

Comment on External Report on the Topic of IFC/MIGA Engagement in CAO Processes

11 September 2020

In addition to submitting a joint comment with other civil society organizations in support of the scope and tenor of the External Review Team’s report (“Report”), Accountability Counsel -- as a non-profit organization that assists communities, at their request, to prevent and remedy harm by utilizing the accountability offices of development finance institutions -- would like to use this greatly appreciated opportunity to call specific attention to the recommendations related to IFC/MIGA’s engagement with CAO processes.

One of the major themes of the Report is that IFC/MIGA and CAO should strengthen their working relationship to be more “collaborative,” to “address disagreements that have arisen between IFC/MIGA and CAO, and to clarify the scope for remedial actions.”¹ We could not agree more, especially when IFC/MIGA engages with CAO processes. Below we highlight key recommendations in the report that would improve IFC/MIGA’s engagement in CAO processes, refocus priorities to promote positive impacts on communities, and better enable remedy if and when harm occurs.

A. Protect the Independence of the CAO

Preliminarily, no changes to the accountability framework should compromise the independence of CAO. As the Report recognizes,² CAO needs independence to deliver on its mandate, ensure credibility among stakeholders, and engage effectively with IFC/MIGA. We therefore agree with the Report’s recommendations that the CAO maintain its existing independent mandate, including its ability to decide whether to undertake compliance investigations.

B. Increase Access to Information

The Report wisely recognizes that CAO should have full access to “all IFC/MIGA project information, including staff, consultants, and documentation (such as emails, reports, drafts,

¹ Report ¶ 19.

² Report ¶¶ 47 (recognizing “the need to maintain the impartiality and independence of CAO in conducting [compliance] investigations,” and “strongly recommending” that CAO maintain discretion to decide whether to proceed to a compliance investigation), 65 (recommending that the overarching policy to guide CAO operations include the key principle of operational independence from IFC/MIGA and the Board), 165 (“CAO’s Dispute Resolution function needs to be seen as independent from Management” and avoid being perceived as an “‘an instrument of Management’”), 274 (“Board involvement in a decision whether an investigation should be conducted could be perceived as undermining the effectiveness and independence of the CAO”).

databases, consultant reports) as necessary in the exercise of its mandate,”³ including: (1) “the documentation of IFC/MIGA’s investments in any [financial intermediary] whose sub-project is the focus of a complaint”;⁴ and (2) “factual documentation from IFC/MIGA on each and every supply chain complaint.”⁵ We fully support these recommendations as they will improve coordination with IFC/MIGA, build a more responsive culture of accountability, and facilitate faster and more efficient compliance reviews. To that regard, we agree that part of an IFC/MIGA response to implement the recommendation should be the development of “standard contractual language to guarantee CAO access to all relevant client information as necessary to exercise its mandate.”⁶

C. Build a Culture of Response

IFC/MIGA’s engagement in the CAO process must be enhanced, documented, and monitored. We therefore fully support recommendations outlined in the Report under Sections 7.1, 7.4, 7.6, 7.7, 7.8.1, and 7.9, which respectively would require Management to: (1) submit a written response to every complaint;⁷ (2) formalize protocols for consultation with CAO during dispute resolution cases;⁸ (3) refrain from complicating compliance reviews by proffering new information or arguments after the factual review and comment phase of an investigation;⁹ (4) develop, through community consultation, more comprehensive MAPs that address all issues of concern;¹⁰ (5) report biannually to the CAO on the implementation of MAPs;¹¹ and (6) discuss with CAO and a Board Committee on an ad hoc basis any difficulties in addressing serious issues of noncompliance.¹²

The Report also contains related recommendations for the CAO,¹³ namely that it should update its operational guidelines or draft other policies to articulate (1) time frames for complaint handling, (2) protocols for consultation with IFC/MIGA during dispute resolution cases, (3) timelines for receiving Management Responses, and (4) procedures for handling any new information or arguments presented late in a compliance investigation. We support these as well.

³ Report ¶ 289.

⁴ Report ¶ 220.

⁵ Report ¶ 223.

⁶ Report ¶ 289.

⁷ Report ¶ 215.

⁸ Report ¶ 267.

⁹ Report ¶ 289.

¹⁰ Report ¶ 323.

¹¹ Report ¶ 341.

¹² Report ¶ 343.

¹³ *see* Report §§ 6, 7.4, 7.7, and 7.8.1.

Any proposals from IFC/MIGA and the CAO should be subject to input from the public through a consultation process.

D. Increase IFC/MIGA Engagement in Dispute Resolution to Improve Outcomes

Recommendation 4 of the Report acknowledges the importance of more responsive engagement from IFC/MIGA to better understand the issues of a complaint and assist in providing solutions for remedy. One clear way for IFC/MIGA to engage directly to help resolve issues is through the CAO dispute resolution process.

In our experience, Management engagement and participation in dispute resolution can result in creative solutions that more effectively address underlying issues of concern. For example, by participating as a party in a dispute resolution process, representatives from the Inter-American Development Bank (IDB) contributed immensely to help resolve issues related to adverse social impacts caused by a large export-oriented industrial park in Caracol, Haiti.¹⁴ The policy of the IDB's accountability office, the Independent Consultation and Investigation Mechanism ("MICI" in Spanish), expressly considers that the IDB could be included as a potential "party" to dispute resolution.¹⁵ In response to a request for accountability by displaced farming communities in Caracol, MICI convened representatives from the communities, the Haitian Government, and the IDB for a series of facilitated dialogue meetings. The parties made progress on a variety of agreed actions in between meetings and, after approximately a year and a half, the parties (including the IDB) signed a final agreement¹⁶ to help provide redress for the communities' overarching and discrete concerns.

The IDB's engagement in the process provided good perspective and context to better design an agreement and plan for follow-up on the implementation of the agreement and enable full remedy. Moreover, the IDB's continued engagement in the implementation of the agreement has been instrumental in addressing unforeseen issues endemic of fragile and conflict-affected situations. Likewise, IFC/MIGA should engage in dispute resolution processes, when welcomed by communities, utilizing their participation and leverage to encourage clients to participate in good faith dialogue.

¹⁴ *Livelihoods Lost: Caracol Industrial Park* (2017), available at https://www.accountabilitycounsel.org/wp-content/uploads/2017/10/HAITI_Livelihoods_SPREAD.pdf.

¹⁵ *Policy of the Independent Consultation and Investigation Mechanism of the IDB*, 3, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40792853>.

¹⁶ *Summary of the Agreement between Stakeholders in the Case MICI-IDB-HA-2017- 0114: "Productive Infrastructure Program" (HA-L1055 and others)*, available at <https://www.accountabilitycounsel.org/wp-content/uploads/2018/12/agreement-summary-pic-mici-bid-ute-kol-dece-mber-19-2018-final-eng.pdf>.

Whereas IFC’s *Stakeholder Engagement Good Practice Handbook* recognizes the benefit of negotiated agreements to address “sensitive situations where stakeholder concerns present a significant risk to project operations,”¹⁷ the same can be said of the benefit of dispute resolution to address sensitive environmental and human rights issues that arise as a potential result of clients failing to abide, or IFC/MIGA failing to ensure, safeguards and standards intended to prevent harm. The handbook also stresses the importance of grievance management, which includes a recognition that clients should bring in third parties to assist in remedy where needed.¹⁸ In the same manner, when grievances are submitted through the CAO process, IFC/MIGA could join as a third party to dispute resolution when they may be able to “level the playing field of perceived power” and when agreed to by communities.¹⁹

E. Increase IFC/MIGA Commitments to Monitor Outcomes of CAO Processes

Continuous dialogue with communities is essential to assure that dispute resolution agreements are honored and MAPs implemented. Herding communities in Mongolia, who still await full implementation of commitments made by IFC/MIGA client Rio Tinto to address harm caused by its large-scale mining project,²⁰ know this to be true. The mining project fragmented traditional pastures, depleted water resources, led to herd loss, and ultimately disrupted the herding community’s way of life. In 2017, the parties concluded a nearly four-year-long voluntary negotiation process, reaching two agreements that contained client commitments to address water and pasture issues, improve environmental monitoring, review compensation for displacement, and help local herders achieve greater economic stability. But while many promises have been fulfilled, the communities continue to face challenges with respect to transparency in the implementation of commitments. Herders have expressed frustration and suspicion at not knowing when or how commitments will be implemented. Accountability Counsel has attempted to address this monitoring gap by dedicating resources to track the progress and shortcomings of implementation.²¹

Communities should not have to bear the burden of enforcing client commitments. Here, in the last mile of remedying harm, IFC/MIGA can use its relationships and resources to engage with

¹⁷ International Finance Corporation, *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets*, 64 (2007), available at https://www.ifc.org/wps/wcm/connect/affbc005-2569-4e58-9962-280c483baa12/IFC_StakeholderEngagement.pdf?MOD=AJPERES&CVID=jkD13-p.

¹⁸ *ibid.*, at 69.

¹⁹ *ibid.*, at 73.

²⁰ *From Paper to Progress: Tracking agreements between nomadic herders and Mongolia’s largest copper mine* (2019), available at <https://www.accountabilitycounsel.org/wp-content/uploads/2019/02/from-paper-to-progress.pdf>.

²¹ “From Paper to Progress” Online Tracking Tool, available at <https://www.tpcprogress.com/>.

clients and communities and assure that agreements are followed through. IFC/MIGA can also ensure full implementation of agreements by providing resources to CAO for continued monitoring over reasonable time frames. Tracking and reporting on agreements would close a major accountability gap, build trust with communities, and prevent protracting the underlying issues of grievances that ultimately threaten project sustainability.

F. Improve Consultation with Complainants when Designing Management Action Plans

Performance Standard 1 establishes the importance of effective community engagement through disclosure of project-related information and consultation with local communities on matters that directly affect them. Performance Standard 7 expands upon that requirement in the context of Indigenous communities, lands, and resources -- requiring free, prior, and informed consent from affected communities of Indigenous Peoples. The principles of community engagement are further articulated in IFC’s *Stakeholder Engagement Good Practice Handbook*; amongst them are early disclosure of project designs to support consultation efforts and ensuring that all meaningful information is made available and accessible to communities.²² The same should be true when designing MAPs intended to remedy harm caused by non-compliance with environmental and social (E&S) protocol. IFC even acknowledges as much in its *Good Practice Note on Addressing Grievances from Project-Affected Communities*, affirming that “[i]t is good practice to respond to community feedback through the relevant pillars of community engagement, such as disclosure, consultation, and participation in project monitoring.”²³ We therefore support the recommendations in Section 7.8.1 of the Report, i.e., “[t]he complainant should be consulted on the proposed remedial actions in the Management Action Plan (in line with processes established at the World Bank [Inspection Panel]).”²⁴

However, we recommend that IFC management take this opportunity to not only align with the MAP consultation practices of its colleagues in the World Bank but to improve upon them. Project-affected communities in Jharkhand, India recently experienced a situation that revealed shortcomings in MAP consultation processes in the context of a World Bank-financed water treatment scheme.²⁵ Major components of the project were sited on culturally significant and sacred lands of Indigenous Santhal and Ho Adivasi communities, and unfortunately -- as World

²² *supra* note 17, at 29.

²³ International Finance Corporation, *Good Practice Note: Addressing Grievances from Project-Affected Communities*, 4 (2009), available at <https://www.ifc.org/wps/wcm/connect/f9019c05-0651-4ff5-9496-c46b66dbee/db/IFC%2BGrievance%2BMechanis.ms.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-f9019c05-0651-4ff5-9496-c46b66dbee/db-jkD0-g>.

²⁴ Report ¶ 323.

²⁵ *India: Jharkhand Water Project*, available at <https://www.accountabilitycounsel.org/client-case/india-jharkhand-water-project/#overview>.

Bank Management conceded -- the construction on those sites proceeded without the free, prior, and informed consent of the communities, and in violation of provisions in the Indian Constitution that provide special Indigenous self-governance protections.²⁶ Even with admitted weaknesses in project design and consultation, World Bank Management has yet to agree to provide a draft MAP to communities in advance of consultation, and it has yet to pause the projects to account for its neglect in respecting the free, prior, and informed consent of the Indigenous Communities.

A consultation is a consultation, no matter at what stage of a project's life cycle. Consultations regarding MAPs should adhere to the same baseline principles and good practices as any consultation expected of clients under the Performance Standards and accompanying guidance. Requiring consultations on MAPs can help to promote a more collaborative working relationship between IFC/MIGA, CAO, clients, and project affected communities. It also increases the opportunity for MAPs to be successful in that stakeholder engagement helps understand needs of communities with greater context and specificity, and helps set realistic timelines for implementation.

G. Help Client Implement the Performance Standards and Participate in CAO Processes

With respect to client engagement, Recommendation 4 of the Report urges IFC/MIGA to support clients with “high-quality” E&S advice and use its lending leverage to motivate clients to meet their responsibilities and expectations.²⁷ We fully agree that improved engagement in this regard could help IFC/MIGA better understand and resolve issues of concern and demonstrate IFC/MIGA commitment to project-affected people. Moreover, by increasing the capacity of clients to adhere to the Performance Standards and respond to issues before they worsen, IFC/MIGA can more proactively ensure the sustainable outcomes of projects and prevent undue harm.

We therefore support the specific recommendations provided under Sections 5.3.2, 7.3, and 7.4, which respectively call for: (1) the creation of a Board Committee to oversee IFC/MIGA's implementation and responsibility for the Performance Standards;²⁸ (2) defined client

²⁶ Inspection Panel Report No. 134474-IN, Report and Recommendation on Requests for Inspection: India, Rural Water Supply and Sanitation Project for Low Income States (P132173), ¶ 37 (Feb. 12, 2019), available at https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/128-129-Inspection%20Panel%20Report%20and%20Recommendation-12%20February%202019_0.pdf.

²⁷ Report ¶ 35.

²⁸ Report ¶ 167.

engagement during CAO assessment phases;²⁹ and (3) focused support to improve clients' grievance resolution capacity and engagement in CAO dispute resolution.³⁰

With respect to community stakeholder engagement, Recommendation 4 also calls for “a more active engagement culture, not only with the client but also with affected people--both in proactive stakeholder engagement and in response to those who bring complaints.”³¹ Further, Recommendation 8 encourages IFC/MIGA to “be prepared to interact with . . . complainant[s] during the CAO process, where there is an appropriate way to do so, coordinated with the client and with the CAO.”³² We fully support both recommendations as well.

Conclusion

We are heartened by the recommendations and assessments made by the External Review Team regarding ways that Management can deepen engagement in CAO processes and better engage with and respond to needs of communities impacted by IFC/MIGA projects. We commend the Board for embracing the challenge of building an ecosystem of accountability that fosters greater communication, coordination, and engagement with project-affected communities, clients, and the CAO alike.

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²⁹ Report ¶ 249.

³⁰ Report ¶ 267.

³¹ Report ¶ 34.

³² Report ¶ 54.