



## **Comments from India, Myanmar and Philippines on the Report and Recommendations from the External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness**

12 September 2020

We welcome the opportunity to comment on the report of the external review team. At the outset, the recommendations reinforce our long-running calls to address the accountability deficits in the World Bank's private sector investment system. We wish to reiterate and bolster the key recommendations around: 1) remedy fund, 2) shift in CAO's reporting structure, 3) IFC/MIGA's early engagement with the community and in the dispute resolution, 4) litigation, 5) eligibility, and 6) the process to implement recommendations.

Our experience in supporting the struggles of project-affected communities in India, Myanmar, Philippines and the rest of Asia who demand real accountability informed our comments. Despite our good-faith engagement with the IFC/MIGA through their sustainability framework and the CAO through its dispute resolution and compliance functions, delivering justice remains more of an exception than the rule.

First, no matter how well intended, the IFC/MIGA lost track of communities in the design and implementation of projects. By undue attention to pushing the lending envelope to clients, they paid little regard to meaningful community consultations, which prevents them from achieving the expected development results. Second, the current accountability framework is reactive. It is triggered only when formal complaints are filed. The community complaints we have supported show how the reactive framework pits two critical institutions (the Management and the CAO) in a warring position. This culture should change. The IFC/MIGA should be proactive by initiating problem-solving functions before and during the early stage of project implementation.

Following the external review report, it is important not to lose time to make major corrections and improvements in the accountability of the Bank's business financing, advisory and asset management services. Peer institutions and other international banks have moved forward in upgrading their accountability systems and implementation. The substantive comments in this paper bolster the recommendations the IFC/MIGA and CAO must implement.

### **1. Litigation**

The review team rightfully dismissed the myth that CAO's compliance function created the risk of litigation. By citing the Jam versus IFC case that challenged the institution's immunity at the US court, we note that while this case provided additional impetus for the accountability review, the IFC/MIGA must recognize that this litigation came as an offshoot of avoided accountability and failure of IFC to comply with its own E&S performance standards. The institution failed to provide

just resolution to the community grievances which were recognized by the CAO in its audit report.<sup>1</sup> It was a legal and necessary recourse when the institution repeatedly failed to deliver remedy and address significant grievances.

We take issue with the recommendation on the framing of recent litigation (page 20) that *CAO's Compliance function should continue to fulfil its mandate to identify IFC/MIGA non-compliance, while being attentive in its use of language to the possibility that non-compliance findings and assertions of factual conclusions could be used for collateral purposes (including to support litigation against IFC/MIGA), and exercise restraint accordingly.*

The Board must recall that the Jam fisherfolk complaint was filed at the CAO in 2011 and findings of significant policy violations were published in 2013. The IFC management repeatedly rebutted CAO and went out of the way to defend its erring client, CGPL and its parent company. It is now 2020 where monitoring after monitoring, CAO repeatedly documented IFC's failure to deliver a meaningful action plan. It was not the collateral purpose of the CAO that its findings will be used to litigate against IFC. Communities had no choice but to resort to any legal process to seek justice. Litigation is not the intent but an offshoot of inaction and injustice.<sup>2</sup>

By extension, CAO's compliance function should be to protect IFC/MIGA from litigation. The role of the CAO is to provide compliance findings and where necessary, state failures to meet the objectives and comply with the rules based on solid and verified facts. This should never be compromised. IFC must regard CAO findings as substantiated calls to rectify the design and implementation problems and deliver better based on performance standards. Compromising on the language for the risk of litigating will undermine the process of compliance, the integrity and independence of CAO.

## **2. Shift in CAO reporting**

We support the recommendation that changes the governing structure of the CAO. That the CAO should report to the Board, not to the President, is long overdue. It is the step in the right direction.<sup>3</sup>

This new reporting structure is crucial because it gives the Board a formal opportunity to weigh in on the quality of management response. The Review Team recommends requiring a detailed Management Action Plan (MAP), not just a short Management Response. The Board must have a MAP to review and approve as it is the bedrock of CAO's regular and periodic monitoring.

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<sup>1</sup> See the Tata CGPL case profile at [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=171](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=171)

<sup>2</sup> In 2011 a complaint was filed by fishworkers of Mundra, India to CAO regarding the adverse E&S impacts of the Tata Mundra Project. After the complaint, an audit was done which reinforced the serious environmental and social harms of the project. CAO audit report clearly stated the failures in IFC assessment and compliance of E&S standards. The IFC management response was rebutting all CAO findings and going out of the way to defend its client, CGPL and its parent company, Tata Power. The action plan devised by IFC did not reflect the seriousness of the CAO audit report and was limited to a band aid solution. The action plan merely commissioned studies on marine impact, ambient air quality, health status and need survey, household level socio-economic survey of 21 villages/hamlets including seasonal settlements in CGPL's influence area and undertaking the environment and social impact assessment for the expansion project. Today, nine years after the initiation of the complaint and seven years since the CAO compliance report, no proper action plan has been implemented.

<sup>3</sup> The Board's role should not be a daily supervision of CAO's handling of cases but ensuring that case outcomes are aligned with the objectives of the Sustainability Policy and the development mandate of the IFC/MIGA. The latter should include fostering a constructive feedback loop between the IFC/MIGA and CAO in order to design and implement MAP supported by communities.

We have long pushed for this new reporting line since the Jam case went to compliance in 2012. If only the Board at that time had the formal opportunity to weigh in, this would have prevented the complainants to seek redress outside the Bank's accountability mechanism. There was no opportunity for both the Board and the complainants to give feedback on the remedial measure. It was lackluster to begin with, which was why the community rejected the plan.

That a Sustainability Committee (separate from CODE or COGAM) will be created to oversee CAO's functions (advisory, dispute resolution, and compliance) needs no debate. It is critical in ensuring project sustainability that does not compromise the rights and security of communities. This also avoids conflict of interest and avoidance of accountability by the management. Under the existing structure, the CAO VP reports to the President, who is the gatekeeper for the management.

Under the new reporting structure, the management will be required to act on the compliance findings by stating its specific responses via Management Action Plan (MAP). The new structure ties in with the requirement to produce MAP and to adopt a remedy implementing framework (discussed in the next section). MAP can no longer escape the Board when the CAO monitoring detects significant inactions.

To have a meaningful and good faith implementation, the MAP must:

- be co-created and have obtained buy-in from the complainants to ensure proportionality and adequacy of remedial measures;
- not be a unilateral plan produced by the client;
- even not intended to stop the project or suspend the lending agreement, state as expected results the concrete changes and goals (livelihood restoration, environmental rehabilitation or protection; adequate compensation and resettlement measures) defined by the community;
- secure a full commitment of the management and the client to conduct fruitful dialogue with communities;
- be adequately funded; and
- have clear metrics for monitoring and verification.

Where CAO finds significant inaction in the MAP, the management must explain to the Board how it will address the inaction. Repeated failures to enforce the MAP should lead to demotion and other disciplinary measures.

We note some caveats here. The new reporting structure should safeguard the independence of CAO in exercising its case-handling decision. For example, the decision to move the case to compliance investigation and monitor the implementation of the action plan should rest with the CAO, not with the Board. These should be reconfirmed in the updated operational guidelines. The change in structure must protect, not undermine, CAO's current mandates.

### **3. Remedy fund**

We support the recommendation to the IFC/MIGA to adopt a remedy framework and for making a case for embedding resource allocation for E&S and remedy in the lending contract. For us, a remedy fund should be mandatory, not optional, in cases of significant losses for affected communities.

The institution should not view remedy funds as overly ambitious, too expensive, impractical or non-cost beneficial. Contrary to the argument that they add new burdens to the investment, that it could mean a loss of business, we believe this is unfounded.

This might be a big change, but peer institutions have been moving into this direction. It can be done. There are emerging practices among the DFIs and the private sector lending banks that allocate readiness funds or resources for remedy. The Asian Development Bank and its accountability body, CRP, have allocated a TA fund to cover the comprehensive air dispersion modeling study linked with its financing of a coal power plant project in the Philippines.<sup>4</sup> Dutch banks, ANZ, and other asset managers have innovated to fund their remedial measures. They have increasingly integrated a 'liability fund' in their business model for it makes the E&S standards meaningful.

IFC/MIGA should not be left behind by its peers that are moving towards this direction. The institution and its clients are not foreign to remedy funds that come in various modalities. This can include a redirection or reallocation of some budget that forecasts the need for a remedy fund based on the level of risks that E&S management plans indicate.

Again, it can be done. An unfunded MAP is incomplete and will not deliver justice. Remedy costs money. But it would cost the institution and clients more risks (financial, operational, reputational) if IFC/MIGA won't fully account for this.

#### **4. IFC engagement with communities early in the project and during dispute resolution**

We agree with the recommendation that IFC/MIGA should strengthen capacities, systems and organizational mindsets to address concerns from affected people.<sup>5</sup> We also agree with the review team's recommendation that regardless of the mechanisms used, IFC/MIGA need a more active response culture and greater willingness to engage with clients and complainants.<sup>6</sup>

This is a restatement of our calls for many years. Now is the time to codify and translate these recommendations into the accountability policy and CAO's operating guidelines. Our observations on the community-led complaints we supported suggest the following:

First, IFC's deferral to clients to address community concerns early is woefully inadequate. Clients often rely on their consultants whose lack of familiarity with the political economy, community dynamics and local power relations often pose many risks, including failing to consult widely and meaningfully, and failing to address substantive concerns early in the project development. If IFC is involved in project preparation that includes direct communication with the project-affected population, IFC can spot defects that consultants and clients tend to ignore and can use its leverage to get clients to implement applicable performance standards. The first community complaint against IFC's project in Myanmar, an agro-chemical industrial complex, is a testament to this problem.<sup>7</sup> Further, the early engagement of the IFC investment team is much needed in a low governance environment, and in fragile and conflict affected states like Myanmar.

Second, the IFC should be involved during the dispute resolution. Their absence from the process causes delay in getting low-hanging fruits like disclosing relevant environmental and social and other contractual documents. Clients often use contract confidentiality as a cover. IFC's presence

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<sup>4</sup> Details of the TA fund are found in the second annual monitoring report by the Compliance Review Panel: [http://www.compliance.adb.org/dir0035p.nsf/attachments/FINAL-CRP2ndMonitoringRpt-Visayas%20Project\\_1Aug14\(with%20disclosure\).pdf/\\$FILE/FINAL-CRP2ndMonitoringRpt-Visayas%20Project\\_1Aug14\(with%20disclosure\).pdf](http://www.compliance.adb.org/dir0035p.nsf/attachments/FINAL-CRP2ndMonitoringRpt-Visayas%20Project_1Aug14(with%20disclosure).pdf/$FILE/FINAL-CRP2ndMonitoringRpt-Visayas%20Project_1Aug14(with%20disclosure).pdf)

<sup>5</sup> See page xi of the External Review Report

<sup>6</sup> See page xiii of the External Review Report

<sup>7</sup> See details of the Myanmar project complaint here: [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=1267](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=1267)

in the DR process can put pressure on clients to engage in good faith, as seen in the cases in Cambodia (Sihanoukville airport expansion project)<sup>8</sup> and Mongolia (Oyo Tolgoi copper mine).<sup>9</sup>

Third, the basic parameters for an effective DR process should have communities in the driver's seat. In most of the cases where communities file a case with the CAO, communities are in a disadvantageous position of being negatively impacted by the project and in most cases with little agency to ensure security of their rights. The process should provide them genuine, safe and equal opportunity to have a fair resolution process.

To ensure this, it is essential to recognize the role of CSOs (who support the complainants and with the knowledge of the IFC client) in the advisory capacity, but not to represent the community. They can be part of the facilitated dialogue and be in the room to provide real time advice to complainants but have no deciding power. It is important for the IFC and its clients that by recognizing CSOs' role in an advisory capacity, it will definitely help move the DR process towards providing a level playing field for both the parties.

Fourth, it is also essential for the CAO to be cautious in hiring external consultants. There are several cases where these consultants are seen to lack sensitivity to political dynamics and nuances of unequal power relations. Their work background and technical expertise should match the unique condition and needs of the case. This becomes even more critical in conflict areas and in complex societies with fragmented and hierarchical social structures.

Fifth, Recommendation 8, which suggests efforts to seek early resolution of CAO complaints, needs to be strengthened. This includes IFC working with the client to support its response, including client action to meet PS requirements and remedy harm. If unsatisfied, there is no reason to take the deferral option before moving to compliance.

Meanwhile, we do not agree with Recommendation 9, which contradicts Recommendation 8. It states, "At present, the full text of the complaint is disclosed on the CAO website at the time a complaint is declared eligible. IFC/MIGA and clients have raised concerns that such early disclosure can create reputational and litigation risks for the client".

The recommendation that the CAO should disclose "only a brief summary of the complaint at the time it was registered", and that "CAO should delay publishing the complaint until the compliance stage to protect clients" is hugely problematic. It is a downgrade, not an upgrade. It does not make the IFC/CAO accountability framework at par with peer institutions. The reality is that CAO publishes no more than a paragraph of the complaint summary. The rest of the published information are public knowledge, ie. about the project loan and CAO action.

The CAO assessment and dispute resolution conclusion reports are fair as they cite the responses by IFC and client – and this does not influence the compliance process. The notion of 'protecting the client' is misguided. Keeping the current disclosure practice about the complaint is in the best interest of all parties involved. The only time the client blows up its chances of 'protection' is when it does not act on its commitment to correct or enact remedial measures during the dispute resolution. Also, disclosed at CAO website or not, complainants will always have other ways to publish their complaints. Overall, it will not help the IFC/MIGA to do a culture shift if it keeps

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<sup>8</sup> See details of the concluded Cambodian airport project complaint here: [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=155](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=155)

<sup>9</sup> See details of the Mongolia OT gold and copper mine project case here: [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=191](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=191)

protecting clients that do not act accordingly on rules and remedies mutually agreed upon with the complainants.

## **5. Eligibility**

The recommendation that “CAO should change the eligibility criteria so that complaints are not eligible until investments are approved by the Board” is problematic. This deprives the affected community the opportunity to reach out to the CAO for accountability measures. Our experience with several cases in India, Myanmar and other projects in Asia suggest that the filing of complaints or the threat of filing one did not prevent the IFC or the client from proceeding with their investment contracts and their corresponding obligations. The project still went on. Once a problematic project, specially Category A investments with significant environmental and social concerns, gets an approval from the Board, the community will have lost critical time to push major corrective measures. As such, the affected communities must retain their right to file a complaint even when the project is in the pipeline.

## **6. Comments on the process to implement the recommendations**

In principle, the IFC/MIGA should change its culture of accountability mechanism. It is not just an additional layer of investment that makes it easier for companies to operate and have a smooth run, but also an essential part of project sustainability. Investments that deliver justice to the vulnerable populations and their sources of livelihood is integral to delivering real development impacts. Finally, CAO’s role is critical for accountability and sustainability. But its operational functions must be protected, not undermined, by the development of an accountability policy and revision of operational guidelines.

Now is the time to implement the recommendations. We urge the Board to:

- Request that IFC/MIGA Management publish work plans stating how they propose to implement the recommendations;
- Request that CAO publish a work plan on preparing a draft of the Accountability Framework Policy and updated Operational Guidelines.
- Establish a new Committee, the Sustainability Committee, to exercise oversight of CAO while protecting the CAO’s authority to pursue a compliance investigation per its existing procedures without Board approval; and
- Require a Management Action Plan (MAP) with adequately funded remedial measures after findings of IFC’s non-compliance.

We look forward to engaging further with the implementation of recommendations.

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