August 24, 2012

Via Electronic Mail

Office of the CAO
Operational Guidelines Update
2121 Pennsylvania Avenue NW
Washington, DC 20433
Tel. 1-202-458-1973
Fax 1-202-522-7400
E-mail: cao-compliance@ifc.org

Re: Comments on CAO Draft Operational Guidelines

To Whom It May Concern:

We, the undersigned, are writing in response to the invitation to submit comments on the Compliance Advisor Ombudsman ("CAO") 2012 Draft Operational Guidelines ("Draft"). We represent organizations from around the world that work with people and communities impacted by International Finance Corporation ("IFC") and Multilateral Investment Guarantee Agency ("MIGA") projects. Therefore, we are interested in commenting on the Draft and its potential impact on communities we represent as they access the CAO's services.

We commend the CAO for a number of improvements to its 2007 Operational Guidelines ("Guidelines"), most notably the restructuring of its complaint process, which now allows for direct access to the Compliance function following assessment[1] and following a successful resolution to Dispute Resolution.[2] However, significant improvements are still needed in order for the accountability mechanism to conform to best practices and the principles upon which accountability mechanisms are based: independence, fairness, transparency, accessibility, and effectiveness. Reforms are needed in both the Dispute Resolution and Compliance processes to more successfully respond to harms suffered by project-affected communities.

Our comments address both strengths and deficiencies in the Draft by analyzing the following: I. General Features of the Mechanism and Complaints Process; II. Complaint Assessment; III. Representation; IV. Dispute Resolution Role; V. Compliance Appraisal; VI. Compliance Investigation and Monitoring ; VII. Advisory Role; and VIII. Communications and Outreach.

[1] 2012 Draft CAO Operational Guidelines ("Draft"), 2.3.
[2] 2012 Draft at Figure 1.

I. General Features of the Mechanism and Complaints Process

a. Choice of Functions

We strongly agree with the Draft's proposed change in the complaints process, which allows a case to go directly to Compliance after assessment.[3] This prevents one CAO role from restricting access to another, and honors community self-determination by allowing complainants to choose the process they seek to initiate. When communities feel that Compliance Review is the most appropriate way to address a complaint, this amendment removes the delay caused by a prerequisite Dispute Resolution process.

It is also an improvement that the complaint is no longer addressed to the Ombudsman Role, but instead goes through a neutral assessment.[4] We are pleased that the CAO Ombudsman no longer has to determine that collaborative resolution is not possible before transferring a complaint to compliance.[5] Finally, complainants now have access to the Compliance role even after reaching an agreement in Dispute Resolution.[6] All of these changes allow for greater access to the important Compliance function of the CAO.

While more direct access to the Compliance role is a welcome improvement, the Draft could be more explicit about the process of accessing both roles. For instance, the text of the Draft does not make it clear that a complainant can request *both* Dispute Resolution *and* Compliance. The text instead seems to indicate that complainants can select one role or the other, and that the assessment will determine which one of the roles was selected.

We also recommend that greater flexibility be built into the system to allow claimants to determine not only the functions they wish to initiate, but also their order. Sequencing should be determined on a case-by-case basis to enhance the effectiveness and accessibility of the Compliance function. This would allow for compliance review first when it is more urgently needed but both roles are requested, avoiding the delay caused by a prerequisite dispute resolution process.

However, if complainants are not given the choice of which function to use first, the Draft needs to be clarified on this point. In Figure 1 of the Draft, there is an arrow from Dispute Resolution monitoring to Compliance appraisal, but no arrow in the opposite direction.[7] This seems to indicate that a case can go to Compliance after Dispute Resolution, but not from Compliance to Dispute Resolution. This was confirmed during the July Consultation. However, this is not spelled out anywhere in the text and should be clarified so complainants know what to expect.

We further recommend that the CAO allow for parallel Dispute Resolution and Compliance Review processes. While the Draft does not clearly foreclose this option, the CAO

[3] *See, e.g.,* 2012 Draft at 2.1.1, 2.1.2.
[4] 2012 Draft at 2, 2.1.1, 2.1.2.
[5] 2007 CAO Operational Guidelines ("Guidelines") at 2.3.3; and 2012 Draft at 2.3.
[6] 2012 Draft at Figure 1.
[7] Draft at Figure 1.

made it clear during the July Consultation that the CAO is not considering parallel processes. In cases where Compliance Review is the most appropriate way to resolve the issue, these suggestions would allow Compliance Review to occur from the beginning or before the Dispute Resolution dialogue is concluded.[8]

Finally, language in the Draft seems to suggest that both parties (complainant and company) must agree on which CAO function to initiate. For example, during assessment the CAO determines which role the *parties*, rather than *complainants*, seek to initiate.[9] After assessment, the CAO conducts Dispute Resolution, "[i]f the *parties agree* to seek joint resolution to the issues," or Compliance "[i]f the *parties seek* a compliance route."[10] While it is important for both parties to agree to the Dispute Resolution process, since it is voluntary and impossible without the buy-in of both sides, this should not be the case for Compliance Review. During the July Consultation, the CAO provided clarification, and we understand that the client would not be able to prevent a complainant from accessing Compliance. We therefore recommend that the language in the Draft be changed to reflect that understanding.

b. IFC/MIGA Financial Involvement

We recommend that the CAO adopt greater flexibility in accepting complaints regarding projects that were previously, but are not currently, funded by IFC/MIGA. The Draft states that a complaint is only eligible if it "pertains to a project that IFC/MIGA is participating in, or is actively considering."[11] This is problematic because some project impacts are delayed, and communities may suffer harm that originated in a project during IFC/MIGA involvement, but which they did not experience until after divestment. This eligibility criterion may create a barrier to Dispute Resolution or Compliance Review, because the CAO may terminate the process if IFC/MIGA ends its financial involvement before a complaint is filed or even midway through the process. Of particular concern are cases that do not proceed to a full investigation because IFC/MIGA ended its relationship with the project sponsor before an investigation could take place.

The Draft should not create a loophole that permits IFC/MIGA to evade investigation of its past actions by ending its current financial relationship with a non-compliant project. Rather, the CAO should consider complaints to be eligible if they are regarding projects that IFC/MIGA financed up to two years prior. We note that the Asian Development Bank recently adopted such a procedure, and we encourage the CAO to follow suit.[12] At the very least, an appraisal should consider for investigation all cases that were eligible at the time the complaint was filed, even if IFC/MIGA subsequently terminated its involvement before Compliance Review began.

---

[8] A similar suggestion was made in the Internal Review for a test pilot of parallel Ombuds assessment and Compliance appraisal processes. While this is a potential option, it should not impede the Compliance Review staff from having direct contact with complainants. Internal Review at Recommendation 4.1.3.2.
[9] Draft at 2.3
[10] Draft at 2.4.
[11] Draft at 2.2.1.
[12] *Accountability Mechanism Policy 2012*, §142(iv), *available at* http://www.adb.org/sites/default/files/accountability-mechanism-policy-2012.pdf.

c. CAO Ability to Prevent Future Harm

In cases where severe or irreversible future harm is alleged by complainants, the CAO should have the power to investigate and recommend preventative action. Through its various functions, the CAO is meant not only to address past harms, but also future ones, whether it is through a mediated agreement to prevent further harm from a project, a compliance investigation that addresses IFC/MIGA failures in preventing harm, or an advisory memorandum advising IFC/MIGA on how to improve future activities. In order to enhance the CAO's leverage, the office should be explicitly empowered to make recommendations to the President and Board that include consequences, such as suspending a project, blacklisting a company, retracting a loan in cases of egregious violations, or suspending lending to a certain sector.

d. Independence of the CAO Vice President

It is an improvement to the independence of the CAO Vice President role that he/she now "is restricted for life from obtaining employment with the World Bank Group."[13] However, we recommend that the CAO additionally adopt the Internal Review recommendation that the CAO VP "be chosen from outside the World Bank Group."[14] This restriction on World Bank employment both prior to and following the CAO VP post would help protect against conflicts of interest.

The Internal Review noted that although the CAO's Terms of Reference ("TOR") state that the "Ombudsman will be appointed by the President,"[15] the appointment process for the CAO VP in 2000 was quite participatory, involving a search committee with civil society representation. This approach, rather than a private appointment by the President, increases the CAO's legitimacy and transparency. We agree with the Internal Review recommendation calling for the codification of this appointment process, so that it is not "open to interpretation when the recruitment of a new CAO VP takes place."[16] We are pleased that the Draft includes language which indicates that the appointment will be done in a participatory manner.[17] To further improve this process, we recommend that the CAO consult with civil society regarding who should be on the selection committee.

e. Complaint Submission

Complainants under threat of retribution for accessing the CAO should be able to keep their identities anonymous when filing a complaint through a representative. The Draft currently states that an organization must "clearly identify the people on whose behalf the complaint is made."[18] This requirement may further threaten vulnerable communities, and bar access to CAO services for complainants who are too intimidated to include their names on the complaint.

---

[13] 2012 Draft at 1.2.
[14] 2010 Internal Review of CAO Terms of Reference, Operational Guidance and Operational Practices, Recommendation 2.1.3.2.
[15] CAO Terms of Reference, 2; Internal Review at 2.1.3.
[16] Internal Review at 2.1.3; Internal Review Recommendation 2.1.3.1.
[17] Draft at 1.1 (stipulating that appointment is "subject to an independent selection process involving representatives from civil society and the private sector.").
[18] Draft at 2.1.2.

Furthermore, since "[t]he CAO strives to be an . . . accessible, and equitable mechanism"[19] that allows "any individual or group or group of individuals, to lodge a complaint,"[20] it should accept complaints in a wider variety of forms. Currently, "complaints should be submitted in writing."[21] The CAO should allow oral complaints from communities that are illiterate, unable to secure trained representation, and/or more effectively able to describe their concerns verbally.[22] This will further increase the accessibility of CAO's services to project-affected communities who would otherwise have difficulty making their voices heard.

II. Complaint Assessment

a. Enhancing Assessment Neutrality

As mentioned above, we commend the CAO for allowing greater access to the Compliance role by providing a neutral assessment and by allowing the complainant to determine which role to initiate. While we appreciate the effort to make the complaint assessment a neutral process, rather than a process housed within the Ombudsman Role, the Draft does not go far enough to achieve this end. The Draft specifies that "[t]he assessment of a complaint will be carried out by CAO dispute resolution experts," which reflects the current status quo.[23] At the July Consultation, the CAO reasoned that dispute resolution staff have the skill set to effectively map a conflict, and will "psychologically" put themselves in a neutral position during the process. It further explained that it is the complainant and project sponsor, not CAO staff, who decide which direction to go with the complaint.

However, we are concerned that even well-meaning experts will tend to see an issue through the lens of their expertise. Dispute resolution staff may therefore disproportionately identify complaints as raising problem-solving issues and believe that the issues would not be as effectively addressed in Compliance Review. Furthermore, while the parties decide which role(s) of the CAO to initiate, it is the information collected and interpreted during assessment that forms the basis of Compliance appraisals and investigations. An assessment done by dispute resolution experts, who may be more likely to view a complaint as primarily a problem between a project sponsor and a community, may less effectively inform the Compliance process. This is especially problematic since the Compliance appraisal rarely involves any further consultation with communities. Therefore, we urge the CAO to hire staff who are dedicated exclusively to complaint assessment in order to foster neutral analysis and allow for free access to Compliance Review.

---

[19] Draft at 1.2.
[20] Draft at 1.1.
[21] Draft at 2.1.3.
[22] The option to submit oral complaints is available at the Inter-American Development Bank's accountability mechanism. *See* Inter-American Development Bank Policy Establishing the Independent Consultation and Investigation Mechanism, at 32a (Feb.17, 2010) ("Requests may be received in writing, via electronic or regular mail, fax, or text message to the ICIM Office phone number. Oral Requests will be accepted, subject to subsequent receipt of a signed communication.").
[23] Draft at 2.3.

b. Site Visit Notification

We are concerned about the deletion of the provision from the current Guidelines which states that "[w]hen planning a visit, the CAO Ombudsman will notify the IFC/MIGA, the sponsor, complainants, and other relevant stakeholders of its plans."[24] While we understand the usefulness of surprise visits to a project site, the complainants and their representatives should still receive notice of a CAO visit in order to adequately prepare for meetings with CAO representatives.

c. Disclosure of Eligibility Assessment

We urge the CAO to maintain transparency in its determination of eligibility. It is troubling that the section in the current Guidelines entitled "Initial response and notification," detailing the steps the CAO will follow after eligibility screening, has been struck from Draft.[25] While it is generally an improvement that disclosure procedures have been "captured in one section rather than throughout the entire document,"[26] in this step of the process, disclosure has been weakened, or its specifications made less clear. For instance, currently, if a complaint is eligible for assessment, the CAO notifies complainants "immediately" and posts on its website "an announcement of complaints that meet the criteria."[27] If the complaint is rejected, complainants receive written notice including the rationale for the decision.[28] In the Draft, however, the most similar provisions merely state that "[o]nce the CAO has deemed a complaint to be eligible, other affected stakeholders . . . typically will be notified about the complaint."[29] The Draft does not indicate how quickly the CAO will notify complainants about whether their complaint is eligible, whether the CAO will provide its reasons for rejecting a complaint, or whether it will post announcements regarding eligible complaints online.

In order to strengthen the transparency and predictability of its processes, we recommend that the CAO retain its policy of notifying complainants immediately upon completing an eligibility assessment, including providing its reasoning for denying a complaint, and additionally provide its reasoning for deeming a complaint eligible. We also urge the CAO to post each complaint received on its website, along with each eligibility determination and the rationale behind the determination.

d. Complaint Amendment

Complainants should have the opportunity to amend their complaints. This will improve the overall effectiveness of the mechanism, since there are a number of reasons that an initial complaint which warrants a response may nonetheless be ineligible for assessment or lacking key information. Initial requests for CAO services are frequently not comprehensive because complainants are unfamiliar with the process and what information the CAO requires.

---

[24] *See* 2007 Guidelines at 2.3.3; Draft at 2.3.
[25] *See* 2007 Guidelines at 2.3.2; Draft at 2.2.1.
[26] CAO Operational Guidelines Review (2012): Overview of Updates.
[27] 2007 Guidelines at 2.3.2.
[28] *Id*.
[29] Draft at 1.4.

Furthermore, new violations and additional information may arise that were impossible to predict when the complaint was filed. The Draft is currently silent on the ability or inability of complainants to amend their complaints. In order for the CAO to thoroughly understand complainants' concerns and avoid denying valid complaints or overlooking important new issues that arise after filing, we recommend that the Draft include a provision allowing for amendment of complaints.

III. Representation

a. Freedom to choose representation

We agree with the values that the CAO articulates in the new section, "Principles of and Approach to Dispute Resolution."[30] It is indeed important that the CAO have direct access to project-affected communities, that the communities communicate with the project sponsor, and that dispute resolution be a "nonjudicial, nonadversarial, neutral forum."[31] We are concerned, however, that this new language may be used to limit the ability of communities to choose to work with representatives, when in fact, representation is not inconsistent with these values. Explicit language affirming complainants' ability to work with chosen representatives would be a welcome improvement to this section.

We also note with concern that the Draft consistently avoids the use of the word "representative,"[32] though this term is found in the 2007 Operational Guidelines.[33] Currently, a "representative" can lodge a complaint on behalf of a complainant, as long as there is "evidence of authority to represent" the complainant.[34] This has been replaced with language indicating that "a complaint can be lodged by a different organization on behalf of those affected" as long as there is "evidence of authority to present the complaint on their behalf."[35] The section on "What to include in a complaint" has been similarly changed.[36] Although the July Consultation clarified that the CAO does not anticipate a change in its current operations as a result of these language modifications, we believe the language change is a move in the wrong direction. The term "representative" can imply a role that goes beyond submitting a complaint and could include various levels of participation in the dispute resolution and compliance processes, which should be decided by the complainants. Deleting mention of representatives fails to affirm the right of communities to choose to receive assistance through representation.

Narrowing the participants in Dispute Resolution from "stakeholders" to "parties" likewise seems to indicate intent to exclude representatives and other players who could facilitate an effective dialogue. For example, in the current Guidelines, "the CAO Ombudsman may encourage *the complainant, the sponsor, and other stakeholders* to engage directly in dialogue and negotiation."[37] In the Draft, "the CAO Dispute Resolution team may encourage the *parties*

[30] Draft at 3.1.
[31] *Id*.
[32] *See, e.g.,* Draft at 2.1.2, 2.2.4.
[33] *See, e.g.,* 2007 Operational Guidelines, 2.2.2, 2.2.4.
[34] 2007 Guidelines at 2.2.2.
[35] Draft at 2.1.2.
[36] Draft at 2.1.4.
[37] 2007 Guidelines at 2.4.1.

to engage directly in dialogue and negotiation."[38] We recommend that the Draft retain the previous inclusive posture, allowing stakeholders selected by the complainant to contribute toward resolution of complaints.

We note that, unlike most of the changes in the Draft, these modifications affecting representation do not appear to be responsive to any findings or recommendations from the Internal Review.

b. Access for Non-local Claimants

We are pleased to see that a current requirement stating that "[i]f prospective complainants are from outside the country where the project is located, complaints should be lodged jointly with a local entity" has been removed.[39] Assuming that complainants may still file complaints about a project in another country, this is an improvement, and we hope that this will be made clear in the Draft. Communities affected by projects in neighboring countries should be permitted to file a complaint on their own behalf, or through a representative of their choosing. A requirement that they locate a local organization is an unnecessary barrier to accessing CAO services.

IV. Dispute Resolution Role

a. Compliance Review Following Dispute Resolution

We commend the CAO for striking the stipulation that it "may conclude and close a complaint if a satisfactory settlement has been reached" at the problem-solving stage.[40] Similarly, the Draft removes the restriction that a complaint can be transferred from the Ombudsman role to Compliance only "where no resolution [is] possible."[41] These changes will lead to greater use of the Compliance Role for complaints that implicate compliance issues, but first go through Dispute Resolution. This change will enhance the legitimacy and effectiveness of the mechanism, avoiding the perception that the CAO is "cleaning up messes" through Dispute Resolution that would be better addressed by investigating IFC/MIGA's compliance.[42]

b. Termination of Dispute Resolution

We encourage the CAO to accept the parties' decision on whether or not to continue dialogue and to allow dialogue to continue if both parties wish to continue working toward a solution. Under the Draft, the CAO may unilaterally terminate dispute resolution at any time if it "believes that resolution of the case is unlikely to be possible through a dispute resolution process or that it would be an inefficient use of resources."[43] This contradicts the stated principles of Dispute Resolution, which is meant to be a "mutually agreed process" between the

[38] Draft at 3.2.1.
[39] *See* 2007 Guidelines at 2.2.2; Draft at 2.1.2.
[40] *See* 2007 Guidelines at 2.4.2.
[41] *See* 2007 Guidelines at 3.3.1.
[42] *See* Internal Review at 4.1.2.
[43] Draft at 2.3.

parties,[44] dependent on "consensus between the affected people and sponsor, at a minimum."[45] Because the process provides a "neutral forum" for the parties to negotiate an agreement,[46] the parties ought to have ownership over the process, including when it ends.

c. Monitoring and Conclusion

We are concerned that the Draft significantly weakens the CAO's commitment to monitoring results of the Dispute Resolution process. Furthermore, the Draft no longer indicates that monitoring "should be integrated into the normal project management and monitoring of IFC/MIGA."[47] The current Guidelines also ensure that "[m]onitoring reports will . . . be shared directly with the complainants, as well as IFC/MIGA,"[48] but this does not appear in the Draft. A provision that "[t]he CAO may request that IFC/MIGA staff or other agencies on the ground provide assistance in monitoring implementation of agreements"[49] has also been deleted.

Taken together, these omissions seem to indicate a weakening of the CAO's monitoring role in the Dispute Resolution process. We recommend that the Draft retain the monitoring provisions, as consistent monitoring and disclosure of monitoring reports is essential to the long-term implementation of dispute resolution agreements.

We are pleased that the Draft clearly calls for the release of a conclusion report following implementation of a monitored agreement.[50] However, this section of the Draft is unclear about to whom the report will be released and whether there are regular reports issued as monitoring continues over time. We recommend that the conclusion report be released directly to complainants and posted on the website and that it be drafted in consultation with complainants. We further suggest that follow-up reports be released at least annually to the public and to complainants.

V. Compliance Appraisal

We recommend that the CAO send cases in Compliance directly to a full investigation. The appraisal process is problematic due to the high level of discretion, inconsistent application of appraisal criteria, and conclusory findings that this stage allows. Too few cases receive a full investigation, despite evidence of policy violations leading to substantial harm on the ground. Thus, although the Draft improves access to the Compliance function, it may not result in investigations of and improvement in IFC/MIGA compliance with social and environmental policies.

If the CAO chooses, however, to continue the compliance appraisal step, we recommend the following changes.

---

[44] Draft at 2.4.
[45] Draft at 3.1.
[46] *Id*.
[47] 2007 Guidelines at 2.4.5.
[48] *Id.*
[49] *Id*.
[50] *See* Draft at 3.2.4.

a. Clarity of Criteria and Focus on Outcomes

We urge the CAO to use only published criteria in making appraisal determinations and to maintain in practice the emphasis on outcomes found in the Draft. As stated in the Draft, "the purpose of the appraisal process is to ensure that compliance investigations are initiated only for those projects that raise substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA."[51] While this does not guarantee that *all* cases raising substantial concerns about outcomes will go to investigation, it does indicate that the purpose of appraisal is to filter out the cases with trivial concerns. There should be a presumption, therefore, that cases which present substantial negative outcomes merit investigation. We also urge the CAO to create parameters for "substantial concerns," in order to provide guidance, not only to potential complainants, but also to CAO staff and consultants who are assessing whether concerns regarding environmental and social outcomes qualify as "substantial."

Furthermore, the appraisal criteria place an emphasis on outcomes on the ground. The Draft states that the CAO will consider (1) whether there are or will be adverse outcomes from the project; (2) whether IFC/MIGA failed to adhere to a "policy or other appraisal criteria;" and (3) whether those provisions provided adequate protection.[52] The first and third criteria require an inquiry into harm the project caused regardless of adherence to IFC's/MIGA's policies. The second criterion looks at IFC/MIGA compliance with its policies, which are largely aimed at improving project outcomes. The analysis found in appraisal reports, however, is frequently dominated by discussion of how IFC/MIGA made efforts to "assure itself" of compliance, with little regard for whether such assurances resulted in improved outcomes on the ground. We urge the CAO to clarify in the Draft that the CAO should rely exclusively on the stated criteria, two of which are explicitly outcome-oriented, in conducting appraisals.

Finally, we are concerned that the written appraisal criteria in the Draft do not accurately reflect all the criteria that the CAO uses in conducting appraisals. From the July 23, 2012 CAO Consultation with Civil Society ("July Consultation"), and a July 30, 2012 phone conversation between Accountability Counsel and CAO's Principal Specialist on Compliance, Henrik Linders, it was suggested that there were various unwritten criteria that influence the appraisal process, such as whether the CAO feels it would learn anything from a full investigation that it did not learn in the appraisal; whether the case includes issues of systemic importance to IFC/MIGA; or whether a full investigation will have much impact on the practices of a given industry and/or future IFC/MIGA activity. We believe that the CAO should limit itself to using the criteria currently in the Draft. If, however, the CAO chooses to use other criteria in conducting appraisals, those criteria should be added to the Draft in order to foster a fair and predictable appraisal process.

To this end, we agree with the recommendation from the 2010 Internal Review of CAO Terms of Reference, Operational Guidance and Operational Practices ("Internal Review") that the CAO develop an operating manual "that takes the Operational Guidelines to a more detailed level" regarding both appraisal and investigation practices, and open the manual for public

[51] Draft at 4.2.1.
[52] *Id*.

comment prior to implementation.[53] Doing so would establish "acceptable parameters" for the discretion used in the CAO's Compliance Role and allow the CAO "to produce consistent work over time and ensure a quality product."[54]

To ensure transparency, we also recommend that either the Draft or an operating manual include the expectation that all appraisal reports contain a rationale section that enumerates and defines the criteria and reasoning used to evaluate the merit of conducting an investigation.

b. Ensuring Accuracy of Facts

While we agree that the focus of Compliance Review should be on the IFC/MIGA, we nonetheless urge the CAO to engage the complainants in the appraisal and investigation stages. The Draft indicates that "[i]n conducting the appraisal, the CAO will hold discussions with the IFC/MIGA team working with the specific project and other stakeholders" to understand the criteria and procedures IFC/MIGA used, "and, generally, whether a compliance investigation is the appropriate response."[55] We recommend that the CAO include complainants as "stakeholders" who can help the CAO understand whether investigation is appropriate. Just as in the Dispute Resolution process, working directly with affected communities during Compliance is important because they "often have much to gain or lose from a project"[56] and can provide valuable information relevant to fact gathering about compliance. Whether IFC/MIGA complied with its policies and whether such policies are adequately protective directly affects communities, and the accuracy and impartiality of the information gleaned from communities, the sponsor, and IFC/MIGA can impact the appraisal process. Facts in appraisal reports frequently misrepresent complainant concerns and are construed in favor of the IFC/MIGA. We therefore recommend that the Draft include a statement specifying that either the facts in a complaint be taken as true during the appraisal process, complainants be given opportunity to comment on draft appraisal reports, and/or that the CAO conduct additional consultations with complainants to ensure comprehensive and accurate information during the appraisal.

c. Strengthening the Third Appraisal Criteria

We support the Draft's addition of an explicit provision that the CAO will discuss with IFC/MIGA staff whether the criteria they used to evaluate project performance sufficiently protected the affected community.[57] This is an important addition because this is one of the criteria the CAO uses to determine whether an investigation is warranted.[58] We note that this third criterion is infrequently applied at the appraisal stage; the CAO is often satisfied that a case does not merit an investigation when it finds that IFC/MIGA staff made efforts to comply with relevant policies. A more rigorous inquiry during the appraisal into whether the policies provided adequate protection would contribute toward a more effective Compliance process.

---

[53] Internal Review at Recommendation 3.3.3.d.
[54] *Id.*
[55] Draft at 4.2.1.
[56] Draft at 3.1.
[57] Draft at 4.2.1.
[58] *Id*. ("the CAO seeks to determine whether . . . [t]here is evidence that indicates that IFC's/MIGA's provisions, whether or not complied with, have failed to provide an adequate level of protection")

Moreover, as described above, in addition to consulting with IFC/MIGA staff about the level of protection afforded by the policies, we urge the CAO to consult complainants on these issues during the appraisal stage to ensure that there are no factual inconsistencies. Disputes as to facts should be noted in all reports.

d. Considering the Decision to Invest

We strongly urge the CAO to consider questions about client capacity to meet IFC/MIGA standards and whether IFC/MIGA complied with its policies in its initial decision to invest in the project. Currently, appraisals often focus on IFC/MIGA efforts to bridge the gap between IFC/MIGA policies and the non-compliant project's performance. However, this leads to an analysis that is too narrow, failing to consider the period of involvement with a project where IFC/MIGA has far greater leverage to compel compliance: when the IFC/MIGA is considering the project for investment. If IFC/MIGA invested in a project in serious violation of its standards, this is an issue of bank non-compliance that should be considered at the appraisal stage, and should weigh in favor of a full investigation. We urge the CAO to add language in the Draft specifying that the appraisal stage will include consideration of the decision to invest in a project.

VI. Compliance Investigation and Monitoring

a. Investigation of Systemic Issues

We are pleased to see that the Draft allows for the opportunity for program-wide audits of "systemic issues of importance to IFC/MIGA."[59] We request clarity as to how the CAO identifies and decides to investigate these systemic issues, and urge the CAO to secure additional funds for systematic investigations rather than divert resources from project-specific investigations.

b. Independence in Decision to Initiate Compliance Review and its Outcome

The Draft appears to give the CAO Vice President greater discretion in his or her decision to initiate Compliance Review, which is a positive change. While the CAO VP must submit a memorandum to a greater number of parties explaining the reasons for the proposal to start a compliance review process, the decision no longer needs to be made "in consultation with the Executive Vice President(s)."[60] It is important that the CAO remain "independent from operational management" in order to provide effective accountability.[61]

We recommend that the independence of the CAO be further increased by allowing the CAO, rather than the President, to make the final decision about the outcome of an investigation. The Draft states that "[t]he President retains discretion over clearance" of the investigation report and the response by IFC/MIGA management.[62] Furthermore, the Board does not see these

[59] Draft at 4.2.1.
[60] *See* 2007 Guidelines at 3.3.4.
[61] *See* CAO Terms of Reference, 1.
[62] Draft at 4.4.5.

documents until the President clears them.[63] The CAO should instead have the discretion to release the report directly to the public and the Board.

c. Expansion of the Scope of an Investigation

The CAO should allow for greater flexibility in expanding the scope of an investigation beyond issues that were identified in an appraisal report. We note the positive change that expansion may be allowed "[s]hould additional issues or concerns emerge during an investigation," but do not agree that they must first be "subject to a separate appraisal at the decision of the CAO Vice President."[64] We suggest that once a case has been approved for an investigation, the CAO commit to investigating substantial new issues or concerns arising during the process and requested by the complainants. Because the appraisal and subsequent investigation rely on documentation from the initial assessment,[65] which may have been drafted prior to potentially lengthy problem-solving and appraisal processes, it is reasonable to expect the situation to change over that period of time. In order to effectively respond to the harms caused by a project, the CAO should allow for expansion to new issues based on the current conditions on the ground, and should not subject such concerns to a formal, separate appraisal process nor to the decision of the CAO Vice President.

d. Disclosure of Investigation Report

The Draft improves the CAO's disclosure policies by explicitly providing that the CAO "alert relevant stakeholders of the disclosure of [the investigation report and IFC/MIGA's response] on CAO's Web site, and in cases where the investigation was initiated by a complaint, share the documents with complainants."[66] We support this improvement in transparency and also urge the CAO to adopt greater parity in its consultation with complainants as compared to IFC/MIGA staff during the Compliance process. Since the "draft compliance investigation report will be circulated to IFC/MIGA senior management and all relevant IFC/MIGA departments for factual review and comment,"[67] we urge the CAO to do the same with complainants, to ensure accuracy of facts on both sides.

e. Monitoring

We support the subtle but important change of wording, which provides that the CAO will monitor cases following compliance review until IFC/MIGA "is back in compliance,"[68] rather than until the CAO is assured that IFC/MIGA "will move back into compliance."[69] The previous language allowed for too much discretion as to when to terminate monitoring, potentially allowing projects to continue to operate in violation of IFC/MIGA policies.

---

[63] *Id*.
[64] Draft at 4.4.1.
[65] *See* Draft at 4.2.1 ("The scope of the appraisal will be defined by issues raised in the complaint and identified during the CAO assessment phase").
[66] Draft at 4.4.5.
[67] *Id*.
[68] Draft at 4.4.6
[69] 2007 Guidelines at 3.4.3.

Disclosure of monitoring results should be improved. The Draft states that "[t]he CAO makes public the current status of all compliance cases," but does not provide for disclosure of monitoring reports.[70] In order to increase transparency, these reports should be posted on the CAO's website and provided directly to complainants.

Finally, we support the codification of the CAO's practice of regularly providing Management Action Tracking Record reports to the Committee on Development Effectiveness.[71]

VII. Advisory Role

a. Expansion to Private Sector

We are pleased to see that the objectives of the Advisory function include "[a]dvancing the boundaries of environmentally and/or socially responsible behavior in the private sector through lessons derived from CAO cases."[72] We recommend clarification in the Draft for how the CAO plans to expand its Advisory Role beyond IFC/MIGA to the private sector, and how this may affect performance of project sponsors.

b. Condensation of Section

We encourage the CAO to expand, rather than condense, its Advisory Role section in the Draft, and follow the Internal Review recommendation to develop additional operational guidance for this function.[73] We are concerned by the significant condensation of this section of the Draft and the implications that it may have for the Advisory Role. For example, the Draft gives less explanation than the current Guidelines for how the scope of advice is determined,[74] the process of screening requests for advice,[75] and timelines the office will follow.[76]

It is unclear whether the succinct "Screening criteria for requests for advice" section, which replaces the current "Appraising requests for advice" section, indicates that a simpler screening process rather than extensive appraisal process applies to requests for advice. If so, we welcome this improvement, allowing a more straightforward and predictable procedure. However, if the process still involves a lengthy appraisal process resulting in a decision regarding "whether an advisory activity by the CAO is the appropriate response,"[77] the Draft should detail the criteria that will be considered in making this determination.

We also note that the section titled "Report preparation and target audiences" in the current procedures is deleted or missing from the Draft.[78] It is important to retain this section to outline the procedure and timeline for handling a request to the Advisory Role.

---

[70] Draft at 4.4.6.
[71] Draft at 1.5.
[72] Draft at 5.2.2.
[73] *See* Internal Review at 3.4.2.
[74] *See* Draft at 5.2.1; 2007 Guidelines at 4.2.2.
[75] *See* Draft at 5.2.3; 2007 Guidelines at 4.2.3.
[76] *See* Draft at 5.2.1; 2007 Guidelines at 4.2.1.
[77] 2007 Guidelines 4.2.3.
[78] *See* 2007 Guidelines at 4.4.2.

We urge the CAO to adopt the Internal Review recommendation of providing expanded guidance in the procedures, "to make the Advisory function more proactive and strategic in its focus."[79] We particularly advise the CAO to adopt procedures in order to more consistently and effectively identify systematic or sector-specific issues from its Dispute Resolution and Compliance cases and "discuss possible interventions."[80]

c. Access and Disclosure

We advise the CAO to follow the current Guidelines, which state that "the presumption is in favor of disclosure" within the Advisory Role.[81] Because the Draft lacks a section on Advisory report preparation and audience, it is unclear to whom final reports will be disclosed. We recommend that, in the interest of transparency, they be public and posted on the CAO website. We further recommend that the CAO release to the public, and not only to the President, monitoring reports on the implementation of advice.[82]

Finally, we recommend that the CAO retain the provision allowing departments within the IFC/MIGA to request advice.[83]

VIII. Communications and Outreach

a. Translation

We note improvements in the Draft to translation procedures, and commends the CAO for broadening of access to its services. For example, translation of the Operational Guidelines and other materials is no longer limited to "predominant languages" of the World Bank,[84] but will be available in the official languages of the World Bank Group "and additional languages where deemed necessary."[85] We request clarification as to what would qualify as a necessary translation, but generally approve of this change. We also appreciate that the Draft provides that "[a]ll publicly disclosed CAO reports relating to complaints—including assessment reports, agreements, compliance appraisals and investigations and conclusion reports—are translated into the local language of the relevant complainants,"[86] deleting the clause "when possible" that is found in the current Guidelines.[87]

In order to further improve accessibility to the CAO's services, we recommend that the office additionally provide an easy-to-understand guide to CAO procedures, translated into the major world languages and additional languages if requested.

---

[79] Internal Review at Recommendation 3.4.2.1.
[80] *See* id.
[81] *See* 2007 Guidelines at 4.4.1.
[82] *See* Draft at 5.3.3.
[83] *See* Draft at 5.2.1; 2007 Guidelines at 4.2.1.
[84] 2007 Guidelines at 1.4.
[85] Draft at 6.
[86] *Id.*
[87] 2007 Guidelines at 1.4.

b. Local Experts

In its outreach activities, we recommend that the CAO keep the current language on "[s]eeking advice of those with expert knowledge *within* countries" rather than shifting to a focus on advice from "experts *with in-country and/or regional knowledge*."[88] While it may not always be practicable to consult with local experts, this should be the preferred method of gaining local knowledge in order to contextualize CAO activities.

We appreciate the opportunity to comment on the CAO Draft Operational Procedures, and we request that the CAO release a timeline of subsequent steps in the consultation process. Please do not hesitate to contact us with any questions about our comments.

Sincerely,

Natalie Bridgeman Fields
Accountability Counsel, USA

Pieter Jansen
Both Ends, The Netherlands

Kate Watters
Crude Accountability, USA

R. Sreedhar
Environics Trust, India

Michelle Chan
Friends of the Earth, USA

Hasan Mehedi
Humanitywatch, Bangladesh

David Pred
Inclusive Development International, USA

Zachary Hurwitz
International Rivers, USA

Maurice Ouma Odhiambo
Jamaa Resource Initiatives, Kenya

Gautam Bandyopadhyay
Nadi Ghati Morcha, India

Ana Schjolden
The Norwegian Forum for Environment and Development, Norway

Nurul Alam Masud
Participatory Research & Action Network, Bangladesh

Ravindranath
River Basin Friends, India

Ranjan Panda
Water Initiatives Odisha, India

[88] *See* Draft at 6; 2007 Guidelines at 1.4.