

External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness Report and Recommendations

This Report was prepared by the Review Team¹ in order to facilitate and inform the IFC and MIGA Boards' consideration of the IFC's and MIGA's E&S accountability framework, including CAO's role and effectiveness.

IFC, MIGA and CAO and their respective Boards have not adopted, approved or endorsed any part of this Report or its recommendations and consideration of the Report and its recommendations is continuing.

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¹ See Appendix C

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Acronyms

ADB	Asian Development Bank
ADF	Agence française de développement (French Development Agency) (France)
AfDB	African Development Bank
ADB	Asian Infrastructure Investment Bank
AIIB	Asian Infrastructure Investment Bank
AM	Accountability Mechanism (Asian Development Bank)
AMR	Annual Monitoring Report
BSTDB	Black Sea Trade and Development Bank
CAO	Office of the Compliance Advisor Ombudsman (IFC and MIGA, World Bank Group)
CDB	Caribbean Development Bank
CEO	Chief Executive Officer
CIEL	Center for International Environmental Law
CRP	Compliance Review Panel (Asian Development Bank)
CSO	civil society organization
CODE	Committee on Development Effectiveness (World Bank Group)
COGAM	Committee on Governance and Executive Directors' Administrative Matters (World Bank Group)
DFI	development finance institution
DFID	Department for International Development (United Kingdom)
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
E&S	environmental and social
ESAP	Environmental and Social Action Plan
ESDD	environmental and social due diligence
ESG	environmental, social, and governance
ESMS	Environmental and Social Management System
ESRP	Environmental and Social Review Procedures
EU	European Union
EVP	Executive Vice President
FCS	fragile and conflicted-affected situations
FI	financial intermediary
FMO	Entrepreneurial Development Bank (Netherlands)
GCF	Green Climate Fund
GM	grievance mechanism
IAM	independent accountability mechanism
IBRD	International Bank for Reconstruction and Development (World Bank Group)
IDA	International Development Association (World Bank Group)
IDB	International Development Bank
ICM	Independent Complaints Mechanism (DEG, FMO)
IFC	International Finance Corporation (World Bank Group)
IFI	international financial institution
ILO	International Labour Organization (United Nations)
IPAM	Independent Project Accountability Mechanism Independent (EBRD)
IPN	Inspection Panel (IBRD and IDA, World Bank Group)
IRM	Independent Redress Mechanism (Green Climate Fund)
IRM	Independent Review Mechanism (African Development Bank)
JBIC	Japan Bank for International Cooperation (Japan)
LESS	Lead Environmental and Social Specialist
M&E	Monitoring and Evaluation
MAP	Management Action Plan

MATR	Management Action Tracking Record
MDB	multilateral development bank
MICI	Independent Consultation and Investigation Mechanism (IDB)
MIGA	Multilateral Investment Guarantee Agency (World Bank Group)
MSMEs	micro, small, and medium enterprises
NEXI	Nippon Export and Investment Insurance (Japan)
NGO	nongovernmental organization
OECD	Organization for Economic Co-operation and Development
OEEG	Office of Examiner for Environmental Guidelines (JBIC)
OGs	Operational Guidelines (CAO)
PCM	Project Complaints Mechanism (EBRD)
PPM	Project-affected People's Mechanism
PS	Performance Standards (IFC/MIGA)
SECU	Social and Environmental Compliance Unit (United Nations Development Programme)
SGR	Stakeholder Grievance Response (IFC)
SMEs	small and medium enterprises
SRM	Stakeholder Response Mechanism (UNDP)
UN	United Nations
UNDP	United Nations Development Programme
UNGPs	United Nations Guiding Principles on Business and Human Rights
VP	Vice President

Note: All dollar amounts are in US dollars.

Overview

1. Starting in the 1990s, communities and civil society organizations (CSOs) advocating for environmental protection and social justice started to question the impacts of private investment projects in developing countries, arguing that they failed to pay sufficient attention to environmental and social (E&S) Safeguards Policies. The International Finance Corporation (IFC) and later the Multilateral Investment Guarantee Agency (MIGA), the two private sector arms, of the World Bank Group, became major targets of CSO activism. After some resistance and substantial internal debate, IFC responded positively to the push for investing in and lending to clients in an environmentally and socially responsible way.
2. Having accepted responsibility for the management of environmental and social impacts, IFC used research to show that companies that included environmental and social risk mitigation in their investment decisions could achieve higher long-term profitability than companies that did not. In 1998, under pressure from CSOs, IFC formally adopted the World Bank's Safeguards Policies for its own investments, and MIGA adopted them in 1999. Also, in 1999, the President of the World Bank Group created the Compliance Advisor/Ombudsman (CAO). CAO was mandated to respond to complaints about the E&S impacts of IFC/MIGA investments; assess IFC/MIGA compliance with their Safeguards Policies; and advise IFC, MIGA, and the World Bank Group President on ways to improve E&S performance.
3. Supported by a team of environmental and social experts, IFC and MIGA began to integrate the assessment of environmental and social risks into their project appraisal and supervision. By building both its own and its clients' E&S management capacities, IFC became for a time the industry leader for environmental and social standards for international financial institutions (IFIs) lending to the private sector. In 2003, ten leading commercial banks committed to adopt IFC's Safeguards for their own due diligence in project finance; this commitment was formalized by the banks as the Equator Principles (Kamijiyu 2004).
4. IFC made a significant change in its approach to E&S management in 2006, when it transitioned from the Safeguards Policies to an Environmental and Social Sustainability Policy and the eight Performance Standards (PS) as the basis for client E&S accountability. (MIGA was involved in the creation of this framework and adopted a closely aligned version of the Policy and Performance Standards in 2007.) The Sustainability Policy stated that clients were accountable for applying the Performance Standards, and IFC was responsible for oversight of the client's E&S responsibilities, including identifying and assessing E&S risks, the client's risk management capacity, and the client's commitment to E&S performance as part of its due diligence; establishing the specific PS requirements for the investment; supervising the client's implementation of its E&S systems and commitments during the life of the investment; and taking corrective action where necessary to bring the client into compliance with the required Performance Standards.
5. The Equator Principles banks soon adopted the Performance Standards. Other IFIs and DFIs have also been directly influenced by the IFC/MIGA approach, including the World Bank Group's International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) (collectively known as the World Bank), which adapted and added to the Performance Standards for the World Bank Environmental and Social Framework.
6. IFC and MIGA updated the Sustainability and Performance Standards in 2012, most notably by including more explicit commitments in the Sustainability Policy on climate change, business and human rights, corporate governance, and gender; clarifying the application of the Performance Standards to financial intermediaries (FIs); and strengthening specific provisions in individual Performance Standards. Though IFC is still an important contributor to the development, application,

and dissemination of private sector E&S good practices, others have been pushing the agenda of E&S performance and accountability further, both complementing and moving ahead of IFC and MIGA.

7. In the past decade, the United Nations (UN), bilateral and multilateral development finance institutions (DFIs), and private sector associations have developed standards for E&S accountability that reinforce and, in some instances, go beyond the IFC/MIGA Performance Standards. Notably, in 2011 the United Nations published the Guiding Principles on Business and Human Rights (UNGPs), with its principles of “Protect, Respect and Remedy.” The UNGPs have been a major milestone in guiding private sector companies to identify and respect a broad range of risks to human rights related to their operations; to create grievance mechanisms; and to provide remedy in situations in which they have contributed to harm. More recently, the Dutch Banking Sector Agreement Working Group on Enabling Remediation has presented a clear framework for financial intermediaries that distinguishes among cause, contribution, and linkage to human rights impacts (including environmental and social impacts), and offers an approach to remedy based on those distinctions. Overall, there is substantial and growing interest among business and development stakeholders in incorporating the UNGPs into business policies and practices.

8. In response to these developments, several DFIs have included stronger human rights dimensions in their E&S standards. Among private banks, discussions on providing remedy in case of harm are rapidly evolving. Some banks are making strong commitments to contribute to remedy, and to disclose more information about the E&S performance of individual investments. Commitment to E&S principles in the private sector has rapidly evolved. Given this rapid evolution, there is a need for IFC to regain leadership in shaping E&S policies and practices.

9. In parallel with the evolution of IFC/MIGA E&S policies, standards, and procedures, CAO has also evolved. In its first decade, CAO prioritized its Dispute Resolution function, responding to 76 eligible complaints, of which 20 went to compliance appraisal, and 8 continued to audit.² CAO issued its first advisory work and made an early mark on the institution through its 2003 Safeguards Review. CAO rapidly became the most active and respected independent accountability mechanism (IAM). Starting with its 2011 compliance audit of the Wilmar palm oil case and its 2012 audit of E&S issues in IFC’s financial intermediary investments, CAO’s Compliance function became more active and impactful. It also raised the profile of controversies over particular IFC/MIGA investments, as well as IFC’s and MIGA’s overall approach to E&S risk management and accountability.

10. Compared to the Safeguards Policies, the IFC/MIGA Sustainability Policies and Performance Standards have given IFC/MIGA and their clients more flexibility to use risk-based judgment to minimize E&S risks and improve E&S outcomes. The Sustainability Policies state that the client’s E&S management and IFC/MIGA oversight should be “commensurate with the level of social and environmental risks and/or impacts.” The Policies also allow IFC to invest in projects and MIGA to offer guarantees in operations that pose significant E&S risks as long as the client can achieve compliance with the Performance Standards “over a reasonable period of time.” The Policies also state that IFC/MIGA staff should conduct E&S reviews commensurate to the risk, scale, and nature of the project. Implementing the Policies thus requires IFC/MIGA staff to make many judgments about the significance of risks and the adequacy of mitigation measures.

11. This flexibility has been a strength in many cases, enabling IFC/MIGA to work constructively with clients to assess, mitigate, and manage risks in ways tailored to the specific context of an

² CAO, *The CAO at 10: Annual Report FY2010 and Review FY2000–10* (http://www.cao-ombudsman.org/languages/french/documents/CAO_10Year_AR_web.pdf).

investment/guarantee. In some cases, however, flexibility has contributed to controversy over IFC/MIGA decisions to invest in/provide guarantees to companies and activities with significant risks and impacts. It has also contributed to disagreements between IFC/MIGA and CAO over CAO compliance investigations and reports. Those disagreements frequently focus on differences of interpretation regarding what the Sustainability Policy did or did not require of IFC/MIGA in particular cases and the extent to which IFC/MIGA met those requirements.

12. Regrettably, such disagreements have led to polarized attitudes and unconstructive interactions between IFC/MIGA and CAO in the context of some compliance investigations and reports. IFC has frequently disagreed with CAO investigation findings; when it disagrees, IFC has not pursued remedial actions to correct CAO non-compliance findings. Though there are inevitably adversarial elements in the conduct of compliance reviews at all accountability mechanisms, the dynamic between IFC/MIGA and CAO has become problematic in some cases, impeding the flow of information, delaying the process, undermining potential corrective actions, and limiting the utility of some compliance reviews as an opportunity to learn from difficult cases. Though CAO's other functions have not been as seriously affected, the disagreements about its compliance work have sometimes made it harder for IFC/MIGA and CAO to coordinate and collaborate on CAO's dispute resolution and advisory work.

13. The contentious nature of a compliance process is also reflected in disagreements with complainants. Just as IFC and MIGA sometimes disagree with CAO findings, complainants sometimes express dissatisfaction when CAO does not consider their complaint eligible, does not proceed to investigation after an appraisal process, or makes compliance findings which in their view do not adequately respond to their concerns or to the evidence they presented. Complainants at times voice their disappointment in public statements and in letters to IFC/MIGA Senior Management and the World Bank President.

14. The context for this Review has been shaped by questions about the E&S performance of IFC/MIGA and its clients and concerns about CAO Compliance cases and insufficient IFC follow-up actions. The recent controversy over IFC's investment in the Tata Mundra power plant in India, which triggered both a CAO compliance investigation and the *Jam v. IFC* litigation in the US courts, has intensified these concerns.

15. While an impetus for this Review was a concern about increasing litigation risks faced by IFC (including with respect to the status of immunity defenses available to international organizations), the Review Team does not see this as a key issue. Rather than serving as an excuse for inaction, litigation risk should place a sharper focus on and commitment to the effectiveness of IFC's Sustainability Framework and to the care with which CAO conducts its compliance investigations and presents its findings.

16. The Review has focused on IFC/MIGA accountability for implementing their Sustainability Policies and Performance Standards, and on CAO's roles and functions. The Review Team looked at procedures, capacities, and mindsets, using review of written procedures, case reviews, interviews, and discussions with IFC, MIGA, CAO, Board members, and the Reference Group formed for this study—which represents IFC and MIGA clients and private co-investors; civil society organizations; independent experts; and other IFIs and their independent accountability mechanisms (IAMs).

17. In its interactions with the Reference Group, the Review Team found much support for the work of IFC/MIGA and CAO, but also found reasons for concern. A repeated message was that clients found IFC/MIGA support to enable them to meet the E&S requirements insufficient, particularly during the planning stages of projects, with IFC/MIGA expertise often coming in only after problems had

arisen. They also expressed high appreciation for the quality of IFC/MIGA support once it was provided. But there was a prevailing view that more support was needed. This Review thus emphasizes the need for IFC/MIGA to step up E&S assessment and capacity building work with clients from the earliest stages of a potential investment/guarantee relationship.

18. There was also concern expressed by IFC/MIGA staff and clients that CAO, while performing compliance review functions, has at times made questionable judgments about IFC/MIGA and client risk assessment and management measures. These concerns reflect strong divergence of views on interpretation of Sustainability Policy requirements for IFC/MIGA and interpretation of Performance Standards requirements for clients. Complainants and clients raised concerns about long and cumbersome CAO processes, which entail several stages and can extend over several years. CSOs that have partnered with complainants expressed concerns about insufficient remedial actions, questioned some CAO decisions to find particular complaints ineligible, and questioned some CAO compliance findings for failing to hold IFC/MIGA fully accountable.

19. In this regard, the Review Team proposes that current CAO processes (including IFC/MIGA roles and responses) be adjusted to promote a more collaborative relationship between IFC/MIGA and CAO, address disagreements that have arisen between IFC/MIGA and CAO, and clarify the scope for remedial actions. The discussion that follows presents an overview of the Review Team's conclusions and recommendations.

Recommended Changes in IFC/MIGA Roles and Responses

Recommendation 1: IFC/MIGA Need to Take the Lead on Private Sector Sustainability

20. The Review Team is of the view that IFC/MIGA must not only ensure that all clients comply with their E&S requirements, but also take a strong leadership role in two key contexts: the least developed (IDA-eligible) countries and fragile and conflicted-affected situations (FCS) in which they have committed to expand their investments; and the emerging markets in which investments in dynamic companies that seek triple-bottom-line results (economics, environmental, and social) can drive industry-level and societal change. This is central to IFC's and MIGA's mission.

21. The World Bank IDA Private Sector Window, the IFC 3.0 strategy, and MIGA's Strategy and Business Outlook FY21–23 commit IFC and MIGA to invest a larger share of their resources in least developed, fragile, and conflict-affected contexts. IFC/MIGA should give top priority to active E&S support and capacity building in these contexts, both with regard to individual investments and to help establish E&S norms and practices at the sector level. **To support clients in IDA-eligible and fragile countries, IFC and MIGA will have to spend considerably more resources at the front end during project design, preparation, and implementation to help their clients mitigate adverse impacts and achieve positive E&S outcomes.** This most likely will require more resources and environmental and social experts than IFC/MIGA now has at its disposal.

22. In emerging economies, IFC/MIGA should actively seek and work in partnership with major clients that aim for triple-bottom-line results, innovating with those clients in ways that shift competitive advantage at the industry and sector level. IFC/MIGA can help these clients gain and maintain access to global markets and finance, which increasingly are contingent upon companies demonstrating effective environmental management and delivering positive development results for local communities affected by their operations. **With these clients, IFC/MIGA should be leading with the most ambitious E&S principles and commitments; experimenting with innovative practices and instruments; and delivering world-class economic, environmental, and social results.**

23. The Review Team recognizes and strongly supports IFC's recent and important reforms to strengthen its E&S capacity. Such efforts need to continue. A significant restructuring has been carried out by IFC's Chief Executive Officer (CEO), with environmental and social experts now being assigned to the Operations Vice Presidency. These experts should become fully integrated into the investment teams—and might even lead the investment teams when environmental and social opportunities and/or risks are prominent in certain projects. The reforms should not stop with the organizational chart; they need to drive a major cultural change in IFC, from an investment banking culture to a business culture focused on sustainability goals.

24. As noted, it will be important for IFC/MIGA to provide excellent, proactive E&S support to clients from the early stages of project design through the life of the investment. In some cases, this support can be provided directly by IFC/MIGA staff. IFC/MIGA should also help clients identify and work with skilled consultants and with nongovernmental organizations (NGOs) that bring environmental and social expertise that neither IFC/MIGA nor the client can provide. Securing the right expertise is especially important in least developed and fragile countries, and it may be necessary for IFC/MIGA to invest in identifying consultant and NGO counterpart capacity in those countries.

25. The Review Team also welcomes the establishment of IFC's E&S Policy and Risk Department—reporting directly to the Executive Vice President—to provide guidance and oversight at the policy level, and to provide quality assurance with veto power over projects at the Investment Committee level. The Review Team believes this to be particularly important because application of the Sustainability Policy and Performance Standards requires numerous reasoned judgments, in contexts where information may be limited and where investment teams may have incentives to move a proposed investment forward. The E&S Policy and Risk Department should establish clear parameters and provide guidance on appropriate IFC engagement for E&S reviews and engagement and implementation of E&S standards over an appropriate time frame. While IFC's current Environmental and Social Review Procedures do require detailed recording of E&S risk assessments and decisions, the Policy and Risk Department should ensure that the reasoning behind staff judgments about investment risks and risk mitigation measures is consistently and adequately documented; and that the results of significant judgments (that is, where risks and mitigation measures were judged accurately and where they were not) are tracked to contribute to institutional learning over time.

Recommendation 2: IFC Needs to Clarify E&S Accountability for Financial Intermediaries and Ensure their E&S Performance

26. **IFCs' increased portfolio of FI lending and equity investments poses special challenges for E&S requirements, including the CAO complaint process.** Almost half of IFC's portfolio is now invested as loans and equity investments in FIs, which in turn are onlent to/invested in borrowers/investees (FI sub-projects). IFC makes available a vast range of products to these FIs, from trade facilities to enhance import/export opportunities, to microcredit and lines of credit to small and medium enterprises (SMEs), as well as long-term loans and direct equity investments. IFC has made significant progress in clarifying how the Performance Standards apply to its FI investments, in part in response to CAO's 2012 audit of IFC FI investments and ongoing monitoring, as well as several CAO FI Compliance cases. However, significant gaps remain in IFC's ability to ensure that FI clients are adequately assessing E&S risks in their portfolios and ensuring the application of the IFC Performance Standards in their higher-risk investments. **IFC needs to further clarify how it will assure itself of FI E&S performance, and strengthen its due diligence and supervision of FI clients, including through an update of the FI Interpretation Note, and review of that Note by the Board.**

27. In addition, the complexity, diversity, and limited transparency of IFC's instruments for FI investments create challenges for affected stakeholders to raise concerns with IFC/MIGA and with

CAO. They also create challenges for CAO as it seeks to make eligibility determinations about complaints regarding FI clients. To address these challenges, **IFC should enhance the transparency of IFC-funded portfolios and sub-projects.** The Review Team supports the recent commitments made by the World Bank President to disclose FIs' Category A sub-projects (those with potential for significant adverse E&S risks/impact) and climate finance Category B sub-projects (those with potential for limited adverse E&S risks/impacts) on IFC's website, where legally permissible. IFC should seek ways to extend further the scope of FI disclosure of sub-projects.

Recommendation 3: IFC/MIGA and Clients Need to Strengthen Capacities, Systems, and Organizational Mindsets to Address Concerns and Complaints from Affected People

28. CAO is an essential component of IFC/MIGA E&S accountability. It enables people who believe they have experienced negative E&S impacts from an IFC/MIGA investment/guarantee to raise their concerns and receive a well-structured response, through dispute resolution and/or compliance review. However, CAO should not be the only mechanism through which stakeholders affected by IFC/MIGA investments/guarantees can raise their concerns.

29. While the IFC/MIGA Performance Standards (notably PS 1, concerning E&S Management Systems) require the establishment of stakeholder engagement processes and project-level grievance mechanisms where there are affected communities, IFC/MIGA currently have limited capacity for either due diligence or supervision of such grievance mechanisms. Evidence available from supervision and from evaluations show that in many cases insufficient attention is given to grievance mechanisms by the client and by IFC/MIGA. Where they do exist, grievance mechanisms (whether at the project level or at the organizational level) may not be utilized if complainants do not trust the client or are worried about retaliation.

30. Sometimes affected communities bring complaints directly to IFC/MIGA staff and Management. IFC and MIGA have had no centralized and systematic way to register and respond to these complaints. As a result, the organizational response to complaints has been highly dependent on the initiative and professional judgment of the investment teams and managers who receive particular complaints. Neither IFC nor MIGA have the tools for learning systematically from their responses to such complaints.

31. Both client and IFC/MIGA response mechanisms must be strengthened. When project-level grievance mechanisms are well developed and trusted, they can be effective in addressing community concerns and complaints, and have the ability to provide a quick response on the ground. While a number of useful Guidance Notes are available both from IFC and CAO on how to develop and operate grievance mechanisms, **IFC and MIGA should conduct a detailed assessment of implementation of grievance mechanisms in a sample of their investments, exploring the challenges faced and how they can be overcome, consulting widely with both affected people and clients.** IFC and MIGA should use that assessment as the basis for a significant expansion of their own capacity to appraise, support, and supervise client grievance mechanisms.

32. IFC's new E&S Policy and Risk Department is planning a process to register and track complaints received directly by IFC; to strengthen knowledge about oversight and conflict solutions; and to support a culture change to ensure that IFC staff are proactive and effective in responding to complaints. These efforts are still at an early stage. An important beginning has been made by the new Department, and IFC regional and country offices also will have an important role to play in the development of effective responses. If a trusted and efficient complaint response culture and processes can be established at IFC, it is likely that the number of complaints filed with CAO will decline because more complaints will be resolved by IFC itself or through project level grievance mechanisms.

Once IFC's response mechanisms are well established, MIGA should follow IFC's lead and strengthen its own complaint response capacity.

33. CAO can contribute to grievance mechanism capacity building as well, within the scope of its Advisory function and based on agreement with IFC/MIGA on roles and resources. CAO's Grievance Mechanism Toolkit is a strong starting point for capacity-building workshops for clients. CAO can also advise IFC and MIGA on strategies for building their own grievance response capacity, especially in fragile and least-developed contexts, without providing any case-specific advice. The Review also examined the question of whether IFC, MIGA, and/or their clients could request Dispute Resolution support in some case, without triggering a full CAO process. However, this option raises significant procedural and capacity questions for CAO, and it is unlikely to be workable.

Recommendation 4: Regardless of the Mechanism Used, IFC/MIGA Need a More Active Response Culture and Greater Willingness to Engage with Clients and Complainants

34. The Review Team is of the view that in order for IFC/MIGA to be more effective in providing support to their clients and in helping to mitigate harm resulting from environmental and social impacts, they need to develop 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. The Review Team found that some IFC/MIGA staff believe that it is the sole responsibility of IFC/MIGA clients to implement E&S measures, to remedy harm, and to interact with affected people, including those who filed complaints. Other IFC/MIGA staff see value in engaging directly with clients and with affected people to understand concerns, help the client address them, and demonstrate IFC/MIGA commitment to meet their E&S responsibilities. The Review Team holds the view that more active IFC/MIGA engagement with affected people, including complainants, is needed in CAO cases.

35. **IFC/MIGA need to embrace fully and without equivocation their responsibility to engage with clients and affected people to advance effective responses to legitimate concerns, while respecting the distinction between IFC/MIGA's role as investor/guarantor and the client's role as implementer.** When things go wrong, IFC/MIGA should support the client with high-quality E&S advice. In cases where the problem is client commitment rather than client capacity, IFC/MIGA should use their available leverage as fully as necessary to move the client to meet its responsibilities under the Performance Standards.

36. IFC/MIGA also need to recognize that interacting directly with affected people, including complainants, is often a necessary and effective means to (1) understand issues and options; (2) help solve the issues of concern by providing well-informed advice to the client; and (3) demonstrate IFC/MIGA commitment to affected people. IFC/MIGA staff need to coordinate their engagement with affected people closely with clients to maintain role clarity and avoid miscommunication. When CAO is involved, IFC/MIGA need to coordinate closely with their CAO counterparts for the same reasons. Coordination may mean that IFC/MIGA have limited engagement in some cases, and active engagement in others. **In no case should IFC/MIGA assume that engagement with affected people is so risky that it should not be considered and actively discussed with the client, and with CAO where CAO is involved.**

37. More specifically, IFC/MIGA should systematically provide:

- Adequate support to the client to enable the client to implement requirements for E&S stakeholder engagement, including direct interaction with potentially affected people during investment appraisal and supervision visits, disclosure of CAO's existence and how to lodge a complaint with CAO, and capacity building for clients on community engagement

- Adequate supervision to assure that project-level grievance mechanisms work, providing direct advice on resolving project-level grievances where needed
- Active engagement to resolve complaints addressed to IFC/MIGA
- Appropriate engagement during grievance resolution to advise, support, and, if necessary, hold the client accountable for an effective response
- Early efforts during the CAO assessment process to address client non-compliance and related harm, and to engage effectively in the assessment process
- For complaints transferred to Compliance, efforts to resolve issues of non-compliance and related harm, through a deferral option agreed with CAO during the compliance appraisal process (establishment of such a deferral option is recommended in this Review)
- Consultation with complainants (jointly with the client, where possible) to obtain inputs when designing a Management Action Plan (MAP) to support remedial actions to correct non-compliance where identified in CAO investigation reports
- Engagement with complainants and other affected people during the implementation of remedial actions.

38. With more active engagement and willingness to engage with both clients and affected people (including complainants), a number of complaints could be resolved before entering the CAO process or early on during the CAO process, more effective remedial actions could be agreed upon and implemented, and institutional learning from complaints could be enhanced.

Recommendation 5: All Parties Need to Recognize that an Effective CAO is an Integral Component of IFC/MIGA Environmental and Social Accountability

39. CAO provides a mechanism by which people who feel that they are negatively affected by an IFC/MIGA project can register complaints and seek redress. It is essential for IFC/MIGA's E&S accountability. The structure of CAO was innovative when established because it encompassed both a Dispute Resolution and a Compliance function, and introduced an Advisory function as well. The combination of Dispute Resolution and Compliance functions has been adopted by all independent accountability mechanisms established by IFIs since CAO was launched, and the Advisory function pioneered by CAO has been incorporated in most new IAMs. Most IAMs conduct compliance reviews and dispute resolution and advisory work in one independent accountability office.

40. In broad terms, the Review found agreement among all stakeholders that CAO is an essential component of E&S accountability for IFC and MIGA. There was also widespread praise for its Dispute Resolution function, though there are important questions about the decreasing share of complaints that are resolved through the Dispute Resolution function. Most controversial are questions about CAO's governance and its Compliance function. **The Review endorses the current structure and functions of CAO and considers them to be basically sound, but also recommends changes in its governance and in several aspects of CAO policies and procedures.**

Recommended Changes in CAO Governance, Policies, and Procedures

Recommendation 6: CAO's Reporting Structure Needs to Be Revised So that CAO Reports to the Board for All Three Functions (Compliance, Dispute Resolution, and Advisory).

41. Governance of CAO has become controversial primarily in connection with compliance investigations and the lack of remedial action in case of findings of non-compliance and related harm. In the current governance structure, where CAO reports to the World Bank Group President, non-compliance findings presented in CAO investigation reports have frequently become the subject of disputes between CAO and IFC/MIGA Management. The President has generally not played an active

role in resolving these disputes. One consequence has been inadequate remedial action by IFC, MIGA, and their clients. In addition, questions have been raised about perceived conflict of interest in decisions about CAO's budget and the appointment of the CAO Vice President, because the President of the World Bank may be perceived as favoring the interests of IFC and MIGA Senior Management, who report directly to the President, and who have been delegated responsibility for most aspects of Management interaction with CAO.

42. **The Review Team recommends that CAO should report to the IFC/MIGA Board rather than to the President, in order to eliminate potential conflicts of interest, ensure that issues of E&S accountability are regularly reviewed at the highest level of IFC/MIGA governance, and ensure appropriate action in response to CAO non-compliance findings.** The Review Team proposes that a specialized Sustainability Committee of the Board oversee CAO's operations, receive its Compliance reports, and approve Management Action Plans in response to non-compliance findings, acting in all cases on behalf of the Board. This Board Committee should consist of Board members who are, or will become, well versed in E&S standards and risks. This Committee would not only oversee CAO but also oversee IFC and MIGA's overall environmental and social performance.

43. Responsibilities of this Board Committee would include:

- Appointing the CAO VP for a term of five years, selecting from a group of potential candidates nominated by an independent Committee. This system of forming a Committee recruited from IFC/MIGA clients, CSO representatives, and IAM experts has worked well in the past and provides a guarantee for the continuous independence of CAO, which is essential. One or two Board representatives could be included on the Committee, as well.
- Evaluating the work of the CAO VP on an annual basis, and based on these evaluations renew or not renew the term of the VP for a second five-year term.
- Determining on an annual basis budgeting needs and approving the budget request of CAO.
- Being informed about CAO's Dispute Resolution cases.
- Requesting and responding to CAO advice through the Advisory function.
- Ensuring timely responses from IFC/MIGA Management to CAO compliance investigations, reviewing and approving Management Action Plans submitted in response to CAO findings of non-compliance.
- Selectively reviewing CAO monitoring reports to assure that Board-approved Management Action Plans are implemented.
- Overseeing the E&S performance of IFC and MIGA, receiving annual E&S reports from them (including E&S supervision results), reviewing planned updates to policies, and being informed of significant changes in procedures.

44. The Committee should play an active role in ensuring that IFC/MIGA and CAO work together more constructively. In the context of Compliance cases, the Committee should ensure that all parties follow the agreed policies, procedures, and timelines for assessments, compliance reports, and Management Action Plans.

45. **The Review Team recommends that all three CAO functions (Compliance, Dispute Resolution, and Advisory) report to the Board through the CAO VP.** IFC/MIGA Management have proposed that CAO's Compliance function report to the Board, while keeping the reporting lines for the Dispute Resolution and Advisory functions with the President. However, splitting the reporting lines could have three negative impacts. First, it could reduce the perceived impartiality of CAO Dispute Resolution, by aligning Dispute Resolution processes more explicitly with the World Bank's Management. Second, it could reduce the ability of CAO's VP to effectively manage the three functions as one organization. Third, it could reduce the operational complementarity that exists now among the three functions.

46. There are also several benefits to unified reporting of CAO to the Board. Having the CAO Dispute Resolution and Compliance functions report to the Board would be in line with the recent decision taken by the Board to situate the newly established Dispute Resolution function for the World Bank, along with the existing Inspection Panel, within a new Accountability Mechanism reporting to the Board. As to individual Dispute Resolution cases, no decisions are required by the Board. CAO would simply inform the Board about the status of ongoing dispute resolution cases, while maintaining appropriate confidentiality. CAO's Advisory function would both report to the Board and be available to the Board, which could request advice from it. The Board could also review and discuss CAO Advisory products as part of its oversight of CAO and IFC/MIGA E&S performance.

47. With respect to the Compliance function, the Review does not support the introduction of a requirement for Board approval of CAO to proceed to compliance investigations. The decision whether to proceed to investigation is a technical one, based on the application of compliance criteria to evaluate initial evidence. Given the technical nature of the decision, the level of controversy that sometimes surrounds compliance investigations, the fact that the activities in question are those of private companies and not sovereign governments, and the need to maintain the impartiality and independence of CAO in conducting those investigations, **the Review Team strongly recommends that the CAO VP continue to make the determination as to whether to proceed to a compliance investigation, based on the evidence presented and assessed in the compliance appraisal.**

48. In addition, **the Review Team recommends the introduction of (1) a requirement for IFC/MIGA Management to present a Management Action Plan to the Board in response to all CAO compliance investigation reports that find IFC/MIGA non-compliance, and (2) Board review and decision as to the adequacy of each Management Action Plan.** Currently, there is a requirement for IFC/MIGA to present a response to CAO compliance investigations, but no requirement for IFC/MIGA to present an operational, time-bound Management Action Plan that lays out corrective actions for each non-compliance finding, and no requirement for the President of the World Bank Group to approve the IFC/MIGA response. Other IFIs, including the World Bank with regard to Inspection Panel findings, require Management to present such Management Action Plan.

49. The Review Team considers the absence of a Management Action Plan and the lack of Board approval of such a Plan to be a significant shortcoming in the current CAO compliance process. The Review Team recommends introduction of such Management Action Plans in response to CAO investigation findings. Management Action Plans would need to be agreed with the client, and reflect consultation with the complainants. Development of the Management Action Plan in consultation with complainants is an established practice of other IAMs, including the World Bank Inspection Panel. CAO should also have the opportunity to comment on Management Action Plans.

50. The Review Team also recommends that the proposed Board Sustainability Committee approve each Management Action Plan. In practice, this would enable the Sustainability Committee to address any disagreements among IFC/MIGA, CAO, and other parties with regard to non-compliance findings by either (1) approving the Management Action Plan as presented (even if this Management Action Plan, as a result of disagreements, is not fully responsive to all non-compliance findings) or (2) requiring changes in the Management Action Plan to ensure responsiveness of proposed actions to all CAO non-compliance findings.

Recommendation 7: CAO Complaint Handling Times Need to be Shortened

51. Current CAO processes are too lengthy. For a complaint that goes through a dispute resolution process, the average length of time between filing a complaint and concluding the dispute resolution

process, including monitoring of implementation of agreements, amounts to about three years. For complaints that proceed through a compliance review process, the average time is longer. Long delays are particularly problematic for Compliance cases, as remedial actions need to be implemented in response to CAO non-compliance findings and related harm, and timeliness is essential for vulnerable people who are potentially subject to harm.

52. As a result of late filing of complaints and long delays in CAO assessment, compliance, and report clearance processes, CAO investigation reports are often issued at a time when business relationships between IFC/MIGA and the client have ended. After closure of the business relationship, the leverage of IFC/MIGA on their clients to ensure remedial actions is more limited. Extended dispute resolution processes are less problematic, as the process of stakeholder engagement, trust building, clarification of issues, development of options, and crafting of a consensus solution may require a substantial investment of time in order to achieve a full resolution that can be implemented and sustained. **The Review Team recommends significantly shortening some steps in the process, including a more focused assessment process, a shortened appraisal and investigation process, and significantly shortened processes between IFC/MIGA and CAO for what is currently called “report clearance.”**

53. Shortened processes with regard to compliance will require increased resources for to the CAO Compliance functions. Over the past 10 years, the proportion of Compliance cases has increased considerably, as CAO’s Operational Guidelines have shifted the “default” focus of assessment from seeking to establish the basis for dispute resolution to explicitly giving parties the choice between Dispute Resolution and Compliance. Resources allocated to the CAO Compliance function are not adequate to handle the increasing case load of Compliance cases and lower than for compliance reviews in other comparable IAMS. **Significant additional resources for the CAO Compliance function will be required to accelerate compliance processing.** The need for timely resolution of complaints is critical in ensuring that complainants experiencing negative impacts are able to obtain mitigation measures as soon as possible.

Recommendation 8: Efforts to Seek Early Resolution of Complaints Need to Be Strengthened

54. IFC/MIGA should seek early resolution of complaints whenever possible. The Review Team sees two early resolution possibilities: (1) at the assessment stage; and (2) by implementing remedial measures using an “early deferral option” to be introduced as part of the compliance appraisal process. CAO’s Operational Guidelines provide for 120 days for a CAO assessment to understand the issues raised in the complaint and advise the complainants about the CAO functions so that complainants and the client can make informed choices between Dispute Resolution and Compliance. This period can and should be actively used by IFC/MIGA (in a “hands-on” manner rather than a “hands-off” one) to help solve issues raised by complainants by supporting the client. As advocated earlier in this Overview, IFC/MIGA should also be prepared to interact with the complainant during the CAO process, where there is an appropriate way to do so, coordinated with the client and with CAO. There is no need for any change in CAO procedures for IFC/MIGA to be proactive while CAO conducts its assessment. If IFC/MIGA, the client, and the complainants are successful in resolving some or all issues, that result will be reflected in the CAO assessment report and in the parties’ decision as to whether and how to proceed with either dispute resolution or a compliance appraisal.

55. The Review Team recommends that an early deferral option be introduced as part of the compliance process. This would require a change in CAO’s current compliance procedures. If Management indicates in a Management Response, to be submitted at the beginning of the appraisal process, that corrective actions can be carried out, then CAO will consult with complainants and determine whether it would be appropriate to allow a time-bound period for implementation of

agreed measures to address the compliance issues and the allegations of harm raised in the complaint. The decision to investigate or close the case would be deferred during the agreed time period, and the decision after the deferral period would be based primarily on whether agreed corrective actions were implemented.

Recommendation 9: Steps to Protect the Client and Give IFC/MIGA a Formal Voice Early in the Compliance Process Need to Be Enhanced

56. At present, the full text of the complaint is disclosed on the CAO website at the time a complaint is declared eligible. IFC/MIGA and clients have raised concerns that such early disclosure can create reputational and litigation risks for the client. The Review Team recommends that CAO disclose only a brief summary of the complaint at the time the complaint is registered. CAO should disclose the full text of the complaint only if the complaint proceeds to compliance appraisal, in which case it would be disclosed at the beginning of the appraisal process.

57. Moreover, IFC/MIGA Management should be given a formal voice early in the compliance process. Before commencing with the compliance appraisal process, IFC/MIGA should submit a formal Management Response to the complaint in which they provide their views on the issues raised in the complaint. Positions presented by IFC/MIGA Management would be considered by CAO during the compliance appraisal and investigation process. At the beginning of compliance appraisal, the client may also choose to provide a statement on issues raised in the complaint. As the client is not a party to a compliance review process, CAO should not require a client statement, but should consider such a statement if the client chooses to present one. The Management Response and any client statement would be disclosed as part of CAO's public case documents.

Recommendation 10: An IFC/MIGA Framework Needs to Be Established for Remedial Action in Cases in which Non-compliance Contributes to Harm

58. Remedial actions carried out by IFC, MIGA, and their clients in response to CAO non-compliance findings and to correct related harm are at present mostly unsatisfactory. In its monitoring data, CAO reports that remedial actions are adequate to bring the project into compliance in only 13 percent of cases. For 37 percent of cases, actions are partly satisfactory, and for 50 percent of cases, actions are unsatisfactory. Such results raise questions about the commitment of IFC/MIGA to their E&S obligations and the effectiveness of IFC/MIGA in holding their clients accountable to E&S obligations.

59. This Review makes several recommendations on how to create a stronger framework for remedial action. As the first element of this framework, clients should set aside their own resources to remedy instances of non-compliance with E&S requirements. The foundation for such a framework is stronger contingency mechanisms that trigger client action, using client resources, to remedy client non-compliance. Effective contractual mechanisms should be implemented so that a client's E&S commitments continue past the time when its financial relationship with IFC/MIGA ends, for at least two years. Whether in the form of E&S contingency reserves, insurance, performance bonds, or other contingent funds, such mechanisms and their triggers can be specified in IFC/MIGA covenants with the client, with provisions allowing IFC/MIGA to exercise remedies if the client refuses to use the contingent funds for the intended purpose when triggered. These contingent resources can be used both in response to IFC/MIGA supervision, where IFC/MIGA identify non-compliance and there is a need to trigger the contingency, and in the context of complaints (whether CAO Dispute Resolution and Compliance cases, or complaints made directly to the client and/or IFC/MIGA). **The Review recommends that IFC/MIGA develop one or more E&S contingent funding requirements, with**

associated legal covenants, that will be binding on the client during the period of IFC/MIGA involvement, and for at least two years after the end of other aspects of the financial relationship.

60. The second element in a remedial action framework is IFC/MIGA accountability to contribute to remedy where there is a CAO (or IFC/MIGA Management) finding of IFC/MIGA non-compliance that contributed to harm by enabling or failing to prevent harmful action or inaction by the client. Drawing on the approach outlined by the Dutch Banking Sector Agreement Working Group on Enabling Remediation, the Review Team recommends that the Board establish the principle that IFC/MIGA contribution to harm triggers an obligation for their contribution to remedy.

61. Operationally, the form of IFC/MIGA contribution would be determined case by case. In CAO Compliance cases, it would be reflected in a Management Action Plan, approved by the Board, and monitored by CAO. In cases where the client accepts responsibility and has resources for remedy, IFC/MIGA contributions may include technical support to the client. Where the client does not accept responsibility but has resources, IFC/MIGA's contribution will be to use their leverage over the client to the fullest extent possible to generate remedial action by the client. Where client lacks resources, IFC/MIGA may mobilize additional resources with and for the client on a commercial basis.

62. Only in cases where there is no prospect of enabling or requiring the client to commit resources would the question of IFC/MIGA funds outside the scope of the investment agreement arise. In such cases, the Review Team recommends that the Board and/or IFC/MIGA Senior Management establish a mechanism for determining whether, how, and to what extent a commitment of IFC/MIGA resources could contribute to remedy. Those commitments could be made in the context of CAO cases (whether Compliance or Dispute Resolution) or in other circumstances in which IFC/MIGA acknowledge a contribution to harm and seek to contribute to remedy. The Review Team recognizes that IFC and MIGA do not wish to commit their resources to remedy harm that is the sole responsibility of the client, and that they do not want to establish any principle, mechanism, or precedent that would suggest that such commitments are possible or desirable. However, at issue here is the limited number of situations in which there is a demonstrable IFC/MIGA contribution to harm through non-compliance with E&S standards and procedures, and no client resource available for remedy. In this situation, the Review Team believes that IFC and MIGA should accept responsibility to act on their own account to provide remedy, while recognizing that full remedy may not be possible.

Recommendation 11: The CAO Operational Guidelines Need to Be Revised and a New, Board-Approved Policy for CAO Created

63. CAO follows a set of Operational Guidelines, last revised through a consultative process in 2013, and approved by the President. For clarity and completeness, the Operational Guidelines require numerous revisions in the following areas: the eligibility criteria; the objectives of the Compliance function; the criteria for compliance appraisals and investigations; access to information and disclosure policies to be adhered to by CAO; investigation standards; and the monitoring process.

64. Moreover, a number of recommendations provided in this Review, if adopted by CAO, would need to be reflected in revised Operational Guidelines.

65. In addition, the Review recommends that the Board approve an overarching policy to guide CAO's operations, to replace the 1999 Terms of Reference. The policy would lay out key principles, which would include, among others:

- The three-part mandate of the CAO as the independent accountability and recourse mechanism for IFC/MIGA to resolve complainants from stakeholders affected by the environmental and social

impacts of IFC/MIGA investments, assess IFC/MIGA compliance with their E&S policies, and provide advice to IFC and MIGA on ways to strengthen their E&S performance

- The organization of CAO, led by a Vice President, appointed by the Board based on nominations from a multi-stakeholder selection committee
- The operational independence of CAO from IFC and MIGA Management and the Board
- The role of the Board in the CAO process, including oversight of CAO's operations, approval of Management Action Plans, and oversight of their implementation
- Roles and responsibilities of CAO, IFC/MIGA, the complainant, the client, and other stakeholders in the CAO process.

66. The Review recommends that the Board provide guidance to CAO on the overarching policy, reflecting the Board's response to this Review. The policy could then be drafted by CAO in consultation with IFC, MIGA, and reviewed by World Bank Group General Counsel. The overarching policy should be approved by the Board. CAO would subsequently revise its operational guidelines for consistency with the policy, as well as to address the specific recommendations of this Review. There should be public consultation and disclosure for the draft policy and for the updated Operational Guidelines.

67. A summary of recommendations, and index to the sections where they are discussed in this Review, is contained in appendix A.

[Resource Implications of the Recommendations in this Review](#)

68. The Review makes numerous recommendations for IFC, MIGA, and CAO. Costing these recommendations was beyond the scope of the Review. However, the Review Team notes that all the recommendations in this Review aim to support and improve the environmental and social performance of IFC, MIGA, and their clients. Specifically, the recommendations aim to ensure that IFC, MIGA, and CAO have the policies, procedures, and capacities they need to ensure accountability for meeting the E&S standards and requirements to which they have committed themselves. Relative to the scale of IFC and MIGA portfolios and annual commitments, the resources required are modest. Relative to the scale of avoided E&S impacts, reputational risk, and potential for development impact through enhanced E&S benefits, the return on investment could be substantial.

Section 1. Approach to the Review

69. The External Review of IFC/MIGA/CAO Environmental and Social Accountability was requested by the World Bank Group Committee on Development Effectiveness (CODE) on behalf of the IFC and MIGA Boards of Executive Directors. Terms of Reference were issued in May 2019 (see appendix B). CODE appointed a Review Team consisting of six outside experts, chaired by Peter Woicke, former Executive Vice President and Managing Director of the World Bank. Brief bios of the six members of the Review Team are provided in appendix C.

70. Key issues as stated in the Terms of References were as follows:

- The optimal governance arrangement for CAO
- The role and effectiveness of CAO, including its Operational Guidelines (2013); IFC and MIGA's responsiveness to concerns regarding adverse E&S impacts of the business activities of their clients; impacts of current CAO processes on stakeholders; and uptake of learning from CAO's work at the level of IFC and MIGA's policies, standards, and practices
- Any needed calibrations to CAO's complaint's handling processes or Operational Guidelines to fulfill its role and improve its overall effectiveness and efficiency
- Any needed calibrations to IFC/MIGA's response to complaints on E&S matters, including ways in which IFC and MIGA respond to CAO processes, as well as to other complaints or concerns not related to CAO
- Any need to develop complaint/grievance mechanisms through which project-affected people and communities may raise concerns directly with IFC/MIGA Management.

71. The Review Team submitted a Scoping Report to CODE in September 2019. The Scoping Report outlined in detail issues to be addressed by the Review Team. Between October 2019 and March 2020, the Review Team conducted an extensive review of documents and input notes provided by IFC/MIGA and CAO. It held discussions with IFC/MIGA Management and staff, as well as with CAO Management and staff. Members of the Review Team also met with the President of the World Bank Group and with Executive Directors and Advisors of the World Bank Group Board of Directors.

72. In addition, CODE established a Reference Group based on nominations of IFC/MIGA and CAO. The Reference Group consisted of IFC/MIGA clients that were involved in CAO dispute resolution and/or compliance review processes, as well as representatives of financial intermediaries that implement IFC/MIGA sustainability policies when they receive IFC investments/MIGA guarantees. The Reference Group also included civil society organizations engaged in CAO and other IAM processes; representatives of other IFIs and their IAMs; and academics with expertise in E&S accountability and the role of IAMs. A list of Reference Group members is provided in appendix D. The Terms of Reference specified that the Review Team should consult with members of the Reference Group. All members, except a few who could not be reached, were interviewed either by phone or in person. It is important to emphasize that the interviews with the Reference Group do not constitute a public consultation process with relevant stakeholders. Neither the Terms of Reference for the Review Team nor the Scoping Report were made public. The Terms of Reference for the Review did not provide for a public consultation process.

73. The Review Team provided a draft report to IFC/MIGA and CAO for comments in May 2020 and considered these comments in their final report submitted to CODE and COGAM.

74. It should be emphasized that the Review Team conducted the Review under tight resource constraints. The Review Team met three times (in September and October 2019 and in March 2020) in Washington, DC for interviews and consultations. However, the budget constraint did not allow the Review Team to conduct any site visits to meet CAO complainants and IFC/MIGA clients involved in

those complaints. Rather, as mentioned, all interviews with clients and representatives of complainants were conducted by phone.

Section 2. Understanding Institutional Accountability for E&S Performance: Principles and Mechanisms

2.1. Evolving E&S Accountability Principles in the Private Sector

75. The focus of the private sector on sustainability and its willingness to accept accountability for environmental and social harm done to local communities is a relatively recent phenomenon. With the growth of multinational companies, the Organization for Economic Co-operation and Development (OECD), the United Nations (UN), and the International Labour Organization (ILO) started to issue guidelines as early as 1970 on how to respect human rights; avoid environmental harm; and respect internationally accepted labor laws, such as the right to join unions and prohibitions on the use of child labor. Guidelines such as these spurred debate among economists as to whether private companies should pay attention exclusively to enhancing shareholder value or be concerned about stakeholders, as well. The discussion was then very much influenced by Milton Friedman, the twentieth century's most prominent advocate of free markets, who in 1970 argued that the fundamental obligation of managers is to return profits to shareholders and not to invest corporate funds in endeavors that they would find socially beneficial but would reduce shareholders' returns.

76. This paradigm to a large extent survived well into the new century. However, a new grassroots movement for corporate social responsibility, driven by civil society organizations (CSOs), started in the 1970s in the United States and Western Europe, and had become global by the early 1990s. Campaigns against sweat shops and against underpaying local farmers (Fair Trade Movement) were organized, and violations of human rights were criticized.

77. As the pressure from CSOs widened from an initial focus on extractive industries to include the entire private sector, the views of business schools and economics faculties slowly shifted and an emphasis on all stakeholders, rather than merely shareholders, gained the upper hand. Boards of large mining companies became more sensitive to employee and community safety concerns, environmental degradation, and the negative impacts of forced resettlement, especially when indigenous people were involved. These boards recognized that their companies' official permits to operate—provided by local governments—often proved to be of little value when adversely affected local communities were able to shut down these projects, at least temporarily. As a result, the International Council on Mining and Metals (ICMM) was founded in 2001. Most of the large mining companies joined as members. Among its principles, ethical business practices and social and economic development featured prominently. Recognizing the need for a “social license to operate” along with formal government approvals, ICMM and other business associations (such as Business for Social Responsibility) began to develop guidance for business on how to structure community engagement, manage impacts, and provide benefits.

78. Another milestone was the establishment of the Equator Principles. Financial institutions that had co-financed IFC projects had accepted IFC's Safeguards being applied to those projects. In 2003, a number of large international financial institutions agreed to apply these Safeguards to all their project financings—even when IFC was not involved.

79. Over the next few years, a number of leading companies, activist shareholders, academic research, continuous pressure from CSOs, and evolving government regulations pushed a growing number of companies operating in emerging market and lower-income countries to accept responsibility for contributing to environmental and social sustainability. The Institute for Human Rights and Business (IHRB) stated in 2015 that ““The contribution of business is about much more

than creating jobs, paying taxes and developing technology. It is also about determining the nature and purpose of business in a world where economic growth has delivered wealth alongside inequality, and prosperity alongside environmental damage.”³ John Ruggie, a Patron of the Institute, had previously served as the UN Special Representative for Business and Human Rights. He drafted the Guiding Principles on Business and Human Rights in 2011. The Guidelines called for governments and business enterprises to always observe the principles of “Protect, Respect and Remedy.” These Guidelines also advocate for the establishment of grievance mechanisms at business enterprises for affected people and to provide remediation for harm caused.

80. Whether all businesses that joined the UN Global Compact and other global sustainability initiatives have fully met their commitments remains an open question. Yet the trend in the private sector to focus on sustainability clearly gained momentum. The *Harvard Business Review* published an article in 2015 that made the business case for environmental sustainability.⁴ While some specialized investment funds such as Calvert, for many years, had made it their policy to invest only in companies that had taken account of E&S risks, more and more pension funds—and prominently, the Norwegian sovereign wealth fund, the world’s largest—joined in to announce that they would prioritize companies in their portfolios that met sustainability criteria. In 2019 the world’s largest private asset fund company, BlackRock, admonished CEOs of its investee companies to pay more attention to investments that mitigate the environmental and social impacts associated with their operations. In 2020, the prominent international consulting company McKinsey reported in “The ESG Premium: New Perspectives on Value and Performance” that a majority of executives of major companies now recognize that environmental, social, and governance (ESG) programs and investments not only create long-term value but increasingly even short-term value for their companies and shareholders.

81. While there is no comprehensive analysis of differences in perspectives on sustainability among business leaders in high-income, emerging market, and lower-income countries, numerous studies suggest that commitment to sustainability is uneven within and across these categories, and that the need to build understanding and capacity for strong E&S performance is greater for businesses in emerging market and lower-income countries. Therefore, IFC/MIGA must continue to play a major role in helping, advising, and financing private sector clients in developing countries so that they will be able to compete in the future with companies that have had the necessary insight and capability to improve their E&S performance, including their engagement with communities and stakeholders affected by their operations.

2.2 E&S Accountability – Policy Evolution and Implementation

E&S Policy Evolution

82. It was not until 1993—as a result of increasing pressure from civil society organizations, and following an independent review—that IFC adopted environmental review procedures similar to those of the World Bank and started to add a number of environmental specialists to oversee the due diligence process. In 1998, IFC adopted most of the World Bank’s Environmental and Social Safeguard Policies, and developed its own Policy on Disclosure of Information, with the aim “to be open about its activities, to welcome input from affected communities, interested members of the public and business partners and to seek out opportunities to explain its work to the widest possible audience.”⁵ Following soon after, MIGA also adopted the World Bank’s Safeguard Policies and developed its own Policy on Disclosure.

³ Institute for Human Rights and Business, *Business and the Sustainable Development Goals: Mind the Gap – Challenges for Implementation*. IHRB State of Play Series: Volume Four. (London: IHRB, 2015).

⁴ *Harvard Business Review*.

⁵ IFC, Policy on Disclosure of Information, 1998.

83. A major policy development occurred in 2006 when IFC adopted a new Policy and Performance Standards on Social and Environmental Sustainability that significantly changed the structure and comprehensiveness with which IFC addresses E&S issues, and defined more clearly the roles and responsibilities of IFC and those of its private sector clients. Two strands of policies were created:

- A set of eight Performance Standards (PS) that define clients' responsibilities for managing the environmental and social risks of their projects. These PS also incorporate requirements for more comprehensive information disclosure.
- A Sustainability Policy that defines IFC's responsibility to support clients to achieve the Performance Standards over time.

84. The 2006 policy further developed the categorization of projects intended to reflect the magnitude of E&S risks and impacts, from projects with potentially significantly adverse E&S risks/impacts (Category A) to potentially limited adverse E&S risks/impacts (Category B) to potentially no adverse risks/no adverse impacts (Category C). It also includes a category for financial intermediaries (Category FI). MIGA adopted the same Policy and Performance Standards in 2007, with modifications to reflect its role as an investment guarantor.

85. IFC adopted a revised Sustainability Framework in 2012, which is the policy that is currently in force. MIGA adopted the revised Sustainability Framework in 2013. The revised policies keep the overall structure of the 2006 Sustainability Framework in distinguishing between the Sustainability Policy, which sets out the responsibility of IFC, and the PS, which are the responsibility of the client. The revised Sustainability Framework now includes an Access to Information Policy (replacing the 2006 Disclosure Policy), which provides for ongoing disclosure throughout the lifetime of the project and not just before Board approval. Substantive changes were made to the Performance Standards to include rigorous requirements around social issues, highlighting the role of the private sector with regard to human rights, as well as a greater focus on gender equality and supply chain and resource efficiency. In addition, the 2012 Sustainability Policy further developed the risk/impact categorization of projects to include more detail on Category FI projects.

86. Application of the Sustainability Framework and Performance Standards is supported through a series of Good Practice Notes, Good Practice Handbooks, and Tip Sheets, the majority of which have been created since 2012. They include topics such as HIV in the workplace, security forces, grievance mechanisms, hydropower, and agro-commodity supply chains. The majority of these are external and a resource for both the client and the IFC/MIGA's E&S teams, as guidelines to be adapted to the particular needs of a project and its context.

General Policy Challenges

87. While it is not the role of this Review to examine the adequacy of the Sustainability Policies, a number of general issues are relevant to an assessment of accountability:

- A central theme of the Sustainability Framework is collaboration with clients to help them continually improve their sustainability performance over a reasonable period of time. This directive does leave IFC/MIGA open to questions about whether a client has met relevant aspects of the PS to the required level at a particular point in time, especially when standards are qualitative (such as requirements for stakeholder engagement and grievance mechanisms in PS 1) and when particular terms are open to interpretation (such as "primary supplier" in PS 2 and PS 6).
- Investment timing also creates challenges. As discussed in para. 27 of the IFC Sustainability Policy (para. 25 of the MIGA Policy), IFC/MIGA may start their engagement with a client at different stages in a project/business activity. In some cases, such engagement may occur when a business

activity is already well developed. If IFC/MIGA enter at such late stage, it is often difficult to agree on how to address gaps in the achievement of the Performance Standards.

- Some Reference Group consultees have mentioned that the policies are “first class,” but rather aspirational and difficult to achieve in the short term. In some emerging markets, suitable clients are not easy to find and even if such clients are identified, IFC must spend a long time with the client, cultivating knowledge and capacity.
- Over the years the financing modalities available to IFC have evolved considerably, leading to concerns about the clarity and application of policies in the context of advisory, FI, and private equity investments, and in investments through the IFC Asset Management Company.
- More could be done to frame the Sustainability Framework as a value proposition for good business practice. IFC and MIGA could also improve their marketing to stress their comparative advantages, such as the availability of highly skilled E&S experts to help a client improve its performance and add value for shareholders and stakeholders.

Policy Implementation

88. IFC/MIGA’s key challenge is implementation of the policies with clients of varying levels of E&S knowledge, capacity, and commitment, as well as a diverse range of local contexts. The general guidance for IFC and MIGA on how to implement the policies through E&S appraisal and supervision is set out in their respective E&S Review Procedures (ESRP) Manuals. MIGA’s latest ESRP was adopted in 2014 and is harmonized with that of IFC but adapted to MIGA’s role as a political risk insurance provider. The latest IFC ESRP dates from October 2016,⁶ and is the main document referred to in the discussion that follows.

89. The IFC E&S review procedures follow a typical investment project cycle, with key roles played by a Sector Lead and a Lead Environmental and Social Specialist (LESS). To date, the LESS has almost always been an environmental specialist, perhaps due to the initial emphasis of the Sustainability Policies on environmental issues. The LESS can/will bring in additional expertise, through a social specialist and other environmental experts, as required. Specialists are expected to exercise their knowledge and expertise in making assessments/judgments, but any deviations from the Manual must be agreed and approved by the Manager of the ESG Investment Group and recorded and stored in iDesk/IFCDocs. Overall, the role of the ESG Investment Group is stated in the ESRP to be the following:

- Conduct due diligence of the proposed investment activity.
- Assess client E&S management capacity and identify gaps.
- Assist the client in developing measures to avoid, minimize, mitigate, and where residual impacts remain, compensate/offset for E&S impacts, consistent with the PS.
- Categorize the project to specify IFC’s institutional requirements to disclose project-specific information to the public, and to determine which E&S assessment and management requirements will apply to the client.
- Identify opportunities to improve E&S outcomes.
- Monitor and document the client’s E&S performance throughout the life of IFC’s investment.
- Disclose information about its institutional and investment activities in accordance with the Access to Information Policy.

90. E&S risk management starts with an initial review in which potential risks and impacts are identified, based on what is known from secondary sources about the physical footprint of the project, sector, and locational context. A provisional categorization is also made at this stage. These potential risks and impacts and the proposed categorization are discussed in a Concept Review Meeting. In the subsequent appraisal phase, IFC/MIGA will assist the clients in reviewing all E&S risks and, guided by

⁶ IFC E&S Review Procedures Manual; MIGA E&S Review Procedures Manual.

the Performance Standards, identify those that are relevant to the project. For certain risks, such as for biodiversity loss and labor influx, specific plans may be needed that identify the risks and develop mitigation measures. Appraisal design is based on the nature of the proposed investment and the risks, with categorization being confirmed at the end of the appraisal after review of all information collected.

91. For projects in which there are affected communities, clients are required to carry out stakeholder engagement appropriate to stakeholder needs and develop a stakeholder engagement strategy to be adapted over the life of the project. In the case of high-risk projects that are likely to generate potential significant adverse impacts on communities, there is a need for the client to demonstrate through stakeholder participation that there is broad community support (or free, prior, informed consent, in the case of indigenous peoples) for the project.

92. If at the point of presentation to the Board there are still outstanding actions that need to be taken to meet the PS, an Environmental and Social Action Plan (ESAP) will be developed that sets out key environmental and social activities that must be carried out over a specific time period to enable compliance with the PS.

93. Reference Group consultees have stressed the need to put more emphasis on this appraisal stage and for greater involvement of IFC/MIGA in ensuring that the appraisal is carried out as comprehensively as possible. Some consultees expressed the desire to widen the scope of the appraisal phase to carry out a more rigorous analysis of the local political economy context so that there is a better understanding of underlying issues that can potentially create E&S risk and conflict and that need to be addressed with skill. The appraisal phase can take many months and even years to complete for large-scale projects, but if carried out in a comprehensive way can ensure that risks are managed well going forward.

94. Supervision of environmental and social compliance varies depending on the risk level of the project. In most cases, supervision will include the preparation of an Annual Monitoring Report (AMR), except in rare cases such as listed equities, for which the reporting is carried through alternative means. For high-risk projects, supervision may include site visits by IFC/MIGA as well as independent external monitoring, but for low-risk projects, a site visit may occur as infrequently as once every three years. Certain risks that are complex and sensitive, such as resettlement and economic displacement, have well developed processes for monitoring and close-out, but not all risks have such well-developed systems in place.

95. Even where supervision tools exist, they are not always comprehensive. For example, the AMRs do not systematically collect detailed information about community awareness of and access to the project-level grievance mechanism, or on the disposition of cases that come to the grievance mechanism. This is unfortunate as many E&S practitioners in the different IFIs highlight that certain risks are difficult to identify during appraisal but become apparent during supervision. Moreover, Reference Group members consulted during the Review stressed the need for regular IFC support, not just during appraisal but also during project implementation.

Issues and Recommendations

96. **Enabling Clients to Meet the Performance Standards over Time.** IFC/MIGA Sustainability Policies state that clients may not fully meet the Performance Standards at the initial stages of the project, but will be required to do so “within a reasonable period of time” (IFC Sustainability Policy para. 22; MIGA para. 19). However, IFC/MIGA determinations of how much time is “reasonable” are not guided by any explicit procedure or criteria.

Recommendation: IFC/MIGA should specify more clearly the criteria and procedures to be used during appraisal to determine the amount of time and the level of capacity-building support that clients will receive in order to comply with the PS.

97. **Performance Standards that Need to be Met at the Commitment Stage of a Project.** Some aspects of the PS present such high risks that there is no possibility for flexibility, and they must be met at the commitment stage of a project. Examples include ensuring that there is no land entry without prior compensation, or, for work sites, that specific safety measures are in place.

Recommendation: IFC/MIGA should review the PS and identify all requirements that need to be complied with before a project can be approved.

98. **Reducing Variations in Interpretation of Policy.** The PS are deliberately designed with flexibility to accommodate differing client capacity and project contexts. Determining the appropriate standards and implementation measures requires the use of professional judgment by highly experienced E&S specialists. The recent reorganization of IFC's E&S risk management and the creation of the IFC E&S Policy and Risk Department should enable a check on the range of interpretation, and provide quality assurance, at least for new projects. Guidance needs to be provided for policy interpretation to reduce the potential "grey area" of interpretation or at least give greater clarification of why certain decisions are taken.

Recommendations:

- IFC/MIGA should develop tools to record and track key decisions during risk assessment, development of mitigation measures, and monitoring.
- IFC/MIGA should provide reasoned justifications for decisions.
- The E&S Policy and Risk Department should assist in the clarification of policy interpretations for each project and the rationale behind them.

99. **Making Due-Diligence More Comprehensive during the Appraisal Stage.** IFC/MIGA works with clients early in the project cycle to gain an appreciation of local context. Nonetheless, the appraisal stage could benefit from more detailed investigation as well as a broadening of scope, including a more comprehensive appraisal of the local political economy context, particularly in fragile States.

Recommendations:

- IFC/MIGA should work with clients early in the project cycle to gain an appreciation of local context.
- IFC/MIGA should conduct a political economy analysis and, if required, a conflict analysis.

100. **Updating of the ESRP Manual.** Since the Manual was adopted in 2016, there have been developments in E&S practices and organizational changes within IFC/MIGA that should be reflected in the document. The Manual would also benefit from a clearer presentation.

Recommendation: The structure of the ESRP Manual should be made clearer and the roles of the new E&S Policy and Risk Department should be incorporated.

101. Recommendations regarding access to Information and the project-level grievance mechanisms are discussed in section 8.

2.3. The Evolution of International Accountability Mechanisms

102. The call by civil society for heightened attention to E&S accountability in the 1990s also resulted in the creation of the first mechanism whereby individuals and communities could file complaints if they felt that they had been harmed by a World Bank (IBRD/IDA) project. This was the World Bank Inspection Panel (IPN), which was established in 1993 in response to “grassroots level uprising.” Civil society organizations, working with “local peoples” movements, expressed strong dissatisfaction with the World Bank, labeling several of its projects “development disasters” that harmed poor and vulnerable people.⁷ Momentum for change increased at the 1992 Earth Summit when the Rio Declaration called for all citizens to have access to information, access to public participation, and access to justice on environmental issues. At the same time, the World Bank faced fierce criticism over a power dam project on the Narmada River in India that involved the resettlement of more than 120,000 people. The Morse Commission identified serious compliance failures by the World Bank.⁸ In addition, a World Bank task force reviewed the implementation performance of World Bank projects and found an “internal approval culture” that rewarded staff for pushing through as many projects as possible, without adequate attention to environmental and social impacts.⁹ This led to pressures from the US Congress, where the responsible subcommittee threatened to cut off funding for the next IDA replenishment unless the World Bank instituted reforms, including establishing an accountability mechanism.¹⁰

103. The establishment of the World Bank IPN was a turning point in governance structures of international organizations. For the first time, international organizations ceded some of its power to the public. Ibrahim Shihata, then General Counsel at the World Bank, and widely seen as the main architect of the IPN, noted: “No standing mechanisms independent from the governing organs of such organizations have hitherto existed to hear and investigate complaints by private entities and groups affected by their activities regarding deviations from their established policies and procedures.”¹¹

104. Soon after the establishment of the IPN in 1993 for the World Bank, other IFIs followed suit. Today, independent accountability mechanisms (IAMs) are a regular feature of governance structures of IFIs (see). In 1995, the Asian Development Bank (ADB) established an inspection function. The African Development Bank (AfDB)/Independent Review Mechanism (IRM) and the European Bank for Reconstruction (EBRD)/Project Complaint Mechanism (PCM) established their mechanisms in 2003, and the Inter-American Development Bank (IDB) launched the Independent Consultation and Investigation Mechanism (MICI) in 2004. The Black Sea Trade and Development Bank (BSTDB) and the Caribbean Development Bank (CDB)/Project Complaints Mechanism (PCM) followed suit in 2015, along with the Green Climate Fund (GCF) in 2017. The Asian Infrastructure Investment Bank (AIIB) established its mechanism (PPM) in 2018. The United Nations Development Programme (UNDP), in 2016, became the first UN organization to establish a mechanism. Moreover, bilateral institutions are increasingly adopting mechanisms.¹² (For a complete list of IAMs, see appendix E.1, and for

⁷ See World Bank, *The Inspection Panel, Accountability at the World Bank, 25 Years* (November 2019), p. 14.

⁸ Ibid.

⁹ Ibid., p. 17.

¹⁰ Ibid.

¹¹ Shihata, Ibrahim F.I., *The World Bank Inspection Panel*, published for the World Bank, Oxford University Press, 1999.

¹² Bilateral IAMs include those of France (Agence française de développement, ADF/French Development Agency); Japan (Japanese Bank for International Cooperation, JBIC, and Japanese Investment Cooperation Agency, JICA); the Nordic Investment Bank (NIB); and the United States (Overseas Private Investment Corporation, OPIC—recently renamed the Development Finance Corporation, DFC). A unique approach to a complaint mechanism is the joint mechanism (ICM) operated by the German Development Cooperation/Deutsche Investitions und Entwicklungsgesellschaft (DEG), the Dutch Entrepreneurial Development Bank (FMO), and the French Proparco; project-affected people can submit complaints to the ICM concerning projects funded by any of the three institutions.

comparisons of their features, in terms of functions, governance structures, compliance review reports, Management Action Plans, monitoring mandates, and Advisory role, see tables E.2–E.7.) Bilateral institutions provide for such complaint mechanisms in spite of the fact that these institutions are subject to national jurisdictions and unlike most IFIs do not enjoy immunity before domestic courts.

105. The complaint mechanism for IFC/MIGA was established only in 1999, as IFC first resisted the establishment of such a mechanism. However, a loan by IFC to the Spanish electric utility Endesa for the construction of a hydroelectric dam on the Upper BioBio River in Chile caused the World Bank Board to reconsider the value of such a mechanism for IFC and MIGA. An independent commission found that IFC had not adequately upheld the World Bank’s Safeguard Policies regarding involuntary resettlement of indigenous communities.¹³

106. The Office of the Compliance Advisor Ombudsman (CAO) was established with a structure significantly different than the IPN. While the IPN was designed as a “quasi-judicial instrument” that would investigate complaints that allege that the World Bank policies have not been adhered to, the CAO’s main instrument was dispute resolution. In addition, the CAO was provided with an advisory role and, in its original design, a somewhat limited Compliance function. Consensus-based, more flexible, and less publicly visible dispute resolution was considered preferable to address complaints on private sector projects. Today, all IAMs offer dispute resolution and compliance review processes as an option for complainants to choose and have at least a limited advisory mandate. A latecomer has been the IPN, which only through a recent policy reform has received a formal advisory. The IPN itself does not have a dispute resolution function, but recent reforms decided that a dispute resolution function will be set under the World Bank Accountability Mechanism. Just as the IPN, after its creation, set in motion a process for IFIs to establish IAMs as part of their governance structures, CAO has set in motion a process of all IAMs offering both dispute resolution and compliance review processes to complainants, and seeking institutional reform through provision of advice based on lessons from complaints handling.¹⁴

107. CAO has been reviewed three times, in 2003, 2006, and 2010. All these reviews were initiated by CAO. The first and second reviews included extensive consultations with external stakeholders, surveys of stakeholders, and site visits. Reviews led to adjustments in the Operational Guidelines (OGs) in 2004, 2007, and 2013. For each revision, draft OGs were subject to consultation with external stakeholders.

Section 3. Financial Intermediaries and E&S Accountability

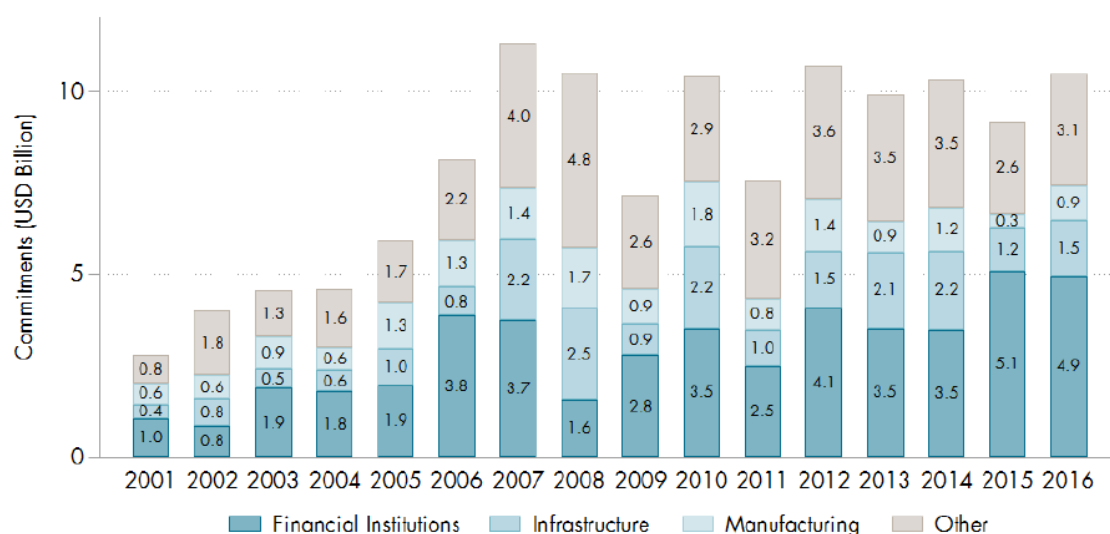
108. Since 2000, IFC has substantially expanded its business with financial intermediaries (FIs) in developing countries. Annual investments in FIs (loans and equity) rose from roughly \$1 billion to nearly \$5 billion annually from 2001 to 2016 (see figure 3.1). Investment in FIs has fluctuated between 30 percent and 50 percent of IFC’s total commitments.

¹³ See CIEL, “Independent Review Confirms IFC Covered Up Social and Environmental Impacts from Chilean Dam Project,” June 30, 1997 (<https://www.ciel.org/wp-content/uploads/2015/05/prbio2.pdf>). See also Maartje van Putten, *Policing the Banks’ Accountability Mechanisms for the Financial Sector*, McGill-Queen’s University Press (2008), pp. 176–77.

¹⁴ The IAM of the ADB was established in 1995, before CAO was launched. It was originally modelled after the World Bank Inspection Panel and only had a compliance investigation function. A dispute resolution process was introduced in 2003.

Figure 3.1. IFC Commitments by Main Sector, 2001–16

Figure 5: IFC commitments by key expertise areas, 2001-2016



Source: Center for Global Development.

109. IFC's FI investments include equity stakes in FIs; lending to FIs in order for them to un-lend to micro, small, and medium enterprises (MSMEs); and long-term loans to FIs to enable them to provide long-term funds to their corporate clients. In addition, IFC makes available trade finance facilities to local FIs, particularly when liquidity for export/import finance is limited or nonexistent. IFC also makes equity investments in or provides long-term loans to private equity funds that invest in private companies in developing countries. More broadly, IFC invests in commercial banks, private equity funds, and other kinds of FIs that make a wide range of investments in emerging markets. In some cases, the FIs make corporate and project finance investments that are similar to those that IFC itself might make.

110. IFC's primary goals in expanding its investments in FIs have been to expand access to credit for MSMEs, and to create credit markets, particularly longer-term markets that are often nonexistent in these countries. Investing in local FIs enables IFC to expand access to credit at substantially lower transaction costs than if IFC invested directly in individual MSMEs.

111. IFC and MIGA have committed to assess and support the E&S performance of FIs in which they invest, and have created systems and procedures to do so within the framework of their Performance Standards. When IFC and MIGA published their first Sustainability Policies and Performance Standards in 2006, FIs were explicitly included. All FIs were required to establish a Social and Environmental Management System sufficient to meet IFC/MIGA requirements. FI clients with portfolios (or ringfenced IFC/MIGA investments) assessed as low risk were required to apply IFC's Exclusion List (a set of illegal, highly damaging and/or morally problematic activities in which FIs may not invest IFC funds) and to ensure the compliance of sub-projects with relevant national laws. FI clients with higher-risk portfolios/investments were required to apply the Performance Standards to the sub-client investments that presented higher risks. Starting in 2010, all FI clients were also required to apply relevant portions of PS2 (Labor) to their own workforce practices.

112. As noted, IFC's efforts to assess and support E&S performance by FIs are noteworthy and have been viewed as market leading. Its Performance Standards have been voluntarily adopted by more than 100 banks, development finance institutions, and export credit agencies that are signatories to the Equator Principles. The Principles are the basis for the signatories' E&S due diligence and

supervision. Together, these banks and agencies account for the majority of international private project and corporate finance in developing countries.

113. However, the scale of IFC's involvement in the FI sector, and the complexity created by translating IFC's Performance Standards into a set of requirements that would be meaningful for FIs, have raised questions about IFC's ability to assure itself of the E&S performance of its FI clients. Although IFC/MIGA have committed to assess and support the E&S performance of FIs in which they invest, the way in which IFC applies E&S responsibilities to FI clients depends on the type of investments that the FI makes with IFC funding.

114. The interpretation of how IFC's Performance Standards apply to FIs can be complex, and has become a source of significant concern for CAO and for NGOs that seek to hold IFC accountable for the E&S performance of its investments. In 2010, CAO prepared an Advisory Note to support IFC's first update of its Sustainability Policy and Performance Standards.¹⁵ The Advisory Note included a review of IFC's approach to E&S performance in its FI investments. Based on a sample of eight FI investments, the Note found that there were gaps between IFC's E&S requirements for FIs and their implementation. Specifically, it found that IFC E&S specialists were not always given adequate time or budget for due diligence or supervision of FI investments, and that not all IFC FI investment officers saw the assessment and strengthening of FI E&S management capacity as an important aspect of their FI transactions.

115. When IFC updated the Performance Standards in 2012, it also created an Interpretation Note further clarifying how the Performance Standards apply to its FI investments.¹⁶ The Interpretation Note included risk categorization for FI investments (FI-1 for significant risk, FI-2 for limited risk, and FI-3 for minimal risk investments), with increasing E&S requirements for FIs in a higher risk category. It also provided detailed guidance on the application of PS 1, the requirement for FIs to create an Environmental and Social Management System (ESMS—renamed from SEMS, Social and Environmental Management System) scaled to the risks in IFC's investments in the FI. The Note specified IFC ESMS requirements for FIs, including the FI's E&S policy, E&S risk management capacity, due diligence, investment monitoring and reporting, and external communications mechanism (for transparency and response to complaints). IFC also increased the number of E&S staff dedicated to FI investments.

116. In 2012, the CAO Vice President commissioned an audit of a larger sample of IFC FI investments (63 investments with commitment dates between 2006 and 2011). That audit amplified the findings of the 2010 Performance Standards Review Advisory Note. The FI audit made three major findings:

- IFC did not have effective procedures in place to assure itself that its FI clients were effectively managing E&S risks at the sub-project level.
- IFC's focus on the establishment and operation of SEMS did not necessarily assure IFC of FI client capacity or commitment to meet its E&S requirements.
- IFC could do more to harmonize FI E&S requirements among development finance institutions.¹⁷

¹⁵ CAO, *Advisory Note: Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information* (Washington, DC: CAO, May 2010).

¹⁶ IFC, "Interpretation Note on Financial Intermediaries," January 1, 2012 (last updated November 2018).

¹⁷ CAO, *Audit Report: CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries*, CAO, October 2012. The audit, IFC's Management Response, and the subsequent CAO monitoring reports and IFC Management Responses to those reports are available at <http://www.cao-ombudsman.org/newsroom/documents/FIAUDIT.htm>

117. IFC's response to the audit disagreed on the first two points, and in response to the third point, noted several accomplishments in its work with other IFIs. On the first point, IFC noted that it had created detailed, FI-specific guidance in its Environmental and Social Review Procedure in 2006, and updated that guidance in 2012. Specifically, that guidance focused on ensuring that the FI client had the capacity to conduct E&S due diligence (ESDD) on higher-risk sub-projects and to address risks where they were identified.

118. On the second point, IFC indicated that considerations of client capacity and commitment were central to its due diligence in appraisal, and were reflected in Environmental and Social Action Plans (ESAPs), covenants, and conditions of disbursement for FI clients, as well as in ongoing supervision. IFC acknowledged that it did not expect to achieve major shifts in FI clients' systems and culture of E&S management in every investment. It stated that "not all IFC investments will lead to a broader cultural change process at the institutional level. Some institutions are not exposed to sufficient E&S risks to warrant such a cultural change ... the influence of the ESMS on broader culture change will be commensurate with the FI's exposure to significant E&S risk."

119. In 2013, IFC prepared and began to implement an Action Plan in response to the CAO audit. The Plan focused on continual improvement in IFC's management of FI clients' E&S practices; stronger outreach and engagement with external stakeholders on FI E&S issues; and strengthening of FI market and client capacity for good E&S management. Among other actions, IFC:

- Increased its supervision of FI clients' E&S performance by explicitly assessing client E&S commitment and capacity as part of its due diligence
- Added supervision visits for all FI-2 clients
- Included detailed reviews of a sample of FI client E&S due diligence documentation for sub-projects
- Trained IFC FI investment officers on the importance of E&S performance
- Increased its engagement with the FI sector in emerging markets to promote effective E&S performance (both with regulators and with consultants) to support strengthening of Environmental and Social Management Systems
- Engaged more proactively with NGOs that had raised concerns about IFC's ability to monitor the E&S impacts of its FI investments.

120. CAO followed up its 2012 FI audit with three monitoring reports, in 2014, 2015, and 2017.¹⁸ The 2014 monitoring report noted the Action Plan and initial actions that IFC had begun taking in response to the 2012 audit, and indicated that those actions had the potential to address several of the issues raised in the audit. It cautioned that it was not clear whether those actions would be sufficient to address concerns regarding:

- IFC's ability to assess the effectiveness of its FI clients' ESMS, particularly whether FI clients were able to effectively assess and mitigate sub-project E&S risks
- The sufficiency of FI disclosures regarding higher-risk sub-projects (other than private equity funds, which were required to disclose their IFC-funded sub-projects)
- The adequacy of IFC requirements for FI client communication and grievance mechanisms.

¹⁸ The 2014 monitoring report was undertaken in the context of the Honduras Ficohsa/Dinant compliance investigation, the first CAO Compliance case that focused on an FI investment. That audit found significant IFC non-compliance in due diligence and supervision of Ficohsa Bank's implementation of its ESMS, particularly regarding Ficohsa's investments in Dinant, a palm oil firm whose operations were embroiled in violent land rights and human rights conflicts. The Ficohsa case and sparked renewed IFC Management, Board, and external attention to IFC's application of the Performance Standards in the FI sector.

121. CAO also noted that the 2014 revisions to IFC's E&S Review Procedures narrowed the scope of application of the Performance Standards to FI investments, based on the type, tenor, and size of those investments. CAO questioned whether the narrowing of application aligned with the intent of IFC's 2012 Sustainability Policy.

122. IFC's response emphasized that IFC had strengthened its ability to assess the adequacy of FI clients' Environmental and Social Management Systems, including assessment of clients' Environmental and Social Due Diligence on sub-projects. It also noted that IFC had established thresholds for the application of the Performance Standards in a variety of contexts, as had other IFIs for their E&S Safeguards and standards, and that this practice was consistent with the risk-based approach inherent in the Sustainability Policy and Performance Standards. CAO's 2015 monitoring report noted additional progress by IFC on its Action Plan, and reiterated many of the concerns raised in its 2014 report. (IFC did not provide a written response to the 2015 Report.)

123. CAO's most recent monitoring report on the FI audit was published in March 2017. Unlike the previous two reports, this Review was based on additional analysis, using a partially random, partially intentional sample of 38 IFC FI investments committed since 2012. The 2017 report acknowledged significant progress by IFC in strengthening its ESMS appraisal and supervision of FI clients, including piloting new, in-depth tools for due diligence and supervision, and increasing the number of E&S staff dedicated to FI work. However, it found that in a significant proportion of the sample, IFC was found to be noncompliant with its own requirements for ensuring that the FI client had undertaken adequate E&S appraisal, risk mitigation, supervision, external communications, and grievance management, and/or sub-project disclosure requirements (for private equity funds). Overall, CAO concluded that IFC "does not, in general, have a basis to assess FI clients' compliance with its E&S requirements."

124. IFC's response to the 2017 monitoring report stated its disagreements with CAO in stronger terms than had its previous responses. IFC's main points of disagreement were with CAO's interpretations of the FI requirements of the Sustainability Policy as translated into the ESRP sections and the Access to Information Policy (AIP). It stated:

"Many of the observations in the report ... are not informed by IFC's Board-approved Policy or procedural requirements regarding FI investments, but rather are CAO's views, and are not supported by market practice. In addition, the conclusions presented in this monitoring report do not give an accurate view of IFC's performance regarding its broader FI portfolio."

125. Without fully detailing those disagreements here, the exchange regarding the 2017 monitoring report makes it clear that there are significant gaps between CAO's and IFC's interpretation of the requirements, and of the ways in which IFC uses its discretion in particular cases.

126. Since the 2017 monitoring report, IFC has announced that it is seeking to ensure that nearly all of its FI lending is for defined rather than general purposes. This approach aims to create a more clearly traceable and auditable basis for managing IFC's FI E&S risks and assessing the E&S performance of FI clients. CAO has recognized this shift, and noted the importance of ensuring that ringfencing is covenanted with the FI client and operationally traceable, and that the client systematically reports to IFC about the use of proceeds.

127. The Review Team notes that the most significant areas of current disagreement are (1) which FI sub-clients are required to apply the Performance Standards, and (2) whether IFC appraisal and supervision of FI clients is sufficient for IFC to know whether clients' ESMS are effective, particularly with regard to ensuring that higher-risk sub-projects meet IFC's Performance Standards. IFC's view is

that it has sufficient procedural clarity about the risk-based application of its FI requirements, and sufficient staff capacity to assure itself of the adequacy of client ESMS. CAO's view is that neither the procedures nor the capacities are sufficient, and that IFC is making overly broad use of its discretion to allow departures from the requirements of the Sustainability Policy.

128. An independent review of the adequacy of IFC's FI E&S systems and practices was not within the scope of this Review. The Review Team did hold discussions with IFC, CAO, IFC FI clients, and NGOs that participated in the Reference Group, reviewed the FI audit and responses, and reviewed the Banco Ficohsa and Corporación Interamericana para el Financiamiento de Infraestructura (CIFI) CAO cases, which raised questions about the adequacy of IFC supervision of FI clients operating in higher-risk contexts.¹⁹

Recommendations for IFC: While acknowledging that IFC alone cannot transform E&S, disclosure, and transparency standards across the FI sector, its leadership in this area, coordinated with the ongoing efforts of the Equator Principles Financial Institutions (EPFIs), can continue to be a very significant influence on its own clients and on the sector as a whole. IFC should continue to strengthen its systems for ensuring effective E&S performance by FI clients in the following areas:

- Identifying E&S risks in FI portfolios during appraisal (noting that the type of lending—such as trade finance, project finance, or MSME lending—should not be taken as the primary indicator of E&S risk, but rather considered in combination with should risks associated with specific industries and clients, and with the country context)
- Specifying more clearly and with less discretion the criteria that FIs must use to identify higher-risk sub-projects and the mechanisms that FIs must use to ensure that those sub-projects apply the Performance Standards
- Assessing the adequacy of a potential FI client's ESMS, including the potential for deeper review of the potential client's E&S management of its existing, higher-risk sub-projects
- Enhancing its supervision of high-risk projects for non-private equity FI clients, by combining review of ESDD documentation with visits to a sample of higher-risk sub-projects (such as using the approach currently taken with private equity clients)
- Expanding disclosure initiatives for sub-projects, building on its current voluntary disclosure partnership with the Equator Principles Financial Institutions (EPFIs), and translating insights from that work into expanded sub-project disclosure requirements for most FI clients unless prohibited by national law.

¹⁹ The Banco Ficohsa case, initiated by the CAO Vice President in 2013, involved lending by this Honduras-based bank to Corporación Dinant, a palm oil plantation operator that was the subject of a prior CAO compliance investigation. CAO initiated a compliance appraisal and subsequent investigation of Ficohsa; the investigation found that IFC had not assured itself that Ficohsa was applying IFC's E&S requirements (which included the IFC Performance Standards) to its higher-risk sub-projects. (A subsequent complaint regarding Ficohsa's investment in a coastal resort was incorporated into CAO's ongoing monitoring of IFC's response to CAO's earlier non-compliance findings.) The CIFI case, initiated by a complaint received in 2015, involved IFC lending to CIFI, a non-bank financial intermediary that invested in small and medium infrastructure across Latin America. A CIFI investment in Hidro Santa Cruz in Guatemala was the focus of the complaint. CAO's compliance appraisal found evidence with regard to IFC's pre-investment E&S risk assessment and risk management processes and decisions, and its supervision of CIFI's ESMS, sufficient to warrant a compliance investigation. The investigation report has not yet been released.

129. IFC's efforts should include expanded engagement by E&S staff with FI clients. In both the Ficohsa and the CIFI cases, clients expressed disappointment that IFC's E&S teams provided valuable help and advice, but only at a late stage, after complaints had been made to CAO.

Recommendation for IFC: IFC's E&S staff should expand their engagement with FI clients, ideally starting at the stage of investment identification and continuing through appraisal and into supervision.

130. The Review Team also has several recommendations for CAO.

Recommendations for CAO: CAO should:

- Clarify its eligibility criteria for complaints involving FIs, and ensure that it consults and receives factual information from IFC on FIs that are the subjects of complaints, in order to clarify their relationship to sub-projects that are usually the focus of the complaints (for an expanded discussion of this recommendation, see section 7.1 on eligibility criteria)
- Determine an end-point for its ongoing monitoring of the 2013 FI compliance audit, and ensure that it maintains a clear distinction between the compliance focus of monitoring and advice to IFC and/or to the Board on the overall application of the Performance Standards to FIs
- Create a new Advisory product for IFC on ways that IFC could clarify the application of the Performance Standards to FIs; ideally, this Advisory product should be developed in close consultation with IFC, FI clients, outside experts on FI E&S accountability, national bank regulators, and civil society.

Section 4. Recent Litigation and Evolving Judicial Decisions and Implications for IFC/MIGA/CAO and E&S Accountability

131. As discussed earlier in this Review, IFC has long led efforts to encourage borrowers and investee companies to embed responsible and sustainable business practices with a view to helping ensure better environmental, social, and governance outcomes and, in consequence, greater enterprise sustainability. This effort has been dynamic (and has had significant impacts well beyond the universe of those with whom IFC has direct contractual relationships); IFC's success has become a model for others and, in turn, has engendered higher expectations, particularly for IFC. It has also become more challenging as IFC increasingly focuses on promoting economic development in the world's most disadvantaged countries, including fragile and conflict-affected contexts. This has led to an increase in litigation by those who assert that IFC's Sustainability Framework has not been adequately administered, monitored, or complied with (whether by IFC, the borrower/investee, and/or an intermediary financial institution).²⁰

132. Aside from demanding substantial resources to respond, these legal challenges have been particularly vexing for an institution that is viewed by many in the private sector investment community as a leader in promoting better E&S practices, with well-developed governance mechanisms that have been designed to provide for a high level of transparency and accountability, including a sophisticated and responsive grievance mechanism (namely, CAO).

²⁰ This Sustainability Framework includes the IFC's Sustainability Performance Standards on Environmental & Social Sustainability.

133. IFC has long considered itself, as an international organization headquartered in the United States, to enjoy immunity conferred by the US Congress by the International Organizations Immunity Act of 1945 (which granted international organizations “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments”). Starting in the 1950s, the US State Department began following a more restrictive theory of foreign immunity (under which a foreign government is entitled to immunity with respect to sovereign activities, but not commercial ones). This approach was codified in 1976 in the US Foreign Sovereign Immunities Act, which denies immunity to foreign governments with respect to claims based on commercial activities with a sufficient nexus to the United States.

134. A recent case filed in US courts, *Jam v. International Finance Corp.*, raised the question of whether the adoption of this restrictive theory of sovereign immunity limited the immunity of IFC (and other US-based international organizations) under the 1945 legislation. The claim arose as a result of environmental damage allegedly caused by a power plant in rural India that was partially funded (in 2008) by IFC, pursuant to a loan agreement that required the borrower to comply with IFC’s E&S Performance Standards. Based in part on CAO’s findings that IFC’s supervision of compliance with the contractual environmental and social action plan was inadequate, a group of farmers and fishermen near the plant (represented by EarthRights International) claimed damages against IFC based on negligence, nuisance, trespass, and breach of contract. The case proceeded through the US federal court system to the US Supreme Court, which heard the case in 2018.

135. The majority of the US Supreme Court Justices relied on the principle of statutory construction that whenever a statute refers to a general body of law, it should be construed as incorporating subsequent changes in the law: that is, that the Foreign Sovereign Immunities Act governs the immunity of international organizations. IFC had argued that foreign state immunity and international organization immunity serve distinct purposes (the latter designed to allow international organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one-member country). The Supreme Court rejected this argument but noted that the charters of international organizations can mandate a different level of immunity “if the work of a given international organization would be impaired by restrictive immunity.”

136. The sole dissenting judgment (by Justice Stephen Breyer) expressed concern that the multilateral mission of international organizations could be compromised. Justice Breyer specifically noted that many international organizations have agreed to limited waivers of immunity or set up alternative methods of dispute resolution that provide recourse to claimants in a way that does not interfere with the organization’s core objectives and policies. Justice Breyer suggested that the majority decision in *Jam* “exposes these organizations to potential liability in all cases arising from their commercial activities, without regard to the scope of their waivers.”

137. As a result of the Supreme Court decision, the claim was returned to the Washington, DC District Court to determine whether IFC’s loan constituted commercial activity in the United States for which immunity would not apply. In February 2020, that Court determined that the claimants did not demonstrate that the activity at the core of the complaint (IFC’s alleged failure to supervise and ensure compliance with the environmental and social sustainability requirements in the loan agreement) occurred in the United States and, accordingly, ruled that IFC is immune from suit. In March 2020, the claimants submitted a motion to amend their complaint, which is currently under consideration by the Court.

138. For now, the immunity defenses available to international organizations in the United States (and elsewhere) are uncertain. While the Supreme Court recognized that the charter of an international organization may provide an independent source of immunity, the scope of IFC’s charter

immunity based on its charter remains to be fully litigated, and amending IFC's charter would be challenging. Moreover, the Court's decision on immunity did not address the laws relevant in any country other than the United States. The *Jam* case (and others) have altered litigation risk for IFC (and other international financial institutions) and placed a sharper focus on the substantive effectiveness and procedural legitimacy of IFC's commitment to its Sustainability Framework, including the manner in which CAO administers (and IFC engages in) its complaint resolution processes.

139. In part, the theory of IFC's accountability framework (including CAO) is to provide project-affected people with a process for raising concerns about negative externalities before the project is executed, as well as to mitigate the risk that IFC or its clients fail to effectively apply its E&S principles and procedures (having regard for the assumption that recourse may not be available in national courts due to immunity). In recent years, however, two groups of complainants have sought redress through CAO and later used non-compliance findings as "evidence" of IFC's duty to affected people and liability for consequential harm in national courts—a lengthy, costly, and otherwise inefficient process for all. The Review Team's understanding is that CAO was to be an accountability mechanism, rather than one intended to create legal duties (or to be the arbiter of breaches of such duties).²¹ Accordingly we have focused on ways to strengthen the accountability mechanism (and IFC's performance).

140. Stepping back from the legal issues, it should not be surprising that courts have taken a narrow view of immunity in contexts that appeal to their sense of equity. It has been suggested that the protection of reasonable expectations provides a central organizing principle for legal rules.²² By definition, reasonable expectations mean more than the current law. As the Supreme Court of Canada has stated, the doctrine (of reasonable expectations) "looks beyond legality to what is fair, given all of the interests at play" to address conduct that is "wrongful, even if it is not actually unlawful."²³ Reasonable expectations act as legal polyfilla (putty), molding around other legal structures to plug perceived gaps.

141. Notwithstanding the wide variety of public and private law contexts in which the doctrine of reasonable expectations appears, the core objectives it promotes are remarkably consistent: first, requiring powerful public and private actors to treat others fairly, by acting with honesty and avoiding actions that would impose unnecessary or disproportionate costs on others; and second, to uphold the integrity of legal regimes (and, through them, economic, political, and social institutions) by penalizing tactics that frustrate the underlying purpose of a legal, regulatory, or social norm by allowing someone to avoid the obligations associated with that norm.²⁴

142. A classic illustration is *The T.J. Hooper v. Northern Barge Corp.*, a leading US tort case, in which Justice Learned Hand concluded that "reasonable prudence" required a tugboat operator to carry radio sets (a then-novel technology), even though tugboat operators were not required to do so by statute or regulation, on the basis that doing so had become a nearly universal safety practice.²⁵ The court determined that the standard of care adapts to new technology, and that the tugboat operator

²¹ To date, the two notable cases in which CAO non-compliance findings with respect to E & S principles are being litigated are *Jam* and *Dinant*. The Review Team believes that much will depend on how (and how quickly) those cases (and the next few) are resolved, as well as the extent to which the recommendations in this Review are implemented.

²² Rosco Pound, *An Introduction to the Philosophy of Law* (New Haven, CT: Yale University Press, 1922).

²³ *BCE Inc. v. 1976 Debentureholders* [2008] 3 S.C.R. 560.

²⁴ Edward J. Waitzer and Douglas Sarro, "Protecting Reasonable Expectations: Mapping the Trajectory of the Law" (2016), 57 Cdn. Business Law Journal 285.

²⁵ *The "T.J. Hooper" v. Northern Barge Corp.*, 60 F. 2d 737 (2nd Cir., 1932).

should have weighed the risk of injury created by its failure to comply with this industry norm, and the gravity of the possible injury, against the costs that would have been associated with mitigating this risk.

143. Litigation in *Jam* (and related cases) have brought the tension between IFC immunity and “reasonable expectations” to the foreground. Commendably, IFC has responded by focusing on how to refine and improve its commitment to its E&S principles. The Review Team believes it should continue to do so. Apart from amending its own charter, IFC has recognized that one way to mitigate litigation risk is to be able to demonstrate the integrity and efficacy of its governance and accountability mechanisms with respect to E&S principles and sustainability outcomes. It is increasingly focused on ex ante and proactive engagement—with clients and stakeholders before and throughout the investment cycle. While this entails a significant incremental commitment of resources and an evolution of operational culture, IFC remains uniquely positioned as an E&S resource. Addressing such “reasonable expectations” within the existing institutional framework is entirely consistent with IFC’s mission. Such leadership (including acting like a sovereign when it comes to engaging with stakeholders) should mitigate a variety of risks, including the proliferation of “home country” litigation.

144. Likewise, CAO should be mindful of the “unintended consequences” of its compliance processes. Without derogating from (indeed, arguably enhancing) their efficacy, caution and a higher degree of collaboration are called for to guard against CAO’s efforts being “hijacked” to advance agendas that are beyond CAO’s remit. CAO can best discharge its mandate by (1) maintaining a high degree of engagement with IFC to try to address E&S concerns before they are escalated to non-compliance findings, and (2) exercising care and constructive intent in how it goes about framing such findings with integrity.²⁶

145. It should be noted that the shift in litigation exposure, attitude, and procedures at IFC is consistent with the exposure increasingly experienced by private lenders and investors with respect to negative social externalities and their recognition of the materiality of E&S factors to the sustainability of their business models and those of their borrowers/investees.

146. For example, there is a rapidly growing body of legal precedent (particularly in the context of insolvencies) for imposing on creditors a duty to consider climate risk and other systemic risks in their lending decisions.²⁷ Evolving theories of legal liability will increase the exposure of FIs and clients. Moreover, under a set of governance rules released in 2010, financial institutions agreeing to the Equator Principles now execute an agreement representing that they have or will put in place internal policies and procedures for environmental and social risk management consistent with those Principles. This will heighten reputational and other business risks and create new operational requirements for lenders (and cause them to impose additional contractual compliance obligations on borrowers). While the Equator Principles expressly disclaim lender liability, courts have found disclaimers of this nature ineffective.²⁸

147. In other contexts (such as racial inequality, fair housing, and shareholder rights) courts have allowed third parties to enforce contracts. Leaving aside the issue of sovereign immunity, under US

²⁶ The term “integrity” is used in a descriptive rather than a normative sense: that is, in terms of being whole and complete, without stating more than is required and having regard for the impacts the findings may have.

²⁷ Janis Sarra and Edward Waitzer, “Climate Change—A Case Study/Tipping Point for Rebalancing Interests in Insolvency Law,” in Janis Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law* 2016, p. 643 (Toronto: Thomson Reuters, 2017).

²⁸ See Marissa Marco, “Accountability in International Project Finance: The Equator Principles and the Creation of Third Party Beneficiary Status for Project Affected Communities” (2001), 34 *Fordham Int’l L. J.* 452 at p. 469.

law such claims typically hinge on the third party's ability to demonstrate (1) that a binding contract between other parties exists; (2) that the contract is intended for the third party's benefit; and (3) that the benefit is sufficiently immediate, rather than incidental, to indicate the contracting parties' assumption of a duty to compensate if the benefit is lost.²⁹ Likewise, Canadian case law "suggests that, when justice requires it, a third party may enforce a contract made for that party's benefit."³⁰

148. Another evolving body of law relates to the directors' duties of care and loyalty. The consequential "duty to monitor" requires directors to do more than review individual "red flags" and risks in isolation from one another. It also requires that they understand the possible connections between them and the broader patterns they may reflect. In regard to the Wells Fargo shareholders derivatives claim,³¹ the plaintiffs asserted that Wells Fargo's directors knew or consciously disregarded numerous red flags suggesting that bank employees were creating accounts for customers without their knowledge or consent. The court concluded:³²

While any of these red flags might appear relatively insignificant to a large company like Wells Fargo when viewed in isolation, when viewed collectively they support an inference that a majority of the director defendants, consciously disregarded their fiduciary duties and therefore, that there is a substantial likelihood of director oversight liability.

149. The US Federal Reserve subsequently brought an enforcement action against Wells Fargo that emphasized directors' responsibility for risk management.³³ The Federal Reserve expressed the view that business growth strategies should be supported by a system for managing all key risks, including the risk that business goals will motivate compliance violations and improper practices. This view has been echoed by a number of the world's largest institutional investors, particularly as regards E&S risks. For example, the Chair of BlackRock, Inc. stated in a public letter:³⁴

In the current environment... stakeholders are demanding that companies exercise leadership on a broader range of issues. And they are right to; a company's ability to manage environment, social and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth...

150. Likewise, the shift in attitude (and the growing sensitivity of financial institutions to E&S concerns in their lending and investing policies and procedures) is consistent with a growing focus in the financial and corporate sectors that acknowledges and addresses responsibility for negative E&S outcomes. A recent example was the voluntary settlement by Australia and New Zealand Banking Group Limited (ANZ) with a group of Cambodian families that had been forcibly displaced by a sugar company that a local subsidiary of ANZ had loaned funds to in 2011. The settlement came more than five years after a complaint was filed on behalf of the affected families with the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises, which found in 2018 that ANZ's loan was inconsistent with the bank's own policies and the OECD's ethical business guidelines. In February 2020, the Independent Examiner of the ANCP facilitated a conciliation meeting, which resulted in the settlement.

²⁹ *Chen v. St. Beat Sportswear Inc.*, 226 F. Supp. 2d 355 (E.D. N.Y., 2002) at p. 355.

³⁰ Stephen M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) at p. 2007.

³¹ *Shaev v. Baker*, No. 16-5541, 2017 WL 1735573 (N.D. Cal., May 4, 2017).

³² *Ibid.*, fn. 74, at p. 13.

³³ Board of Governors of the Federal Reserve System news release (February 2, 2018). (<https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a2.pdf>).

³⁴ Larry Fink, "Annual Letter to CEOs: A Sense of Purpose" (2018) (<https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>).

151. According to the social psychologist Jonathan Haidt, people form political opinions based on moral intuitions.³⁵ Among the criteria voters use to form judgments are fairness and loyalty. The insight is as relevant for multilateral development institutions as it is for governments and business. Those who understand and can effectively respond to it are more likely to survive and succeed in achieving their missions.

152. Framed in this manner, the recent litigation uncertainty is, arguably, incidental to a broader shift in sensitivity to the imperative of identifying and mitigating E&S risks (and where appropriate, remedying consequential harms). As institutions, IFC/MIGA/CAO should not let the litigation tail wag the dog of effective E&S risk management.

Recommendations:

- IFC/MIGA should treat litigation risk as a secondary consideration, to be addressed through legal means only when litigation actually arises, rather than as an ex ante constraint on proactive efforts to avoid, mitigate, and compensate for E&S impacts.
- CAO's Compliance function should continue to fulfill its mandate to identify IFC/MIGA non-compliance, while being attentive in its use of language to the possibility that non-compliance findings and assertions of factual conclusions could be used for collateral purposes (including to support litigation against IFC/MIGA), and exercise restraint accordingly.

Section 5. Governance

5.1 Governance of IFC/MIGA/CAO with Regard to E&S Performance

153. As described in section 2.3, the World Bank in 1993 became the first multilateral institution to establish an independent accountability mechanism (IAM). IFC/MIGA followed in 1999, creating their own IAM—CAO. In comparison to the Inspection Panel (IPN), the role of CAO was enlarged substantially. And the governance structure was conceived entirely differently. The IPN—as well as most of the other IAMs subsequently established—report to their respective Boards (the exception is the European Investment Bank, whose IAM reports to its Inspector General).³⁶ In contrast, it was decided that CAO should report to the President of the World Bank Group.

154. It is not entirely clear why this route was selected. Various reasons might have played a role: Board members at that time generally did not find it an easy task to engage competently in IAM processes. Perhaps more importantly, the role of the private sector in development was not, yet, seen as essential in the 1990s, and IFC's work was not a major focus of the Board. Many Board members had little or no background experience themselves in the private sector and hence were content with CAO reporting to the President. The dual role of the President in the World Bank must also be emphasized: the President is the most senior Manager as well as the Chairman of the Board. The latter provided an indirect way for the Board to oversee CAO. Also, it should be noted that CAO initially positioned itself more as a problem solver than as a compliance oversight office, focusing during the first few years more on dispute resolution between IFC/MIGA clients and persons/communities with complaints than on its Compliance role. As a consequence, the majority of complaints were solved in the initial years of CAO through mediation, which did not require the attention of the Board or the President.

³⁵ Jonathan Haidt, *The Righteous Mind: When Good People Are Divided by Politics and Religion* (Knopf, 2013).

³⁶ The ADB Accountability Mechanism has a split reporting function, with the compliance function reporting to the Board and the dispute resolution function (referred to as Problem Solving) reporting to the President.

155. It is important to note that despite CAO's reporting line to the President, the independence of CAO was ensured through a number of measures.

156. The selection process for the CAO VP stipulated that the President could only nominate the CAO VP from a list of candidates proposed by an independent Selection Committee representing IFC/MIGA clients and CSOs. The list could not include any individuals currently employed by, or with any history of employment by, the World Bank Group.³⁷ The President, however, has influence over CAO's work, as he/she determines CAO's annual budget or approves its budget request.³⁸

157. The independence of CAO is strengthened by its procedures. Neither the President nor any other person can influence the CAO's decision to accept or decline a complaint. CAO has full authority for accepting or not accepting complaints by persons or communities that feel they have been or will be negatively affected by IFC/MIGA financial investments. CAO's three functions also operate under the authority of the CAO VP, and are not subject to direction from the President, IFC, or MIGA (though IFC and MIGA engage as counterparts in responding to complaints and to CAO advice).

158. The President's role is to take notice of CAO's reports and then to make sure that IFC/MIGA Managements respond to and take action in Compliance cases, with the aim of reaching compliance. Unlike the IPN, which—until recent policy reforms—had no authority to monitor the efforts of World Bank Management and clients to bring projects into compliance, CAO was given this monitoring role for IFC and MIGA efforts, thus providing the President with an important tool to supervise IFC/MIGA responses and subsequent actions.

5.2 Issues in the Current Governance of the IFC/MIGA/CAO E&S Arrangements

159. While CAO was initially widely seen and accepted as a model for other IAMs, some weaknesses, particularly in its governance structure, became apparent early on. In reporting to the President, CAO's work intended to be closely followed, encouraged, and monitored by the President. As CAO focused its attention during the first years on solving complaints by way of dispute resolution, which did not require the involvement of the President, very often CAO oversight was delegated to Managing Directors. This delegation was especially problematic when the Chief Executive Officer of IFC was asked to provide his opinion on CAO's annual budget request, creating a conflict of interest. Rather than determining the real needs of CAO, the budget was usually approved on the basis that its percentage of increase did not exceed or was around the same percentage level as IFC.

160. The reporting line to the President became especially problematic after CAO took on more complaints that could not be solved through Dispute Resolution and hence proceeded to the Compliance function. The aim of a compliance investigation (as stated in CAO's Operational Guidelines) is to determine whether in IFC/MIGA operations with clients "the actual environmental and/or social outcomes are consistent with, or contrary to, the desired effect of the policy decisions and the failure to address environmental and/or social issues as part of the review process resulted in outcomes that are contrary to the desired effect of the policy provisions." If the compliance investigation concludes that IFC/MIGA have not met the necessary requirements, the President has no right to edit the content of the final CAO report. Rather, he/she is supposed to ensure that IFC/MIGA Senior Management respond in writing to the CAO report. The President does not need to

³⁷ See CAO and The World Bank, Process for Selecting the Vice President, Office for the Compliance Advisor Ombudsman (CAO), 2014.

³⁸ Starting FY2020, the Board began providing advice and direction to inform and shape the WBG President's decision regarding CAO's budget. Memo on Follow-up on Restricted Executive Session on "Governance of IFC and MIGA Office of the Compliance Advisor/Ombudsman (CAO)," September 13, 2018.

act when IFC/MIGA agree with the findings and initiate corrective measures to bring the investment into compliance, other than to review CAO's monitoring reports to confirm that IFC/MIGA are implementing the measures they proposed. However, if IFC/MIGA Management disagrees with CAO's findings, the President has two options: he/she can (1) disagree with Management's opinion and direct IFC/MIGA to take corrective action; or (2) side with Management if he/she deems corrective actions are not warranted in light of the evidence CAO has provided, or are not financially or technically feasible, or are not appropriate given the overall positive developmental impact of the investment. When rejecting specific CAO findings, the President runs the risk of losing the confidence complainants and their CSO representatives have in the integrity of the CAO process and exposing IFC/MIGA to potential legal actions taken by the complainants.

161. The Review Team does not suggest that the President's potential conflict of interest contributed in a major way to inaction. But there is no doubt that Presidents in the past have not ensured a timely response by IFC/MIGA Management to CAO compliance reports, and have allowed disagreements between IFC/MIGA Management and CAO to fester. The Review Team recognizes that Presidents have often found themselves in no-win situations. Heavily lobbied by IFC/MIGA Management about the greater benefits of the investments, Presidents might have found it difficult to overrule their subordinates, especially in cases when only few persons were negatively affected by projects that otherwise appeared highly developmental. The difficulty in forcing IFC/MIGA Management to take corrective action is exacerbated when clients decided to repay equity or loans and IFC/MIGA Management argues that they had lost their leverage over their clients to accommodate affected communities (see section 7.8.)

162. To avoid potential conflicts of interest for the President in the future, the Review Team proposes stronger IFC/MIGA Board oversight regarding E&S risks IFC/MIGA are taking when they invest in, lend to, or guarantee investments for the private sector. It is quite common for the Board to evaluate investments/guarantees in terms of developmental outcomes such as employment, finance, and capital market access created. The Board usually also discusses the profitability these investments/guarantees have generated for IFC/MIGA. E&S risks also need to be properly overseen.

163. Likewise, since the Board has also approved the Performance Standards that IFC/MIGA have committed to apply, it should also take on the responsibility to ensure that IFC/MIGA Management is adequately implementing them. The Review Team is of the opinion that IFC/MIGA are well equipped to evaluate and mitigate financial, engineering, operational, and marketing risks when they consider investments. However, investment officers should pay more attention to environmental risks and particularly social risks potentially inherent in projects when they look at investments. As described in section 2.1, new public awareness of sustainability, increasing investor focus on stakeholder well-being and the growing sophistication of CSOs in supporting project-affected communities have contributed to a higher profile of E&S risks. It is the Review Team's view that it is the Board's role to be more engaged concerning these risks. It is the Board that must ensure that adequate measures have been taken by IFC/MIGA Management to identify and then mitigate these risks as thoroughly as possible. It must be understood that even investments/projects/guarantees that appear to have overall highly developmental outcomes will be regarded as failures when local communities do not benefit from them, or, even worse, suffer harm from them.

5.3 Recommendations on Governance

5.3.1. CAO as a Whole Should Report to the Board

Recommendation: The responsibility for CAO as a whole should be shifted from the President to the Board.

164. For reasons elaborated above, the responsibility for CAO should be shifted to the Board. The vast majority of IAMs report to their respective Boards. The Review Team is of the view that the CAO as a whole (including the Compliance, Dispute Resolution, and Advisory functions) should report to the Board. This is the model adopted by the World Bank Board under the recent IPN Toolkit Reforms, wherein it was decided that a newly established Dispute Resolution function, independent from Management, and the IPN would be integrated into a World Bank Accountability Mechanism. This World Bank Accountability Mechanism will report to the Board.³⁹

165. IFC Management has suggested that reporting lines should be split, with CAO Compliance reporting to the Board and Dispute Resolution reporting to the President. The Review Team does not agree with this position. CAO's Dispute Resolution function needs to be seen as independent from Management. If the reporting lines for Dispute Resolution remained with the President, while Compliance reported to the Board, the Dispute Resolution function would be seen as an 'instrument of Management' and thus not independent. Furthermore, while Dispute Resolution and Compliance operate as two distinctly separate CAO functions, there are important complementarities and synergies between them. Both functions benefit from a joint eligibility determination and assessment process. In addition, the Advisory function builds on lessons learned from both Dispute Resolution and Compliance processes. From a management perspective, split reporting lines increase administrative complexity for the CAO Vice President.

166. Finally, maintaining unified CAO reporting has advantages for the Board. Board oversight of the Advisory function offers opportunities for CAO to respond to Board requests for advice. Having both Dispute Resolution and Compliance report to the Board will not significantly increase the workload of the Board. Just as in the case of the newly established World Bank Dispute Resolution function, the Board will be informed about Dispute Resolution cases as an element of CAO reporting, but will take no decisions about those cases.⁴⁰ Overall, the Review Team believes that there are important advantages to having CAO as a whole report to the Board, and no significant disadvantages to this approach.

5.3.2. A New Board Committee Should Oversee IFC/MIGA E&S Risk Mitigation and CAO Processes and Reforms

Recommendation: IFC/MIGA's implementation and responsibility for the E&S Performance Standards and CAO should be overseen by a Board Committee on behalf of the Board.

167. The Review Team is of the view that the Board Committee should play a very active role and perform most of the work on behalf of the Board. Implementation of World Bank projects and adherence to Safeguard Policy standards are usually the role of governments or government agencies. In some instances, implementation and adherence might touch on the country's sovereignty, raising political issues and therefore requiring discussions of the whole Board. In contrast, helping private companies to be environmentally and socially responsible, and hence improving their long-term sustainability and profitability, should be in the interest of every World Bank shareholder, and should not cause any disagreements on the Board. Also, complaints to CAO about IFC/MIGA investments are more frequent than complaints about IBRD/IDA lending to the IPN.

168. The Review Team discussed whether CODE should take on the responsibility for overseeing IFC/MIGA E&S risk mitigation and CAO oversight. The Team also considered whether the Audit

³⁹ See World Bank/IDA, Review of the Inspection Panel's Toolkit, February 26, 2020, R2020-0039, IDA/R2020-0064, para. 25.

⁴⁰ See para. 31–32, World Bank/IDA, Review of the Inspection Panel's Toolkit, February 26, 2020, R2020-0039; IDA/R2020-0065.

Committee's role should be enlarged to take on these roles. This would be in line with increased roles of Audit Committees in the private sector, which have taken on responsibility for risks beyond just financial risks. A third option would be to create a completely new Committee to oversee E&S risks that IFC and MIGA encounter when they lend, invest, or provide guarantees to, in, or for their clients. While CODE is concerned with the developmental effectiveness/outcomes of IFC/MIGA, it is a Committee that already has an exceptionally broad and demanding agenda and is unlikely able to give adequate attention to the increasingly demanding and important E&S agenda. A new Sustainability Committee might better be able to focus in adequate depth on E&S issues and ensure adherence to the established Performance Standards or, in case of failures, through oversight of CAO help assure that communities harmed be heard by IFC/MIGA or their clients, and mitigation/remedies applied.

169. After consultation with a number of Executive Directors and other experts, the Review Team believes that the best way forward would be to create a new Board Committee, consisting of Executive Directors or Alternative Executive Directors who would take on this responsibility. This Committee, on behalf of the Board, would oversee IFC/MIGA's E&S strategies and their implementation to ensure compliance with the two institutions' environmental and social objectives when investing/lending/making guarantees. The Committee would also take responsibility for CAO oversight. The responsibilities of the new Committee would include:

- Appointing the CAO VP for a term of five years, selecting from a group of potential candidates nominated by an independent Committee. This system of forming a Committee recruited from IFC/MIGA clients, CSO representatives, and IAM experts has worked well in the past and provides a guarantee for the continuous independence of CAO, which is essential. As this Review recommends that the CAO should report to the Board, the CAO VP Selection Committee could also include one or two Board members.
- Evaluating the work of the CAO VP on an annual basis, and based on these evaluations determining whether to renew or not renew the term of the VP for a second five-year term.
- Determining on an annual basis budgeting needs and approving CAO's budget request.
- Being informed about CAO's Dispute Resolution cases.
- Requesting and responding to CAO advice through the Advisory function.
- Ensuring timely responses from IFC/MIGA Management to CAO compliance investigations, reviewing and approving Management Action Plans submitted in response to CAO findings of non-compliance.
- Selectively reviewing CAO monitoring reports to assure that Board-approved Management Action Plans are implemented
- Overseeing the E&S performance of IFC and MIGA, receiving annual E&S reports from them, reviewing planned updates to policies, and being informed of significant changes in procedures.

170. Such a Committee should provide an additional advantage. IFC/MIGA plan to increase their investments in IDA countries. In these countries, substantial capacity building will need to be done to prepare private sector companies to be able to adhere to IFC/MIGA Performance Standards. A specifically focused Committee should be in the best position to support IFC/MIGA in their need to acquire and retain the necessary resources and specialists for this effort.

5.3.3. The Separation between CAO from the World Bank Accountability Mechanism/ Inspection Panel Should Be Maintained

171. Other IAMs combine the Dispute Resolution and the Compliance Function under one IAM and conduct these two functions for both private sector and public sector lending.⁴¹ The question thus

⁴¹ An exception is the Asian Development Bank, which has two separate offices for dispute resolution and compliance review. However, both these offices perform their functions for both private sector and sovereign lending operations.

arises why the World Bank should have two separate IAMs: CAO for private sector lending/guarantees, and IPN for World Bank (IBRD/IDA) public sector lending.

172. It was a deliberate decision of the World Bank group to establish two separate IAMs that had significantly different structures. The IPN was authorized only to conduct compliance investigations. In contrast, CAO originally channeled all its complaints through dispute resolution processes, with compliance reviews established as an auxiliary process. Both institutions have evolved since then and retain distinct differences in policies and operating cultures. CAO today provides complainants the choice between its Compliance and Dispute Resolution functions. Both functions are actively used. The IPN until very recently only had a Compliance function. It is only during the recent Toolkit Reform process that the Board determined that the Accountability Mechanism Secretary would offer an opportunity for dispute resolution to the parties.⁴²

173. Shaped by the differences in functions, the processes of the CAO and the IPN differ. Unique at CAO is a very thorough assessment process before entering either dispute resolution or the compliance process. During the assessment process, complainants and the client are comprehensively informed about CAO functions and during this time the parties decide which CAO function they seek to initiate. Only after completion of such an assessment process are dispute resolution and compliance review activities commenced. Both dispute resolution and the compliance process then benefit from information collected during this assessment process. This assessment process is distinctly different under the World Bank Accountability Mechanism. CAO also monitors all non-compliance findings, while the IPN only recently received a limited verification mandate. Access policies to the IPN and CAO also differ, as well as compliance processes and processes to achieve remedial actions. Moreover, at present the IPN reports to the Board, while CAO reports to the President.

174. This Review makes a number of recommendations that will lead to greater alignment of the IPN and CAO. The Review Team recommends that CAO also report to the Board. Moreover, the Review Team also recommends that under CAO compliance processes, a Management Response, a Management Action Plan (to be approved by the Board), and an early deferral option be introduced. These are processes that already exist at the IPN. Over time, with both IAMs reporting to the Board and some alignment of compliance processes, an assimilation of processes is thus likely. However, important differences will remain, particularly between the Dispute Resolution functions. CAO brings to bear many years of experience in dispute resolution and its process has a significantly longer time horizon than the planned IPN dispute resolution process. The IPN has no assessment process and a rather limited verification function.

175. The Review Team is of the view that a merger between the two IAMs, in principle, would be possible. However, it would entail great challenges, given the very different operating cultures and policies. A merger cannot simply fold CAO into the World Bank Accountability Mechanism or fold the World Bank Accountability Mechanism into CAO. A merger would require the design of a common set of policies that would preserve the strengths of both institutions. Establishing such a common policy framework would not be an easy task.

176. During the recent IPN Toolkit Reform discussions, the Board considered several options for how to handle World Bank Dispute Resolution cases, including the possibility of strengthening the Grievance Redress Service (GRS) and elevating its reporting to the President; creating an independent stand-alone Dispute Resolution unit; and outsourcing Dispute Resolution cases to the CAO. The Board opted against creating a joint Dispute Resolution function for both World Bank and IFC/MIGA projects and, instead, decided to establish a new Dispute Resolution function specifically for World Bank (IBRD/IDA) projects. The Board thus decided against a joint Dispute Resolution function for sovereign

⁴² World Bank/IDA, Review of the Inspection Panel's Toolkit, February 26, 2020, R2020-0039, IDA/R2020-0064.

and private lending and created two separate structures, considering that differences between private and public sector contexts warrant such an approach. Accordingly, it appears inopportune at this time to propose a merger between CAO's well-established Dispute Resolution function and process, with 20 years of experience working with the private sector, and the nascent World Bank Dispute Resolution structure, which will focus on disputes in projects with sovereign lending.

177. A merger of the World Bank Accountability Mechanism and the CAO might be possible and desirable after the respective reform processes for the IPN/World Bank Accountability Mechanism and the reforms for the CAO proposed in this Review have been implemented and tested over a period of years. The reform recommendations for CAO proposed in this Review will require revisions in the Operational Guidelines for CAO and the adoption of a Board-approved Accountability Framework. Both IAMs will require several years of operations for the revised policies and processes to effectively take hold and to be tested. Most IAMs conduct reviews of their policies and processes within five-year intervals. A joint review of the World Bank Accountability Mechanism and the CAO could be considered after a five-year implementation period. During such a joint review, the desirability of a merger between the two structures could also be reassessed.

5.3.4. A New Board-Approved Accountability Framework Policy for CAO and Revisions to the CAO Operational Guidelines

178. CAO currently operates in accordance with Operational Guidelines and Terms of Reference approved by the President, to whom it reports. The Operational Guidelines (OGs), last revised through a consultative process in 2013, describe the CAO's mandate and prescribe how CAO conducts its three functions. The OGs require revisions to improve clarity and completeness, as noted throughout this Review. Moreover, if this Review's recommendations relating to CAO's operations are accepted, a number of OG provisions would either need to be added or amended.

179. In addition, this Review recommends that CAO report to the Board. If that recommendation is accepted, a Board will need to approve a policy framework for the CAO. The Review Team is of the view that an umbrella policy stating CAO's mandate, its governance, and the principles that should guide its operations should be approved by the Board. The proposed policy would replace the 1999 Terms of Reference for the CAO VP (supplemented by 2014 guidance on the selection process for the CAO VP), which currently serves as the foundational document for the Office. The policy would lay out key principles, such as:

- the three-part mandate of the CAO as the independent accountability and recourse mechanism for IFC/MIGA to resolve complainants from stakeholders affected by the environmental and social impacts of IFC/MIGA investments; assess IFC/MIGA compliance with their E&S policies; and provide advice to IFC and MIGA on ways to strengthen their E&S performance
- the organization of CAO, led by a Vice President, appointed by the Board based on nominations from a multi-stakeholder selection committee
- the operational independence of CAO from IFC and MIGA Management and the Board
- the role of the Board in the CAO process, including oversight of CAO's operations, approval of Management Action Plans, and oversight of their implementation
- roles and responsibilities of CAO, IFC/MIGA, the complainant, the client, and other stakeholders in the CAO process.

180. The principles laid out in the umbrella policy would need to be complemented by more detailed operational procedures. The existing OGs, revised and complemented as recommended in this Review, are suitable to serve as procedure document. The approach taken by the Green Climate Fund could be taken as guidance. The Green Climate Fund lays out key principles for its Independent

Redress Mechanism in the Terms of Reference for the IRM⁴³ and defines detailed operating procedures in Procedures and Guidelines.⁴⁴

181. The Review recommends that CAO be tasked to prepare the draft of the Accountability Framework Policy upon guidance from the Board, reflecting the Board's response to this Review.⁴⁵ CAO should draft this policy in consultation with IFC and MIGA, and it should be reviewed by the World Bank Group General Counsel. CAO would subsequently revise its OGs for consistency with the Policy, and make adjustments to address the specific recommendations of this Review. The Framework Policy should be approved by the Board. Operational Guidelines would not require Board approval.

182. Importantly, a public stakeholder consultation process would need to be conducted on draft documents. Such public stakeholder consultations are regularly conducted during IAM reform processes. AfDB, ADB, AIIB, EBRD, and EIB all have conducted public consultation processes on draft policies prior to Board approval.⁴⁶ All past revisions of CAO OGs have also been subject to public consultation processes. As CAO policies affect outside stakeholders, in particular project-affected people, it is important that these external stakeholders obtain a voice in the process.

Recommendation: The CAO Operational Guidelines should be revised and a new Board-approved Accountability Policy should be created. This policy framework could consist of an umbrella policy redefining key principles. The existing OGs, appropriately amended and revised to reflect recommendations of this Review, would constitute complementary operating procedures. Upon guidance of the Board, the CAO, working in close consultation with IFC, MIGA, and the World Bank Group General Counsel, should be tasked to prepare the drafts of the Framework Policy and the revisions of the OGs. Board approval would be required for the Framework Policy. Both the draft policy and procedures and guidelines should be consulted with external stakeholders.

Section 6. Effectiveness and Impacts of Current IFC/MIGA/CAO Processes

183. Until recently, IFC/MIGA had no systematic way for receiving, tracking, or responding to complaints. The SGR team, which was recently constituted, is in the process of developing plans and capacities to support IFC teams in responding to complaints not handled by CAO. MIGA relies primarily on IFC for responses to complaints in joint IFC/MIGA projects and has a designated contact for complaints about access to information. When there are complaints regarding MIGA-only projects,

⁴³ See Green Climate Fund, Decision of the Board on Updated Terms of Reference of the Independent Redress Mechanisms (Revised), B.BM-2017/10, 25 September 2017.

⁴⁴ See Green Climate Fund, Procedures and Guidelines of the Independent Redress Mechanism, Decision B. 22/22, 26 February 2019.

⁴⁵ In most recent IAM review processes or for the establishment of new IAMs, leadership for drafting of policies was assumed by the IAM (for example EBRD/IPAM, EIB/CM, GCF/IRM, and AIIB/ PPM). The Board subsequently approved the umbrella policies. The ADB Accountability Review (2010) and the AfDB/IRM Review (2014) pursued an alternative approach where outside consultants working directly for the Board Committee prepared the draft, closely consulting with the respective IAMs.

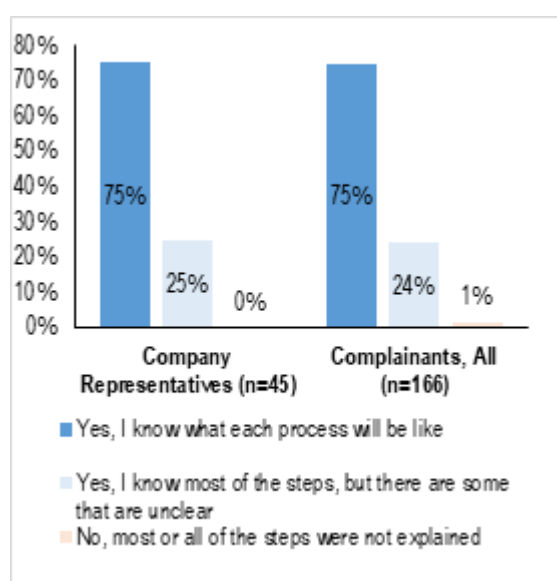
⁴⁶ See European Investment Bank, Public Consultation Meeting on EIB Groups' Complaint Mechanism, 2017, <https://www.eib.org/de/about/partners/cso/consultations/item/public-consultation-on-eib-group-complaints-mechanism.htm>; Asian Infrastructure Investment Bank, First Call for Public Consultations for the Proposed AIIB Complaints Handling Mechanisms, August 2017, <https://www.eib.org/de/about/partners/cso/consultations/item/public-consultation-on-eib-group-complaints-mechanism.htm>; European Bank, PCM's Upcoming Evolution, IPAM and the Project Accountability Policy, 2019, <https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-evolution.html>; African Development Bank's Independent Review Mechanism to Take Place this Year, 15 February 2019, <https://www.afdb.org/en/news-and-events/third-review-of-african-development-banks-independent-review-mechanism-to-take-place-this-year-19007>.

MIGA handles these complaints itself. As structures at IFC to address complaints have only recently been established, it is too early to assess their effectiveness. This section thus focuses only on CAO.

184. CAO’s mission is to serve as fair, trusted, and effective recourse and accountability mechanism. Within the network of independent accountability mechanisms (IAMs),⁴⁷ of which all IAMs of international financial institutions (IFIs) are members, CAO is a highly respected mechanism that in many dimensions—albeit not in all—operates in accordance with established good IAM practices.⁴⁸ Section 7 makes recommendations as to how CAO policies can be brought fully in line with good practice recommendations of the IAM network. Among IAMs, CAO is recognized for its long expertise in both dispute resolution and compliance work and for its advisory work. CAO is the only IAM with a distinct Advisory function and dedicated staff for advisory work and has positioned itself on topics that are relevant not only for IFC/MIGA/CAO but also for other IFIs and their IAMs.

185. CAO has conducted surveys to gather stakeholder feedback regarding satisfaction with CAO processes. Survey on the assess process of cases completing assessment during FY2017–FY2019 showed that almost all respondents felt that they were well informed about the different steps in the CAO process (see figure 6.1). Most respondents also stated that they fully or mostly understood the advantages and disadvantages of the Dispute Resolution and Compliance functions (see figure 6.2).

Figure 6.1 Survey Responses to the Question: “Do You Feel Well Informed by the CAO about the Steps of the Different Process Options?”

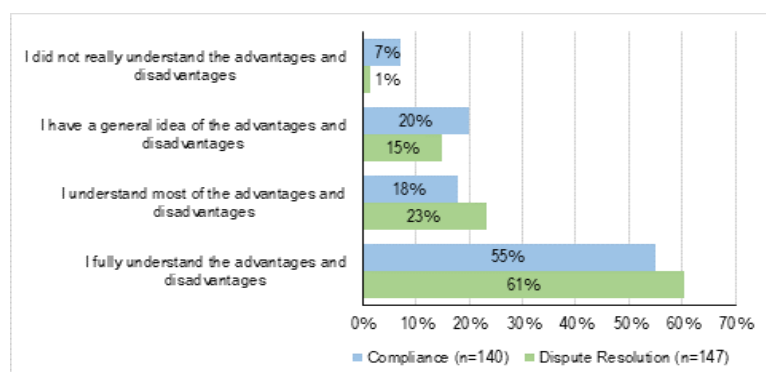


Source: CAO monitoring and evaluation (M&E) surveys sent at conclusion of Assessment Process, FY2017–FY2019.

⁴⁷ See <https://independentaccountabilitymechanism.net> and appendix E.

⁴⁸ See SOMO (Centre for Research on Multinational Corporations), Accountability Counsel, International Accountability Project, Fundacion para Desarrollo de Politicas Sustentables, Best of Independent Accountability Mechanism Policies, October 2019.

Figure 6.2. Complainants' Understanding of the Dispute Resolution and Compliance Process at Conclusion of Assessment



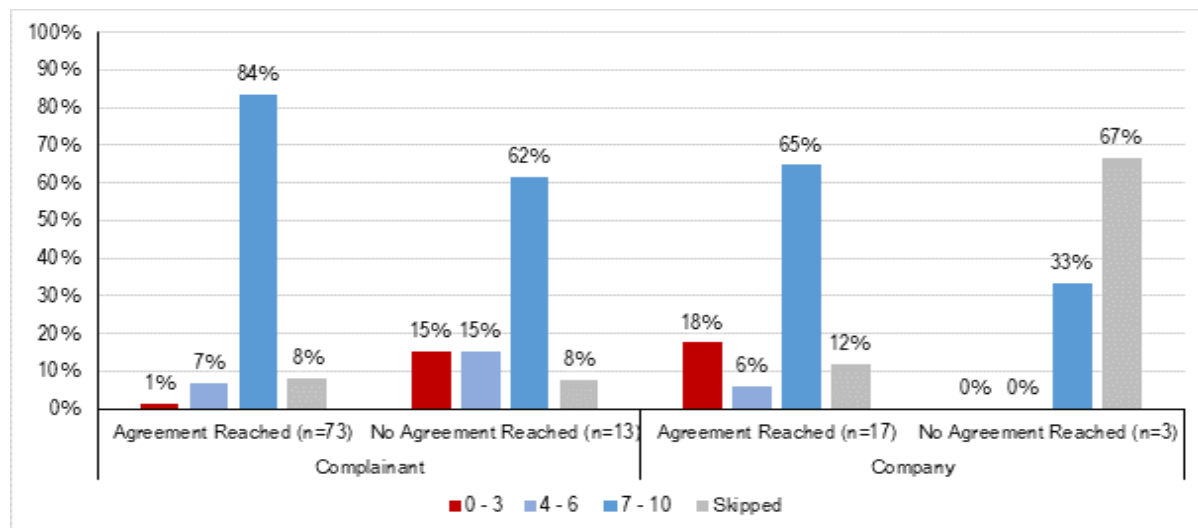
Source: CAO M&E surveys sent at conclusion of Assessment Process, FY2017–FY2019.

186. Complainants also expressed satisfaction with the dispute resolution process. Regardless of whether the parties in dispute resolution had reached agreement or not, complainants generally agreed that CAO acted without favoring any of the parties (figure 6.3, panel a) and with integrity (panel b). Most clients that concluded a dispute resolution agreement also agreed that CAO acted without favoring any of the parties and with integrity. Among clients that did not reach agreement, there are too few respondents to assess their perceptions.

Figure 6.3. Complaints' and Clients' Perceptions of CAO Dispute Resolution's Fairness and Integrity

a. Stakeholder feedback to the statement: CAO did not favor any party

Percent of respondents

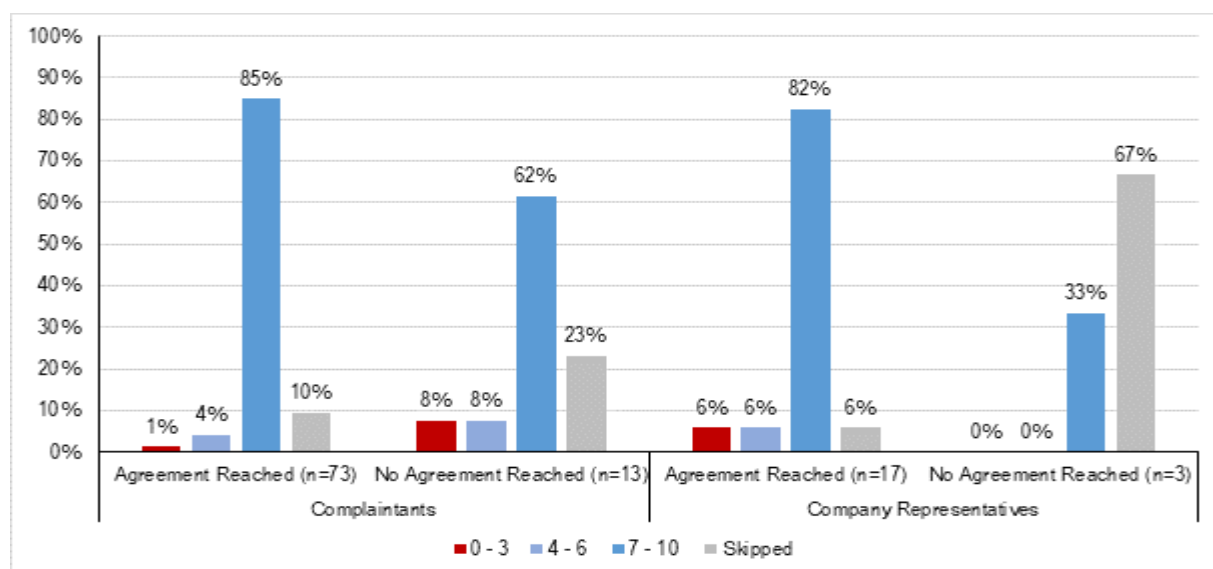


Source: CAO M&E Surveys, cases that concluded dispute resolution during FY2017–FY2019.

Note: Scale: 0 = totally disagree; 10 = totally agree. "Agreement" refers to dispute resolution cases in which parties reached an agreement; "No Agreement" refers to cases in which parties did not reach an agreement.

b. Stakeholder feedback to the statement: CAO acted with integrity throughout the process

Percent of respondents



Source: CAO M&E Surveys, FY2017–FY2019.

Note: Scale: 0 = totally disagree; 10 = totally agree. “Agreement” refers to dispute resolution cases in which parties reached an agreement; “No Agreement” refers to cases in which parties did not reach an agreement.

187. In addition, a number of case studies on CAO cases have been conducted that provide some insights into satisfaction with CAO processes. A study by SOMO (Centre for Research on Multinational Corporations) interviewed complainants on three CAO complaints.⁴⁹ All complainants felt that CAO was easily accessible (once they learned about the existence of CAO) and felt that CAO staff handled the processes transparently and with professionalism. But there were serious concerns about the long-time delays. Another study used qualitative and quantitative methods to assess the effectiveness of CAO from 1999 to 2011), prior to the current CAO Operational Guidelines.⁵⁰ This study is somewhat less complimentary, arguing that stark power imbalances between the client and poor communities made successful dispute resolution outcomes less likely. The study also stressed that complainants were not offered opportunities for meaningful participation in the process, and objected to the lack of level playing field with IFC/MIGA Management, which is provided the opportunity to comment on draft investigation reports, while complainants cannot provide any comments and only receive a final report after the President has released it.

188. The outcome effectiveness of CAO, just as for other IAMs, is difficult to measure. An important intangible benefit of IAMs are the incentives for IFI enforcement of environmental and social (E&S) policies. The fact that people can complain if they are harmed as a result of nonapplication of policy helps enforce the E&S policy framework as IFI staff and Management will pay greater attention to E&S policies knowing that otherwise, complaints could follow. But such impacts can only be measured qualitatively and so far, no efforts have been made to estimate them.

189. This section focuses only on some quantified outcome variables. In a CAO process, complainants can choose between the Dispute Resolution function and the Compliance function. During the assessment process, CAO informs parties about their choices between the two CAO

⁴⁹ Caitlin Daniel, Kristen Genovese, Mariëtte van Huijstee, and Sarah Singh, eds., *Glass Half Full, The State of Accountability in Development Finance*, SOMO (Centre for Research on Multinational Corporations), 2016.

⁵⁰ Roxanna Altholz and Chris Sullivan, *Accountability & International Financial Institutions: Community Perspectives on the World Bank’s Office of the Compliance Advisor Ombudsman*, International Human Rights Law Clinic, University of California, Berkeley School of Law, March 2017.

functions and explains the advantages and disadvantages of both. However, only 37 percent of parties pursued dispute resolution during FY2013–FY2019. It is not clear why in the majority of cases parties choose the Compliance rather than the Dispute Resolution function, especially as Dispute Resolution, if selected, seems to be mostly successful. Since 2013, CAO’s dispute resolution process achieved full or partial resolution of about 75 percent of cases in which Dispute Resolution was chosen. Between FY2016 and FY2019, 30 cases were transferred after assessment to Compliance. In 50 percent of these cases, the client did not agree to conduct dispute resolution; in 30 percent, complainants did not agree; and in 20 percent, both parties did not want to pursue dispute resolution.

190. For compliance processes, a relevant outcome variable for Compliance cases is whether non-compliance findings are addressed. Here the record is discouraging. The majority of CAO findings of non-compliance and related harm are not remedied (see section 7.8.1). CAO monitors the implementation of Management Actions through a Management Action Tracking Record (MATR) and through its monitoring reports. According to CAO monitoring reports, only 13 percent of monitored projects demonstrate satisfactory actions by IFC/MIGA to remedy non-compliance and related harm, while 37 percent demonstrate partially satisfactory actions. The results are somewhat better for IFC/MIGA responding with systemic reforms to CAO non-compliance findings: in such instances, 27 percent of cases are considered satisfactory and 53 percent are considered partially satisfactory.

191. Section 7.8.1 lays out the systemic issues underlying this highly unsatisfactory response by IFC/MIGA and the client in implementing corrective actions and provides recommendations for reform. The frustrations of complainants with the inadequate follow-up of IFC/MIGA and the client to CAO non-compliance findings has also been highlighted in the CAO case studies that the SOMO reviewed for outcome and process effectiveness in its 2016 report, *Glass Half Full, The State of Accountability in Development Finance*.⁵¹ The report states that complainants commend the CAO mechanism for conducting well-documented and thoroughly researched investigations, but not as a mechanism to obtain remedial actions, given the inadequate follow-up of IFC/MIGA and the client.⁵²

192. CAO, through its Advisory role, is well positioned to make a significant contribution to contribute to reforms in E&S issues. It is designed to provide recommendations to strengthen IFC and MIGA’s E&S policy and practice based on generating learning from CAO’s case experience (see section 7.10). It has helped influence IFC’s evolving environmental and social policy framework over time, in particular through its 2003 Safeguards Review, as well as its contribution to 2010 IFC Performance Standards Review, including work on financial intermediaries.⁵³ CAO advisory work on project-level grievance redress mechanisms has provided important guidance to IFC/MIGA and their clients. CAO’s case findings also led to reforms in E&S policy and procedures. An example are the revisions to the World Bank Group’s Environmental, Health, and Safety Guidelines for Ports, Harbors and Terminals in relation to the assessment of project impacts on coastal processes and erosion.⁵⁴

⁵¹ C. Daniel, Kristen Genovese, Mariëtte van Huijstee, and Sarah Singh, eds., *Glass Half Full, The State of Accountability in Development Finance*, SOMO (Centre for Research on Multinational Corporations), 2016, pp. 82–99.

⁵² *Ibid.*, p. 85.

⁵³ See [https://www-cao-ombudsman.org/documents/CAOAdvisoryNote for IFCPolicyReview May2010.pdf](https://www-cao-ombudsman.org/documents/CAOAdvisoryNote%20for%20IFCPolicyReview%20May2010.pdf)

⁵⁴ CAO Compliance Monitoring Report of IFC’s Response to CAO Investigation of IFC’s Investments in Togo LCT, Project Nr. 29197, March 28, 2018, p. 9.

6.1. Time Requirements for CAO Processes

Increasing Number of CAO Complaints and Compliance Cases as the IFC/MIGA Portfolios Have Expanded Rapidly

193. The number of complaints to CAO has increased considerably over the past ten years (FY2009–FY2019), which has led to an overburdening of capacity of the CAO Compliance function and delays in processing. In the first ten years of its operations (FY2000–FY2010), CAO received 128 complaints, of which 73 complaints were eligible and 3 complaints were triggered by the CAO VP.⁵⁵ In the past 10 years (FY2011–FY2019), 231 complaints have been filed, of which 115 cases were declared eligible, corresponding to an average of 11.5 eligible complaints per year. Thus, while the number of complaints filed in the second decade increased by 80 percent, as the share of complaints declared eligible declined, the number of cases declared eligible increased by only 58 percent. The percentage share of complaints declared eligible declined from 59 percent during the first ten years to 49 percent over the second ten-year period. Nearly all cases have been related to IFC projects/investments; only 5 percent have related to MIGA projects. The increase in cases over the past ten years corresponds to a period of very rapid growth in IFC lending and in the number of projects supported. From FY2000 to FY2009, IFC lending amounted to \$54 billion (for 2,452 projects). It increased to \$101 billion from FY2010 to FY2019 (for 3,529 projects). The 58 percent increase of eligible complaints thus relates to a 44 percent increase in project numbers.

194. It is important to emphasize that even with this increase in complaints, the share of eligible complaints filed with CAO remains very small in comparison with overall number of IFC/MIGA projects. As of July 2019, IFC/MIGA had 4,378 active and disclosed projects and CAO had a total of 51 complaints in its portfolio (under assessment, in dispute resolution, in compliance, or under monitoring). CAO cases thus represent a very small fraction of the overall IFC/MIGA project portfolio. As of July 2019, the CAO portfolio represented 1.2 percent of the total IFC project portfolio.

195. IFC/MIGA makes the argument that complaint rates at CAO are higher than at other IAMs and that the higher case load is related to easier access of complainants to CAO due to less stringent eligibility criteria. CAO complaint rates are comparable to complaints filed with the European Investment Bank (EIB) complaint mechanisms, though somewhat higher than for other IAMs. Comparisons with the World Bank Inspection Panel are not meaningful as the IPN so far does not have a Dispute Resolution function. Moreover, CAO complaints stay longer in the CAO portfolio, as CAO has a monitoring function. CAO has a slightly higher share of total project numbers than IPN for compliance cases for which investigation reports are completed. This may reflect the fact that the IPN already applies an early deferral option for selected complaints. For cases resolved under the early deferral option, no investigation reports are completed. This report recommends the introduction of an early deferral option to be introduced for the CAO (see section 7.6). Higher CAO case numbers in comparison with some other IAMs may also reflect the fact that other IAMs require that complainants first explore the solution of their concern with operational departments. This Review Team does not propose the introduction of such an eligibility criteria (see section 7.1). But for complaints on projects funded by several international financial institutions, which would have been eligible at several IAMs, complainants appear to prefer to file with CAO, given CAO's long experience with dispute resolution

⁵⁵ *The CAO at 10: Annual Report FY2010 and Review FY2000–10*, http://www.cao-ombudsman.org/languages/french/documents/CAO_10Year_AR_web.pdf

processes and overall robust and transparent compliance investigation processes.⁵⁶ It is important again, however, to emphasize, that CAO cases represent an extremely small share of the overall IFC/MIGA project portfolio, with even fewer being subject to a compliance investigation.

Increasing Number of Complaints Entering Compliance Review Rather than Dispute Resolution

196. Since FY2011, parties have increasingly selected the CAO compliance process rather than the dispute resolution process (figure 6.4). The large number of complaints that are regularly referred to CAO Compliance has placed a burden on the CAO Compliance staff in handling this large case load because CAO's Compliance staffing and budget have not increased commensurately with the increased caseload.

Figure 6.4 Trends in CAO Case Handling, FY2000–FY2019



Source: Data provided by CAO.

Long Time Frames for Complaint Processing

197. A key concern regarding the effectiveness of CAO processes is the long delays needed by CAO to process complaints (table 6.1). Reference Group members have cited the long delays in their interviews with the Review Team.

198. The CAO Operational Guidelines lay out time parameters for different stages of CAO processes. These are: (1) eligibility determination, 15 working days; (2) assessment, 120 working days; (3) dispute resolution, no time frame prescribed; (4) compliance appraisal, 45 working days; (5) compliance investigation review and monitoring, no time frame prescribed; (6) IFC/MIGA comments and fact checking on draft report, 20 working days; and (7) issuance of IFC/MIGA Management Response, 20 working days.

199. In practice, it takes an average of 782 working days for a complaint to proceed from the eligibility phase through the compliance process until issuance of a final investigation report. Median timelines are 718 working days, given that some very long investigations skew the averages. Such very long timelines impose serious hardships on the complainants and on the client. Importantly, with such long delays, investigation reports very frequently are issued at a time when the business relationships

⁵⁶ An example is the complaint on the LCT investment in the Lome Container Terminal (Togo), Project Nr. 20107, for which a complaint was filed with CAO but not with AfDB/IRM. Another example is the second complaint on the Bujagali (Bujagali) Uganda project, which was filed with CAO but not with AfDB/IRM.

between IFC/MIGA and the client have ended. By then, it is extraordinarily difficult to correct non-compliances and related harm. Complainants, who have waited throughout this long process, then very often do not benefit from remedial actions.

200. Table 6.1 compares the time frames prescribed by the CAO's OGs, the actual time frames, and the time frames recommended by the Review Team. The long appraisal process is especially noteworthy. It requires 129 working days, on average, as compared to the 45 days prescribed in the OGs. A CAO appraisal should not need such a long time, given that it requires only an assessment of prima facie evidence. In most cases, no site visits are conducted and only a summary report should be issued.

201. Section 7.6 presents specific recommendations how to shorten the appraisal process. The very long average clearance time of 137 working days for draft investigation reports is especially puzzling. OGs provide for only 20 working days for fact checking and commenting by IFC/MIGA Management (see OG para. 4.4.5). IFC/MIGA then has another 20 working days to issue a Management Response. This amounts to a total of 40 working days. The long delay also includes finalization of draft reports by CAO and clearance of the final report by the World Bank Group President. The Review Team could not establish the specific causes for needing an additional 97 working days, on average, before the final investigation report is authorized by the President's Office for release. Other IAMs do not experience such long delays between completion of a draft report and issuance of the final report. Such long delays can raise questions about the transparency of the process.

202. The long times required for the appraisal and compliance investigation (as distinct from report clearances by the President's Office) seem to be related to the overly tight budgetary resource envelope for the CAO Compliance function. Resources have been augmented over the last 10 years, but given the large number of Compliance cases, the resources are tight in comparison to the World Bank Inspection Panel and the Asian Development Bank's Accountability Mechanism. Both are more generously resourced than the CAO Compliance function. In FY2019, the CAO Compliance function received only 23.5 percent of CAO resources yet it handled 63 percent of cases.⁵⁷ The CAO Dispute Resolution function received about 43.4 percent of resources.

Recommendations: The Review Team recommends that strong efforts be made to significantly shorten the time frames for complaint handling. Efficiency gains should be possible at all stages, including assessment, appraisal, investigation, and especially the clearance of the Compliance investigation report. Table 6.1 proposes time frames. Recommendations are largely guided by time frames applied and adhered to in other IAMs.

The Review Team recommends that the CAO Compliance function be provided with more resources to bring it in line with other IAM compliance functions, including the IPN, without reducing resources available for Dispute Resolution. Reductions in timelines also require that IFC/MIGA staff/Management provide required information, inputs, and comments on a timely basis. Sections 7.7 and 7.8 provide more specific recommendations.

⁵⁷ Specifically, the FY20 CAO budget amounts to US\$6,827,663, of which US\$3,003,993 is allocated to the Dispute Resolution and assessment function and US\$1,632,472 is allocated to the Compliance function .

Table 6.1. Comparison of the Time Frames Prescribed by the CAO'S Operational Guidelines (OGs), the Actual Time Frames, and the Time Frames Recommended by the Review Team

CAO processing stage	Prescribed by CAO (OGs)	Actual average	Actual median	Review Team recommendation
Eligibility	15 working days	Eligible complaints: 22 working days Ineligible complaints: 20 working days	Eligible complaints: 21 working days Ineligible complaints: 16 working days	15 working days
Assessment	120 working days	Overall: 146 days For cases proceeding to Compliance: 156.5 working days	Overall: 119.5 days For cases proceeding to Compliance: 125 working days	After 90 working days, the CAO Vice President decides whether the assessment process should be continued. After 120 working days, the case is transferred to Compliance if parties have not agreed to dispute resolution.
Compliance Appraisal	45 working days	129 working days	110 working days	45 working days (only disclosure of a summary of appraisal report is required)
Investigation	No time frame prescribed in the OGs	361 working days	336 working days	1 year until issuance of draft compliance review investigation report
Report clearance (time from issuance of draft report to IFC/MIGA for comments until report disclosure)	20 working days for IFC/MIGA to provide comments on draft report 20 working days for the Management Response	137 working days	132 working days	To be defined in a new proposed governance structure with CAO reporting to the Board. Adjustments are necessary if the Management Action Plan is introduced, to be agreed with the client and consulted with complainants. Complainants can provide comments on the draft report.

Source: CAO Operational Guidelines (OGs) for prescribed timelines; actual and median data obtained from CAO.

Section 7. Potential Changes to CAO Processes and Procedures

7.1. Eligibility Criteria

Eligibility in Current CAO Operational Guidelines and Procedures

203. The CAO's Operational Guidelines (OGs) state that CAO is intended to be accessible to any stakeholder who may be adversely affected by the environmental or social impacts of an IFC/MIGA project: "Any individual or group of individuals that believes it is affected, or potentially affected by the environmental and/or social impacts of the IFC/MIGA project may lodge a complaint with CAO" (OG para. 2.1.2). CAO excludes complaints that are malicious or aimed at gaining competitive advantage. CAO refers complaints of fraud or corruption to the World Bank Department of Institutional Integrity.

204. CAO's OGs (para. 2.2.1) stipulate three eligibility criteria:
1. The complaint pertains to a project that IFC/MIGA is participating in or is actively considering.
 2. The issues raised in the complaint pertain to CAO's mandate to address environmental and social (E&S) impacts of IFC/MIGA projects.
 3. The complainant is, or may be, affected by the environmental and/or social impacts raised in the complaint.

205. Questions have been raised by members of the Board of Executive Directors, IFC, MIGA, and CAO about whether the eligibility criteria should be more stringent, and about some types of complaints in which the linkage of IFC/MIGA to the focus of the complaint may be difficult to establish.⁵⁸ Specifically, questions have been raised about the interpretation of the phrase "actively considering" when IFC/MIGA have not yet made a commitment to invest; how to determine the eligibility of complaints related to IFC/MIGA financial intermediary (FI) and supply chain investments; and about impacts on global public goods (such as impacts on climate change).

206. With a focus on these issues and questions, the Review Team has considered the eligibility criteria and processes as developed and implemented by CAO with good practices established in other independent accountability mechanisms (IAMs), the impacts of current eligibility policies/practices, and suggestions made by various World Bank Group stakeholders and others in the Reference Group. The discussion that follows presents the Review Team's assessment of the issues and recommendations on how to make CAO eligibility criteria as clear and legitimate as possible in the eyes of all stakeholders.

CAO's Current Eligibility Criteria Compared to Those of Other IAMs

207. Overall, CAO's current eligibility and exclusion criteria are similar to those of the IAMs of other international financial institutions (IFIs) and the Green Climate Fund (GCF)/Independent Redress Mechanism (IRM)—and in some respects have shaped those of other IAMs. However, no other IAM has the volume of private sector cases or diversity in complaints of types of private investments that CAO has received. Therefore, there are some eligibility issues related to FIs and supply chains that are unique to CAO; these issues are addressed in the discussion that follows. Other areas where there are distinctions between the eligibility criteria of some other IAMs and those of CAO include:

- Explicit claim of non-compliance with the institution's E&S policies, linked to harm
- Prior efforts by the complainant to address the issue with the institution's Management
- Exclusion of complaints that are being addressed through judicial processes
- Eligibility of projects prior to Board approval
- End-point for eligibility at or after project closure.

Explicit Claim of Non-compliance and Harm

208. Most IAMs require that the complainant claim some relationship between the complaint and the institution's E&S policies (Asian Development Bank/ Accountability Mechanism (ADB/AM); European Bank for Reconstruction and Development/Independent Project Accountability Mechanism (EBRD/IPAM); Inter-American Development Bank/Independent Consultation and Investigation

⁵⁸ There are also questions about the criteria that CAO uses to determine when to proceed from a compliance appraisal to a compliance investigation. This issue is addressed separately in the review of CAO operational policies and practices (see section 7.5).

Mechanism (IDB/MICI); and World Bank Inspection Panel (World Bank/IPN). Two require an explicit claim of harm linked to non-compliance (IDB/MICI and World Bank/IPN).

209. The CAO criteria require complaints to pertain to E&S impacts of IFC/MIGA projects within CAO's mandate, and require that the complainant be affected or potentially affected by those impacts. These criteria are broadly similar to the policy and harm criteria of other IAMs. However, CAO's practice allows complainants to enter the CAO process without showing ex ante a link to a specific policy, which makes filing a complaint less burdensome for the complainant, and can allow dispute resolution between the complainant and client to proceed on the basis of the presenting E&S issues, without taking up the question of IFC/MIGA non-compliance. If a complaint proceeds to compliance appraisal, the issue of non-compliance with IFC/MIGA policies is examined in detail.

Recommendation: No change is needed to CAO's current eligibility criteria with regard to non-compliance and harm.

Prior Efforts by the Complainant to Work with the Institution's Management

210. Other IFI IAMs require the complainant to have made an effort to address their concerns with the IFI client or the IFI's management (ADB/AM, World Bank/IPN) or require the complainant to state whether they have made such an effort and indicate the result (African Development Bank/Independent Review Mechanism, AfDB/IRM); EBRD/IPAM; IDB/MICI). GCF/IRM makes the submission of this information an option for complainants.

211. Requirements for complainants to bring concerns to Management before bringing them to IAMs are debatable. Complainants may have legitimate concerns about retaliation, may be concerned that they will not get a fair hearing from Management, and/or may find it difficult to know how to communicate with IFI Management to raise their concerns. In addition, CAO's assessment process provides ample time for IFC/CAO Management to engage with the complainant if the complainant is willing to do so.

Recommendation: No change is needed to CAO's current eligibility criteria with regard to prior efforts by complainants to work with IFC/CAO Management.

Exclusion of Complaints that Are Being Addressed through Judicial Processes

212. Two mechanisms (AfDB/IRM and IDB/MICI) exclude complaints whose issues are being addressed through a judicial process. EBRD/IPAM makes judicial proceedings a consideration, but not an exclusion criterion. Other IAMs have no such exclusion or consideration. The main argument in favor of excluding complaints that are undergoing judicial proceedings is that introducing CAO dispute resolution into such a context might be ineffective, and that CAO's Compliance function could be perceived by complainants and/or clients as duplicative, burdensome, and/or prejudicial to litigation proceedings. With regard to dispute resolution, some clients and complainants may not wish to undertake a CAO dispute resolution process, preferring to take their chances with litigation, while others may see a CAO dispute resolution process as a good settlement opportunity. These are precisely the kinds of case-by-case assessments that CAO undertakes with the parties to complaints.

213. With regard to compliance, CAO uses IFC's Sustainability Policy and Performance Standards (PS), not national law, as the basis for determining compliance. Therefore, there is no reason for CAO's Compliance function to exclude complaints on the basis that they are being adjudicated. On the contrary, given that the CAO process is not meant to preclude complainants from pursuing other channels for remedy, including legal channels, there is a strong argument that the existence of a legal

case should not in and of itself preclude eligibility. In sum, there does not seem to be a good rationale for introducing an exclusion criterion related to litigation or adjudication into CAO's eligibility process.

Recommendation: No change is needed to CAO's current eligibility criteria with regard to the existence of judicial proceedings.

Eligibility of Projects Prior to Board Approval

214. Most IFI IAMs (ADB/AM, AfDB/IRM, World Bank/IPN) and the GCF/IRM allow complaints pertaining to projects or investments under consideration prior to Board approval; IDB's MICI and EBRD's IPAM do not. Both MICI and IPAM forward requests received before Board approval to Management. MICI records such requests in its public registry. IPAM notifies the EBRD Board; EBRD Management are also required to "take the Request into account and inform IPAM in writing as to how the Requester's concern is being addressed."⁵⁹

215. IFC and MIGA have raised concerns about the limits on their ability to respond to complaints filed before Board approval of an investment or guarantee. They note that there have been situations where the potential client has withdrawn or the investment has not proceeded for other reasons, but CAO has still determined the complaint to be eligible and proceeded with assessment, despite the absence of any direct link between IFC/MIGA and the potential client—such as the Anatolian Natural Gas Pipeline (TANAP), in the case of MIGA. They note that such situations put into question any prospect of material harm involving IFC or MIGA, and also make direct involvement of IFC/MIGA in addressing the complaint impossible. In addition, they point out that public E&S disclosures before Board approval provide an opportunity for concerned stakeholders to raise concerns about E&S issues for investment teams and Management to consider.⁶⁰ CAO notes that complaints before project approval are rare, and that CAO generally cannot foresee how the investment under consideration may evolve at the time that CAO determines eligibility. CAO also notes that such complaints can (1) provide a confidential means for vulnerable groups to communicate concerns about a project; (2) alert IFC/MIGA to issues with a proposed investment that may warrant additional due diligence before approval; and/or (3) enable exploration of dispute resolution to help to address concerns.

Recommendations:

- CAO should change the eligibility criterion so that complaints are not eligible until investments are approved by the Board.
- 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.
- CAO should allow the complainant to refile the request if the project is approved.

End-Point for Eligibility at or after Project Closure

216. The current CAO eligibility criterion relating to project closure is that IFC/MIGA must be "participating in" a project. In practice, CAO has interpreted that criterion to mean that IFC/MIGA must still have a financial interest in the project/investee. All of the other IAMs set an explicit end-point for eligibility. Most set that date at two years after project closure or final disbursement (ADB/AM, AfDB/IRM, EBRD/ IPAM, IDB/MICI). The World Bank IPN deadline is 95 percent but has just been extended to 15 months after project closure. The GCF/IRM deadline is the latter of two years from when the complainant became aware of harm or two years from project closure.

⁵⁹ EBRD, *Project Accountability Policy*, p. 10, para. 2.2 (b) iii.a., April 2019.

⁶⁰ Currently, such disclosures are required 60 days before Board review for IFC and MIGA E&S Category A and IFC FI Category 1 investments, and 30 days before Board review for all other investments.

217. In this context, it is important to note that IFC has a wider range of time frames for its investments than many other IFIs. Most IFIs close most of their projects five to six years after approval, albeit repayment of the loan can take much longer. In IFC's case, its financial interest may range from 12 to 18 months for some equity investments to 15 or more years for repayment of some loans. This fact makes it more complex to determine an appropriate end-point for CAO eligibility. On the one hand, CAO may be involved for a relatively short time in an early-stage investment that then proceeds to generate substantial impacts after IFC has exited. On the other hand, a client may be repaying IFC many years after the activity that created E&S impacts has ceased.

218. Though the end-point for eligibility has not been a significant issue in CAO's cases to date, there may be a benefit to all parties from having CAO clarify the end-point for eligibility, to avoid future controversy. One option would be for CAO to state that IFC/MIGA must still have a financial interest in the project/investee. Another would be to modify the current approach by stating that CAO may accept a complaint up to two years after MIGA/IFC have exited, if the complaint meets the other eligibility criteria *and* CAO has reason to believe that the complainants could not have brought the complaint earlier (whether because there was no evidence of harm, or because they were not aware of CAO's existence). However, this approach could lead to CAO taking on complaints in which IFC/MIGA has no leverage with the client, significantly reducing the likelihood of an effective response.

Recommendation: CAO's eligibility criteria should state explicitly that the end-point for eligibility is the end of IFC/MIGA financial interest in the project (for Advisory Services, this is the point of project closure). The Review Team's view is that the difficulty of generating an effective client response to complaints after IFC/MIGA's financial interest has ended will almost always outweigh the potential benefit of allowing complaints after that point.

The CAO Vice President (VP) should have the authority to find a post-exit complaint eligible for up to two years after the end of IFC/MIGA financial interest in exceptional cases where (1) the complaint could not have been made during the period when IFC/MIGA had a financial interest; (2) all of CAO's other eligibility criteria were met; and (3) based on consultation between CAO and IFC/MIGA Management, the CAO VP decided that accepting the complaint would be consistent with CAO's mandate.

FI Sub-project and Sub-Sub-Project Eligibility

219. The IFC portfolio has seen a large increase in engagement in financial intermediaries in developing countries and in lending through financial intermediaries; roughly half the value of IFC's portfolio is now invested in FIs. MIGA also has substantial exposure to FIs. In cases where IFC is making a general purpose loan or equity investment in a financial intermediary (FI), questions have been raised regarding the potential eligibility of complaints about the environmental and social impacts of the FI's borrowers/investees (FI sub-projects). IFC, MIGA, and CAO all agree on the need for clarification of eligibility criteria related to these questions. First, should there be any limitation on the eligibility of complaints about FI sub-projects initiated during the period when IFC/MIGA is investing in the FI? Second, should there be any limitation on eligibility of complaints regarding sub-sub-projects, where the FI client uses a portion of the FI's investment to make its own investment in another entity, which may then become the subject of a complaint to CAO?

220. IFC's "Interpretation Note on Financial Intermediaries"⁶¹ makes it clear that FI clients are expected to ensure that all of their borrowers involved in Higher Risk transactions meet IFC's

⁶¹ IFC, "Interpretation Note on Financial Intermediaries," January 1, 2012 (last updated November 2018).

Performance Standards.⁶² Lower Risk FIs (FI-2, with no Higher Risk sub-projects; and FI-3) are expected to screen their portfolios against the IFC Exclusion Criteria, except for those with very low-risk portfolios. The “Interpretation Note on Financial Intermediaries” is not explicit about FI Environmental and Social Management System (ESMS) obligations with regard to investment of FI proceeds by its investees/borrowers. However, the IFC “Interpretation Note on Small and Medium Enterprises and Environmental and Social Risk Management” does provide more specific E&S guidance and requirements for FI clients that invest in small and medium enterprises (SMEs).⁶³

Recommendations:

- IFC/MIGA should clarify the E&S responsibilities of its FI clients with regard to sub-projects and sub-sub-projects through a revised, publicly disclosed, and Board-reviewed FI E&S Interpretation Note. Given the current FI share in IFC’s total portfolio, and the anticipated growth in the portfolio in higher-risk markets over the next five years, it is very important to make it as clear as possible to all IFC/MIGA stakeholders how E&S responsibilities translate from FIs to their sub-projects. It would be especially useful to clarify the conditions under which FI sub-project clients have responsibility for E&S due diligence and supervision of sub-sub-projects in which they invest FI proceeds, and where therefore the FI would have responsibility for assuring itself that the sub-project was applying the relevant E&S standards and procedures to the sub-sub-project.
- IFC and MIGA should require their FI clients to disclose all sub-projects to which the IFC Performance Standards apply, unless the FI is prohibited from making such disclosures by national law or regulation.⁶⁴ The disclosure could be very simple, such as a regularly updated list of such sub-projects on the FI’s website and/or on the IFC/MIGA project web page for the FI, providing the same information currently disclosed by Equator Principles financial institutions for project finance: project name, sector, country, and year of financing. Arguably, FI clients should view their relationship with IFC/MIGA and their Performance Standards as a reputational asset. By disclosing the sub-projects to which the Performance Standards apply, the FI client would demonstrate its own commitment to effective E&S management, provide additional transparency to potentially affected communities, and facilitate CAO determinations of the eligibility of a complaint.
- The IFC and MIGA requirements for FIs to ensure that sub-projects identify and address E&S impacts argue for the eligibility of complaints regarding sub-projects. The Review Team recommends that FI sub-projects be considered eligible for CAO complaints if (1) the complaint pertains to a sub-project within the scope of IFC/MIGA’s investment in the FI (that

⁶² The FI Interpretation Note defines “Higher Risk” activities as follows: “A key aspect of IFC’s approach to E&S risk management in the FI sector is to ensure that where FIs provide project or long-term (over 36 months) corporate finance to a borrower/investee to support a business activity that may include a) involuntary resettlement, b) risk of adverse impacts on Indigenous Peoples, c) significant risks to or impacts on the environment, community health and safety, biodiversity, cultural heritage or d) significant Occupational Health and Safety risks (collectively, Higher Risk transactions), the FI will appropriately assess and require its clients to mitigate these risks and impacts in line with the IFC Performance Standards” (para. IN1).

⁶³ IFC, “Interpretation Note on Small and Medium Enterprises and Environmental and Social Risk Management,” **January 2012 (last updated April 2017)**. IFC defines SMEs in terms of the number of employees, asset values, and annual revenues. When IFC invests in FIs that invest in SMEs, the FI is required to review SME E&S risks, with a focus on HSE (health, safety and environment), labor, and social issues, as well as compliance with national E&S laws and regulations. When the FI makes long-term investments (whether corporate or project finance) in SMEs that have E&S risks, the FI is supposed to ensure that the SME applies the relevant Performance Standards (para. IN28).

⁶⁴ In some jurisdictions, financial sector regulations permit FIs to disclose sub-projects they are funding if they have obtained the consent of the sub-project client. To maximize sub-project disclosure, IFC/MIGA should require FI clients in such jurisdictions to include consent to disclosure in their standard terms and conditions for all sub-projects within the scope of IFC/MIGA financing.

is, if IFC/MIGA is providing corporate finance/guarantee to the FI, or the sub-project is within any ringfence that IFC/MIGA contractually established with the FI); (2) the share, type, and tenor of the FI investment in the sub-project make the investment material; and (3) there is a plausible link from the sub-project to harm or risk of harm to the complainant.⁶⁵

- Assuming that IFC/MIGA do clarify the applicability of E&S policies to FI sub-sub-projects, the Review Team recommends that CAO complaints about sub-sub-projects be considered eligible if the FI client has a clear responsibility (via its sub-project investee) for oversight of E&S issues in the sub-sub-project, and the sub-sub-project also meets the three tests above (that is, it is within the scope of the FI's investment in the sub-project; it is material; and there is a plausible link from the sub-sub-project to harm or risk of harm).
- This approach to determining eligibility of FI sub-projects and sub-sub-projects will require more fact-finding by CAO staff than is normally the case with complaints pertaining to IFC project finance/MIGA guarantees. The Review Team recommends that:
 - CAO request factual information from IFC/MIGA in each and every case involving FIs, to ensure that it has an accurate basis on which to make an eligibility determination; and
 - IFC/MIGA provide CAO with full access to the documentation of IFC/MIGA's investments in any FI whose sub-project is the focus of a complaint.
- The eligibility fact-finding process should proceed on the basis of mutual trust and respect, with the understanding that (1) CAO is bound by the confidentiality commitments of its Operational Guidelines and the relevant IFC/MIGA Disclosure Policies; and (2) CAO will share information about the complaint with IFC/MIGA to enable IFC/MIGA to respond effectively to CAO's queries, while respecting complainant confidentiality. As with all CAO complaints, fact-finding during eligibility should be treated an opportunity to clarify the situation to the mutual benefit of all concerned parties, not to engage in dialogue regarding the merits of the complaint.

Eligibility of Complaints against IFC/MIGA Suppliers

221. In parallel with eligibility questions about FI sub-projects, questions have been raised about eligibility of complaints against the suppliers of IFC/MIGA clients: Should eligibility extend to complaints focused on the suppliers of IFC/MIGA clients? If so, how far into the supply chain should eligibility extend?

222. The IFC and MIGA Performance Standards define primary suppliers as those "those suppliers who, on an ongoing basis, provide goods or materials essential for the core business processes of the project" (IFC and MIGA PS 2, fn. 4.) and as "those suppliers who, on an ongoing basis, provide the majority of living natural resources, goods, and materials essential for the core business processes of the project" (IFC and MIGA PS 6, fn. 21). IFC and MIGA require clients to assess and manage supply chain risks (PS 1), and to apply the IFC/MIGA labor standard (PS 2) and natural resource/biodiversity standard (PS 6) to their primary suppliers. CAO's eligibility criteria do not speak to the eligibility of supply chain complaints, but CAO has accepted such complaints (such as the Wilmar and Wings/PT Gawi cases).

223. The primary concerns that IFC and MIGA have raised are with regard to suppliers that arguably do not meet the definition of "primary," and/or where the IFC/MIGA client arguably does not have responsibility for oversight of the E&S issues raised in a complaint. CAO acknowledges that the definition of "primary supplier" can be open to interpretation, but notes that there is no more detailed

⁶⁵ Traditional FI project finance beyond a *de minimus* level would normally be considered material. In contrast, if the FI provided a short-term credit or trade line, or offered finance amounting to, for example, less than 1 percent of the capitalization of the borrower/investee, the FI's involvement with the sub-project might not be considered material.

definition of “primary supplier” available in the PS.⁶⁶ CAO also acknowledges that complaints about suppliers may raise issues beyond the labor and biodiversity standards. Since it understands its mandate to include E&S impacts broadly defined, CAO does not exclude in principle supplier complaints pertaining to issues beyond labor and natural resource/biodiversity management.

Recommendations:

- IFC and MIGA should clarify the definition of “primary supplier” to make it clearer to whom the client must apply the supply chain risk assessment and management required in PS1, and the relevant provisions of PS 2 and PS 6. It should also clarify the extent to which primary supplier E&S commitments apply by extension to the supplier’s subcontractors. This could be done definitionally within the PS Guidance Notes, and/or in the documentation of individual investments by specifying the client’s primary suppliers in E&S documents and related covenants, and by updating the list of primary suppliers during supervision.
- Complaints pertaining to “primary suppliers” as clarified by IFC and MIGA should be assumed to be eligible as long as (1) the complaint pertains to activities and impacts of the supplier that are directly related to its role in supplying the IFC/MIGA client, and (2) the activities and impacts in question are linked to the IFC/MIGA client’s E&S responsibilities. For complaints that proceed to compliance appraisal, appraisal can determine whether there is an IFC/MIGA non-compliance issue related to application of PS 1, PS 2, and PS 6 to primary suppliers.
- Complaints relating to subcontractors of the primary supplier should only be eligible to the extent that they meet the two tests above (link to the IFC/MIGA client and to its E&S responsibilities), and in addition, the IFC client had a responsibility to ensure that its primary suppliers managed the subcontractor E&S risks raised in the complaint.
- As with FI sub-project and sub-sub-project complaints, CAO should request factual documentation from IFC/MIGA on each and every supply chain complaint, to understand whether the entity named in the complaint qualifies as a primary supplier or as a subcontractor to a primary supplier that has assumed IFC/MIGA E&S obligations. IFC/MIGA should provide that information. There should also be sufficient discussion between CAO and IFC/MIGA to ensure factual clarity before CAO makes an eligibility determination. If additional time is needed to determine whether there is a relevant supply chain or FI linkage, CAO could extend the eligibility period to 30 days by notice to IFC/MIGA and the complainants.

Eligibility of Complaints Pertaining to Global Public Goods

224. With regard to global public goods (GPGs), there are questions about whether any threshold could be established for determining when a particular investment has a material impact on a GPG (such as climate stability) or for determining when any such impact creates material harm or risk to a particular complainant (such as reduced crop yields).

225. Within the GPG discussion, there is an important distinction between complaints that focus on the global impact of an IFC/MIGA investment (such as on climate stability) and those that focus on local impacts that could be exacerbated by the investment’s global impact (such as climate impacts

⁶⁶ In the IFC Guidance Note for Performance Standard 6, IFC itself suggests an elastic definition of “primary supply chain”: “A company’s supply chain can be complex and include a large number of suppliers in different tiers. Although it might not be feasible to assess the entire supply chain, the client should identify the areas of risks and impacts related to paragraphs 27 and 28, whether due to (i) suppliers’ operating context (e.g., inherent risk in country, region or sector); (ii) the particular materials, components, or products supplied (e.g., inherent risk in production, agricultural commodities or extracting process); or (iii) other relevant considerations, and prioritize assessment of those suppliers” (GN94).

on local crop yields). Complaints about global impacts on a GPG are arguably complaints about IFC/MIGA policies and standards pertaining to that GPG. Complaints about local impacts linked to a GPG might be eligible, though the degree of harm that could be attributed to the IFC/MIGA investment would need to be material.

Recommendation: Complaints that focus only on global impacts of a GPG should not be eligible for a CAO response, though CAO could refer all such complaints to IFC/MIGA Management. Complaints that focus on local impacts linked to the investment's contribution to a GPG should be considered eligible if (1) the contribution of the investment to the local impact is material; and (2) the complainants are directly affected. While acknowledging that national and international organizations might reasonably argue that impacts on climate and biodiversity affect them, the Review recommends that CAO require that an affected local stakeholder participate in any such complaint.

Eligibility of Complaints from Individual Workers

226. Finally, a question has been raised whether complaints brought by a single individual in relation to employment issues should remain eligible for a CAO response. IFC and MIGA have noted that a single individual's dispute with an employer that is an IFC/MIGA client may have no systemic significance. They also note that resources devoted by CAO, IFC/MIGA, and the client to addressing such complaints can be greatly disproportionate to the benefit when the issue pertains to a single individual. CAO agrees that not all individual employment cases raise systemic issues.

Recommendation: CAO should only accept employment contract-related complaints from individuals when there is reason to believe that the complaint may apply to a significantly broader class of workers. CAO should seek the factual information necessary to make this assessment before determining eligibility.

Eligibility Decisions about Complex Cases

227. Finally, given the complexity of eligibility issues in some cases (particularly FI and supply chain complaints), and the necessity of using judgment in those cases, it would be useful for CAO to publish a brief explanation of such eligibility decisions.

Recommendation: CAO should amend its Operational Guidelines to require a brief statement from CAO explaining the key criteria and reasoning used for highly complex eligibility decisions.

7.2. Complaint and Response Disclosure

228. Currently, CAO lists the complaint on its website after consulting with the complainants about whether they wish to disclose the complaint letter publicly and after conducting a call with the IFC client. Under current OG processes there is no IFC/MIGA Management response issued until a compliance investigation report has been completed. IFC/MIGA staff emphasize that the disclosure of a complaint at such an early stage and throughout a process that often lasts several years is an undue burden for the client that can result in reputational and financial loss. This Review recognizes that such early disclosure before an assessment phase could negatively affect the client. Most other IAMs do disclose the complaint at the stage of registration in their respective registries. However, other IAMs do not have such a long assessment phase as CAO and other IAMs expect a Management Response to the complaint within 21 business days after the complaint has been registered. By publishing both the Management Response and the complaint early on in the process, a more equal level playing field is created between the two parties.

Recommendation: CAO should establish a registry, where complaints should be registered once they have been declared eligible. This registry should contain a very short summary of the complaint. Full disclosure is not needed during the assessment phase, but the assessment report should (and already does) include a presentation of issues raised in the complaint and the view of the client.

The complaint, Management Response to the complaint, and optional client response be fully disclosed at the appraisal stage. More detail on this recommendation is provided in section 7.6.

7.3. CAO Assessment Process

229. Once a complaint is determined to be eligible, CAO Dispute Resolution staff undertake an assessment process on behalf of CAO. Assessment has two main purposes: to inform CAO in detail about the issues, the stakeholders, their concerns, and potential opportunities for resolving the issues; and to inform the complainant, the client, and other relevant stakeholders about CAO's role, the option to choose either dispute resolution or compliance appraisal, and the fact that CAO will undertake a compliance appraisal if the complainant and the client do not both agree to try dispute resolution.

230. CAO has a time frame of 120 days to complete the assessment process. Compared to most other IAMs, CAO's assessment process is longer (EBRD/IPAM and IDB/MICI allow 40 days; GCF/IRM allows 60 days; ADB/Special Project Facilitator (SPF) allows 120 days;⁶⁷ and AfDB/IRM has no separate assessment step). The assessment process requires a substantial commitment of time and effort by CAO and the parties. This extended process reflects CAO's commitment to ensure that the complainant, the client, and other local stakeholders have a good understanding of the options CAO provides. It may require multiple visits to the affected community and to the client to establish effective communication, clarify the issues and stakeholders, clarify how CAO Compliance and Dispute Resolution paths are likely to unfold, and explore the potential for dispute resolution if there is any serious interest in it.

231. In the Review Team's discussions with CAO, IFC, MIGA, and external stakeholders, four primary issues were raised: (1) the role of IFC/MIGA staff in the assessment process; (2) the option of including the text of the initial complaint and an option for a client response with the CAO assessment report; (3) the proportion of all complaints that are referred to Dispute Resolution or to Compliance after assessment; and (4) the time required to complete assessments.

IFC/MIGA Engagement with CAO and Clients during Assessments

232. Through most of CAO's existence, IFC and MIGA have taken a "hands-off" approach during the assessment process. Their assumption was that CAO would engage the IFC/MIGA client, and that IFC/MIGA involvement could complicate the situation by giving the client conflicting messages, and/or by raising additional questions about IFC/MIGA responsibility for addressing the issues raised in the complaint. While understandable, this stance may have led to some instances where IFC/MIGA clients did not recognize an opportunity to address issues constructively with the complainants through the CAO dispute resolution process. On the other hand, the Review Team learned about examples of effective IFC/MIGA engagement with clients during the assessment process, leading clients that were initially resistant to dialogue with CAO and the complainant to change their approach and to benefit from the dispute resolution process and its outcomes.

233. Currently, the new IFC Stakeholder Grievance Response (SGR) Team is organizing a systematic IFC response to CAO complaints, including case-by-case assessment of how IFC can best advise and

⁶⁷ The ADB/SPF assessment phase relates only to complaints that have opted for dispute resolution.

support the client during the assessment process. IFC's current thinking is that it is appropriate for IFC staff to discuss the CAO assessment process, and the choice between dispute resolution and compliance processes, with the client, and to engage with CAO staff who are conducting the assessment. At the same time, IFC remains concerned that extensive and direct involvement of its staff in the assessment process could set unhelpful expectations for IFC's participation in dispute resolution and about the availability of IFC resources to fund solutions. CAO's view is that ongoing consultation between CAO and IFC during the assessment process is appropriate and can be helpful, as long as there is no confusion about the fact that IFC/MIGA are not formally parties in the assessment. CAO also sees advantages to IFC engagement with the client in an advisory role, while agreeing that IFC staff should not pressure the client into a particular decision, and should remain in a secondary, not primary, role during the assessment.

234. The Review Team supports more proactive engagement of IFC/MIGA staff during the CAO assessment process, as long as it is well coordinated with CAO. As part of its engagement, IFC/MIGA should not only advise the client, but also conduct full and detailed review of the client's E&S performance. If the client is in breach of any E&S commitments, IFC/MIGA staff should be proactive in bringing the client into compliance, and should consult with CAO on how best to integrate that effort into the CAO assessment process.

235. If IFC/MIGA staff do take a more proactive role in engaging the client and the complainant during CAO assessment, one option proposed was to change CAO procedures to allow IFC/MIGA, the client, and/or the complainant to request a formal "time out" in the assessment process. Such a pause could have the benefit of enabling IFC/MIGA, the client, and the complainant to focus fully on resolving the issues raised in the complaint, without simultaneously engaging in CAO's process.

236. The Review Team's view is that the option for proactive problem solving is already available to complainants and clients during CAO assessment. Without any change to CAO's procedures, the complainant and the client can indicate to CAO that they are working together to resolve the issues raised in the complaint, and that they would like to pause their engagement with CAO, while recognizing the 120-day limit for the assessment process. In fact, several CAO complaints have been resolved during assessment, with varying levels of CAO involvement. As IFC/MIGA proactive engagement becomes more the rule than the exception, it will be good practice for CAO assessment teams to be more explicit in exploring the option for the parties to engage in problem solving during the assessment process.

Recommendations for IFC/MIGA: IFC/MIGA staff should engage systematically with clients and with CAO during the assessment process, with the goals of ensuring that clients have a good understanding of CAO's role and the options for dispute resolution and compliance processes; and that CAO understands clients' perspectives and concerns. IFC/MIGA should use their relationship with the client to encourage constructive resolution of issues, while also ensuring that the client addresses any issues in its E&S performance linked to the complaint.

Recommendation for CAO: CAO should consistently determine whether there is any opportunity for the parties to engage directly with one another to resolve the issues during the assessment process. Such engagement may take place without direct involvement of CAO and any outcomes from such engagement should be reflected in the way CAO concludes the assessment process.

Publication of Complaints and Client Responses with Assessment Reports

237. As noted in section 7.2 on complaint and response disclosure, IFC/MIGA and CAO have been considering ways to reduce the reputational impact on clients of publishing the full text of complaints on CAO's website, while ensuring that the issues raised in the complaint are publicly disclosed at an

appropriate time. One option that has been discussed is to attach the text of the complaint to the assessment report, and also to give the client an option to provide a written statement to accompany the assessment report.

238. This possible approach to complaint disclosure raises a concern for the Review Team. One important value of the CAO assessment report is to summarize and restate issues raised in the complaint, and to provide a summary of the perspectives of complainants, clients, and other stakeholders, in language that is intended to be constructive, not polarizing. The risk of attaching the original complaint to the assessment report is that its language is likely to be far more polarizing than the text of the report. Further, if the client were given the option to attach a statement to the assessment report, along with the original complaint, many clients would feel compelled to respond primarily to the original complaint, rather than responding to the assessment report.

Recommendations: CAO should not attach either the original complaint or a client response to its assessment reports. Instead (as discussed in section 7.6 on compliance appraisal), if the complaint is transferred to Compliance, CAO should attach the original complaint to the compliance appraisal report, given that the complaint establishes the scope of issues for the compliance appraisal. An IFC/MIGA Management Response should also be attached to the compliance appraisal report, with the option for the client to provide a response as well.

Proportion of Complaints Referred to Dispute Resolution

239. On this issue, a question has been raised by IFC/MIGA and some external stakeholders whether there is a trend of complainants and/or clients rejecting the option to participate in CAO dispute resolution processes and therefore increasing the number of complaints going to compliance processes. Using CAO's Annual Reports to the Committee on Development Effectiveness (CODE), the data suggest that after the publication of CAO's current OGs in 2013, there has been a rise in the proportion of complaints going to compliance appraisal. As noted in section 6, for the operating life of CAO (FY2000–FY2019), 52 percent of cases were referred to Dispute Resolution after assessment, and 25 percent of those Dispute Resolution cases (13 percent of all cases) were referred to Compliance. In contrast, out of 74 cases that completed assessments in FY2014–FY2019, 24 (or 32 percent) were referred to Dispute Resolution, and 50 (68 percent) were referred to Compliance (see table 7.1).

Table 7.1. Number of CAO Complaints Referred to Dispute Resolution or Compliance, FY2014–FY2019

Fiscal year (FY)	Referred to Dispute Resolution	Referred to Compliance
2014	7	10
2015	2	10
2016	4	6
2017	6	7
2018	4	10
2019	3	7

Source: CAO's Annual Reports to the Committee on Development Effectiveness (CODE).

240. The Review Team explored this increase in cases going to Compliance after assessment with CAO and IFC staff and with Reference Group interviewees, and by reviewing CAO case documentation. The trend starting in FY2014 is explained in large part by the fact that under the 2013 OGs, dispute resolution was no longer required as a first step before the parties could proceed to compliance review. Interestingly, the available CAO documentation for FY2014–FY2019 suggests that it was more often the company than the complainant that rejected dispute resolution. Out of 50 complaints referred to Compliance in those 6 years, CAO records that in 33 cases it was the company that rejected dispute resolution, in 10 cases it was the complainant, in 6 cases it was a joint decision, and in 1 case the party is not stated.⁶⁸

241. The Review Team recognizes the validity of giving the parties the choice to pursue dispute resolution or compliance processes. As a practical matter, this means that unless both the complainant and the client agree to a dispute resolution process, the case will be transferred to Compliance. The Review Team’s view is that CAO staff and the local assessor/mediator teams involved are certainly not encouraging the parties to select compliance over dispute resolution processes, and that CAO strives in every case to make the choice between the two paths very clear and understandable to both complainants and clients.

242. CAO case surveys for FY2017–FY2019 indicate these efforts are moderately successful. As stated in Section 6 in its FY2019 Annual Report to CODE, CAO noted (para. 70) that 72 percent of complainants felt informed about CAO processes and 61 percent reported that they fully understood the respective advantages and disadvantages of dispute resolution and compliance processes to address a complaint.⁶⁹ These results leave open the question of whether more could be done to ensure that complainants have a very clear understanding of the choice. It would also be useful to survey clients on the same question, since some clients may be rejecting dispute resolution based on an incomplete understanding of the implications.

Recommendations: CAO should conduct a systematic, retrospective evaluation of decisions to transfer complaints to Dispute Resolution and Compliance from FY2014 to the present, to determine what factors are most predictive of complainants’ and clients’ choice to pursue dispute resolution or compliance processes. If there are factors that are highly predictive of the choice, CAO should ensure that these factors are fully addressed in its assessments, both to reduce the time required for assessments, and to ensure that parties have given full, well-informed consideration to both Dispute Resolution and Compliance options when choosing between them.

Time Required to Complete Assessments

243. CAO’s Operational Guidelines require that assessments be completed within 120 days. As noted in section 6, for 85 assessments completed since the beginning of FY2013, the median length of time required (from the initial outreach the complainant and the client to the publication of the CAO assessment report) was 119.5 days, and the average was 146 days. Forty-six percent of assessments took more than 120 days to complete.

⁶⁸ Data presented in CAO Annual Reports to CODE, FY2014–FY2016, and CAO data provided to the Review, FY2017–FY2019. Clustering 6 employment complaints with the same client that rejected dispute resolution (Mexico, Harmon Hall, FY2014) as though they were a single case would change the count to a total of 45 complaints referred to Compliance after dispute settlement was rejected by the client (28 cases), by the complainant (10 cases), both jointly (6 cases), or for a reason not stated (1 case).

⁶⁹ CAO provided additional data that includes FY2016 results. With FY2016 added, 75 percent of clients and complainants felt informed about their process choices.

244. The Review Team had extensive discussion with CAO staff, and CAO provided useful data and analysis on the factors driving the length of time currently taken for assessments. CAO noted that the assessment process generally has three phases: (1) from initial outreach to the CAO assessment field visit (some cases require more than one field visit); (2) the time after that visit for the parties to make a choice between Dispute Resolution and Compliance (often including several further rounds of communication with CAO); and (3) the time required for CAO to complete the assessment report after the choice has been made; this step can involve multiple rounds of review, and can also trigger renewed dialogue and reopen the question of which CAO process to pursue. Each of these steps can have highly varied time requirements. For a sample of 6 cases from FY2017 to FY2019, the time from outreach to the first visit ranged from 2 to 6 months; from visit to decision ranged from 3 weeks to 5 months; and from decision to publication of the assessment report ranged from 5 weeks to 5 months.

245. The Review Team explored with CAO whether additional human or financial resources could reduce the time required for assessment. CAO's view was that those resources are not the primary constraint, but rather that many issues, from logistics to preliminary negotiations among the parties, can require extensive time during assessments. The Team also explored whether in some cases, CAO staff and local mediators who were contracted to support the assessment process might be trying so hard in their efforts to find a pathway to dispute resolution that they were drawing out the assessment process in an inefficient way. CAO staff were very clear that they do not see a benefit in dragging out the assessment process, and noted that some cases were quickly moved to compliance appraisal because it was clear that dispute resolution was not possible.

246. A detailed analysis of individual assessment processes and parties' decision making was beyond the scope of the Review. It seems clear from the data that CAO is aiming to be thorough in the assessment process, and is less focused on completing the assessment process within the 120-day time frame. However, the high proportion of cases that are transferred to Compliance, and the fact that assessment times are somewhat longer on average for cases that are transferred to Compliance, suggest that CAO is spending more time helping parties decide not to try dispute resolution than is necessary, at least in some cases. Given the importance of shortening the overall time to the completion of compliance processes, it is important to consider ways to accelerate the transfer of cases to Compliance if dispute resolution is unacceptable to the complainant, the client, or both.

247. The Review Team acknowledges that 120 days may be needed to assess some cases, to deal with complex internal dynamics in decision making by complainants and companies. On the other hand, CAO should be able to ensure in every case that within 90 days of the start of the assessment, it has engaged directly with the parties and that they understand their process choices. While recognizing the logistical and organizational challenges CAO may sometimes face in reaching and engaging with the parties, CAO should be able to use a combination of telecoms and field visits to achieve that outcome. At that point, the CAO Vice President should determine whether there is any benefit to extending the assessment process. If at least one party is interested in dispute resolution at the 90-day mark, it may be advisable to continue the assessment process to see if the other party will participate. On the other hand, if after 90 days both parties are well informed and neither wants dispute resolution, the case should transfer to Compliance.

248. Similarly, 120 days should be treated as a firm, immovable deadline for the finalization of the assessment report, including the parties' process decision. There is great value to firm deadlines as a tool for ensuring that parties focus attention and resources on reaching a decision. In the event that both parties have not agreed to dispute resolution at the 120-day mark, the assessment report should state that the parties did not agree to dispute resolution, and the case should transfer to Compliance.

249. The Review Team also strongly encourages CAO and IFC/MIGA (when they provide comments on the draft assessment report) to expedite the finalization of reports, given that these reports are written to provide a brief, neutral, nonjudgmental summary of the issues and the perspectives of the parties on those issues, and to state the parties' process choice.

Recommendations:

- CAO should make every effort to ensure that it has had clear communication with the complainant and the client about the choice of process within 90 days of the start of the assessment process, that the parties are well informed about their choices, and that the parties have communicated their preferences to CAO.
- The CAO Vice President should review the status of each assessment that continues to the 90-day mark. In cases where communication has been clear but neither party has expressed interest in dispute resolution by that time, the case should be transferred to Compliance. On the other hand, if either party has expressed interest in dispute resolution, and there is some potential for the other party to agree, then the Vice President should have the option of continuing the assessment up to but not beyond 120 days.
- CAO and IFC/MIGA should commit as a good practice to expedite the finalization of assessment reports, given that these reports are intended to provide a brief overview of issues, perceptions, and choices, and not to make findings of fact.

7.4. CAO Dispute Resolution

250. CAO's Dispute Resolution function is widely viewed as effective, and is considered to set the standard among IFI IAMs. For this Review, the Team interviewed CAO and IFC/MIGA staff and managers and members of the Reference Group who had participated in CAO dispute resolution processes. The Team also reviewed the discussions of the Dispute Resolution function and specific cases in CAO's annual reports to CODE from FY2013 to FY2019, and additional information from CAO's website on a selection of Dispute Resolution cases.

The Dispute Resolution Process

251. The Dispute Resolution function operates on the basis of voluntary participation of CAO complainants and clients. Other parties, including community members beyond the complainants, local and national government agencies, and other private sector actors that may be contributing to impacts can also be involved.

252. Historically, IFC/MIGA staff have played a limited role in dispute resolution processes. Overall, it is appropriate that the focus of dispute resolution remains on the client and the complainant, without direct IFC/MIGA involvement. However, there have been several positive examples of IFC/MIGA staff advising clients during dispute resolution in ways that have contributed to constructive outcomes. CAO and IFC/MIGA have agreed in principle that it is appropriate for IFC/MIGA staff to play an advisory role for clients involved in Dispute Resolution cases, and to maintain lines of communication with CAO during the dispute resolution process.

253. The new IFC Stakeholder Grievance Response (SGR) Team has the mandate and capacity to guide IFC investment teams as they interact with CAO and with the client to maximize the potential for CAO dispute resolution to deliver mutually satisfactory resolution of cases. The Review Team learned during interviews with participants in CAO dispute resolution processes that clients with stronger stakeholder engagement and grievance capacities highly value CAO's dispute resolution work, and find it very helpful in working through the issues with complainants. Clients with less capacity and sophistication in working with stakeholder grievances often have a harder time understanding how CAO's Dispute Resolution function can be helpful to them, or what they need to

do to participate effectively. It will be particularly important for the IFC SGR Team to find ways to support the clients with lower capacity, both to understand the dispute resolution process and to engage effectively when they choose dispute resolution.

254. CAO Dispute Resolution staff use a CAO database of screened mediators to work directly with the parties in Dispute Resolution cases, with CAO providing support and oversight. The mediators are selected for their professional expertise, as well as language and cultural competence for individual cases. Mediators are proposed by CAO but must be acceptable to the parties in order to conduct dispute resolution. In most cases, the CAO assessment process has identified the primary issues to be resolved and has led to agreement in principle on the dispute resolution process. The mediator may have been involved in the assessment process, or may be recruited after the assessment.

255. CAO dispute resolution processes are highly tailored to particular cases, ranging from face-to-face mediation of disputes over unpaid wages to extensive joint fact finding on environmental contamination using independent technical experts. CAO dispute resolution staff oversee the process and maintain close contact with the mediator and with the parties throughout the process. It is notable that CAO sometimes provides capacity-building support to complainants and to clients to enable them to participate effectively.

256. Once CAO dispute resolution processes produce agreements, CAO continues to monitor their implementation until the provisions have been fully implemented or renegotiated and resolved in another way. This means that CAO may continue to show a dispute resolution case as open for monitoring for several years after an agreement has been reached. CAO's ongoing monitoring provides an important incentive and support to the parties to maintain and follow through on commitments they made during the dispute resolution process.

257. There is one procedural change that could make dispute resolution services available to parties after they have entered the compliance track. As detailed in section 7.8.1, the Review Team is recommending that IFC and MIGA produce Management Action Plans in response to CAO non-compliance findings. Management Action Plans, at times, require that dispute resolution processes (such as for resolving individual compensation claims) are pursued in the implementation of remedial actions. CAO's Dispute Resolution function could provide expert support in the establishment of robust dispute resolution processes. However, there are potential complexities if CAO Dispute Resolution support is introduced in the context of ongoing CAO Compliance monitoring of the implementation of an IFC/MIGA Management Action Plan. There would have to be a very clear delineation of the role of CAO Dispute Resolution so that the accountability of IFC/MIGA for remedial action remained clear, regardless of CAO Dispute Resolution advice or involvement in the establishment of a dispute resolution process as part of the remedy. A recommendation to explore the potential for CAO Dispute Resolution to contribute to the implementation of dispute resolution provisions in Management Action Plans is presented in section 7.8.1.

258. Outside the direct scope of the Dispute Resolution function, there is also opportunity for CAO to contribute the expertise it has developed in grievance resolution to support IFC, MIGA, and the private sector to improve their grievance response capacity. Recommendations for drawing on CAO's expertise in this regard are presented in section 7.10 and section 8.

259. Enabling IFC/MIGA and/or their clients to request CAO Dispute Resolution directly was an option considered during the Review. IFC and MIGA expressed interest in being able to request Dispute Resolution (and to enable their clients to request it) to expedite resolution of community concerns, without the full CAO eligibility and assessment process, and without an option for such requests to result in a compliance process. Though CAO's dispute resolution expertise could in

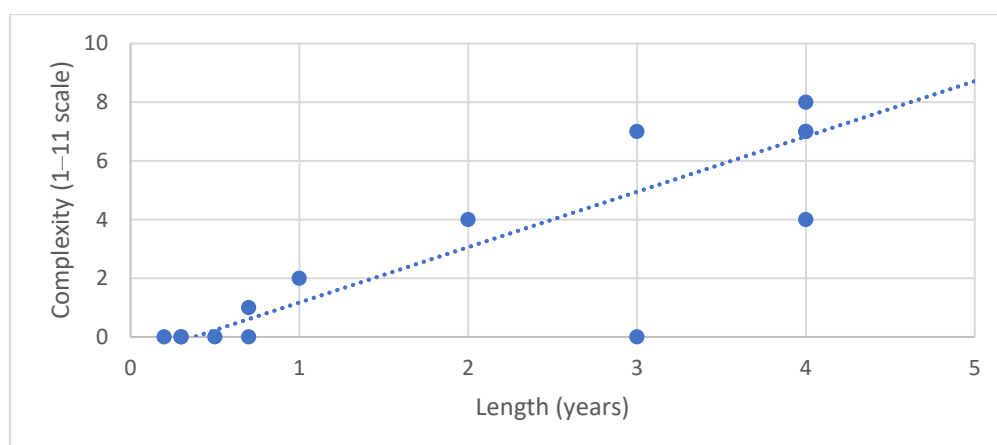
principle be helpful whether requested by communities, clients, or IFC/MIGA, this option could create problematic complexities for CAO, and is unlikely to be workable in a way that would satisfy IFC's and MIGA's interest. If a new procedure were created limiting CAO's response to dispute resolution, communities involved would need to retain the option to file a later complaint, which could result in a compliance process. A separate issue is the potential increase in demand for CAO's Dispute Resolution capacity. CAO capacity might not be sufficient to enable effective responses to a substantial number of IFC/MIGA and client requests. For these reasons, it would be very difficult to find a viable pathway to enable IFC/MIGA or their clients to request CAO Dispute Resolution outside the context of a community-initiated complaint. However, there is no barrier to a client asking an affected community to make a complaint to CAO, stating that the community stakeholders are seeking CAO support for dispute resolution with a willing client.

Effectiveness

260. Since 2013, CAO's Dispute Resolution function has achieved full or partial resolution of 70 percent to 75 percent of all cases that proceed to dispute resolution. The time required for mediation ranges from two months to two years or more. Questions have been raised about the potential for reducing the time required to resolve Dispute Resolution cases. Most other IAMs with Dispute Resolution functions do not specify time limits for those functions (though EBRD/IPAM and GCF/IRM note that cases should generally be completed within one year, and MICI extends the time frame beyond one year only with the approval of the MICI Director). The actual range of time needed to complete dispute resolution at other IAMs appears to be similar to CAO's, though there is no consistent reporting of the average time for dispute resolution processes by IAMs.

261. Data provided by CAO suggest that there is a strong correlation between indicators of case complexity (including the number and diversity of parties involved, the availability of a qualified mediator, logistical and linguistic challenges, and contextual factors such as risk of reprisals and overall insecurity) and the time required to resolve cases. Figure 7.1 shows the relationship between complexity and time to resolution for a sample of 15 cases completing dispute resolution between FY2013 and FY2019.

Figure 7.1. Complexity of CAO Dispute Resolution Cases and Length of Time Required to Resolve Them, FY2013–FY2019



Source: Unpublished case analysis provided to the Review Team, April 2020.

Note: Complexity is measured on a 1–11 scale, with 1 signifying least complex and 11 signifying most complex.

262. The Review Team acknowledges the link between complexity and length of time required to resolve a case, and recognizes that CAO is sometimes called upon to work in very challenging contexts

where any progress should be considered a significant accomplishment. On the other hand, cases that last a long time and do not successfully resolve the main issues raise a question about the efficacy of CAO's dispute resolution intervention. It would be useful for CAO to conduct a review of Dispute Resolution cases lasting more than two years, comparing those that successfully resolved all or nearly all issues with those that did not. That review could assess retrospectively whether CAO could have ended the dispute resolution process for mostly unsuccessful cases earlier, and whether there are lessons learned that could be applied to future cases.

263. Questions have been raised about whether the resolution rates for Dispute Resolution cases have been declining and the number of cases referred from Dispute Resolution to Compliance has been increasing. As shown in section 7.3 on CAO assessments, there has been a significant rise in the proportion of cases transferred to Compliance after assessment. However, for cases that began a dispute resolution process after assessment, full and partial resolution rates for cases appear to be steady in the 70 percent to 75 percent range over the period since FY2013. There was a modest increase in cases transferred from Dispute Resolution to Compliance in FY2015 and FY2016 relative to the previous three years, and this may have contributed to a perception of a falloff in the effectiveness of dispute resolution, even though the number of cases transferred from Dispute Resolution to Compliance subsequently fell.

264. With regard to perceived fairness, as detailed in Section 6, a recent CAO survey indicated that stakeholders in a dispute resolution process rated CAO and its mediators to be impartial and to have acted with integrity in most cases that reached agreement (62 percent of client respondents and 84 percent of complainant respondents rated CAO high on impartiality, and 75 percent of company and 74 percent of complainant respondents rated CAO high on integrity). Numbers were lower for cases that did not reach agreement (33 percent of company respondents and 62 percent of complainant respondents rated CAO high on impartiality, and 33 percent of company and 64 percent of complainant respondents rated CAO high on integrity) (see figure 6.3 in section 6). The disparity in company versus complainant ratings in cases that did not reach agreement raises some questions about the ability of CAO mediators to maintain impartiality in the more challenging mediations, and bears further reflection by CAO. However, given the small sample size, these results should not be taken as a strong critique unless borne out by further surveys and other forms of feedback.

265. Beyond its immediate case work, CAO's Dispute Resolution function has also been effective in disseminating lessons learned from its work through its mediator network, its participation in the network of IAMS, and through occasional publications and contributions to CAO's advisory work.

Resources

266. CAO is generally satisfied with the level of financial and human resources available for Dispute Resolution cases. However, in years when several complex Dispute Resolution cases are underway at the same time, resources can be strained. It can also sometimes be difficult to identify qualified mediators for particular cases, regardless of the financial resources available. CAO is working to expand its network and roster of qualified mediators. This effort will need to expand as IFC moves more investment into fragile and conflict-affected states where mediator capacity may be very limited, even as IFC invests in projects with higher E&S risks in contexts with weak governance.

267. Given the overall effectiveness of the CAO dispute resolution process, the Review Team's primary recommendations have to do with ensuring effective coordination between CAO and IFC/MIGA during dispute resolution processes, and ensuring adequate human resources for dispute resolution.

Recommendations:

- CAO and IFC/MIGA should formalize protocols for consultation between CAO and IFC/MIGA during Dispute Resolution cases, such as using IFC's Stakeholder Grievance Response Team as the primary point of contact, and confirming case by case the role that IFC/MIGA investment teams and Management will play in advising the client and supporting a good faith effort at dispute resolution.
- IFC/MIGA should provide focused support to clients with lower stakeholder engagement and grievance resolution capacity, to ensure that they understand the CAO dispute resolution process and engage effectively in it.
- CAO should expand its efforts to identify qualified mediators and build their capacity, with increasing emphasis on mediators who are able to work effectively in fragile and conflict-affected contexts, where IFC/MIGA is expected to expand its investments/guarantees in the next several years.
- CAO should review all cases that began dispute resolution under the current OGs and took longer than two years to resolve or transfer (partially or fully) to Compliance, in order to determine whether it could better identify complex cases that are unlikely to be resolved through a dispute resolution process, and accelerate their transfer to Compliance.

7.5. Initiating the Compliance Process

268. The compliance process includes three stages: (1) appraisal; (2) compliance investigation; and (3) monitoring in cases in which non-compliance and related harm have been identified in the compliance investigation. Complaints are either referred to Compliance after the assessment process when parties cannot agree to dispute resolution or through transfer from Dispute Resolution, if the dispute resolution process could not be completed successfully (see OG para. 4.2.1). In this latter case, the compliance process will only review the issues on which the dispute resolution could not find a consensus-based solution. A compliance process can also be initiated by a request from the CAO Vice President based on project-specific or systemic concerns and/or a request from the President or Senior Management of IFC/MIGA.⁷⁰ The OGs do not require that all cases that could not be resolved fully in the dispute resolution process always be transferred to Compliance, but in practice CAO automatically transfers all cases to Compliance if there are unresolved issues. As the compliance process is a lengthy and cumbersome process, automatic transfer might not always be appropriate if there are only a few unresolved issues.

Recommendation: When transferring a complaint from Dispute Resolution to Compliance, an appraisal process should only be started if complainants request such a transfer. Complainants should give an explicit agreement to participate in a compliance process before CAO begins the compliance appraisal. The agreement to proceed with a compliance process should be given by the complainants at the first point of engagement between the CAO Compliance function and the complainants.

The Purpose of a Compliance Process Needs to be Clearly Defined

⁷⁰ Over the past 10 years, about 5 percent of cases have been initiated by the CAO Vice President. They were: (1) Amaggi Expansion 1, compliance audit closed in 2005; (2) Anvil Mining Congo, compliance audit closed in 2006; (3) SN Power 01, closed at appraisal in 2010; (4) Tullow Oil, Kosmos EnergyJuilee FPSO-01, closed at appraisal in June 2011; (5) IFC Financial Markets, audit completed, last monitoring in March 2017; (6) Dinant 01, combined with affected community complaint, investigation report completed, last monitoring in January 2019; (7) Tata Tea 01, combined with affected community complaint, investigation completed, last monitoring in January 2019; (8) Lonmin 01, closed at appraisal in August 2013; and (9) Ficohsa 01, combined with affected community complaint, investigation completed, and monitoring closed in June 2019.

269. The Review Team in their interactions with IFC/MIGA found a fair amount of confusion about the purpose of the compliance process. Unclear language provided in OG para. 4.1 might have contributed to the confusion. OG para. 4.1 states: "... CAO assesses how IFC/MIGA assured itself/themselves of the performance of its business activity or advice, as well as whether the outcomes of the business activity or advice are consistent with the intent of the relevant policy provisions." This definition of purpose is puzzling as the assessment whether the outcomes of the business activity or advice are consistent with the intent of the relevant policy provisions seems to shift the compliance review to an evaluation of policy effectiveness. But compliance review processes are not mechanisms to evaluate policy effectiveness, although compliance reviews may well flag issues that merit consideration in this regard. An evaluation of policy effectiveness is the task of evaluation departments. Moreover, the purpose of the compliance process needs to be aligned with the objectives of CAO (see OG 1.1.). These objectives include: "address complaints from people affected by IFC/MIGA projects ... in a manner that is fair, objective, and equitable, and enhance the environmental and social outcomes of IFC/MIGA projects." The CAO compliance review responds to complaints that allege harm (or likely harm) and should assess whether there have been non-compliances with E&S policies that caused the harm (or likely harm). The language in OG para. 4.1 does not lay out these objectives. Box 7.1 provides a comparative overview of various IAMs' definitions of the purpose of compliance reviews.

Recommendation: The purpose of the CAO compliance review should be clearly established. The language provided in section 2.7 of the recently issued EBRD/IPAM policy could provide guidance.

Box 7.1. Other IAMs' Definitions of the Purpose of Compliance Reviews

ADB/CRP, para. 186: "The CRP will investigate alleged non-compliance by ADB with its operational policies and procedures in any ADB-assisted project in the course of the formulation, procession, or implementation of that project that directly, materially, and adversely affects local people. A compliance review will not investigate the borrowing country, the executing agency, or the private sector client. The conduct of these other parties will be considered only to they are directly relevant to an assessment of ADB's compliance with its policies and procedures."

EBRD/IPAM, sec. 2.7 (a) (i): "The purpose of the Compliance Review is to determine whether the Bank, through its actions or inactions, has failed to comply with the Environmental and Social Policy or Project-specific provisions of the Access to Information Policy, in respect of an approved Project. Where IPAM concludes that the Bank was not in compliance with either Policy, IPAM will recommend remedial changes related to actions or omissions of the Bank...If EBRD is found to be non-compliant, further objectives of this stage are to (i) recommend Project-specific actions to bring the Bank into compliance in respect of the Project, and address the harm or potential harm associated with the findings of non-compliance..."

GCF/IRM, para. 50, Procedures and Guidelines: "When conducting a compliance review, the IRM will focus on examining whether the GR funded project or program has not complied with applicable GCF operational policies and procedures and whether such non-compliance has caused or may cause adverse impacts to the complainant."

IDB/MICI, para. 36: "The purpose of the Compliance Review Phase is to impartially and objectively investigate allegations by Requestors that the IIIC has failed to comply with its Relevant Operational Policies and has caused Harm to the Requestors."

Note: ADB/CRP = Asian Development Bank/Compliance Review Panel; EBRD/IPAM = European Bank for Reconstruction and Development/Independent Project Accountability Mechanism; GCF/IRM = Green Climate Fund/Independent Redress Mechanism; IDB/MICI = Inter-American Development Bank/Independent Consultation and Investigation Mechanism.

7.6 Compliance Appraisal

270. The compliance appraisal determines whether a complaint should proceed to a full investigation. The OGs state that compliance investigations should be initiated only for those projects that raise substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA. This language is unclear, as it can be read that compliance investigations should only be conducted for those projects that entail both alleged environmental and social harm and issues of systemic importance. Limiting compliance review processes to complaints that raise issues of systemic importance cannot be the objective of a process designed to address complaints from people affected by IFC/MIGA projects (see OG para. 1.1). Taking the view of a project-affected people, it is irrelevant whether their complaint raises systemic issues. The complainants' immediate concern is the harm to themselves and their communities that IFC/MIGA Performance Standards are designed to prevent. The qualification "systemic issues" should apply only to those compliance processes initiated by the CAO Vice President or IFC/MIGA Vice President, or IFC/MIGA Senior Management.

Recommendation: OG para. 4.2.1. should be clarified to state that the purpose of a compliance appraisal in relation to a complaint from project-affected people is to ensure that compliance investigations are conducted when the complaint raises substantial concerns regarding the environmental and/or social impacts of a project on the complainant, and the appraisal provides preliminary evidence that there may have been non-compliance with relevant E&S policies.

271. OG para. 4.2 provides that compliance appraisal can also be triggered through a request of the CAO VP, the President, or Senior Management of IFC/MIGA. Only 5 percent of CAO cases have been triggered through such a request, but the possibility for a CAO VP, the President, and IFC/MIGA Senior Management to request a compliance process is important for such cases where project-affected people are reluctant to step forward and complain (for example, due to fear of threats of retaliation and in cases where project-affected people have been killed). The compliance process of the prominent Dinant case was triggered by a request of the CAO VP.⁷¹ Unless there are retaliation concerns or exceptional severe harm (or likely harm), requests for a compliance process should only be triggered without a complaint if there are systemic issues.

Recommendation: The CAO VP, the President, IFC/MIGA Senior Management, and the Board (assuming that the Board in the future will assume responsibility for the CAO), should be able to request compliance investigations in cases where affected people are subject to, or fear, retaliation, in cases where there is preliminary evidence for particularly severe harm (or likely harm), and in cases where there are issues of systemic importance.

Revisions of Appraisal Criteria

272. The OGs lay out three basic criteria to guide the process: (1) There is evidence of potentially significant adverse environmental and/or social outcome(s) now or in the future; (2) there are indications that a policy or other appraisal criteria may not have been adhered to or properly applied by IFC/MIGA; and (3) there is evidence that indicates that IFC/MIGA's provisions, whether or not complied with, have failed to provide an adequate level of protection. It is noteworthy that the OGs do not expressly establish linkages between harm (which in the CAO OG is referred to as "adverse outcome") and non-compliances. The CAO appraisal criteria require significant adverse outcomes and evidence of significant non-compliances, but do not require a linkage between the non-compliance and adverse outcome (harm). Such a linkage is necessary given that only negative impacts (harm) linked to the non-compliances with E&S policies should be subject to compliance reviews and, in case

⁷¹ CAO Audit of IFC, CAO Ref. C-I-R9-Y12-F161, CAO Audit of IFC Investment Corporacion Dinant S.A.de C.V. Honduras, December 20, 2013.

of non-compliance findings, subsequent remedy. Adverse impacts (harm) not linked to failures to adhere to E&S requirements do not constitute non-compliances and thus would not call for remedial actions.⁷² Table 7.2 presents criteria of some comparable IAMs, most of which establish the need for a linkage between non-compliances and related harm.

Table 7.2. Overview of Appraisal Criteria of Independent Accountability Mechanisms (IAMs)

IAM	Appraisal stage	Criteria	Comment
ADB/CRP	Eligibility assessment	1. There is evidence of non-compliance with ADB policies and procedures; 2. There is evidence that the compliance has caused, or is likely to cause, direct and material harm to project-affected people; and 3. The non-compliance is serious enough to warrant a compliance review.	Upon receipt of a complaint, the CRP requests a Management Response, which needs to be submitted within 21 working days.
AfDB/IRM	Eligibility assessment	Determine that there is prima facie evidence that the complainants have been harmed or threatened with harm by a Bank-financed project and that the harm or threat of harm was caused by the failure of the Bank Group's staff and Management to comply with any of the Bank Group's relevant policies and procedures.	Management Response within 21 days upon notification of complaint.
EBRD/IPAM	Compliance assessment	1. It appears that project may have caused, or may be likely to cause, direct or indirect and material harm to complainants. 2. There is an indication that the Bank may not have complied with a provision of the Environmental and Social Policies or the project-specific provisions of the Access to Information Policy.	IPAM can request a Management Response; the client can elect to submit a response.
IDB/MICI	Eligibility determination	The request describes the harm that could result from potential non-compliance with one or more relevant operational policies.	Management Response within 21 business days of registration of complaint.
World Bank (IBRD & IDA)/IPN	Eligibility	The Request asserts in substance that a serious violation by the Bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester.	Management Response.
<i>Note:</i> ADB/CRP = Asian Development Bank/Compliance Review Panel; AfDB/IRM = African Development Bank/Independent Review Mechanism; EBRD/IPAM = European Bank for Reconstruction and Development/Independent Project Accountability Mechanism; GCF/IRM = Green Climate Fund/Independent Redress Mechanism; IDB/MICI = Inter-American Development Bank/Independent Consultation and Investigation Mechanism; World Bank (IBRD & IDA)/ IPN = World Bank (International Bank for Reconstruction and Development & International Development Association) Inspection Panel.			

⁷² As an example, adverse impacts resulting from changes in market supplies and related changes in output prices or changes in business opportunities would not be covered under the IFC E&S policies, and thus would not be considered for remedial actions.

Recommendations:

- Revised OGs should establish as an appraisal criterion that a linkage between potential non-compliances with IFC/MIGA policies and alleged adverse outcomes exists.
- Criterion (iii) of the OG policy should be eliminated. It establishes as a criterion of appraisal whether there is evidence that IFC/MIGA's provision have provided adequate protection (OG para. 4.2.1). The CAO process is not an evaluation instrument that assesses whether IFC/MIGA policies are effective. CAO has informed the Review Team that, in practice, this appraisal criteria has not been applied in the past five years.
- The first two appraisal criteria should be altered to state that there must be preliminary evidence of potentially adverse environmental and/or social outcomes now, or in the future, and that there must be preliminary evidence that a policy might not have been properly adhered to or properly applied by IFC/MIGA. An appraisal process looks at preliminary evidence. It is during the investigation phase that CAO should make findings based on a full review of evidence.

The Need to Define Criteria to Limit Repeat Complaints

273. The OGs do not provide for a restriction on repeat complaints on the same project. It would thus be possible for complainants to file successive complaints with similar issues on the same project. CAO has informed the Review Team that in practice it does not allow such repeat complaints from the same complainants but either closes them at appraisal or “bundles” them under a related complaint. Repeat complaints raising the same issues from different sets of complainants on a project already investigated are also not necessary, as investigation findings and the need for remedial actions apply to all affected people, not only to the specific group of people who filed the complaint.

Recommendations: Repeat complaints on a project already investigated should not be accepted unless they raise new evidence or new issues not previously considered. Revised OGs should include language used in policies of other IAMs. The language of para. 148 (v) of the ADB Accountability Policy (2012) provides good practice language. It states the exclusion of complaints “...about matters already considered by the CRP, unless the complainants have new evidence previously not available to them or unless the subsequent complaint can be readily consolidated with the earlier complaint.”⁷³

The Decision to Investigate Should Be Made by the CAO VP

274. The OGs provide that the decision whether to investigate is made by the CAO as a result of the appraisal process and that CAO will advise IFC/MIGA, the President, and the Board in writing about this decision (OG para. 4.2.2). By the way of comparison, about half of the IAMs, including those which primarily serve the private sector (such as IPAM/EBRD and ICM/DEG-FMO-Proparco) take the decision whether to investigate by themselves without Board involvement. The other group of IAMs, such as CRP/ADB, IRM/AfDB, MICI/IDB, and the World Bank IPN, present a recommendation to their respective Boards for approval of an investigation. IAMs more recently established, such as the GCF/IRM and UNDP/SECU, keep the decision-making authority with the respective IRM. The Review Team is of the view that a decision to investigate, based on preliminary evidence for non-compliance and related harm established during an appraisal process, should be taken by the CAO VP based on expert analysis by compliance review staff. While there might be justification for Board involvement on investigation decisions for public sector projects supported by sovereign lending, given that Board members, as representatives of member countries, might hold the view that they should be consulted

⁷³ Para. 25 of the World Bank Inspection Panel Operating Procedures (2014) contains comparable language: “The Request is not the same as a previous Request on which the Panel has already made a recommendation. If the Request raises similar matters as a previous Request, then the new complaint must present new evidence or circumstances related to the Requesters ‘concerns.’”

on investigations affecting the public sector, this rationale does not hold for private sector projects. Board involvement in a decision whether an investigation should be conducted could be perceived as undermining the effectiveness and independence of the CAO.

275. On a practical level, assessments as to whether there is preliminary evidence for non-compliance and related harm require the exercise of technical professional judgments that are not the core competency of the Board. Ombudsman systems generally conduct preliminary assessments and then independently decide whether an in-depth investigation is warranted.⁷⁴

276. Requiring Board approval of the decision to investigate will further delay and require additional resources for a compliance process that is—as documented in this Review—already too long. This Review proposes a Board decision on the Management Action Plan that is to be prepared by IFC/MIGA in response to CAO investigation findings (see section 7.8.1). Adding an additional Board decision point to approve investigations would increase the Board workload with respect to CAO complaints. The Review Team is thus of the view that the decision to investigate a CAO complaint should be taken by the CAO VP.

Recommendation: The decision to investigate after an appraisal process determines that there is preliminary evidence of non-compliances with E&S policies and related harm should be made by the CAO VP.

The Need for a Management Response at the Appraisal Stage

277. A crucial missing element in the CAO compliance process is that the OGs do not provide for IFC/MIGA to present a formal position on issues raised in a complaint. Current OGs provide for a Management Response only very late in a compliance process in response to an investigation report. IFC/MIGA views and client views may be presented in an assessment report, and CAO interacts with IFC/MIGA staff throughout the compliance process (the CAO Handbook emphasizes the requirement to interact with IFC/MIGA), but there is no formal submission of IFC/MIGA positions that is publicly disclosed. The objective of a compliance process is to assess whether IFC/MIGA have done “due-diligence” to assure application of IFC/MIGA policies. Due process requires that the voice of IFC/MIGA staff/Management be heard, and that these positions be disclosed and formally considered in the compliance process. Other IAMs provide for IFI Management to present a formal Management Response in which IFI Management lay out their views on the issues presented in the complaint (see box 7.2). This Review considers it essential that a Management Response be introduced at the beginning of a compliance process. Given that the client is not formally part of the compliance process, this Review does not propose to make submission of a client statement a regular part of a compliance review process. But if the client wishes to present a client view, the client view should be considered in the compliance process. Among IAMs, only the EBRD provides the client the possibility to express a position, if they wish to do so. Other IAMs assume that the Management Response will sufficiently represent the client view. The complaint, the Management Response, and the client statement (if it has been submitted) should all be disclosed on the CAO website, together with the appraisal report.

Recommendations: IFC/MIGA Management should present a Management Response within 10 business days of transferring a complaint to the compliance process. This time frame is shorter than the 21-working day time frame of other IAMs. But other IAMs do not have the very extensive assessment process that CAO has before a complaint is transferred to Compliance. There is a delay

⁷⁴ See International Ombudsman Institute, *Developing and Reforming Ombudsman Institutions*, p. 6, <https://www.theloi.org/publications>; Ombudsman Association, “Ombudsman Association Schedule 1 to the Rules – Criteria for the Recognition of Ombudsman Offices,” pp. 2–3, <http://www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf>

between the determination that a complaint should be transferred to the compliance process and the actual transfer, as the assessment process is completed only with the issuance of the assessment report. This hiatus can be used by IFC/MIGA to prepare the Management Response.

This Review does not recommend regularly soliciting a response from the client, given that it is IFC/MIGA staff and Management that is the focus of the compliance review. But if the client wishes to submit a response, the response should also be disclosed, together with the Management Response and appraisal decision.

If a client response is submitted, it should be considered by CAO in the appraisal process.

Box 7.2. The Management Response at Appraisal Stage at Other IAMs

ADB/CRP (para. 178): "...the CRP will forward the complaint to Management and request a response within 21 days. In its response, Management must provide evidence that (i) ADB has complied with the relevant ADB policies and procedures; or (ii) there are serious failures attributable exclusively to ADB's actions or omissions in complying with its policies and procedures, but Management intends to take actions to ensure compliance, as appropriate."

AfDB/IRM (para. 36): "Within 21 business days after being notified of the Registration of a Request, Management shall provide CRMU [Compliance Review and Mediation Unit] with a Management Response or evidence that it has complied or intends to comply with the Bank Group's relevant policies and procedures...."

EBRD/IPAM (para 2.6c): "IPAM will also (ii) consider Bank management's written response to the Request, where a management response has been requested by IPAM, outlining the steps taken by the Bank to ensure its compliance with the Environmental and Social Policy of Access to Information Policy."

World Bank/IPN (Resolution 1993, para. 16): "Within 21 days of being notified of a request for inspection, the Management of the Bank shall provide the Panel with evidence that it has complied, or intends to comply with the Bank's relevant policies and procedures."

Note: ADB/CRP = Asian Development Bank/SAfDB/IRM = African Development Bank/Independent Review Mechanism; EBRD/IPAM = European Bank for Reconstruction and Development/Independent Project Accountability Mechanism; GCF/IRM = Green Climate Fund/Independent Redress Mechanism.

278. IFC/MIGA is concerned that the appraisal process allows too many complaints to proceed to compliance investigations, while complainants and CSOs raise concerns about too many cases being closed at appraisal.⁷⁵ The share of complaints appraised that proceed to a full investigation has increased from 35 percent to about 50 percent in the past 10 years. CAO commissioned an external review of its appraisal process, which was concluded in 2016.⁷⁶ The objective of the review was to assess to what extent appraisal reports respond to the requirements of the OGs. The 2016 review assessed 15 cases and examined the adequacy of evidence presented in the reports, the extent to which CAO's mandate has been fulfilled, and whether the decision to proceed to investigation following appraisal was justified. The review found the appraisal reports to be robust. The reviewer found that the issues were well defined, the positions of the parties were set out in an evenhanded manner, the evidence on each issue was clearly set out and analyzed, and appropriate evidentiary standards were applied in arriving at conclusions. The reviewer agreed with each of the decisions of CAO to proceed to investigation, but had questions about four of the six cases reviewed that were closed. In his view, there was evidence to proceed to investigation even for four of the six cases that CAO decided to close.

⁷⁵ For example, complainants disagreed with the CAO appraisal decisions for the Ghana/Terma Port (2019) and the Nigeria/Elemé Fertilizer (2019) complaints.

⁷⁶ See Lalanath de Silva, "Peer Review of CAO Compliance Cases," August 30, 2016.

Proposal for a Deferral Option Back to Management at the Appraisal Stage

279. Compliance processes are long and cumbersome. Efforts should be made to allow for possibilities that agreements on solutions can be reached without going through the full process. The OGs do not provide for an early solution option or for a deferral of the complaint back to Management in order to solve the issues raised in the complaint. Some other IAMs have introduced such deferral options if Management signals willingness to proceed rapidly with corrective actions. The World Bank Inspection Panel introduced “deferral” of the decision to investigate in 2004 and formally incorporated it into its Operating Procedures in 2014. Past deferrals sought to allow the Bank an opportunity to implement a corrective action plan to mitigate alleged actual or potential harm. Based on Management’s proposed time frame to implement these actions, the IPN specifies the date at which it will revisit the decision to investigate. The deferral periods have ranged between six months to a year. Similarly, IDB/MICI provides for an option to delay the decision on whether a compliance review is warranted. This occurs in the form of an eligibility suspension. The suspension might be granted of up to 45 days and only if there is a specific plan to make corrections and a proposed timeline for carrying out the activities. EBRD/IPAM has established a suspension process before a complaint is registered, during which Management has 45 business days, at the discretion of the Head of IPAM, to make good faith efforts to address the issues. During suspension, IPAM will monitor the status and progress of efforts. In most IAM cases, deferral processes are relatively new and still in the testing phase and it is too early to determine a good practice approach.

280. Some CSOs may object to the introduction of a deferral option as they may consider this a further delay in the already lengthy compliance processes, during which time communities could be further harmed and weakened. They argue that the deferral would be at the expense of the complainant. The Review Team does not agree with this position. Unlike many other IAMs, the CAO does not require that complainants first explore their concerns with IFC/MIGA operations staff before being able to file a complaint. This Review does not recommend that such a requirement be introduced (see section 7.1), but instead considers the deferral option at the appraisal stage to be a more suitable option to address concerns expeditiously if Management recognizes non-compliance issues and related harm and is willing to act. A deferral process would require a definition of a time-bound action plan by IFC/MIGA Management and a monitoring process by CAO. If the actions have not been successfully implemented during the agreed time frame, CAO would decide whether to extend the period of deferral or trigger an investigation. CAO would also consider the view of complainants on the deferral option before making a decision to defer. Given the concerns of CSOs about the introduction of such an approach and the rather early testing phase of deferral options in different IAMs, CAO might wish to consider a third-party review after several years of implementation, which would be publicly disclosed.

Recommendations: A deferral option should be introduced, with the following provisions:

- CAO should have the ability to defer the decision to investigate as part of the appraisal process.
- A decision to defer should be reasoned, considering:
 1. The severity of harms and potential compliance issues raised by the complaint;
 2. Whether the Management Response includes specific commitments that are commensurate to the issues raised in the complaint and consistent with IFC/MIGA policy requirements;
 3. The views of the complainants as to the impact (positive and negative) of a decision to defer; and
 4. Other information deemed relevant by CAO.

- In cases in which CAO decides to defer the decision to investigate, CAO should establish and make public:
 1. A framework for monitoring during the period of deferral including reporting by Management and on commitments included in the Management Response
 2. A time line for CAO to issue a report on implementation of commitments included in the Management Response and their effectiveness in addressing the concerns raised by the complaint
 3. A framework for CAO to decide whether to close the complaint, extend the period for deferment, or trigger an investigation.

Timeline of Appraisal Process

281. The OGs state that the appraisal should be completed within 45 working days. Actual time frames average 129 working days (the median is 110 working days). Such delays are too long and need to be significantly shortened. The long times required for the appraisal reflect insufficient resources allocated to CAO to conduct the increasing number of Compliance cases (see section 6). Moreover, appraisals could be more focused as the process should only establish whether there is preliminary evidence of non-compliances and related harm. Full evidence does not need to be established, as this is the task of the subsequent investigation. Appraisal reports could be significantly shortened. OG para. 4.2.2 provides that a summary of appraisal results be made public. CAO at present discloses fully reasoned appraisal reports and not merely a summary of results. Reasoned decisions need to be disclosed to make appraisal decisions transparent, but reports should be kept short.

Recommendations:

- The appraisal process should be limited to 45 days.
- In the interest of a more streamlined process, CAO should publish a short, reasoned decision.

7.7. Compliance Investigation

282. A compliance investigation is the core function of the compliance process. It takes place after an appraisal has concluded that there is sufficient preliminary evidence that non-compliances and related harm might have occurred and after CAO has decided to proceed with the complaint to investigation. The investigation report determines whether there are non-compliances and related adverse environmental and social outcomes. The OGs specify that the focus of the compliance process is on IFC/MIGA staff (OG para. 4.1). The OGs also state, however, that in many cases, it is necessary for CAO to review actions of the client and to verify outcomes in the field, in order to assess whether IFC/MIGA appropriately pursued their obligations. CAO is expected to make findings with respect to both “non-compliance and any adverse environmental and/or social outcomes...” (OG para. 4.4.5). As the CAO investigation report—in case of non-compliance findings—establishes a failure of due diligence of IFC/MIGA in exercising its E&S responsibilities, it is not surprising that these findings are contentious and are often resisted by IFC/MIGA.

Criteria for CAO Compliance Investigations

283. The CAO compliance investigation is guided by the CAO OGs and the CAO Operational Handbook on Compliance. OG para. 4.3 lays out the following prescription for the compliance investigation:

“An investigation is a systematic, documented verification process of objectively obtaining and evaluating evidence to determine whether environmental and social activities, conditions, and management systems, or related information are in conformance with the compliance investigation criteria.”

284. Criteria provided in the OGs for compliance investigations are limited and somewhat confusing, as they do not capture the key task of CAO's compliance investigation. OG para. 4.4.2 states that in CAO's compliance investigation should determine whether:

- "The actual environmental and/or social outcomes are consistent with, or contrary to, the desired effect of the policy provisions."
- "The failure to address environmental and/or social issues as part of the review process resulted in outcomes that are contrary to the desired effect of the policy provisions."

285. The Review Team is of the view that these two criteria do not adequately articulate the task of a compliance investigation. The first criterion focuses only on outcomes and on an assessment as to whether this outcome is consistent with a policy. The second criteria focuses on the failure to assess environmental and/or social issues and related outcomes. However, an investigation should review whether IFC staff appropriately applied relevant E&S policies, conducted required E&S reviews, and provided support to the client to remedy harm. The Sustainability Policy states that IFC, and by extension, MIGA, seek to ensure through their due diligence, monitoring, and supervision efforts that the business activities they finance/guarantee are implemented in accordance with the requirements of the Performance Standards (para. 7). The same policy states that it is central to IFC's and MIGA's development mission to carry out investment and advisory activities with the intent to "do no harm" to people and the environment (para. 9). It is through the appropriate implementation of the Performance Standards that harm is expected to be assessed, minimized, mitigated, and compensated for as appropriate.

286. Reflecting good practice among IAMs, compliance investigations should answer three questions: (1) Has there been non-compliance with E&S policies? (2) If the answer is yes, have IFC/MIGA staff appropriately carried out its E&S obligations to assure that the client reaches compliance? (3) Has the non-compliance resulted in or contributed to harm or likely future harm? While the OGs do not adequately lay out the task of a CAO investigation, actual practice of CAO, as reflected in investigation reports, does apply these three questions. It would be important that OGs appropriately reflect the task of an investigation. Other IAMs provide language that could be adopted in revised OGs (see box 7.3).

Box 7.3. Other IAM's Criteria for Compliance Investigations ADB Accountability Mechanism

Policy 2012 (para. 186): "The CRP [Compliance Review Panel] compliance review report will ... document the CRP's findings concerning any non-compliance, and alleged direct and material harm. It will include all relevant facts that are needed to fully understand the context and basis for the CRP's findings and conclusions. It will focus on whether ADB failed to comply with its operational policies and procedures in formulating, processing, or implementing the project in relation to the alleged direct and material harm. It will also ascertain whether the alleged direct and material harm exists."

EBRD/IPAM Policy (para. 2.7 [b]): "Criteria. The Bank will be found to be non-compliant if it is determined by IPAM, that through its actions or inactions, the Bank has failed to comply with any provision of the Environmental and Social Policy (including any provision requiring the Bank to monitor Client commitments, or the Project-specific provisions of the Access to Information Policy, in respect of a Project."

GCF, Procedures and Guidelines of the Independent Redress Mechanism, 26 February 2019 (para. 50): "When conducting compliance review, the IRM will focus on examining whether the GCF funded project or programme has not complied with applicable GCF operational policies and procedures and whether such non-compliance has caused or may cause adverse impacts to the complainant."

Note: Asian Development Bank; EBRD/IPAM = European Bank for Reconstruction and Development/Independent Project Accountability Mechanism; GCF = Green Climate Fund.

Recommendation: Revised OGs should clearly lay out compliance investigation criteria that determine that investigations should focus on: (1) whether there has been/have been non-compliance with E&S obligations; (2) whether IFC/MIGA reviewed and supervised project E&S risks and impacts in accordance with relevant requirements; and (3) whether there is harm or likely future harm that is related to non-compliance with IFC/MIGA E&S policies.

CAO Access to Information to Conduct Compliance Investigations.

287. Compliance investigation processes require full access to internal documents related to the project. For this reason, almost all IAM policies have a provision that provide for full access to information. The IAM Network also has a Good Practice Note⁷⁷ that lays out the need for IAMs to have automatic access provision to information. The OGs do not contain such a provision. Currently, CAO staff have direct access to IFC's electronic filing system (iPortal) unless the project file is marked "confidential." In relation to projects marked confidential, CAO is required to request access for specific staff working on the relevant complaint. IFC staff and Management have typically provided this access. CAO, however, does not have access to relevant information from IFC that has not been filed in the iPortal but is kept in staff emails and departmental shared drives. Moreover, CAO does not have direct access to MIGA's online filing system and must request specific documentation from MIGA staff.⁷⁸ Other IAMs have more expansive access to information provisions (box 7.4).

Box 7.4. Access to Information Provisions of Other IAMs

AfDB/IRM, para. 91 (a): "When conducting any inquiry, assessment or review for a problem solving exercise or a compliance review, the Director of a Review Panel shall have full access to relevant Bank Group staff and files, including electronic files, cabinets and other storage facilities..."

EBRD/IPAM, para. 3.1 (f): "In connection with a case, IPAM staff will have full and direct access to relevant Bank staff and all Project files (including electronic and hardcopy files), and will have access to cabinet and storage facilities."

GCF/IRM, para. 99: "When implementing its functions, the IRM shall have access to GCF staff and consultants, and to all records produced or possessed by GCF that the IRM seems relevant, except personal information that is typically restricted."

Note: AfDB/IRM = African Development Bank/Independent Review Mechanism; EBRD/IPAM = European Bank for Reconstruction and Development/Independent Project Accountability Mechanism; GCF/IRM = Green Climate Fund/Independent Redress Mechanism.

288. There is also a need to provide for adequate access by CAO to information held by the client. Typically, IFC inserts a contractual provision into its investment agreement with clients that commits the client to permit CAO visits on site and premises where the business is conducted; have access to records; and have access to those employees, agents, contractors, and subcontractors of the Borrower who have or may have knowledge of matters with respect to which CAO seeks information. This provision is usually sufficient to ensure CAO access to information. Issues have arisen, however, when the access provision is altered during negotiations between IFC and the client. Issues may also arise if IFC enters into a broad nondisclosure agreement with a client and the client is of the view that CAO is bound by this agreement and thus does not wish to release information or seeks assurance that CAO will not reference information shared in its published reports.

289. Provision of information also needs to be timely. IFC/MIGA is/are expected to cooperate in a timely fashion in the investigation process. Terms of References should establish a deadline by which

⁷⁷ IAMnet Good Practice Note: IAM's Access to and Use of Project Information, November 2018, <https://bit.ly/IAMnetGPIinformation>.

⁷⁸ IFC/MIGA staff noted to the Review Team that MIGA and IFC staff have typically provided all requested documentation.

IFC/MIGA shall submit all requested information. In exceptional circumstances, pieces of evidence can still be submitted during the factual review and commenting period provided for under OG para. 4.4.5. Under no circumstances should additional information be introduced after the factual review and comment stage. Failure to invoke positions on facts or arguments regarding compliance during the investigation process must lead to their not being considered by CAO.

Recommendations:

- Procedures should be established clarifying that CAO Compliance staff should have full access to all IFC/MIGA project information, including staff, consultants, and documentation (such as emails, reports, drafts, databases, consultant reports) as necessary in the exercise of its mandate. The full access provision should be reflected in the revised OGs.
- Standard contractual language should be developed ensuring that CAO has access to all relevant client information as necessary to exercise its mandate; that material amendments to this language should not be negotiated with clients without prior written approval from CAO; and that any nondisclosure agreement entered into by IFC/MIGA should include standard language referring to CAO's access to and use of client information as necessary in the exercise of its mandate.
- CAO, in its Terms of References for the investigations, should define the deadline by which information needs to be presented in order to be considered in the investigation.
- IFC/MIGA should not introduce new information or arguments regarding compliance after the factual review and comment phase of the investigation.

Disagreement on Compliance Findings

290. Complainants often have strong disagreements when CAO findings are not favorable to them. So do IFC/MIGA, as reflected in Management Responses that signal disagreements with investigation reports findings. IFC/MIGA staff argue that CAO in its investigations favors complainants' views and does not adequately consider the view of IFC/MIGA staff/Management and the client. Similarly, complainants feel that their views are not being heard or that CAO is taking a narrow interpretation of the IFC/MIGA requirements or does not consider evidence that they presented in their favor.⁷⁹ IFC/MIGA argue that in compliance reports they are held accountable for outcomes, while in their view IFC/MIGA responsibility is solely to review the E&S application and to support the client so that the client can achieve implementation of E&S provisions. IFC/MIGA also argue that CAO investigation reports are selective in the presentation of facts and are not objective and balanced.

291. The Review Team cannot attest as to the validity of these divergent points of view. An attestation would be possible only if the Review could have made its own independent, in-depth review of a representative set of cases, which would have required an assessment of documents used as evidence, along with interviews with IFC/MIGA staff, complainants, clients, and CAO. Such an in-depth assessment would have required resources far beyond those provided to the Review Team.

292. The CAO Vice President commissioned an external peer review of CAO's Compliance casework in 2016. The peer reviewer (a former ADB/CRP panel member and currently head of the GCF IAM) considered a representative sample of 15 cases. In relation to CAO's investigation findings, the reviewer "...found the investigation reports to be robust. The issues were well defined, the positions

⁷⁹ For example, complainants for the Albania/Enso (2018) and the Peru/Yanacchoa-11 (2020) strongly disagreed with CAO compliance findings. Complaints of the latter case alleged that the investigation was characterized by "ambiguity and obfuscation" and that CAO was involved in "collusion" with IFC and its client.

of the parties were even handedly set out, the evidence on each issue was clearly set out and analyzed and appropriate evidentiary standards were applied in arriving at the conclusions and findings.”⁸⁰

Recommendation: Peer review processes on appraisal and investigation reports should be conducted at periodic intervals. In the peer review, the concerns of both IFC/MIGA and of the complainants should be considered. To strengthen the voice of IFC/MIGA and the client in CAO investigations, the Review Team recommends two important changes to CAO processes on compliance appraisal, which are presented in more detail in section 7.6:

1. A Management Response should be submitted before the compliance process in which Management would respond to the issues raised in the complaint.
2. A client response should be submitted if the client wants to present one (albeit the client is not formally part of the compliance process).

CAO Assessments of IFC/MIGA Judgments in Cases where Policies Provide for Discretion

293. IFC/MIGA disagreements often center on CAO determinations as to whether IFC/MIGA staff have conducted E&S reviews that are “commensurate to risk.” IFC asks its clients to develop an environmental and social risk management system (PS1) that is commensurate to expected risks and dynamic in response to new risks, and that progressively achieves alignment with the Performance Standards in a reasonable period of time. The IFC’s Sustainability Policy (para. 26) states that IFC’s environmental and social due diligence should be “commensurate with the nature, scale and stage of the business activity, and with the level of environmental and social risks and impacts.” IFC/MIGA assign staff time, specialists, and seniority of staff on the basis of perceived risk and staff focus their attention on particular risks during due diligence and monitoring based on their professional judgment and what they understand the risks to be.

294. Non-compliance findings in CAO reports often refer to the “sufficiency” of analysis and whether review was “commensurate to risk.” CAO reports often conclude that IFC/MIGA staff should have recognized risks and appropriately attended to them. IFC/MIGA staff/Management argue that appropriateness of E&S review of IFC/MIGA staff should not be subject to the review of CAO compliance investigations. The Review Team differs with this view. CAO, when making a compliance assessment, is bound by the language of the IFC/MIGA Sustainability Policy and the Performance Standards, using, as secondary sources, IFC Guidance Notes and instructions to staff to interpret the policy. E&S policies assign certain responsibilities to IFC/MIGA staff. The language in these policies leaves discretion to IFC/MIGA staff. Concepts requiring the exercise of discretion include, for example, the requirement for an Environmental and Social Management System commensurate “with the level of environmental risks and impacts” (PS 1, para. 5); the expectation that a client will meet IFC/MIGA requirements within a “reasonable period of time” (Sustainability Policy, para. 22); and the standard of Good International Industry Practice (referred to frequently in multiple Performance Standards). While allowing discretion, compliance with each of these standards should be seen as requiring that any exercise of discretion reflect that of a reasonably prudent professional in the circumstances.

295. The flexibility of IFC/MIGA E&S policies has been a strength in many cases, enabling IFC/MIGA to work constructively with clients across a range of settings and industries. But flexibility has also contributed to IFC/MIGA decisions to invest in companies and activities with significant risks and impacts. CAO is empowered to review the judgments made on issues in which discretion exists needs to be exercised. However, it is absolutely essential that CAO makes this judgment not with the benefit of hindsight, but considering sources of information available at the time. This principle is laid out in the CAO Handbook (Chapter IV: Compliance), and is reiterated in the Compliance investigation

⁸⁰ Lalanath de Silva, “Peer Review of CAO Compliance Cases,” 2017, http://www.cao-ombudsman.org/about/governance/documents/CompliancePeerReview_WebSummary_July18_2017.pdf

reports.⁸¹ CAO, in its compliance investigations, should rigorously apply this principle articulated in the CAO Handbook: “In considering the adequacy of IFC&ES performance, CAO is conscious not to expect performance at a level that requires the benefit of hindsight. Rather, the question is whether there is evidence that IFC/MIGA applied relevant requirements considering sources of information available at the time.”

Recommendation: The revised OGs should articulate the principle that CAO should make its judgment about compliance not with the benefit of hindsight, but considering sources of information available at the time. As complaints often argue that harm has occurred or will occur and thus unforeseen risks have materialized or are expected to materialize, it may be tempting in a compliance process to substitute the knowledge of hindsight for a professional ex ante view. Thus an explicit and clear OG provision on that subject is appropriate.

The Need for Careful CAO Consideration of Disagreement between Experts

296. Experts for different parties (IFC/MIGA, the client, complainants) and for CAO may differ in their judgments of what risk and impact assessments and mitigation measures are appropriate for a given case, for a given situation, at a given time. Professional judgments can differ and a compliance process needs to exercise caution when substituting the view of one expert with the view of another. But not every exercise of professional judgment is compliant with IFC/MIGA requirements. CAO could, for example, conclude that an expert selected to conduct or review a risk and impact assessment lacked the appropriate qualifications or experience. It is not infrequent that highly complex technical judgments are made by staff or consultants who are not appropriately qualified. But even a qualified professional may not properly apply relevant standards in the course of the assessment or monitoring of a project. The professional may fail to consider relevant information about the project risks and impacts that was available at the time, or may apply national policies rather than policies required by IFC/MIGA and draw conclusions that are not supported by available evidence. CAO should exercise restraint in substituting the judgment of a professional engaged by the client or IFC/MIGA with the judgment of a similarly qualified professional engaged by CAO as part of the investigation process. However, it is an established practice of IAM investigation processes that key decisions leading to risks and harm are reviewed by independent professional experts hired by the IAM. And it is within CAO’s Compliance mandate that CAO—like other IAMs—may conclude that the professional judgment exercised by the client or IFC/MIGA expert was not consistent with IFC/MIGA policies and standards. In such findings, CAO positions need to be carefully articulated and presented with appropriate evidence.

Defining the Standard of Evidence

297. Another subject of disagreement when IFC/MIGA or complainants are not satisfied with CAO’s findings is whether evidence provided supports the conclusions in CAO investigation reports. CAO, not being a judicial body, does not have elaborate rules of evidence. The CAO Handbook provides only limited guidance as to the standards of evidence to be applied. Most IAMs do not articulate specific evidentiary standards for fact finding. Two IAMs refer to standards of evidence in their policies. The Procedures and Guidelines of the Green Climate Fund/Independent Review Mechanism provide as follows:

“Unless otherwise stated or necessarily implied in these Procedures and Guidelines, whenever the IRM is required to make a finding on a fact, state facts or matters in connection with a request, or a grievance or complaint, the IRM shall use the balance of probabilities evidentiary standard. This is an assessment

⁸¹ See, for example, “CAO Investigation of IFC’s Environmental and Social Performance in Relation to its Investment in Enso Albania (Lengarica Hydropower Project),” June 25, 2018, p. 11.

of whether a fact or matter under consideration is more likely to be true than not true ... If the IRM is prevented, obstructed or hindered in gathering evidence and information for addressing a request, or a grievance or complaint, or if information that is relevant to the case ... if otherwise withheld, the IRM may make findings of fact based on the best available evidence" (para. 93 and 94, Procedures and Guidelines of the IRM).

298. A similar approach is spelled out in the Investigation Guidelines of the United Nations Development Programme Social and Economic Compliance Unit (UNDP/SECU).

"SECU uses the 'preponderance of evidence' standard, which is an assessment of whether a fact is more likely to be true than not true, based on information available to and assessed by SECU" (para. 13, Investigation Guidelines: Social and Environmental Compliance Unit).

299. For CAO's evidentiary standards, the Handbook states:

"Evidence supporting a CAO non-compliance findings should be sufficient to lead a reasonable person with relevant technical expertise to sustain the findings presented in the compliance investigation report."

300. The language draws on standards developed by the US Council of Inspectors General (IGnet).⁸²

Recommendation: The revised OGs should include a provision on the standards of evidence to be applied in a CAO compliance investigation based on the approach currently articulated in CAO's Handbook. These standards are preferable to more legalistic articulations, as standard of evidence should not give rise to a perception that CAO exercises a judicial function. Compliance investigation reports should routinely note that CAO does not apply legal standards of evidence.

The Investigation Report: Disclosure of Information

301. The CAO investigation report is expected to lay out the findings of the investigation with respect to non-compliance and any adverse environmental and/or social outcomes (see OG para. 4.4.5). The investigation report is expected to systematically document the evidence to support the conclusions. The presentation of evidence contained in information not made publicly available can lead to tension between the rights of clients, which have been assured confidentiality of certain information, and the obligation of CAO to present the evidence for their findings. This tension is recognized in OG para. 1.4. CAO is bound by the IFC and MIGA Disclosure Policies that require the confidentiality of certain business information to be respected. However, the Access to Information Policy includes a "presumption in favor of disclosure" (para. 10). The Policy does not address CAO's role other than to note that CAO has a "separate disclosure regime" established under its OGs (Access to Information Policy, para. 11 (g)). OG para. 1.4, to which the Access to Information Policy refers, insufficiently elaborates the disclosure principles that should guide CAO in releasing investigation reports wherein CAO is required to provide supporting evidence for its findings. This is a void that needs to be addressed.

⁸² The IGnet standard is as follows: "Evidence supporting inspection findings, conclusions, and recommendations should be sufficient, competent, and relevant and should lead a reasonable person to sustain the findings, conclusions, and recommendations" (<https://www.ignet.gov/sites/default/files/files/iestds12.pdf>).

302. To deal with this issue, CAO has established the following practice, which is documented in its Handbook. The approach was developed following CAO discussions with the General Counsels of both IFC and the World Bank Group:

- CAO prepares its compliance reports avoiding references to sources of information that are not publicly available, where possible. CAO is particularly mindful to respect confidential business information belonging to an IFC/MIGA client. Where references to a nonpublic source are required to support CAO's compliance analysis, CAO refers to IFC/MIGA documentation rather than client documentation, if possible. CAO summarizes and paraphrases nonpublic information unless a direct quote is necessary to support a compliance findings.
- During the review of the draft report, IFC/MIGA should raise any issues regarding the disclosure of confidential information when it/they review the draft of a CAO compliance report before publication. If IFC/MIGA is/are of the view that information contained in a CAO report should be excluded for reasons of confidentiality, this information should be identified and compelling reasons for nondisclosure provided.
- The CAO Vice President will clear the final investigation report and exercise judgment in determining what information to include in a compliance investigation report, taking due account of the views expressed by IFC/MIGA Management. CAO will also consider specific confidentiality commitments between IFC/MIGA and their clients in reaching conclusions as to the information CAO discloses.

Recommendation: The language of OG para. 1.4 should be revised to more clearly spell out the special disclosure regime of CAO. Moreover, an agreement should be established between CAO and IFC General Counsel in which the disclosure practices are spelled out in detailed, balancing the need of CAO to disclose information supporting its findings and the need of confidentiality of client information. Until a more detailed framework is agreed, the approach set out in CAO's Handbook provides an appropriate framework for balancing disclosure concerns related to CAO compliance reports.

The Investigation Report: Fact Checking and Commenting on Draft Reports

303. Current OGs provide that a draft investigation report be circulated to IFC/MIGA Senior Management and all relevant IFC/MIGA departments for factual review and comment (OG para. 4.4.5). No fact checking of the draft report with either the client or the complainant is provided. This practice places the complainant, whose views are not being heard, at a disadvantage. Complainants and CSOs often highlight this as an absence of a "level playing field" between IFC/MIGA and complainants in the process. Several IAMs (ADB/CRP; EBRD/IPAM; GCF/IRM) provide for fact checking and commenting on draft reports with IFI staff/Management, the client, and the complainants. The IAM Network considers such a process to be "good practice."

304. The Review Team recognizes IFC/MIGA's concern that confidential commercial information might be unduly disclosed. The Review does not recommend that IFC/MIGA, clients, and complainants all receive the full draft report for fact checking and commenting. However, to establish at least some notion of a "level playing field," CAO should apply the same access rules to draft reports that were introduced for the World Bank IPN after the recent Toolkit Reform, which provide restricted access to draft reports. Detailed provisions are laid out as to how complainants can have access to the draft report, with precisely defined restrictions.⁸³ Moreover, just as in the case of World Bank IPN reports, complainants should receive a Table of Findings for the draft report. This Table of Findings needs to be provided to the complainants so that they can be meaningfully consulted by the client and IFC/MIGA to provide inputs into the Management Action Plan, which this Review recommends (see section 7.8.1). Given that the CAO—unlike the World Bank IPN—provides for fact checking and

⁸³ See CODE's Report and Recommendation to the Board on the Review of the Inspection Panel's Toolkit, Chair Summary, paras. 16–19, November 2, 2018 (IDA/SU 2018-0029/1).

commenting with IFC/MIGA staff/Management, complainants may also submit comments within 20 days upon receipt of the Table of Findings. Just as CAO needs to consider comments from IFC/MIGA, CAO equally then needs to consider comments received from complainants.

Recommendations:

- Complainants should have access to draft investigation reports at the same time when the draft report is circulated to IFC/MIGA for factual review and comments. To contain the risk of leakage of CAO draft reports, the same access rules for complainants could be applied for the CAO draft report as have been approved by CODE for IPN's final reports.
- Complainants should receive a Table of Findings concurrently when the draft report is circulated to IFC/MIGA for factual review and comments and as a basis for information for subsequent consultation on Management Action Plans.
- Comments received from the complainants, just like comments received from IFC/MIGA, should be considered by CAO before finalizing the report.

Length of the Investigation Process

305. The OGs provide no timeline for the investigation process. At present, it takes on average 361 working days until a draft report is issued (see table 6.1). This process should be significantly shortened, with the objective of issuing a draft investigation report within one year. This would be a rather tight deadline and could only be achieved if adequate resources are made available to CAO's Compliance function. It is disconcerting that 137 working days currently elapse between the time a draft report is cleared and a final report is disclosed. This is an extraordinary long process, which should be significantly shortened. The 20-day period the current OGs provide for fact checking and commenting should be strictly adhered to.

Recommendations:

- CAO should issue a draft investigation report within one year after disclosure of the appraisal report.
- Adequate resources should be provided to CAO to be able to comply with this deadline.
- IFC/MIGA and complainants should complete their fact checking and commenting within 20 days.

7.8. Remedies for Non-compliance and Harm

7.8.1. Remedial Actions in Case of CAO Findings of Non-compliance

Should CAO Non-compliance Findings Lead to Remedial Actions?

306. The OGs define as the mission of CAO "to serve as a fair, trusted, and effective independent recourse and accountability mechanism. "One of CAO's key objectives, as stated in OG para. 1.1., is to "address complaints from people affected by IFC/MIGA projects (or projects in which those organizations play a role) in a manner that is fair, objective and equitable." In addition, the CAO compliance process has a monitoring function according to which CAO monitors non-compliance until "actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the non-compliance" (OG para. 4.4.6). The OGs also define evidence of potentially significant adverse environmental and/or social outcomes as one of the appraisal criteria (OG para. 4.2.1). The investigation report then, typically, lays out "findings... in respect to non-compliance and any adverse environmental and/or social outcomes, including the extent to which these are verifiable."

307. These provisions clearly seem to indicate that the CAO investigation process should lead to corrective actions in case of findings of non-compliance. However, the Review Team heard from some IFC staff/managers interacted with during the Review that the CAO compliance process should not lead to remedial actions but, instead, should remain restricted to institutional learning to prevent a recurrence of such non-compliance. Their position is—among others—anchored in the rather diffuse articulation of purpose of the CAO compliance process in OG para. 4.1 and 4.3, where remediation of harm is not listed as one of the purposes of the CAO compliance process. The questioning of the compliance review function as a remedial action function apparently has its origin in early articulations of the CAO Compliance mandate, whereby complaints were addressed through the Dispute Resolution function and not the Compliance function. For example, CAO's original Operational Guidelines (2000) stated that "...formal compliance audits will take place separately from the Complaint process..." While the conception of the Compliance function evolved over subsequent versions of the Operational Guidelines, a perception persisted that it was the dispute resolution process that was to provide remedy/recourse and the compliance process was designed as an institutional learning instrument.

308. This discussion about limiting the CAO Compliance function to institutional learning is unique among independent accountability mechanisms (IAMs). IAMs are considered nonjudicial grievance mechanisms that are designed to address grievances presented by project-affected people. The IAM community aligns itself with the Guiding Principles on Business and Human Rights, implementing the United Nations "Protect, Respect and Remedy."⁸⁴ Under these principles, it is clear that correction of non-compliance and related harm are key objectives of these grievance mechanisms. The discussion in other IAMs is *not* whether there is a remedial action requirement but rather *how, by whom, and at whose expense* remedial action should be carried out. There are debates about the *effectiveness* of IAMs in supporting remedies to harm, but there is a common understanding that the role of IAMs is to help assure (through action by the IFI and the borrower) that non-compliance and related harm are remedied.⁸⁵ The World Bank Inspection Panel does not in its 1993 Resolution define the purpose of the IPN, but the redress function is implied in the requirement for Management to present a Management Action Plan that would correct non-compliance stated in the IPN Review Report. Mr. Alvaro Umana, a former chair of the IPN, has noted that within the first four years of creation of the IPN, its role in addressing actual or potential harm to local populations and addressing remedial actions became an area of emphasis.⁸⁶ The redress function of the IPN was prominently articulated by the World Bank Group President James Wolfensohn in 2003:⁸⁷

"The Panel is the first body of its kind to give voice to private citizens in an international development context. The creation of the Inspection Panel provided, for the first time, a vehicle for private citizens, and especially poor people, to access directly the World Bank's highest governing body—the Board of Executive Directors—and to seek redress for what they may perceive to be harmful operational consequences of the World Bank."

309. A similar view was expressed in the CAO 2009 Annual Report:

⁸⁴ United Nations Human Rights, Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations, "Protect, Respect, and Remedy" Framework*, 2011, <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHrEn.pdf>.

⁸⁵ See for example, Vanessa Richared, "Justice by Any Other Name? The Grievance Mechanisms of Multilateral Development Banks," Proceedings of the Conference "Public Participation and Water Resources Management," UNIGE/UNECE, United Nations Office in Geneva, 2013; and Peter Boldt "The Need for Private Sector Accountability Mechanisms and Beyond: A Canary in the Coal Mine," Green Climate Fund, Independent Redress Mechanism, May 7, 2019.

⁸⁶ Alvaro Umana Quesada, ed., *The World Bank Inspection Panel: The First Four Years (1994–1998)*, p. 326. Also referenced in Ibrahim F. I. Shihata, *The World Bank Inspection Panel in Practice*, 2nd ed., 2000, fn. 16.

⁸⁷ James D. Wolfensohn, Foreword to *Accountability at the World Bank: The Inspection Panel 10 Years On*, 2003, <http://sitesources.worldbank.org/EXTINSPECZIONPANEL/Resources/TenYear807.pdf>.

“The accountability mechanisms were set up in response to external demands for greater public accountability of the international financial institutions. They provide an avenue of recourse for people who believe they have been harmed by projects financed by these institutions when the application of appropriate operational standards, procedures and safeguards are perceived to have failed. While the mechanisms of the various institutions differ in the way they process complaints, they all provide an independent body to investigate compliance issues and address social and environmental harm at the project level.”

310. The role of a Compliance function as an investigation body both to assess and address non-compliance and related harm has been most clearly articulated in the recently revised EBRD/IPAM policy, which states in its para. 2.7.a:

“The purpose of the Compliance Review is to determine whether the Bank, through its action or inactions, has failed to comply with the Environmental and Social Policyin respect to an approved Project. Where IPAM concludes that the Bank was not in compliance with either Policy, IPAM will recommend remedial changes related to the actions or omissions of the Bank... If EBRD is found to be non-compliant, further objectives... are to:

- (i) Recommend Project-specific actions to bring the Bank into compliance in respect of the Project, and address the harm or potential harm associated with the findings of non-compliance;
- (ii) Recommend changes to EBRD practices, procedures, guidance or systems to be implemented in an effort to avoid ongoing and future situations of non-compliance, both on the Project at issue and on other Projects, and
- (iii) Promote institutional learning and capacity building.”

Are CAO Non-compliance Findings Effectively Remedied?

311. The brief answer is that most CAO non-compliance findings do not lead to effective remedy. The only aggregate evidence available on the effectiveness of remedial actions to correct stated non-compliances and related harm are outcome statistics provided by CAO on results of its monitoring. CAO has established a Management Action Tracking Record (MATR) on projects under monitoring for dispute resolution agreements and for compliance investigation reports with non-compliance findings.⁸⁸ Data show that in the vast majority of cases, IFC responses to address project-level compliance findings are insufficient and/or ineffective. Of the 16 cases for which monitoring data are available (since FY2008), CAO reported that only 13 percent of monitored projects demonstrated satisfactory actions by IFC, 37 percent of projects were partly unsatisfactory, and 50 percent of projects were unsatisfactory. As of FY2019, 50 percent of the projects for which the CAO compliance monitoring process was closed remained in substantial non-compliance status.

312. In contrast, CAO considers IFC actions to support systems-level changes to prevent recurrences of non-compliance somewhat more effective. Of the 15 projects for which CAO has monitoring data on systems-level actions, 27 percent are considered satisfactory, 53 percent are considered partly satisfactory, and 20 percent are considered unsatisfactory. The lack of IFC responsiveness to support remedial actions was also prominently highlighted in the *Jam v. IFC* case, on which the US Supreme Court made a ruling.

⁸⁸ See CAO Dispute Resolution and Compliance Cases Management Action Tracking Record (MATR), March 31, 2019.

313. All IAMs face difficulties in supporting effective remedial actions, albeit to differing extents. The frustration of complainants who may wait years to benefit from remedial actions after a long compliance process is generally described as “the last mile problem.”⁸⁹ Complainants’ claims might have been substantiated as the compliance process recognizes non-compliance and related harm, but in many cases (during “the last mile”), their harm is addressed only partially, or not at all. There are systemic issues common to all IAMs that make it difficult for IAMs to assure effective remedial actions, and there are issues specific to the CAO compliance process.

Systematic Weakness Common to All IAMs to Assure Effective Remedial Actions.

314. The systematic weakness include: all IAM compliance reviews focus on IFI staff/Management and not on the borrower/client. The compliance review process establishes whether the IFI staff/Management has done due diligence in assuring that mandated Environmental and Social Policies are applied. The client is not the focus of the review. Yet, corrective actions are expected to be undertaken and funded by the borrower/client of the IFI. This dichotomy, with the focus of the compliance review on IFI staff/Management, and the corrective action expected to be performed by the client/borrower, creates a “systemic disconnect.” In some cases, borrowers/clients are simply unwilling to carry out required actions, especially if significant due diligence failures of the IFI resulted in designs of investments that were inconsistent with policies and where corrective actions would be very expensive.⁹⁰ Some borrowers/clients simply argue that due diligence failures of IFI staff/Management identified by the IAM are the cause of the non-compliance and related harm, and that it is thus the obligation of the IFI to pay for corrective actions. Moreover, IFI staff argue that they do not in many cases have the leverage to persuade the client to undertake corrective actions even when the client clearly bears primary responsibility. IFC/MIGA especially argue that, given late filings of complaints and the long delays in the compliance process, investigation reports are often issued at a time when the business relationship between the client and IFC/MIGA has ended and when IFC/MIGA, in their view, no longer have leverage over the client.

Issues Specific to CAO to Assure Effective Remedial Actions by IFC/MIGA

315. There are also specific IFC/MIGA-CAO issues that make it less likely than at other IAMs that IFC/MIGA will take corrective actions. An essential weakness is the lack of a Management Action Plan that lays out detailed, operational, time-bound actions to correct non-compliances and harm, and the absence of an authorizing environment that determines whether the Management Action Plan is appropriate and instructs Management to support the implementation of agreed actions. All IAMs of the IFIs, other than CAO and ICM (DEG-FMO-Proparco), require Management to present a Management Action Plan after (or concurrently while) their respective Boards have received a compliance investigation report. And the Boards of all IAMs that report to their Boards approve Management Action Plans.

316. A Management Action Plan should not be confused with the Management Response, which is provided for in the CAO OGs (see OG para. 4.4.5). IFC/MIGA Management Responses state agreement or disagreement with the findings of the CAO compliance investigation report. At most, the Management Response lays out some limited provisions for discussion of remedial actions with the

⁸⁹ See, for example, Stephanie Amoako, Abidjan Meeting on Accountability in International Finance, 2 July 2019, Accountability Counsel, 2020, www.accountabilitycounsel.org/2020/02.

⁹⁰ See, for example, “CAO Complaint Tata Ultra Mega-01/Mundra and Anja,” June 14, 2011, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=171. The complaint centered on the agreement by ADB and IFC on a design for an open discharge channel in India whereby cooling water was disposed at temperature levels that exceeded levels permitted by ADB’s and IFC’s policies. Also see ADB, Georgia Sustainable Urban Transport Investment Program (Tranche 3), Compliance Review Panel Request No. 2016/1, 13 February 2017, <http://compliance.adb.org/dir0035p.nsf/attachments/GEO-CRP-Final%20report-6March-Board.pdf>.

client. In only a few recent cases have some Management Responses presented specific, time-bound actions. In contrast, the expectation of Management Action Plans of other IFIs is that Management (1) will present specific, time-bound actions that address compliance findings, and (2) these actions have been agreed with the borrower/client before submitting the Action Plan to their Boards. The policies of several IAMs, including the World Bank IPN, also require that complainants be consulted on the MAP. Management Action Plans are thus an instrument to lay out measures of how and when compliance findings will be addressed. Management Action Plans are not an instrument to signal agreement or disagreement with compliance findings.

317. Why are these Management Action Plans so important? They represent detailed commitments, specified in operational measures, of the IFI Management and the client to undertake remedies, and provide the road map for carrying out remedial actions. IFC/MIGA Management should address each non-compliance finding and related harm stated in the investigation report. The Management Action Plan itself is not the instrument to signal agreement or disagreement with CAO compliance findings. If IFI Management disagrees with IAM compliance findings, this disagreement should be expressed at the commenting stage of the draft report. Moreover, IFC/MIGA can express agreement or disagreement with compliance findings of the final report in a separate communication to the Board submitted together with the Management Action Plan.

318. Even in cases in which IFC/MIGA accepts that non-compliance occurred, they may argue that because a client is unwilling, or because of insolvency unable, to take corrective actions, no remedy can be provided. In these cases, the Board must either accept that view, or require Management to propose alternative measures, which may include funding of remedial actions by the IFI, proportional to its contribution to the harm.

319. The importance of the role of the Board in assuring that only a responsive and adequate Management Action Plan be approved cannot be overemphasized. As IAMs cannot enforce remedial actions but only state findings on compliances and related harm, IAMs depend on a governing authority that has the authority to direct and influence IFI Management and staff to work effectively toward bringing projects into compliance and remedying harm. Boards should thus carefully study proposed Management Action Plans prior to approval to assess whether, in their view, proposed MAPs are adequately responsive to stated non-compliance findings. Experiences in other IFIs and IAMs have shown that compliance review processes can lead to effective remedial actions only with an engaged and knowledgeable Board (or Board Committee) willing to take strong positions. Good examples are the more effective remedial actions of ADB in the *Jam* case (as opposed to IFC) as a result of the firm stance on the Management Action Plan taken by the ADB Board Compliance Review Committee, and subsequent attention to implementation on the ADB investigation report on the Tata Mundra Power Plan Project.

320. The Review Team is of the view that CAO should report (through a Board Committee) to the World Bank Group Board (see section 5.3). Approval of Management Action Plans would be one of the key responsibilities of the Board. The Board already is familiar with this practice, as Management Action Plans submitted by World Bank Management in response to IPN investigation reports are approved by the Board. The Review Team understands that for CAO cases an interim process has already been established with the Board with respect to CAO investigation reports. Since September 2018, IFC Management Responses have been sent to the Board for review, advice, and direction but not for approval, as CAO currently reports to the President.⁹¹

⁹¹ See Memorandum, September 18, 2018, by Philippe Le Houerou, Follow Up on Restricted Executive Session on Governance of IFC and MIGA Office of the Compliance Advisor/Ombudsman (CAO), September 13, 2018; Report to the Board from the Committee on Development Effectiveness, Annual Report on the Activities of the

321. The Review Team considers it essential that IFC/MIGA agree with the client on Management Actions and consult with the complainants when preparing them. This consultation process should, preferably, be carried out jointly with the client. However, if the client is unwilling to interact with the complainants, then it is the task of IFC/MIGA to conduct the consultations with complainants.

322. The Review Team furthermore proposes that IFC/MIGA should consult with CAO on the proposed Management Action Plan and that CAO should send its comments to the Board on the proposed Management Action Plan. This process works well at the ADB's Compliance Review Panel (CRP). The "input process" of the ADB/CRP has not undermined ownership of Management for the Plan and has helped in the formulation of more responsive Management Action Plans. Importantly, the fact that IAM comments on the final Management Action Plan are provided to the Board helps the Board take informed positions.

323. Finally, dispute resolution is sometimes required as part of the implementation of remedial actions approved by the Board. Dispute resolution processes are often necessary to reach agreement, for example, on compensation payments for resettlement or for environmental impacts. Without adequate support and professional expertise, dispute resolution efforts are often not successful. CAO's Dispute Resolution function could make a contribution to help establish sound dispute resolution processes. As IFC/MIGA are accountable for the implementation of Management Action Plans, IFC/MIGA could request assistance from CAO Dispute Resolution as needed. CAO could decide whether it was appropriate to provide dispute resolution support to the parties in the particular case. If so, the type of support would need to be worked out between CAO and the parties to the particular case. As noted in section 7.4, there would have to be a very clear delineation of the role of CAO Dispute Resolution so that the accountability of IFC/MIGA for remedial action remained clear, regardless of CAO Dispute Resolution advice or involvement in the establishment of a dispute resolution process as part of the remedy. There would also have to be clarity about the respective roles of CAO Compliance and Dispute Resolution in the process, to avoid any risk of unconstructive ambiguity.

Recommendations:

- CAO should clarify the language defining the objectives of the CAO Compliance process, taking as its starting point the language laid out in the EBRD/IPAM (2019) policy.
- CAO's OGs should state that within 40 working days after sending the compliance review report to the Board, IFC/MIGA Management should send a Management Action Plan to the Board for approval.⁹² The Management Action Plan should contain time-bound operational measures in response to each CAO finding of non-compliance and related harm.
- This Management Action Plan should be agreed with the client with respect to measures to be implemented by the client.

IFC/MIGA Compliance Advisor Ombudsman (CAO), July 1, 2017–June 30, 2018; and IFC Management Response, December 7, 2018.

⁹² This recommendation is in line with the procedure established with the World Bank IPN. See "The Inspection Panel at the World Bank, Operating Procedures April 2014," paras. 67 and 68, which state that Management has six weeks after the submission of the IPN investigation report to the present a MAP to the World Bank Board. The EBRD/IPAM policy provides for 30 business days for Management to prepare a Management Action Plan; complainants then have 20 business days to comment on the draft Management Action Plan; and IPAM has 10 business days to provide comments. EBRD Management then has 15 business days to finalize the Management Action Plan. The ADB/CRP policy provides that a Management Action Plan should be submitted to the Board within 60 days after Board consideration of the CRP investigation report.

- IFC/MIGA should indicate what non-compliance findings they cannot address with proposed measures and specify the reasons why.
- The Management Action Plan should also present measures to be implemented by IFC/MIGA in order to avoid a recurrence of stated non-compliances in other IFC/MIGA projects.
- The complainant should be consulted on the proposed remedial actions in the Management Action Plan (in line with processes established at the World Bank IPN).⁹³
- IFC/MIGA Management should seek CAO input into the Management Action Plan, with the understanding that the Action Plan is the sole authority of IFC/MIGA Management and not CAO.
- CAO should submit comments on the proposed Management Action Plan to the Board at the same time that IFC/MIGA present the Management Action Plan for approval.
- CAO should consider whether it is feasible to provide support in dispute resolution processes required to implement remedial actions approved under a Management Action Plan, without creating unconstructive ambiguity about the responsibilities of IFC/MIGA for remedial action, and without creating any potential confusion between CAO Compliance and Dispute Resolution functions. If such support does seem feasible, CAO, IFC, and MIGA should seek an opportunity to pilot test this approach in one or more appropriate cases.

7.8.2. IFC/MIGA Contributions to Remedy Harm

324. The role of banks in the remediation of E&S harm is now actively discussed in industry and multi-stakeholder platforms around the world. Recently (2019), a group of Dutch banks and NGOs developed a typology on the degree and kind of responsibility that banks may have for the actions of their clients that cause harm to affected people.⁹⁴ While this work is framed in terms of human rights principles (United Nations Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises), it is applicable to E&S impacts in general. The framework is well thought out and is highly relevant to the assessment of IFC/MIGA responsibility for remedy. In the Dutch framework, a bank may *contribute* to harm by “incentivizing” or “facilitating” action or inaction by a client that leads to harm:

“Incentivizing implies a situation in which the other party might not have taken the action that led to the impact, but was motivated to do so by the actions of the bank... Facilitating implies a situation in which the other party was already likely to take the action that led to the impact, and the bank’s actions (or inaction) made it more likely that the other party would do so.”⁹⁵

325. In situations in which the bank directly contributes to harm, the bank has a responsibility to contribute to remedy, along with its client. The Dutch framework defines situations whereby the client causes harm, but the bank does not contribute (by action or omission) to harm, as *linkage*. In these situations, the bank does not have a responsibility to contribute directly to remedy, but does have a responsibility to use “any leverage [it] may have over others to seek to influence those actors to provide for remediation.”⁹⁶

⁹³ In contrast, the EBRD/IPAM policy provides that IPAM itself seeks comments from the complainants on the proposed Management Action Plan (see para. 2.7.1.(c) of the IPAM policy).

⁹⁴ Dutch Banking Sector Agreement Working Group Enabling Remediation, Discussion Paper (Social and Economic Council, The Hague, May 2019).

⁹⁵ *Ibid.*, p. 34.

⁹⁶ *Ibid.*, p. 35. Chapter 5 of the Discussion Paper develops the distinction between contribution and linkage in detail, using case examples.

326. In simplified form, the responsibilities for remedies can be assigned as depicted in table 7.3.

Table 7.3. IFC/MIGA Contributions or Linkages to Harm and Associated Responsibilities for Remedial Action

Responsible party	IFC/MIGA relationship to harm (assuming client caused or contributed to harm)	
	IFC/MIGA <i>contribution</i> to harm	IFC/MIGA <i>linkage</i> to harm
IFC/MIGA	Contribute to remedy	Use leverage to promote remedial action by client/others
Client	Contribute to remedy	Provide or contribute to remedy

327. The Review Team sees this framework as a succinct statement of the range of responsibilities of IFC/MIGA and their clients to provide remedy. In the IFC/MIGA context, a finding of non-compliance by CAO would be sufficient to establish some degree of contribution by IFC/MIGA, though the extent of IFC/MIGA contribution relative to that of the client (and other actors) could still be open to interpretation. Conversely, a finding that IFC/MIGA was in compliance would generally be sufficient to establish linkage. In situations where there appeared to be a need for remedy but there was no CAO case, IFC/MIGA Management would need to make a determination of the extent of IFC/MIGA contribution to harm, and then consider the issues of leverage, extent of harm, and feasibility of remedy.

328. The Review Team is of the view that IFC/MIGA do have responsibilities to contribute to remedy in situations where their non-compliance has contributed to harm. The Dutch Banking Sector Agreement typology provides a useful framework for Board and IFC/MIGA decision making on remedial action.

Funding Remedial Action: Needs and Mechanisms

329. All stakeholders involved (including IFC/MIGA) agree that there are currently severe limitations to IFC/MIGA's ability to contribute to remedy in cases where harm is linked to failures to meet Performance Standards. The task of a compliance investigation is to make a threefold assessment: (1) Is there non-compliance with E&S policies? (2) If so, has there been failure by IFC/MIGA to adequately perform its E&S review requirements? (3) Is the harm related to stated non-compliances with E&S policies?

330. As stated, efforts to correct non-compliance and related harm often fall short and remedial actions are not adequate to bring the project into compliance and correct harm. At times, IFC/MIGA Management have shown limited engagement. There were no requirements committing IFC/MIGA staff to a clear and operationally relevant action plan, and the President, to whom CAO reports, did not in the past regularly demand that adequate corrective actions be taken. With a culture change and a willingness to be more proactive, the introduction of a Management Action Plan to be approved by a Board, and a Board committed to ensure that these agreed actions will in fact be implemented, a significant improvement in remedial action could be achieved. But even with these measures, there will be situations where the client is not willing to carry out remedial action at its own expense. There are at least three situations in which the client may not be willing or able to carry out remedial action at its own expense:

1. Clients argue that they were wrongly guided by IFC/MIGA staff during the preparation and implementation of the investment and then proceeded with a specific investment design

assuming that they were in compliance with Performance Standards. Such situations are not uncommon. While active misguidance is very rare, it is less rare for IFC/MIGA to accept Environmental and Social Impact Assessments and associated mitigation plans that do not fully comply with the Performance Standards and that will not meet these standards over a defined period of time.⁹⁷ In such cases, clients sometimes simply refuse to take expensive corrective actions, as they argue that the fault does not rest with them.

2. Clients failed to comply with the relevant Performance Standards, but IFC/MIGA did not sufficiently alert or support the client, or supervise the client to assure that the client performs its responsibilities.
3. The client relationship with IFC/MIGA has ended, the client has repaid the loan, and/or the client has gone into bankruptcy. IFC/MIGA staff argue that in cases where their business relationship has ended, they simply do not have the “leverage” to persuade the client to take corrective actions.

331. The Review Team is of the view that with regard to situations (1) and (2), accountability for E&S impacts requires stronger efforts and supporting measures to ensure that remedial actions are taken to correct harm. Consistent with the framework for remedial action presented in table 7.3, the extent of IFC/MIGA contribution in these situations should depend on the extent of their contribution to harm.

332. With regard to situation (3), the end of the business relationship between the client and IFC/MIGA does not necessarily end IFC responsibility to contribute to remedy. Harm often materializes only after a project has become operational. Typical examples are environmental impacts that materialize only over time, such as air pollution and water pollution. Equally, livelihood impacts of resettlement programs often only become apparent over time. Given that such impacts are linked to the IFC/MIGA-funded investments, the responsibility to contribute to remedial action should not be strictly limited to the time period when an active financial relationship exists between IFC/MIGA and the client. Moreover, complainants themselves may not become aware of the link between harm and IFC/MIGA involvement until after the financial relationship has ended (especially if IFC/MIGA funding was channeled through a financial intermediary). Again, IFC/MIGA responsibility to contribute to remedy should depend on the extent of their contribution to harm.

333. In addition, the Review Team is of the view that mechanisms to provide financial support for remedial action should be established. As stated, all IAMs have difficulties in achieving implementation of effective remediation measures, but the challenges seem to be particularly pronounced in the case of IFC/MIGA investments. Other IFIs have not yet established formal remediation funds, but ad hoc funding practices have been established for sovereign lending to support the client. For World Bank IPN cases, special trust funds have at times been used to support remedial actions. Similar support measures have been put in place at the Asian Development Bank. The Norwegian Development Fund (Norfund) has a commitment to contribute toward mitigation of adverse impacts, and some private banks have made statements to this effect.⁹⁸ In selected cases, private banks have made contributions to remediation of harm.⁹⁹

⁹⁷ The so-called *Jam case* is a pertinent example. ESIA and project designs assumed that the power plant’s cooling water could be discharged through an open cooling discharge channel at water temperatures significantly above 3 degrees Celsius above ambient levels. Such discharge temperatures are permissible under Indian national standards, but not under IFC standards. The client was not informed that planned discharge temperatures exceeded permissible levels. Complainants argue that the discharge of water above IFC-permitted temperature levels harms the fishing community.

⁹⁸ See ABN AMRO, *Human Rights Update 2019*, 2020.

⁹⁹ Reference to the Australian bank that made payment *<to be provided>*.

Recommendations: Two mechanisms should be established to fund remedial actions: (1) contingent liability funds from the client that can be tapped in the event that E&S harm materializes and is linked to the client's failure to meet the Performance Standards; and (2) funds that the IFC/MIGA can contribute in the event that IFC/MIGA has/have contributed to E&S harm.

Increasing Availability of Client Resources in Case of Harm to which IFC/MIGA Have Not Contributed

334. In case of harm caused by an IFC/MIGA project without any IFC/MIGA contribution, the Review Team proposes that a source of contingent liability funding, jointly agreed by IFC/MIGA and the client, would be established for every project. The client would agree ex ante, as part of the investment agreement, to provide contingent funding to address the risk of material E&S harm. The contingent fund could take the form of E&S insurance (through a third party or self-funded), E&S provisions within an overall project contingency fund agreed with IFC/MIGA, a performance bond, or an equivalent contingent mechanism, in an amount scaled to the likelihood and magnitude of E&S risk associated with the project.

335. The agreement would commit the client to draw on the contingent fund in the event that material E&S harm occurred due to the client's failure to meet its PS requirements. The conditions triggering use of the contingent fund would be detailed in the investment agreement (and in any third-party insurance or bond), with agreed indicators and means of verification, and would be legally binding. The agreement would also specify that if the client refused to use the available contingent fund in a situation that required its use, IFC/MIGA would be co-authorized to access the contingent funding to contribute to the remedy. The contingent funding could be used in response to IFC/MIGA supervision, where IFC/MIGA identify non-compliance and there is a need to trigger the contingency, and in the context of complaints (whether CAO Dispute Resolution and Compliance cases, or complaints made directly to the client and/or IFC/MIGA).

336. The time limit for accessing these funds could be set at two years after the end of specified project activities with potential E&S risks, regardless of whether there was any ongoing business relationship between IFC/MIGA and the client. An extension beyond the business relationship between the client and IFC/MIGA would assure that funds were available for remedial action for a reasonable period, even after the business relationship between IFC/MIGA and the client had ended. Providing for a contractual obligation that requires adherence to E&S Performance Standards even beyond the completion of the project, and requiring clients to provide a source of funding for remedy that would be accessible even after the other business relationships with IFC/MIGA have ended, would increase the likelihood that remedial actions at such later stages would be carried out. Such a contingent liability fund would also minimize the risk of creating moral hazard for the client because the client would be liable for repayment.

Funds from IFC/MIGA When IFC/MIGA Have Contributed to Harm and Funding from Other Sources Is Not Sufficient for Remedy

337. In situations where IFC/MIGA action or inaction (in addition to client action or inaction) contributed to harm, the Review Team is of the view that IFC/MIGA should also contribute to remedial action. As discussed, a CAO finding of IFC/MIGA non-compliance (when de facto accepted by the Board) should in principle establish the need for IFC/MIGA to contribute to remedy along with the client. Contributions could be made in other circumstances in which IFC/MIGA acknowledged a contribution to harm and a responsibility to contribute to remedy, including CAO Dispute Resolution cases, or in non-CAO contexts where Management determined that IFC/MIGA had contributed to harm and therefore had a responsibility to contribute to remedy.

338. Not all such contributions need to be financial. In cases where the client has the will, capacity, and resources to remediate harm, it may be sufficient for IFC/MIGA to contribute technical advice and guidance. The use of contingent liability funds should make such situations more common. In cases in which the client is willing to contribute but the scale of harm outstrips whatever contingent liability funding is available, IFC/MIGA may need to negotiate with other investors and the client with regard to the balance of financial responsibility.

339. In situations that have not triggered a CAO case, IFC/MIGA Management might still determine that there was an IFC/MIGA contribution and therefore a need to contribute to remedy. This fund would not create moral hazard situations, as it would be akin to a “liability insurance fund” established in-house within IFC/MIGA to insure themselves against wrong-doings and related harm. The fund would only be used by IFC/MIGA if evidence is established that failures of IFC/MIGA staff have contributed to harm that resulted from non-compliance with E&S standards. IFC/MIGA profits could be used to finance such a fund.

Recommendations:

- IFC and MIGA should define a framework for remedial action, and the Board should review and approve that framework, building in part on the Dutch Banking Sector Agreement discussed in this section.
- IFC and MIGA should develop contingent liability funding requirements and mechanisms for all investments that present significant E&S risk (at a minimum, all Category A, B, FI 1, and FI 2 investments).
- IFC and MIGA should develop, in collaboration with CAO, and present to the Board a draft policy on the use of IFC/MIGA resources to contribute to remedy, clarifying the criteria, potential uses, and limitations of such resources to contribute to remedy.

7.9 CAO Compliance Monitoring

340. CAO has a mandate to monitor projects that have non-compliance findings, as stated in its investigation reports. OG para. 4.4.6 states “... CAO will keep the compliance investigation open and monitor the situation until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the non-compliance. CAO will then close the compliance investigation.” CAO had 14 projects under compliance monitoring and was monitoring 7 dispute resolution agreements as of May 2020. CAO monitors projects, on average, for 2.7 years. While CAO does not have a time limitation for its monitoring mandate, its actual monitoring time frame is fully in line with monitoring periods of other IAMs, which typically extends over three years. CAO attempts to monitor projects once a year. For most cases, but not all of them, site visits are conducted as part of the monitoring.

341. The current monitoring process suffers from the absence of a Management Action Plan, which would be approved by the Board, and specify which specific non-compliances should be corrected through what remedial actions. At present, the CAO monitoring efforts focus on all the non-compliance findings stated in the compliance investigation report. In many cases, IFC/MIGA disagree with some of these findings. Under the current process, no decision is made as to what remedial actions should be pursued. Accordingly, the CAO monitoring process often perpetuates disagreement and tension between IFC/MIGA and CAO.

Recommendations: The monitoring approach should be revised to be consistent with almost all IAMs (other than the IPN, which does not have a monitoring mandate). This approach is as follows:

- The core focus of CAO monitoring are the remedial actions approved as part of the Management Action Plan.
- CAO monitoring should focus only on those non-compliance findings addressed under the Management Action Plan. If the Management Action Plan is not responsive to all non-

compliance findings, yet the authorizing environment (proposed in this Review to be the Board) has approved the Management Action Plan, it is to be assumed that the Board did not consider it necessary to address all non-compliance findings, and CAO is bound by that decision in its monitoring.

- CAO will focus in its monitoring on the remedial actions approved in the Management Action Plan, but it will also assess whether these actions have corrected the non-compliance that these measures are designed to address. This provision is necessary given that the objective of the monitoring is to assure that non-compliance is corrected. Some remedial actions approved under a Management Action Plan, due to evolving circumstances, might not achieve this objective. The Board should have an interest in learning about such a situation.
- The supervision of implementation of remedial action is an IFC/MIGA Management function. IFC/MIGA should present biannual progress reports to CAO on progress made in implementation of remedial measures. IFC/MIGA should lay out in these progress reports actions taken by IFC/MIGA to support the client in the implementation of remedial actions. Progress reports will be an important input into the CAO monitoring process.

342. The engagement of the Board Committee (proposed by this Review Team) in receiving and reviewing monitoring reports is essential. Given that the Board has approved the Management Action Plan, the Board should also have an interest in the CAO monitoring report, which would monitor implementation of approved actions, including project-level remedial actions and measures taken at the level of IFC/MIGA policy, practice, or procedure in response to CAO compliance findings.

343. At present, no oversight authority outside CAO reviews the monitoring reports. CAO completes the monitoring report, sends it to IFC/MIGA for fact checking, and then posts it on its website. There is no requirement for IFC/MIGA to follow up on findings in monitoring reports. In the future, the Board Committee, to which CAO will report, should follow monitoring findings and hold quarterly meetings with CAO for briefings on progress made in implementation of remedial actions. Projects with particularly severe non-compliance findings and related harm should be reviewed in adequate depth. In cases in which monitoring reports point to insufficient implementation of agreed remedial actions, the Board Committee might also wish to call meetings with the IFC/MIGA Management to discuss their views on the assessment of the monitoring report. Active interest by the Board Committee would send important signals that implementation of remedial actions approved under Management Action Plans is considered of appropriate priority. Such an approach works well at the ADB/CRP, where the responsible Board Committee takes interest in the monitoring reports and, if considered necessary, arranges for meetings with the IAM (ADB/CRP) and ADB Management to discuss progress made.

Recommendations:

- The Board Committee to which CAO will report should meet with CAO at regular intervals to be briefed on progress made in implementation of agreed remedial actions, including project-level actions and IFC/MIGA systemic responses to CAO compliance findings.
- The CAO Operational Guidelines should be revised to provide that CAO compliance monitoring should be closed (1) when non-compliance findings have been substantively addressed (satisfactory closure); or (2) if there is no reasonable expectation of further action to address CAO's compliance findings (unsatisfactory or partially unsatisfactory closure).
- In cases in which there were significant non-compliance findings and related harm and there has been little progress made in the implementation of agreed remedial actions, the Board Committee should convene meetings with IFC/MIGA Management and CAO to consider options on how to strengthen progress in implementation.

7.10 Organizational Learning from E&S Experiences, Complaints, and Responses

344. IFC has several learning and knowledge management functions related to its E&S responsibility and accountability. Notably, IFC has produced extensive, high-quality materials designed for clients implementing the Performance Standards, which are available through its Sustainability web page. These materials range from country- and industry-specific case studies and Good Practice Notes to global guidance on applying individual Performance Standards. IFC also periodically updates guidance on implementing elements of the Sustainability Framework for its E&S staff, and provides training on E&S issues for both E&S staff and investment departments. The guidance and training functions will now be performed through the new E&S Policy and Risk Department, while the ESG Advice and Solutions Group will continue to generate case studies and practice notes that are useful for IFC clients.

345. CAO's Advisory function is designed to provide recommendations to strengthen IFC and MIGA E&S policy and practice, and prevent future harm to communities. It does so by generating learning from CAO's case experience (for both Compliance and Dispute Resolution cases) and sharing it with IFC, MIGA, and external stakeholders. Throughout CAO's history, its advisory work has had a significant influence on IFC/MIGA's evolving E&S policy framework. Most notably, the CAO advisory review of extractives (2003), its review of IFC's Safeguard Policies (2003), and contribution to the Performance Standards Review (2010) have helped ensure that policies reflect learning from communities' experiences of development projects. Since 2013, when CAO committed resources for a fulltime Advisory staff, the Advisory function has provided guidance to IFC/MIGA on issues of policy and practice through Advisory Notes on topics such as supply chains, corporate incentives, and grievance mechanisms. It has also produced several good practice tools and papers on E&S issues; co-organized and delivered learning and training events for IFC/MIGA staff and for E&S staff in other IFIs; and provided input on a number of IFC Guidance Notes and tools. The 2016 CAO Grievance Mechanism Toolkit is particularly notable for the quality and accessibility of guidance it provides to IFC/MIGA clients and others. In addition, CAO's Dispute Resolution function has organized multiple events for mediators in its network, has published a series of "Reflections from Practice" Guidance Notes on elements of the dispute resolution process, and has published occasional case studies with lessons.

346. IFC and CAO both organize and participate in outward-facing events and networks, such as IFC's annual Sustainability Exchange, and CAO's outreach events around the world and central role in IAMNet, the network of IFI independent accountability mechanisms. IFC has played a notable standard-setting and advancement role in the financial intermediary sector, working closely with the Equator Principles Association of major banks investing in emerging markets, and supporting the creation and operation of a Sustainable Banking Network involving banking regulators and associations from emerging market countries.

347. Overall, both CAO and IFC have demonstrated strong, sustained, and systematic commitment to learning from their E&S experience internally and from the experiences of others, and sharing what they have learned with peer organizations and constituencies. MIGA, with a far smaller portfolio and limited E&S staff, has not generated substantial documentation of its E&S learning, nor is it as actively involved in learning exchanges as either IFC or CAO, but its staff have participated jointly with IFC and CAO in numerous learning events and workshops, and MIGA does strive to translate lessons into its ongoing engagement with its clients on E&S issues in specific investments.

348. Though CAO has generated high-quality Advisory products, there is no established system for generating formal IFC/MIGA responses to CAO advice, and CAO has not integrated the Advisory function into its overall monitoring and evaluation system. Most evidence of the impact of Advisory products is anecdotal. Given that the primary focus of advisory work is IFC and MIGA policy and

practice, one option would be to track IFC/MIGA Management Responses to Advisory products consistently as part of the Management Action Tracking Record that CAO currently maintains and reports to CODE. In addition, it would be advisable to integrate Advisory fully into the CAO monitoring and evaluation (M&E) system, using tools such as surveys of intended audiences (including the Board) for feedback on the relevance and usefulness of Advisory products; systematic tracking of the citation, dissemination, and use of Advisory products by others beyond IFC and MIGA; and periodic external reviews to assess the effectiveness of the Advisory function.

349. In addition, the Advisory function would benefit from explicit authorization in CAO's Operational Guidelines (through a change to OG Sec. 5.1.2) to provide advice not only in writing, but through interaction, including direct interaction with IFC/MIGA staff, private sector companies, and civil society organizations. In practice, the Advisory function has already experimented with collaborative lesson-learning workshops with IFC and MIGA, as noted. Going forward, the Review recommends that CAO use the Advisory function to collaborate with IFC and MIGA on building client capacity for effective response to grievances, and also support IFC and MIGA with advice on building their internal grievance response capacity, while maintaining a clear separation between advisory work (which cannot be case-specific) and CAO's Dispute Resolution and Compliance functions. (See section 8 for these recommendations.) To make the Advisory function more accessible to IFC and MIGA, CAO, IFC, and MIGA should consider whether to allow requests for the Advisory function from managers below the Senior Management level.

350. One area of complexity in the learning efforts of IFC, MIGA, and CAO is the response of IFC and MIGA to CAO non-compliance findings. While in principle findings of non-compliance create a learning opportunity, the atmosphere surrounding some CAO compliance reports has become highly polarized, making it difficult to have a constructive discussion about what can be learned. This is especially so in instances in which IFC and/or MIGA disagree with CAO interpretations of what would have been necessary to ensure compliance and/or with findings of fact.

351. Despite this difficulty, IFC has made significant institutional changes in response to CAO non-compliance findings. In its 2018 Report to CODE, CAO noted changes that IFC acknowledged having made in response to CAO non-compliance findings. CAO specifically cited new IFC requirements, guidance, and/or procedures for contextual risk screening, security risk management, financial intermediaries, coastal erosion, and phased development projects.

352. If, as the Review Team recommends, CAO begins to report to the Board, there may be an opportunity for CAO Advisory products to directly inform the Board, as well as IFC and MIGA Management. It would be appropriate for the Board to be able to request advisory work, as the World Bank Group President and IFC/MIGA Senior Management can do under the current OGs. CAO could continue to provide other Advisory products to the Board as sources of information.

Recommendations:

- IFC's new Policy and Risk Department and its ESG Advice and Solutions Group should maintain close collaboration with each other and with CAO to continue generating high-quality learning for IFC staff and clients, and continue supporting external networks such as the Equator Principles Association and Sustainable Banking Network.
- CAO should continue to generate learning products and advice through its Advisory function and through its ongoing engagement with IFC and MIGA on lessons from cases.
- CAO should revise its Operational Guidelines (Sec. 5.1.2) to authorize the Advisory function to deliver advice through interaction as well as in writing.

- CAO, IFC, and MIGA should consider whether to allow requests for CAO Advisory support from IFC and MIGA management below the Senior Management level.
- CAO should systematically assess the impact of its advisory work through the Management Action Tracking Record, its organizational M&E system, and periodic external reviews.
- CAO's Operational Guidelines should be revised to include the option for the Board to request advice from CAO.
- MIGA should enhance its efforts to document and share learning on E&S issues with its clients, within the scope of its mandate and resources.

Section 8. Potential Changes to IFC/MIGA Response to Non-CAO Complaints

8.1 Project-Level Disclosure of Accountability Mechanisms and Grievance Mechanisms

8.1.1. Disclosure of Accountability Mechanisms

353. A first requirement for any accountability mechanism to work is that there is knowledge of its existence by different stakeholders. The CAO's outreach and communications mandate as articulated in its Operational Guidelines requires it to raise awareness of CAO's work with different stakeholders, including potentially affected communities and civil society organizations. CAO does carry out regular and substantive outreach to CSOs in all the regions where IFC and MIGA operate. However, this outreach does not normally engage affected communities directly. Currently, IFC/MIGA clients are not required to disclose the existence of CAO to potentially affected stakeholders, but IFC and MIGA do disclose the existence of CAO (including contact information) in their Policies and on their websites in their project disclosures, specifically the Environmental and Social Review Summary. A link to the CAO website also appears at the bottom of every page on IFC's website.¹⁰⁰

354. IFC's Policy on Access to Information states the organization's responsibilities to make available institutional information about IFC and project-level information regarding investments and advisory services supported by IFC. It further stipulates that IFC disclose within the Environmental and Social Review Summary (ESRS) of Category A and B projects a specific reference to applicable grievance mechanisms, including CAO.

355. The CAO Terms of Reference do not stipulate the need for IFC, MIGA, or their clients to disclose the existence of the organization, but CAO does have a comprehensive website as well as Facebook, Twitter, and YouTube presence.

356. The current disclosure regime raises several questions:

- How easy is it in practice for diverse stakeholders within affected communities to learn of CAO's existence, and to access it?
- Should IFC and MIGA require their clients to disclose the existence of CAO along with the clients' own grievance mechanisms? If so, what guidance and support for client disclosure should IFC and MIGA provide?
- Given that CAO is an independent body (and this independence needs to be guarded), how involved should the IFC E&S teams be in disclosure of CAO?

¹⁰⁰ CAO is mentioned in Section 6 of the IFC's Policy on Environmental and Social Sustainability: "There may be cases where grievances and complaints from those affected by IFC-supported business activities are not fully resolved at the business activity level or through other established mechanisms...a mechanism has been established through the Compliance Advisor/Ombudsmen (CAO) to enable individuals and communities affected by IFC-supported business activities to raise their concerns to an independent oversight authority." The Policy goes on to set out contact details of CAO in Washington, DC, with a link to the CAO website.

357. At present, the primary disclosure of CAO to project-affected stakeholders is through the IFC and MIGA websites, where a stakeholder who is not already aware of CAO's existence would generally look first at project information. However, a stakeholder would need to read carefully, and in one of the official languages of IFC/MIGA, to find reference to CAO. Unfortunately, not all people in affected communities share an ability to access the IFC and MIGA websites; and those who can access the websites may face language barriers; and those who can read one of the official languages used by IFC/MIGA may not be familiar with the concepts of a complaints mechanism, and therefore may not understand their option to file a complaint with CAO. Reference Group consultees, particularly CSOs, have highlighted the low awareness of the existence of CAO among affected communities and the fact that for most affected people, even if they know about CAO, it is conceptually a very distant organization and therefore not one that they could readily access. It is therefore not surprising that 52 percent of complaints that reach CAO do so with the support of local, national, and international CSOs, while 43 percent are filed by communities on their own, and 5 percent are initiated by CAO.¹⁰¹ While CSOs often provide valuable support to communities, their extensive involvement does raise a concern about the direct accessibility of CAO to affected communities, particularly those affected by FI sub-projects.

8.1.2. Disclosure by the Client of Project-level Grievance Mechanisms

358. There are four types of project-level grievance mechanisms (GMs): overall project GMs; resettlement GMs; worker GMs; and organizational GMs.¹⁰² Usually the overall project and resettlement GMs are combined. GMs do not replace other mechanisms such as government or industry-level grievance bodies. Under the IFC Access to Information Policy, clients are required to "engage with communities affected by their projects including through the disclosure of information, in a manner that is consistent with IFC's Policy and Performance Standards on Environmental and Social Sustainability." PS 1 requires that clients inform the affected communities about the availability of the grievance mechanisms and how they can be accessed as a part of the community engagement process.

359. IFC and CAO have produced a number of documents that provide excellent guidance on what would constitute a robust project-level grievance mechanism. However, there is a lack of information about how IFC checks whether clients have adequately informed people about the existence of the grievance mechanism. In complex communities, local power dynamics can lead to the exclusion of certain groups so that use of local leaders to disseminate information (a frequently used and often reliable approach) can lead to marginalized groups not gaining access.¹⁰³

Recommendations:

- IFC/MIGA should ensure that clients (including FI sub-projects) that are required to establish grievance mechanisms provide information to affected communities both about the client's grievance mechanism and about CAO.

¹⁰¹ CAO Annual Report 2019.

¹⁰² A client may establish a GM for all complaints related to a specific project, and/or for project complaints specifically regarding resettlement or worker issues. Alternatively, or in addition, a client may have an organizational GM that can respond to complaints from multiple projects in which it is involved. IAMs are organizational GMs for their respective IFIs.

¹⁰³ In addition in the field, the question needs to be posed in a way that people understand. Just asking people about whether they know about the grievance mechanism will usually yield a negative response. On the other hand, asking about whether they know what they need to do if they have a problem with a project can yield a different response—and the question often needs to be stated various times in different ways. (This seems obvious, but this practice is not always implemented in the field.)

- IFC/MIGA supervision should ensure that clients are meeting this responsibility, in part by surveying diverse community members regarding their awareness of the client's grievance mechanism and the existence and work of CAO. An annual assessment of client disclosures of CAO should be included in the summary of IFC/MIGA E&S results reported to the Board.
- As and when IFC and MIGA have established effective channels for directly receiving and responding to complaints from affected communities, they should ensure that affected communities are aware of this option, and about the process for communicating complaints to IFC/MIGA.
- CAO should review the effectiveness of its outreach and communications mandate for different stakeholders and explore mechanisms to increase awareness of its work among potentially affected communities in a way that is not project specific.

8.1.3. Effectiveness of IFC/MIGA Support and Supervision of Client GMs

360. In the IFC/MIGA Performance Standards, a functioning GM is requirement for all projects that may have impacts on local communities directly affected by the project (defined as "Affected Communities" in PS1 para. 1). PS 1 (para. 35) states:

"Where there are Affected Communities, the client will establish a grievance mechanism to receive and facilitate resolution of Affected Communities' concerns and grievances about the client's environmental and social performance. The grievance mechanism should be scaled to the risks and adverse impacts of the project and have Affected Communities as its primary user. It should seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate and readily accessible, and at no cost and without retribution to the party that originated the issue or concern. The mechanism should not impede access to judicial or administrative remedies. The client will inform the Affected Communities about the mechanism in the course of the stakeholder engagement process."

361. Though the requirement is clear, there is lack of systematic data available on the effectiveness of client GMs or on the support and supervision provided by IFC/MIGA. The frequency and level of supervision of projects vary according to category, phase, and complexity. Some B-level projects may only be monitored every three years. Moreover, the quality of supervision and support is dependent on the IFC/MIGA E&S staff knowledge and experience.

362. An IFC Internal Thematic Portfolio Review on Stakeholder Engagement carried out in 2014,¹⁰⁴ in which 50 projects were sampled, although not focused on GMs, did reveal that 76 percent of projects had some evidence of GMs, but only 36 percent had evidence that communities were using it. This data set is actually too broad to be useful. A more detailed information-gathering exercise is needed to understand how GMs are working in the field; what factors are contributing to the effectiveness or ineffectiveness of GMs; and specifically, the impact of IFC/MIGA support and supervision to the effectiveness of GMs.

363. While CAO does not systematically track whether complainants had previously taken their complaint to the client grievance mechanisms, since 2016, CAO has asked a related question when carrying out monitoring and evaluation surveys at the conclusion of CAO's assessment. Complainants are asked whether they had used other mechanisms before lodging a complaint with CAO. Responses have revealed that for the 22 cases that have concluded assessment since 2016, complainants in 14 cases (64 percent) had tried to address the issue through discussions with the client, or through the

¹⁰⁴ IFC, Internal Thematic Portfolio Review on Stakeholder Engagement, 2014.

client's grievance mechanism, or both. Complainants in 9 of these cases (40 percent) specifically used the client's GM.¹⁰⁵

364. Consultations carried out as a part of this Review revealed a certain divergence of opinion on GMs. CSOs consulted were of the opinion that GMs often do not exist and where they are available, do not function well because of limited community knowledge and access to the GM or because individual grievances received by the GM are not managed well. In contrast, IFC E&S staff said that from their experience GMs are an important risk management tool that local stakeholders can engage with to find solutions to project-level problems, but they acknowledged several challenges. Box 8.1 summarizes issues that emerged in a roundtable discussion with six IFC E&S staff.

Box 8.1. Views about Grievance Mechanisms Expressed by IFC E&S Staff at a Roundtable Discussion on October 23, 2019 in Washington, DC

Effectiveness of Grievance Mechanisms (GMs)

- GMs may be well designed in action plans, but are difficult to implement on the ground.
- When GMs work well, clients have said that they can be a great tool to manage social relations.
- Effectiveness also depends on the sector. Agribusiness clients, although willing, often have less knowledge about GMs and capacity to implement them.
- Time is needed to train clients, but E&S specialists have limited resources and they do what they can within time available.
- The smaller the project, the more difficult it is to give clients the support they need. Some Category B clients have only one assigned E&S specialist.
- Category B projects may have committed to a GM, but E&S specialists often do not find time during supervision to check implementation.
- A disconnect exists between a GM process and CAO processes. It would be good to identify the gaps in a GM process that complainants experience to understand why complainants have filed a complaint with CAO.
- There is a misconception that a receiving a complaint somehow indicates a failure; that is far from the truth.

Coordination with Client Grievance Mechanisms on Complaints that Go Directly to IFC

- In the case of worker GMs, there is a tendency for worker representatives such as unions to take their complaint directly to IFC.
- It is rare that complaints go directly to IFC unless supported by an organization. Many communities do not have enough of an understanding about IFC to directly approach it.
- It would be beneficial to enable avenues for communities with grievances to directly access IFC.
- The client's project-level GM and IFC systems can be complementary, allowing for additional checks and balances.
- There is some concern that if affected communities had easier access to IFC for complaints, they might bypass the client GM and put their efforts into a direct approach to IFC.

Dispute Resolution/Mediation as an Option for Grievances

- Dispute resolution/mediation could be an option for the resolution of some grievances. This could occur through CAO dispute resolution process or an independent mediator.
- The problem with a CAO process is that when dispute resolution does not work, a case is transferred to Compliance. If CAO dispute resolution is to be used for complaints in the client GM, then the case should stop at Dispute Resolution, with no automatic transfer to a Compliance investigation.

¹⁰⁵ CAO M&E data, FY2017–FY2019.

- When should E&S specialists bring in mediators? This is required rarely, but IFC E&S staff are exploring this option.
- IFC E&S staff are also exploring the possibility of developing accreditation for client GMs or a kind of “GM master class” training for E&S specialists.
- Keeping the resolution of grievances at the GM level rather than turning to CAO is desirable because the goal is to have the client solve the problem.

8.1.4. Options to Strengthen IFC/MIGA Support and Supervision of Client Grievance Mechanisms

365. Considerable opportunities exist to strengthen IFC/MIGA support to client GMs, and to improve access by affected communities and effective client response to their concerns.

Recommendations:

- IFC/MIGA should hire or contract E&S staff with expertise in GM design and operation to ensure adequate support for every region and sector in IFC/MIGA portfolios. Adequate support would mean that:
 - For every investment with an identified affected community, the client would be supported in establishing or strengthening an appropriate GM.
 - There would be rigorous assessment of the adequacy of the GM as part of due diligence.
 - Clients could receive clear guidance on additional policies, procedures, staffing, and/or outreach necessary to satisfy the IFC/MIGA grievance mechanism requirement, with requirements included in covenants for higher-risk investments.
 - IFC/MIGA E&S staff with expertise in GMs would engage in ongoing supervision of the investment, assessing GM effectiveness by reviewing documentation of GM cases; interviewing GM staff and other client representatives expected to interact with affected communities, along with members of affected communities; and reviewing complaints about the investment channeled to other mechanisms.
 - In instances in which supervision reveals limitations in the effectiveness of the GM, IFC/MIGA could specify remedial actions in a time-bound action plan, offering support where appropriate, and indicating what consequences would ensue if the actions needed to strengthen the GM were not taken in a timely fashion.
- Given its expertise, CAO should assist IFC and MIGA in building client GM capacity, using its Grievance Mechanism Toolkit and the expertise of CAO’s staff and mediator network. CAO’s involvement should be under the auspices of CAO’s Advisory function, to maintain the separation of this activity from any project-specific issues that could become the focus of a CAO complaint. Roles and resources would also need to be allocated by mutual agreement among CAO, IFC and MIGA.

8.2 IFC/MIGA Institutional Capacity for Tracking and Responding to Complaints Raised Outside of CAO Channels

366. Until the creation of the Stakeholder Grievance Response Team (SGR), there was no dedicated team within IFC responsible for tracking and managing complaints raised outside of CAO channels. The SGR is currently a five-person team dedicated to supporting investment team responses to complaints about IFC projects/investments, whether received through CAO or presented directly to IFC. MIGA has yet to develop such a team, but is closely observing the experience of IFC to guide MIGA should it decide to do so.

367. Tracking and reporting on non-CAO complaints is one of four work focus areas of SGR. In this regard, the intention is for the SGR is “to guide IFC teams on early action to prevent escalation and promote effective client grievance response.”¹⁰⁶

368. A centralized tracking system will be developed to track, coordinate, and report to Management on complaints received directly by IFC. These complaints will now receive a timely response and teams will be accountable to Management for the response, with SGR staff supporting project teams. It is hoped that through the effective management of non-CAO complaints there will be fewer complaints that will be unaddressed or will be taken to CAO.

369. There are no data at present on how many complaints IFC receives directly each year, their breakdown by sector, region, and complaint type, or whether these complaints/complainants have tried the project-level GM first. A better understanding of this baseline situation is required to guide further development of the SGR.

8.2.1. Key Issues with the Stakeholder Grievance Response Team (SGR)

370. SGR is a new team and still in the process of development. It faces a number of overall challenges:

- Ensuring that client GMs are a preferred recourse for affected stakeholders, while also ensuring that IFC is responsive to complaints that come to it directly, and making it clear that stakeholders also have the option to use CAO.
- Establishing guidelines for IFC staff to ensure that those making complaints have the option of confidentiality and in any case are protected against retaliation, while also providing a systematic way for IFC to communicate complaints to the client and support client redress where appropriate.
- Ensuring that clients understand and act on the fact that they are the key actor responsible for management of grievances, while providing IFC support and accountability for client responses.
- Encouraging clients to recognize the value of their GMs and maintain responsibility for managing grievances once they pay back a loan/investment if impacts (or risks) are expected to continue, and as a way to maintain social relations with communities.
- Ensuring consistency in the quality of GM implementation across projects in different sectors and for different types of clients and country and community contexts.

Recommendations:

- IFC and MIGA should develop a detailed understanding of baseline situation for project-level GMs, complaints received directly, and complaints received by CAO so that trends and gaps can be identified and progress can be monitored.
- IFC/MIGA should create more explicit guidance for IFC investment teams on how to appraise and supervise project GMs.
- After IFC/MIGA have gained sufficient operational experience with a more systematic approach to responding to complaints, they should evaluate their experience based on complaint tracking data and feedback from complainants, CSOs, clients, and other interested external stakeholders.
- IFC Management should ensure that E&S staffing includes adequate expertise to appraise and supervise GMs in a wide range of sectors and country/community contexts.

¹⁰⁶ Internal IFC document, IFC E&S Policy and Risk Department, 2019 (privileged and confidential, should be checked before inclusion in any public document).

- MIGA should follow IFC's experience with SGR closely, and consider creating a similar support team, scaled to MIGA's level of complaint activity and GM oversight.
- IFC, MIGA, and CAO should consider ways for CAO to support the development of IFC and MIGA capacity to respond to complaints. CAO support may be especially useful in advising IFC and MIGA on grievance response in fragile and least-developed country contexts, where they are seeking to expand their investments and where E&S risks may be substantially higher than in other contexts. There is precedent for such CAO support in several workshops and dialogues that CAO, IFC, and MIGA have co-organized.

CAO support should be based on mutual understanding that (1) CAO has unique expertise and experience in grievance response and dispute resolution; (2) CAO support would need to be provided in the context of CAO's Advisory function, with no linkage to any specific IFC or MIGA project; and (3) CAO's own staff and mediators are a scarce resource, and CAO must give priority to ensuring that it can support its own Dispute Resolution case work.

Appendix A. Matrix of Policy Recommendations

Issue/Recommendation	Section
E&S Policies and their Interpretation (Section 2)	
IFC/MIGA should specify more clearly the criteria and procedures to be used during appraisal to determine the amount of time and the level of capacity-building support that clients will receive in order to comply with the PS.	2.2.
IFC/MIGA should review the PS and identify all requirements that need to be complied with before a project can be approved.	2.2.
IFC/MIGA should develop tools to record and track key decisions during risk assessment, development of mitigation measures, and monitoring.	2.2.
IFC/MIGA should provide reasoned justifications for decisions.	2.2.
The E&S Policy and Risk Department should assist in the clarification of policy interpretations for each project and the rationale behind them.	2.2.
IFC/MIGA should work with clients early in the project cycle to gain an appreciation of local context.	2.2.
IFC/MIGA should conduct a political economy analysis and, if required, a conflict analysis.	2.2.
The structure of the ESRP Manual should be made clearer and the roles of the new E&S Policy and Risk Department should be incorporated.	2.2.
Financial Intermediaries (Section 3)	
IFC should identify E&S risks in FI portfolios during appraisal (noting that the type of lending—such as trade finance, project finance, or MSME lending—should not be taken as the primary indicator of E&S risk, but rather considered in combination with should risks associated with specific industries and clients, and with the country context).	3.
IFC should specify more clearly and with less discretion the criteria that FIs must use to identify higher-risk sub-projects and the mechanisms that FIs must use to ensure that those sub-projects apply the Performance Standards.	3.
IFC should assess the adequacy of a potential FI client's ESMS, including the potential for deeper review of the potential client's E&S management of its existing, higher-risk sub-projects.	3.
IFC should enhance its supervision of high-risk projects for non-private equity FI clients, by combining review of ESDD documentation with visits to a sample of higher-risk sub-projects (such as using the approach currently taken with private equity clients).	3.
IFC should expand disclosure initiatives for sub-projects, build on its current voluntary disclosure partnership with the Equator Principles Financial Institutions (EPFIs), and translate insights from that work into expanded sub-project disclosure requirements for most FI clients unless prohibited by national law.	3.
IFC's E&S staff should expand their engagement with FI clients, ideally starting at the stage of investment identification and continuing through appraisal and into supervision.	3.

Financial Intermediaries (Section 3- cont.)	
CAO should clarify its eligibility criteria for complaints involving FIs, and ensure that it consults and receives factual information from IFC on FIs that are the subjects of complaints, in order to clarify their relationship to sub-projects that are usually the focus of the complaints.	3.
CAO should determine an end-point for its ongoing monitoring of the 2013 FI compliance audit, and ensure that it maintains a clear distinction between the compliance focus of monitoring and advice to IFC and/or to the Board on the overall application of the Performance Standards to FIs.	3.
CAO should create a new Advisory product for IFC on ways that IFC could clarify the application of the Performance Standards to FIs; ideally, this Advisory product should be developed in close consultation with IFC, FI clients, outside experts on FI E&S accountability, national bank regulators, and civil society.	3.
Litigation Concerns (Section 4)	
IFC/MIGA should treat litigation risk as a secondary consideration, to be addressed through legal means only when litigation actually arises, rather than as an ex ante constraint on proactive efforts to avoid, mitigate and compensate for E&S impacts.	4.
CAO's Compliance function should continue to fulfill its mandate to identify IFC/MIGA non-compliance, while being attentive in its use of language to the possibility that non-compliance findings and assertions of factual conclusions could be used for collateral purposes (including to support litigation against IFC/MIGA), and exercise restraint accordingly.	4.
Governance (Section 5)	
The responsibility for CAO as a whole should be shifted from the President to the Board.	5.3.1.
IFC/MIGA's implementation and responsibility for the E&S Performance Standards and the CAO should be overseen by a Board Committee on behalf of the Board.	5.3.2.
The CAO Operational Guidelines should be revised and a new Board-approved Accountability Policy should be created. This policy framework could consist of an umbrella policy redefining key principles. The existing OGs, appropriately amended and revised to reflect recommendations of this Review, would constitute complementary operating procedures. Upon guidance of the Board, CAO, working in close consultation with IFC, MIGA, and the World Bank Group General Counsel, should be tasked to prepare the drafts of the Framework Policy and the revisions of the OGs. Board approval would be required for the Framework Policy. Both the draft policy and procedures and guidelines should be consulted with external stakeholders.	5.3.4.
Effectiveness of Current IFC/MIGA/CAO processes (Section 6)	
Strong efforts should be made to significantly shorten the time frames for complaint handing. Efficiency gains should be possible at all stages, including assessment, appraisal, investigation, and especially the clearance of the Compliance Investigation Report. Timelines for CAO processes are specified. The CAO Compliance function should be provided with more resources to bring it in line with other IAM compliance functions, including the IPN, without reducing resources available for Dispute Resolution. Reductions in timelines also require that IFC/MIGA staff/Management provide required information, inputs, and comments on a timely basis.	6.

Eligibility Criteria (Section 7.1)	
CAO should change the eligibility criteria so that complaints are not eligible until investments are approved by the Board.	7.1.
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.	7.1
CAO should receive a written Management Response to each such complaint.	7.1
CAO should allow the complainant to refile the request if the project is approved.	7.1
CAO's eligibility criteria should state explicitly that the end-point for eligibility is the end of IFC/MIGA financial interest in the project (for Advisory Services, this is the point of project closure).	7.1.
The CAO Vice President should have the authority to find a post-exit complaint eligible for up to two years after the end of IFC/MIGA financial interest in exceptional cases where (1) the complaint could not have been made during the period when IFC/MIGA had a financial interest; (2) all of CAO's other eligibility criteria were met; and (3) based on consultation between CAO and IFC/MIGA Management, the CAO VP decided that accepting the complaint would be consistent with CAO's mandate.	7.1.
Eligibility of Financial Intermediary Sub-Projects and Sub-Sub-Projects (Section 7.1)	
IFC/MIGA should clarify the E&S responsibilities of its FI clients with regard to sub-projects and sub-sub-projects through a revised, publicly disclosed, and Board-reviewed FI E&S Interpretation Note.	7.1.
IFC and MIGA should require their FI clients to disclose all sub-projects to which the IFC Performance Standards apply, unless the FI is prohibited from making such disclosures by national law or regulation.	7.1.
FI sub-projects should be considered eligible for CAO complaints if (1) the complaint pertains to a sub-project within the scope of IFC's investment in the FI (that is, if IFC/MIGA is providing corporate finance/guarantee to the FI, or the sub-project is within any ringfence that IFC/MIGA contractually established with the FI); (2) the share, type, and tenor of the FI investment in the sub-project make the investment material; and (3) there is a plausible link from the sub-project to harm or risk of harm to the complainant.	7.1.
CAO complaints about sub-sub-projects should be considered eligible if the FI client has a clear responsibility (via its sub-project investee) for oversight of E&S issues in the sub-sub-project, and the sub-sub-project also meets the three tests above.	7.1.
CAO should request factual information from IFC/MIGA in each and every case involving FIs, to ensure that it has an accurate basis on which to make an eligibility determination. IFC/MIGA should provide CAO with full access to all relevant documentation of IFC/MIGA's investments in any FI whose sub-project is the focus of a complaint.	7.1.
The eligibility fact-finding process should proceed on the basis of mutual trust and respect, with the understanding that (1) CAO is bound by the confidentiality commitments that of its Operational Guidelines and the relevant IFC/MIGA Disclosure Policies; and (2) CAO will share information about the complaint with IFC/MIGA to enable IFC/MIGA to respond effectively to CAO's queries, while respecting complainant confidentiality. As with all CAO complaints, fact-finding during eligibility should be treated as an opportunity to clarify the situation to the mutual benefit of all concerned parties, not to engage in dialogue regarding the merits of the complaint.	7.1

Eligibility of Complaints against IFC/MIGA Suppliers (Section 7.1)	
IFC and MIGA should clarify the definition of “primary supplier” to make it clearer to whom the client must apply the supply chain risk assessment and management required in PS1, and the relevant provisions of PS 2 and PS 6. It should also clarify the extent to which primary supplier E&S commitments apply by extension to the supplier’s subcontractors.	7.1.
Complaints pertaining to “primary suppliers” as clarified by IFC and MIGA should be assumed to be eligible as long as (1) the complaint pertains to activities and impacts of the supplier that are directly related to its role in supplying the IFC/MIGA client, and (2) the activities and impacts in question are linked to the IFC/MIGA client’s E&S responsibilities. For complaints that proceed to compliance appraisal, appraisal can determine whether there is an IFC/MIGA non-compliance issue related to application of PS 1, PS 2, and PS 6 to primary suppliers.	7.1.
Complaints relating to subcontractors of the primary supplier should only be eligible to the extent that they meet the two tests above, and in addition the IFC client had a responsibility to ensure that its primary suppliers managed the subcontractor E&S risks raised in the complaint.	7.1.
CAO should request factual documentation from IFC/MIGA on each and every supply chain complaint, to understand whether the entity named in the complaint qualifies as a primary supplier or as a subcontractor to a primary supplier that has assumed IFC/MIGA E&S obligations. IFC/MIGA should provide that information. There should also be sufficient discussion between CAO and IFC/MIGA to ensure factual clarity before CAO makes an eligibility determination.	7.1.
Eligibility of Complaints Pertaining to Global Public Goods (Section 7.1)	
Complaints that focus only on global impacts of a GPG should not be eligible for a CAO response, though CAO could refer all such complaints to IFC/MIGA Management. Complaints that focus on local impacts linked to the investment’s contribution to a GPG should be considered eligible if (1) the contribution of the investment to the local impact is material, and (2) the complainants are directly affected.	7.1.
Eligibility of Complaints from Individual Workers (Section 7.1)	
CAO should only accept employment contract-related complaints from individuals when there is reason to believe that the complaint may apply to a significantly broader class of workers. CAO should seek the factual information necessary to make this assessment before determining eligibility.	7.1.
Eligibility Decision (Section 7.1)	
CAO should amend its Operational Guidelines to require a brief statement from CAO explaining the key criteria and reasoning used for highly complex eligibility decisions.	7.1.
Complaint and Response Disclosure (Section 7.2)	
CAO should establish a registry, where complaints should be registered once they have been declared eligible. This registry should contain a very short summary of the complaint. Full disclosure is not needed during the assessment phase, but the assessment report should (and already does) include a presentation of issues raised in the complaint and the view of the client.	7.2.
The complaint, Management Response to the complaint, and optional client response be fully disclosed at the appraisal stage.	7.2.

CAO Assessment Process (Section 7.3)	
IFC/MIGA staff should engage systematically with clients and with CAO during the assessment process, with the goals of ensuring that clients have a good understanding of CAO's role and the options for dispute resolution and compliance processes; and that CAO understands clients' perspectives and concerns. IFC/MIGA should use their relationship with the client to encourage constructive resolution of issues, while also ensuring that the client addresses any issues in its E&S performance linked to the complaint.	7.3.
CAO should consistently determine whether there is any opportunity for the parties to engage directly with one another to resolve the issues during the assessment process. Such engagement may take place without direct involvement of CAO and any outcomes from such engagement should be reflected in the way CAO concludes the assessment process.	7.3.
CAO should not attach either the original complaint or a client response to its assessment reports. Instead, if the complaint is transferred to Compliance, CAO should attach the original complaint to the compliance appraisal report, given that the complaint establishes the scope of issues for the compliance appraisal. An IFC/MIGA Management Response should also be attached to the compliance appraisal report, with the option for the client to provide a response as well.	7.3.
CAO should conduct a systematic, retrospective evaluation of decisions to transfer complaints to Dispute Resolution and Compliance from FY2014 to the present, to determine what factors are most predictive of complainants' and clients' choice to pursue dispute resolution or compliance processes. If there are factors that are highly predictive of the choice, CAO should ensure that these factors are fully addressed in its assessments, both to reduce the time required for assessments, and to ensure that parties have given full, well-informed consideration to both Dispute Resolution and Compliance options when choosing between them.	7.3.
CAO should make every effort to ensure that it has had clear communication with the complainant and the client about the choice of process within 90 days of the start of the assessment process, that the parties are well informed about their choices, and that the parties have communicated their preferences to CAO.	7.3.
The CAO Vice President should review of the status of each assessment that continues to the 90-day mark. In cases where communication has been clear but neither party has expressed interest in dispute resolution by that time, the case should be transferred to Compliance. On the other hand, if either party has expressed interest in dispute resolution, and there is some potential for the other party to agree, then the Vice President should have the option of continuing the assessment up to but not beyond 120 days.	7.3.
CAO and IFC/MIGA should commit as a good practice to expedite the finalization of assessment reports, given that these reports are intended to provide a brief overview of issues, perceptions, and choices, and not to make findings of fact.	7.3.
CAO Dispute Resolution (Section 7.4)	
CAO and IFC/MIGA should formalize protocols for consultation between CAO and IFC/MIGA during dispute resolution cases, such as using IFC's Stakeholder Grievance Response Team as the primary point of contact, and confirming case by case the role that IFC/MIGA investment teams and Management will play in advising the client and supporting a good faith effort at dispute resolution.	7.4.

Eligibility Criteria (Section 7.4)- cont.	
IFC/MIGA should provide focused support to clients with lower stakeholder engagement and grievance resolution capacity, to ensure that they understand the CAO dispute resolution process and engage effectively in it.	7.4.
CAO should expand its efforts to identify qualified mediators and build their capacity, with increasing emphasis on mediators who are able to work effectively in fragile and conflict-affected contexts, where IFC/MIGA is expected to expand its investments/guarantees in the next several years.	7.4.
CAO should review all cases that began dispute resolution under the current OGs and took longer than two years to resolve or transfer (partially or fully) to Compliance, in order to determine whether it could better identify complex cases that are unlikely to be resolved through a dispute resolution process, and accelerate their transfer to Compliance.	7.4.
Initiating a Compliance Process (Section 7.5)	
When transferring a complaint from Dispute Resolution to Compliance, an appraisal process should only be started if complainants request such a transfer. Complainants should give an explicit agreement to participate in a compliance process before CAO begins the compliance appraisal. The agreement to proceed with a compliance process should be given by the complainants at the first point of engagement between the CAO Compliance function and the complainants.	7.5.
The purpose of the CAO compliance review should be clearly established. The language provided in section 2.7 of the recently issued EBRD/IPAM policy could provide guidance.	7.5.
Compliance Appraisal (Section 7.6)	
OG para. 4.2.1. should be clarified to state that the purpose of a compliance appraisal in relation to a complaint from project-affected people is to ensure that compliance investigations are conducted when the complaint raises substantial concerns regarding the environmental and/or social impacts of a project on the complainant, and the appraisal provides preliminary evidence that there may have been non-compliance with relevant E&S policies.	7.6.
The CAO VP, the President, IFC/MIGA Senior Management, and the Board (assuming that the Board in the future will assume responsibility for the CAO), should be able to request compliance investigations in cases where project-affected people are subject to, or fear, retaliation, in cases where there is preliminary evidence for particularly severe harm (or likely harm), and in cases where there are issues of systemic importance.	7.6
Revised OGs should establish as an appraisal criterion that a linkage between potential non-compliances with IFC/MIGA policies and alleged adverse outcomes exists.	7.6.
Criterion (iii) of the OG policy should be eliminated. It establishes as a criterion of appraisal whether there is evidence that IFC/MIGA's provision have provided adequate protection (OG para. 4.2.1). The CAO process is not an evaluation instrument that assesses whether IFC/MIGA policies are effective.	7.6.
The first two appraisal criteria should be altered to state that there must be preliminary evidence of potentially adverse environmental and/or social outcomes now, or in the future, and that there must be preliminary evidence that a policy might not have been properly adhered to or properly applied by IFC/MIGA.	7.6.

Compliance Appraisal (Section 7.6)- cont.	
Repeat complaints on a project already investigated should not be accepted unless they raise new evidence or new issues not previously considered. Revised OGs should include language used in policies of other IAMS.	7.6.
The decision to investigate after an appraisal process determines that there is preliminary evidence of non-compliances with E&S policies and related harm should be made by the CAO VP.	7.6.
IFC/MIGA Management should present a Management Response within 10 business days of transferring a complaint to the compliance process.	7.6.
The client may submit a response if the client so wishes. If a client response is submitted, it should be considered by CAO in the appraisal process.	7.6.
<p>A deferral option should be introduced, with the following provisions: CAO should have the ability to defer the decision to investigate as part of the appraisal process. A decision to defer should be reasoned, considering:</p> <ol style="list-style-type: none"> 1. The severity of harms and potential compliance issues raised by the complaint; 2. Whether the Management Response includes specific commitments that are commensurate to the issues raised in the complaint and consistent with IFC/MIGA policy requirements; 3. The views of the complainants as to the impact (positive and negative) of a decision to defer; and 4. Other information deemed relevant by CAO. <p>In cases in which CAO decides to defer the decision to investigate, CAO should establish and make public:</p> <ol style="list-style-type: none"> 1. A framework for monitoring during the period of deferral including reporting by Management and on commitments included in the Management Response 2. A timeline for CAO to issue a report on implementation of commitments included in the Management Response and their effectiveness in addressing the concerns raised by the complaint 3. A framework for CAO to decide whether to close the complaint, extend the period for deferment, or trigger an investigation. 	7.6.
The appraisal process should be limited to 45 days.	7.6.
In the interest of a more streamlined process, CAO should publish a short, reasoned decision.	7.6.
Compliance Investigation (Section 7.7)	
Revised OGs should clearly lay out compliance investigation criteria that determine that investigations should focus on: (1) whether there has been/have been non-compliance with E&S obligations; (2) whether IFC/MIGA reviewed and supervised project E&S risks and impacts in accordance with relevant requirements; and (3) whether there is harm or likely future harm that is related to non-compliance with IFC/MIGA E&S policies	7.7.

Compliance Investigation (Section 7.7)- cont.	
Procedures should be established clarifying that CAO Compliance staff should have full access to all IFC/MIGA project information, including staff, consultants, and documentation (such as emails, reports, drafts, databases, consultant reports) as necessary in the exercise of its mandate. The full access provision should be reflected in the revised OGs.	7.7.
Standard contractual language should be developed ensuring that CAO has access to all relevant client information as necessary to exercise its mandate; that material amendments to this language should not be negotiated with clients without prior written approval from CAO; and that any nondisclosure agreement entered into by IFC/MIGA should include standard language referring to CAO's access to and use of client information as necessary in the exercise of its mandate.	7.7.
Peer review processes on appraisal and investigation reports should be conducted at periodic intervals. In the peer review, the concerns of both IFC/MIGA and of the complainants should be considered.	7.7.
CAO, in its Terms of References for the investigations, should define the deadline by which information needs to be presented in order to be considered in the investigation.	7.7.
IFC/MIGA should not introduce new information or arguments regarding compliance after the factual review and comment phase of the investigation.	7.7.
The revised OGs should articulate the principle that CAO should make its judgment about compliance not with the benefit of hindsight, but considering sources of information available at the time.	7.7.
The revised OGs should include a provision on the standards of evidence to be applied in a CAO compliance investigation based on the approach currently articulated in CAO's Handbook. These standards are preferable to more legalistic articulations as standard of evidence should not give rise to a perception that CAO exercises a judicial function. Compliance investigation reports should routinely note that CAO does not apply legal standards of evidence.	7.7.
The language of OG para. 1.4 should be revised to more clearly spell out the special disclosure regime of CAO. Moreover, an agreement should be established between CAO and IFC General Counsel in which the disclosure practices are spelled out in detailed, balancing the need of CAO to disclose information supporting its findings and the need of confidentiality of client information. Until a more detailed framework is agreed, the approach set out in CAO's Handbook provides an appropriate framework for balancing disclosure concerns related to CAO compliance reports.	7.7.
Complainants should have access to draft investigation reports through the same process as approved by CODE for the World Bank IPN: that is, concurrently when the draft report is circulated to IFC/MIGA for factual review and comments.	7.7.
Complainants should receive a Table of Findings concurrently when the draft report is circulated to IFC/MIGA for factual review and comments and as a basis for information for subsequent consultation on Management Action Plans.	7.7.
Comments received from the complainants, just like comments received from IFC/MIGA, should be considered by CAO before finalizing the report.	7.7.

Compliance Investigation (Section 7.7)- cont.	
CAO should issue a draft investigation report within one year after disclosure of the appraisal report. Adequate resources should be provided to CAO to be able to comply with this deadline.	7.7.
IFC/MIGA and complainants should complete their fact checking and commenting within 20 days.	7.7.
Remedial Actions in Case of CAO Findings of Non-compliance (Section 7.8.1)	
CAO should clarify the language defining the objectives of the CAO Compliance process, taking as its starting point the language laid out in the EBRD/IPAM (2019) policy.	7.8.1.
CAO's OGs should state that within 40 working days after sending the compliance review report to the Board, IFC/MIGA Management should send a Management Action Plan to the Board for approval. The Management Action Plan should contain time-bound operational measures in response to each CAO finding of non-compliance and related harm.	7.8.1.
This Management Action Plan should be agreed with the client with respect to measures to be implemented by the client.	7.8.1.
IFC/MIGA should indicate what non-compliance findings they cannot address with proposed measures and specify the reasons why.	7.8.1.
The Management Action Plan should also present measures to be implemented by IFC/MIGA in order to avoid a recurrence of stated non-compliances in other IFC/MIGA projects.	7.8.1.
The complainant should be consulted on the proposed remedial actions in the Management Action Plan (in line with processes established at the World Bank IPN).	7.8.1.
IFC/MIGA Management should seek CAO input into the Management Action Plan, with the understanding that the Action Plan is the sole authority of IFC/MIGA Management and not CAO.	7.8.1.
CAO should submit comments on the proposed Management Action Plan to the Board at the same time that IFC/MIGA present the Management Action Plan for approval.	7.8.1.
CAO should consider whether it is feasible to provide support in dispute resolution processes required to implement remedial actions approved under a Management Action Plan, without creating unconstructive ambiguity about the responsibilities of IFC/MIGA for remedial action, and without creating any potential confusion between CAO Compliance and Dispute Resolution functions. If such support does seem feasible, CAO, IFC, and MIGA should seek an opportunity to pilot test this approach in one or more appropriate cases.	7.8.1.
IFC/MIGA Contributions to Remedy of Harm (Section 7.8.2)	
Two mechanisms should be established to fund remedial actions: (1) contingent liability funds from the client that can be tapped in the event that E&S harm materializes and is linked to the client's failure to meet the Performance Standards; and (2) funds that the IFC/MIGA can contribute in the event that IFC/MIGA has/have contributed to E&S harm.	7.8.2.
IFC and MIGA should define a framework for remedial action, and the Board should review and approve that framework, building in part on the Dutch Banking Sector Agreement.	7.8.2.

IFC/MIGA Contributions to Remedy of Harm (Section 7.8.2)- cont.	
IFC and MIGA should develop contingent liability funding requirements and mechanisms for all investments that present significant E&S risk (at a minimum, all Category A, B, FI 1, and FI 2 investments).	7.8.2.
IFC and MIGA should develop, in collaboration with CAO, and present to the Board a draft policy on the use of IFC/MIGA resources to contribute to remedy, clarifying the criteria, potential uses, and limitations of such resources to contribute to remedy.	7.8.2.
CAO Compliance Monitoring (Section 7.9)	
The core focus of CAO monitoring should be the remedial actions approved as part of the Management Action Plan.	7.9.
CAO monitoring should focus only on those non-compliance findings addressed under the Management Action Plan. If the Management Action Plan is not responsive to all non-compliance findings, yet the authorizing environment (proposed in this Review to be the Board) has approved the Management Action Plan, it is to be assumed that the Board did not consider it necessary to address all non-compliance findings, and CAO is bound by that decision in its monitoring.	7.9.
CAO will focus in its monitoring on the remedial actions approved in the Management Action Plan, but it will also assess whether these actions have corrected the non-compliance that these measures are designed to address. This provision is necessary given that the objective of the monitoring is to assure that non-compliance is corrected. Some remedial actions approved under a Management Action Plan, due to evolving circumstances, might not achieve this objective. The Board should have an interest in learning about such a situation.	7.9.
The supervision of implementation of remedial action is an IFC/MIGA Management function. IFC/MIGA should present biannual progress reports to CAO on progress made in implementation of remedial measures. IFC/MIGA should lay out in these progress reports actions taken by IFC/MIGA to support the client in the implementation of remedial actions. Progress reports will be an important input into the CAO monitoring process.	7.9.
The Board Committee to which CAO will report should meet with CAO at regular intervals to be briefed on progress made in implementation of agreed remedial actions, including project-level actions and IFC/MIGA systemic responses to CAO compliance findings.	7.9.
The CAO Operational Guidelines should be revised to provide that CAO compliance monitoring should be closed (1) when non-compliance findings have been substantively addressed (satisfactory closure); or (2) if there is no reasonable expectation of further action to address CAO's compliance findings (unsatisfactory or partially unsatisfactory closure).	7.9.
In cases in which there were significant non-compliance findings and related harm and there has been little progress made in the implementation of agreed remedial actions, the Board Committee should convene meetings with IFC/MIGA Management and CAO to consider options on how to strengthen progress in implementation.	7.9.

Organizational Learning from E&S Experiences, Complaints, and Responses (Section 7.10)	
IFC's new Policy and Risk Department and its ESG Advice and Solutions Group should maintain close collaboration with each other and with CAO to continue generating high-quality learning for IFC staff and clients, and continue supporting external networks such as the Equator Principles Association and Sustainable Banking Network.	7.10.
CAO should continue to generate learning products and advice through its Advisory function and through its ongoing engagement with IFC and MIGA on lessons from cases.	7.10.
CAO should revise its Operational Guidelines (Sec. 5.1.2) to authorize the Advisory function to deliver advice through interaction as well as in writing.	7.10.
CAO, IFC, and MIGA should consider whether to allow requests for CAO Advisory support from IFC and MIGA management below the Senior Management level.	7.10.
CAO should systematically assess the impact of its advisory work through the Management Action Tracking Record, its organizational M&E system, and periodic external reviews.	7.10.
CAO's Operational Guidelines should be revised to include the option for the Board to request advice from CAO.	7.10.
MIGA should enhance its efforts to document and share learning on E&S issues with its clients, within the scope of its mandate and resources.	7.10.
Disclosure or Accountability Mechanisms (Section 8.1.1)	
IFC/MIGA should ensure that clients (including FI sub-projects) that are required to establish grievance mechanisms provide information to affected communities both about the client's grievance mechanism and about CAO.	8.1.1.
IFC/MIGA supervision should ensure that clients are meeting this responsibility, in part by surveying diverse community members regarding their awareness of the client's grievance mechanism and the existence and work of CAO. An annual assessment of client disclosures of CAO should be included in the summary of IFC/MIGA E&S results reported to the Board.	8.1.1.
As and when IFC and MIGA have established effective channels for directly receiving and responding to complaints from affected communities, they should ensure that affected communities are aware of this option, and about the process for communicating complaints to IFC/MIGA.	8.1.1.
CAO should review the effectiveness of its outreach and communications mandate for different stakeholders and explore mechanisms to increase awareness of its work among potentially affected communities in a way that is not project specific.	8.1.1.
Client Grievance Mechanisms (Section 8.1.3)	
<p>IFC/MIGA should hire or contract E&S staff with expertise in GM design and operation to ensure adequate support for every region and sector in IFC/MIGA portfolios. Adequate support would mean that:</p> <ul style="list-style-type: none"> ○ For every investment with an identified affected community, the client would be supported in establishing or strengthening an appropriate GM. ○ There would be rigorous assessment of the adequacy of the GM as part of due diligence. 	8.1.3.

<ul style="list-style-type: none"> ○ Clients could receive clear guidance on additional policies, procedures, staffing, and/or outreach necessary to satisfy the IFC/MIGA grievance mechanism requirement, with requirements included in covenants for higher-risk investments. ○ IFC/MIGA E&S staff with expertise in GMs would engage in ongoing supervision of the investment , assessing GM effectiveness by reviewing documentation of GM cases; interviewing GM staff and other client representatives expected to interact with affected communities, along with members of affected communities; and reviewing complaints about the investment channeled to other mechanisms. ○ In instances in which supervision reveals limitations in the effectiveness of the GM, IFC/MIGA could specify remedial actions in a time-bound action plan, offering support where appropriate, and indicating what consequences would ensue if the actions needed to strengthen the GM were not taken in a timely fashion. 	
<p>Given its expertise, CAO should assist IFC and MIGA in building client GM capacity, using its Grievance Mechanism Toolkit and the expertise of CAO's staff and mediator network. CAO's involvement should be under the auspices of CAO's Advisory function, to maintain the separation of this activity from any project-specific issues that could become the focus of a CAO complaint. Roles and resources would also need to be allocated by mutual agreement among CAO, IFC and MIGA.</p>	8.1.3.
Complaints Raised Outside of CAO Channels (Section 8.2)	
<p>IFC and MIGA should develop a detailed understanding of baseline situation for project-level GMs, complaints received directly, and complaints received by CAO so that trends and gaps can be identified and progress can be monitored.</p>	8.2.
<p>IFC/MIGA should create more explicit guidance for IFC investment teams on how to appraise and supervise project GMs.</p>	8.2.
<p>After IFC/MIGA have gained sufficient operational experience with a more systematic approach to responding to complaints, they should evaluate their experience based on complaint tracking data and feedback from complainants, CSOs, clients, and other interested external stakeholders.</p>	8.2.
<p>IFC management should ensure that E&S staffing includes adequate expertise to appraise and supervise GMs in a wide range of sectors and country/community contexts.</p>	8.2.
<p>MIGA should follow IFC's experience with SGR closely, and consider creating a similar support team, scaled to MIGA's level of complaint activity and GM oversight.</p>	8.2.
<p>IFC, MIGA, and CAO should consider ways for CAO to support the development of IFC and MIGA capacity to respond to complaints.</p>	8.2.

Appendix B. Terms of Reference for the Accountability Review

Terms of Reference

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

Overview

1. Given two decades of operational experience by the CAO and IFC/MIGA and a context that has evolved significantly in the years since CAO was created, it is an opportune time to review and reflect on IFC/MIGA E&S accountability, including what and to whom IFC/MIGA are accountable for in the context of the IFC/MIGA existing Sustainability Policy and Performance Standards on Environmental and Social Sustainability, the role and effectiveness of CAO, and other aspects of IFC/MIGA's complaint/grievance response (how well the system and processes are working for all stakeholders), take stock of lessons learned to date, and consider whether any recalibrations may be needed at this juncture.

2. The External Review ("the Review") is requested by the Committee on Development Effectiveness (CODE) on behalf of the IFC and MIGA Boards of Executive Directors, and follows discussions between CAO, IFC and MIGA Management, and the Boards about opportunities to further strengthen accountability and governance¹⁰⁷. It will consider the respective roles of the Board, management and CAO, including the governance and effectiveness of the CAO comprising the CAO's three functions (Advisory, Dispute Resolution, Compliance), the role of IFC and MIGA and their clients in identifying, mitigating and responding to concerns regarding adverse E&S impacts of the business activities each finances or insures, and the oversight function of the Board. The Review will include multi-stakeholder consultation and consideration of good practices in the field, including the complaint/grievance response and Independent Accountability Mechanisms of other Development Financial Institutions (DFIs) and Multilateral Development Banks (MDBs).

Background

3. In 1999, IFC and MIGA created the Compliance Advisor Ombudsman (CAO) as an additional pillar – independent of operational management – to ensure that projects are environmentally and socially sound and enhance IFC's and MIGA's contribution to sustainable development, and to assist in addressing the concerns and complaints of people affected by projects supported by IFC and MIGA in a manner that is fair, constructive and objective.

4. The original mandate and scope of the CAO are described in the 1998 Terms of Reference (TOR). The scope and three roles of the CAO Vice Presidency – compliance, advisory and ombudsman – were subsequently developed through CAO Operational Guidelines issued in 2000, 2004, 2007 and 2013, respectively.

5. In the almost twenty years since IFC and MIGA established the CAO, there have been a series of significant developments, changes and emerging trends that are important in today's context. These include:

- Replacement of the safeguards framework with the Sustainability Policy and Performance Standards on Social and Environmental Sustainability (IFC 2006 and MIGA 2007) and their update (IFC 2012 and MIGA 2013).
- Three Effectiveness Reviews initiated by CAO and conducted by independent experts in 2003, 2006 and 2010 leading to successive evolution of CAO's Operational Guidelines.

¹⁰⁷ Memo to Executive Directors of the IFC and MIGA Boards of Executive Directors from IFC and MIGA EVPs and CEOs, Follow up on Restricted Executive Session on "Governance of IFC and MIGA Office of the Compliance Advisor Ombudsman (CAO)", September 13, 2018 and meeting of the Board's Committee on Development Effectiveness, September 12, 2018 (CODE/GS2018-0015).

- Strategic developments at IFC/MIGA emphasizing a greater focus on investments in the poorest, Fragility, Conflict and Violence (FCV) contexts with less environmental and social capacity and greater contextual risks, along with an increased focus on development impact, public private partnerships, investments through financial intermediaries (FIs) and market creation.
- Growth in the volume and complexity of CAO's caseload generally and in the compliance caseload, in particular, with an emerging source of complaints related to investments in financial intermediaries.
- Litigation by project-affected people seeking to establish International Finance Institutions (IFIs) legal liability and obtain compensatory redress directly from IFC as a lender/investor.
- Ongoing review of the World Bank's Inspection Panel toolkit with implications for the way that project related grievances are being handled on the public-sector side of the WBG.

External Review Objectives

6. The following objectives will guide the review, with more specific questions to be identified and considered by the Review Team¹⁰⁸. The objectives of the Review are to evaluate, provide high-level recommendations, taking into consideration costs and benefits to all stakeholders, and enable the IFC and MIGA Boards to make decisions with respect to:

- The optimal governance arrangement for the CAO in light of the purpose of each of its functions (Dispute Resolution, Compliance and Advisory);
- (a) The role and effectiveness of CAO, including its Operational Guidelines (2013), against the requirements of its mandate and TOR, and Operational Guidelines (2013); (b) IFC and MIGA's responsiveness to concerns regarding adverse E&S impacts of the business activities of their clients; (c) Impacts that current CAO processes have on stakeholders, including communities, clients and governments, as well as on IFC and MIGA operations, policies, and risk profile; and (d) uptake of learning from CAO's work at the level of IFC and MIGA's policies, standards and practices;
- Any needed calibrations to CAO's complaint's handling processes or operational guidelines to fulfil its role and improve overall effectiveness and efficiency;
- Any needed calibrations to IFC/MIGA's complaint's response including ways in which IFC and MIGA respond to CAO processes as well as to other complaints or concerns not related to CAO; and;
- Any need to develop complaint/grievance mechanisms through which project-affected people and communities may raise concerns directly with IFC/MIGA Management.

Review Methodology

7. Specific questions and issues should be identified by the Review Team following initial consultations and feedback from the Reference Group.¹⁰⁹ A list of possible topics for the Review will be shared by CAO and IFC/MIGA with CODE separately. The Review Team will:

- Review CAO's TOR and evolution of operational guidelines, CAO's historic work product and IFC/MIGA response, and IFC and MIGA's roles and responsibilities under the current Sustainability Policies;
- Consider practices in the field, including comparison with other E&S independent accountability mechanisms;
- Interview a representative range of stakeholders.

¹⁰⁸ See below details on Review Team.

¹⁰⁹ See below details on Reference Group.

Review Team Structure

8. The Review will be conducted by a team of 6 independent experts including a convening Chairperson, with input from a multi-stakeholder Reference Group including representatives of CAO, IFC and MIGA, civil society, IFC and MIGA clients, independent accountability mechanisms and government officials. Selection of Review Team and Reference Group members will consider the representation of Part I and Part II countries.

9. The Review Team will comprise experts in private sector development in emerging markets, environmental and social sustainability, independent accountability mechanisms (IAMs), and IFC and MIGA operations. Specific competencies sought will include experience in: dispute resolution, audit/compliance work, environmental and social systems including use of the Performance Standards, legal, and governance issues. The chairperson will be a senior expert with the appropriate stature to convene the process in a way that ensures maximum legitimacy across stakeholder groups.

Role and Structure of Reference Group

10. The role of the Reference Group will be to provide a consolidated forum for stakeholder input to the Review Team. The Reference Group will include participants nominated by IFC, MIGA, CAO, the private sector, civil society and government. CAO and IFC/MIGA will propose a pool of candidates for the Reference Group for CODE's consideration. Appointment of the Reference Group will be made by CODE on an absence of objection basis.

Process and Deliverables

11. CODE will commission and oversee the Review on behalf of the IFC and MIGA Boards and provide the scope and terms of reference of the Review Team. The Review Team will report to CODE. CAO and IFC/MIGA will propose consultants for the Review Team for CODE's consideration. Executive Directors are welcome to submit names of potential candidates for consideration that meet the criteria set out on paragraph 9.

12. The CODE Secretariat will contact the potential consultants to verify their availability and willingness to undertake the assignment as well as to ascertain whether the candidates have a possible conflict of interest. A prior or ongoing relationship with IFC, MIGA or CAO should not necessarily be viewed as a conflict. However, all such engagements should be fully disclosed and discussed with IFC, MIGA and CAO with a view to ensuring that no actual or perceived conflict of interest exists that would jeopardize the legitimacy of the review process from either IFC/MIGA or CAO's perspective.

13. The CODE Secretariat will then submit the pool of potential candidates for CODE's consideration. The selected consultants will then be submitted for the Board's approval on an absence of objection basis.

14. The initial output of the Review Team will be a short scoping report, which will include a fuller description of the approach to the review, in particular: key questions and issues for the review, a list of proposed interviewees, elaboration of the methodology, and areas of focus. The scoping report will be circulated to CODE for discussion and input prior to finalizing.

15. The Review Team will share a draft of its final report and recommendations with CODE for discussion and input prior to finalization.

16. The Review Team may hold a structured interaction or consultation at predetermined stages of the review to elicit input from the Reference Group. The Reference Group will have no power to oversee, advise, influence or modify the outcome of the Independent External Review. Unless recommended by the Review Team and agreed by CODE, the Reference Team shall have no access to the work in progress of the Review Team.

17. The Review Team will produce a final report with recommendations for the CODE's consideration. Disclosure and timing of the External Review and Board's decision will be decided by the respective Boards.

Timeline

18. The review process is expected to take approximately 8 months from inception.

Appendix C. Bios of the Review Team Members

David Fairman. David Fairman is Managing Director at the Consensus Building Institute and Associate Director of the MIT-Harvard Public Disputes Program. He has nearly 31 years of experience in facilitating consensus building on complex public and organizational issues internationally and in the United States. Mr. Fairman's primary focus is building effective multistakeholder partnerships, strategies, and dispute resolution systems to meet the challenges of sustainable development. He works extensively with national governments, multilateral agencies, global and national nongovernmental organizations (NGOs), and multinational corporations in Asia, Africa, Latin America, and the Middle East. Mr. Fairman has worked with the World Bank Group on a wide range of projects and initiatives over the past 20 years and knows both CAO and IFC well. He has facilitated IFC-CAO joint learning and dialogue on managing the environmental and social impacts of IFC investments and facilitated direct dialogue between IFC and CAO Management and senior staff to share perspectives, and to clarify and refine roles and modes of interaction during CAO problem-solving and compliance processes. Mr. Fairman has previously evaluated CAO's Operational Procedures, and facilitated CAO staff planning to set priorities, develop strategies, and refine procedures. In addition, he has worked on dispute resolution and prevention assessments and recommendations for World Bank Group projects and investments in the energy, agribusiness, and forest sectors, and facilitated global dialogue on lessons learned from evaluations of the World Bank Group's global programs and its engagement in the forest sector. He is well versed in dispute resolution in the context of complaint-handling processes at the independent accountability mechanisms (IAMs) and also brings high-level, strategic thinking to the Review Team.

Arntraud Hartmann. Arntraud Hartmann is the Steven Muller Professor for Development Studies at SAIS/Europe of the Johns Hopkins University. She brings a variety of strengths and competencies to the area of compliance and accountability of IFIs, combining long experiences serving at both the World Bank as well as on various complaint mechanisms of multilateral development banks (MDBs). Her World Bank experience (from 1981 to 2004) includes 10 years in Senior Management Positions, including Director of the Romania Program, Country Director for Southeast European countries and Senior Advisor to the Managing Director. From 2012 to 2017, Ms. Hartmann served as a member of the three-person panel of the independent accountability mechanism of the African Development Bank (IRM), and from 2013 to 2018 as a member of the three-person panel of the independent accountability mechanism of the Asian Development Bank (CRP). She has recently been appointed to the Panel of the Independent Complaint Mechanism (ICM) of the KfW/DEG-FMO-Proparco, a mechanism jointly established between the German, Dutch, and French development banks lending to private sector companies in developing countries. As a member of the ADB and AfDB independent accountability mechanisms, Ms. Hartmann led numerous compliance review investigations and subsequent monitoring processes. The majority of these cases were private sector operations. In her academic research, Ms. Hartmann conducts comparative studies on international accountability mechanisms to distill best practices and on the effectiveness of development cooperation.

Peter Larose. Peter Larose is a distinguished professional specializing in banking, finance, and commerce, with a focus on serving International Development Association (IDA), fragility, conflict, and violence (FCV), and small states in a career that has spanned the public, private, and multilateral sectors. In the early 2000s, Dr. Larose served as an advisor in the ministry of finance and then general manager of the Central Bank of the Seychelles. He joined the World Bank Group in 2008 as an Advisor in the Executive Director's office, then was promoted to Senior Advisor, and in 2012 Alternate Executive Director. He was elected Executive Director in 2014 of African Group 1 Constituency, representing 22 African countries. In this role, he was a member of the Committee for Development Effectiveness (CODE), where he contributed to the work that culminated in the Board's approval of the new World Bank Environmental and Social Framework. In 2016, he was called back to the Seychelles to take up the position of Minister of Finance, Trade and Economic Planning, serving until

2018. Since 2019, he has worked as an international consultant at Qnective, AG (Switzerland), a privately held provider of sophisticated and secure communications technology. Dr. Larose brings a wide range of expertise to the Review Team, particularly in institutional governance, reflecting not only his position as an Executive Director of the World Bank Group, but also as a Board member of a number of other international financial institutions with a special focus on Africa. He combines hands-on experience with the World Bank Group's environmental and social policies, especially in IDA, FCV, and small states, with an emphasis on financial inclusion, transparency, and accountability.

Tasneem Salam. Tasneem Salam brings 30 years of professional experience in the field of environmental and social sustainability in emerging markets, with an emphasis on social development, gender, and resettlement issues. In this capacity, she has worked on both private and public sector projects and with a broad range of development finance institutions, including the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), and the World Bank, as well as bilateral development assistance agencies, including Ausaid (Australia) and the Department for International Development (DFID) (United Kingdom). Her work has focused on helping private sector clients implement IFC's Performance Standards as well as other international financial institution (IFI) standards, particularly in complex oil & gas, mining, and transport projects. She has served as a member of Expert Monitoring Panels for complex projects, including the IFC-financed Baku-Tbilisi-Ceyhan (BTC) Pipeline, which received 33 CAO complaints across its three countries of operation. Ms. Salam was very involved in reviewing and monitoring the grievance redress mechanism in that project and advising the client on improving its effectiveness in responding to concerns of affected communities. Other areas of expertise include community engagement, stakeholder analysis, labor, health and safety, indigenous people, and monitoring and evaluation.

Edward Waitzer. Edward Waitzer is a senior partner and head of the Corporate Governance Group at Stikeman Elliott, LLP. His practice focuses on complex business transactions and advising clients in respect of various public policy and governance matters. Mr. Waitzer was Chair of the firm from 1999 to 2006. He has served as Chair of the Ontario Securities Commission (and of the Technical Committee of the International Organization of Securities Commissions) and as Vice President of The Toronto Stock Exchange. He has written and spoken extensively on a variety of legal and public policy issues. He was Chair of the Strategy Working Party that restructured the International Accounting Standards Board, a member of the Canadian Institute of Chartered Accountants' Task Force on Standard Setting, a public Director of the American Institute of Certified Public Accountants, a member of the Independent Review Panel on the Comptrollership Function in Canada, and Chair of the Liquor Control Board of Ontario. Mr. Waitzer has been the Falconbridge Professor of Law at Osgoode Hall Law School and is the Jarislowsky Dimma Mooney Chair in Corporate Governance and Director of the Hennick Centre for Business and Law at Osgoode Hall Law School and Schulich School of Business at York University. He is an inaugural Fellow of the American College of Governance Counsel, and a Senior Fellow at the C.D. Howe Institute and the Centre for International Governance Innovation (CIGI).

Peter Woicke, Chairman of the Review Team. Peter Woicke is the former Executive Vice President of the International Finance Corporation (IFC) and former Managing Director of the World Bank (1999–2005), championing sustainability issues during his tenure. Since his retirement from IFC, he has served as Strategic Advisor to CAO since 2015, as part of the CAO’s Strategic Advisory Group, providing advice and guidance from a private sector perspective. The combination of these roles in private sector development finance and environmental and social accountability, combined with a deep understanding of IFC, MIGA, and CAO, give Mr. Woicke a unique profile and legitimacy across a wide range of stakeholder groups. While at IFC, Mr. Woicke’s leadership focused on IFC’s expansion, particularly in frontier countries and high-impact sectors, such as domestic financial markets, infrastructure, information technology, health, and education, and small and medium enterprises. Before joining IFC, Mr. Woicke spent 29 years with J.P. Morgan, holding several positions. These included heading the banking division of an affiliate in Beirut and leading the international oil & gas group. For two years, he was responsible for J.P. Morgan’s information technology group and its entire back office. He was also Chairman of J.P. Morgan Securities Asia and a member of the company’s Executive Management Group. From 2006 to 2017, he was a member of various boards, including: Anglo American plc (London); MTN (Johannesburg); Plug Power (Albany, New York); Raiffeisen International (Vienna); and Saudi Aramco (Saudi Arabia). He also served as Chairman of Save the Children International (London) and was a trustee of Ashesi University Foundation (Seattle) and the Chesapeake Bay Foundation (Annapolis, Maryland). Current board positions include: Global Communities (Washington, DC); International Youth Foundation (Baltimore); and Talbot Interfaith Shelter (Easton, Maryland); as well as the Advisory Committee to the IFC/MIGA Compliance Advisor Ombudsman (CAO).

Appendix D. Reference Group Members

Company /organization / government	Contact representative	Previous engagement with IFC/MIGA/CAO
Parties to Review		
CAO	Osvaldo Gratacos	
IFC	Mary Porter Peschka	
MIGA*	Merli Baroudi	
IFC/MIGA Private Sector Clients		
Indorama Eleme Fertilizers Limited	Munish Jindal, CEO	IFC-MIGA Nominee Ongoing compliance process
Axzon / Danosha	Luba Bogachevska, Chief of External Relations Department and Projects	IFC-MIGA Nominee Previous dispute resolution and ongoing compliance process
Newmont Mining Corporation	Nick Cotts, Vice President - Sustainability and External Relations	IFC-MIGA Nominee Previous dispute resolution and ongoing compliance process
Real LRIF	Steve Pearlman, Managing Partner Portfolio Management, E&S Officer, CFO	IFC-MIGA Nominee FI client with ongoing compliance process
Zalar Holding	Amina Chaouni, Group Legal Counsel	IFC-MIGA Nominee Dispute resolution process in monitoring phase
Reventazon	Miguel Vásquez Camacho, Coordinator Planificación Ambiental	IFC-MIGA Nominee Ongoing compliance process
Bidco Group	Dipak Shah, Director	IFC-MIGA Nominee Ongoing compliance process
Rio Tinto	Alexandra Guaqueta, Global Practice Leader, Communities	CAO Nominee Ongoing dispute resolution process
SN Aboitiz Power, Philippines	Mike Hosillos, Vice President	CAO Nominee Concluded dispute resolution process

Civil Society Organizations/Academia		
American University Washington College of Law	David Hunter, Professor of International and Comparative Environmental Law	CAO nominee Has been involved in the establishment and development of both the Inspection Panel and CAO
Accountability Counsel (USA)	Kindra Mohr, Policy Director, Accountability Counsel	CAO nominee Accountability Counsel has supported complainant groups in dispute resolution and compliance processes
Bank Information Center (USA)	Jolie Schwarz, Policy Director, Bank Information Center	CAO nominee Bank Information Center has supported complainant groups in dispute resolution and compliance processes
Bankwatch	Fidanka Bacheva-McGrath, EBRD Policy Officer, Bulgaria, Bankwatch	CAO nominee Bankwatch has supported complainants in a dispute resolution process and has partnered with CAO in outreach efforts
Center for Research on Multinational Corporations (SOMO) (Europe)	Kris Genovese, Senior Researcher, SOMO	CAO nominee SOMO has supported complainants in dispute resolution and compliance processes
Latin America and Caribbean representative	Carla Garcia Zendejas, Director, People, Land and Resources Program, Center for International Economic Law	CAO nominee CIEL has supported complainant groups in dispute resolution and compliance processes
Asia representative	Jelson Garcia, formerly Asia Pacific Director, Natural Resources Governance Institute	CAO nominee Has supported complainants in dispute resolution and compliance processes, and has partnered with CAO on regional outreach to civil society groups
Africa representative*	Guillain C. Koko, Project Coordinator of the African Coalition for Corporate Accountability network (ACCA)	CAO nominee Has partnered with CAO in outreach and network involving regional complainants to CAO
Middle East and North Africa representative	Amy Ekdawi, Arab Watch Coalition for Just Development	CAO nominee Has partnered with CAO on regional outreach and has supported complainant groups in compliance processes
Leo Baunach	Director, DC Office, Global Unions	CAO nominee Has supported complainant groups in compliance processes
Fund for Peace	J.J. Messner, Executive Director	IFC/MIGA nominee
ProNatura	Marcelo De Andrade, Chair & Founder, Pro-Natura Network	IFC/MIGA nominee

Standard Bank	Nigel Beck, Executive and Group Head: Environmental & Social Risk and Finance	IFC/MIGA nominee
CDC	Mark Eckstein, Director, Environmental and Social Responsibility	IFC/MIGA nominee
Actis	Shami Nissan, Head of Responsible Investment	IFC/MIGA nominee
International Financial Institutions and Independent Accountability Mechanisms (IAMs)		
World Bank*	Charles Di Leva, Chief Environmental and Social Standards Officer	IFC/MIGA/CAO nominee Public sector lender
World Bank Inspection Panel	Imrana Jalal, Chair	IFC/MIGA/CAO nominee IAM
EBRD (European Bank for Reconstruction and Development)*	Alistair Clark, Managing Director	IFC/MIGA/CAO nominee Public/private sector lender
EBRD/Project Complaint Mechanism	Sarah Hanes, PCM Officer, Acting Associate Director	IFC/MIGA/CAO nominee IAM
IDB Invest	Luis Gabriel Todt de Azevedo, Chief Environmental, Social & Governance Division	IFC/MIGA/CAO nominee Private sector lender
Inter-American Development Bank/ MICI	Victoria Marquez Mees, Director	IFC/MIGA/CAO nominee IAM
EIB (European Investment Bank)	Eva Mayerhofer, Senior Environment and Biodiversity Specialist	IFC/MIGA/CAO nominee Public/private lender
EIB/ Complaints Mechanism	Sonja Derkum, Head of Division	IFC/MIGA/CAO nominee, IAM
Green Climate Fund (GCF)*	Leo Paat, Head of E&S	IFC/MIGA/CAO nominee Public/private Lender currently allocating via other MDBs
GCF/Independent Redress Mechanism (IRM)	Lalanath de Silva, Head	IFC/MIGA/CAO nominee
Asian Development Bank (ADB)	Nessim Ahmad, Deputy Director General and Chief Compliance Officer	IFC/MIGA/CAO nominee Public/private Lender
ADB/Compliance Review Panel (CRP)*	Dingding Tang, Head of Compliance Review Panel	IFC/MIGA/CAO nominee IAM
IFC Banking Clients		
Yes Bank (India)	Namita Vikas, Group President & Global Head, Climate Strategy & Responsible Banking	Non-Equator bank
Ficohsa (Honduras)	Siham Gabriele Senior E&S Officer, Ficohsa	Non-Equator bank CAO compliance process
Standard Bank	Nigel Beck, Executive and Group Head: Environmental & Social Risk and Finance	Current Chair, Equator Principles Association
Itau Unibanco (Brazil)	Gilberto Frussa, Corporate Compliance Director	Equator bank

Note: E&S = environmental and social; FI = financial intermediary; MDB = multilateral development bank; MICI = Independent Consultation and Investigation Mechanism. * Indicates no response.

Appendix E. Independent Accountability Mechanisms

The tables that follow provide a description of selected characteristics of various independent accountability mechanisms (IAMs) and their respective institutions (listed in table E.1) based on a review of publicly available IAM policies and procedures. The selected characteristics include:

- Functions of IAMs (table E.2)
- Governance structures of IAMs (table E.3)
- Compliance review reports (table E.4)
- Management Action Plans (table E.5)
- Monitoring mandates (table E.6)
- Advisory role (table E.7)

The information contained in these tables is intended for descriptive purposes only. It does not imply a judgment on whether particular policy and procedural provisions constitute good practice, nor does it represent a description or assessment of whether and/or how such policy and procedural provisions are implemented in practice.

The selections provide an overview of some key IAM and institutional characteristics. They do not account for the varied IAM and institutional dynamics, culture, history, business model or evolution of accountability frameworks that exist across development finance institutions, which may make certain policies more or less suitable in a specific institutional context.

Table E.1. Independent Accountability Mechanisms (IAMs) and their Respective Institutions

Institution		Independent accountability mechanism	
African Development Bank	AfDB	Independent Review Mechanism	IRM
Agence française de développement/ French Development Agency (France)	ADF	Environment and Social Complaint Mechanism	
Asian Development Bank	ADB	Compliance Review Panel	CRP
Asian Infrastructure Investment Bank	AIIB	Project-affected People's Mechanism	PPM
Black Sea Trade and Development Bank	BSTDB	Internal Audit Department	
Caribbean Development Bank	CDB	Project Complaints Mechanism	PCM
Deutsche Investitions und Entwicklungsgesellschaft/ German Development Corporation (Germany)	DEG	Independent Complaints Mechanism	ICM ^a
Entrepreneurial Development Bank (Netherlands)	FMO	Independent Complaints Mechanism	ICM ^a
European Bank for Reconstruction and Development	EBRD	Project Complaint Mechanism/Independent Project Accountability Mechanism	PCM/ IPAM
European Investment Bank (European Union)	EIB	Complaints Mechanism	CM
European Union	EU	European Ombudsman	
Green Climate Fund	GCF	Independent Redress Mechanism	IRM
Inter-American Development Bank	IDB	Independent Consultation and Investigation Mechanism	MICI
International Finance Corporation and Multilateral Investment Agency (World Bank Group)	IFC/ MIGA	Compliance Advisor Ombudsman	CAO

Table E.1. Independent Accountability Mechanisms (IAMs) and their Respective Institutions (cont.)

Institution		Independent accountability mechanism	
Japan Bank for International Cooperation (Japan)	JBIC	Office of Examiner for Environmental Guidelines	OEEG
Japanese Investment Cooperation Agency (Japan)	JICA	Secretariat of The Examiner for the Guidelines	
Nippon Export and Investment Insurance (Japan)	NEXI	Objection Procedures on Environmental Guidelines	
Nordic Investment Bank (Nordic countries)	NIB	Complaints	
Overseas Private Investment Cooperation (now Development Finance Corporation) (United States)	OPIC/ DFC	Environmental and Social Independent Complaints Mechanism	ICM
Proparco (French Development Agency [ADF] for private investors) (France)		Independent Complaints Mechanism	ICM ^a
United Nations Development Programme	UNDP	Social and Environmental Compliance Unit/Stakeholder Response Mechanism	SECU/SRM
World Bank (International Bank for Reconstruction and Development /International Development Association)	World Bank (IBRD/IDA)	Inspection Panel	IPN

Sources: IAMnet (Independent Accountability Mechanisms Network); UNDP website.

Note: ADF = Agence française de Développement.

a. Project-affected people can submit complaints to the ICM concerning projects funded by DEG, FMO, or Proparco.

Table E.2. Overview of Functions of Independent Accountability Mechanisms (IAMs)

Institution / IAM	Compliance reviews	Dispute Resolution	Monitoring	Complaint accepted prior to Board approval	Board approval requirement for compliance review	Right to start investigation without complaint	Advisory work
African Development Bank (AfDB)/IRM	Yes	Yes	Upon Board authorization (routinely approved)	Yes	Yes	No	Yes
Asian Development Bank (ADB)/CRP	Yes	Yes	Yes	Yes	Yes	No	Yes
Asian Infrastructure Investment Bank (AIIB)/PPM	Yes	Yes	No	For dispute resolution, Yes; for compliance review, No	Yes	No	Yes
Caribbean Development Bank (CDB)/PCM	Yes	Yes	Yes	Not specified in policy	Not specified in policy	Not specified in policy	Yes
DEG-FMO-Proparco/ICM	Yes	Yes	Yes	No	No	No	No
EBRD/IPAM	Yes	Yes	Yes	No	No	No	Yes
European Investment Bank (EIB)/CM	Yes	Yes	Yes	Yes, but referred to Management	No	No	Yes
Green Climate Fund (GCF)/IRM	Yes	Yes	Yes	Yes	No	Yes	Yes
Inter-American Development Bank (IDB)/MICI	Yes	Yes	Upon Board authorization	No	Yes	No	Not specified in policy, but informal role
IFC & MIGA/CAO	Yes	Yes	Yes	Yes	No	Yes	Yes
UNDP/SECUSRM	Yes	Yes	Yes	No	No	Yes	Yes
World Bank (IBRD & IDA)/IPN	Yes	To be provided as part of Toolkit Reform Process	To be provided as part of Toolkit Reform Process	Yes	Yes	No	Yes

Sources: ADB, Accountability Mechanism Policy (2012); AfDB, Independent Recourse Mechanism Operating Rules and Procedures (2015); AIIB, AIIB Policy on the Project-affected People's Mechanism (2018) and Project-affected People's Mechanism Rules of Procedure (2019); Caribbean Development Bank, Strategic Framework for Integrity, Compliance and Accountability (2015) and Project Complaints Mechanism Policy (2015); DEG, Unabhängiger Beschwerdemechanismus der DEG (2017); EBRD, Project

Complaints Mechanism Rules of Procedure (2019); Green Climate Fund, Procedures and Guidelines of the Independent Redress Mechanism (2018); EIB Group, Complaints Mechanism Policy (2018) and Complaints Mechanism Procedures (2018); IDB, Policy establishing Independent Consultation and Investigation Mechanism (2010, 2015); IFC/MIGA, CAO Operational Guidelines (2013); UNDP, Stakeholder Response Mechanism: Overview and Guidance (2014) and Investigation Guidelines: Social and Environmental Compliance Unit (2017); World Bank (IBRD/IDA), Inspection Panel Operating Procedures (2014).

Note: CAO = Office of Compliance Advisor Ombudsman; CM = Complaints Mechanism; CRP = Compliance Review Panel; DEG = Deutsche Investitions und Entwicklungsgesellschaft; EBRD = European Bank for Reconstruction and Development; FMO = Dutch Entrepreneurial Development Bank; IBRD = International Bank for Reconstruction and Development; IDA = International Development Association; IFC = International Finance Corporation; IPAM = Independent Project Accountability Mechanism; IPN = Inspection Panel; IRM = Independent Review Mechanism (African Development Bank); IRM = Independent Redress Mechanism (Green Climate Fund); MICI = Independent Consultation and Investigation Mechanism; MIGA = Multilateral Investment Guarantee Agency; PCM = Project Complaints Mechanism; PPM = Project-Affected People's Mechanism; SECU = Social and Environmental Compliance Unit (UNDP); SRM = Stakeholder Response Mechanism; UNDP = United Nations Development Programme.

Table E.3. Governance Structures of IAMs

Institution/IAM	Compliance review		Dispute resolution	
	Reporting to:	Work carried out by:	Reporting to:	Work carried out by:
African Development Bank (AfDB)/IRM	Board	Panel members	Board	Staff Secretariat (BCRM)
Asian Development Bank (ADB)/CRP	Board	Panel members	ADB President	Problem Solving Office (OSPF) staff
Asian Infrastructure Investment Bank (AIIB)/PPM	Board	PPM staff	Board	PPM staff
Caribbean Development Bank (CDB)/PCM	Office of Integrity, Compliance and Accountability (OICA)	OICA staff	OICA	OICA staff
DEG-FMO-Proparco/ICM	No reporting defined in ICM policy	Panel members	No reporting defined in ICM policy	Panel members
EBRD/IPAM	Board	IPAM staff	Board	IPAM staff
European Investment Bank (EIB)/CM	Inspector General (decisions can be appealed with European Ombudsman)	CM staff	Inspector General (decisions can be appealed to European Ombudsman)	CM staff
Green Climate Fund (GCF)/IRM	Board	IRM staff	Board	IRM staff
Inter-American Development Bank (IDB)/MICI	Board	MICI staff	Board	MICI staff
IFC & MIGA/CAO	President of World Bank Group	CAO staff	President of World Bank Group	CAO staff
UNDP/SECU-SRM	Office of Audits and Investigation (OAI)	SECU staff	UNDP Operations	SRM staff, in coordination with UNDP Country Offices
World Bank (IBRD & IDA)/IPN	Board	Panel members	To be provided as part of Toolkit Reform Process	To be provided as part of Toolkit Reform Process

Sources: ADB, Accountability Mechanism Policy (2012); AfDB, Independent Recourse Mechanism Operating Rules and Procedures (2015); Asian Infrastructure Investment Bank, AIIB Policy on the Project-affected People's Mechanism (2018) and Project-affected People's Mechanism Rules of Procedure (2019); Caribbean Development Bank, Strategic Framework for Integrity, Compliance and Accountability (2015) and Project Complaints Mechanism Policy (2015); DEG, Unabhängiger Beschwerdemechanismus der DEG (2017); EBRD, Project Complaints Mechanism Rules of Procedure (2019); EIB Group, Complaints Mechanism Policy (2018) and Complaints Mechanism Procedures (2018); GCF, Procedures and Guidelines of the Independent Redress Mechanism (2018); IDB, Policy Establishing Independent Consultation and Investigation Mechanism (2010, 2015); IFC/MIGA, CAO Operational Guidelines (2013); UNDP, Stakeholder Response Mechanism: Overview and Guidance (2014) and Investigation Guidelines: Social and Environmental Compliance Unit (2017); World Bank (IBRD & IDA), Inspection Panel Operating Procedures (2014).

Note: BCRM = Compliance Review and Mediation Unit; CAO = Office of Compliance Advisor Ombudsman; CM = Complaints Mechanism; CRP = Compliance Review Panel; DEG = Deutsche Investitions und Entwicklungsgesellschaft; EBRD = European Bank for Reconstruction and Development; FMO = Dutch Entrepreneurial Development Bank; IAM = independent accountability mechanism; IBRD = International Bank for Reconstruction and Development; IDA = International Development Association; IFC = International Finance Corporation; IPAM = Independent Project Accountability Mechanism; IPN = Inspection Panel; IRM = Independent Review Mechanism (African Development Bank); IRM = Independent Redress Mechanism (Green Climate Fund); MICI = Independent Consultation and Investigation Mechanism; MIGA = Multilateral Investment Guarantee Agency; PCM =

Project Complaints Mechanism; PPM = Project-Affected People's Mechanism; SECU = Social and Environmental Compliance Unit; SRM = Stakeholder Response Mechanism; UNDP = United Nations Development Programme.

Table E.4. Compliance Review Reports in Various IAMs

Institution/IAM	Who receives compliance review report?	Is compliance review approved by Board?	Does Management comment on draft report?	Do complainants comment on draft reports?	Provision for nondisclosure of investigation report?
African Development Bank (AfDB)/IRM	Board (if project has been approved) President (if in preapproval stage)	Yes (if project has already been approved) President (if in preapproval stage)	Yes	No	No
Asian Development Bank (ADB)/CRP	Board	No; report is submitted for information only	Yes	Yes	No
Asian Infrastructure Investment Bank (AIIB)/PPM	Board	No	Yes	Yes	No
DEG-FMO-Proparco/ICM	Not specified in policy	No	Yes, but for fact checking only	Yes, but for fact checking only	No
EBRD/IPAM	Board	No	Yes	Yes	No
European Investment Bank (EIB)/CM	Management Committee	No	Yes	Yes	No
Green Climate Fund (GCF)/IRM	Board	No	Yes	Yes	No
Inter-American Development Bank (IDB)/MICI	Board	Yes	Yes	Yes	No
IFC & MIGA/CAO	President	No	Yes	No	No
UNDP/SECU-SRM	Office of Audits and Investigation (OAI) Director; UNDP Administrator	Approved by OAI Director	Yes	Yes	No
World Bank (IBRD & IDA)/IPN	Board	No	No	No	No

Sources: ADB, Accountability Mechanism Policy (2012); AfDB, Independent Recourse Mechanism Operating Rules and Procedures (2015); Asian Infrastructure Investment Bank, AIIB Policy on the Project-affected People's Mechanism (2018) and Project-affected People's Mechanism Rules of Procedure (2019); Caribbean Development Bank, Strategic Framework for Integrity, Compliance and Accountability (2015) and Project Complaints Mechanism Policy (2015); DEG, Unabhängiger Beschwerdemechanismus der DEG (2017); EBRD, Project Accountability Policy (2019); EIB Group, Complaints Mechanism Policy (2018) and Complaints Mechanism Procedures (2018); GCF,

Procedures and Guidelines of the Independent Redress Mechanism (2018); IDB, Policy Establishing Independent Consultation and Investigation Mechanism (2010, 2015); IFC/MIGA, CAO Operational Guidelines (2013); UNDP, Stakeholder Response Mechanism: Overview and Guidance (2014) and Investigation Guidelines: Social and Environmental Compliance Unit (2017); World Bank (IBRD/IDA), Inspection Panel Operating Procedures (2014).

Note: CAO = Office of Compliance Advisor Ombudsman; CM = Complaints Mechanism; CRP = Compliance Review Panel; DEG = Deutsche Investitions und Entwicklungsgesellschaft; EBRD = European Bank for Reconstruction and Development; FMO = Dutch Entrepreneurial Development Bank; IAM = independent accountability mechanism; IBRD = International Bank for Reconstruction and Development; IDA = International Development Association; IFC = International Finance Corporation; IPAM = Independent Project Accountability Mechanism; IPN = Inspection Panel; IRM = Independent Review Mechanism (African Development Bank); IRM = Independent Redress Mechanism (Green Climate Fund); MICI = Independent Consultation and Investigation Mechanism; MIGA = Multilateral Investment Guarantee Agency; PPM = Project-Affected People's Mechanism; SECU = Social and Environmental Compliance Unit (UNDP); SRM = Stakeholder Response Mechanism (UNDP); UNDP = United Nations Development Programme.

Table E.5. Management Action Plans in Various IAMs

Institution/IAM	Management Action Plan (MAP) agreed with borrower?	Approved by:	Input by IAM?	Input from complainant?
African Development Bank (AfDB)/IRM	Yes	Board	No	No
Asian Development Bank (ADB)/CRP	Yes	Board	Yes	No
Asian Infrastructure Investment Bank (AIIB)/PPM	Yes	Board	Yes	Yes
DEG-FMO-Proparco/ICM	No MAP, only Management Response without requirement to define time-bound action	Not applicable (no MAP)	Not applicable (no MAP)	Not applicable (no MAP)
EBRD/IPAM	Not defined in policy	Board	Yes	Yes
European Investment Bank (EIB)/CM	Yes	No approval. MAP agreed between CM and Management	Yes	No
Green Climate Fund (GCF)/IRM	Yes	Board	Yes	Yes
Inter-American Development Bank (IDB)/MICI	Role of borrower not specified. Board instructs Management, if appropriate, to prepare Management Action Plan	Board	MAP jointly elaborated between MICI and Management	No
IFC & MIGA/CAO	No MAP, only Management Response to Compliance Report with no requirement to lay out time-bound actions ^a	Not applicable (no MAP)	Not applicable (no MAP)	Not applicable (no MAP)
UNDP/SECU-SRM	Role of borrower (project implementer) not specified. UNDP Administrator decides on remedial action.	UNDP Administrator	No	No
World Bank (IBRD & IDA)/IPN	Management Action Plan	Board	No	Yes

Sources: ADB, Accountability Mechanism Policy (2012); AfDB, Independent Recourse Mechanism Operating Rules and Procedures (2015); AIIB, AIIB Policy on the Project-affected People's Mechanism (2018) and Project-affected People's Mechanism Rules of Procedure (2019); Caribbean Development Bank, Strategic Framework for Integrity, Compliance and Accountability, 2015; DEG, Unabhängiger Beschwerdemechanismus der DEG (2017); EBRD, Project Accountability Policy (2019); EIB Group, Complaints Mechanism Policy (2018) and Complaints Mechanism Procedures (2018); GCF, Procedures and Guidelines of the Independent Redress Mechanism (2018); IDB, Policy Establishing Independent Consultation and Investigation Mechanism (2010, 2015); IFC/MIGA, CAO Operational Guidelines (2013); UNDP, Stakeholder Response Mechanism: Overview and Guidance (2014) and Investigation Guidelines: Social and Environmental Compliance Unit (2017); World Bank (IBRD/IDA), Inspection Panel Operating Procedures (2014). Note: CAO = Office of Compliance Advisor Ombudsman; CM = Complaints Mechanism; CRP = Compliance Review Panel; DEG = Deutsche Investitions und Entwicklungsgesellschaft; EBRD = European Bank for Reconstruction and Development; FMO = Dutch Entrepreneurial Development Bank; IAM = independent accountability mechanism; IBRD = International Bank for Reconstruction and Development; IDA = International Development Association; IFC = International Finance Corporation; IPAM = Independent Project Accountability Mechanism; IPN = Inspection Panel; IRM = Independent Review Mechanism (African Development Bank); IRM = Independent Redress Mechanism (Green Climate Fund); MICI = Independent Consultation and Investigation Mechanism; MIGA = Multilateral Investment Guarantee Agency; PPM = Project-Affected People's Mechanism; SECU = Social and Environmental Compliance Unit (UNDP); SRM = Stakeholder Response Mechanism; UNDP = United Nations Development Programme.

a. Recently, the World Bank Board introduced a requirement for IFC to prepare a Management Response akin to a MAP.

Table E.6. Monitoring Mandates of IAMs

Institution/IAM	Monitoring mandate?	Time frame	Site visits?	Who receives monitoring reports?
African Development Bank (AfDB)/IRM	Yes (after authorization of Board or President (depending on project stage), (routinely provided) Monitoring of MAP	Not specified. Until project is in compliance and harm has been rectified	Yes	Board (or President if pre-approval stage) for information
Asian Development Bank (ADB)/CRP	Yes Monitoring of MAP	Three years, unless BCRC extends monitoring mandate	Yes	Board Compliance Review Committee
Asian Infrastructure Investment Bank (AIIB) /PPM	Reviews Management Progress Reports	Not provided for	Not provided for	Not applicable
Caribbean Development Bank (CDB)/PCM	Yes	Not specified	Not specified	Not specified
DEG-FMO-Proparco/ICM	Yes Monitoring whether project is in compliance. As no MAP, no limitation to MAP monitoring	Until non-compliances have been corrected, but administratively restricted to 3 years	Yes	Policy does not define who receives monitoring reports
EBRD/IPAM	Yes	Not specified. Until IPAM determines MAP has been fully implemented	Yes	Board for information
European Investment Bank (EIB)/CM	Yes	Not specified, but no later than 24 months after conclusion report	Yes	Not specified
Green Climate Fund (GCF)/IRM	Yes	Time frame is project-/program-specific, and unless extended by the IRM, will not exceed 3 years	Yes (site visits are optional)	Board
Inter-American Development Bank (IDB)/MICI	Yes Monitoring of MAP upon Board approval	Specified in Board approval for monitoring. Not to exceed 5 years from date that Board approved the MAP	Yes (site visits are optional)	Board for information
IFC & MIGA/CAO	Yes	No specified time frame. Until project has been brought into compliance.	Yes, regular site visits	CAO Vice President

Table E.6. Monitoring Mandates of IAMs (cont.)

Institution/IAM	Monitoring mandate?	Time frame	Site visits?	Who receives monitoring reports?
UNDP/SECU-SRM	Yes	No specified time frame. Until project has been brought into compliance.	Yes (site visits are optional)	Not specified. UNDP Administrator receives a status update as part of SECU's annual report.
World Bank (IBRD & IDA)/IPN	To be provided as part of Toolkit Reform Process	To be provided as part of Toolkit Reform Process	To be provided as part of Toolkit Reform Process	To be provided as part of Toolkit Reform Process

Sources: ADB, Accountability Mechanism Policy (2012); AfDB, Independent Recourse Mechanism Operating Rules and Procedures (2015); AIIB, AIIB Policy on the Project-affected People's Mechanism (2018) and Project-affected People's Mechanism Rules of Procedure (2019); Caribbean Development Bank, Strategic Framework for Integrity, Compliance and Accountability (2015) and Project Complaints Mechanism Policy (2015); DEG, Unabhängiger Beschwerdemechanismus der DEG (2017); EBRD, Project Accountability Policy (2019); EIB Group, Complaints Mechanism Policy (2018) and Complaints Mechanism Procedures (2018); GCF, Procedures and Guidelines of the Independent Redress Mechanism (2018); IDB, Policy Establishing Independent Consultation and Investigation Mechanism (2010, 2015); IFC/MIGA, CAO Operational Guidelines (2013); UNDP, Stakeholder Response Mechanism: Overview and Guidance (2014) and Investigation Guidelines: Social and Environmental Compliance Unit (2017); World Bank (IBRD/IDA), Inspection Panel Operating Procedures (2014).

Note: BRCR = Board Compliance Review Committee; CAO = Office of Compliance Advisor Ombudsman; CM = Complaints Mechanism; CRP = Compliance Review Panel; DEG = Deutsche Investitions und Entwicklungsgesellschaft; EBRD = European Bank for Reconstruction and Development; FMO = Dutch Entrepreneurial Development Bank; IAM = independent accountability mechanism; IBRD = International Bank for Reconstruction and Development; IDA = International Development Association; IFC = International Finance Corporation; IPAM = Independent Project Accountability Mechanism; IPN = Inspection Panel; IRM = Independent Review Mechanism (African Development Bank); IRM = Independent Redress Mechanism (Green Climate Fund); MICI = Independent Consultation and Investigation Mechanism; MIGA = Multilateral Investment Guarantee Agency; PCM = Project Complaints Mechanism; PPM = Project-Affected People's Mechanism; SECU = Social and Environmental Compliance Unit (UNDP); SRM = Stakeholder Response Mechanism; UNDP = United Nations Development Programme.

Table E.7. Advisory Role of IAMs

Institution/IAM	Does policy provide for an Advisory role?	Can IAM initiate project specific reviews?	Output of advisory work	Special features
African Development Bank (AfDB)/IRM	Yes, and right to issue recommendations in CRRs	Yes	No output defined but annually two spot checks on project approved by Board	Spot checks unique to AfDB
Asian Development Bank (ADB)/CRP	Yes, but limited mandate	No	Periodic Learning Reports, lessons learned in Annual Report	
Asian Infrastructure Investment Bank (AIIB)/PPM	Yes	No	No output specified in policy	
Caribbean Development Bank (CDB)/PCM	Yes	No	No output specified in policy	No specifics on mandate provided
DEG-FMO-Proparco/ICM	No, but right to issue recommendations in CRRs	No	No output specified in policy	
EBRD/IPAM	Yes, and right to issue recommendations in CRRs	No	Through Annual Reports and various learning outputs	
European Investment Bank (EIB)/CM	Yes	No	No output specified in policy	
Green Climate Fund (GCF)/IRM	Yes, and right to issue recommendations in CRRs	Yes	No output specified in policy but elaborated in Annual report	Has mandate to conduct capacity building and give guidance to operational-level grievance mechanisms
Inter-American Development Bank (IDB)/MICI	Not specified in policy. Informal role, and right to issue recommendations in CRRs	No	Lessons learned series based on case experiences (“Reflections” series)	
IFC & MIGA/CAO	Yes	Yes	Various outputs, including memos, Guidance Notes, and lessons series based on case experiences	Extensive advisory role with multiple outputs
UNDP/SECU-SRM	Yes	Yes	Advisory notes and reports that provide systemic, institution-wide, or policy advice based on past case lessons	
World Bank (IBRD & IDA)/IPN	Advisory mandate to be included in IPN Policy as part of Toolkit Reform	No	Comprehensive Learning Reports issued	

Sources: ADB, Accountability Mechanism Policy (2012); AfDB, Independent Recourse Mechanism Operating Rules and Procedures (2015); AIIB, AIIB Policy on the Project-affected People’s Mechanism (2018) and Project-affected People’s Mechanism Rules of

Procedure (2019); Caribbean Development Bank, Strategic Framework for Integrity, Compliance and Accountability (2015) and Project Complaints Mechanism Policy (2015); DEG, Unabhängiger Beschwerdemechanismus der DEG (2017); EBRD, Project Accountability Policy (2019); EIB Group, Complaints Mechanism Policy (2018) and Complaints Mechanism Procedures (2018); GCF, Procedures and Guidelines of the Independent Redress Mechanism (2018); IDB, Policy Establishing Independent Consultation and Investigation Mechanism (2010, 2015); WBG, Inspection Panel Operating Procedures (2014); IFC/MIGA, CAO Operational Guidelines (2013); UNDP, Stakeholder Response Mechanism: Overview and Guidance (2014) and Investigation Guidelines: Social and Environmental Compliance Unit (2017); World Bank (IBRD/IDA), Inspection Panel Operating Procedures (2014).

Note: CAO = Office of Compliance Advisor Ombudsman; CM = Complaints Mechanism; CRP = Compliance Review Panel; DEG = Deutsche Investitions und Entwicklungsgesellschaft; EBRD = European Bank for Reconstruction and Development; FMO = Dutch Entrepreneurial Development Bank; IAM = independent accountability mechanism; IBRD = International Bank for Reconstruction and Development; IDA = International Development Association; IFC = International Finance Corporation; IPAM = Independent Project Accountability Mechanism; IPN = Inspection Panel; IRM = Independent Review Mechanism (African Development Bank); IRM = Independent Redress Mechanism (Green Climate Fund); MICI = Independent Consultation and Investigation Mechanism; MIGA = Multilateral Investment Guarantee Agency; PCM = Project Complaints Mechanism; PPM = Project-Affected People's Mechanism; SECU = Social and Environmental Compliance Unit (UNDP); SRM = Stakeholder Response Mechanism; UNDP = United Nations Development Programme.

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<Note: The Scoping Report and all other formal IFC, MIGA, and CAO inputs to this Review will be added.>

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