

Office of the United Nations High Commissioner for Human Rights

Comments on the IFC/MIGA Independent Accountability Mechanism Policy for the Office of the Compliance Advisor Ombudsman (CAO) (1 April consultation draft)

16 May 2021

We are grateful for the invitation to comment on the draft CAO policy and offer some observations from a human rights perspective, drawing from our Office's [Accountability and Remedy Project](#) and our consultations and research in connection with our Remedy in Development Finance project.

We recognise, firstly, the important role that IFC/MIGA have played as a global standard-setter for sustainability in private sector financing, the leading role of CAO in the field of accountability, and the thorough analysis and recommendations of the External Review of IFC/MIGA E&S Accountability (2020) (External Review). We trust that the outcome of the review process will cement IFC/MIGA's continuing leadership role and CAO's effectiveness, which is indispensable for institutional legitimacy and development impact.

Our Office notes numerous positive features in the draft policy, including the emphasis on the role of CAO in facilitating access to remedy (although remedy could be defined more clearly) and addressing harms, and the requirement for Management Action Plans to address harms related to non-compliance findings. These requirements will clearly be critical for addressing the disconnect between compliance review and remedy to date, as noted in the External Review.¹ We also note the leadership of IFC/MIGA and CAO among DFIs and IAMs in recognising and responding to the growing problem of reprisals against complainants, and welcome the specific requirements in the draft CAO policy in this regard. Finally, we note elements of the policy that are designed to ensure the independence of the CAO, for example: (a) the retention by CAO of case handling decisions including the decision to investigate, (b) the strong role given to external stakeholders in the selection of the CAO DG; and (c) the requirement of a cooling off period for CAO staff before seeking employment with management. Our recommendations for strengthening the draft policy are below.

Explicit alignment with the UN Guiding Principles on Business and Human Rights (UNGPs)

We note the implicit recognition of the UNGPs in the statement of CAO's purpose and core principles, and in line with emerging practice among DFIs,² we would recommend that this reference be made explicit. The UN Guiding Principles on Business and Human Rights (UNGPs) were unanimously endorsed by the UN Human Rights Council in 2011 and are the most authoritative framework for enhancing standards and practices with regard to human rights risks related to economic activities. In addition to DFI policies and IAM procedures, the UNGPs have been integrated within the OECD Guidelines on Multinational Enterprises and the forth revision of the Equator

¹ External Review, paras. 311-312. According to the CAO, of the 16 cases since the year 2008 for which data are available, only 13 percent of monitored projects demonstrated satisfactory remedial actions, 37 percent of projects were partly unsatisfactory, and 50 percent of projects were unsatisfactory. Moreover, as at 2019, one half of all projects for which the CAO compliance monitoring process was closed remained in "substantial non-compliance."

² See e.g. EIB Environmental and Social Standards (2018), para. 46; EBRD ESF (2019), para. 2.4; FMO Sustainability Policy (2016); IDB ESPF (Sept. 2020), para. 1.3; IDB Invest ESSP (Dec. 15, 2020), para. 17; IDB Invest Implementation Manual (2020), pp.56 and 104, p.4; IFC PS 1, fn 12, and IFC, Guidance Note 1 (Jan. 1, 2012), para. GN45 (although OHCHR is not aware of the extent to which human rights due diligence, limited to "special high risk circumstances", has been implemented in practice); and CAO (2018) "Getting Started with Dispute Resolution", p. 3 (fn 2).

Principles.³ As an instrument, the UNGPs are not legally binding; however, they are based upon the international law obligations of States and encapsulate international law standards applicable to business activity, and reflect and reinforce evolving national legal requirements including (increasingly) mandatory human rights due diligence laws.⁴ Explicit referencing of the UNGPs' guidance with the CAO policy would make an important contribution to (upwards) harmonisation of standards and procedures concerning accountability and remedy for adverse impacts of business activities.

Section II (Purpose): Definition of remedy

While we welcome the explicit inclusion of “access to remedy” within the draft CAO policy, the definition (II. Purpose, 2nd para “In executing its mandate ...”) does not seem clear. We assume that the phrase “.. in a manner this is consistent with those international principles related to business and human rights included within the Sustainability Framework” is intended to refer to the UNGPs, but if so, this could be clarified. In order to clarify the many forms that remedy may take, we'd recommend that the definition include “Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.” (UNGP 25)

Section III (Mandate and Functions): Role of CAO in identifying fault

The draft policy (appropriately) distinguishes CAO's role from that of national judicial and regulatory processes and, in this context, proposes that “CAO's analyses, conclusions, and reports are not intended to be used (among other things) *for the purposes of attributing fault or liability...*” (Emphasis added). However the scope of this exclusion is unclear, and the exclusion of inferences of “fault” may be inconsistent with recommendations of the External Review and constrain the development of IFC/MIGA's future remedy framework.

In this regard we note that IFC and MIGA will be consulting on the development of a remedy framework (including with respect to leverage and remedy options) between now and 2022, in response to recommendations of the External Review.⁵ We assume that this may, in turn, involve consideration of circumstances in which it may be appropriate for IFC/MIGA to contribute to remedy. The External Review argued that IFC and MIGA have responsibilities to contribute to remedy in situations where their non-compliance has contributed to harm, and recommended that CAO non-compliance findings (as well as dispute resolution cases and/or Management determinations) may help to establish some degree of contribution by IFC/MIGA, within a larger assessment of responsibilities of the client and other relevant actors.⁶ However if CAO findings cannot address questions concerning “fault”, writ large, this important recommendation of the External Review may be undermined and the scope of IFC/MIGA's consultations on its remedy framework may be curtailed.

Taking these factors into account, and given that the purpose of the exclusion is to distinguish CAO from national judicial and regulatory authorities, we would recommend that exclusion be limited as

³ See <http://mneguidelines.oecd.org/MNEguidelines/>, and <https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf>, respectively.

⁴ For a discussion see <https://www.ohchr.org/EN/Issues/Business/Pages/MandatoryHRDD.aspx>.

⁵ See <https://www.ifc.org/wps/wcm/connect/711d4863-d53f-4284-b774-59a5744a4b9f/202105-ifc-miga-non-policy-and-remedial-solutions-update.pdf?MOD=AJPERES&CVID=nBmiLRI>.

⁶ External Review, para. 327 and 337.

follows: “CAO’s analyses, conclusions and reports are not intended to be used in judicial or regulatory proceedings or for purposes of *attributing legal liability*.” (Emphasis added).

Section IV: Core Principles

We note that the core principles correspond to a significant extent with the Effectiveness Criteria in UNGP 31 however we would recommend that the latter criteria be integrated as a whole. To exclude one of the criteria may undermine CAO’s ability to meet others and make the mechanism as a whole less effective. In this regard we would recommend the explicit inclusion of the “rights compatibility” criterion in UNGP 31(f), which calls for mechanisms to ensure that “outcomes and remedies accord with internationally recognized human rights.” As detailed in our latest Accountability and Remedy Project report, which addresses how IAMs can meet the UNGP effectiveness criteria, this criterion could involve consideration of the following factors:

- Remedies should meet international standards (adequate, effective, prompt) and be culturally appropriate and gender sensitive;
- The mechanism should empower rights holders, for instance by working with and building upon existing local decision making structures;
- Affected stakeholders should be consulted about what constitutes an appropriate remedy;
- The mechanism should assess and address the human rights implications of remedies (to make sure the remedy itself won’t inadvertently cause further harm);
- The mechanism should evaluate the effectiveness of outcomes and remedies in addressing relevant harm, and corrective action should be taken if needed;
- Plans should be in place to address non-implementation of outcomes; and
- Safety of rights holders should be ensured (e.g., when involving State agencies).⁷

We’d underscore that a requirement for CAO to assess and address human rights implications of remedies should not be seen as a “check-the-box” exercise, an external veto, or legal analysis of whether a CR or DR outcome definitively “violates international law”⁸ (which can be a difficult technical judgement even for specialised tribunals). Rather, consistent with the spirit of CAO’s existing Operational Guidelines, the expectation would be that CAO is conscious of potential human rights implications, seeks external guidance where needed, and shares its assessment with the parties so they are fully informed of potentially unintended consequences. We also note, particularly in relation to DR outcomes, that voluntary, non coercive processes leading to agreed outcomes provide a strong basis for rights compatibility.

With respect to the core principle of “accessibility,” we’d note that the UNGP effectiveness criterion on accessibility (UNGP 31(b)) emphasizes the need for mechanisms to be “known to all stakeholder groups for whose use they are intended.” We recommend that “awareness of the mechanism” be included within the accessibility principle, given the significant constraint that lack of knowledge of IAMs presents in practice. Regarding the core principle on “predictability,” we suggest amending it as follows to be in closer alignment with the UNGP effectiveness criteria (UNGP 31(c)): “Offering clear and consistent processes and procedures with ~~relevant~~ *indicative* timeframes, and providing clarity with respect to available outcomes and means of monitoring implementation”.⁹

⁷ [A/HRC/44/32](#), pp. 15-16; [A/HRC/44/32/Add.1](#), paras. 63-67.

⁸ Cf: CAO, Operational Guidelines (2013), para. 3.2.2: “In pursuit of resolution, CAO will not support agreements that would coerce one or more parties, be contrary to IFC/MIGA policies, or violate domestic laws of the parties or international law.”

⁹ UNGP, principle 31 (c).

Section VI: Access to and Disclosure of Information

We are pleased to see clear requirements for IFC/MIGA and their clients to provide CAO with access to information as needed to carry out the CAO role. The disclosure provisions are also improved compared to CAO's current Operational Guidelines, however, there remains a concern that non-disclosure agreements may be used to limit the ability of CAO's compliance function in publishing fully reasoned reports, including in relation to a recent complaint alleging child sexual abuse.¹⁰

We strongly recommend that non-disclosure agreements should be subject to a public interest override and should not be permitted to interfere with: (i) CAO's ability to publish fully reasoned reports, or (ii) referral and investigation by appropriate authorities of allegations of serious human rights abuses, subject to necessary procedural safeguards.

Section VII: Responding to complaints

We'd recommend the following changes:

(p.6) Who may lodge a complaint: "~~Any individual or group, or representative they authorize to act on their behalf~~ *legitimate representative*, who believes they are or may be harmed by a Project or Sub-Project may lodge a complaint with CAO". This formulation would take account of situations of incapacity, death, or where a person is missing or subject to particularly serious reprisals risks, and is unable to authorise somebody else to act on his/her behalf.

(p.6) How to lodge a complaint: "CAO will provide confidentiality upon receiving a complaint if requested to do so by the Complainant *or the circumstances of a case would otherwise make it necessary or appropriate.*"¹¹

(p.7) What to include in a complaint (para A.3(b)): As indicated earlier, a strict requirement to present evidence of representation of a project-affected person may be excessive in situations of incapacity, death, or where the project-affected person is missing or subject to particular serious reprisals risks.

(p.7) What to include in a complaint (para A.3(e)): For internal consistency with para. VII.A.1 (p.6) and VII.B.1(c) (p.8), we'd recommend a minor amendment: "A statement of how the Complainant believes they have been, or ~~are likely to~~ *may* be, harmed by the Project or Sub-Project."

¹⁰ CAO, Compliance Appraisal: Summary of Results, [Bridge International Academies-04](#) (Dec. 23, 2020), pp.7-8: "Document Access and Confidentiality Agreement: Some information relevant to the client's policy and approach to child safeguarding and protection issues, including child sexual abuse, is included in the IFC project record and has been reviewed by CAO. CAO requested additional information from the client in February 2020, but the information was not provided at that time. *In June 2020, as part of discussions to arrange access to client information about child sexual abuse issues, IFC and the client entered into a wide-ranging confidentiality agreement that purports to cover CAO's work. The confidentiality agreement was reached without CAO's agreement or participation.* While the agreement affirms CAO's access to client information, it also includes commitments from IFC that CAO will not disclose information that the client asserts to be confidential. In this context, CAO notes that its mandate requires it to (i) verify evidence as part of its compliance investigation process (OG 4.3); and (ii) report its findings with respect to any adverse environmental and/or social outcomes, including the extent to which these are verifiable. CAO also notes that important privacy concerns arise in relation to issues of child safeguarding and protection for both the children and the alleged perpetrators. CAO's reporting on these issues will follow good international industry practice in relation to privacy protection in addition to applying the framework for disclosure of information provided by IFC's Access to Information Policy and CAO's Operational Guidelines." (Emphasis added).

¹¹ See [A/HRC/44/32/Add.1](#), para. 48.

(p.8) Eligibility criteria and considerations (para. B.1): We'd recommend that the complainant be afforded the right in all cases to comment on a proposed decision to reject and close a case based on the application of eligibility criteria.

(p.8) Eligibility criteria and considerations (para. B.1(a), definition of "active project"): We note that the term "active project" is not specifically defined in the draft policy and should presumably be interpreted consistently with admissibility requirements for post-exit complaints (B.7, below). We would also recommend that the definition of "project" be clarified to include associated facilities

(p.8) Eligibility criteria and considerations (para. B.1, "CAO will establish whether good faith efforts have been made ..."): CAO has estimated that approximately one in three complaints are associated with reprisals risk. While the "good faith effort" obligation as articulated in the draft policy is not absolute, the complex formulation of the requirement may still put complainants under undue pressure to do something they are uncomfortable with and which may put them at risk. The striking of the words "good faith" from this para. may assist in this regard.

(p.8) Additional eligibility criteria (para. B.2(a)): The additional eligibility criteria read as highly technical and may be difficult for complainants and other stakeholders to understand. We note that criterion (i) appears to reflect and may fuel the trend toward very specific ring-fencing covenants in FI loans in IFC and other MDBs. This seems to reflect a "legal risk mitigation" approach rather than one that is focused on E&S outcomes. For this reason we'd recommend that criterion (i) be deleted.

(p.8) Additional eligibility criteria (para. B.2(d), supply chains): The criteria appear to insert elements of compliance analysis into the eligibility criteria by cross referencing concepts from the Performance Standards. The approach proposed in the draft policy would appear to be significantly narrower than major private sector actors that have processes for accepting supply chain complaints.¹² OHCHR recommends that CAO should accept supply chain complaints when they relate to E&S impacts of the supply chains of IFC/MIGA clients/sub-clients.

(p.9) Exclusions (para. B.3(e), pre-approval complains): In order to enable preventive actions, we would suggest that complaints should be considered eligible once formally disclosed by IFC/MIGA rather than needing to wait for Board approval.

(p.9) Exclusions (para. B.3(e) & (p.11) Complaints received after IFC/MIGA Exit (para. B.7): We note the External Review's recommendation that eligibility should end when IFC/MIGA's financial interest ends, or exceptionally 2 years after that point in certain circumstances.¹³ Our Office's Accountability and Remedy Project recommends: "Time limits for accessing the mechanism should

¹² See e.g. Nestle: "it is crucial for our Company to have a robust reporting system that enables us to listen to anyone along our value chain about any non-compliance concern."

<https://www.nestle.com/aboutus/businessprinciples/report-your-concerns>. Unilever refers to grievances in their 'extended supply chain'. <https://www.unilever.com/planet-and-society/respect-human-rights/human-rights-in-our-extended-value-chain/>. See also UNGPs Principle 13(b) and pp.5-10 of [InterpretationGuidingPrinciples.pdf \(ohchr.org\)](#).

¹³ But see External Review, para. 332: "[T]he 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)."

be flexible enough to take account of the length of time that abuses may take to become apparent, or for the rights holders to become aware of the mechanism, as well as other barriers that may be faced by affected stakeholders in practice.”¹⁴ Unduly strict time limits may also foreclose possibilities for willing clients to engage in remediation after project closure. Findings in relation to such a case could have implications for future projects with the same client.

In the case of compliance reviews, the focus is on IFC/MIGA's actions, not the client's. In OHCHR's view, compliance findings with respect to IFC/MIGA's role, and associated institutional learning, policy review (“non-repetition” remedy) and accountability implications should not be dependent on whether a project is active or not. We consider GCF-IRM's eligibility provisions to constitute best practice in this regard, wherein complaints may be received either (a) within two years from the date the complainant became aware of the adverse impacts at issue, or (b) within two years from the closure of the project or exit from the investment, whichever is later.

(p.9) Exclusions (para. B.3, “When CAO refers a complaint...”): We would recommend an explicit requirement of “informed” consent, in order to ensure that consent will not be deemed to have been given unless the complainant has been fully informed of the potential risks they may face from the complaint being referred.¹⁵

(p.12) Assessment process (para. C.2(a)): For the sake of internal consistency (cf. p.17) we would suggest: “Where deemed necessary by the Parties, CAO will consider the relevance of judicial *and non-judicial* proceedings.”

(p.13) Outcomes of assessment (para. C.3(b)): We'd suggest the following amendment to ensure that all relevant documents will be redacted: “A copy of the complaint ~~redacted as required to protect the confidentiality of the Complainants,~~ as well as any Client and/or Sub-Client response that may be provided, *redacted as required to protect the confidentiality of the Complainants.*”

Section VIII: Dispute Resolution

(p.14) Reaching and documenting agreements (para. D): In line with our recommendation concerning “rights compatibility” above, we would suggest: “In pursuit of a resolution, CAO will *take all reasonable steps to ensure that it does not knowingly* support agreements that would coerce one or more Parties, be contrary to IFC/MIGA policies, or ~~violate the~~ *contravene* domestic laws applicable to the Parties or international law.” The adjective “knowingly,” without more, may inadvertently operate as a disincentive to due diligence and assessing and advising on possible human rights implications of individual DR agreements. The “all reasonable steps” would be an obligation of conduct, not result. We also think the word “contravene” more realistically reflects the kinds of assessment that CAO should be expected to undertake in this context.

Section IX: Compliance

(p.16) Purpose (para. A): For the sake of clarity, internal consistency¹⁶ and to avoid dilution of existing policy, we would recommend: “The purpose of the CAO compliance function is to carry out reviews of IFC/MIGA's compliance with E&S Policies *and Procedures*, assess related Harm, and recommend remedial actions where appropriate.”

¹⁴ [A/HRC/44/32/Add.1](#), para. 42.

¹⁵ See [A/HRC/44/32/Add.1](#), para. 48.

¹⁶ Draft CAO policy, p.21: “In determining whether IFC or MIGA has complied with its E&S Policies, CAO will include, where appropriate, an assessment of whether IFC/MIGA has deviated in a material way from relevant directives and procedures.”

(p.20) Request for Board review of a decision to investigate (para. B.8): In our view this is among the most significant concerns in the draft policy, threatening to undermine the independence of the mechanism and perceptions of legitimacy. In our view the existence of a provision of this kind sends unwarranted signals to the public and complainants concerning the independence and professionalism of CAO in making sound appraisal decisions and objectively applying criteria set out in the policy. The caveat of “exceptional circumstances” would be unlikely to reduce scope for uncertainty and arbitrariness, in our view. The concerns may be less in the event that the technical eligibility (“appraisal”?) criteria were all truly “technical”, but this is not the case. Suggested criterion (b) (“plausible linkage” to a project), in particular, requires the independent judgement of experts with specialized competencies. This is not to impugn or diminish the important oversight role exercised by the Board; however great care is needed to ensure that critical criteria involving professional judgement calls on potentially complex facts are not unduly swayed by political or other extraneous factors. Further and in any event, if all the criteria were genuinely “technical” in nature, it is difficult to see what the added value of Board review would be. We would strongly suggest that section B.8 be deleted.

(p.21) Definitions and approach to compliance investigations (para. C.1): We would suggest: “Where relevant in accordance with applicable IFC/MIGA E&S Requirements that refer to national *or international* law, CAO will also consider how IFC/MIGA reviewed and supervised the Project’s compliance with applicable national *or international* law.” The reasons for this recommendation are that environmental treaties and indigenous peoples’ human rights are referenced in the PS’s directly, and that otherwise the PS’s require adherence to national laws “including those laws implementing host country obligations under international law.” However we note that in many constitutional systems international law forms part of the legal order as a higher source of law, without the need for implementing legislation. For EHS issues, we note that IFC-supported projects are expected to achieve the EHS Guidelines or host country regulations, “whichever is more stringent” (PS 1, para. 7). Given these factors, and the increasing gaps between national and international laws on many social issues within the ambit of the PS’s,¹⁷ it would seem important that international human rights and environmental law should inform compliance reviews directly.

(p.22) Factual review and comment (para. C.4): We would suggest: “Management may share the draft report with the Client on the condition that appropriate measures are in place to safeguard the confidentiality of the draft report prior to disclosure *and protect against reprisals risks*.”

(p.23) Factual review and comment (para. C.4, “At a minimum...”, and “Upon completion...”): We’d recommend that complainants be afforded a greater scope to comment on the type of remedy and manner in which it is delivered. As currently formulated, it is unclear what sort of input complainants have on the remedial actions that would be appropriate for the MAP, and as worded there seems to be no scope for complainants to comment on remedial actions. Moreover the exclusion of further inputs after the factual review and comment phase may preclude consideration of information that couldn’t have been known previously, as well as issues raised in the IFC/MIGA review that complainants hadn’t yet had a chance to comment on.

¹⁷ See e.g. University of Wyoming International Human Rights Law Clinic, Social Trends Analysis for Select Countries in the Latin American Region (2020).

(p.23) Management response, action plans, and clearance for disclosure (para. C.6, “During the preparation of the MAP...”): We’d suggest: “During the preparation of the MAP, Management will be required to consult the Complainants and the Client. ~~Any actions that require the cooperation of the Client will only be included if agreed with the Client prior to inclusion in the MAP.~~” In OHCHR’s view the need for client cooperation is self-evident. Making this reality explicit may inadvertently undermine the prospects for client cooperation (making it easier for clients to say no) and weaken incentives for IFC/MIGA to build leverage with the client.

(p.24) Approach to monitoring (para. D.1): In order to achieve the aims of the draft policy, we would suggest: “The scope of CAO’s compliance monitoring will be the corrective actions approved as part of the MAP. Monitoring will verify the effective implementation of the actions set out in the MAP *in remedying the identified harms.*” If CAO monitoring discloses that MAP implementation is not addressing harms, then it follows that the MAP should be revised.

(p.24) Reporting during monitoring (para. D.2, “The Board may consider options...”): We would suggest: “*If necessary*, the Board may consider options on how to strengthen the implementation of measures in the MAP *to remedy identified harms, if necessary*, and taking into account Management progress reports and CAO monitoring reports.” The focus should be on more than just whether the MAP actions are implemented. There needs to be a focus on whether the MAP actions, if implemented, actually fix the problem.

(p.24) Closure of compliance investigations (para. D.3): We would suggest: “CAO determines that substantive commitments as set out in the MAP have been effectively fulfilled *and identified harms have been remedied;*” and that there be explicit provision for complainants to challenge outcomes when they are unsatisfactory or improper.¹⁸

Section XI: Threats and Reprisals

(p.26, “The following principles ...”): We would recommend: “CAO should safeguard individual identities where requested *or the circumstances of a case would otherwise make it necessary or appropriate*, including keeping information confidential that could, directly or indirectly, reveal identities.”¹⁹

Section XII: Outreach and Communication

(p.28) IFC/MIGA Information Disclosures about CAO (para. C(c)): We would recommend that IFC/MIGA require clients to share information about CAO at the project level, as well as information on the reprisals policies and procedures of IFC/MIGA and CAO.

¹⁸ [A/HRC/44/32](#), p. 14, para 10.4(c); [A/HRC/44/32/Add.1](#), para. 55.

¹⁹ See [A/HRC/44/32/Add.1](#), para. 48.