

May 19, 2021

Via Electronic Mail

CAO/IFC/MIGA Accountability Working Group
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RE: Comments on the 2021 Draft IFC/MIGA Independent Accountability Mechanism (CAO) Policy

To the CAO/IFC/MIGA Accountability Working Group:

We are writing in response to the invitation to submit comments on the draft updated policy of the Compliance Advisor Ombudsman (CAO). As civil society organizations and individuals who advise and work with communities seeking remedy for harm caused by International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) projects, we approach these comments with the objective of making the CAO policy more effective for the project-affected communities. We divide our comments into three sections: (1) particular aspects of the policy that make the CAO process effective and should therefore remain in the final version; (2) aspects of the proposed policy that limit the CAO's effectiveness and regress from current CAO practice and that should therefore be amended; and (3) edits to improve the proposed processes. Thank you sincerely for your consideration.

Section 1: Positive Aspects of the Proposed Policy

First, we commend that many positive aspects of the existing CAO operational guidelines were maintained and that certain changes will make the CAO process more effective for communities who need to access it. In particular, we recommend the following remain in the policy:

- (1) The calibration of the CAO's "Core Principles" to the effectiveness criteria for grievance redress mechanisms under the United Nations Guiding Principles for Business and Human Rights, although noting that it omits the criterion of rights-compatibility;¹
- (2) The mention of the CAO's role in facilitating access to remedy for harm stemming from IFC/MIGA projects and sub-projects, and IFC/MIGA's duty to support, engage in, and

¹ 2021 Draft CAO Operational Guidelines ("Draft"), at IV "Core Principles."

cooperate with the CAO's processes;²

- (3) Allowing explicitly for IFC/MIGA to participate in the Dispute Resolution Process, although noting that we believe IFC/MIGA's participation should be required if requested by Complainants;³
- (4) Clarified timelines and deadline requirements;⁴
- (5) Enhanced accessibility as a result of providing translation services for all correspondence with Complainants and their representatives, and clarifying eligibility considerations for complaints related to financial intermediary projects and supply chain activities and impacts;⁵
- (6) The possibility of accepting complaints submitted up to 15 months after an IFC/MIGA Exit where specific criteria are met, although noting that any complaint meeting such criteria should be accepted, without requiring "exceptional circumstances;"⁶
- (7) Increased transparency and inclusivity with respect to circulating and publishing eligibility determinations, reasoned decisions to defer compliance investigations, and compliance appraisal reports, and allowing Complainants the opportunity to review and comment on draft investigation reports and to be consulted in the preparation of Management Action Plans (MAPs);⁷
- (8) The CAO's mandate to carry out compliance investigation, assess related harm, and recommend remedial actions;⁸
- (9) Recognition of the duty to assess and manage reprisal risks;⁹

² 2021 Draft, at II "Purpose"; VI.A "Access to Information"; VII.C.2.b "[Assessment] Timeframe"; IX.B.4.a "Appraisal Approach"; VIII.H "IFC/MIGA Engagement in the Dispute Resolution Process"; VIII.E "Monitoring and Implementation of Agreement"; IX.C.1 "Definitions and approach to compliance investigations"; XII.C "IFC/MIGA Disclosures about CAO."

³ 2021 Draft, at VIII.H "IFC/MIGA Engagement in the Dispute Resolution Process."

⁴ 2021 Draft, at VII.B.4 "Timeline for eligibility decisions"; IX.B.2 "Management and/or Client response"; IX.B.4 "Appraisal Approach"; IX.C.2.d "Terms of reference for compliance investigations."

⁵ 2021 Draft, at VII.B.2 "Additional eligibility criteria for specific complaint types"; XII.B "Public Reports and Information Materials."

⁶ 2021 Draft, at VII.B.7 "Complaints received after IFC/MIGA Exit."

⁷ 2021 Draft, at VII.B.5 "Complaints Registry"; IX.B.6 "Deferral of decision to investigate"; IX.B.7 "Circulation and disclosure of the appraisal report"; IX.C.4 "Factual review and comment"; IX.C.6 "Management response, action plans, and clearance for disclosure."

⁸ 2021 Draft, at III "Mandate and Functions."

⁹ 2021 Draft, at XI "Threats and Reprisals."

- (10) Codification of CAO's right to access client information and inspect project sites, and the IFC's inclusion of contractual obligations in this regard;
- (11) Maintenance of the two-year cooling off period for CAO staff;¹⁰ and
- (12) Inclusion of the selection and qualification criteria for the CAO DG position.¹¹

Section 2: Substantive Aspects of the Policy that Require Changes

Nonetheless, there are a few ways in which the new policy regresses from the operational guidelines and risks limiting the effectiveness of the CAO: (1) permitting the Board to review aspects of the CAO DG's decision to investigate; (2) restricting eligibility to projects already approved by the Board; (3) creating a referral process that risks letting complaints slip through the cracks; and (4) postponing the publication of complaints until the conclusion of the assessment phase. We also believe that, in the interests of fulfilling the CAO's purpose, the new policy should, under certain circumstances, permit complaints from organizations that are not directly affected by an IFC/MIGA project. We address these issues below:

1. The CAO should retain its independent decision to investigate.

Section IX.B.8 of the draft policy allows for, in exceptional circumstances, the Executive Vice Presidents of either the IFC or MIGA to request a review by the Board of the CAO DG's decision to investigate. We object to this new limitation on the CAO's independence. The CAO's power to determine whether to investigate should remain for the following reasons:

a. Conditioning compliance investigations on Board approval risks politicizing a technical decision and independent process.

The independence of the CAO is of the utmost importance to fulfill its mandate of enhancing the environmental and social outcomes of IFC/MIGA projects and addressing complaints from people affected by IFC/MIGA projects in a manner that is fair, objective, and equitable. Limiting the CAO's independent decision-making authority creates an appearance of impropriety counterintuitive to the principles of accountability.

The Expert Report astutely noted that, “[o]n a practical level, assessments as to whether there is preliminary evidence for noncompliance and related harm require the exercise of technical professional judgments that are not the core competency of the Board.”¹² The CAO's years of

¹⁰ 2021 Draft, at V.C “Staffing.”

¹¹ 2021 Draft at V.A.2 “Pre-employment conditions”; V.A.4 “Selection Process”; V.C “Staffing.” The selection process for the head of the CAO, which has been followed for the selection of the prior two CAO Vice Presidents, contributes to communities’ trust that the office is independent and qualified to address their issues.

¹² Expert Report, para. 275.

expertise in this area have been recognized and well documented, decisions to investigate should therefore remain as a matter of principle.

b. CAO has exercised its mandate to conduct compliance investigations with restraint and balance.

The evidence counters any argument that the CAO’s exercise of its mandate to conduct compliance investigations has become unwieldy, biased, or unfair. The CAO has exercised its discretion to not pursue compliance investigations in many cases where it is requested. The CAO deemed a compliance investigation unwarranted in 47 complaints because neither of the appraisal thresholds were met.¹³ These decisions have often been heavily criticized by affected communities and their civil society advocates.

Of the 39 cases in which the CAO has completed an investigation, non-compliance was found in all 39 of them. Issues raised in the cases of non-compliance related to lack of due diligence, inadequate consultation, displacement, harm to livelihoods, pollution, harm to community health, and contamination or inaccessibility to water.

2. Complaints related to projects actively considered by IFC/MIGA but not yet approved by the Board should be admissible.

The draft policy limits the CAO’s current ability to receive complaints regarding projects pending Board approval.¹⁴ The operational guidelines state that complaints related to projects that IFC/MIGA “is actively considering” are eligible.¹⁵ The CAO should retain the purview to accept complaints about pre-approved projects under active consideration. First, it is standard

¹³ All data comes from the Accountability Console, which compiles complaints to independent accountability mechanisms. Available at www.accountabilityconsole.com.

¹⁴ 2021 Draft, at VII.B (“CAO shall deem the following complaints ineligible: ... Complaints related to Projects which are pending Board approval, or Projects where IFC/MIGA Exit has occurred.”).

¹⁵ CAO Operational Guidelines, section 2.2.1(1).

practice for IAMs to be able to receive complaints regarding projects still pending approval.¹⁶ Second, the exclusion fails to recognize the benefits of early intervention through complaints toward improving project design and sustainability, and optimizing a net positive development impact. Board members and Management should appreciate hearing if there are concerns of potential environmental and social harm from projects under consideration. Notably, the draft CAO policy is more restrictive than what the External Expert Report recommends.¹⁷ We therefore recommend striking the provision from the exclusion list under section VII.B.3:

~~*e) Complaints related to Projects which are pending Board approval, or Projects where IFC/MIGA Exit has occurred (see Complaints received after IFC/MIGA Exit below);*~~

Further, we recommend clarifying in the eligibility criteria of section VII.B.1 that:

a) The complaint relates to an active Project or one IFC/MIGA is actively considering;

¹⁶ E.g., World Bank **Inspection Panel** Operating Procedures, para. 26(b) (“The project/program, which is the subject of the Request, appears to be supported, or is being considered for support, at least in part, by the Bank.”), and also included in 2021 draft Operating Procedures; **Independent Complaints Mechanism** (“ICM”) policy for FMO, para. 3.1.4 (“FMO must have or will have an active financial relationship with the Client”), and also for **Proparco** and **DEG**; AfDB **Independent Review Mechanism** (“IRM”) policy, sec. I(b) (“CRMU will submit its problem-solving reports to the Boards of Directors of the Bank and Fund [collectively the ‘Boards’] on approved projects or to the President of the Bank Group [the ‘President’], on projects under consideration for financing by the Bank Group... CRMU and the IRM Experts will submit the compliance review reports to the Boards ... on approved projects or to the President ... on projects under consideration for financing by the Bank Group.”); **Office of Accountability** procedures of the Overseas Private Investment Corporation (now U.S. Development Finance Corporation), para. 4.2.2. (“The request relates to a Project that OPIC is supporting or is actively considering to support at the time of the request.”); ADB **Accountability Mechanism** (“AM”) policy, para. 145 (“The applicable operational policies and procedures will depend on whether the complaint concerns a proposed or an ongoing project. A “proposed project” refers to a project being prepared that has not been approved by the Board or the President [as delegated by the Board].”); EIB **Complaints Mechanism** (“CM”), section 4.3.12 (“Complaints regarding a lending operation and falling within types E or F are admissible as far as the EIB Group has financed, approved or is at least actively considering financing the operation/project.”); GCF **Independent Redress Mechanism** (“IRM”) policy, para. 20 (“A grievance or complaint can be submitted to the IRM by a person or group of persons or community who has/have been or who may be affected by adverse impacts of a GCF funded project or programme.” Guidance clarifies that the IRM may receive complaints concerning “projects being actively considered for funding by the GCF” [see <https://irm.greenclimate.fund/case-register/file-complaint>]).

¹⁷ Although the Expert Report recommends, incorrectly in our view, that the “CAO should change the eligibility criterion so that complaints are not eligible until investments are approved by the Board,” it also recommends that the “CAO should institute a practice of notifying the Board, as well as IFC/MIGA Management, of all complaints received before Board approval and posting them on its registry,” “CAO should receive a written Management Response to each such complaint,” and “CAO should allow the complainant to refile the request if the project is approved.” See Expert Report at para. 215.

3. Referral processes agreed to by Complainants should be time bound and monitored by CAO.

Section VII.B.1 of the draft policy requires CAO to establish whether Complainants made “good faith efforts” to resolve complaints outside of the CAO and, if not, whether Complainants wish to refer a complaint to IFC/MIGA or relevant Clients or Sub-Clients. As written, the policy is unclear as to what happens if Complainants agree to have the complaint referred but are left unsatisfied with the handling of the issues. To enhance predictability of process and prevent losing track of complaints through the referral process, the policy should articulate how CAO will proceed if Complainants express dissatisfaction with the attempts to resolve the issues after time-bound periods or at any point during referral. To this regard, setting expectations with respect to the prompt handling of referred complaints is integral.¹⁸ We therefore recommend including the following clarifying language:

CAO will establish whether (i) good faith efforts have been made by the Complainants with IFC/MIGA and/or the Client or Sub-Client to address the issues raised in the complaint or (ii) such efforts were not undertaken and why. In the event CAO determines that the Complainant has not made any good faith efforts with IFC/MIGA or the Client or Sub-Client, CAO will establish whether the Complainant wishes to refer the complaint to IFC/MIGA or the Client or Sub-Client. In the event the Complainant does, CAO will refer such complaint to IFC/MIGA and/or the Client or Sub-Client. The CAO will contact Complainants within a specified timeframe after referring a complaint to IFC/MIGA, typically no longer than 6 months, to inquire whether Complainants are satisfied with the response of IFC/MIGA or the Client or Sub-Client, or whether the Complainant still wishes to pursue a complaint with CAO. At any time after a complaint has been referred, Complainants may re-engage the CAO process if they are unsatisfied with the handling of their concerns or the issues are not addressed within time-bound agreements. In the event no such good faith efforts were made, and the Complainant still wishes to pursue a complaint with CAO, CAO will consider the complaint in terms of its eligibility criteria and will record the fact that no good faith efforts were made.

¹⁸ See, e.g., the ADB AM policy, para. 144 (“The Accountability Mechanism policy will not require complainants’ good faith efforts to solve problems with project-level grievance redress mechanisms as a precondition for their access to the Accountability Mechanism. However, complainants will be encouraged to first address their problems with the project-level grievance redress mechanisms to facilitate *prompt* problem solving on the ground.” [emphasis added]).

4. All complaints should be published on the CAO’s website within seven days of being filed, subject to the agreement of complainants and consistent with complainants’ requests regarding confidentiality.

Section VII.C.3.b of the draft policy provides that only “a brief summary” of eligible complaints will be published until the publication of the assessment report, which will attach the full complaint. We disagree with this new limitation on the CAO’s effectiveness,¹⁹ as it is out-of-step with good IAM practice,²⁰ and exacerbates the typical power imbalance between complainants and IFC/MIGA clients.

The draft policy states that ineligible complaints will never be posted to the CAO’s website. This is a missed opportunity for data on systemic sectoral or regional issues that emerge in various ways. Even complaints that are technically ineligible might present important issues that IFC/MIGA, and the public, should be able to view. Further, other mechanisms post both eligible and ineligible complaints.²¹

We therefore recommend the following language:

[Section VII.B.4] Timeline for eligibility decisions

Eligibility screening and determination will take no more than 15 Business Days from the CAO’s acknowledgment of receipt of the complaint. However, it may be necessary for CAO to extend this timeframe where CAO needs to receive clarification from the Complainants or from IFC/MIGA to make an eligibility determination, in which case CAO will notify the Complainants. Within 7 days of receiving the complaint, subject to the agreement

¹⁹ We acknowledge that this is one of the few recommendations in the Expert Report with which we disagree.

²⁰ See, e.g., ADB **AM** policy, appendix 9 (“The CRP will post the following information and documents on the ADB website at the times specified below: ... the complaint letter (or the request for compliance review)—upon the CRP’s receiving the complaint letter and subject to the agreement of the complainants—within 7 days of receipt of the complaint....”); EBRD **Independent Project Accountability Mechanism** (“IPAM”) policy, section 2.2 (describing a screening process for registration of a request). See also, EBRD **Project Complaint Mechanism** (“PCM”) policy, para. 20 (“After notification of Registration to the Relevant Parties, the Complaint will be noted on the PCM Register and a copy of the Complaint will be publicly released and posted on the PCM web site.”).

²¹ See, e.g., AfDB **IRM** policy, para. 79(c) (“[The IRM Director shall] Oversee[] the establishment and maintenance of the Register open to the public on the Bank Group’s website, which shall contain significant data concerning the delivery and registration of Requests”); IDB **Independent Consultation and Investigation Mechanism** (“MICI”) policy, para. 20(c) (After reviewing eligibility, “In all cases, the decision will be recorded in the Public Registry and the Requesters, Management, and the Board will be informed thereof.”). For a good example on documenting and disclosing an ineligible complaint, please refer to MICI’s recent handling of a complaint related to the IDB-financed Chorrera Power Project, available at <https://www.iadb.org/en/mici/complaint-detail?ID=MICI-BID-PN-2021-0163>.

of the complainants, the CAO will publish the complaint on its website.

[Section VII.B.5] Complaints registry

CAO will publish a complaints registry on its website. In addition to case documents, the registry will contain the following information in relation to eligible complaints:

- a) a brief summary of the issues raised in the complaint;*
- b) date of receipt;*
- c) the name, sector, and location (country or countries) of the Project and/or Sub-Project that is the subject of the complaint;*
- d) information about IFC/MIGA's exposure to a Project that is derived from public information disclosed by IFC/MIGA;*
- e) with regard to complex cases, succinct reasoning for the eligibility decision; and*
- f) information on the status of CAO's complaint handling process.*

The Complaints registry will also contain the following information in relation to ineligible complaints:

- a) the subject matter of the complaint (e.g., labor, resettlement, etc.);*
- b) date of receipt;*
- c) the location (country or countries) and sector of the Project or Sub-Project operates, but not the Client's or Sub-Client's identity; and*

d) the basis for the ineligibility determination (including succinct reasoning in complex cases).

~~*CAO will not post the complaint itself at the eligibility stage, though, as noted above, a brief summary of eligible complaints will be posted.*~~

5. The policy should permit organizations that are not directly affected by IFC/MIGA projects to file complaints under defined circumstances.

We strongly support the draft policy’s statement of the CAO’s purpose, which includes conducting compliance investigations “to foster public accountability for [IFC/MIGA] commitments and enhance the environmental and social performance of IFC and MIGA.”²² The draft policy’s eligibility requirements and list of exclusions, however, unduly limit the CAO’s ability to fulfill this purpose. In some cases, a project may cause serious harm or undermine IFC/MIGA commitments, but there may not be directly affected individuals who are well-positioned to lodge a CAO complaint. For example, projects that primarily threaten protected natural environments or endangered species could fall into this category, as are projects that seriously undermine IFC/MIGA climate commitments.

To ensure that CAO can fulfill its purpose, we recommend the following language:

[Section VII.A.1] Who may lodge a complaint

Any individual or group, or representative they authorize to act on their behalf, who believes they are or may be harmed by a Project or Sub-Project may lodge a complaint with CAO.

Organisations that are not directly or personally affected by a Project, provided the complaint includes satisfactory information on: (1) efforts to engage with Project-affected people (if any) on the issues of concern; (2) feedback from any such Project-affected people; and (3) the reasons preventing any such Project-affected people from submitting the complaint themselves.

Complaints submitted by organisations that are not directly or personally affected by a Project may be considered under CAO’s Compliance function.

....

²² 2021 Draft, at II.

[Section VII.B.3] Exclusions

CAO shall deem the following complaints ineligible:

a) Complaints that are clearly fraudulent, frivolous, malicious, or generated to gain competitive advantage;

b) Allegations of fraud and/or corruption. CAO will refer these allegations to the World Bank Group Integrity Vice Presidency (INT);

c) Complaints relating to an International Bank for Reconstruction and Development/International Development Association (IBRD/IDA) project. CAO will refer these complaints to the World Bank Independent Accountability Mechanism;

d) Complaints relating exclusively to IFC/MIGA procurement decisions. CAO will refer these complaints to IFC/MIGA;

~~*e) Complaints related to Projects which are pending Board approval, or Projects where IFC/MIGA Exit has occurred (see Complaints received after IFC/MIGA Exit below);*~~

~~*f) Complaints that focus exclusively on global impacts of a global public good. CAO will refer these Complaints to IFC/MIGA;*~~

g) Employment contract-related complaints (e.g., complaints relating to payments and benefits) from an individual where there is no reason to believe that the issues raised are systemic in nature. CAO will refer ineligible employment contract-related complaints to IFC/MIGA; and

~~*h) Complaints that are the same in all material respects as a complaint that has previously been deemed eligible or ineligible by CAO.*~~

Section 3: Edits to Improve Proposed Processes

1. Management should not have power to compromise the CAO's independent discretion over decisions to investigate.

We strongly object to the dilution of CAO's independence by allowing Management the ability to challenge discretionary decisions to investigate, and we urge removing the entirety of section IX.B.8, "Request for Board review of a decision to investigate," from the policy. Compromises to the CAO's independence over decisions to investigate risk deteriorating trust in the entire accountability framework. If stakeholders perceive an attempt by IFC or MIGA to stifle investigation into their legitimate concerns about project risks and impacts, they no doubt will question the overall legitimacy of the accountability process and the intentions of Management. The fallout almost certainly would be to the detriment of project outcomes and sustainability.

We therefore urge removing the entirety of section IX.B.8, "Request for Board review of a decision to investigate," from the policy.

2. If the policy includes the option for Management to request a review of the CAO DG's decision to investigate, the criteria should be edited slightly for consistency.

To the extent that requests for Board review of decisions to investigate are envisioned to occur only "in exceptional cases," section IX.B.8 should protect against potential abuse of investigation decision, e.g., those made to delay investigation, extend a time-bound deferral period, or for any other frivolous, disingenuous, or bad faith reason. Fairness demands that if Management is given the power to challenge a decision to investigate for abuse of discretion, then the Board should also have the ability to examine potential abuse with respect to the intent behind the challenge. Moreover, to prevent perceptions of complaint mishandling, the CAO should publish review requests in full transparency.

Additionally, the criteria on which to base a request to review a decision to investigate should be edited for consistency, in the following ways: (1) the review should only be related to the issues listed in section IX.B.8(a)-(f) of the draft policy; and (2) small edits should be made to section IX.B.8(b) to be consistent with the other options listed.

We recommend the following edits:

Management will have 10 Business Days from the date of circulation of the appraisal report to request a Board review. The review request should be based on the technical criteria outlined below and not raise any issue that is within the discretion of the CAO DG. The request for review will be circulated to the Board for decision and to CAO and the President for information. Upon receipt of a review request, CAO will ~~publish the review request post a notice~~ on its website. ~~stating that its decision to investigate is subject to the Board's review but will not publish the review request.~~

The Board will review the decision to investigate without making a judgment on the merits of the complaint and will not discuss matters that require the exercise of discretion by the CAO DG under this Policy. The Board will base its review solely on the following technical eligibility criteria:

a) If complaint is transferred from dispute resolution, CAO enquired regarding the Complainant's intentions before initiating the transfer of the case to CAO's compliance function.

b) ~~CAO's compliance appraisal report includes consideration of whether~~ the complaint or internal request asserts Harm or potential Harm that is plausibly linked to a Project or Sub-Project.

c) CAO's compliance appraisal report includes consideration of whether E&S Policies might not have been adhered to by IFC/MIGA.

d) CAO's compliance appraisal report includes consideration of the relevance of any judicial or non-judicial proceeding in relation to the subject matter of the complaint.

...

The Board will have 10 Business Days to consider a decision to investigate in response to a request for review. During this period, the Board may decide to affirm or overturn the CAO DG's decision to investigate. ~~The Board shall use appropriate discretion to assure itself that a request for review was not submitted frivolously, in bad faith, or for the sole purpose of delaying a compliance investigation.~~ The Board will not have any editorial input into the CAO compliance

appraisal report. The CAO will publish the Board's decision, including its reasoning against the above criteria, on its website.

3. The policy should improve transparency and inclusiveness by allowing Parties the opportunity to comment on reports and action plans.

While we commend considerations in the draft policy that allow complainants greater access to reports and action plans at key stages,²³ complainants should also be provided with the opportunity to comment on the (1) dispute resolution conclusion reports; (2) appraisal reports; (3) adequacy of consultation on and substance of management action plans; and (4) monitoring reports.

First, Parties should be afforded the opportunity to provide comment on dispute resolution conclusion reports.²⁴ We recommend the following language under section VIII.F.2:

CAO will release a conclusion report that summarizes core process steps and outcomes and the rationale for concluding the dispute resolution process. The CAO will allow all Parties an opportunity to comment on the conclusion report. The conclusion report will be circulated to the Parties, the Board, and Management and publicly disclosed on CAO's website.

Second, the draft policy presently does not allow Complainants to comment on appraisal reports or the terms of reference that dictate the scope of a compliance investigation. Peer IAM policies, like that of the IDB's MICI, recognize the benefit of Complainant insight on recommendations

²³ For example, to assess a complaint's eligibility (section VII.C.2); to decide whether to transfer to compliance investigation at the conclusion of a dispute resolution process resulting in partial or no agreement (section VIII.F.2); to consider deferral of compliance investigation (section IX.B.6.c); and to review draft compliance investigation reports (section IX.C.4).

²⁴ See, e.g., AFD **Environmental and Social Complaints Mechanism** ("ESCM") policy, para. 8 ("The Mechanism Secretariat monitors the implementation of any agreement achieved by dispute resolution. The Ethics Advisor, in conjunction with the Secretariat, submits Draft Monitoring Reports on the implementation of the dispute resolution to the Parties concerned, which are given the reasonable possibility ... to comment on them. Should the Secretariat receive comments made by the Parties concerned, it has ten [10] working days from the date of receipt of the last comments to finalize the Report, and sends the Final Report to the parties concerned."); FMO/DEG respective **ICM** policies, section 3.2.9 ("After the Dispute Resolution phase the Panel prepares a draft report on the outcome of the process. The Panel sends the draft report to the parties involved in the Dispute Resolution for comments regarding facts and sensitivities."); EBRD **IPAM** policy, section 2.4(d)(ii) ("IPAM will submit draft Monitoring Reports to the Parties for comment, and consider any such comments in the finalisation of its Monitoring Reports."); EIB **PCM** policy, para. 39 ("The PCM Officer will monitor the implementation of any agreements reached during a Problem-solving Initiative. The PCM Officer will submit draft Problem-solving Initiative Monitoring Reports to the Relevant Parties who will be given reasonable opportunity to comment on such Reports.").

and terms of reference for compliance investigations,²⁵ and we recommend that the CAO policy follow good practice by including the following language under section IX.B.5:

Appraisal decision

*At the conclusion of the appraisal process, CAO will prepare an appraisal report stating its appraisal decision, **affording Complainants an opportunity to comment on its content and recommendations.** When the appraisal outcome is a decision to investigate, CAO's appraisal report will also include terms of reference, indicating the scope of the compliance investigation. **Complainants shall be afforded opportunity to comment on the proposed scope of investigation.***

The appraisal decision, including the decision to investigate, close, or defer, will be made at the discretion of the CAO DG, applying the criteria set out in this section.

Third, while it is positive that the draft policy expressly references the duty of Management to consult with Complainants in the design of Management Action Plans (MAPs) to address issues of non-compliance, Complainants should also be allowed to submit comments to be relayed to the Board for it to consider the adequacy of consultation and of Management's proposed actions. The EBRD's IPAM is an apt example to look for good policy language on this important point.²⁶ We recommend aligning with good policy through the following language edits in section IX.C.6:

Management response, action plans, and clearance for disclosure

. . . . During the preparation of the MAP, Management will be required to consult the Complainants and the Client. Any actions that require the cooperation of the Client will only be included if

²⁵ IDB MICI Policy, paras. 39-40 ("When a Request is transferred to the Compliance Review Phase, the Compliance Review Phase Coordinator, under the supervision of the MICI Director, will prepare, within a maximum term of 21 Business Days, the recommendation and the TOR for the investigation, in consultation with Management and the Requesters... Upon completion of the TOR, the MICI will send a copy to Management and the Requesters, which will each have a term of up to 15 Business Days to make comments.").

²⁶ EBRD IPAM policy, section 2.7.1(f) ("Upon a finding of non-compliance in respect of a Project, IPAM will submit the final Compliance Review Report; the final Management Action Plan; the Management Response, if any; and Requesters' or Representatives' comments on the draft Management Action Plan, if any, to the President and the Board. The Management Action Plan will be submitted to the Board for decision; the other documents relating to the finding of non-compliance will be submitted to the Board for information.").

agreed with the Client prior to inclusion in the MAP. Management will submit its proposed MAP to CAO. Upon receipt, CAO will send the proposed Management Report and MAP to complainants for review and comment, and append the compliance investigation report for information.

CAO will submit comments on the proposed MAP to the Board, including any comments received by Complainants, at the same time that IFC/MIGA presents the MAP for approval.

Fourth, the policy can be improved to enshrine the role of Complainants to both help monitor MAPs and to provide insight to guide progress reports during MAP implementation. Likewise, Complainants must have the opportunity to comment on final monitoring and closure reports following the compliance investigation process. Peer mechanisms embrace community participation in monitoring and reporting, as well as responsibly closing an accountability process by providing opportunities for Complainants to express their level of satisfaction with the actions taken in response to their concerns.²⁷

We recommend aligning with good policy through the following edits to section IX.D:

1. Approach to monitoring

After the Board has approved a MAP, CAO will monitor the implementation of the MAP.

The scope of CAO's compliance monitoring will be the corrective actions approved as part of the MAP. Monitoring will verify the effective implementation of the actions set out in the MAP. Throughout monitoring, CAO may survey and receive communications from Complainants on their observations with respect to improvement or worsening of project concerns and the on-the-ground impacts of MAP implementation.

²⁷ UNDP **SRM** policy, para. 8 (“[E]ffective monitoring may require ongoing meetings of a multi-stakeholder group that has reached agreement [e.g. to review implementation of a set of commitments for consultation with indigenous people, or implementation of a new approach to developing a voter registry]. The SRM will issue a monitoring report at least annually until such time as the agreement has been fully implemented.”); ADB **AM** policy, paras. 194, 198, 201 (“The methodology for monitoring may include (i) consultations with the complainants, the borrower, the Board member concerned; Management; and ... site visits ... Site visits should be a routine and noncontroversial aspect of the Accountability Mechanism ... In the absence of a necessary site visit, the CRP may give added weight to the complainants’ views.”); AfDB **IRM** policy, paras. 46, 63(d) (“[The Compliance Review and Mediation Unit] shall monitor the implementation of the solution agreed upon in a problem-solving exercise. This will include meeting with the affected communities to ascertain that the problem solving exercise worked as intended and the Bank Group has met its commitments.”).

CAO Compliance monitoring will not consider non-compliance findings for which there is no corresponding corrective action in the MAP.

2. Reporting during monitoring

IFC/MIGA will be responsible for the supervision of the implementation of the MAP and should submit progress reports to the Board on the implementation of the MAP at such intervals as proposed by Management and approved by the Board. A progress report shall summarize the implementation status of the MAP in the period covered by the report, including actions completed, actions in ongoing implementation, and upcoming actions based on timelines included in the MAP. It also may include information on engagements undertaken during the reported period.

CAO will incorporate these reports in its annual public monitoring report.

As requested by the Board, CAO or Management, CAO and Management will provide a briefing on progress made in the implementation of remedial measures in MAPs, including Project or Sub-Project-level actions and IFC/MIGA systemic responses to CAO compliance findings.

*The Board may consider options on how to strengthen the implementation of measures in the MAP, if necessary, and taking into account Management progress reports and CAO monitoring reports. **Complainants shall be provided the opportunity to review and comment on monitoring reports before they are submitted to the Board for consideration.***

3. Closure of compliance investigations

CAO will close the compliance monitoring process if:

(i) CAO determines that substantive commitments as set out in the MAP have been effectively fulfilled; or

(ii) following engagement with Management and/or the Board, not all substantive commitments in the MAP have been effectively fulfilled, and CAO determines that there is no reasonable expectation of further action to address its Project or Sub-Project-level noncompliance findings.

*In either case, CAO will prepare a final monitoring and closure report and **provide Complainants the opportunity to comment.** **After addressing comments made by Complainants, CAO will circulate ~~the~~ the final monitoring and closure report** for information to the Board, the President, and IFC/MIGA, before making it public.*

4. The new process of deferring compliance investigation should make explicit that complainants have access to the management response and request for deferral before consultations.

In prior comments on this topic, we stated that deferral, while worthwhile in certain circumstances, carries with it significant risks. Complainants at other mechanisms with the option of deferral have experienced undue delays and increased harm as a result. Deferral should be used in exceptional circumstances only, the criteria for which need to be explicit and considerate of complainants, as complainants stand to incur the most harm if redress is delayed. In this regard, deferral should require *consent* of complainants. Short of that, at the very least, the decision to defer should require *consultation* with complainants. To adequately engage in consultation, complainants require copies of management's response to the complaint and a written proposal for deferral. Further, should an initial deferral period be undertaken, any subsequent decision to close the case or extend the deferral period should also require *consent* of complainants, or at minimum, *consultation* with complainants. We propose the below edits accordingly.

Further, the existing criteria and parameters -- in section X.B.6 (a)-(d) -- should not be removed or watered down in the final policy. To ensure transparency of process, deferral reports should be published on CAO's website in addition to being circulated to all relevant parties.

4. Appraisal approach

[...]

During a compliance appraisal, CAO will also consider the following:

[...]

d) Whether Management has provided a statement of specific remedial actions, and whether, in CAO's judgment after ~~considering the Complainant's view~~ consultation with the Complainant, these proposed remedial actions may substantively address the matters raised by the Complainant.

6. Deferral of a decision to investigate

In specific cases that meet the criteria for a compliance investigation (paragraph 4 above) as well as the criteria below, the CAO DG may decide to defer the decision to investigate to allow IFC/MIGA, the Client, and the Complainants to resolve issues directly:

a) The severity of Harms and potential compliance issues raised by the complaint, including whether the issues of alleged Harm are clearly defined, limited in scope, and appear to be amenable to early resolution;

b) Whether the Management response includes specific commitments that are commensurate to the issues raised in the complaint or during the assessment, and consistent with IFC/MIGA policy requirements;

c) The views of the Complainants as to the impact (positive and negative) of a decision to defer, *given after they have reviewed Management's response and the proposed terms for deferral*; and

d) Other information deemed relevant by CAO.

....

Upon the conclusion of the deferral period, CAO DG may decide to:

a) close the case if *the Complainants agree that* the issues raised in the complaint have been substantially addressed and there is no particular value for accountability, learning, or remedial action from conducting an investigation;

*b) extend the deferral period if considerations above remain, and there is in CAO's analysis, **after consultation with Complainants**, a high likelihood of the issues being resolved within a defined extension period; or*

c) proceed to a compliance investigation if issues have not been substantially addressed or if there is otherwise particular value for accountability, learning, or further remedial action.

*In any case, CAO will issue, and circulate for information, a report to the Boards, the President, **Complainants**, and Management summarizing the actions taken and outcomes of the deferral. **The circulated report shall be published on CAO's website.***

5. The additional eligibility criteria for complaints pertaining to Financial Intermediary (FI) projects are too restrictive.

While we welcome the additional clarity that the draft policy provides regarding how the CAO will determine eligibility for FI complaints, the proposed criteria are too restrictive and appear to exclude complaints related to exposure to sub-projects through bond underwriting.

The bond market is a crucial source of financing for companies around the world. BlackRock has called it “the world’s largest and deepest source of capital for companies,” estimated it to be worth \$28.4 trillion globally in 2016.²⁸ Many companies rely on capital raised through bond issuances to fund new projects. Commercial banks, including IFC FIs, play an essential role in underwriting these bonds and thereby helping companies raise capital on this market.

According to the IFC’s own environmental and social procedures, when an FI arranges a bond issue for a corporate sub-client, it has the same responsibility to ensure that the sub-client complies with the Performance Standards as it does when it provides a loan. This makes sense because underwriters are the only entities in a position to incorporate environmental and social standards into a bond issue’s key documents.

Yet, the draft CAO policy appears to place these transactions beyond the purview of the CAO and deny communities affected by the end use of bond proceeds access to remedy for harms they have suffered. This is because the draft requires there to be a “material link” between the FI client and the “active Sub-Client that is the subject of the complaint.” By restricting eligible FI complaints to “active” sub-clients, the draft policy appears to rule out complaints in relation to

²⁸ *Addressing Market Liquidity: A broader perspective on today's Euro corporate bond market*, BlackRock ViewPoint (August 2016), available at <https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-addressing-market-liquidity-euro-corporate-bond-market-2016.pdf>.

companies and projects that are utilizing the proceeds of bonds underwritten by FI clients. This fails to reflect how an increasingly securitized global financial system operates. When banks underwrite bonds, they buy debt from companies, slice it into pieces and sell it to third parties at a profit. Bonds are often traded on stock exchanges, where they can change hands rapidly. The role of the underwriter is fundamental to the operation of the bond market, and is really the only place where there is leverage to address environmental and social issues and ensure adequate safeguards are in place.

CAO should therefore consider underwriters materially exposed: i) when the proceeds of bonds may be used to fund the sub-project that is the subject of a complaint, ii) for as long as the bond is active on the market (and the prospectus and covenants are still in force). We recommend the following change be made to Section VII B2(a) to close this accountability loophole:

*a) For complaints pertaining to FI Projects, whether: (i) the complaint pertains to a Sub-Project within the scope of the financial product being offered to an FI by IFC or guaranteed by MIGA under the applicable financing agreement or contract of guarantee (e.g., if IFC is providing equity or financial support of a general-purpose or MIGA is providing a non-commercial risk guarantee in relation to an investment in the FI, or the Sub-Project is within any ringfence that IFC contractually established with the FI or that MIGA contractually established with its guarantee holder); (ii) there is a material link between the FI Client and its ~~active~~ Sub-Client that is the subject of the complaint (considering factors including the nature of the *exposure financing*, the share, type, and tenor of the FI investment/debt exposure to the Sub-Project); and (iii) there are indications of a plausible link to harm or risk of harm related to the Sub-Project.*

6. Language should clarify how Management should participate in dispute resolution if invited by Complainants.

We welcome language in section VIII.H that encourages IFC/MIGA to participate in dispute resolution processes where appropriate and agreed to by the Parties but we recommend making this language stronger. Financial institution involvement in dispute resolution, when agreed to by the Parties, have proven helpful to resolve disputes adequately and effectively. For example, the policy of the IDB MICI expressly allows Management to participate as a party in dispute resolution processes,²⁹ which has resulted in Management joining dispute resolution dialogues to

²⁹ IDB MICI Policy, “Glossary” (“**Parties:** The Requesters, *Management*, the Borrower, the Client and/or

assist in developing holistic solutions for remediation, and to help Clients deliver on remediation commitments more efficiently.³⁰ We also believe that IFC/MIGA's participation in dispute resolution processes is instrumental to effective supervision of its' clients' environmental and social performance when there are community grievances that are serious enough to give rise to a CAO complaint. IFC/MIGA needs to be able to hear directly the concerns of Complainants and support its client to respond appropriately, consistent with the Performance Standards.

If Complainants agree, IFC/MIGA should be required to participate in dispute resolution. We therefore recommend the following changes to section VIII.H:

IFC/MIGA Engagement in the Dispute Resolution Process

Where ~~appropriate and~~ agreed by ~~the Parties~~ Complainants, IFC/MIGA ~~may be invited to~~ will participate in a CAO dispute resolution processes. ~~IFC/MIGA will consider its participation on a case-by-case basis.~~

7. While inclusion of the selection process for CAO DG in the policy is positive, the process can be improved.

A clear and principled selection process for an IAM principal is critical to ensuring trust in the selected candidate and in the accountability mechanism as a whole. We support its inclusion in the CAO policy and request that the proposed process remain without any additional edits that would result in a dilution of the policy. From its inception the CAO's VP selection process was recognized as a strong, inclusive and participatory procedure. For years this selection process has been held up as an example to follow at other IAMs and has been used as a template when creating new accountability mechanisms.

the Executing Agency, if applicable.” [emphasis added]), para. 24 (“The objective of the Consultation Phase is to provide an opportunity to the *Parties* to address the issues raised by the Requesters related to Harm ...” [emphasis added]).

³⁰ See, e.g., MICI Consultation Phase Report, MICI-BID-HA-2017-0114 (Productive Infrastructure Program, Caracol, Haiti), “*Acronyms and Abbreviations*” (“**Parties:** The Requesters, IDB Management, and the Executing Agency”), para. 2.9 (“In order to ensure effective participation in the process IDB Management ensured the translation, and shared electronic and hard copies of the documents during the first round of dialogue.”), para 2.18 (“A central aspect of the process was to develop an agenda and preliminary format in conjunction with the Parties. The participation of IDB Management ... in this exercise was essential to creating a sense of legitimacy and ownership of the process.”), 2.24 (“**Measures concerning the environmental and social impacts of the PIC** Bank Management has followed up on several of the different aspects ... in connection with social and environmental matters. In particular, it pledged to continue to monitor the contracting ... to perform water quality tests and to request that the results be shared It will also provide a detailed update ... on environmental and social issues during the meetings held as part of the Monitoring stage.”), 3.1 (“The Parties agreed to create a Monitoring Committee to monitor compliance with the agreements. The Committee will include representatives of ... IDB Management ... if there is no objection from the Board of Directors.”), available at <https://www.accountabilitycounsel.org/wp-content/uploads/2019/06/mici-consultation-phase-report-eng.pdf>.

With respect to section V.A.5, “Term and renewal,” there is one edit we propose to make the process stronger: instead of having two five-year terms, there should be one term for six years.

Term and renewal

Following the selection process, the Boards shall nominate the CAO DG to be appointed for a six-year non-renewable term based in Washington, D.C. ~~The CAO DG’s term may be extended for one additional five-year term, following the recommendation of CODE and approval of the Boards. The CAO DG will inform the Boards in writing of his/her interest to seek a second term. If so, the President will consult the Boards in an executive session, following which a recommendation will be made to the Boards for approval. If the CAO DG does not seek renewal, or if the renewal is not approved, the vacancy will be advertised, and the selection process initiated.~~ Upon termination of the appointment, the CAO DG is restricted for life from obtaining employment with the World Bank Group following his/her appointment as CAO DG.

Conclusion

While improvements to the CAO Policy are to be commended, we urge the above edits and amendments to promote a fair reflection of the 2020 External Expert Report and consistency throughout the policy, and to avoid dilution of CAO’s effectiveness.

Thank you for your consideration. If you would like to discuss any of the recommendations further, please contact Margaux Day at margaux@accountabilitycounsel.org to coordinate.

Signed by:

Abibinsroma Foundation
Accountability Counsel
Arab Watch Coalition
Bank Information Center (BIC)
The Bretton Woods Project (BWP)
Center for International Environmental Law (CIEL)
Centre for Research on Multinational Corporations (SOMO)
David Hunter, Peregrine Environmental Consulting, LLC
Friends with Environment in Development
Gender Action

Global Rights
The Hunger Project
Inclusive Development International (IDI)
International Accountability Project (IAP)
Mazingira Network Tanzania (MANET)
Nepal Kirat Kulung Bhasa Sanskriti Utthan Sangh
Oyu Tolgoi Watch
Oxfam
Peace Point Development Foundation (PPDF)
Recourse
Rights and Accountability in Development (RAID)
SUHODE Foundation
Urgewald e.V.
Witness Radio - Uganda