

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Perspectives

Independent Accountability Mechanism Project

2023

Can Mediation Provide Remedy For Human Rights Violations? A Quest for Justice Using a Development Bank Accountability Mechanism

Natalie Bugalski

David Pred

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/accountability-perspectives>



Part of the [Banking and Finance Law Commons](#), [Comparative and Foreign Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), and the [International Trade Law Commons](#)

Can Mediation Provide Remedy For Human Rights Violations? A Quest for Justice Using a Development Bank Accountability Mechanism

Natalie Bugalski and David Pred

No one can negotiate without the power to compel negotiation

—Saul Alinsky¹

Kounsa is a Guinean farmer whose family has lived in a rural village in the fertile region of Boké for several generations. A natural leader with friendly eyes and a warm smile, Kounsa has a keen interest in the native ecosystem. His passion for ecology has intensified in recent years as the natural landscape around him has been transformed. Over the past decade, Kounsa has witnessed the escalating destruction of his village’s once abundant forests, rivers and agricultural land by one of the world’s largest bauxite mines. Contributing 12 percent of government revenues and 7 percent of GDP in 2014,² the mining operation is hailed as an important public development project, and globally critical for the manufacture of components for lightweight electric vehicles, among other things. But these benefits have come at the expense of Kounsa’s community, which has experienced extensive loss and damage to their land-based livelihoods.

As part of our work at Inclusive Development International, we have had the privilege of partnering with Kounsa and his community in their fight for accountability. Together we have deployed a multi-pronged advocacy strategy to seek redress and prevent future harms. A centerpiece of this strategy has been a complaint to the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC).

In this essay we describe what it takes—the enormous tenacity, solidarity, courage and skill required—for communities and their civil society partners to seek recourse through the dispute resolution processes of development bank accountability mechanisms. While these mechanisms can be the crucial centerpiece of an effective strategy, their critical shortcomings mean that community advocates must often engage in Olympian advocacy gymnastics to achieve even a small measure of redress. We also make recommendations for strengthening community-centered accountability in development finance, so that remediation and prevention of harm become the norm, and not the rare exception.

These reflections and recommendations feel particularly pertinent at a moment when the World Bank Group’s shareholders are debating a dramatic increase in private sector investment to respond to the growing crisis of poverty, inequality, and climate change. With investment in large-scale infrastructure and extractive industries pouring into fragile and conflict-affected countries, against the backdrop of rising authoritarianism and shrinking civil society space, effective remedy and accountability systems are more important than ever.

¹ SAUL ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* (1972).

²International Finance Corporation, *CBG Expansion*, Project No. 34203, <https://disclosures.ifc.org/project-detail/ESRS/34203/cbg-expansion>.

The Double-edged Sword of IFC's Financial Support

In 2016 the IFC, along with other development finance institutions and Equator Principle Financial Institutions,³ collectively provided the mining company Compagnie des Bauxites de Guinée, or CBG, \$823 million in financing to expand its sprawling bauxite mine in north-western Guinea.⁴ CBG, whose owners include mining giants Rio Tinto and Alcoa along with the Government of Guinea, has operated the mine since 1973, exploiting large tracts of land to extract the high-quality bauxite ore used to produce aluminum.⁵

According to the project's environmental and social impact assessment, since the start of its operation, the company has taken land without seeking the consent of affected communities and without paying fair compensation.⁶ The mine has caused significant disruption to the traditional crop rotation system and local herding practices.⁷ It has affected rivers and other water sources nearby villages rely on,⁸ and had severe impacts on biodiversity, including critical habitats for endangered chimpanzees.⁹ These impacts, along with the failure to provide significant local development benefits, has caused enormous frustration amongst host communities, who have witnessed enormous wealth being extracted from underneath them and exported.

The IFC provided financing to expand CBG's mine despite these devastating impacts being documented in an Environmental and Social Impact Assessment,¹⁰ and with little to suggest that the company's conduct would change, putting at further risk the resources and livelihoods of thousands of rural inhabitants. As a condition of the loan, the IFC required an environmental and social action plan, which included vague remedial measures for past impacts and compliance with the Performance Standards moving forward.¹¹ However, despite CBG committing to execute the plan, the company's environmental and social practices did not improve. Indeed, the ominous warning in the impact assessment soon came to pass: without suitable mitigation measures, the

³ The syndicate of commercial banks included French banks Société Générale, BNP Paribas, Credit Agricole, and Natixis; the German branch of ING bank, ING-DiBa AG; and two Guinean banks, Société Générale de Banques en Guinée (SGBG) and Banque Internationale pour le Commerce et l'Industrie de la Guinée (BICIGUI), a member of the BNP Paribas group. The loan was provided under the Equator Principles, the banking industry's voluntary environmental and social risk management framework that is based on the IFC's Performance Standards.

⁴ IFC, CBG Expansion, *supra* note 2.

⁵ *See id.* Rio Tinto, Alcoa and Dadco collectively hold their 51% stake in CBG through a Delaware-registered joint venture company called Halco, made up of Alcoa (USA, 45%) Rio Tinto (UK, 45%) and Dadco (guernsey Channel Islands – UK, 10%). All three companies also own refineries and/or smelters that source from the CBG mine in Guinea.

⁶ EEM, *Environmental and Social Impact Assessment of the CBG Mine Expansion Project*, Chapter 7 – Social Impact Assessment, section 7.1.4.1, at 6, (December 2014), https://www3.dfc.gov/environment/eia/cbg/eia_cbg.html.

⁷ *See id.*, at Chapter 7 – Social Impact Assessment, section 7.1.4.1-2; *See also* HUMAN RIGHTS WATCH, “WHAT DO WE GET OUT OF IT?” THE HUMAN RIGHTS IMPACT OF BAUXITE MINING IN GUINEA (2018), <https://www.hrw.org/report/2018/10/04/what-do-we-get-out-it/human-rights-impact-bauxite-mining-guinea>.

⁸ *See* EEM, *Environmental and Social Impact Assessment of the CBG Mine Expansion Project*, *supra* note 6, at Chapter 5 – Social Impact Assessment, section 5.5.10, page 83; *See also* HUMAN RIGHTS WATCH, *supra* note 7.

⁹ Jennifer O'Mahony, *Bauxite mining and Chinese dam push Guinea's chimpanzees to the brink*, MONGABAY, May 21, 2019, <https://news.mongabay.com/2019/05/bauxite-mining-and-chinese-dam-push-guineas-chimpanzees-to-the-brink/>.

¹⁰ EEM, *Environmental and Social Impact Assessment of the CBG Mine Expansion Project*, *supra* note 6.

¹¹ International Finance Corporation, *CBG Expansion*, *supra* note 2.

authors' cautioned, "most of the villages impacted are likely to suffer a deep, generalized and long-term slide into poverty."¹²

The IFC had considerable leverage over CBG at the time of appraising the loan, and its backing of the mine was instrumental in the project going ahead—not only because of the IFC's own financial contribution, but because of the signal it sent to other banks, which may otherwise have been wary of financing a project with such high risks. The IFC's involvement, therefore, arguably contributed significantly to the displacement and other human rights impacts communities have suffered in the years since.

Yet, IFC financing also opened an important avenue for accountability and redress: a complaint to its independent accountability mechanism, the CAO. As is commonly the case, however, the affected communities were unaware of this newly available avenue of recourse.

Getting to the Starting Line: What it Takes to File a Complaint to an Accountability Mechanism

We learned about the project at a civil society strategy meeting in 2018. Guinean human rights organizations had gathered in the capital, Conakry, to discuss ideas for responding to the onslaught of mining that was wreaking havoc on the rural population. Our organization specializes in researching the investments and supply chains linked to harmful projects to inform communities' advocacy strategies, so we offered to do this for the communities affected by the CBG mine. After completing the investigation, we traveled with local partners to Boké to explain the findings to community members and discuss the international advocacy opportunities that the investigation revealed, including the possibility of filing a complaint with the CAO. Knowing that filing a complaint alone was unlikely to result in satisfactory remediation, we presented the range of international banks and corporations that had a financial or supply chain link to the mine and how these financial 'pressure points' could be leveraged in a multi-pronged advocacy strategy.

With more than a dozen remote rural villages already impacted by the mining operation (and many more at risk), informing all the affected people about the CAO and their other advocacy options was an enormous challenge for civil society advocacy organizations operating on shoestring budgets. Even after best efforts were made at raising awareness, it was not easy for the communities, who faced divide-and-conquer tactics and the risk of reprisals, to make a unified decision on whether to file a complaint.

Ultimately, all of the 13 affected communities we consulted decided to raise their plight with financiers of the expansion, and defend their rights by filing the complaint. Our small team of advocates now had our work cut out for us: collecting testimonies and other evidence of the extensive and multifaceted harm across these remote villages and analyzing breaches of the IFC's Performance Standards to draft a credible and compelling complaint, able to withstand IFC and CBG defenses. Time was of the essence, not only because of the serious daily hardships experienced by the communities, but also because community cohesion and motivation to file a complaint can easily erode over time, especially once the IFC client becomes aware of the initiative and may embark on efforts to prevent it.

¹² *Id.*, at 190, Chapter 7 – Social Impact Assessment.

After seven months of groundwork, in early 2019, we and our Guinean partners CECIDE and ADREMGUI, filed the complaint on behalf of the 13 villages. Later, other affected communities asked to join the complaint, but with our limited resources stretched to breaking point, and aware of how difficult it is to manage a mediation process involving so many villages, we made the difficult decision not to offer our assistance to file further complaints. Our hope was, and remains, that any agreements reached are applied by CBG across all affected villages, which are equally entitled to the protections and benefits conferred by the Performance Standards.

Balancing Power in Mediations Involving Human Rights Violations

Early on, the communities decided that they wanted to attempt to address their grievances through mediation, offered through the CAO's dispute resolution function. Mediation appealed to them because it offers the possibility of a less confrontational setting/platform/milieu/context, as compared to a compliance investigation, and the opportunity for the parties to agree on remedial action.

We knew from experience that even though the CAO likely provides the best support to mediation processes among all the independent accountability mechanisms, succeeding in securing remedy in such a complex case would be an uphill battle. For the best chance of success, we had to get to work on three fronts. First, it was critical for the 13 villages to select the right community members to represent their interests in the mediation process, a serious and often burdensome responsibility which could last for years. This meant encouraging each village to choose two representatives (any more than 26 would make it logistically impossible to hold mediation meetings), and respectfully challenging entrenched power structures to encourage them to choose women and younger leaders like Kounsa, along with more traditional elder male leaders. Then, the community representatives had to begin to prepare for the mediation, a completely foreign forum and setting for them. This included gathering evidence about each issue they wished to raise, learning their rights and entitlements under the Performance Standards, clarifying their interests, defining their positions, and practicing negotiating skills. While not without challenges, some four years on, the group of community representatives have displayed enormous tenacity and strength, developing an inspiring sense of solidarity and organization among themselves, which did not exist before the CAO process began.

Second, as CAO mediation processes are voluntary, there is no guarantee that IFC clients will agree to come to the table, and if they do, it is far from assured that they will negotiate in good faith on their own accord. To counter this risk, we got to work deploying our "follow the money" strategy of engaging investment and supply chain actors that have influence over the company. We sent letters not just to IFC but to CBG's other lenders, to its shareholders, and to the consumer-facing brands, including automakers, whose supply chains we traced to the Guinean mine. Citing their responsibilities under the UN Guiding Principles on Business and Human Rights and their own human rights policies, we asked these financial institutions and companies to use their leverage with CBG to urge it to participate in the CAO process in good faith and to provide effective remedy to the communities. Several heeded the call and have continued to engage with us and monitor the process in the years since—the stand-out being Mercedes Benz, which after a period of active engagement with us and our partners at Human Rights Watch visited the mine and

the affected communities to see the problems directly, and to urge action from the mining company. We also established a dialogue with Rio Tinto and Alcoa, the two main private sector joint venture partners in CBG and the mine's main off-takers, who after persistent prompting from us and urging from their customers have since dramatically increased their attention on the mine's environmental and social performance. Notably, until recently, IFC's own engagement with us and the complainants was guarded and lacked the openness and practical dynamism of the most proactive industry actors.

Thirdly, it is not a given that the mediators engaged by the accountability mechanisms will adopt a rights-based approach to the mediation process. Often mediators are trained in commercial settings and have little experience working with communities. In applying the principle of neutrality, mediators often assume an approximate equivalence between parties that simply does not exist in the asymmetric power relations in company–community conflicts: on one side of the table sits a powerful corporation that has perpetrated human rights violations, often with the backing of an authoritarian government, and on the other side the victims, who have very little bargaining power. If a mediator does not take proactive steps to right this imbalance, a just outcome is unlikely. One of the ways this can manifest is in the setting of ground rules for the mediation process. Although ground rules must be agreed to by the parties to the mediation, mediators can influence these rules by suggesting a first draft as a basis for negotiation. In some cases, ground rules suggested by mediators that may be best practice in commercial disputes can be out of place in community-company conflicts because they are disempowering for communities—for example, requiring strict confidentiality, which serves to inhibit the ability of communities to conduct advocacy, one of their only tools to gain bargaining power. In other cases, mediators have promoted rules that restrict the role of NGO and legal advisors, ostensibly to center community voices, but in reality, denying their right to counsel and legal assistance. Without fair and appropriate ground rules designed to both build trust and equalize the highly asymmetric power relations that are typical of most conflicts between communities and companies, mediations cannot succeed at providing remedy.

In this case, the ground rules that were ultimately adopted¹³ following lengthy negotiation, strike a good balance between confidentiality, to build trust in the process, and transparency, to allow the parties to keep stakeholders, including the banks and buyers, updated so they can monitor the process and engage as necessary. Importantly IFC, Rio Tinto and Alcoa are formal observers to the process. This allows them to support CBG in addressing the issues at hand, and helps IFC to align its ongoing supervision responsibilities with the mediation process, taking into account the community's perspectives.

Investing time and energy on these three fronts –supporting strong community representatives in preparing to participate in the mediation; leveraging the influence of key industry players with a connection to CBG; and pushing for equitable ground rules— set us up for the best chances of success. The CAO has also to its credit put enormous resources into the process, and the CAO team, led by its principal dispute resolution specialist, has mediated problems skillfully, despite immense challenges in a complex case.

¹³ See *Guinea: CBG-01/ Sangaredi*, Project No. CBG Expansion 34203, (filed Feb. 26, 2019), Dec 14, 2020, <https://www.cao-ombudsman.org/cases/guinea-cbg-01-sangaredi>.

Today, the representatives are aware of their entitlements, provide support to one another, and are uplifted by the new attention to their plight—once invisible outside of Boké—by a dizzying array of large corporations and international actors placing pressure on CBG to remediate harm and improve its conduct. Relations between the company and the communities have improved noticeably. Positive tangible impacts from the mediation so far include new safeguards around CBG’s use of explosives and an agreement on compensation for damages,¹⁴ and improvements in access to water. And while confidentiality restrictions prohibit us from disclosing information on discussions under mediation, which is ongoing at the time of writing, suffice it to say that additional important remedial action may be finally underway.

Even with the intensity of resources and pressure that has been brought to bear in this case, though, progress has been far too slow. This is partly due to the Covid-19 pandemic which prevented in-person mediation meetings for almost two years. Another major factor is CBG’s significant environmental and social capacity constraints, which have been laid bare by the process. It is also not easy to change the attitude and behaviors of a large bureaucratic company, partly owned by the government, that has operated with a different mindset for half a century. But widening the aperture and extrapolating from our experience in other mediation cases as well, we see a more fundamental obstacle to remedy and accountability through dispute resolution at play.

Justice Remains Elusive Without Enforceable Rights

It has been immensely challenging for communities affected by CBG’s mining operation to succeed at securing remedy despite best efforts. And yet, most communities affected by development finance backed projects around the world do not have the support of advocacy organizations that are attuned to—much less able to implement and sustain over years—the multi-pronged campaigns and advocacy gymnastics necessary to shift power and achieve a modicum of accountability and redress. The accountability mechanisms of financial institutions (or other companies and governments) should be effective at ensuring remedies for harm and preventing future adverse impacts without requiring these monumental efforts, which are still only partly successful.

Mediation processes have the potential to provide an empowering platform for communities. When run well, the parties have a high degree of autonomy over the process, and communities have a real opportunity to express their perspectives to the other party, hear and challenge the responses, and shape agreements. At their best, effective mediation has the potential to transform hostile dynamics and help build a foundation for more constructive relationships that continue after the process ends. Accountability mechanisms and development finance institutions should ensure that a number of factors are in place to promote a rights-based approach to mediation, with an eye toward empowering affected communities to establish a more level playing field. These include, among others: i) amply resourced legal and technical assistance for communities and support for fact finding and technical solutions; ii) equal access to relevant information; iii) the acceptance of human rights-compatible standards as the basis for agreements; iv) protection from reprisals; and v) ground rules that strike an appropriate balance between confidentiality and transparency. While

¹⁴*Id.*, at Signed Agreement on Dynamite Blasting, (October 21, 2021), <https://www.cao-ombudsman.org/cases/guinea-cbg-01-sangaredi>.

the terms of mediations are dependent on agreement between parties, there is much that the accountability mechanism (and the development bank) can do to steer the process towards adopting these practices and principles.

But even at their best, mediations of community-company conflicts have considerable weaknesses. Crucially, even where good agreements are reached, there are usually no legal mechanisms to enforce them. Moreover, if a company is unwilling to negotiate in good faith, communities typically have no strong alternative recourse (BATNA¹⁵) to claim their rights. The complaint can be transferred to the compliance review function of the mechanism,¹⁶ and in some cases, this alternative is a legitimate threat to the client and the development bank, which are likely to want to avoid an investigation and a public record of poor conduct. But compliance review processes have their own shortcomings, including much less involvement of and agency for the communities, no direct jurisdiction over the client, and a poor track record of remedial results, which limit their effectiveness as a BATNA.

Could Arbitration, as an Additional Tool Available to Communities, Provide an Answer?

A new potential avenue for redress for affected communities that could address these shortcomings and that we believe deserves attention is arbitration. The IFC and other development banks could include arbitration clauses in their investment agreements that allow affected communities, as third-party beneficiaries,¹⁷ to pursue arbitration against the client in order to claim entitlements under the bank's environmental and social standards or to enforce agreements reached through dispute resolution processes. The right to activate arbitration could extend to legal agreements directly between IFC clients and affected communities that give effect to the Performance Standards and are reached in the context of obtaining Broad Community Support, a requirement of IFC's Sustainability Policy,¹⁸ such as negotiated land use agreements and benefit sharing agreements.

The Hague Rules on Business and Human Rights Arbitration¹⁹ could be considered for such cases. The rules incorporate principles and procedures to advance fairness and rights protection in arbitration processes, such as transparency of proceedings and awards;²⁰ the ability for numerous

¹⁵ BATNA stands for best alternative to a negotiated agreement, an important part of a negotiation strategy, coined by Roger Fisher and William Ury. See ROGER FISHER AND WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* (3rd ed. 2011).

¹⁶ In the case of the CAO, upon conclusion of the dispute resolution process with partial or no agreement, CAO will enquire whether the complainant wishes to transfer the complaint to CAO's compliance function and will do so with the consent of one or more complainants. See International Finance Corporation [IFC], *IFC/MIGA IAM (CAO) Policy*, at 71, (June 28, 2021), <https://www.miga.org/sites/default/files/2021-08/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf>.

¹⁷ See Center for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration*, art 19; See also model clauses to grant third-party arbitration rights, at 39–40 and 106–7.

¹⁸ IFC, *IFC Policy on Environmental and Social Sustainability*, para. 30, (Dec. 31, 2011), <https://www.ifc.org/en/insights-reports/2012/publications-policy-sustainability-2012>.

¹⁹ *Id.*

²⁰ On the trend towards more transparency of arbitration proceedings, See Katerina Yiannibas, *The effectiveness of international arbitration to provide remedy for business-related human rights abuses*, in LIESBETH F. H. ENNEKING ET AL., *ACCOUNTABILITY, INTERNATIONAL BUSINESS OPERATIONS, AND THE LAW: PROVIDING JUSTICE FOR CORPORATE HUMAN RIGHTS VIOLATIONS IN GLOBAL VALUE CHAINS* 94 (Routledge, 2020).

victims to aggregate their claims;²¹ awards of monetary and non-monetary relief; and a requirement that the arbitral tribunal satisfy itself that the award is human rights-compatible.²² The Permanent Court of Arbitration already offers a pro bono service for the administration of human rights-related cases and is considering establishing a roster of arbitrators with relevant expertise. The IFC and other development banks could also establish funds to support arbitration costs. Arbitral awards in favor of communities could trigger the release of project contingency liability funds or other types of remedy funds by the development banks, a measure recommended by the 2020 *External Review of IFC and MIGA's Environmental and Social Accountability*.²³

In parallel with arbitration proceedings against the client, the CAO could continue its own process of transferring the complaint to its compliance function, whose mandate is to investigate the IFC's compliance with its own policies, including its due diligence and supervision of its client's application of the Performance Standards. However, some discretion as to sequencing may be necessary, depending on the scope and subject matter of the arbitral proceedings. Arbitration would also remain available as an option after the completion of a CAO compliance investigation and the development of a management action plan by the IFC to address findings of non-compliance, particularly if the plan does not provide adequate remediation to the satisfaction of complainants.

Using arbitration to defend their rights would undeniably present challenges to communities, including the costs of evidence collection and submissions of arguments (requiring funds for legal and technical support), and the administration of proceedings, if not provided *pro bono*. As is the case for litigation in court and even CAO compliance investigations, arbitration is likely to be less participatory than mediation, though conceivably proceedings could be tailored to be accessible and inclusive. Moreover, arbitration, like litigation, is also more likely to be a zero-sum game, with winners and losers, which may leave communities in a worse position to seek remedy should their claims be rejected by an arbitrator. But despite these challenges, access to arbitration would provide affected communities with an additional option to directly claim their entitlements under the Performance Standards without having to rely on the good will of the IFC or its client. It would provide communities with a legal mechanism that would serve as their BATNA to mediation, thereby incentivizing companies to negotiate with them in good faith and would allow them to enforce agreements reached. Ultimately, we hypothesize that this would serve to increase the chances of successful mediation.

The adoption of environmental and social standards by development banks and the establishment of accountability mechanisms were fundamental milestones in the advancement of community-centered development accountability over the past three decades. But remedy and justice for communities harmed by development projects remains almost as elusive today as it did when the first such mechanism was adopted 30 years ago. The necessity of giving communities like Kounsa's the power to claim and enforce their entitlements themselves is long overdue and all the

²¹ See Center for International Legal Cooperation, *supra* note 17.

²² *Id.*, at art. 45.

²³ David Fairman et al., *External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness Report and Recommendations* (June 2020), <https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAAccountabilitydisclosure.pdf>.

more urgent as private sector development finance is set to scale up dramatically in the years to come.