

CSO Submission to the External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness

Introduction

The External Review of IFC/MIGA E&S accountability, including the CAO's role and effectiveness, is a welcome effort, and we commend the IFC and the World Bank Board of Directors for initiating such a holistic review of the system. Collectively, our organizations have decades of experience working with communities impacted by IFC projects and programs, as well as with IFC and CAO staff to learn from those experiences and improve policies and practices. We therefore look forward to engaging with the Review Team as well as with other stakeholders throughout the course of this review to share our views and ensure that the rights and interests of communities and the environment remain a central focus in this reform effort.

While we remain pleased with many early steps that the IFC has taken in the wake of the Supreme Court's decision in *Jam v. IFC*, broader reforms are still necessary to ensure that communities and the environment are protected from adverse impacts associated with development, and that communities are able to seek redress when harm occurs. The structural changes underway at the IFC will certainly help in this regard. For example, the creation of the Environment and Social Policy and Risk department has the potential to ensure that IFC projects provide sustained development benefits by confirming the IFC is in compliance with its E&S standards. However, this new unit can be effective only if it is given sufficient resources and staffed with appropriate, senior-level specialists with decision-making power and influence across the institution.

We are hopeful that this review can lead to positive, meaningful change at the IFC, and we have included several recommendations in this document that outline some of the most impactful reforms we see as necessary to achieve the goals of the review. However, we also strongly urge the Review Team to ensure that the process for soliciting input for the review is inclusive of civil society and communities in the Global South, and in particular those who have experience with IFC projects and CAO complaints. We are very concerned that the process – so far – has suffered from a serious lack of transparency, and that very few people are even aware that it is happening. Posting an announcement on the World Bank's website with an email address to send feedback is not enough. If the goal of the review is to seriously strengthen the accountability, governance, and effectiveness of the institution, a transparent, public process that proactively seeks input from a wide range of stakeholders is essential.

This document includes some of the issues we, the undersigned organizations, hope to flag with you at an early stage in the review. As the review moves forward, and we hopefully have more information on its scope and purpose, we plan to follow up on these recommendations in more detail.

Strengths of the Current System That Should Be Maintained

There are many aspects of the IFC's current E&S/Accountability system that represent good or best practice among IFIs, which should be built on and strengthened through the review process. The IFC was the first development finance institution (DFI) to adopt a comprehensive set of E&S policies, the Performance Standards (PSs), which have been replicated by many other DFIs around the world. In addition, the CAO's integrated structure of functions – including Dispute Resolution, Compliance, and Advisory – ensure that the system as a whole is greater than the sum of its parts. While there are weaknesses in both the PSs, the CAO process, and the governance structure of the institution, the following aspects should be maintained and strengthened through the review process:

Institutional Commitment to Strengthening E&S/Accountability

We welcome the commitment of the IFC's current leadership to addressing E&S/Accountability issues, and to strengthening the system. The creation of the Environment and Social Policy and Risk department is an important first step that can allow the IFC to identify and address risks in a timely and comprehensive way. In addition, the adoption of the IFC's Position Statement on Retaliation Against Civil Society and Project Stakeholders was commendable. However, it has been almost a year since this statement was made, which included a commitment to develop internal protocols and guidance. We are aware that the process to develop this guidance and protocols has begun and value the opportunity to provide input. However, we hope that changes in IFC operations provide for the proactive approach that has been set forth in the statement, even while the guidance is being developed fully. The IFC's efforts to strengthen its E&S/Accountability system should be characterized by much more urgency--particularly in the wake of *Jam*.

Governance and Structure

The CAO should continue to operate as a unit of three integrated functions, with a term-limited leader at the Vice President level, selected through a multi-stakeholder process led by civil society, industry, and academia. Compliance Review and Dispute Resolution are different in approach, but intended to reach the same results: prevention of or remedy for harms. Advisory complements these two functions by drawing lessons learned from compliance and dispute resolution cases, and improving environmental and social policies as well as their implementation.

Compliance

A particular strength of the CAO's compliance function is its mandate to monitor actions taken by the IFC or MIGA against compliance findings, to ensure the project is brought back into compliance, before a case is closed. In order to ensure the implementation of management action plans effectively bring a project back into compliance, this mandate must be maintained. The timeframe for monitoring – until the noncompliance has been addressed – must also be continued.

The current triggers for a compliance appraisal must also be maintained, including at the discretion of the CAO Vice President. Many communities face serious obstacles in bringing complaints to accountability mechanisms—for example, in countries or regions where the potential for retaliation is high. The CAO VP is well placed to trigger investigations based on project-specific or systemic concerns because of the depth and breadth of experience with the accountability process across the compliance, dispute resolution, and advisory functions. More broadly, the CAO should maintain the authority to proceed with a compliance investigation when the compliance appraisal indicates that a full investigation is warranted. The Board should not have a role in approving the decision to conduct a compliance investigation.

Dispute Resolution

The CAO's Dispute Resolution function is extremely well-regarded for its holistic and robust approach. That starts with an assessment phase in which CAO DR staff meet with complainants and the IFC's client to discuss whether they would like to proceed with a dispute resolution process or a compliance investigation. That is an important phase for all of the parties to develop a better understanding of what would otherwise be a foreign process and to develop trust with the mechanism. The CAO's flexibility in designing a process that fits the parties and their context is also notable. The significant results that the CAO has been able to facilitate in many cases is the product of the approach they have developed.

Advisory

The CAO's advisory function allows it to provide the IFC and MIGA with specific suggestions and guidance for addressing difficult and problematic projects. While the CAO has provided these recommendations and guidance in the past, it would seem that this advisory role has a clear place in serving the Board as well as the President or Management at the IFC or MIGA within the new structure and as part of the feedback loop mechanism.

Priority Improvements/Reforms to the Current System

While we recognize the importance of maintaining and strengthening the existing functions and structures mentioned in the previous section, we also hope this process provides an opportunity for serious consideration of potential reforms that could improve the system. Below are several areas in which we think the Review Team should focus:

Disclosure

One of the fundamental challenges hindering the effectiveness of the accountability system as a whole is the lack of awareness of the CAO by project-affected people. In his recent report on the practical implementation of the right to development, the United Nations Special Rapporteur on the Right to Development recommended that “[i]nternational financial institutions should make the complaints ... mechanisms that they finance more known to individuals affected by

development programmes and projects”¹ and that “[i]nternational financial institutions should make their accountability mechanisms more accessible to individuals and communities.”² While the CAO has made strides in raising awareness of its existence and procedures, in the absence of the IFC contractually requiring its clients to systematically disclose information, accessibility is ultimately diminished. The IFC should make the CAO more accessible for communities and individuals by requiring its clients to disclose the existence of and procedures for accessing the CAO from the very beginning of the project cycle, including in local languages and in formats that are more available to marginalized communities.

Disclosure of E&S and remediation requirements in legal agreements. While the IFC objects to disclosing its legal agreements with clients, it should at least disclose clauses related to E&S requirements and measures the client must take if the Performance Standards and other E&S requirements are not met. The IFC should also disclose the legal remedies available to it when clients breach the terms of the agreement. Disclosure of these clauses is manifestly in the public interest and the communities affected by IFC projects have a right to know what requirements have been contractually imposed on IFC clients with respect to the protection of their rights. Public disclosure of these clauses will help to hold the IFC and the client accountable to them.

The IFC should also be required to publicly report on divestment for E&S reasons, as well as measures it took to use its leverage to try to bring about remedy. In some cases, when problematic projects have been brought into the spotlight, the IFC has quietly divested presumably to wash its hands of the reputational mess. This is especially the case for financial intermediary clients. Additionally, divestment from projects where project affected communities have been the victims of retaliation can leave these communities vulnerable to further risk of harassment, criminalization and violence. In such cases, the IFC should be required to state the reasons for its decision to divest, and explain the measures it took to use its leverage to bring about remedy with its client prior to divesting. This disclosure can go far to protect communities from blame regarding changes in project financing and has the potential to avoid further retaliation.

Furthermore, when the project in question is or has been the subject of a CAO complaint, the IFC should be required to, before divestment:

- (i) consult affected communities of the decision to divest; and
- (ii) work with the client and communities on a plan to mitigate adverse impacts of divestment and address any ongoing E&S issues after divestment occurs.

IFC Responsiveness to Compliance Review Findings

Unfortunately, IFC management has often chosen to challenge CAO findings of non-compliance rather than accept the findings and outline actions to remedy the harm. In several cases, the

¹ A/HRC/42/38, Right to development: Report of the Special Rapporteur on the right to development (2019), para. 178, <https://undocs.org/en/A/HRC/42/38>.

² *Id.* at para. 177.

IFC's response has been defensive and has not proposed meaningful actions to address the challenges highlighted by the CAO. By ignoring rather than addressing the root causes of non-compliance, the IFC risks project failures, reputational risks, further harm to communities, and legal exposure.³ Unlike the World Bank, which is required to respond to findings of non-compliance by the Inspection Panel with a Management Action Plan (MAP), there is no such requirement currently upon the IFC. As it stands, the CAO Operational Guidelines only mention that a management "response" is necessary.⁴

Upon receiving a CAO compliance review report, the IFC must be required to respond to each finding of non-compliance. Additionally, the IFC should be required to submit a detailed MAP, which would require meaningful actions for remedying all findings of non-compliance. To ensure that the proposed actions are helpful, MAPs must be drafted in consultation with the complainants. Some DFIs require that a MAP also be agreed with the independent accountability mechanism and empower the mechanism to suggest changes in the MAP during implementation.

Past CAO cases have demonstrated the need for support at the highest levels for meaningful IFC responses to complaints. The newly created Environmental and Social Policy and Risk Department, if properly resourced and supported, has the potential to improve the IFC's responsiveness to CAO findings. The department should be led by high-level operational staff with development expertise so that responses and implementation of remedial actions are robust, proactive, and transparent.

Financial Intermediaries (FI)

At an alarming pace, the IFC has shifted its lending paradigm to invest the majority of funds through financial intermediaries (FIs). Our work with communities has illuminated many instances where FIs may have used IFC funds for projects that otherwise would have been ineligible for direct IFC financing.⁵ The IFC must ensure that lending to FI institutions does not harm communities. We welcome recent efforts by Mr. Le Hou  rou to improve the IFC's FI practices to prevent harm. We encourage further actions in this area, including in ring-fencing of FI investments to ensure that IFC financing only supports targeted areas and does not go to harmful sub-projects. If ring-fencing is the primary tool to address the concerns of FI investments, then the IFC must be more rigorous, consistent, and transparent in its approach.

³ See, e.g., *Jam v. IFC*, 139 S. Ct. 759 (2019), https://www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf.

⁴ CAO Operational Guidelines, § 4.4.5, http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf.

⁵ See "Outsourcing Development: Lifting the Veil on the World Bank Group's Lending Through Financial Intermediaries," <https://www.inclusivedevelopment.net/what-we-do/campaigns/outourcing-development/>; and for example: "Complaint regarding the International Finance Corporation's investments in Kenya Commercial Bank and Co-Operative Bank of Kenya" (Apr. 26, 2019), <https://www.accountabilitycounsel.org/wp-content/uploads/2018/04/cao-complaint-re-fi-investment-in-lamu-coal-plant.pdf>; and "Complaint regarding the IFC's investments in Rizal Banking Corporation of the Philippines," (Oct. 17, 2019), https://www.inclusivedevelopment.net/wp-content/uploads/2017/10/Letter-of-Complaint-to-CAO_Phillippines-Coal-final.pdf.

Communities must be able to access accountability and remedy when harm does occur as a result of FI financing. A major hindrance to IFC accountability in FI financing is a lack of transparency – communities often do not have up-to-date information about the IFC’s FI financing, do not know if a harmful sub-project has IFC support, and do not know that the CAO is an available avenue for addressing grievances.⁶ Despite long-standing calls from civil society for the IFC to disclose its clients’ sub-projects, especially high risk ones, this information is still not available for the IFC’s FI bank clients.⁷ For the IFC’s accountability framework to effectively address harm caused by FI financing, the IFC must improve transparency.⁸ These efforts should include creating incentives to disclose the name, sector, and location of higher-risk sub-projects not only on the IFC’s website but also on the FI client’s website – regardless of the financial instrument: loan, equity, or bonds.⁹ Disclosure must be continuous; information must be kept up-to-date throughout the IFC-FI relationship.

Moreover, the accountability framework must allow the CAO to accept cases related to FI sub-projects. Currently, the CAO makes eligibility decisions regarding FI-derived complaints in the absence of clear, published guidance. The CAO’s Operational Guidelines do not articulate separate or additional eligibility requirements for FI investments.¹⁰ However, the CAO has in practice applied additional, largely undisclosed eligibility requirements and considerations in FI cases, which has undermined the predictability of the complaint process.¹¹ The CAO should ensure that its eligibility requirements for FI cases are clear, transparent, and do not unnecessarily hinder access to the mechanism. Given that the typologies of IFC exposure to sub-projects through FIs are varied and complex, the CAO must have the ability to adapt general eligibility criteria to various FI investment typologies as they arise, while publishing fully-reasoned decisions to ensure that the eligibility process is transparent and predictable for all stakeholders.

Dispute Resolution

There should be a clear expectation that IFC clients and sub-clients participate in dispute resolution processes, as a means of bringing the project into compliance with the Performance Standards (PSs). When the requirements for participation and consultation under the PSs are

⁶ See Lani Inverarity, *IFC Escapes Responsibility For Lamu Coal Plant Contributions*, Accountability Counsel Blog (Sept. 2, 2019), <https://www.accountabilitycounsel.org/2019/09/ifc-escapes-responsibility-for-lamu-coal-plant-contributions/>.

⁷ IFC private equity clients do disclose high risk sub-projects at this time.

⁸ See Oxfam report “Open Books” (2018) that shows what policies and initiatives exist among DFIs and the banking sector to promote disclosure of project information and proposes a framework to improve them. Oxfam, *Open Books: how development finance institutions can be transparent in their financial intermediary lending* (Oct. 16, 2018), <https://www.oxfam.org/en/research/open-books-how-investments-financial-intermediaries-can-be-transparent-and-why-they-should>.

⁹ See Letter from NGOs to Mr. Philippe Le Houérou (Jan. 11 2019), <https://bic-europe.org/wp-content/uploads/2019/01/Letter-to-IFC-Jan-11-2019.pdf>.

¹⁰ See CAO Operational Guidelines, § 2.2.1, http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf.

¹¹ Inverarity, *supra* note 6; see CAO Eligibility Decision (July 9, 2019), <https://www.accountabilitycounsel.org/wp-content/uploads/2019/07/2019-july-09-ltr-from-cao-to-complainants-complaint-not-elg.pdf>.

taken seriously by a client and scrupulously implemented on the ground, in most cases, affected people will have no need to file a complaint at the CAO. Indeed, the failure to meaningfully consult affected communities is the most common basis upon which people file complaints with the CAO.¹² Grievances typically ensue because the client did not effectively engage and consult affected people “leading to the client’s incorporating [their views] into their decision-making process,” as required by the PSs. Often too, the client has failed to establish a PSs-compliant grievance mechanism, which must incorporate affected peoples’ views, if it is to be effective.

There is a contractual requirement on clients to remediate these and other areas of non-compliance. Therefore, once a complaint has been filed with the CAO, and the complainants request a dispute resolution process, typically mediation, it should be incumbent on the client to participate in the mediation in good faith, with a view to addressing harms and bringing the project back into compliance. Indeed, in most cases, the client cannot bring the project back into compliance without participating in the dialogue requested by the affected people. A facilitated and organized mediation process, in which power asymmetries between the parties are addressed, is precisely what is called for in an effective process of informed consultation and participation under the PSs. Just as the IFC places a (legal) expectation on its clients to consult affected communities throughout the project cycle, it should expect its client to participate in dispute resolution processes with affected people where a prima facie case has been made by complainants that meaningful consultations did not occur to begin with.

The IFC should also offer its participation in dispute resolution processes to the parties. In our experience, the IFC’s participation in mediation processes is a valuable contribution to the dialogue and an important factor in the parties’ ability to reach and implement agreements. The IFC can provide environmental and social expertise to the table that neither of the primary parties, nor the CAO, possess, and that may be perceived by complainants as more neutral than that of company experts, who were involved in creating the problems being discussed. E&S expertise – for example, on resettlement, livelihood rehabilitation, and natural resource restoration – is commonly in high demand in dispute resolution cases, and essential to a successful outcome. The IFC commonly emphasizes its environmental and social expertise as part of the value it brings to projects through supporting their clients to meet the PSs. Absent from the dispute resolution processes on these very issues, the IFC cannot meaningfully fulfill this role.

Moreover, we believe that the IFC’s involvement in CAO processes is consistent with its supervisory responsibility under its Policy on Environmental and Social Sustainability and associated procedures. It allows the IFC to more fully understand affected community experiences and views and the relationship between clients and affected communities. As a result, it enhances the IFC’s capacity to work with its clients to bring them back into compliance with the PSs, to the benefit of all parties.

¹² A dataset of complaints filed at the CAO through the end of 2018 shows that consultation and disclosure issues are explicitly raised in ¼ of all complaints – the most commonly raised issue. This data set will be publicly available in November 2019.

In some cases, the IFC's presence may not be desirable from the standpoint of complainants, who may have negative views of the IFC. They may be concerned that the IFC will serve to bolster its client's position rather than act as a constructive force in the mediation process and support compliance with the PSs. For this reason, the IFC should offer its participation but respect the wishes of complainants if they decline. We do not believe that the same factors apply for IFC clients and believe they should accept the IFC's involvement in dispute resolution processes as a condition of IFC financial support.

Compliance of Clients

The CAO's mandate should be extended to make findings on client compliance. Under the current system, the CAO's mandate is limited to investigating noncompliance by the IFC with its policies and procedures. In practice, in order to assess whether the IFC met its own E&S due diligence and supervision requirements, it must also examine whether the Performance Standards have been respected by the client. However, the CAO is unable to comment directly on the client's compliance with the E&S requirements in its appraisals and audit reports. One can only reach conclusions about the client's compliance by reading between the lines of CAO reports.

This ambiguous situation presents a major obstacle to accountability. It incentivizes the IFC to take a very defensive posture with respect to compliance investigations, because the entire focus is on the IFC, when in fact it is the client that bears the bulk of responsibility for the grievances raised by complainants. Placing all the focus on the IFC precludes it from using its leverage with the client to bring the project into compliance. Under the current arrangements and incentives, the IFC has an overriding interest in maintaining a good relationship with its clients, which conflicts with its duty to enforce its environmental and social standards when they are violated by clients. The IFC is asked to be both the business partner and the regulator, which presents a major conflict of interest. However, the CAO, which is independent from the IFC, is not conflicted and is therefore in a prime position to act as the regulator. If the CAO had a clear mandate to investigate and issue findings on client compliance, the IFC would be in a much stronger position to require that the client implement remedial actions when they are found non-compliant.

Clients are already contractually obligated to comply with the PSs, so it should not be a major leap for them to also be required to cooperate with and accept the findings of the IFC's accountability mechanism.

Consequences for clients that refuse to remediate harms

As part of its accountability framework, the IFC should develop a public debarment list of companies and FIs based on environmental and social noncompliance for when IFC clients, including its FI's clients, are persistently recalcitrant with respect to complying with PSs, participating in CAO dispute resolution processes, or cooperating on remedial action plans in response to CAO compliance investigations. The debarment list could have different levels of

sanctions depending on the level of noncompliance including failure to disclose relevant documentation. Any client from which the IFC has divested for environmental and social reasons should be included in this debarment list. A similar system exists at the World Bank Group's integrity unit, which investigates and pursues sanctions related to fraud and corruption. IFC clients that are complicit in human rights violations or cause serious social and environmental damage and refuse to take appropriate remedial action should also be debarred.

Realizing the right to redress: financing corrective and restorative measures

An accountability system that does not ensure meaningful remediation of harm fails its most important test. This is currently the case with the IFC and several other development institutions. Even when non-compliance is found through a CAO report, communities that have suffered grievous harms must rely on the goodwill of IFC management and the cooperation of the client to secure the redress to which they are entitled. The current IFC ecosystem provides few meaningful incentives – positive or negative – for management or clients to respond proactively and deliver remedy. This “last mile” barrier also hinders holistic learning to improve environmental and social practices.

One way to ensure that root causes of complaints are dealt with expeditiously and effectively is through the creation of a reserve fund that establishes a pre-existing source of funds that can be accessed to provide redress in the event of harm. Such a fund would facilitate timely and predictable implementation of remedial programs for impacted communities and provide the IFC and/or its clients with a concrete financial stake in adhering to good environmental and social practices.

Conclusion

This initial submission includes many of the areas we hope the Review Team will prioritize in its work over the next few months, and should be read as a high-level summary of some of the priorities of the undersigned organizations. As we continue to call for a more robust public process through which to submit input and recommendations, we will also provide the Team with more detailed recommendations on these areas and others as the review progresses.

Endorsing Organizations

Accountability Counsel
Arab Watch Coalition
Bank Information Center
Center for International Environmental Law
Centre for Research on Multinational Corporations (SOMO)
Inclusive Development International
International Accountability Project
Oxfam