



4 February 2021

Dear Review Team, colleagues,

The UN Human Rights Office welcomes the opportunity to comment on the 3rd review of the IRM and proposed amendments to its Operating Rules and Procedures.

Our Office has worked extensively with DFIs and Independent Accountability Mechanisms (IAMs) on risk assessment, due diligence, reprisals and accountability issues in recent years, at the policy and project levels. We recently concluded a multi-year [Accountability and Remedy Project](#) (ARP), which included a dedicated consultation with IAMs hosted by AfDB in June 2019 in Abidjan.

We are also currently finalising a report of our Remedy in Development Finance project (DevRem), which includes extensive inputs from AfDB and IRM participants in a virtual consultation hosted by EBRD-IPAM last September. We are grateful for our collaboration in connection with these initiatives and for the valuable inputs and perspective shared with us by AfDB to date.

We warmly welcome the fact that the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) are a central part of the review of the IRM's effectiveness (paras. 6 (fn 10), 18, 270 and Annex V of the draft Report (Dec. 2020)). The UNGPs have emerged as the most authoritative framework for enhancing standards and practices with regard to human rights and the private sector, and they have been integrated within the Equator Principles, OECD Guidelines for Multinational Enterprises, DFI safeguard policies, operational guidance and accountability review processes including, recently, the External Review of IFC/MIGA E&S Accountability.

We would like to offer a number of suggestions for your consideration and that of the AfDB, as the 3rd review of the Rules and Procedures are finalised. In doing so, we recognise the many important reforms that have already been proposed, including in relation to the limitation period for complaints (para. 11), structural reforms to strengthen the IRM's independence, the removal of eligibility restrictions concerning parallel judicial proceedings, the creation of an external advisory group, and disclosure and consultation requirements concerning draft management action plans (MAPs).

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Our suggestions are selective in nature, highlighting just a few of the more important findings and recommendations from the ARP and DevRem project consultation processes. Our comments are intended to support the specific objective of assessing “the extent to which IRM has been an effective recourse mechanism for people affected by a project” (draft Report, para. 5(1)), including the extent to which IRM processes lead to redress (draft Report, para. 6).

Benchmarking IAMs against the UNGPs Effectiveness Criteria

Firstly, given the centrality of the effectiveness criteria of the UNGPs in the IRM review, we Annex a draft extract from our Office’s forthcoming DevRem project report which specifies how the UNGPs’ effectiveness criteria may be applied in the context of DFIs and their IAMs. For each criterion (“legitimacy, accessibility” and so on) an illustrative list of indicators is identified, in the form of questions, to guide assessments of IAMs’ structure and performance. The indicators draw from our DevRem project consultations and [the report of the third phase of the ARP project](#) (pages 11-18), and extend beyond those contained in the draft Report (Dec. 2020), Annex V.

We emphasise that the indicators are only draft, hence we do not recommend that they be substituted for the table in Annex V of the draft Report. We are conscious that the IRM Rules and Procedures already reflect many of these indicators, but nevertheless we hope that they may serve as a useful checklist for the further strengthening of the IRM’s structure and functions in the future. We would welcome the Bank’s and IRM’s substantive feedback on these draft indicators at any point prior to the end of March 2021, and look forward to engaging in discussions in connection with the final DevRem report in due course.

Linking IAM functions to remedy

We note that only a very small proportion of IAM complaints so far have resulted in remedy, and that IAM cases are themselves a small fraction of projects overall. Hence we welcome the strong acknowledgement in the draft Report that IAM functions, supported by Management and Board, should contribute to remedy for project-affected people (e.g. page 9, para. 36; page 14, para. 12; page 23, para. 28; page 83, para. 296; page 84, para. 300). This link may seem self-evident but is not systematically reflected in IAM mandates.

A failure of IAM processes to lead to remedy can undermine trust and legitimacy in the parent institution as well as the IAM. Unaddressed grievances can fuel social conflict and State fragility, as World Bank research has documented.¹ The External Review on IFC/MIGA/CAO E&S Accountability (“External Review”) noted the “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.”²

¹ World Bank Group Strategy on Fragility, Conflict and Violence 2020-2025, paras. 2, 6, 12, 13, 48, 53, 97, 99 and 126.

² See for example, CAO External Review para. 307-308

The IRM Operating Rules and Procedures already require MAPs to contain clear, time-bound actions for achieving remedy for affected populations (para. 67(b)). However, in order to align fully with best practice, we would recommend that:

- the IRM be explicitly mandated to recommend reparations in the form of financial compensation,³ and
- the IRM be mandated to monitor the extent to which the MAP leads to remedy for Requestors in practice.

Remedy funds

We note the important discussion in the draft Report (page 18, paras. 26-29) on need for remedy funds to assist communities harmed through the parent bank's non-compliance, and the more detailed discussion of these issues in the External Review report (section 7.8). While this issue goes beyond the scope of the IRM Rules and Procedures, we strongly support the need for urgent and creative thinking on remedy funds and similar mechanisms, tailored to particular circumstances.

We note concerns that proposals of this kind might unwittingly increase banks' risk aversion or legal liability exposure. However, in our view, such concerns are easily overstated given the broad scope and strict construction of most DFIs' jurisdictional immunities, the many legal and practical barriers to litigating claims, and the very narrow scope for lender liability claims in most jurisdictions. We also note concerns about moral hazard and blurring the boundaries between the bank's and client's roles; however in our view the present situation, where losses are overwhelming externalised to vulnerable communities with little if any influence over the project, involves far more serious moral hazard concerns.

The UNGPs' responsibility framework can help to put such concerns in context. In many circumstances, a financial institution may be considered to be "directly linked" to harm through its financial relationship to its client and its client's adverse impacts.⁴ In these cases, the institution has the responsibility to build and use whatever forms of leverage⁵ it can in order to encourage the client to prevent and remediate the harm. While the financial institution will not be required itself to provide for remediation, it may take a role in doing so. However, if a financial institution has identified that it has "contributed" to harms together with a client, it should: (i) cease or prevent its own contribution; (ii) use its leverage with the client to mitigate any remaining impact to the greatest extent possible; and (iii) actively engage in remediation appropriate to its share in the responsibility for the harm. In practice, there is a continuum between 'contributing to' and having a 'direct link' to an adverse human rights impact, and a financial institution's involvement with an impact may shift over time, depending on its own actions and omissions. Our office has issued advice as to how banks can determine their responsibilities in this regard.⁶

³ See e.g. GCF IRM, Terms of Reference, para. 14.

⁴ UNGPs, Principles 13, 19 and 22.

⁵ Banks can build leverage directly with clients through commercial incentives, safeguard policies, loan agreements, policy dialogues and capacity building, and collectively through convening power, normative projects, sectoral and multi-stakeholder initiatives. OHCHR DevRem report (forthcoming 2021).

⁶ See OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector (2017), available at <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

There are a number of potential remedy financing models that could be considered, depending upon the context. The principal mechanisms emerging through our Office's DevRem consultations are: (1) standing funds (drawn from a fixed percentage of a DFI's revenue, or a pooled fund in high-risk contexts); (2) escrow accounts; (3) trust funds, (4) contingency funds; (5) insurance; and (6) guarantees and letters of credit.⁷ Each model has advantages and disadvantages that should be weighed in the selection process. A mechanism that ring-fences assets, such as a pooled fund or on a project-by-project basis at the start of a project or investment, provides greater certainty that there will be funds available which can be accessed in a timely and efficient manner in the event of harm.

We note that practice is evolving in positive directions in this regard. For example, the World Bank has piloted an environmental and social performance bond for its civil works that could be cashed by the contracting entity where the contractor fails to remedy cases of environmental and social non-compliance.⁸ The Norwegian Development Fund (Norfund) has a formal policy commitment to contribute toward mitigation of adverse impacts, and some private banks have made statements to this effect. In certain cases, private banks⁹ and bilateral DFIs have also made contributions to remediation of harm. In World Bank Inspection Panel cases, special trust funds have at times been used to support remedial actions. We would strongly encourage the AfDB and IRM to engage in and shape this important conversation and, thereby, help make remedy a reality in more people's lives.

Independence of the IRM's compliance review function

An IAM's independence is critical to its legitimacy and effectiveness. A number of IAMs (IFC/CAO, EBRD/IPAM, EIB/CM, GCF/IRM and the DEG-FMO-PROPARCO/ICM) are empowered to self-initiate compliance reviews without Board authorisation, and in some cases (IFC/CAO, UNDP/SECO, GCF/IRM) without a complaint. Independence of this kind enables IAMs to more effectively fulfil a preventive function and address emerging trends and particularly serious or emblematic cases, including in contexts where communities have not yet mobilised or, as is increasingly the case, retaliation risks limit or preclude complaints altogether.

We note that the IRM currently requires Board authorization before carrying out a compliance review. Through our consultations with partners in connection with the DevRem project, we heard evidence that requirements of this kind may have curtailed the scope of action and utility of IAMs and prevented affected populations accessing remedy. It is sometimes assumed that a low number of complaints indicates relatively few problems in projects, but there are many other possible explanations including lack of trust and confidence in the mechanism. If IAMs cannot operate independently and proactively, problems will be less likely to be identified and addressed in a timely and effective fashion, triggering a vicious cycle in which remedy is put further from reach. For these reasons, to maximise the IRM's independence, we would respectfully

⁷ These mechanisms are analysed more extensively in the report of the DevRem project (forthcoming 2021).

⁸ "Uganda Transport Sector Development Project – Additional Financing: Lessons Learned and Agenda for Action," World Bank, Nov. 11, 2016, p. 41, <http://documents.worldbank.org/curated/en/948341479845064519/pdf/110455BR-PUBLIC-LESSONS-LEARN-IDA-SecM2016-0204.pdf>. The bond would be for a reasonable amount, normally not to exceed 10 percent of the contract amount, and be cashable based on failure to comply with the engineer's notice to correct defects.

⁹ External Review para 333.

encourage AfDB/IRM to update its Rules and Procedures in line with the practice of IFC/CAO, EBRD/IPAM, EIB/CM, GCF/IRM and other IAMs referred to above.

Scope of requests

We recognise that the IRM Rules and Procedures constitute best practice in permitting Requests in relation to anticipated (not only actual) harms (para. 9), and in connection with harms that materialise post-closure (para. 11), and in avoiding any explicit limitations regarding parallel judicial proceedings (subject to comments below regarding para. 88). However, unlike certain other IAMs,¹⁰ we note that para. 9 does not explicitly permit complaints prior to Board approval. Such an exclusion can curtail the ability of the IAM to prevent harms before they arise. We would respectfully recommend that the IRM:

- explicitly allow for complaints prior to Board approval;
- explicitly allow for anonymous complaints (para. 10(d)) where this is requested and necessary for protecting Requestors; and
- eliminate para. 10(g) given information gaps faced by Requestors and the difficulties of isolating or parsing responsibility between the client, bank and other relevant parties in practice.¹¹

Transparency

We note the very low percentage of project-related concerns that reach IAMs, across all DFIs (as few as 1-3% of all projects), and the limited number of compliance reviews undertaken by the IRM to date. We note the long-standing problem that IAMs, even if they are effective, are generally not widely known among project-affected communities. We welcome the provisions concerning outreach in para. 88 of the Rules and Procedures, although note that the disclosure requirement in para. 91 appears to be limited to eligible complaints. The latter omission risks exacerbating a serious data gap regarding the extent and causes of inadmissibility.

Finally, we note that the bank's disclosure obligation concerning the existence of the IAM (para. 88) is qualified by the phrase "in case other mechanisms for dealing with harmful project impact are not successful." This caveat seems to imply that the IRM is only available as a final recourse. If so, this fails to reflect the unique character and purpose of the IRM in reviewing the *bank's* own compliance with its operational policies (rather than the client), and may impose unwarranted restrictions on Requestors' freedom to choose the most suitable avenues for remedy and ability to utilise multiple mechanisms as needs require. In the light of these concerns, we would respectfully recommend that:

- borrowers be required to publicise the existence of the IRM, and that this requirement be included in contractual agreements;
- the Register (para. 91) not be confined to eligible complaints, but also include all Requests that were deemed ineligible; and
- the phrase "in case other mechanisms for dealing with harmful project impact are not successful" (para. 88) be deleted.

¹⁰ See e.g. IFC/CAO, para. 2.2.2: The CAO can accept a complaint if "the complaint pertains to a project that IFC/MIGA is participating in or is actively considering."

¹¹ This is particularly the case where the impacts in question are "directly linked" to the bank's operations, products and services through its business relationships. See UNGPs, Principles 13, 19 and 22.

Reprisals

We note with concern the increasing risks and threats faced by potential Requestors in connection with MDB-supported projects, over one-third of cases in some instances.¹² We note the impressive momentum among IAMs to develop specific procedures to help assess, prevent and respond to reprisals (including the World Bank Inspection Panel, IFC/CAO, IDB/MICI and EBRD-IPAM). We note that some parent banks have done likewise (including IFC, EBRD and IDB Invest) though overall progress is slow and uneven.

We warmly welcome the strong zero tolerance statement on retaliation in para. 89 of the Rules and Procedures and their important provisions concerning confidentiality and reprisals protection (paras. 17-19). We also note the AfDB's strong whistle-blower policy concerning corruption and institutional integrity matters. We recognise that effective prevention and responses to reprisals risks requires collective commitment and coordinated actions from the IAM and parent bank, and would recommend that:

- the AfDB publish a zero tolerance statement against reprisals, not limited to the scope of its whistle-blower policy, and amend its operational policies and develop detailed procedures to assess, prevent and respond to reprisals, in line with MDB best practice;
- the AfDB incorporate requirements to avoid and address reprisals risks in contractual agreements with the client, with sanctions for non-compliance;
- the IRM develop detailed procedures to assess, prevent and respond to reprisals, in line with IAM best practice; and
- the IRM's Register (para. 91 of the Rules and Procedures) include regular publication of data on reprisals and the IRM's and AfDB's responses, anonymised as needed.

Concluding comments

We thank you again for the opportunity to contribute to this important consultation process. We hope that our comments are useful. Please do not hesitate to contact our Office's Representative in Washington DC, Mac Darrow (mdarrow@ohchr.org) should you have any queries in connection with this submission. We greatly look forward to our continuing dialogue on accountability issues.

Yours sincerely,



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¹² See <http://www.cao-ombudsman.org/newsroom/documents/CAOApproachtoReprisals.htm>

ANNEX

DRAFT EXTRACT FROM OHCHR, “REMEDY IN DEVELOPMENT FINANCE” (forthcoming 2021)

Strengthening IAM Procedures - Benchmarking Against the UNGP Effectiveness Criteria

The UNGPs have exerted a strong influence on global normative frameworks relevant to development finance, including the Equator Principles and OECD Guidelines for Multinational Enterprises, and they are increasingly being integrated in DFIs’ Safeguard policies and IAM procedural guidance. The UNGPs have influenced discussions on remedy among IAMs and project-level GRMs, and certain IAMs have recommended that their parent banks refer to the UNGPs’ Effectiveness Criteria (contained in Principle 31) when designing and evaluating project-level GRMs.¹³

IAMs are non-judicial mechanisms to which UNGP 31 applies. This section briefly reviews each of the UNGPs’ Effectiveness Criteria in the context of IAM design and functions, and identifies indicators which may facilitate the application of the UNGPs’ Criteria in this context. The suggested indicators are not exhaustive, and should be read in the context of more comprehensive analyses on this subject.¹⁴

a. Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes

Legitimacy has many dimensions but arguably the most important characteristic for any grievance mechanism is *independence*. The independence of an IAM can be reinforced or restricted in a range of ways, in addition to the discussion on mandate restrictions in the previous section. The governance of IAMs, including structure, management relationship, reporting lines and Board oversight, are among the most fundamental questions in this regard. All IAMs at multilateral DFIs (with the exception, until recently, of the IFC) have a direct reporting line to the DFI Board, rather than DFI management. In principle, subject to safeguards in Board procedures concerning conflicts of interest, this direct reporting relationship to the Board provides IAMs with a necessary degree of independence when assessing DFI compliance.

Other prerequisites for independence and legitimacy include cooling-off periods following staff assignments, the involvement of external stakeholders in the process of selection and appointment of senior IAM staff, the need to ensure that performance

¹³ See e.g. EBRD-IPAM, Compliance Review Monitoring Report, Lukoil Shah Deniz Stage 2 Project (46766), Request No. 2017/07, recommending (at p.11) that the EBRD should “[i]ssue Guidance to Clients that outlines key effectiveness criteria for Project-level grievance mechanisms, aligned with the effectiveness indicators set out in the UN Guiding Principles on Business and Human Rights (UNGPs).”

¹⁴ See, for example, “Glass Half-Full?” (2016), and the report and background materials pertaining to Pillar III of OHCHR’s ARP project, at https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx, which included a dedicated consultation in June 2019 with IAMs.

reviews for senior IAM staff are carried out by the Board (not DFI management), and the need to ensure that IAMs control their own budget and contracting. Legitimacy also involves consideration of the extent to which IAMs are trusted by complainants. On this issue, an influential benchmarking exercise in 2016 found (positively) that “complainants generally report that they are treated fairly by the IAMs and appreciate that their concerns are taken seriously.”¹⁵

Indicators of “legitimacy” include:

- *Is the IAM authorised to initiate investigations without Board approval?*
- *Does the IAM have a direct reporting line to the Board?*
- *Does the IAM control its own budget and contracting?*
- *Are hiring procedures transparent, and are external stakeholders involved in the process of selection of senior IAM staff?*
- *Are performance reviews of senior IAM staff carried out by the Board, rather than Management?*
- *Is the IAM trusted by complainants?*
- *Does the Board have procedures to ensure due process in responding to IAM recommendations, and to eliminate conflicts of interest?*
- *Are IAM staff members precluded from seeking employment in the parent DFI for a “cooling off” period of at least two years?*

b. Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access

Accessibility to IAMs remains a core concern for communities and the organisations that represent them. This is a key point raised consistently in IAM reviews and is also implicit in the small percentage of project-related complaints that are brought to IAMs (as few as 2-3% of all projects). Cases that are closed with a substantive remedial outcome are far smaller still.¹⁶ The accessibility of IAMs varies significantly from case to case. The variables include:

- **Awareness:** As is well recognised, the lack of awareness of IAMs remains among the most fundamental and obvious barriers to remedy. Many but not all IAMs have active outreach activities, but clients are not often required to publicize the existence and availability of the IAM. This simple measure could easily be addressed in Safeguard policy revisions and legal agreements, and the fact that so few DFIs have done so reflects the conflicting incentives and mixed motives within DFIs on accountability issues.
- **Eligibility requirements** can be a significant obstacle in practice, given the substantial burdens that communities and workers may face simply in getting to the point of being able to file a complaint, beginning with understanding who is behind a project that may affect them and who is financing it, and understanding IAM procedures. It has been estimated that over half of all complaints filed with IAMs

¹⁵ Glass Half Full p. 52

¹⁶ Glass Half Full presents a flow diagram of the “drop out” rate of cases from IAM processes, due to various reasons.

until the year 2016 were not registered or were found ineligible.¹⁷ The reasons for this are not entirely clear, but eligibility requirements are almost certainly a factor.¹⁸

- **Link between non-compliance and harm:** While most IAMs require that the complainant show a linkage between the complaint and the institution's Safeguards, others do not. The latter approach allows dispute resolution between the complainant and client to proceed separately from the question of the bank's non-compliance,¹⁹ this promoting accessibility and enhancing the early resolution of problems.
- **Requirements for complainants to bring cases to management first:** Complainants typically only bring complaints to IAMs when other avenues, including with the client or the DFI team, are not reasonable open to them or have failed. A categorical requirement that complainants first exhaust avenues with the client and the DFI ignores this reality and the increasing risks of retaliation that complainants may face.
- **Exhaustion of local remedies:** Some IAMs do not accept complaints that subject to parallel court proceedings at country level. These kinds of exclusion clauses constitute an unwarranted restriction of access to IAMs and overlooks the different nature of court proceedings (focusing on the application of national laws *vis-à-vis* the State or client) and IAM proceedings (focusing on the application of Safeguard policies *vis-à-vis* the bank). It also ignores the comparatively serious logistical and other challenges that complainants may face in connection with court proceedings: the latter may take far longer than the length of the DFI loan and thus effectively preclude access to the IAM for practical purposes. Just as most Safeguards prohibit clients' GRMs from preventing access to judicial or non-judicial mechanisms, the same should apply to IAMs. Complainants should have the option to choose which avenues they want to pursue, alone or in combination, to enable access to justice.
- **Reasoned decisions about eligibility:** To the extent that IAMs do not already do so, they should disclose reasoned explanations about why complaints did not meet eligibility criteria. This is not only vital for accessibility, but is a minimum requirement of due process.
- **Representation and standing:** IAMs generally allow complainants to be represented by CSOs, which has a strong, positive effect on remedy outcomes.²⁰ However some IAMs impose unwarranted constraints in this regard, such as limiting the scope for representation by international organisations.²¹ While it is not always easy for an IAM to identify whether a claim to represent a community is valid not,

¹⁷ Glass Half Full p. 31.

¹⁸ Glass Half Full p. 31. The review also drew attention to the gaps between a positive eligibility assessment and failure to conclude a case, pointing to: the IAM independently decided that problem-solving or compliance review was unnecessary or inappropriate; the complainant chose not to pursue problem-solving or compliance review; the company or government carrying out the project in question refused to participate in problem-solving; or the institution's board refused to authorise a compliance investigation.

¹⁹ CAO External Review, para. 209

²⁰ Glass Half Full (2016), analysing all complaints filed at IAMs from the dates of their establishment until 30 June 2015, found: "[O]f concluded cases filed without any CSO support, 62% were found eligible, 38% reached a substantive phase and only 19% achieved results. In contrast, of concluded cases that involved an international CSO, 87% were found eligible, 70% reached a substantive phase, and 63% achieved results."

²¹ See e.g. AIIB Project-Affected Peoples' Mechanism Policy (Dec. 7, 2018), which permits international representation only in "exceptional situations, when in-country representation is unavailable" (para. 3.1).

complainants should be given maximum latitude in this regard. Complainants frequently face multiple, intersecting barriers to accessing DFIs including lack of knowledge, distance, the financial cost of pursuing a remedy, intimidation from government or businesses, and procedural barriers. Understanding and articulating the linkages between project impacts and Safeguard standards (where this is required to be shown) may be well beyond the scope of local communities to articulate without support of CSOs. The majority of complaints are supported by national CSOs who for substantive, logistical or personal security reasons may require help from international CSOs. Should a DFI have questions about the validity of a complainant's representation, these should be dealt with through the investigation process itself rather than *ex ante* prohibitions or restrictions.²²

- **Time-frames:** Time frames should be as flexible as possible to allow for complaints early in the project cycle (pre-Board approval) through to post-project closure. Shortened timeframes force more complainants to base their claims on “likely” (rather than actual) harms from a project, which can be difficult to sustain without support from CSOs with technical expertise in connection with that type of project. A number of IAMs permit the filing of complaints after project closure for a given period of time, recognising that harms may take time to manifest themselves. In OHCHR's view the latter practice should be encouraged.

Indicators of “accessibility” include:

- *Are both the DFI and clients required to publicise the existence of the IAM, and is this requirement included in contractual agreements?*
- *Are access barriers for women, children, persons with disabilities, indigenous people and other population groups identified and addressed?*
- *Are complainants free from any requirement to exhaust remedial avenues with the client, GRM and/or DFI?*
- *Are complainants free to pursue complaints through the IAM irrespective of parallel proceedings (judicial or otherwise)?*
- *Are complainants free to choose between compliance review and DR processes, or both simultaneously, and are they empowered to make informed choices in this regard?*
- *Are complainants free to choose who to represent them, be they local or international organisations?*
- *Can complaints be admitted prior to Board approval, thereby enabling preventive actions?*
- *Can complaints be admitted for a reasonable period of time (not less than 2 years) after project closure, depending upon when harms are apparent?*
- *Are evidentiary requirements reasonable, taking into account complainants' capacity constraints?*
- *Are complainants free from any requirement to demonstrate linkage between project harms and the DFI's Safeguard compliance?*
- *Where complaints do not meet eligibility criteria, are clear reasons provided within a reasonable time?*

²² See [CAO Dispute Resolution Toolkit – Chapter 2 Representation](#) (2018) for further discussion and suggestions on representation.

c. Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of processes and outcomes available and means of monitoring implementation

Delays are a frequent problem from complainants' perspectives, leading to unpredictable processes.²³ According to one study, the average length of DR processes and compliance investigations is twelve months.²⁴ Lengthy IAM proceedings can impose a significant burden on complainants and project-affected communities who must live with on-going harms for the duration of the proceedings, often at significant cost to their livelihoods. From complainants' perspectives it is also critical to clarify the relationship between the IAM's DR and compliance review functions, and afford full flexibility to move between them.

From complainants' perspectives, self-evidently, it is also critical to ensure that outcomes from DFI processes are actually implemented in practice. Without this, the process is not only unpredictable, but meaningless. From this standpoint, implementation of outcomes is a vital dimension of the "predictability" criterion, relevant to DR and compliance review functions.

The complexities of co-financing can create particular challenges to the predictability of IAM processes. DFIs may finance different parts of a programme or project, or may be involved at different points in the project cycle, and may sometimes assign different names to the same project. These circumstances can make it hard for complainants to identify who is financing a given project and where to file complaints. In some cases, complaints have been filed with all relevant IAMs, notwithstanding great variations in their quality and effectiveness. As a matter of principle, complainants should be able to make an informed choice about which mechanism(s) are most suited to their needs and to use potentially viable mechanisms in combination as needed. Efforts to streamline complaint processes should be based on consultation and consent of complainants. Where IAMs cannot or do not collaborate, this leaves the complainants with the option of dropping proceedings with all but one of the mechanisms, or participating in multiple processes with the multiple logistical and emotional burdens involved, including potential for re-traumatisation where harms are severe.²⁵

Where multiple IAMs are involved, each ordinarily applies the Safeguards of its own parent bank, which may produce different outcomes on the same facts. This is not only problematic for complainants but sends inconsistent messages to project proponents and government authorities involved. IAMs have developed MOUs for use in such cases, specifying how collaboration between them should work. These agreements should provide for as streamlined a process as possible, avoiding unnecessary duplication and repetition and minimising burdens on complainants. Where multiple Safeguard standards apply, it is important to observe the strongest applicable standards, for the

²³ Glass Half Full p. 51. See also 2020 External Review of IFC/MIGA E&S Accountability.

²⁴ Glass Half Full p. 43.

²⁵ ARP III report.

sake of environmental and social sustainability.²⁶ Such a requirement should be incorporated into standard contract language.

Indicators of “predictability” include:

- *Are IAM processes, timeframes and potential outcomes made clearly known to complainants in advance?*
- *Does the IAM provide information in relation to its mandate to:*
 - *monitor the implementation of actions agreed in compliance and dispute resolution?*
 - *monitor the effectiveness of actions taken to address harms and to require updates/corrections if the initial action identified are not addressing the issues?*
 - *carry out monitoring missions on the ground, including with original complainants, other stakeholders, clients and local government?*
 - *report to the Board on implementation?*
 - *continue monitoring until harms are remedied?*
- *In co-financed projects:*
 - *Is there an MOU in place between IAMs which simplifies processes for complainants and specifies how collaboration between IAMs will work?*
 - *are complainants able to make an informed choice about which mechanism(s) are most suited to their needs?*
 - *are complainants consulted on efforts to streamline complaint processes?*
 - *where Safeguard standards of the participating banks differ in strength and scope, is there a requirement that the most stringent applicable standards be applied?*

d. Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms

This equitability criterion is concerned with due process, the active participation of project-affected people in shaping the response to the harm, and addressing power imbalances between the parties. IAM procedures should provide procedural safeguards in the consultation process, including equal opportunity to access information and to review and respond to evidence. Complainants are centrally involved in DR processes but this is not necessarily so for compliance review. Nevertheless, in some cases IAM procedures do afford claimants the right to be consulted and receive feedback over the course of the compliance review process, including reviewing and responding to draft compliance review reports, MAPs and

²⁶ Where multiple standards or sources of law apply to a given project, as is almost invariable the case, MDB Safeguards sometimes (though inconsistently) require observance of the highest applicable standard. For example, IDB ESS 3 (Sept. 2020), para. 5, provides: “When applicable regulations differ from the levels and measures presented in the [World Bank’s Environmental, Health and Safety Guidelines], Borrowers will be required to achieve whichever is more stringent.” And in the context of co-financing, IDB’s ESPF (Sept. 2020), para. 6.2 provides: “A common approach would be acceptable to the IDB when it is consistent with the principles of no dilution ... and when it enables the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functionally equivalent).”

monitoring reports. And in some DFIs, the Board is presented with both Management and the complainants' comments on the MAP.²⁷

As a minimum due process requirement and basic requirement of administrative law, IAMs should provide clear explanations of their findings to complainants, to Management and to the Board. Moreover, as recommended in OHCHR's ARP III report, grievance mechanisms should allow parties to challenge the manner in which the mechanism has responded to a grievance or the outcome of a grievance process. This could include referral and appeal processes. With the exception of the EIB which is subject to the European Ombudsman's oversight, there are currently no formal avenues to appeal IAM compliance review decisions or DFI management responses. Nevertheless, a number DFIs do allow appeals of decisions denying access to information, which may open the door for a wider range of appeals in the future.

Addressing power imbalances should start at the earliest stages of a complaint, as IAMs can and do provide help and advice to enable complaints to understand the advantages and disadvantages of different routes to remedy and choose the option that is best for them.²⁸ This can sometimes create tensions with IAMs' impartial mediator role in DR processes,²⁹ in which circumstances alternative approaches, such as engaging third parties to provide capacity building, may need to be explored. (See Box 1 on Power Imbalances).

IAMs routinely provide capacity building and technical support for complainants,³⁰ although more investment in this area seems to be needed and consideration should also be given to providing particularly vulnerable communities with livelihood support during DR and compliance review processes. Capacity building may also be necessary at the government level as well: even where it is not the client, the government may have important roles to play in enabling or delivering remedial outcomes (for example with relation to land administration). In such circumstances, and to ensure their support, it is important that government partners understand what IAM processes are aiming to achieve and the potential benefits of dispute resolution.

²⁷ ADB, for example.

²⁸ See e.g. [CAO Dispute Resolution Toolkit, Chapter 1 Getting Started with Dispute Resolution](#) which usefully addresses this issue.

²⁹ As noted in an in-depth review of CAO practice, the "need to balance power between two parties that are extremely unequal is paramount for problem-solving cases to lead to human rights remedy... an ability to judge how existing power dynamics are operating may be needed to ensure that some level of fairness or justice is achieved. Impartiality as fairness does not mean treating all parties the same, particularly under conditions of significant asymmetry of power. Instead, impartiality can function in a way that supports the status quo."

³⁰ See CAO Dispute Resolution Toolkit, Chapter 3, Joint Fact Finding (2018).

Box 1: Power Imbalances and Capacity Building in the Context of Dispute Resolution³¹

Power Imbalances	Potential Capacity Building Measures to Respond to Power Imbalances
<ul style="list-style-type: none"> • Educational levels and associated capacity to gather, interpret and use <i>technical</i> information (including things such as evidence-based timelines, maps, and environmental impact assessments) • Educational levels and associated capacity to access, interpret and use <i>legal</i> information, including an awareness of legal rights • Access to and capacity to interpret and use <i>economic and financial information</i> related to projects (such as to make a realistic assessment of the economic value of a project, to assess land value for compensation negotiations, or to assess a company's financial position to strategize a negotiating approach) • Access to information about what other <i>forms of leverage</i> they may be able to deploy, and how to deploy them in negotiations (such as minimum standards relating to Free Prior and Informed Consent (FPIC), or what other communities' have been able to achieve in comparable situations, and how it might be replicated, such as benefit sharing arrangements) • Skills and experience to understand and navigate negotiation sessions • Logistics and basic resources, such as mobile phones, credit for mobile phones, cars and petrol, access to 	<ul style="list-style-type: none"> • Capacity support to put forward the <i>best possible case</i> for their interests, including drawing on any relevant legal rights, standards (such as the Performance Standards), precedents in other cases, or technical, financial or economic information, and helping communities identify and use potential sources of leverage • Provide support for formulation of initial complaints, including articulation of grievances and goals • Provide support for communities to deliberate and make decisions among themselves, including in the formulation of initial demands, during any process, and after • Provide capacity support throughout mediations, including in ensuring communities fully understand the process, the preconditions, and the proposals that arise • Particular attention should be paid to pre-conditions for mediation, including learning from other cases about what preconditions support endurance and better outcomes, such as conditions about confidentiality, provision of livelihood during the negotiation period, forms of evidence that will be accepted in the process, and so on • Provide assistance in gathering, understanding and using technical, legal, financial and economic information in support of the community's claim. • Provide logistics and basic resources, such as mobile phones, credit for mobile phones,

³¹ This table is adapted from Balaton and McDonald, pp 40-45.

<p>email and internet</p> <ul style="list-style-type: none"> • Capacity to manage internal disagreements and divisions within communities over which procedures to pursue, strategies for engagement, goals, and representation arrangements 	<p>transport, and access to email and internet, throughout the process</p> <ul style="list-style-type: none"> • Provide assistance in implementation of agreements, such as through provision of a development consultant to help with tasks such as the establishment of cooperatives, building of financial literacy, and building relevant technical skills.³²
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Finally, the “equitability” criterion also requires consideration of the evidentiary standards that complainants are required to meet. IAMs procedures are not always clear about what kind of evidence needs to be presented in support of complaints,³³ which allows flexibility for IAMs but may create confusion or frustration for complainants. IAMs sometimes impose unduly high evidentiary requirements on complainants to show non-compliance and harm causally linked to the bank’s non-compliance. For example, IAMs may require that complainants show “serious violations,” or “material adverse impacts” or “direct and material impact,” which may pose significant admissibility hurdles.

In some cases, IAMs allow complaints pertaining to “likely” (in addition to actual) harms, and some proactively seek information as needed in order to establish robust baseline data.³⁴ Apart from furthering equity goals, more proactive approaches of this kind also help IAMs fulfil preventive, rather than reactive, E&S functions. However, it is also important to recognize that identifying “likely harm” may be beyond the lived experience and technical capacities of many complainants. Specialized expertise may be required in order to demonstrate that investments in particular sectors utilizing certain technologies may foreseeably lead to particular harms.

Indicators of “equitability” include:

- *Are complainants provided with necessary advisory, technical or financial support?*
- *Do DFIs take into account stakeholders’ different needs, abilities, vulnerabilities, language, culture, and personal circumstances including exposure to trauma?*
- *Do compliance procedures permit both the IAMs themselves and complainants to review and provide comments on MAPs before they are finalised?*
- *Is DFI management required to consider such comments and provide a reasoned explanation where comments are not taken into account?*

³² Some of these measures are already provided by some IAMs but could and should become standard practice. See also CAO Dispute Resolution Toolkit, Chapter 1 – Getting Started (2018).

³³ CAO External Review, para. 297.

³⁴ ADB CRP, Mundra Ultra Mega Power Project, Final Report in English (2015), “should undertake early surveys and studies with the intention of (a) establishing the baseline data, (b) identifying impacts, and (c) monitoring impacts. If these policies are not complied with, then baseline data are not established and impacts may be difficult to be identified and monitored. Without this information, the pre-project situation is often difficult to reconstruct. If, as a result of non-compliance with ADB policies, adequate baseline information is not available, the CRP will, of necessity, base its conclusion on the best other evidence available. This is essential in order to ensure that the ADB safeguard policies and ADB Accountability Mechanism are effective.”

- *Are there any formal avenues to appeal IAM compliance review decisions or DFI management responses?*
- *Do IAMs have capacity building programs and budgets to help equalise power relations between the parties?*
- *Are standards of evidence sufficiently flexible and informal, from the complainant's perspective, and are IAMs required to proactively seek information relevant to admissibility as needed?*

e. Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake

Transparency is critical for strengthening accountability and equalising power imbalances between the parties. Strengthened transparency is important in its own right and essential for meeting other UNGP effectiveness criteria: building trust and legitimacy, enabling access, improving predictability and equitability through clear rules on information handling and regular information flows to complainants. The track record of IAMs is mixed in this regard, with variable requirements regarding the content and timing of disclosure³⁵ and variable accessibility of websites. Some IAMs publish a full list of cases including those deemed ineligible, which provides useful information on the broader types of harms and concerns in projects and provides the basis for more robust trend analysis. But this is not a consistent practice.

On web searches, it can be difficult for complainants to locate the list of complaints filed as IAMs use a wide range of terms for this which may not be intuitive to the uninitiated. Many IAM websites have very limited functionality on the options for searching cases on their websites which can be frustrating to those looking for particular combinations or trying to assess trends. Currently few if any DFIs indicate on their "project document" sites that a project is undergoing review by an IAM, and yet this is relevant information to anyone interested in a project. Moreover the information given on cases handled on IAM website is often extremely limited, thus necessitating a laborious process of opening a wide range of documents in order to understand a given case.

Information that would be useful to include a case overview available immediately on the website when clicking on a case (as opposed to having to open up case documents), would include:

- **Risk categorisation** of the project.
- Short explanation of what the **complaint** covers.
- Short explanation of the **project** and a link to the **project documents** – not just the complaint documents.
- A clear link to **documents involved in complaint management** at each step in the process; (i) for compliance reviews this would include MAPs, Monitoring Reports, Management Responses to Management Reports, and publicly

³⁵ Glass Half Full (2016).

available Board discussions on the complaint, (ii) for DR this would include information about the process, the outcome, the agreement (if it can be made publicly available), monitoring reports, and a summary of the case outcome.

- **Severity of the issues dealt with:** It would be useful to have some overview on the website of the scale, scope and irremediability of issues covered in the complaint – i.e. how many people are affected, the seriousness of the potential or actual harms as alleged, and whether any harms may be irremediable.
- **Status of the case:** a functionally clear and accessible explanation of whether a case is open, closed (with or without outputs) or ineligible (with reasons given), or similar descriptions with searchable terms.
- **Regular update of status:** Cases are sometimes left in an indeterminate status for years without any update. While recognising the uncertainties affecting closure in some circumstances, it would nonetheless be useful to update case status at least once a year.
- **Most importantly, an explanation of the interim and final outcomes of the case.** This should include a short description of (i) interim outcomes, pertaining to complaints that may or may not already be subject to a MAP, including indication of any legitimate confidentiality caveats; and (ii) final outcomes. This is vital in order to understand what remedies have been provided. An indication of complainants’ satisfaction, or otherwise, would also be important.

Indicators of “transparency” include:

- *Does the IAM remain continuously, proactively engaged with parties regarding the status of cases?*
- *Does the IAM have clear rules on handling and disclosing information among the parties, with clear, limited exceptions for commercially confidential documents?*
- *Do DFI information policies include a public interest override to mandate disclosure where human rights violations are concerned?*
- *Does the IAM publish in a user-friendly manner the full record of a case as well as a summary, an easy way to understand the status of the case, and the documentation of the case (complaint submitted, IAM decision, management response, interim and final outcomes, and any monitoring reports)?*
- *Does the IAM publish a full list of cases, including those deemed ineligible?*
- *Does the DFI project document website include reference to any IAM complaints and associated documentation like MAPs and DR agreements?*

f. Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights

The “rights-compatibility” criterion is essentially concerned with ensuring that DFI processes and outcomes put people at the centre, and that relevant international human rights standards are taken into account. Where human rights standards are integrated explicitly within DFI safeguard policies, as is increasingly the case (the IDB and IDB Invest being among the clearest recent examples), rights-compatible processes and outcomes will more consistently follow. Some IAMs, such as the World Bank Inspection Panel, have considered the human rights dimensions and implications of complaints notwithstanding the lack of explicit referencing of human rights in

Safeguard policies.³⁶ But this is not a consistent practice either within the Panel or across IAMs.

The CAO's operational procedures reflect the "rights-compatibility" criterion in at least two important respects: namely, specifically including examination of "business and human rights" impacts within the scope of its functions, and requiring DR outcomes to be consistent with international law (which includes international human rights law).³⁷ The extent to which either provision has been operationalised in practice is not clear, but both are highly significant in principle. The former provision would support more rigorous due diligence, and the latter may help correct for the lack of knowledge of international human rights law among communities, clients and banks, and the tendency of claimants in DR proceedings to settle for what they think may be achievable rather than what they deserve. IAMs can play a role in guiding the parties, including the complainants, towards processes and outcomes that meet basic principles of non-discrimination among the claimants and as necessary, wider community members. Where critical harms are not addressed successfully through DR, or where desired remedies are not available, IAMs can help to identify other avenues where complainants can pursue these concerns.

Last but not least, communities are facing increasing intimidation and threats in connection with DFI-supported development projects in most parts of the world. CAO is among the few IAMs to collect data and report publicly on this problem. In 2019, thirty-six per cent of complainants reported concerns about reprisals to CAO, which was a twenty-three per cent increase from the previous year.³⁸ IAMs have taken a lead in developing policy guidance to address this issue, but DFIs – with a few exceptions³⁹ – have been slow to follow. It is difficult for IAMs to prevent and help address reprisals risks without the clear commitment, support and leverage of the parent bank, which are often lacking in practice.

Indicators of "rights-compatibility" include:

- *Are IAM processes respectful, culturally sensitive and empowering from complainants' perspectives?*
- *Are affected stakeholders consulted about available remedies and the manner in which they should be delivered?*
- *Do DFI Safeguards and IAM procedures specifically integrate international human rights standards, including with respect to the UNGPs, human rights due diligence, and remedy?*
- *Do IAMs specify that compliance reviews and DR processes and outcomes should be non-discriminatory, gender sensitive and compatible with international human rights law?*
- *Do IAMs take international human rights law into account in compliance reviews,*

³⁶ New York University Law School Clinic on International Organizations, The World Bank Inspection Panel and International Human Rights Law (2017), available at <https://www.iilj.org/wp-content/uploads/2017/08/The-World-Bank-Inspection-Panel-FINAL-REPORT.pdf>.

³⁷ CAO Operational Procedures (2013), Sections 1.1 and 3.2.2.

³⁸ See <http://www.cao-ombudsman.org/newsroom/documents/CAOApproachtoReprisals.htm>.

³⁹ As at 2021 the leaders in reprisals policy development among DFIs included IFC, IDB Invest, and EBRD.

as relevant to the country, project and issues involved?

- *Do DFIs and IAMs have clear published commitments, operational policies and procedures to prevent and address reprisals risks?*
- *Does the mechanism provide for confidentiality of complainants, and permit anonymous complaints as needed?*
- *Do DFIs and IAMs collect data and publicly report on reprisals risks, taking due regard of confidentiality concerns?*
- *Are requirements to avoid and address reprisals risks included in contractual agreements with the client, and are there sanctions for non-compliance?*

g. A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms

While IAMs usually publish annual reports and newsletters, it can be difficult to glean a complete picture of the types of outcomes that have been achieved. Some have carried out retrospective studies, of varying analytical depth, and lessons learned studies focusing on particular functions or themes.⁴⁰ However, across the board, there appears to be insufficient data collection and public reporting on outcomes. Lessons learned publications sometimes lack critical rigour, and fail to address key access constraints for complainants, such as the problem of the high drop-out rate of complaints at many IAMs. More systematic analysis and public dialogue on key access constraints could help to more strategically shape the IAM reform agenda and guide the difficult choices that communities and CSOs must face on where and how to pursue remedy.

Indicators of “continuous learning” include:

- *Are external stakeholders consulted in the development and revision of IAM procedures?*
- *Do DFIs publish annual reports, regular newsletters, retrospectives and lessons-learned studies?*
- *Do DFIs seek regular feedback on parties’ experiences, and keep systematic record of frequency, patterns and causes of grievances?*
- *Do DFIs collect and regularly publish data on remedial outcomes?*
- *Are lessons learned publications critical in orientation, do they address key access constraints from complainants’ perspectives, and are they consulted on publicly?*
- *Do lessons learned explicitly feed back into DFI strategies, policies and procedures?*

⁴⁰ The World Bank Inspection Panel’s retrospectives and “emerging lessons” series are notable examples: see <https://www.inspectionpanel.org/publications>.

h. Based on engagement and dialogue: consulting stakeholders on the mechanism's design and performance, and focusing on dialogue as the means to address and resolve grievances

This criterion was intended to apply specifically to project-level GRMs, however it may also be useful in the DFIs/IAMs context. MDBs have made important contributions to the emergence of norms for public consultation in relation to matters of public interest, including Safeguard policy revision processes and accountability reviews. Several of the IAMs, similarly, have well-developed public consultation procedures, which are essential for ensuring the responsiveness, positive impact and legitimacy of the mechanism in the eyes of the public. But as with DFIs, the track record across IAMs is an uneven one. As was discussed earlier, complainants are too often excluded from critical phases of compliance review processes and have inadequate opportunity to influence the formulation, implementation and monitoring of MAPs.

Indicators of “engagement and dialogue” include:

- *Are external stakeholders consulted in the development and revision of IAM procedures?*
 - *Are external stakeholders invited to participate on advisory panels and as part of the selection process of senior IAM staff?*
 - *Are complainants actively involved in shaping remedies and commenting on the formulation, implementation and monitoring of MAPs?*
 - *Is DFI management required to consider external stakeholders' inputs and provide a reasoned explanation of the extent to which comments were taken into account?*
 - *Are communities fully supported to participate in the respects outlined above, through robust and proactive information disclosure in relevant languages and accessible formats, and capacity building support as needed?*
-