

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

<p>KAREN HUDES, Appellant, v. AETNA LIFE INSURANCE COMPANY, <i>et al.</i>,  Appellees.</p>	<p>No. 11-7109  RESPONSE TO DISPOSITIVE MOTION</p>
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**APPELLANT'S CORRECTED RESPONSE TO IBRD'S  
MOTION FOR SUMMARY AFFIRMANCE**

Appellant Karen Hudes respectfully requests this Court to deny the Motion of Appellee International Bank for Reconstruction and Development ("IBRD") for summary affirmance of the Mem. Op. and Order ("Op."), Civ. No. 10-1444 (D.D.C. August 30, 2011) (Exh. 1, Dckt. 77).

**SUMMARY OF ARGUMENT**

IBRD is not entitled to summary disposition on issues of first impression before this Court.<sup>1</sup> Hudes is an IBRD bondholder. There is no precedent for

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<sup>1</sup> Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit, as amended through April 14, 2011, ¶ VIII. G, at 35

disregarding Hudes' status as a bondholder to dismiss her claims for providing misleading financial information to her. *Contra Op.* at 11; *Mot.* at 11.

IBRD is subject to oversight by its Board of Executive Directors, Board of Governors, and its regulators, including the SEC, the Public Company Accounting Oversight Board ("PCAOB"), the National Advisory Council for International Monetary and Financial Policies ("NAC"), and the agencies responsible for enforcement of the blue sky laws in the fifty states whose citizens hold IBRD's \$110 billion in bonds. IBRD's oversight agencies and regulators agree that IBRD's control over financial reporting is deficient.<sup>2</sup>

The legislative history of IBRD's access to the US capital market and Sarbanes-Oxley<sup>3</sup> make it clear that IBRD's temporary and revocable exemption from registration statements did not convey carte blanche to IBRD to maintain deficient control over financial reporting. IBRD waived its immunity in Hudes' cause of action as a bondholder of IBRD against IBRD for issuing misleading certifications required by § 302 of Sarbanes-Oxley, 15 U.S.C. §724.

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<sup>2</sup> Government Accountability Office, "World Bank Group: Important Steps Taken on Internal Control but Additional Assessments Should Be Made," June 16, 2003. Available at: <http://www.gao.gov/products/GAO-03-366> Last visited November 30, 2011.

April 8, 2005 letter from the Joint Economic Committee of the US Congress to Mr. James Wolfensohn: "[t]he Joint Economic Committee has received credible evidence indicating that the World Bank has experienced accounting problems involving its borrowing, investment, and lending activities." Exh. 2, Dckt 24-6 at 1.

<sup>3</sup> Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002), codified in relevant part at 18 U.S.C. §1514A

Hudes requested the SEC to revoke IBRD's temporary exemption under the securities laws, as the SEC was empowered to do pursuant to the Bretton Woods Agreement Act in 22 U.S.C. § 286k-2. Without discovery to ascertain the SEC's response to Hudes' request, the District Court could not conclude as a matter of law that IBRD's temporary exemption from Sarbanes-Oxley was still in effect. The SEC and the NAC possess authority under the Bretton Woods Agreement Act to rescind IBRD's exemptions at any time.<sup>4</sup> "By requiring less of a factual showing than would be required to succeed at trial, district courts ensure that they do not prematurely grant Rule 12(b)(1) to dismiss claims in which jurisdiction is intertwined with the merits and could be established, along with the merits, given the benefit of discovery." *CNA v. U.S.*, 535 F.3d 132, (3d Cir. 2008).

IBRD has requested this Court to suspend *de novo* review of the grounds for dismissal normally applicable to appellate review of a motion to dismiss under

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<sup>4</sup> "The Securities and Exchange Commission acting in consultation with the National Advisory Council on International Monetary and Financial Problems is authorized to suspend the provisions of section 286k-1(a) of this title at any time as to any or all securities issued or guaranteed by the Bank during the period of such suspension." 22 U.S.C. § 286k-2. 63 Stat. 299. 22 U.S.C. § 286k-1(a) provides: "Any securities issued by International Bank for Reconstruction and Development ...shall be deemed to be exempted securities within the meaning of paragraph (a)(2) of section 3 of the [Securities Act of 1933] and paragraph (a)(12) of section 3 of the [Exchange Act of 1934]." Functions of the National Advisory Council on International Monetary and Financial Problems were delegated to the National Advisory Council on International Monetary and Financial Policies, see section 2(a) of Ex. Ord. No. 11269, Feb. 14, 1966, 31 F.R. 2813, set out as a note under 22 U.S.C. §286b.

Rule 12(b)(1). *Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 183

(C.A.D.C.2006). Op. at 11 and 13. Instead, IBRD's motion for summary affirmance rests "wholly on immunity grounds." *See* Mot. at 12. A question of first impression does not warrant an abbreviated disposition.

“A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified.” *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir.1987), (internal citations, omitted). “To summarily affirm an order of the district court, this court must conclude that no benefit will be gained from further briefing and argument of the issues presented.” *Id* at 298. *Walker v. Washington*, 627 F.2d 541 (C.A.D.C., 1980).

There is no merit to IBRD 's argument that IBRD had immunity to Hudes' cause of action as a bondholder. The two cases cited by IBRD in which this Court summarily affirmed the dismissal below on the basis of immunity are not apposite and involved suits for money damages against government employees in their official capacity. *Wishard v. Dep't of Justice*, No. 00-5074, 2000 WL 11093076, (D.C. Cir. June 13, 2000) and *Rose v. United States*, No. 09-5127, 2009 WL 3571270 (D.C. Cir. Oct. 16, 2009) In *Wishard*, the case was remanded to enable the district court to address appellant's *Bivens* claims. IBRD has not met the burden of showing why "plenary briefing, oral argument, and the traditional

collegiality of the decisional process [could] not affect [the Court's] decision." *Sills v. Bureau of Prisons*, 761 F.2d 792 (C.A.D.C. 1985).

## ARGUMENT

### **I. IBRD REQUESTED THIS COURT TO DISREGARD THE DISTRICT COURT'S GROUNDS FOR DISMISSAL**

IBRD has no immunity to report misleading financial information to IBRD's oversight agencies and bondholders.

#### **A. Statement of the Case**

Lucio Tan, a crony of Joseph Estrada, then President of the Philippines, acquired stock owned by government employees in Philippines National Bank ("PNB") valued more than 10% of PNB's outstanding capital without disclosure, as required by Philippines securities laws. Tan owned Philippines Airlines, in default on its loans from PNB. The government of the Philippines loaned \$493 million to PNB after PNB's depositors made heavy withdrawals. \$200 million of a loan from IBRD and similar amounts of Japanese cofinancing were cancelled. Estrada was ultimately impeached, and in 2007 an anti-corruption court in the Philippines required Estrada to refund graft he had plundered. IBRD's Country Director in the Philippines reassigned Hudes when she asked him to sign a letter warning the Philippines' government that IBRD could not disburse its loan without a waiver from the Board of Executive Directors since the loan conditionality was not met. IBRD's Internal Audit Department refused to correct the satisfactory evaluation of

the World Bank's supervision performance or the flawed report of the Institutional Integrity Department to the Audit Committee of the Board of Executive Directors. When the Audit Committee requested an audit of internal controls over financial reporting, KPMG, the external auditors, circumscribed the scope of their audit in violation of Generally Accepted Accounting Principles and Generally Accepted Auditing Standards. Hudes is a bondholder of IBRD. IBRD does not possess immunity to give erroneous unqualified certifications of control over financial reporting or misleading financial information.

**B. *De Novo* Review for Lack of Subject Matter Jurisdiction**

Under current jurisprudence, the DC Court of Appeals is to review *de novo* the District Court's dismissal of Hudes' complaint for lack of subject matter jurisdiction. The DC Court of Appeals also reviews *de novo* dismissals for failure to state a claim. *See Mwani v. Bin Laden*, 417 F.3d 1, 6 (D.C.Cir.2005).

**Under Rule 12(b)(1)** the motion to dismiss stage, counseled complaints, as well as *pro se* complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact.” *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C.Cir.2005). All of IBRD's objections to jurisdiction are intertwined with the merits.

*Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515, (2006). "This distinction-whether a statute contains within itself the bounds of its jurisdiction-counsels the

result in our case. Section 1346, by subsection (b)(1), tethers jurisdiction to meeting that subsection's requirements. Subrogees invoke the principle that "where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a [f]ederal cause of action, the proper course of action for the district court ... is to find that jurisdiction exists and to deal with the objection as a direct attack on the merits of the plaintiff's case." *Cohen v. Kurtzman*, 45 F.Supp.2d 423, 428-29 (D.N.J.1999) (quoting *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.1981)). This idea runs through numerous cases that classify issues as either jurisdictional or relating to the merits. *See, e.g., Mortensen v. First Federal Savings & Loan Association*, 549 F.2d 884, at 890 (3d Cir 1977) (contrasting antitrust claims from "other claims whose jurisdictional bases are not as intertwined with their merits").

Hudes, as IBRD's legal officer, "acted in the public interest and for the protection of investors" in fulfilling her obligations under Sarbanes-Oxley§307. Op. at 9. A chronology of Hudes' report of IBRD's control lapses was appended to Appellant's Mem. in Opp. to Mot. to Dismiss. *See* Exh. 3 Dckt. 62-2, at 11-26. An edited version of the chronology was in a briefing paper prepared for Hudes' testimony to the European Parliament. In his letter of June 1, 2011, Mr. Luigi de Magistris, the Chair of the European Parliament's Committee on Budgetary Control, stated: "I share the opinion expressed by the Members of the Committee

that it was very interesting and inspiring to learn about your case at the World Bank." *See* Exh. 4.

### **C. IBRD Waived Its Immunity**

IBRD has waived immunity to Hudes as an IBRD bondholder. IBRD's Articles of Agreement<sup>5</sup> provide in Article VII Status, Immunities and Privileges:

#### ***SECTION 3. Position of the Bank with Regard to Judicial Process***

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

In *Lutcher S. A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (C.A.D.C. 1967), the Inter-American Development Bank was not immune from suit in the United States District Court for the District of Columbia under an identical provision in its Articles. The Court in *Lutcher* determined that the waiver of immunity in Section 3 under the organizations' Articles of Agreement took precedence over the International Organizations Immunities Act. *Lutcher* also examined a similar Executive Order for the World Bank and IFC. IBRD's latest Information Statement filed with the SEC provides with respect to IBRD's legal status, privileges and immunities to bondholders provides that "[a]ctions may be brought against IBRD in a court of competent jurisdiction in

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<sup>5</sup> The United States acceded to the Articles of Agreement of the IBRD in the Bretton Woods Agreement Act, Pub.L. 79-171, 59 Stat. 512 (1945), codified at 22 U.S.C. § 286.

territories of any member in which IBRD has an office, has appointed an agent for accepting service or notice of process or has issued or guaranteed securities."

The District Court stated incorrectly that Hudes invokes IBRD's waiver of immunity for wrongful-termination and employment-discrimination claims. Op. at 9. Hudes invokes IBRD's waiver of immunity as a bondholder of IBRD. The District Court's decision to disregard Hudes' status as a bondholder was incorrect and warrants full briefing. Op. at 11. Hudes does not have to wait for a default in payment to be entitled to accurate certifications of control over financial reporting. *Contra* Mot. at 10. *Freuler v. Parker*, --- F.Supp.2d ----, 2011 WL 2604907, (S.D.Tex., 2011); *Coronel v. Quanta Capital Holdings Ltd.*, 2009 WL 174656, (S.D.N.Y., 2009), *In re Scottish Re Group Securities Litigation*, 524 F.Supp.2d 370, (S.D.N.Y., 2007), *In re OCA, Inc. Securities and Derivative Litigation*, 2006 WL 3747560 (E.D.La., 2006).

## **II. OVERSIGHT OF IBRD**

### **A. Hudes' Action Furthers the Objectives of IBRD**

After the District Court refused to recognize Hudes' status as an IBRD bondholder, the Court dismissed Hudes' case under a two-pronged test for waivers of immunity: (Op. at 10) *Mendaro v. World Bank*, 717 F.2d 610 (C.A.D.C. 1983), *Atkinson v. Inter-American Development Bank*, 156 F. 3d 1335 (C.A.D.C. 1998) *Aguado v. Inter-American Development Bank*, 85 Fed. Appx. 776 (D.C. Cir. 2004),

*Broadbent v. OAS*, 628 F.2d 27 (C.A.D.C. 1980) : (1) actions arising out of the Bank's external relations with its debtors and creditors; and (2) the particular type of suit would further the Bank's objectives.

Hudes qualifies for IBRD's waiver of immunity under both prongs of the test. Mr. Pieter Stek, then Executive Director of the Netherlands constituency and Chair of IBRD's Board Committee on Development Effectiveness, testified that the effectiveness of the IBRD in fulfilling its mandate was at stake in Hudes' case:

In a multilateral institution which should be governed by the rule of law and high standards of probity the charge of concealment from the Board of Executive Directors of information relevant to the exercise of its duty of supervising management and the persecution of the person who brings this to light is extremely serious. If correct, which I believe, this poisonous cocktail undermines good governance and ultimately the effectiveness of the Bank in fulfilling its mandate. I shall continue to assist Ms. Hudes in her efforts to have due process brought to bear, preferably by the Bank itself, on these issues of governance.<sup>6</sup>

IBRD argues: "[e]ven construing [Hudes's] complaint as a challenge to the Bank's governance procedures (for which no cause of action lies in any event), subjecting the Bank to this type of claim would not 'further [the Bank's] objectives' in any way". The high cost of permitting financial weakness to be concealed by poor accounting and auditing practices has been amply demonstrated. *In re WorldCom, Inc. Securities Litigation*, 294 F.Supp.2d 431, (S.D.N.Y.,2003.) *In re Enron*, 235 F. Supp. 2d 549, (S.D. Tex 2004). "Recognizing the extreme urgency

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<sup>6</sup>The full text of Pieter Stek's testimony is in Exh. 5; Dckt 68-3, at 8.

of restoring confidence, a foundation of the Nation's economy, Congress acted decisively to pass the landmark Sarbanes-Oxley Act, overhauling the regulation of public accounting, substantially expanding the scope and quality of corporate disclosures, and improving corporate governance."<sup>7</sup>

Hudes' action furthers the purposes and operations of IBRD through providing access of the Board of Executive Directors, regulators, other oversight agencies and bondholders to accurate financial information on IBRD's operations in compliance with IBRD's Articles of Agreement. Hudes has followed the advice of Mr. Aaron Broches, Hudes' mentor, and IBRD's longest-serving General Counsel, about the responsibility of IBRD's Legal Department for preserving rule of law in IBRD.

### **B. IBRD Board Investigation**

Hudes was admonished two days after informing the Board's Audit Committee of the cover-up in the Philippines and placed on probation. (Plaintiff's April 10, 2010 Response to Aetna's Motion to Dismiss, Dckt 24-1, at 3) The Dutch Ministry of Foreign Affairs requested IBRD's Audit Committee to look into the corporate governance problems Hudes had raised.<sup>8</sup> Instead, Mr. Pierre Duquesne, Chair of IBRD's Audit Committee, requested an inquiry into the IBRD's

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<sup>7</sup> H.R. Rep. 108-63(I) P.L. 108-44, Accountant, Compliance, and Enforcement Staffing Act of 2003 House Report No. 108-63(I).

<sup>8</sup> See Exh. 6; Dckt. 24-15 at 1.

Institutional Integrity Department. Mr. Paul Volcker headed the 2007 inquiry into the Institutional Integrity Department. The Volcker Panel was discredited after sixteen staff employed in the Institutional Integrity Department received significant damage awards in compensation for abuses of authority to intimidate them during the Volcker Panel investigation.<sup>9</sup> Mr. Paul Lachal-Roberts, a staff-member of the EU's anti-fraud agency on the Volcker Panel, emailed Hudes:

My Director General and I met with a number of European Executive Directors of the World Bank a few weeks ago to discuss the Volcker Panel report. At the meeting there was also discussion about governance issues. My impression was that the European Executive Directors are well apprised of all relevant issues at the Bank and no further comment by [Office Lutte Anti-Fraude] is warranted even if it was within our legal competence.<sup>10</sup>

Hudes had emailed Mr. Lachal-Roberts:

As a lawyer familiar with the mandate of the legal department under the Articles of Agreement in maintaining rule of law in the governance structure of the World Bank, I have thoroughly documented ... severe control lapses and impressed upon the US Congress the urgent need to restore proper governance.

### **C. Contempt of Congress**

Hudes reported to Senator Richard Lugar that IBRD's evaluation department had concealed from IBRD's Board of Executive Directors "the role of the Bank's

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<sup>9</sup> Government Accountability Project, *Bar Complaint Charges Former World Bank Official With Ethics Violations*, April 6, 2010, available at <http://www.whistleblower.org/press/press-release-archive/484-bar-complaint-charges-former-world-bank-official-with-ethics-violations> (Last visited December 1, 2011)

<sup>10</sup>See Exh. 7; Dckt. 32-2 at 13-14.

poor supervision of the Philippines Banking Sector Reform Loan in the corrupt take-over of the second largest bank in the Philippines resulting in a \$500 million banking failure, cancellation of \$200 million from the Bank's loan to the Philippines, and cancellation of \$200 million in cofinancing from Japan."<sup>11</sup>

Hudes informed Senator Lugar that Mr. Eckhard Deutscher, then German Executive Director and Dean of the Board, had concluded from the cover-up to the Board in Hudes' case that "the World Bank Board is treated like a mushroom, kept in the dark, and covered with fertilizer." The Senate Committee on Foreign Relations followed up with three inquiries to IBRD in the spring of 2007.<sup>12</sup> In contempt of Congress and relying upon tampered documentation, IBRD terminated Plaintiff on July 31, 2007.

On September 15, 2007 Hudes informed Senator Bayh, "[t]he ongoing cover-up is an indictment of the probity of US oversight at the Bank and I would encourage the Senate to request GAO to look into it."<sup>13</sup> On April 17, 2008 Senators Lugar, Bayh and Leahy requested GAO to investigate "internal resistance to increased transparency and accountability at the World Bank."<sup>14</sup> On November 4, 2008 Hudes' Congressman, Representative Chris Van Hollen, informed Hudes that he noted "that [Hudes'] claims and concerns have already been provided to the

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<sup>11</sup> See Exh. 8; Dckt. 24-7.

<sup>12</sup> See Exh. 8, Dckt. 24-8 at 3-5 and 7.

<sup>13</sup> See Exh. 10; Dckt. 73-4.

<sup>14</sup> See Exh. 11; Dckt. 24-13.

GAO.... and to the relevant congressional committees".<sup>15</sup> In March 2009 GAO stated that it could not commence the inquiry "because of challenges we recently faced in gaining access to World Bank officials."<sup>16</sup> Senator Lugar asked about the delay in the GAO review during hearings on the IBRD capital increase:<sup>17</sup>

During hearings of the House Appropriations Committee, Congresswoman Kay Granger, Chair of the State and Foreign Operations Subcommittee of the House Appropriations Committee, stated that "large multi-year capital increases will be extremely difficult to justify without convincing evidence that taxpayer dollars will be used in a more effective and transparent manner than they have been in the past...We must prioritize spending by looking at...what has good oversight."<sup>18</sup>

## **II. IBRD'S CONDITIONAL EXEMPTION FROM SECURITIES LAWS**

The District Court erred in determining that "Sarbanes-Oxley's whistleblower-protection provisions do not apply to the World Bank as a matter of

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<sup>15</sup> See Exh. 13; Dckt. 24-10 through 12 and 24-19.

<sup>16</sup> *The International Financial Institutions: A Call for Change A Report to the Committee on Foreign Relations*, United States Senate, March 10, 2010, at 24 Hudes referred to Congresswoman Granger's statement in her Mem. in Reply to IBRD's Opp. to Plaintiff's Mot. for Rule 11 Sanctions, Dckt. 73 at 1

<sup>17</sup> *Hearing on Banking on Reform: Capital Increase Proposals from the Multilateral Development Banks* before the S. Committee on Foreign Relations, 111th Cong. 61 (2011)

<sup>18</sup> Opening Statement to Treasury Secretary Geithner, March 9, 2011 Available at: <http://kaygranger.house.gov/index.cfm?sectionid=12&parentid=4&sectiontree=4,12&itemid=983>

law." Op. at 13. IBRD receives funding from US taxpayers and bondholders and is subject to oversight by Congress, the SEC, state and other jurisdictions' securities regulators.<sup>19</sup> The Senate and House of Representatives intended to protect persons against retaliation who assist in Congressional oversight of the IBRD.

After hearings on accounting irregularities at the World Bank, including cost over-runs on the renovation of the World Bank's headquarters and over-charges to World Bank borrowers, the US Congress required independent arbitration to protect whistleblowers.<sup>20</sup> IBRD did not implement the Lugar Leahy Amendment. IBRD refused Hudes' request for external arbitration.<sup>21</sup>

Securities regulators are required to ensure that IBRD's financial information to bondholders is not misleading. IBRD may not retaliate against its attorneys who correct internal control lapses or assist in lawful investigations of its oversight

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<sup>19</sup>State securities regulators in Arizona, California, the District of Columbia, Georgia, Iowa, Maryland, Michigan, New Mexico, New York, North Carolina, Ohio, Oklahoma, and West Virginia contacted Hudes after she told the states' attorneys general that IBRD's financial information to bondholders was misleading. Hudes also alerted the attorneys general in Maryland, the District of Columbia, and Virginia to the loss of jobs from the governance crisis at the World Bank's Washington headquarters. *See* Exh. 12.

<sup>20</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2005, 119 Stat. 2172; the Lugar Leahy Amendment is 22 U.S.C. §262o-4.

<sup>21</sup> *See* Exh. 14; Dckt. 24-20

agencies and regulatory bodies. The employee protection provisions of Sarbanes-Oxley repealed in part IBRD's temporary exemption from the US securities laws.<sup>22</sup>

Hudes requested the SEC and the NAC, under the statutory authority accorded them pursuant to 22 U.S.C. § 286k-2, to determine that 18 U.S.C. § 1514A was applicable to the IBRD. On May 27, 2010 Hudes sent a memorandum to the Chairman of the SEC and to the NAC:

The Senate and House of Representatives intended to protect persons who assist the legislature in oversight of the International Bank for Reconstruction and Development against retaliation, and the employee protection provisions of Title VIII of the Sarbanes-Oxley Act of 2002, Section 806, repealed in part IBRD's conditional exemption from the US securities laws.<sup>23</sup>

The SEC acknowledged receipt of Hudes' memorandum to the Chairman of the SEC in a letter dated July 21, 2010 from the Assistant Director of Enforcement Matters.<sup>24</sup>

On September 1, 2010 Hudes sent a second Memorandum to the SEC and NAC concerning Hudes' cause of action as a bondholder against KPMG for failure

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<sup>22</sup> George W. Bush's July 30, 2002 Statement on Signing Sarbanes-Oxley: "Given that the legislative purpose of section 1514A of title 18 of the U.S. Code, enacted by section 806 of the Act, is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new investigative authority, the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose." available at:

<http://www.presidency.ucsb.edu/ws/index.php?pid=64514>

<sup>23</sup> See Exh. 15; Dckt.33-2, at 1.

<sup>24</sup> See Exh. 16; Dckt. 38-2.

to observe applicable accounting standards.<sup>25</sup> On September 28, 2010 Hudes met with the U.K. Serious Fraud Office, and on October 12, 2010 the Serious Fraud Office called Mr. Arrevalo, Assistant Director of the SEC's Office of International Affairs, to inquire about the IBRD's compliance on the capital market.<sup>26</sup> On February 14, 2011 Hudes asked the IBRD's Board of Governors whether the IBRD may retaliate against persons who inform the Board of Governors of the World Bank's compliance issues.<sup>27</sup>

**B. Question of Fact Whether SEC Revoked IBRD's Exemption**

The District Court found that Sarbanes-Oxley's whistleblower-protection provisions do not apply to the World Bank. Op. at 13. It is a question of fact and not law whether the SEC and the NAC rescinded IBRD's conditional exemption under the securities laws in response to Hudes' disclosures. The SEC and the National Advisory Council possess authority under the Bretton Woods Agreement Act to rescind IBRD's exemptions at any time.<sup>28</sup>

**C. History of IBRD's Exemptions under Securities Act of 1933 and Securities Exchange Act of 1934**

IBRD's conditional exemption was granted for historical reasons that are no longer applicable. IBRD is the only organization that has been exempted from the

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<sup>25</sup> See Exh. 17; Dckt. 62-2.

<sup>26</sup> Plaintiff's Mem. in Op. to Mot. to Dismiss, Dckt. 62-1 at 20.

<sup>27</sup> See Exh. 18; Dckt. 67-5.

<sup>28</sup> See footnote 4, *infra*.

Securities Exchange Act of 1934 that is not a municipal or government entity. The SEC is prohibited from imposing disclosure rules on municipal and government entities for reasons of federal-state comity. In a 1947 letter to the SEC, the IBRD wrote, "The Bank is not opposed to registering its securities under the Securities Act of 1933 and giving to the public all the information called for by that Act."<sup>29</sup> IBRD's exemption in 1949 from the Securities Exchange Act of 1934 was to permit member banks of the Federal Reserve System to deal in securities issued by IBRD.<sup>30</sup>

IBRD argues that it is irrelevant whether the IBRD's exemption from Sarbanes-Oxley whistleblower provisions was revoked because the SEC was not able as a matter of law to suspend the provisions of section 286k-1(a) with retroactive effect. Mot. at 13. *Fraser v. Fiduciary Trust Co.*, No. 04-CIV-6958, 2005 WL 6328594, cited by IBRD, provides that Sarbanes-Oxley whistleblower protections apply to retaliatory actions after July 30, 2002, *i.e.* the effective date of SOX. Moreover, jurisdictional statutes do not result in retroactive legislation since they speak to the power of the court, rather than to rights or obligations.

*Republic Nat. Bank of Miami*, 506 U.S.80, at 100. (1992)

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<sup>29</sup> See Exh. 19; Dckt. 24-16 Letter to the SEC dated June 18, 1947 from John J. McCloy, President of the IBRD.

<sup>30</sup> See Exh. 20; Dckt.24-18, Mem. on Legis. Proposals Relating to International Bank Securities dated April 19, 1949 of the NAC.

**D. Judicial Remedies for Foreign Affairs Functions**

IBRD also argues that Hudes' Sarbanes-Oxley claim is barred for failure to exhaust administrative remedies. Mot. at 4. Judicial remedies are more appropriate than administrative proceedings when there are international repercussions. *Mcculloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963). "But the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power."

The Federal Administrative Procedure Act provides that cases involving the conduct of foreign affairs functions are not subject to administrative procedures and agency hearings. 5 U.S.C. § 554(a)(4). In an international organization established by treaty, Hudes' function as gatekeeper attorney and correction of IBRD's compliance issues involve the conduct of foreign affairs functions.

**E. Hudes Provided Original Information to the SEC After July 21, 2010**

The District Court held that Hudes was not entitled to rely upon §924(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), 15 U.S.C. §78 u-7(c) because Hudes did not provide information to the SEC after July 21, 2010. Op. at 14. Hudes documented an interview with the

SEC's investigator on August 10, 2010<sup>31</sup> that IBRD was out of compliance on the bond market and that KPMG had violated the SEC's accounting rules:

- (a) IBRD retaliated against staff who reported to US Congress that IBRD was out of compliance with its own Articles of Agreement, securities and banking laws in the Philippines, and professional rules of ethics in violation of 18 U.S.C. §1514A and 18 U.S.C. §1519
- (b) IBRD retaliated against financial staff who reported misleading financial statements and did not provide access of financial staff to external arbitration in violation of the Lugar-Leahy Amendment 22 U.S.C. §262o-4
- (c) KPMG's unqualified opinion on management's assertion that IBRD maintained effective internal control over financial reporting violated the PCAOB's accounting standards and the SEC's accounting rules
- (d) IBRD had destroyed, altered and falsified records in violation of 18 U.S.C. §1519

### CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court to deny IBRD's Motion for Summary Affirmance.

Respectfully submitted,

Dated: December 2, 2011

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<sup>31</sup>See Exh. 21; Dckt. 73 at 2-3.

**CERTIFICATE OF SERVICE**

I hereby certify that on December 2, 2011, a copy of *Appellant's Corrected Response To IBRD's Motion for Summary Affirmance* was filed electronically with the Clerk of the Court using CM/ECF as allowed by Fed. R. App. P. 5 and D.C. Cir. Rule 25(c) which will provide electronic service on the following counsel of record in this case:

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