC, regarding impacts on forests and customary lands, and failure to follow IFC’s due diligence procedures.
- Results:
 - 2009 CAO Audit found Wilmar and IFC had violated due diligence procedures, and had allowed financial considerations to override social and environmental considerations.
 - IFC required a revised strategy for investment in palm oil sector, leading to World Bank Group-wide suspension of new investments in palm oil until revised strategy is in place.
- Endemic problems
 - IFC Performance Standards should apply to the whole supply chain – if negotiation is just between company and bank, doesn’t affect the chain. Only 30% of traded palm oil comes from Wilmar’s own estates. Many other suppliers.
 - Other banks are financing, so scope of IFC influence is limited.
- Outstanding issues

- No actions to discipline IFC staff for policy violations, stop IFC staff from misleading the Board, no proposed remedy for wider problems or address problematic land tenure law.
- No actions proposed to address problems in complaint that companies are planting on peatlands and burning forests.
- No comprehensive action plan to ensure IFC staff will do to ensure future compliance.

Lalanath deSilva (Panel Member, ADB Compliance Review Panel): Perspective from an IFI Mechanism

- The Asian Development Bank Accountability Mechanism
 - Policy/Procedures have been revised from time to time. Last time in 2012.
 - Functions mostly under this policy. Loans governed by the policy operating at that time.
- 2012 Policy
 - Split mechanism into two components (Compliance Review Panel and Special Project Facilitator)
 - SPF – problem solving function. Prefer to deal with complaints individually before collective.
 - CRP – investigates complaints from point of view of harm, and noncompliance by the Bank staff and mgmt.
 - Both functions focus on complaint and compliance by Bank. Not about evaluating government or businesses. This is a challenge because complaints involve bank staff and borrowers/governments; hard to separate.
 - Both functions can occur concurrently. Complainant can go to either function (previously, the complainant had to go to SPF until reached a stage to transfer to CRP).
- Strategies for filing complaints
 - There are various policies (environmental, resettlement, indigenous) – communities and those representing them may find language in any one of these as hook for getting complaints over the threshold.
 - Panel looks at complaint against policies and assesses if complaint meets threshold criteria. Investigates harm, causation, and compliance.
- Moving forward
 - Is there a need to centralize secretariat services for grievance mechanisms of the various multilateral and bi-lateral institutions?
 - Over 40 mechanisms in the world, all applying different policies and procedures, particularly when there are multiple lenders involved. This is very confusing and onerous to complainants and victims. Is there a business case to centralize services with a common procedure and still have the ability to apply different polices/procedures?