

**Joint Comment on Report and Recommendations from the External Review of IFC/MIGA
E&S Accountability, including CAO's Role and Effectiveness**
11 September 2020

Thank you for the opportunity to comment on the external review team's report and recommendations. Below is a joint comment from multiple civil society organizations and stakeholders. While many of the signatory organizations will make additional, thematic submissions, we join here on this letter to express our support for the scope and tenor of the report and highlight a few of what we consider to be its most important recommendations.

Significant Nature of This Report

The External Review Report is path-breaking in the field of development finance accountability, both in its thoroughness and its systems-level analysis. Because of the interconnected nature of the report's recommendations, it would be inappropriate for the institution to implement them selectively. Instead, we urge the Board to endorse the report as the minimum required for implementation. This report should represent the floor—rather than the ceiling—of the level of reform needed at IFC/MIGA and the CAO to truly strengthen the accountability system. We therefore urge the Board to endorse the report as a whole, and to treat it as an important starting point for the implementation of specific reforms. In crafting their recommendations, the External Review Team received input from IFC/MIGA Management and CAO, giving them ample opportunity to argue their perspectives. Now is not the time to re-litigate the issues. Any deviations from the recommendations proposed by IFC/MIGA or CAO should only be considered if they further strengthen the accountability framework.

Comments on Substance

While we will have specific comments on how to build upon the report's recommendations, we consider the following in particular to be critical to strengthening the accountability framework for IFC/MIGA. They relate to maintaining the integrity and independence of the CAO and ensuring a meaningful accountability process and outcome for complainants.

- **CAO's existing authority and independence:** The report correctly recognizes that the CAO is generally fit for purpose and should retain its existing authority and independence.¹ An independent CAO is not only critical to fulfill its mission to project-affected people,² but is an asset for the IFC/MIGA,³ as it ensures that the institution is aware of potential harms and has an opportunity to address them outside of the judicial system. In particular, the CAO should retain its authority to pursue a compliance investigation when an appraisal finds preliminary evidence of non-compliance and related harm.⁴
- **Governance for CAO:** The Report recommends that the CAO should report to the

¹ Report, para. 40 ("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.").

² Report, para. 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.").

³ Report, para. 40 ("[T]he Review found agreement among all stakeholders that CAO is an essential component of E&S accountability for IFC and MIGA.").

⁴ Report, para. 276.

Board.⁵ We agree. We view the Board's role not as supervising the day-to-day handling of cases, but rather ensuring that the outcomes are consistent with the objectives of the Sustainability Policy and the development mandate of the IFC/MIGA. The Board should foster a positive feedback loop by ensuring that IFC/MIGA learn lessons from the cases in order to prevent similar issues from occurring in future projects.

- **Governance For Management:** The report recommends that IFC/MIGA pay “more attention to environmental risks and particularly social risks potentially inherent in projects”⁶ and that the Board should take on the responsibility of ensuring that IFC/MIGA implement the Performance Standards.⁷ We agree that oversight of IFC/MIGA's implementation of environmental and social safeguards is critical and should be strengthened.
- **Management's Engagement with CAO Processes:** IFC/MIGA should prioritize and reform its approach to engagement with the CAO process. As the report states, Management should ensure that CAO has access to any IFC/MIGA and client documentation it needs;⁸ Management should engage in the CAO process per set deadlines;⁹ Management should submit Management Action Plans in response to all CAO reports finding non-compliance;¹⁰ and Management should consult with complainants on proposed remedial actions.¹¹
- **Remedy:** IFC/MIGA should adopt the report's support for the “contribute to harm, contribute to remedy” principle.¹² Even complainants who successfully navigate the CAO process are not provided sufficient remedy for harms suffered.¹³ IFC/MIGA should prioritize the implementation of a remedial environment that includes funds to contribute when harm occurs.
- **Management's posture towards litigation risk:** The Report dispelled the myth that the CAO process increases litigation risk for IFC/MIGA.¹⁴ Not only does the CAO help

⁵ Report, para. 164 (“For reasons elaborated above, the responsibility for CAO should be shifted to the Board.”).

⁶ Report, para. 163.

⁷ Report, para. 163 (“[S]ince 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 [...] 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.”)

⁸ Report, paras. 287-289.

⁹ Report, para. 277 (“IFC/MIGA Management should present a Management Response within 10 business days of transferring a complaint to the compliance process.”); Table 6.1.

¹⁰ Report, paras. 48 (“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.”), 215.

¹¹ Report, para. 49 (“Management Action Plans would need to be agreed with the client, and reflect consultation with the complainants.”).

¹² Report, paras. 326, 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.”).

¹³ Report, para. 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.”).

¹⁴ Report, paras. 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.”), 139 (“The Review Team's understanding is that CAO was to be an

IFC/MIGA mitigate risks, it is IFC/MIGA that increases legal exposure by financing projects that fail to meet the Performance Standards and not responding adequately to findings of non-compliance. The IFC/MIGA's support for and commitment to an independent and effective CAO will not only strengthen its E&S commitments but will reduce litigation risk.

Comments on Implementation Process

This report is the outcome of an extensive process that had buy-in from both internal and external stakeholders. Given the investment and support thus far, and the critical reasons for why the external review was undertaken in the first place, we see the report as an important first step of a process to reform E&S Accountability at the IFC/MIGA. The transformational promise of the report will only be realized with a deliberate and inclusive implementation process.

The report itself provides a clear path forward for implementation. It recommends that the Board trust the IFC/MIGA and CAO to draft proposals for implementation of their respective sets of recommendations and provide guidance when warranted.¹⁵ The report further recommends that CAO be tasked with taking the lead on developing a draft of the Framework Policy, with guidance from the Board and in consultation with IFC, MIGA, World Bank General Counsel, and external stakeholders.¹⁶ We concur with this proposed implementation strategy; it is an improvement upon the implementation process for the Inspection Panel's toolkit reforms, which took years, involved contentious negotiations, and presented the Board with the unenviable task of arbitrating between bank management and the Inspection Panel. However, we understand that a working group has already formed. While a working group could assist in the planning process, forcing the parties to agree on how to implement every one of the report's recommendations risks the success of implementation from the start.

Therefore, consistent with the report's recommendations on implementation, we recommend the following:

- For recommendations that require IFC/MIGA to implement changes, the Board should request that IFC/MIGA Management publish work plans stating how they propose to implement;
- For recommendations that require CAO to implement changes, the Board should request that the CAO publish a work plan on preparing a draft of the Accountability Framework Policy and updated Operational Guidelines; and
- For recommendations that require Board involvement, such as changing CAO reporting and establishing a new Board Committee, the Board should continue to exercise oversight and should require submissions for its review. We recommend that the Board

accountability mechanism, rather than one intended to create legal duties (or to be the arbiter of breaches of such duties). Accordingly we have focused on ways to strengthen the accountability mechanism (and IFC's performance)."), 143 ("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.") 152 ("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.").

¹⁵ See *i.e.* Report paras. 66, 181 for CAO. See *i.e.* Report paras. 220, 234, 249, 289, 323, 339 for IFC/MIGA.

¹⁶ Report, para. 182.

prioritize taking a decision on governance for the CAO. When taking this decision, the Board should preserve the CAO's authority to pursue a compliance investigation per its existing procedures and without Board approval. The Board should defer to the CAO's expertise and champion its independence. Further, we recommend that the Board agree upon a high-level framework policy regarding report implementation before making decisions on details.

We also agree with the report's recommendation that "a public stakeholder consultation process would need to be conducted on draft documents."¹⁷ While the members of the Reference Group were able to share their perspectives on IFC/MIGA's E&S accountability, they were not consulted on the draft recommendations. And the broader public has not had any opportunity to provide input. For any and all implementation plans, we expect that draft proposals will be published, no matter what type of document they are (resolution, work plan, operating procedures, etc.). Draft documents should be published with adequate time for comment.

Thank you for the opportunity to comment. We look forward to engaging with the implementation of recommendations.

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1. Abibiman Foundation (Ghana)
 2. AbibiNsroma Foundation (ANF) (Ghana)
 3. Abna alnaziehn (Iraq)
 4. Accountability Counsel (USA)
 5. Action Paysanne contre la Faim (Democratic Republic of the Congo)
 6. Alliance for Empowering Rural Communities (AERC-Ghana) (Ghana)
 7. Arab Watch Coalition (USA)
 8. Association Tunisienne de Droit du Développement (Tunisia)
 9. Association Tunisienne de Gouvernance Locale (ATGL) (Tunisia)
 10. Bank Information Center (USA)
 11. Building and Wood Workers International (Philippines)
 12. CEE Bankwatch Network (CEE Region)
 13. Center for Development Programs in the Cordillera (Philippines)
 14. Center for International Environmental Law (CIEL) (International)
 15. Centre de Développement de la Région de Tensift (Marrakesh) (Morocco)
 16. Centre for Research on Multinational Corporations (SOMO) (Netherlands)
 17. Conseil Régional des Organisations Non Gouvernementales de Développement (Democratic Republic of the Congo)
 18. David Hunter, Peregrine Environmental Consulting (USA)
 19. Espace de Solidarité et de Coopération de l'Oriental (Morocco)
 20. Fondation pour le Développement au Sahel (FDS) (Mali)

¹⁷ See *i.e.*, Report para. 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. 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.").

21. Global Responsibility (Austria)
22. Green Advocates International (Liberia)
23. Human Rights Watch (International)
24. Inclusive Development International (USA)
25. Interamerican Association for Environmental Defense (AIDA) (Mexico)
26. International Accountability Project (Global)
27. Jamaa Resource Initiatives (Kenya)
28. LawAge Consults & Advocates (Tanzania)
29. Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) (Nepal)
30. Mazingira Network - Tanzania (MANET) (Tanzania)
31. National Federation of Indigenous Nationalities (NAFIN) (Nepal)
32. Observatoire d'Etudes et d'Appui à la Responsabilité Sociale (Democratic Republic of the Congo)
33. Oxfam (Global)
34. People's Coalition for The Right to Water (KRuHA) (Indonesia)
35. Press Freedom Advocacy Association (PFAA) (Iraq)
36. Phenix Center (Jordan)
37. Recourse (Netherlands)
38. Resonate! Yemen (Yemen)
39. Sustainable Holistic Development Foundation (SUHODE) (Tanzania)
40. Urgewald e.V. (Germany)
41. Wedyan Association For Society Development (Yemen)
42. William Nicholas Gomes (United Kingdom)
43. Witness Radio – Uganda (Uganda)
44. Yemeni Observatory for Human Rights (YOHR) (Yemen)