



OMBUDSMAN ASSESSMENT REPORT

Regarding concerns from labour unions on
IFC's investment in the Avianca project (#25899)
in Colombia

May 2012

*Office of the Compliance Advisor Ombudsman
International Finance Corporation
Multilateral Investment Guarantee Agency*
www.cao-ombudsman.org

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LIST OF ACRONYMS

ACAV	Colombian Association of Flight Attendants
ACDAC	Colombian Association of Civil Aviators
ACMA	Colombian Association of Aviation Technicians
CAO	Compliance Advisor Ombudsman
IFC	International Finance Corporation
ILO	International Labour Organisation
ITF	International Transport Workers' Federation
ITUC	International Trade Union Confederation
MIGA	Multilateral Investment Guarantee Agency
PS	Performance Standards
PVB	Voluntary Benefits Plan

INTRODUCTION

The Office of the Compliance Advisor Ombudsman (CAO) is the independent recourse mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) of the World Bank Group. The CAO reports directly to the President of the World Bank Group, and its mandate is to assist in addressing complaints from people affected by IFC/MIGA supported projects in a manner that is fair, objective, and constructive and to enhance the social and environmental outcomes of those projects.

The CAO assessment is conducted by CAO's Ombudsman function. The purpose of CAO's assessment is to: (1) clarify the issues and concerns raised by the complainant(s); (2) gather information on how other stakeholders see the situation; and (3) help stakeholders understand and determine whether a collaborative solution is possible through a process facilitated by CAO's Ombudsman, or whether the case should be transferred to CAO Compliance for review.

This report describes/summarizes the assessment trip carried out by the CAO between February 24-28, 2012. It begins with a general introduction on the workings of the CAO, provides an overview of the complaint along with a succinct background of IFC's project. The report closes with an overall assessment of the dispute and conclusions. This document is a record of the views heard by the CAO team, and explanations of next steps, whether to continue with CAO's Ombudsman process or transfer to CAO Compliance. Such a decision is made by the parties. *This report does not make any judgment on the merits of the complaint.*

As per CAO's Operational Guidelines¹, the following steps will normally be followed in response to a complaint that is received:

- Step 1: **Acknowledgement** of receipt of the complaint
- Step 2: **Eligibility:** Determination of the complaint's eligibility for assessment under the mandate of the CAO (no more than 15 working days)
- Step 3: **Ombudsman assessment:** Assessment of the issues and provide support to stakeholders in understanding and determining whether a collaborative solution is possible through a facilitated process by CAO Ombudsman, or whether the case should be transferred to CAO Compliance for appraisal of IFC's/MIGA's social and environmental performance. The assessment time can take up to a maximum of 120 working days.
- Step 4: **Facilitating settlement:** If the CAO Ombudsman process continues, this phase involves initiation of a dispute resolution process (typically based or initiated by a Memorandum of Understanding and/or a mutually agreed upon ground rules between the parties) through facilitation/mediation, joint fact-finding, or other agreed resolution process, leading to a settlement agreement or other mutually agreed and appropriate goal. The major objective of problem-solving approaches will be to address the issues raised in the complaint, and any other significant issues relevant to the complaint that were identified during the assessment or the problem-solving process, in a way that is acceptable to the parties affected².

¹ For more details on the role and work of the CAO, please refer to the full Operational Guidelines: <http://www.cao-ombudsman.org/about/howweare/index.html>

² Where stakeholders are unable to resolve the issues through a collaborative process within an agreed time frame, the CAO Ombudsman will first seek to assist the stakeholders in breaking through impasse(s). If this is not possible, the CAO Ombudsman will inform the stakeholders, including IFC/MIGA staff, the President and Board of

OR

Compliance Appraisal/Audit: If complainants decide that a compliance review be conducted instead, CAO Compliance will initiate an appraisal of IFC's/MIGA's social and environmental due diligence of the project in question to determine whether a compliance audit of IFC's/MIGA's intervention of the project is merited.

Step 5: **Monitoring** and follow-up

Step 6: **Conclusion/Case closure**

Upon a careful review of the November 2011 complaint submitted by global and local trade unions, the CAO determined that the complaint met its three complaint eligibility criteria on December 13, 2011:

1. The complaint pertains to a project that IFC/MIGA is participating in, or is actively considering.
2. The issues raised in the complaint pertain to the CAO's mandate to address environmental and social impacts of IFC/MIGA investments.
3. The complainant (or those on whose behalf the complaint has been filed) may be affected if the social and/or environmental impacts raised in the complaint occurred.

Subsequently, according to CAO's Operational Guidelines, the CAO Ombudsman began the assessment of the dispute and opportunities for resolving the issues in the complaint.

1. The Complaint

On November 22, 2011, the Office of the Compliance Advisor Ombudsman (CAO) received correspondence from the ITUC/Global Unions Washington Office and the International Transport Workers' Federation (ITF), in consultation with two Colombian labor unions, alleging that the activities of Avianca, an IFC client, is violating workers' right to free association by actively discouraging and sometimes denying employees' rights to join a trade union. The complaint letter was then followed by direct correspondence from the Colombian labour unions, including a third labour union who became signatory to the complaint. The labour unions requested the assistance of the CAO in addressing a number of labour concerns related to Avianca's practices.

The three local unions are: 1) Colombian Association of Civil Aviators (ACDAC); 2) Colombian Association of Flight Attendants (ACAV), and 3) Colombian Association of Aviation Technicians (ACMA).

The complaint raises a number of social impacts which include:

- *Anti-union activity and violations of freedom of association:* The complainants state that the company routinely engages in anti-union actions that create a difficult environment for the labour unions representing Avianca's labour force, and they have seen decreased membership. Among other complaints, they cite discrimination of union members by awarding preferred flight routes to non-union members, unfounded firing of union members, rewards and alternative benefit schemes and positions for non-union members.
- *Violation of PS 2:* The complainants argue that the above stated activities violate IFC's requirements under Performance Standard 2.

the World Bank Group, and the public, that CAO Ombudsman has closed the complaint and transferred it to CAO Compliance for appraisal.

- *Breach of national labour law and ILO:* The complaint states that the company's actions violate Colombian requirements in terms of labour as well as ILO conventions to which Colombia is a party.
- *Inadequate due diligence process:* It is stated in the complaint that prior to investment approval an outstanding ILO complaint against Avianca was brought to IFC's notice. In response, an 'Action Plan' was developed to ensure the implementation of necessary changes and compliance with IFC requirements. Labour audits have been conducted since the development of the Action Plan; however the audits generally excluded participation or consultation with trade unions and audit findings have not been disclosed. The complainants believe the IFC did not exercise thorough due diligence prior to and post investment approval, and the action plan that was developed between Avianca-IFC was never shared with the unions nor it was published on IFC's web site.

The original complaint also expressed that Global Unions had been working with the IFC Social and Environmental Review team through IFC's ongoing dialogue with the Global Trade Unions³ for over three years, and in their view, Avianca had demonstrated no shift in its hostile position towards the unions and its members. In the Global Unions' view this demonstrated the company's unwillingness to engage in constructive dialogue, and a serious problem with the IFC's ability to hold its client accountable to the terms of its loan agreement. Additionally, local unions indicated they have given IFC all material that in their view served as evidence of the problems reported to IFC, and no concrete result was achieved. The complaint requested that the CAO:

- Waive its ombudsman assessment and trigger CAO compliance review immediately;
- Compliance review disclose the results of the 2010 labour audit and the agreed action plan between IFC and Avianca;
- Compliance review assess IFC's responsibilities with respect to Taca Airlines and Ocean Air;
- Advise IFC to demand immediate repayment from its client, who in their view has breached the terms of IFC's loan.

2. The Project

Aerovias del Continente Americano S.A. (Avianca) is a commercial airline based in Colombia providing air transportation services to domestic and international destinations. Avianca plans to renew its fleet over the period 2008-2012 to reduce costs, improve efficiency and safety as well as provide better passenger service. The company has negotiated the purchase of 42 aircraft over a 5 year period (including at least 12 Boeing-787s and a number of Airbus-319/320s) to replace its MD-83 and Boeing-757/767 aircraft.

IFC's project is to provide financing of up to \$50 million to Avianca and its subsidiaries, Sociedad Aeronautica de Medellin Consolidada S.A (SAM) and Aviation Leasing Services Investment S.A. (ALS) to help finance the implementation of the company's fleet renewal program.

The project is headquartered in Bogota, Colombia and operates in 20 domestic routes, as well as 19 international ones.

³ This is a procedure designed to facilitate effective IFC-trade unions engagement on IFC-financed projects, and to systematize and accelerate IFC response to union communications on PS2. It is a part of IFC's effort to further strengthen implementation of PS2 at the local level.

See: http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/LaborPS2_CommunicationForm

3. CAO'S ASSESSMENT

3.1 Methodology

The purpose of the CAO assessment is to better understand the issues and concerns raised by the complainants, gather information on how other stakeholders perceive the situation, and help stakeholders understand and determine whether a collaborative solution is possible through a facilitated process by CAO's Ombudsman, or whether the case should be transferred to CAO Compliance for review. *The CAO Ombudsman does not gather information in order to make a judgment on the merits of the complaint.*

The CAO's assessment of the Avianca complaint consisted of:

- Review of project documents
- Interviews prior to and during visit to Colombia

In the course of the field trip to Colombia conducted by the CAO team in February 2012, the team reviewed IFC, Avianca, and labour union files, project documents, and conducted interviews and group meetings with:

- Representatives of the three labour unions that are represented in the complaint;
- The international trade union groups that are supporting the complaint;
- Representatives of Avianca's management and human resources personnel;
- IFC's project team in Washington DC and in Colombia;
- Representatives of the two 'Voluntary Benefits Plan' (PVB) groups.

3.2 Assessment Findings

3.2.1 Summary of issues

The issues summarized below are based on CAO's interviews and discussions with stakeholders (prior to and during the assessment trip). This summary is intended to cover the key issues raised by local unions in support of their general claim that the company is not respecting union representation and bargaining rights as required by national law, ILO Conventions 87 and 98 and IFC's own PS2. It also intends to capture concerns raised by Avianca to the CAO regarding the complaint and issues raised in it. This summary does not represent a judgment on the issues raised, nor does it result from a full investigation of the internal factors and legal considerations that underlie these issues. Its purpose is to describe parties' perspectives of the issues raised and provide a description of their needs.

It is CAO's understanding that these are the topics and concerns presented by complainants:

1) Company neutrality towards trade union representation of its employees: despite Avianca's stated policy regarding the freedom of its employees to join or not to join organisations of their own choosing and the existence of long-standing collective agreements with its unions, there is a strong perception by representatives of ACDAC, ACAV and ACMA that the company is engaged in a long-term strategy to break unionisation in its operations.

One aspect of this perception focuses on apparent different interpretations of Colombian labour law which defines bargaining units. The law (created at a time when single company unions were the norm) requires that any collective agreement made with a trade union that represents one third or more of "company employees" should be applied to all employees and that those so covered should pay a service fee to the union that is equivalent to the

normal union membership fee. ACDAC, for example, in their view claims representation of well over one third of all pilots in Avianca, but the company points out that this number is much less than one third of all its employees if flight attendants, ground staff, etc are all included and that the requirement to extend the collective agreement to all pilots therefore does not apply. The unions would like to see the establishment of a common understanding of the size and scope of the collective bargaining unit(s) in Avianca for each collective agreement.

Allegations are also made by the unions that new employees are discouraged from joining the union for fear of jeopardizing their advancement in the company or fear of non-renewal of probationary and short-term contracts if they do so.

Some examples of what the unions would like to see changing are: inclusion of a union spokesperson within the induction process for new employees to explain the union collective agreement; and full disclosure and discussion around completion of Avianca's action plan developed with IFC.

2) The status of agreements between the company and internal groups of non-union employees under a 'Voluntary Benefits Plan' (PVB): According to union representatives, these PVB type of agreements (extra-union, one for pilots and one for flight attendants that extend identical -and occasionally better- conditions to non-unionized personnel, without reference to collective agreements) are administered and monitored by nominees of non-union personnel who are given facilities and paid time off for these activities, free flight tickets in lieu of financial support and who are recognised by management for discussing emerging issues in the same manner as trade union representatives.

Furthermore, non-union employees are guaranteed that, if the union negotiates an improved deal for its members, other staff will automatically receive the same improvements despite not paying union fees. Employees are not allowed to benefit from both the union agreement and from the internal 'voluntary benefits plan', but new employees are required to choose whether they wish to be covered by the union scheme or by the internal benefits plan.

The unions that brought the complaint believe that promotion of a specific non-union agreement to employees at the point of entry into the company creates a disincentive for new employees to join existing unions, which amounts from their point of view to anti-union discrimination.

3) The status of re-negotiation of the union agreement for flight attendants (ACAV): unionized flight attendants at Avianca are still operating under a collective agreement that expired in June 2010, but is being extended with inflation-linked increases in six-month intervals. The union alleges that from their perspective 'bad faith' bargaining tactics on the side of the company have prevented the union from renegotiating the collective agreement until better conditions can be assured. As a result, they believe important aspects of the old collective agreement are becoming increasingly outdated, leading to anomalies in practice and further disagreements.

4) Clarification of ACAV's position regarding changes in cabin crew classification unilaterally imposed by the company: during the period of non-negotiation of the collective agreement since June 2010, Avianca management raised the question of simplifying operating grades among flight attendants by creating a three-tier instead of a four-tier structure to create a single flight supervisor category for international and domestic pursers. The union refused to negotiate this item separate from the rest of the agreement and, as noted above, until better bargaining conditions emerge. The company believes that these changes were necessary to give sufficient flexibility for staffing and its expanding flights network in the face of stiff international competition, and so went ahead and introduced the

changes. The union claims that this is illegal in so far as it does not acknowledge the existing collective agreement and is discriminatory because the new positions are not open to union personnel whose collective agreement does not recognise the new structure. The company believes it has called the unions to dialogue about this issue and find ways forward.

5) Impact of hiring technical staff from external labor cooperatives on maintenance quality and aircraft safety: according to the aviation technicians' union (ACMA), their union is not being recognised by Avianca for bargaining purposes. They have currently limited membership among the company's maintenance personnel. However, they expressed it is difficult for maintenance personal to become a union member as most of the company's technical staff is hired via external labour cooperatives, following changes instituted at the time of the company's emergence from Chapter 11 controls.

According to ACMA, Colombian law establishes that members of labour cooperatives are not recognised as being eligible for union membership. This issue is being challenged by the International Labour Organisation's Freedom of Association Committee at the level of the Colombian government. Meanwhile, the union claims that the company cannot guarantee that workers who are hired on an occasional or short-term basis from the labor cooperatives are registered with the qualifying agency established by the Civil Aeronautics Regulation of Colombia that is charged with oversight and maintaining standards of aircraft safety.

According to CAO's understanding, these are the issues and concerns expressed by the company:

1) From Avianca's point of view, the number of union members has increased in the company, and they are concerned about the existence of a contrary perception on this issue. They indicate that they have a track record of more than 60 years in managing and engaging in constant collaboration with the multiple union associations of the company which comprise 7 union organizations of different types. Additionally, they state that every new employee is informed about their right to unionize, and they respect the decision of every employee to join a union as much as those that choose not to join.

2) Avianca indicates that the PVB for flight attendants consist of two additional and/or different benefits to those in the current Collective Agreement for ACAV members, and adds that the company has maintained constant and general interest in achieving a bilateral agreement through dialogue with ACAV to update their benefits. In that vein, they express having sent in different opportunities proposals and invitations to the union with the objective of reaching an agreement and putting an end to the differences between both extrajudicial regimes of benefits. According to Avianca, ACAV's responses have been characterized by rejection of the proposal presented. Additionally, Avianca has indicated that people on the PVB are self-selected leaders, without being nominated by the Management Unit or by the own beneficiaries of the PVB. Avianca believes these examples illustrate their efforts to dialogue with the unions.

3) The company believes that they have made genuine efforts to meet the conditions required by ACAV to renegotiate the collective agreement. Moreover, the company believes that ACAV does not recognize these efforts and refuses to dialogue on this issue.

4) More generally, Avianca believes there are internal channels of communication and dialogue for all unions, and they feel these channels have not yet been properly exhausted by the unions.

5) The company expresses concern for the mistaken perception, in their perspective, about the compliance of Avianca with what is set forth in the special regulation on Civil Aviation in Colombia. They indicate that not only does Avianca comply with the legal

framework, but, for example, in regards to ACMA's concern about aviation technicians, the company states that it also directly employs 565 technicians all of whom can freely make use of their right of association.

3.2.2 Stakeholders' Needs

In addition to the issues and concerns raised by parties, CAO understood during its assessment process that stakeholders have certain needs *vis-a-vis* their concerns:

Mutual confidence and respect between the parties

- The complaining unions appear to believe strongly that the company's every move is intended to weaken their presence among its employees. Therefore, the primary need of the unions was for 'respect'.
- As a result of the 2005 Chapter 11 crisis, a separate group of employees has been clearly defined by the internal 'voluntary benefits system' (PVB) that now has an independent presence within the company and it is known by both parties. Any resolution of the issues presented by the unions will need to take account of the needs, feelings and aspirations of this large group of non-union workers.
- The complainants express the need to envision and plan a shared future with Avianca for all its employees and through that process confirm a place for legally structured worker representation. In the same vein, Avianca has expressed that the primary drive in talking to representatives of its employees is to be able to plan for a stable future.
- Union representatives voice their need to see Avianca respecting workers' choice regarding union participation in the secure knowledge that their choice entails no judgement or concern on the part of their employer.
- The current atmosphere of mutual distrust between unions and Avianca has resulted in a litigious relationship in which almost every discrepancies in their views and in interpreting the law is taken before the courts rather than, when possible, being negotiated and settled at the human relations interface of the company. Responses from the judiciary have allowed each party to support their own arguments and perspectives but according to the unions has not helped them get their concerns addressed or overcome them. Additionally as a result, there is a large and growing volume of court cases awaiting judgment and appeal.

Establishing mutual good faith

- Both unions and Avianca express interest in seeing reflected the good faith of the other to be able to establish the foundations for a constructive relationship over the long term and overcome the perception of lack of trust and willingness to engage with each other in good faith.

4. Conclusions and next steps

The role of the CAO throughout the assessment exercise is towards fostering a better mutual appreciation and understanding of the issues as articulated by the labour unions, Avianca, and other key stakeholders.

In the course of its assessment, the CAO understood from local unions that they were willing to engage in a dispute resolution process with Avianca convened by the CAO as their desire was to see the issues and concerns presented in the complaint addressed and resolved. The CAO shared this point of view with the company, and understood from Avianca that they were not willing to engage in a dispute resolution process as in their view unions have not yet exhausted the internal channels of communication and dialogue. Given the voluntary nature of a dispute resolution process, and the lack of interest and willingness of Avianca to pursue this option, the CAO Ombudsman concludes that this complaint is not amenable to resolution through a collaborative process at this point in time.

In May 2012, in accordance with the CAO's Operational Guidelines, the CAO Ombudsman concluded its process and referred the complaint to CAO Compliance for initial appraisal. The appraisal will determine if an audit of IFC is necessary to provide assurances to the President and the public that the IFC is complying with the relevant social and environmental policies in regards to this project.