## COMMENTS SUBMITTED
### CAO OPERATIONAL GUIDELINES CONSULTATION 2012

**Legend for Organization/Individual**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Organization/Signatories</th>
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<tbody>
<tr>
<td>AC+</td>
<td>Accountability Council and Friends - This document was submitted by Accountability Council with signatures on behalf of the following organizations: Accountability Counsel, USA; International Rivers, USA; Both Ends, The Netherlands; Jamaa Resource Initiatives, Kenya; Crude Accountability, USA; Nadi Ghati Morcha, India; Environics Trust, India; The Norwegian Forum for Environment and Development, Norway; Friends of the Earth, USA; Participatory Research &amp; Action Network, Bangladesh; Humanitywatch, Bangladesh; River Basin Friends, India; Inclusive Development International, US); Water Initiatives Odisha, India</td>
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<td>CIEL</td>
<td>Centre for International Environmental Law</td>
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<td>IFC</td>
<td>International Finance Corporation</td>
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<td>IC</td>
<td>Individual Comment – For the purposes of confidentiality, where comments were submitted by individuals CAO will not disclose their names but will include it under this heading</td>
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<td>MIGA</td>
<td>Multilateral Investment Guarantee Agency</td>
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<td>UM</td>
<td>University of Melbourne – These comments addressed the CAO’s 2007 Operational Guidelines and did not comment on the 2012 draft. Only the comments that were considered relevant to the 2012 revised version were included here.</td>
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<td>UNHR</td>
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Overview of the CAO

1.1 The CAO's Mandate, Terms of Reference and Operational Guidelines

1. Our [...] recommendation relates to the CAO's reviews of IFC’s Advisory Services, and more generally on broader strategic issues. We are concerned that the draft revised Guidelines as proposed may result in lack of clarity in how the CAO deals with IFC’s Advisory Services, and lead to potential inconsistencies with how IFC’s role is set out in this regard in the updated Policy on Environmental and Social Sustainability. We therefore recommend that the CAO’s mandate be specified as covering IFC’s investment operations and relevant Advisory Services, i.e. where IFC has, or should have, identified environmental or social risks and issues associated with the advisory services being provided. – IFC

2. The overlap between the jurisdiction of the CAO and other standards organisations (for example the Roundtable on Sustainable Palm Oil) can be quite significant. They may have complementary or competing requirements, approaches and capacities in relation to handling complaints. These other organisations may or may not be formally engaged by complainants at the same time as the CAO Office is engaged. The extent to which the CAO will cooperate with other standards organisations is unclear in the current Guidelines. – MU, 6

3. In many cases other financial bodies support the same projects as the IFC/MIGA, and these bodies may also have accountability mechanisms. Whether or not complainants actively engage these accountability bodies, they clearly have a stake in the resolution of problems, especially if they also require adherence to IFC Performance Standards, which many do. As with other social and environmental standards organisations, the overlapping jurisdiction of these bodies raises questions about cooperation. The extent to which the CAO will cooperate with other IAMs is also unclear in the current Guidelines. - MU, 6

4. The CAO mandate is to address complaints from people affected by IFC/MIGA projects in a "manner that is fair, objective, and constructive" (section 1.1 of the draft Operational Guidelines). The use of the term "constructive" does not appear elsewhere in the draft Operational Guidelines. For example, in section 3.1 of the draft Operational Guidelines there is emphasis is on the CAO's role to ensure "equitable treatment of participants in a dispute resolution process". I suggest that the term "constructive" be replaced by a more appropriate term such as "equitable" as "constructive" is a relative term and can be viewed differently by the various participants in the dispute resolution process. Section 1.2 of the draft Operational Guidelines also makes reference to the "equitable" mechanism which will provide a predictable process. – IC

5. Explain how the grievance process and outcomes are rights-compatible. The social expectation that States, State-owned enterprises and the private sector identify, prevent, mitigate and redress human rights impacts is rapidly spreading, especially after the unanimous endorsement of the UNGPs by the UN Human Rights Council in 2011. The CAO Operational Guidelines omit the use of the term human rights and refers instead to social impacts. Notwithstanding such omission, the IFCMIGA recognises the importance of identifying potential impacts on the rights of peoples, including vulnerable populations and Indigenous Peoples. The UN Working Group on Business and Human Rights encourages CAO to share its lessons learned with regards to the operationalization of the UNGP’s effectiveness criteria more broadly with the wider global system of remedy encompassing business operational-level grievance mechanisms, rights-compatible assurance and auditing
processes set up by multi-stakeholder and industry initiatives, accountability systems of public finance institutions, transnational nonjudicial mechanisms such as the network of National Contact Points by the Organisation for Economic Cooperation and development, as well as other state and non-State non-judicial bodies active in remediation. The UN Working Group also invites CAO to engage collaboratively with the Working Group and other stakeholders in understanding further the factors that make effective remedy outcomes legitimate and sustainable. – UN, 2

1.2. CAO’s Three Roles

6. The reference to the "discretion" maintained by the CAO President can be explained to provide clarity on what this discretion means and how it is maintained. – IC

1.3 Independence and Impartiality

7. It is an improvement to the independence of the CAO Vice President role that he/she now “is restricted for life from obtaining employment with the World Bank Group.” However, we recommend that the CAO additionally adopt the Internal Review recommendation that the CAO VP “be chosen from outside the World Bank Group.” This restriction on World Bank employment both prior to and following the CAO VP post would help protect against conflicts of interest […] The Internal Review noted that although the CAO’s Terms of Reference (“TOR”) state that the “Ombudsman will be appointed by the President,” the appointment process for the CAO VP in 2000 was quite participatory, involving a search committee with civil society representation. This approach, rather than a private appointment by the President, increases the CAO’s legitimacy and transparency. We agree with the Internal Review recommendation calling for the codification of this appointment process, so that it is not “open to interpretation when the recruitment of a new CAO VP takes place.” We are pleased that the Draft includes language which indicates that the appointment will be done in a participatory manner. To further improve this process, we recommend that the CAO consult with civil society regarding who should be on the selection committee. – AC+, 4

8. It is suggested that the provision on conflict of interest resulting in withdrawal of a CAO staff or consultant from involvement in that particular case be clarified by indicating (i) who determines the conflict of interest, (ii) how and when the conflict of interest is reported, and (iii) the resulting outcome from the determination of the conflict of interest. The present provision in section 1.2 of the draft Operational Guidelines on conflict of interest does not provide adequate guidance and it would be useful to indicate the provisions in the Operational Guidelines for clarity purposes. –IC

1.4 Confidentiality and Information Disclosure

9. In our experience, the CAO has been transparent in its handling of cases, specifically, and in its work, more generally. We do not believe Section 1.4 of the Draft conveys that. We would recommend starting that section with the last paragraph, committing to make every effort at maximum disclosure and then continue by describing when it will make exceptions to that approach. There are also a few places in the Draft where CAO’s information disclosure could be improved further. First, we believe publishing the Management Action Tracking Record is important in order to hold the IFC accountable for those findings and recommendations that it has yet to address. – CIEL, 5
10. The MATR report annually records actions taken by IFC/MIGA in response to the CAO's recommendations and findings and this report is provided by CAO to the World Bank Group Board's Committee on Development Effectiveness. To maximize CAO's objective as an "independent, transparent, credible, ... and equitable mechanism" (in section 1.1 of the draft Operational Guidelines), it is suggested that consideration be given to publishing the MATR report on the CAO website. – IC

11. Complainants under threat of retribution for accessing the CAO should be able to keep their identities anonymous when filing a complaint through a representative. The Draft currently states that an organization must "clearly identify the people on whose behalf the complaint is made." This requirement may further threaten vulnerable communities, and bar access to CAO services for complainants who are too intimidated to include their names on the complaint… [CAO] should accept complaints in a wider variety of forms. Currently, "complaints should be submitted in writing." The CAO should allow oral complaints from communities that are illiterate, unable to secure trained representation, and/or more effectively able to describe their concerns verbally. This will further increase the accessibility of CAO's services to project-affected communities who would otherwise have difficulty making their voices heard. – AC+, 5

12. The current [2007] Guidelines suggest that confidentiality can be protected for complainants, however there is a clear limit to this with the ombudsman’s problem solving approach. We are concerned about the potential implications for complainants who may not feel safe publicly identifying themselves, fearing retaliation from the company, hired ‘goons’, local authorities, or other community members who do not share their views. We encourage the CAO to take this concern seriously in the review of the guidelines, and critically assess the safeguards currently in place for such circumstances, and possible enhancements for such safeguards. – UM, 4

13. I think one really needs to question the viability of any position that mandates a total blackout on the release of any information pertaining to a dispute resolution process […] A statement on the elements for each of these three steps - 1. Diffusing the potential for harm; 2. Opening lines of communication; and 3. Assessment of facts of a complaint - should be the basis for initial reporting from the CAO in conflict situations. – IC

14. [I] observed a 'disturbing pattern', that CAO reports on sensitive issues such as the Palm-Oil sector are often released to the public in the vacation summer month of August, when many influential parties who would otherwise respond to the report, might be on vacation […] In terms of transparency, one change that I would like to see, is that CAO reports be dated on the date of their release to the public, not on the date that they are forwarded to IFC for review. That way when they are released, they will still be considered news by media outlets. Consequently they would receive greater exposure to, and attention from, the general public and civil society. – IC

15. Section 1.4 states that "Any information disclosure will respect confidentiality requests from a party." This sentence is unclear and revision is suggested for clarity.- IC
Complaints Process

16. Given the pro-active stance in awareness on communications and outreach taken by the CAO Office in section 6 of the draft Operational Guidelines, the reference to "The CAO will attempt to respond in the language of the complaint." in section 2.1.3 of the draft Operational Guidelines is modest and can be strengthened to reflect this pro-active stance. – NS, 2

17. [The UN feels the new version of the Operational Guidelines should] Explicitly identify how the complaints process will inform the policies, standard and practices of "sponsors" when the actions of such "sponsors" have caused or contributed to adverse impacts, and how the monitoring of recommendations will be implemented. When an adverse impact has occurred and gaps or problems in a business’s policies, standards, management systems or common practices are identified as the enabling factor or an underlying cause of the problem or the impact, effective remedy should strive towards reforming such policies, standards, management systems or practices. Preventing future impacts and harms is at the heart of the UNGPs and human rights due diligence. Prevention (striving for non-repetition of the harm) should always be a key component of effective remedy, and CAO should use its leverage to engage with sponsors constructively on that end. This is in line with CAO’s own view of its role. CAO has in the past, in the 2007 version of the Operational Guidelines, recognized that “it can call upon the leverage of the IFC and MIGA in urging parties to adopt recommendations” (p. 7) even if it cannot force external entities to change. The UNGPs also set the expectation that States and non-State actors will use any leverage they might have to ensure that impacts are addressed, and the Interpretive Guide of the UNGPs, issued by the Office of the High Commissioner for Human Rights in November 2012 and welcomed by the UN Working Group on Business and Human Rights, recognizes the relevance of leverage. The Interpretative Guide provides further comment on how such leverage can be exercised to effect change, for example through the terms of contract of a business partnership, the ability to incentivize the business partner, and the ability to engage local and central governments with regards to regulations, monitoring and sanctions. All these are means of influence that IFC-MIGA has and can use with flexibility and discretion. –UN, 2

Representation

18. We agree with the values that the CAO articulates in the new section, “Principles of and Approach to Dispute Resolution.” It is indeed important that the CAO have direct access to project-affected communities, that the communities communicate with the project sponsor, and that dispute resolution be a “nonjudicial, nonadversarial, neutral forum.” We are concerned, however, that this new language may be used to limit the ability of communities to choose to work with representatives, when in fact, representation is not inconsistent with these values. Explicit language affirming complainants’ ability to work with chosen representatives would be a welcome improvement to this section. We also note with concern that the Draft consistently avoids the use of the word “representative,” though this term is found in the 2007 Operational Guidelines. Currently, a “representative” can lodge a complaint on behalf of a complainant, as long as there is “evidence of authority to represent” the complainant. This has been replaced with language indicating that “a complaint can be lodged by a different organization on behalf of those affected” as long as there is “evidence of authority to present the complaint on their behalf.” The section on “What to include in a complaint” has been similarly changed. Although the July Consultation clarified that the CAO does not anticipate a change in its current operations as a result of these language modifications, we believe the language change is a move in the wrong direction. The term
“representative” can imply a role that goes beyond submitting a complaint and could include various levels of participation in the dispute resolution and compliance processes, which should be decided by the complainants. Deleting mention of representatives fails to affirm the right of communities to choose to receive assistance through representation. Narrowing the participants in Dispute Resolution from “stakeholders” to “parties” likewise seems to indicate intent to exclude representatives and other players who could facilitate an effective dialogue. For example, in the current Guidelines, “the CAO Ombudsman may encourage the complainant, the sponsor, and other stakeholders to engage directly in dialogue and negotiation.” In the Draft, “the CAO Dispute Resolution team may encourage the parties to engage directly in dialogue and negotiation.” We recommend that the Draft retain the previous inclusive posture, allowing stakeholders selected by the complainant to contribute toward resolution of complaints. We note that, unlike most of the changes in the Draft, these modifications affecting representation do not appear to be responsive to any findings or recommendations from the Internal Review. – AC+, 7

19. The issue of NGO, Civil Society Organisation (CSO) or Community Based Organisation (CBO) representation of complainants is a contentious one for many IAMs. We commend the CAO’s current efforts to seek proof that any international organisations claiming to represent complainants have authority to represent a community before proceeding. However, rather than presume that the best path for complainants is to always ‘speak for themselves’, we encourage the CAO to keep an open mind regarding the risks and benefits associated with representation as opposed to direct negotiation. - UM

20. We are pleased to see that a current requirement stating that “[i]f prospective complainants are from outside the country where the project is located, complaints should be lodged jointly with a local entity” has been removed. Assuming that complainants may still file complaints about a project in another country, this is an improvement, and we hope that this will be made clear in the Draft. Communities affected by projects in neighboring countries should be permitted to file a complaint on their own behalf, or through a representative of their choosing. A requirement that they locate a local organization is an unnecessary barrier to accessing CAO services. – AC+, 8

**Eligibility**

21. We recommend that the CAO adopt greater flexibility in accepting complaints regarding projects that were previously, but are not currently, funded by IFC/MIGA. The Draft states that a complaint is only eligible if it “pertains to a project that IFC/MIGA is participating in, or is actively considering.” This is problematic because some project impacts are delayed, and communities may suffer harm that originated in a project during IFC/MIGA involvement, but which they did not experience until after divestment. This eligibility criterion may create a barrier to Dispute Resolution or Compliance Review, because the CAO may terminate the process if IFC/MIGA ends its financial involvement before a complaint is filed or even midway through the process. Of particular concern are cases that do not proceed to a full investigation because IFC/MIGA ended its relationship with the project sponsor before an investigation could take place [...] CAO should consider complaints to be eligible if they are regarding projects that IFC/MIGA financed up to two years prior. We note that the Asian Development Bank recently adopted such a procedure, and we encourage the CAO to follow suit. At the very least, an appraisal should consider for investigation all cases that were eligible at the time the complaint was filed, even if IFC/MIGA subsequently terminated its involvement before Compliance Review began. - AC+, 2
22. In cases where severe or irreversible future harm is alleged by complainants, the CAO should have the power to investigate and recommend preventative action. Through its various functions, the CAO is meant not only to address past harms, but also future ones, whether it is through a mediated agreement to prevent further harm from a project, a compliance investigation that addresses IFC/MIGA failures in preventing harm, or an advisory memorandum advising IFC/MIGA on how to improve future activities. In order to enhance the CAO’s leverage, the office should be explicitly empowered to make recommendations to the President and Board that include consequences, such as suspending a project, blacklisting a company, retracting a loan in cases of egregious violations, or suspending lending to a certain sector. – AC+, 4

23. We urge the CAO to maintain transparency in its determination of eligibility. It is troubling that the section in the current Guidelines entitled “Initial response and notification,” detailing the steps the CAO will follow after eligibility screening, has been struck from Draft. While it is generally an improvement that disclosure procedures have been “captured in one section rather than throughout the entire document,” in this step of the process, disclosure has been weakened, or its specifications made less clear. For instance, currently, if a complaint is eligible for assessment, the CAO notifies complainants “immediately” and posts on its website “an announcement of complaints that meet the criteria.” If the complaint is rejected, complainants receive written notice including the rationale for the decision. In the Draft, however, the most similar provisions merely state that “[o]nce the CAO has deemed a complaint to be eligible, other affected stakeholders . . . typically will be notified about the complaint.” The Draft does not indicate how quickly the CAO will notify complainants about whether their complaint is eligible, whether the CAO will provide its reasons for rejecting a complaint, or whether it will post announcements regarding eligible complaints online. In order to strengthen the transparency and predictability of its processes, we recommend that the CAO retain its policy of notifying complainants immediately upon completing an eligibility assessment, including providing its reasoning for denying a complaint, and additionally provide its reasoning for deeming a complaint eligible. We also urge the CAO to post each complaint received on its website, along with each eligibility determination and the rationale behind the determination. – AC+, 6

24. Complainants should have the opportunity to amend their complaints. This will improve the overall effectiveness of the mechanism, since there are a number of reasons that an initial complaint which warrants a response may nonetheless be ineligible for assessment or lacking key information. Initial requests for CAO services are frequently not comprehensive because complainants are unfamiliar with the process and what information the CAO requires. Furthermore, new violations and additional information may arise that were impossible to predict when the complaint was filed. The Draft is currently silent on the ability or inability of complainants to amend their complaints. In order for the CAO to thoroughly understand complainants’ concerns and avoid denying valid complaints or overlooking important new issues that arise after filing, we recommend that the Draft include a provision allowing for amendment of complaints. – AC+, 6

Assessment

25. Although we appreciate that [the] new Assessment phase represents a significant reorientation within the CAO, the shift would be more visible to external stakeholders if the assessment were to be performed by a dedicated staff person rather than a dispute
resolution specialist, who may subsequently facilitate a mediation between the parties. CIEL, 2

26. While we appreciate the effort to make the complaint assessment a neutral process, rather than a process housed within the Ombudsman Role, the Draft does not go far enough to achieve this end. The Draft specifies that “[t]he assessment of a complaint will be carried out by CAO dispute resolution experts,” which reflects the current status quo. At the July Consultation, the CAO reasoned that dispute resolution staff have the skill set to effectively map a conflict, and will “psychologically” put themselves in a neutral position during the process. It further explained that it is the complainant and project sponsor, not CAO staff, who decide which direction to go with the complaint. However, we are concerned that even well-meaning experts will tend to see an issue through the lens of their expertise. Dispute resolution staff may therefore disproportionately identify complaints as raising problem-solving issues and believe that the issues would not be as effectively addressed in Compliance Review. Furthermore, while the parties decide which role(s) of the CAO to initiate, it is the information collected and interpreted during assessment that forms the basis of Compliance appraisals and investigations. An assessment done by dispute resolution experts, who may be more likely to view a complaint as primarily a problem between a project sponsor and a community, may less effectively inform the Compliance process. This is especially problematic since the Compliance appraisal rarely involves any further consultation with communities. Therefore, we urge the CAO to hire staff who are dedicated exclusively to complaint assessment in order to foster neutral analysis and allow for free access to Compliance Review. - AC+, 5

27. […] the Assessment phase should be time delimited. The objectives of the Assessment phase are discrete and should be achieved well within the 120 days currently envisioned in the Draft. If the Assessment phase is, in fact, delineated from the dispute settlement phase, the two should have separate timeframes. We do not think that having a distinct deadline for the Assessment phase would cause any undue confusion or complication for complainants. We would suggest a 30 or 45 day deadline, which could be extended with the consent of the complainants. We also note that the last paragraph of Section 2.3, in which the CAO can unilaterally terminate the Dispute Settlement phase, seems to contradict the following section, Section 2.4, which leaves that decision to the parties – CIEL, 1

28. We are concerned about the deletion of the provision from the current Guidelines which states that “[w]hen planning a visit, the CAO Ombudsman will notify the IFC/MIGA, the sponsor, complainants, and other relevant stakeholders of its plans.” While we understand the usefulness of surprise visits to a project site, the complainants and their representatives should still receive notice of a CAO visit in order to adequately prepare for meetings with CAO representatives. – AC+, 6

29. Section 2.3 of the draft Operational Guidelines and step 3 in Section 2.4 of the draft Operational Guidelines identifies the various participants involved in the assessment of the complaint by the CAO. These parties include local communities and IFC sponsors but there is no reference to participants from MIGA activities or to IFC/MIGA staff. – IC

Timeline for Handling a Complaint

30. We recommend that greater flexibility be built into the system to allow claimants to determine not only the functions they wish to initiate, but also their order. Sequencing should
be determined on a case-by-case basis to enhance the effectiveness and accessibility of the Compliance function. This would allow for compliance review first when it is more urgently needed but both roles are requested, avoiding the delay caused by a prerequisite dispute resolution process. – AC+, 2

31. We recommend that the CAO allow for parallel Dispute Resolution and Compliance Review processes. While the Draft does not clearly foreclose this option, the CAO, made it clear during the July Consultation that the CAO is not considering parallel processes. In cases where Compliance Review is the most appropriate way to resolve the issue, these suggestions would allow Compliance Review to occur from the beginning or before the Dispute Resolution dialogue is concluded. – AC+, 2

32. […] This is not to say that efforts by the CAO's Ombudsman function to mitigate and encourage dispute resolution should in any way be abandoned, but rather that a separate CAO Compliance audit of IFC be initiated in tandem. - IC

33. The draft could be more explicit about the process of accessing both roles. For instance, the text of the Draft does not make it clear that a complainant can request both Dispute Resolution and Compliance. The text instead seems to indicate that complainants can select one role or the other, and that the assessment will determine which one of the roles was selected. AC+ – 2

34. […] language in the Draft seems to suggest that both parties (complainant and company) must agree on which CAO function to initiate. For example, during assessment the CAO determines which role the parties, rather than complainants, seek to initiate. After assessment, the CAO conducts Dispute Resolution, “[i]f the parties agree to seek joint resolution to the issues,” or Compliance “[i]f the parties seek a compliance route.” While it is important for both parties to agree to the Dispute Resolution process, since it is voluntary and impossible without the buy-in of both sides, this should not be the case for Compliance Review. During the July Consultation, the CAO provided clarification, and we understand that the client would not be able to prevent a complainant from accessing Compliance. We therefore recommend that the language in the draft be change to reflect that understanding. AC+, 2

35. We commend the CAO for striking the stipulation that it “may conclude and close a complaint if a satisfactory settlement has been reached” at the problem-solving stage. Similarly, the Draft removes the restriction that a complaint can be transferred from the Ombudsman role to Compliance only “where no resolution [is] possible.” These changes will lead to greater use of the Compliance Role for complaints that implicate compliance issues, but first go through Dispute Resolution. This change will enhance the legitimacy and effectiveness of the mechanism, avoiding the perception that the CAO is “cleaning up messes” through Dispute Resolution that would be better addressed by investigating IFC/MIGA’s compliance. – AC+, 8

Figure 1

36. […] if complainants are not given the choice of which function to use first, the Draft needs to be clarified on this point. In Figure 1 of the Draft, there is an arrow from Dispute Resolution monitoring to Compliance appraisal, but no arrow in the opposite direction. This seems to indicate that a case can go to Compliance after Dispute Resolution, but not from
Compliance to Dispute Resolution. This was confirmed during the July Consultation. However, this is not spelled out anywhere in the text and should be clarified so complainants know what to expect. – AC+, 2

37. We note that the dispute resolution and compliance functions will now be parallel processes and completely independent of one another in both their initiation and result, as illustrated in the flowchart on page 9. - MIGA
Dispute Resolution

Staff

38. While we acknowledge that no two mediators or mediations will be the same, we believe that all CAO mediators should adhere to a consistent set of published principles. Most of the complainants will not have had previous experience with mediation and may not know what to expect or ask for, including the ability to object to the choice of mediator. We encourage the CAO to include these principles in Section 3.2.1 of its Operational Guidelines or make reference to the principles in the OG and publish them separately. – CIEL, 4

Principles of and Approach to Dispute Resolution

39. We do not think it would be inconsistent with CAO’s stated focus on working directly with the affected communities—a focus with which we agree—to explicitly acknowledge in Section 3.1 that complainants may choose to have legal and technical advisors present during the process. Doing so would put companies on notice that the CAO will not exclude the complainants’ advisors from participating in the dispute resolution process. – CIEL, 3

40. Section 3.1 of the draft Operational Guidelines state that "Engaging in a dispute resolution process is a voluntary decision, and can be achieved only through consensus between the affected people and sponsor, at a minimum." The reference to "at a minimum" is unclear and it would be helpful to indicate what else is needed so that the affected people and other participants are aware of their respective roles, and are also aware of what they can expect from the CAO’s approach on dispute resolution. – IC

Process Determination/Methods

41. We encourage the CAO to accept the parties’ decision on whether or not to continue dialogue and to allow dialogue to continue if both parties wish to continue working toward a solution. Under the Draft, the CAO may unilaterally terminate dispute resolution at any time if it “believes that resolution of the case is unlikely to be possible through a dispute resolution process or that it would be an inefficient use of resources.” This contradicts the stated principles of Dispute Resolution, which is meant to be a “mutually agreed process” between the parties, dependent on “consensus between the affected people and sponsor, at a minimum.” Because the process provides a “neutral forum” for the parties to negotiate an agreement, the parties ought to have ownership over the process, including when it ends. – AC+, 8

42. Section 2.3 of the draft Operational Guidelines states that "If at any time after the completion of the assessment, the CAO believes that resolution of the case is unlikely to be possible through a dispute resolution process or that it would be an inefficient use of resources, the complainant will be advised of the reasons for the decision to conclude the Dispute Resolution process." The reference to the term "an inefficient use of resources" is unclear and it is suggested that the term be clarified and examples be provided of such "inefficient use of resources". – IC

43. As well as engaging in capacity building, the CAO may benefit from reflecting on the ‘location’ of the problem solving. Formal negotiation, conciliation and mediation may often work in favour of the companies, who usually have more relevant experience and resources, while communities may have their own alternative dispute resolution traditions that could
play a role. Conducting the problem solving on the ‘territory’ of the communities (by this we mean with languages and practices in which community members are skilled and comfortable) may also contribute to levelling the playing field. Section 2.3.3 of the current Guidelines suggests that the assessment process involves asking ‘What existing or new process might be most useful to the stakeholders to resolve the complaint (including project, customary or alternative approaches to dispute resolution)?’ If there are examples where the CAO has already taken such an approach, this could be highlighted in the revised Guidelines. – UM, 4

44. More generally, the current Guidelines could benefit from further emphasis and clarity around the ombudsman function facilitating problem solving, rather than adjudicating on the presence, absence or extent of a problem, and addressing any such problems directly. One possible way to do this would be to provide detailed examples of the kinds of processes undertaken in past cases so that complainants can get a clearer sense of what to expect. We appreciate that the challenge of expectation management is already being taken seriously by the Ombudsman staff at the CAO Office. – UM, 4

Monitoring/Reporting

45. We are concerned that the Draft significantly weakens the CAO’s commitment to monitoring results of the Dispute Resolution process. Furthermore, the Draft no longer indicates that monitoring “should be integrated into the normal project management and monitoring of IFC/MIGA.” The current Guidelines also ensure that “[m]onitoring reports will . . . be shared directly with the complainants, as well as IFC/MIGA,” but this does not appear in the Draft. A provision that “[t]he CAO may request that IFC/MIGA staff or other agencies on the ground provide assistance in monitoring implementation of agreements” has also been deleted. Taken together, these omissions seem to indicate a weakening of the CAO’s monitoring role in the Dispute Resolution process. We recommend that the Draft retain the monitoring provisions, as consistent monitoring and disclosure of monitoring reports is essential to the long-term implementation of dispute resolution agreements. - AC+, 9

46. We are pleased that the Draft clearly calls for the release of a conclusion report following implementation of a monitored agreement. However, this section of the Draft is unclear about to whom the report will be released and whether there are regular reports issued as monitoring continues over time. We recommend that the conclusion report be released directly to complainants and posted on the website and that it be drafted in consultation with complainants. We further suggest that follow-up reports be released at least annually to the public and to complainants. – AC+, 9

47. Section 3.2.3 of the draft Operational Guidelines provides that "the CAO will assist the parties to monitor implementation of those agreements." Given that the CAO Dispute Resolution team will monitor whether the agreements have been implemented, as stated in this section, it would be useful to indicate who actually monitors the agreement so that the parties are clear on who will monitor the overall implementation of the agreement. –NS, 2

48. Section 3.2.2 provides that "In pursuit of resolution, the CAO will not support agreements that would coerce one or more parties, be contrary to IFC/MIGA policies, or violate domestic laws of the parties or international law." The reference to "domestic laws of the parties" is unclear and it would helpful to explain this term. –IC
**Compliance Comments**

**Role of Complainants**

49. CIEL believes the Compliance phase should define a more significant role for the complainant – CIEL, 1

50. Consistent with the CAO’s stated focus on project-affected communities, we believe the complainant should have a role in the CAO compliance process. Not involving the complainant in the compliance process reinforces what we perceive as the widening gulf between IFC and the people it is supposed to help. CIEL, 4

51. The CAO often describes the Compliance phase as one in which the complainant has very little role. It is unclear why this should be so. It seems contrary to the CAO’s approach of valuing the experience and wisdom of the complainants. Complainants could provide valuable insight on whether the outcomes of the project are consistent with the policies. We also assume that IFC’s client, though perhaps not officially, does provide input in the Compliance phase through IFC staff. If our assumption is correct, allowing the complainant to do the same ensures that the process is fair. Perhaps more importantly, though, complainants should be given the opportunity to evaluate and express whether the IFC’s corrective measures, in response to the investigation findings, meet their needs. Being confronted by the experience of the complainants in their own words might provide a valuable opportunity for the IFC to reconnect with the people they are supposed to help. It might be easy to dismiss a cold, dry report. It is much harder to dismiss the woman who has lost her home as the result of an IFC project. The current Compliance process allows IFC to escape facing those people whose lives it impacts. CIEL, 4

52. While we agree that the focus of Compliance Review should be on the IFC/MIGA, we nonetheless urge the CAO to engage the complainants in the appraisal and investigation stages. The Draft indicates that “[i]n conducting the appraisal, the CAO will hold discussions with the IFC/MIGA team working with the specific project and other stakeholders” to understand the criteria and procedures IFC/MIGA used, “and, generally, whether a compliance investigation is the appropriate response.” We recommend that the CAO include complainants as “stakeholders” who can help the CAO understand whether investigation is appropriate. Just as in the Dispute Resolution process, working directly with affected communities during Compliance is important because they “often have much to gain or lose from a project” and can provide valuable information relevant to fact gathering about compliance. Whether IFC/MIGA complied with its policies and whether such policies are adequately protective directly affects communities, and the accuracy and impartiality of the information gleaned from communities, the sponsor, and IFC/MIGA can impact the appraisal process. Facts in appraisal reports frequently misrepresent complainant concerns and are construed in favor of the IFC/MIGA. We therefore recommend that the Draft include a statement specifying that either the facts in a complaint be taken as true during the appraisal process, complainants be given opportunity to comment on draft appraisal reports, and/or that the CAO conduct additional consultations with complainants to ensure comprehensive and accurate information during the appraisal. – AC+ 11

Section 4.4.5 of the draft Operational Guidelines provides that "in cases where the investigation was initiated by a complaint, [the CAO will] share the documents with the complainants". Consistent with this provision and the CAO's mission in being an independent, credible, and equitable mechanism, consideration may be given to providing
the complainants with a copy of the draft compliance investigation report that is provided to IFC/MIGA senior management and relevant IFC/OGA departments for factual review and comment. This will enhance citizen participation in the CAO processes and will provide an avenue for their voices to be heard through their comments on the draft compliance investigation report, if they wish to record their views. The provision of a draft compliance investigation report to claimants by the investigating panel is a common feature in many other accountability mechanisms of international financial institutions (such as the European Investment Bank, Asian Development Bank, Inter-American Development Bank, and the European Bank for Reconstruction and Development) and accords with current best practices. – IC

53. To define a role for complainants in the Compliance phase, we suggest the CAO provide the complainants with the same opportunity it provides IFC for discussion and comment. This would include the following changes in Section 4.2: 1) sharing the appraisal memorandum with complainants; 2) having discussions with complainants during the appraisal process; 3) sharing the terms of reference of the investigation with the complainants; 4) sharing the consultation draft of the investigation report with complainants for their factual review and comment; and 5) soliciting the complainants’ views on the adequacy of IFC’s official response to the CAO’s findings so that the World Bank President can have the benefit of their opinion before he clears the CAO’s report and IFC’s response for publication. We understand that this would functionally result in public disclosure of the CAO’s draft reports. In our opinion, the benefit of increased participation of the complainants and, hopefully, the resulting accountability of the IFC is worth the cost. CIEL, 5

Appraisal Process/Criteria

54. Section 4.1 of the draft Operational Guidelines provides that “When conducting compliance appraisals and investigations, the CAO will consider how IFC/MIGA assured itself/themselves of compliance with national law, along with other compliance investigation criteria.” Section 4.2.1 of the draft Operational Guidelines states that the CAO “applies several basic criteria to guide the [compliance appraisal] process” but does not specifically state what these criteria are other than indicating that the criteria “test the value of undertaking a compliance investigation”. It would be helpful to specify what these compliance criteria are for clarity to the users of the accountability mechanism. – IC

55. [...] we are concerned that the written appraisal criteria in the Draft do not accurately reflect all the criteria that the CAO uses in conducting appraisals. From the July 23, 2012 CAO Consultation with Civil Society (“July Consultation”), and a July 30, 2012 phone conversation between Accountability Counsel and CAO’s Principal Specialist on Compliance, Henrik Linders, it was suggested that there were various unwritten criteria that influence the appraisal process, such as whether the CAO feels it would learn anything from a full investigation that it did not learn in the appraisal; whether the case includes issues of systemic importance to IFC/MIGA; or whether a full investigation will have much impact on the practices of a given industry and/or future IFC/MIGA activity. We believe that the CAO should limit itself to using the criteria currently in the Draft. If, however, the CAO chooses to use other criteria in conducting appraisals, those criteria should be added to the Draft in order to foster a fair and predictable appraisal process. – AC+, 10

56. [...] we agree with the recommendation from the 2010 Internal Review of CAO Terms of Reference, Operational Guidance and Operational Practices (“Internal Review”) that the
CAO develop an operating manual “that takes the Operational Guidelines to a more detailed level” regarding both appraisal and investigation practices, and open the manual for public comment prior to implementation. Doing so would establish “acceptable parameters” for the discretion used in the CAO’s Compliance Role and allow the CAO “to produce consistent work over time and ensure a quality product.” To ensure transparency, we also recommend that either the Draft or an operating manual include the expectation that all appraisal reports contain a rationale section that enumerates and defines the criteria and reasoning used to evaluate the merit of conducting an investigation. – AC+, 10

57. [...] the appraisal criteria [should] place an emphasis on outcomes on the ground. The Draft states that the CAO will consider (1) whether there are or will be adverse outcomes from the project; (2) whether IFC/MIGA failed to adhere to a “policy or other appraisal criteria;” and (3) whether those provisions provided adequate protection.” The first and third criteria require an inquiry into harm the project caused regardless of adherence to IFC’s/MIGA’s policies. The second criterion looks at IFC/MIGA compliance with its policies, which are largely aimed at improving project outcomes. The analysis found in appraisal reports, however, is frequently dominated by discussion of how IFC/MIGA made efforts to “assure itself” of compliance, with little regard for whether such assurances resulted in improved outcomes on the ground. We urge the CAO to clarify in the Draft that the CAO should rely exclusively on the stated criteria, two of which are explicitly outcome-oriented, in conducting appraisals. – AC+, 10

58. CIEL believes that every complaint should reach the Appraisal stage, including those complaints where the parties have successfully concluded a dispute resolution process. The purpose of a Compliance audit is to determine whether IFC complied with its own policies. That the parties were able to solve their conflict is in no way related to IFC’s performance. In fact, often the IFC does not even use its leverage to encourage the company to engage. The hard work that is involved in a successful mediation is done by the parties and the CAO, not the IFC. As we understand it, the reason the CAO does not transfer those cases to Compliance is because an audit might reflect badly on the company even though its objective is to assess IFC’s performance. This is an unsustainable situation, and it is unclear whether or not it has been corrected in the Draft. Section 3.2.4 seems to open the door to the possibility that a case could be transferred to Compliance even when the case results in an agreement between the parties: “Upon the implementation of a monitored agreement, and/or when the Dispute Resolution team transfers to CAO Compliance, the CAO releases a conclusion report...” (emphasis added). On the other hand, the orange arrow in the figure on page nine of the Draft, showing the CAO process for handling complaints, seems to indicate that the case would be transferred to Compliance only if there were problems identified during the monitoring of the agreement between the parties. We urge the CAO to commit explicitly to transfer every case to Compliance regardless of whether the parties have reached an agreement. Otherwise, we recommend that the CAO expand its mandate to including actually investigating the company directly, in addition to investigating the IFC, and thereby justifying the concern that the CAO’s report will reflect on the performance of the IFC’s client. - CIEL, 4

59. [...] by limiting the compliance function to the IFC / MIGA’s due diligence, the CAO Office may be failing to fully exercise that leverage. Consideration should be given to protocols around the extension of the Compliance function to project operations directly, and withdrawal of support in cases of egregious and irremediable negative social and environmental impacts. This would make the CAO Office more consistent across its three
60. We strongly urge the CAO to consider questions about client capacity to meet IFC/MIGA standards and whether IFC/MIGA complied with its policies in its initial decision to invest in the project. Currently, appraisals often focus on IFC/MIGA efforts to bridge the gap between IFC/MIGA policies and the non-compliant project’s performance. However, this leads to an analysis that is too narrow, failing to consider the period of involvement with a project where IFC/MIGA has far greater leverage to compel compliance: when the IFC/MIGA is considering the project for investment. If IFC/MIGA invested in a project in serious violation of its standards, this is an issue of bank non-compliance that should be considered at the appraisal stage, and should weigh in favor of a full investigation. We urge the CAO to add language in the Draft specifying that the appraisal stage will include consideration of the decision to invest in a project. – AC+, 12

61. We support the Draft’s addition of an explicit provision that the CAO will discuss with IFC/MIGA staff whether the criteria they used to evaluate project performance sufficiently protected the affected community. This is an important addition because this is one of the criteria the CAO uses to determine whether an investigation is warranted. We note that this third criterion is infrequently applied at the appraisal stage; the CAO is often satisfied that a case does not merit an investigation when it finds that IFC/MIGA staff made efforts to comply with relevant policies. A more rigorous inquiry during the appraisal into whether the policies provided adequate protection would contribute toward a more effective Compliance process. (“the CAO seeks to determine whether . . . [t]here is evidence that indicates that IFC’s/MIGA’s provisions, whether or not complied with, have failed to provide an adequate level of protection”) Moreover, as described above, in addition to consulting with IFC/MIGA staff about the level of protection afforded by the policies, we urge the CAO to consult complainants on these issues during the appraisal stage to ensure that there are no factual inconsistencies. Disputes as to facts should be noted in all reports. – AC+, 11

4.3 Definitions and Approach to Compliance

Scope of Investigation

62. The working definition of a compliance investigation in Section 4.3 is unnecessarily complicated, however. For example, the definition, as written, appears to exclude activities associated with the project that are not environmental or social in nature but have the potential to produce environmental and social impacts. Instead, we propose the following definition, “An investigation is a systematic, documented process of objectively obtaining, evaluating, and verifying evidence to determine whether the project is in conformance with the compliance investigation criteria.” - CIEL, 2

63. The CAO should allow for greater flexibility in expanding the scope of an investigation beyond issues that were identified in an appraisal report. We note the positive change that expansion may be allowed “[s]hould additional issues or concerns emerge during an investigation,” but do not agree that they must first be “subject to a separate appraisal at the decision of the CAO Vice President.” We suggest that once a case has been approved for an investigation, the CAO commit to investigating substantial new issues or concerns arising during the process and requested by the complainants. Because the appraisal and subsequent investigation rely on documentation from the initial assessment, which may have been drafted prior to potentially lengthy problem-solving and appraisal processes, it is
reasonable to expect the situation to change over that period of time. In order to effectively respond to the harms caused by a project, the CAO should allow for expansion to new issues based on the current conditions on the ground, and should not subject such concerns to a formal, separate appraisal process nor to the decision of the CAO Vice President. – AC+, 13

Investigation Criteria/Eligibility

64. We recommend that the CAO send cases in Compliance directly to a full investigation. The appraisal process is problematic due to the high level of discretion, inconsistent application of appraisal criteria, and conclusory findings that this stage allows. Too few cases receive a full investigation, despite evidence of policy violations leading to substantial harm on the ground. Thus, although the Draft improves access to the Compliance function, it may not result in investigations of and improvement in IFC/MIGA compliance with social and environmental policies. – AC+, 13

65. […] we believe the number of complaints that reach the audit stage is unnecessarily limited. We would like to see the CAO initiate more audits, recognizing that this may require the CAO to increase its capacity. - CIEL, 4

66. As currently written in Section 4.2.1 of the Draft, the Appraisal stage is designed to ensure that compliance investigations are initiated only for projects that raise “substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA.” This sets the bar too high for initiating an investigation. Instead, we believe that the appraisal stage should filter out only those complaints that raise trivial issues. Similarly, we would suggest omitting the word “significant” in the first appraisal criteria so that it reads, “There is evidence of potentially adverse environmental and/or social outcome(s) now, or in the future.” - CIEL, 4

67. Our more significant concern…is whether the criteria included in the Draft accurately describes the test the CAO uses to determine whether to initiate an audit. In our opinion, the CAO declined to initiate an audit on several complaints that met the current appraisal criteria—criteria that are not substantially different from those proposed in the Draft. The determination not to undertake an audit seemed to depend on factors other than those in the OG, in at least once instance evaluating the appropriateness of an audit as a response to the systemic issue raised by the project. Another factor appears to be whether the complaint raises systemic issues. As described above, the Draft states that the purpose of the Appraisal stage is to ensure that investigations are initiated for projects that, inter alia, raise issues of systemic importance. The bulleted list of criteria on page 17 of the Draft does not reference systemic issues. We urge the CAO to limit itself to the Appraisal criteria as listed in the Draft or include all criteria it uses to determine whether a full investigation is warranted. CIEL, 4

Programmatic Review

68. We are pleased to see that the Draft allows for the opportunity for program-wide audits of “systemic issues of importance to IFC/MIGA.” We request clarity as to how the CAO identifies and decides to investigate these systemic issues, and urge the CAO to secure additional funds for systematic investigations rather than divert resources from project-specific investigations. – AC+, 12
69. In our view the most important proposed change is on page 16, where it is stated that compliance appraisals may be initiated in response to "a program designed and approved by the CAO Vice President." The draft Guidelines do not provide much more detail on this, but we understand that the recent review of IFC's financial institution investments may serve as an example of the type of programmatic work intended by this change to the Guidelines, and that the CAO intends to conduct such reviews when you see potential systemic problems in IFC's or MIGA's portfolio. We see this as a significant expansion of the CAO's operational scope. In our view programmatic compliance investigations would take the CAO's time away from its original intended purpose of conducting project-level dispute resolution and compliance audits in response to complaints regarding specific projects. These boundaries of the CAO mandate are set out in the current (2007) Guidelines. In our view this project-specific focus of the CAO has been a major source of the CAO's strength. As stated above, we have found that the work carried out by your expert staff in the dispute resolution and compliance teams has added significant value to individual MIGA projects. In contrast, programmatic compliance work could bring the CAO's mandate into an overlap with that of IAD and IEG and create additional burden on MIGA staff tasked with responding to such programmatic investigations. In this vein, we will be interested to know what conversations and efforts have been made to harmonize and avoid duplication with IEG and other entities, consistent with the 5Is review. – MIGA

70. We propose that if the CAO is to conduct programmatic reviews of MIGA's portfolio, such reviews should be conducted under the auspices of the CAO advisory function, not the compliance function. In this way the CAO could quickly and efficiently draw on its experience in dispute resolution and compliance on specific projects in order to provide timely advice on systemic problems observed or suspected in MIGA's portfolio. This could be done without the procedural burdens of compliance work. This would result in greater value added to MIGA's development work and less demand on both CAO and MIGA resources. – MIGA

71. On programmatic compliance appraisals, we recommend that programmatic appraisals be undertaken as part of the CAO’s advisory role and not as part of the compliance mechanism. We are of the view that compliance appraisals should be reserved to address specific project level complaints, maintaining the current Operational Guidelines criterion for compliance reviews/audits being “initiated only in response to concerns regarding specific projects and their environmental or social impacts, as opposed to random auditing.” (Section 1.2); and “The CAO will undertake only project-level compliance audits, not institutional or programmatic-level audits.” (Section 3.3.2) We support the notion that programmatic reviews can provide important lessons for IFC. We believe that they are more appropriately undertaken as advisory and learning exercises rather than compliance reviews. We recognize that there might be a concern that advisory reviews may carry less weight than compliance reviews. In this regard, we would like to assure you that IFC Management is equally committed to follow up on recommendations from advisory reviews. We would welcome further discussion with you on clarifying the criteria for the compliance reviews, and we are very interested in your views on how we can best follow up on programmatic advisory reviews and strengthen them as meaningful learning exercises. - IFC
Monitoring and Reporting

72. We recommend that the independence of the CAO be further increased by allowing the CAO, rather than the President, to make the final decision about the outcome of an investigation. The Draft states that “[t]he President retains discretion over clearance” of the investigation report and the response by IFC/MIGA management. Furthermore, the Board does not see these documents until the President clears them. The CAO should instead have the discretion to release the report directly to the public and the Board. – AC+, 12

73. The Draft improves the CAO’s disclosure policies by explicitly providing that the CAO “alert relevant stakeholders of the disclosure of [the investigation report and IFC/MIGA’s response] on CAO’s Web site, and in cases where the investigation was initiated by a complaint, share the documents with complainants.” We support this improvement in transparency and also urge the CAO to adopt greater parity in its consultation with complainants as compared to IFC/MIGA staff during the Compliance process. Since the “draft compliance investigation report will be circulated to IFC/MIGA senior management and all relevant IFC/MIGA departments for factual review and comment,” we urge the CAO to do the same with complainants, to ensure accuracy of facts on both sides. – AC+, 13

74. [...] as written, Section 4.2.2 seems to require disclosure of the appraisal report to the public only if the appraisal was the result of a complaint but not in the case where the appraisal was the result of a request made by the CAO Vice President or the World Bank President. We assume this is not the CAO’s intent as it would be inconsistent with its current practice, but suggest that the language be clarified in order to avoid confusion. CIEL, 5

75. Disclosure of monitoring results should be improved. The Draft states that “[t]he CAO makes public the current status of all compliance cases,” but does not provide for disclosure of monitoring reports. In order to increase transparency, these reports should be posted on the CAO’s website and provided directly to complainants. – AC+, 14

76. Section 3.4.2 on report preparation could benefit from further clarity around what kind of response the CAO expects from IFC or MIGA when a compliance report is presented to them. It is unclear in the current Guidelines what effect these reports could potentially have on IFC / MIGA’s support of a project. This is somewhat addressed in section 3.4.3, but remains vague. – MU, 5
Advisory Comments

5.1 The Origin and Principles of the Advisory Role

77. We recommend clarification in the Draft for how the CAO plans to expand its Advisory Role beyond IFC/MIGA to the private sector, and how this may affect performance of project sponsors. – AC+, 14

78. We encourage the CAO to expand, rather than condense, its Advisory Role section in the Draft, and follow the Internal Review recommendation to develop additional operational guidance for this function. We are concerned by the significant condensation of this section of the Draft and the implications that it may have for the Advisory Role. For example, the Draft gives less explanation than the current Guidelines for how the scope of advice is determined, the process of screening requests for advice, and timelines the office will follow. – AC+, 14

79. Section 5.3.3 of the draft Operational Guidelines provides that the CAO "monitors monitors IFC's/MIGA's implementation of advice and reports its findings to the President." There is no period specified when the monitoring ends, and it would be helpful to indicate this as in the case of compliance investigation, the monitoring is when the CAO is assured that IFC/MIGA is back in compliance (under section 4.4.6 of the draft Operational Guidelines). – IC

80. We urge the CAO to adopt the Internal Review recommendation of providing expanded guidance in the procedures, “to make the Advisory function more proactive and strategic in its focus.” We particularly advise the CAO to adopt procedures in order to more consistently and effectively identify systematic or sector-specific issues from its Dispute Resolution and Compliance cases and “discuss possible interventions.” – AC+, 15

81. […] we recommend that the CAO retain the provision allowing departments within the IFC/MIGA to request advice. – AC+, 15

5.2 Initiating the Advisory Role and Determining the Scope of Advice

82. It is unclear whether the succinct “Screening criteria for requests for advice” section, which replaces the current “Appraising requests for advice” section, indicates that a simpler screening process rather than extensive appraisal process applies to requests for advice. If so, we welcome this improvement, allowing a more straightforward and predictable procedure. However, if the process still involves a lengthy appraisal process resulting in a decision regarding “whether an advisory activity by the CAO is the appropriate response,” the Draft should detail the criteria that will be considered in making this determination. – AC+, 15

5.3 The Approach to the Advisory Role

83. We advise the CAO to follow the current Guidelines, which state that “the presumption is in favor of disclosure” within the Advisory Role. Because the Draft lacks a section on Advisory report preparation and audience, it is unclear to whom final reports will be disclosed. We recommend that, in the interest of transparency, they be public and posted on the CAO website. We further recommend that the CAO release to the public, and not only to the president, monitoring reports on the implementation of advice. – AC+, 15
84. We […] note that the section titled “Report preparation and target audiences” in the current procedures is deleted or missing from the Draft. It is important to retain this section to outline the procedure and timeline for handling a request to the Advisory Role. – AC+, 14

**Communications and Outreach**

85. In order to further improve accessibility to the CAO’s services, we recommend that the office additionally provide an easy-to-understand guide to CAO procedures, translated into the major world languages and additional languages if requested. – AC+, 15

86. In its outreach activities, we recommend that the CAO keep the current language on “seeking advice of those with expert knowledge within countries” rather than shifting to a focus on advice from “experts with in-country and/or regional knowledge.” While it may not always be practicable to consult with local experts, this should be the preferred method of gaining local knowledge in order to contextualize CAO activities. – AC+, 16

87. Section 6 of the draft Operational Guidelines provide that “Where deemed necessary, the CAO will translate these materials into additional local languages and present them in a culturally appropriate manner.” The reference to “culturally appropriate manner” is unclear and clarification is suggested. – IC

88. The CAO registry (http://www.cao-ombudsman.org/cases/) has cases reported according to country and region. Consideration may be given to updating the CAO registry by having a simple reference to all cases filed since the date of the CAO’s establishment in 1999 as this would make the registry more accessible and informative instead of having to refer to a case by a particular country or region. This would also enhance the usefulness of the CAO registry. – IC

**Wording/Editing/Syntax**

89. Section 1.3 states that the "CAO has three complimentary roles over which the CAO Vice President maintains discretion". The term "complimentary" should be replaced by "complementary". – IC

90. It is stated that "There are five Boards of Executive Directors representing the four institutions of the World Bank Group" in the explanation of "Board" (page 26 of the draft Operational Guidelines). The World Bank Group has five, and not four, institutions (http://web.worldbank.org/WEBSITE/EXTERNAL/EXABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html) – IBRD, IDA, IFC, MIGA, and ICSID. – IC

91. The draft Operational Guidelines of May 2012 are the revised version of the existing CAO Operational Guidelines of April 2007 where the term "Compliance Advisor/Ombudsman" is used throughout. In the draft Operational Guidelines, the term "Compliance Advisory Ombudsman" is used instead of "Compliance Advisor/Ombudsman". In view of the change made, it would be helpful to explain why this term is used instead of the term used in the existing Operational Guidelines. – IC
Positive Feedback

General Review

92. The CAO sets the bar high for other recourse mechanisms. The CAO constantly pushes itself to be more effective, undertaking self-evaluations and monitoring its own handling of cases. This review is only the most recent example of those efforts. In particular, we commend the CAO for undertaking a public consultation process on the revisions to its Operational Guidelines. We understand that this necessitates more time and effort on the CAO’s part, but it also demonstrates the CAO’s openness to the views and perspectives of its diverse stakeholders, including communities, NGOs, and IFC’s clients. – CIEL, 1

93. In evaluating recourse mechanisms, such as the CAO, CIEL seeks to ensure that they are easily accessible by local communities, deliver results both at the local level and within the institutions with which they are associated, and that the process is designed in such a way as to be fair to complainants who will typically be less economically and politically powerful than the other party. Against these criteria, we find the Draft is an improvement over the current Operational Guidelines, ensuring that the CAO is more responsive to the interests of complainants. CIEL, 1

94. We think that this most recent (May 2012) draft of the Guidelines is well-designed and well-written, and provides helpful clarifications in a number of areas. In particular the dispute resolution process has been clarified. – MIGA

95. I commend the regular reviews by the CAO Office in periodically reviewing and updating the CAO’s Operational Guidelines as it makes the CAO Office very current with best practices and also aligning itself with the lessons gained from handling cases. I applaud the CAO Office for enabling public consultation in a meaningful way as this will enhance the CAO Office as an independent, transparent, credible, accessible, and equitable accountability mechanism. – IC

Information Disclosure/Transparency

96. We support the subtle but important change of wording, which provides that the CAO will monitor cases following compliance review until IFC/MIGA “is back in compliance,” rather than until the CAO is assured that IFC/MIGA “will move back into compliance.” The previous language allowed for too much discretion as to when to terminate monitoring, potentially allowing projects to continue to operate in violation of IFC/MIGA policies. - AC+, 13

97. […] we support the codification of the CAO’s practice of regularly providing Management Action Tracking Record reports to the Committee on Development Effectiveness. – AC+ 14

98. We wish to commend the current [2007] Guidelines for their provisions embedding monitoring of CAO mediated agreements in the regular monitoring activities associated with IFC or MIGA support, in addition to direct CAO monitoring and publication of monitoring reports. – MU, 5

Neutral Assessment Phase

99. CIEL welcomes the inclusion of a neutral Assessment phase to determine which CAO function, Dispute Resolution or Compliance, the complainants seek. CIEL, 2
100. We commend the CAO for a number of improvements to its 2007 Operational Guidelines ("Guidelines"), most notably the restructuring of its complaint process, which now allows for direct access to the Compliance function following assessment and following a successful resolution to Dispute Resolution...It is also an improvement that the complaint is no longer addressed to the Ombudsman Role, but instead goes through a neutral assessment. We are pleased that the CAO Ombudsman no longer has to determine that collaborative resolution is not possible before transferring a complaint to compliance... complainants now have access to the Compliance role even after reaching an agreement in Dispute Resolution. All of these changes allow for greater access to the important Compliance function of the CAO. — AC+, 1

101. We think that this most recent (May 2012) draft of the Guidelines is well-designed and well-written, and provides helpful clarifications in a number of areas. In particular the dispute resolution process has been clarified. We note that the dispute resolution and compliance functions will now be parallel processes and completely independent of one another in both their initiation and result, as illustrated in the flowchart on page 9. While immediate initiation of compliance work upon receipt of a complaint was possible under the 2007 Guidelines the practice up until now has generally been to initiate compliance work in sequence following unsuccessful dispute resolution. We understand the logic behind this change and we look forward to working with both the dispute resolution and compliance teams when complaints arise, as we have been doing over the years. - MIGA

Programmatic Investigations

102. We also support the explicit inclusion of programmatic investigations in the mandate of the CAO. As the IFC diversifies its investment modalities, it will be important for the CAO to undertake a programmatic investigation to ensure that the environmental and social impacts of IFC’s new instruments or business lines are consistent with IFC’s policies. — CIEL, 3

103. We are pleased to see that the Draft allows for the opportunity for program-wide audits of “systemic issues of importance to IFC/MIGA. — AC+, 12

VP Discretion/Appointment

104. The Draft appears to give the CAO Vice President greater discretion in his or her decision to initiate Compliance Review, which is a positive change. While the CAO VP must submit a memorandum to a greater number of parties explaining the reasons for the proposal to start a compliance review process, the decision no longer needs to be made "in consultation with the Executive Vice President(s)." It is important that the CAO remain “independent from operational management” in order to provide effective accountability. — AC+, 12

Advisory

105. We are pleased to see that the objectives of the Advisory function include "[a]dvancing the boundaries of environmentally and/or socially responsible behavior in the private sector through lessons derived from CAO cases." — AC+, 14

Communications and Outreach
106. We note improvements in the Draft to translation procedures, and commends the CAO for broadening of access to its services. For example, translation of the Operational Guidelines and other materials is no longer limited to “predominant languages” of the World Bank, but will be available in the official languages of the World Bank Group “and additional languages where deemed necessary.” We request clarification as to what would qualify as a necessary translation, but generally approve of this change. We also appreciate that the Draft provides that “[a]ll publicly disclosed CAO reports relating to complaints—including assessment reports, agreements, compliance appraisals and investigations and conclusion reports—are translated into the local language of the relevant complainants,” deleting the clause “when possible” that is found in the current Guidelines. – AC+, 15

Terminology

107. CIEL fully supports the new terminology for the compliance phase, replacing “audit” with “investigation”. The term, “investigation” is easier to explain to potential complainants and more accurately represents the CAO’s approach to determining whether the project complied with IFC’s policies. – CIEL, 2

108. [UNHR welcomes] Explicit reference to and the embedding of the UNGPs effectiveness criteria for nonjudicial grievance mechanisms in the Operational Guidelines. The UNGPs state that the non-judicial grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, right-compatible and a source for continuous learning. In addition, it recommends that especially operational-level grievance mechanisms should be based on engagement and dialogue. CAO has now explicitly declared that it strives to be “independent, transparent, credible, accessible and equitable” in order to provide “a predictable process” (p.4), and it has then gone on to clarify or update how its processes are in line with these principles. Examples of this are expressed in the additional information provided in the text with regards to: lodging a complaint and how its eligibility is determined; the governance of CAO and how it aims to maintain its independence and advice; and clearer information on the complaints process and what affected communities can expect. – UNHR, 1

109. [UNHR welcomes] Explicit language on the fact that CAO does not have authority with respect to judicial processes and that it is not a substitute for host country and international court systems. The UNGPs did not create new legal requirements for States, but clarified that States have the duty to protect against possible human rights impacts and abuses by businesses in their territory or jurisdiction. That duty is exercised in several ways, as explained in Principles 1 to 10 of the UNGPs. Ensuring access to remedy by victims of abuse is one of those key functions of the State. Non-State and non-judicial grievance mechanisms based on dialogue are, however, very useful approaches for problem-solving and the early identification of issues and impacts before they escalate into serious human rights violations, which is why the UNGPs encourage their existence. But such non-State, non-judicial grievance mechanisms are part of a wider system of remedy meant to enhance and supplement, but not replace State functions. No party should use non-State grievance mechanisms to circumvent law enforcement. CAO’s explicit recognition of the complementary but differentiated roles of States and businesses in this respect serves to strengthen accountability.