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Office of the Compliance Advisor Ombudsman (CAO)

COMPLIANCE APPRAISAL REPORT

Appraisal of IFC investment in Bidco Bev. & Det, Kenya.

IFC Project #33385

Summary

Bidco Oil Refineries Limited (“Bidco” or “the Client”) is a Kenyan private limited liability company. Bidco generates its revenues from the sale of cooking fats, edible sunflower, soybean, maize and palm oils, soaps and detergents, baking powder and animal feed.

In 2014 IFC approved an investment to Bidco. The investment consisted of an A-loan of up to US\$23 million and a syndicated B-loan of up to US\$13.5 million to support the construction and operation of new facilities, intended to expand Bidco’s capacity in fast moving consumer goods. More specifically this targeted the construction and operation of an extension of Bidco’s detergent facility in Thika and a new beverage facility in Tatu City. Total project cost was estimated at US\$46 million. Prior to IFC’s investment, Bidco employed over 2200 workers. This figure was expected to grow to 2500 during the period of IFC’s investment.

In June 2016, CAO received a complaint regarding Bidco’s operations in Thika. The complaint was filed by Bidco Truth Coalition on behalf of current and former workers. The complaint raised concerns regarding workers’ safety, terms of labor, working conditions, the status for casual workers, the process for grievance redress and freedom of association.

As part of its initial assessment of the complaint, CAO carried out a field visit in August 2016. As CAO did not receive a clear indication as to whether the workers wanted to participate in a dispute resolution process or not, in December 2016 the case was transferred to CAO’s compliance function in accordance with CAO’s Operational Guidelines.

The purpose of a compliance appraisal is to ensure that compliance investigations are initiated only for those projects that raise substantial concerns regarding environmental or social outcomes or issues of systemic importance to IFC/MIGA. In deciding whether to initiate an investigation, CAO weighs factors including the magnitude of the E&S concerns raised in a complaint, the results of a preliminary review of IFC’s E&S performance in relation to these issues, and a more general assessment of whether a compliance investigation is the appropriate response.

This complaint raises concerns that potentially affect a large number of the Client’s employees. While the complainants acknowledge improvements in some areas of the client’s labor practices, they raise ongoing concerns regarding a range of issues that are governed by IFC Performance Standard 2. Based on an initial review of project documentation, publically available information regarding the client’s labor practices, and discussions with IFC staff, CAO has questions as to IFC’s review and supervision of related aspects of the project. In this context, CAO has decided to conduct a compliance investigation of IFC’s E&S performance in relation to this project. The investigation will focus on the adequacy of: i) IFC’s review of the company’s labor practices, particularly as they relate to the concerns raised by the complainants; and ii) IFC’s supervision of

the client's labor and OHS performance, in particular after becoming aware of labor related concerns in 2015. Terms of Reference for this compliance investigation will be issued in accordance with CAO's Operational Guidelines.

About CAO

CAO's mission is to serve as a fair, trusted, and effective independent recourse mechanism and to improve the environmental and social accountability of IFC and MIGA.

CAO (Office of the Compliance Advisor Ombudsman) is an independent post that reports directly to the President of the World Bank Group. CAO reviews complaints from communities affected by development projects undertaken by the two private sector arms of the World Bank Group, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).

For more information about CAO, please visit www.cao-ombudsman.org.

Table of Contents

Summary	1
About CAO.....	3
Acronyms.....	5
I. Overview of the Compliance Appraisal Process.....	6
II. Background.....	7
Investment.....	7
Complaint and CAO Assessment	8
III. Analysis.....	10
IFC Policies and Procedures	10
Pre-investment Environmental and Social Review.....	10
Requirements	11
IFC’s pre-investment review of the Project.....	12
Labor and Working Conditions	13
Conclusion	13
Project Supervision.....	14
Requirements	14
Supervision	14
Conclusion	16
IV. Decision	16

Acronyms

Acronym	Definition
CAO	Office of the Compliance Advisor Ombudsman
EHS	Environmental, Health and Safety
EIA	Environmental Impact Assessment
ESAP	Environmental and Social Action Plan
ESMS	Environmental and Social Management System
ESRP	Environmental and Social Review Procedures
ESRS	Environmental and Social Review Summary
E&S	Environmental and Social
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immuno-Deficiency Syndrome
IFC	International Finance Corporation
ISO	International Organization for Standardization
MIGA	Multilateral Investment Guarantee Agency
OHS	Occupational Health and Safety
PPE	Personal Protective Equipment
PS	Performance Standards
SII	Summary of Investment Information
WBG	World Bank Group

I. Overview of the Compliance Appraisal Process

When CAO receives a complaint about an IFC or MIGA project, the complaint is referred for assessment. If CAO concludes that the parties are not willing or able to reach a facilitated solution, the case is transferred to the CAO compliance function for appraisal and potential investigation.

A compliance appraisal also can be triggered by the CAO vice president, IFC/MIGA management, or the president of the World Bank Group.

The focus of the CAO compliance function is on IFC and MIGA, not their client. This applies to all IFC's business activities, including the real sector, financial markets and advisory. CAO assesses how IFC/MIGA assured itself/themselves of the performance of its business activity or advice, as well as whether the outcomes of the business activity or advice are consistent with the intent of the relevant policy provisions. In many cases, however, in assessing the performance of the project and IFC's/MIGA's implementation of measures to meet the relevant requirements, it will be necessary for CAO to review the actions of the client and verify outcomes in the field.

In order to decide whether a compliance investigation is warranted, CAO first conducts a compliance appraisal. The purpose of the compliance appraisal is to ensure that compliance investigations are initiated only for those projects that raise substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA.

To guide the compliance appraisal process, CAO applies several basic criteria. These criteria test the value of undertaking a compliance investigation, as CAO seeks to determine whether:

- There is evidence of potentially significant adverse environmental and/or social outcome(s) now, or in the future.
- There are indications that a policy or other appraisal criteria may not have been adhered to or properly applied by IFC/MIGA.
- There is evidence that indicates that IFC's/MIGA's provisions, whether or not complied with, have failed to provide an adequate level of protection.

In conducting the appraisal, CAO will engage with the IFC/MIGA team working with the specific project and other stakeholders to understand which criteria IFC/MIGA used to assure itself/themselves of the performance of the project, how IFC/MIGA assured itself/themselves of compliance with these criteria, how IFC/MIGA assured itself/themselves that these provisions provided an adequate level of protection, and, generally, whether a compliance investigation is the appropriate response. After a compliance appraisal has been completed, CAO can close the case or initiate a compliance investigation of IFC or MIGA.

Once CAO concludes a compliance appraisal, it will advise IFC/MIGA, the World Bank Group President, and the Board in writing. If a compliance appraisal results from a case transferred from CAO's dispute resolution, the complainant will also be advised in writing. A summary of all appraisal results will be made public. If CAO decides to initiate a compliance investigation as a result of the compliance appraisal, CAO will draw up terms of reference for the compliance investigation in accordance with CAO's Operational Guidelines.

II. Background

Investment

Bidco Oil Refineries Limited (“Bidco” or “the Client”)¹ is a Kenyan private limited liability company. Bidco generates its revenues from the sale of edible oils, cooking fats, soaps, detergents, animal feeds and baking powder.²

In 2012, IFC began considering an investment in Bidco to support construction and operation of new facilities to expand its capacity in fast moving consumer goods, more specifically the construction and operation of an extension of Bidco’s detergent facility in Thika and a new beverage facility in Tatu City (“the Project”).

In June 2013, IFC initiated its due diligence review of the investment and in May 2014 IFC published the Environmental and Social Review Summary (ESRS) and the agreed Environmental and Social Action Plan (ESAP) for the Project.³ Among other things, the ESAP required the Client to develop and implement human resources policies and procedures appropriate for its workforce and consistent with the requirements of Performance Standard 2 and Kenya’s labor laws.⁴ The investment was classified as category B according to IFC’s Policy on Environmental and Social Sustainability, meaning that IFC assessed the investment as having limited potential E&S risks and impacts.⁵

In June 2014, IFC approved the investment, which consisted of an A-loan of up to US\$23 million and a syndicated B-loan of up to US\$13.5 million to support the Project. Total Project cost was estimated at US\$46 million.⁶ In addition to providing financial support IFC indicated that it expected to support the client to: (a) improve its water and resource efficiency; (b) implement best practices in environmental, social, health and safety standards; and (c) access brand positioning expertise.⁷ Commitment of the A-loan took place almost immediately thereafter, while the B-loan was committed in December 2014. First disbursement of the A and B loans occurred in June 2016.⁸

¹ In February 2015, Bidco Oil Refineries Limited changed its name to Bidco Africa Limited. However, the Loan Agreement was signed between IFC and Bidco Oil Refineries Ltd. Therefore, this report refers to the company’s name as used the Loan Agreement.

² Summary of Investment Information (SII), Project Description, <https://disclosures.ifc.org/#/projectDetailSII/4605> (accessed March 7, 2017).

³ Environmental and Social Review Summary (ESRS), <https://disclosures.ifc.org/#/projectDetailESRS/1064> (accessed March 7, 2017).

⁴ ESRS, Environmental & Social Action Plan, <https://disclosures.ifc.org/#/projectDetailESRS/1064> (accessed March 7, 2017).

⁵ ESRS, E&S Project Categorization and Applicable Standard, <https://disclosures.ifc.org/#/projectDetailESRS/1064> (accessed March 7, 2017).

⁶ SII, Total Project Cost and Amount and Nature of IFC’s Investment, <https://disclosures.ifc.org/#/projectDetailSII/4605> (accessed March 7, 2017).

⁷ SII, IFC’s Expected Role and Additionality, <https://disclosures.ifc.org/#/projectDetailSII/4605> (accessed March 7, 2017).

⁸ An “A-loan” refers to a loan from IFC’s own account. Under a “B-loan”, IFC is the lender on record but commercial banks and other financial institutions participate. One agreement is signed with the Client and covers both A and B loans.

Complaint and CAO Assessment

In June 2016, CAO received a complaint from Bidco Truth Coalition on behalf of former and current employees of Bidco's Thika plant. The CAO assessment report in relation to the complaint was completed in November 2016. The complainants have requested that their names remain confidential. As part of this appraisal, CAO sought clarifications from the complainants about their allegations. During this process, the complainants informed the team that some workers had previously filed labor-related suits against the company in different jurisdictions in Kenya; including a case brought by about 300 workers to the Industrial Court of Nairobi.

The complainants' concerns are summarized as follows:

1- Terms of labor

The complainants allege that employees are expected to work overtime on days off, and these hours are neither registered nor paid for by the Client. They claim that they work long hours without regular breaks. The complainants acknowledge that shifts were reduced to eight hours per day in September 2015, however, they state that at least once every two weeks they are expected to work an additional four hours, for which they are not paid. In relation to benefits, the complainants claim that some workers are not paid for sick or annual leave. They question how maternity leave is awarded and claim that wages are not in line with the cost of living.

They also allege that supervisory positions within certain departments are given to non-African staff who are working in Kenya illegally. They claim that these staff members are lodged on-site in what is called "Green House".

2- Casual workers

The complainants recognize that, since September 2015, Bidco no longer employs casual workers and workers are employed on a contract basis. However, they state that the new contracts do not account for previous years of service as casual workers. According to complainants, based on Kenya's labor laws, casual workers are deemed permanent workers when they complete 6 consecutive months at work. They are therefore aggrieved that the leave days, gratitude payment, and other benefits related to previous years' employment were not taken into account when they started work on a contract basis. This, they assert, also has implications for workers' contributions to the National Social Security Fund and retirement benefits, which take into account years of service. Additionally, the complainants assert that as a result of the transition from casual to term-contracts, some casual workers were terminated without prior notice and without termination benefits despite having worked for the company for many years.

3- Worker health and safety

The complainants state that Bidco does not provide Personal Protective Equipment (PPE) as would be necessary to protect workers. For instance, they assert that safety boots are replaced every three years although they last only two weeks. Hence, workers have to bear the cost to replace degraded equipment. They allege that workers are sometimes required to pursue dangerous tasks, which result in accidents. According to the complainants, supervisors are discriminating against some workers and are not providing such workers with PPE based on their tribal background.

They also allege that accidents are common at the plant. According to complainants, first aid care is not adequate because supervisors are not trained to provide first aid and the kits are

not of good quality. They claim that there is no medical staff on site and whenever a worker is injured or needs medical attention, referrals to the hospital are made under the sole discretion of supervisors. The complainants also claim that many workers do not get medical coverage or compensation due to job related injuries.

4- Food handling and labelling of products

According to the complainants, they sometimes handle food products with their bare hands instead of having to wear appropriate gloves. The complainants claim that water is added to fats and labelling is not in accordance with the different types of products. The complainants also claim that tins are not properly cleaned when the wrong products are placed in them.

5- Grievance redress and reprisals

The complainants state that employees are not aware of a grievance redress mechanism. They claim that whenever they complain, they do not receive a response or follow-up on the issues raised. Further, they allege that workers fear having their contracts terminated if they present grievances. The complainants state that some workers suffer reprisals from management when they voice concerns or make complaints over labor conditions, the lack of replacement of degraded PPE, or work-related injuries.

6- Freedom of association

According to the complainants, Bidco workers are represented by a union called Chemical and Allied Workers Union of Kenya, located in Nairobi. The complainants claim that workers would like to be represented by another union, the Kenya Union of Commercial Food and Allied Workers, which is located in Thika. The complainants state that this preference is because the current union is located in Nairobi and its leadership has a close relationship with Bidco management, which results in the company manipulating the union. They allege that they don't have the freedom to join another union, and that this breaches Kenya's constitution, which guarantees freedom of association. They allege that workers also fear retaliation and discrimination if they join a union. They claim that there have been instances where reprisals were felt and unionized workers were victimized.

CAO's assessment report also documented the Client's views. In response to the specific issues raised in the complaint, the Client stated that in many cases its policies and practices go beyond what is required by Kenya's labor laws. The Client indicated that it adopted the Kaizen management system,⁹ which consists of continual improvement through dialogue with its workforce. The Client also indicated that it has in place comprehensive systems to manage labor issues, such as Occupational Health and Safety (OHS). These include 14 different annual health and safety audits to safeguard the health of its employees. According to the Client, these measures are guided by best human resources and business practices.

The Client added that workers are provided with the necessary PPE and that all workplace accidents are recorded. In such cases, first aid is provided and supervisors refer cases that need medical attention to nearby hospitals. The Client reported that despite an increase in the number

⁹ The Kaizen ("Good Change") model requires continuous improvement. Kaizen is defined as a strategy for long-term organizational competitiveness. It is based on identifying problems and taking action to contain and correct them through teamwork. Under the Kaizen model all employees suggest improvements, which are then led by senior management.

of employees and additional production facilities there has been no fatal accident and a decline in incidents was reported in 2016.

The Client stated that since September 2015 all workers are on contract and all benefits (sick, medical, pension, annual leave, maternity leave, paternity leave) are extended to them through the duration of their employment. The Client also stated that overtime and unused annual leave are paid. The Client added that it provides all employees with meals and transportation to and from the worksite.

The Client considered that its management does not interfere with the employees' right to freely join a union. It added that the Chemical and Allied Workers Union of Kenya, with which it has had a collective bargaining agreement since July 2014, is active at the Thika plant and has a stable number of members. The Client indicated that it has a grievance resolution mechanism, which allows workers including union members to raise issues of concern.

Overall, the Client believed that it has been responsive to the workers' wellbeing and concerns, but expressed interest in learning where and how it could make improvements. The Client informed CAO of its willingness to explore options for dialogue. However, since the parties did not agree on dispute resolution, the assessment process resulted in the transfer of the complaint to the compliance function.

III. Analysis

IFC Policies and Procedures

IFC's investment in the Project was committed under the 2012 Policy on Social and Environmental Sustainability ("the Sustainability Policy") and the 2012 Performance Standards (PS), together referred to as the Sustainability Framework. Given that issues raised by the complainants pertain to the labor practices of the Client, IFC's Performance Standard 2 (PS2) (Labor and Working Conditions) is of particular relevance.

Even though the complainants raise concerns relating to food handling and the labelling of products, they do not assert to be adversely affected by the practices in question. As a result, CAO does not consider these issues as within its mandate.

IFC implements the commitments set out in the Sustainability Policy through its Environmental and Social Review Procedures (ESRP), which are updated periodically.

Pre-investment Environmental and Social Review

At the pre-investment stage, IFC reviews the E&S risks and impacts of a proposed investment and agrees with the client on measures to mitigate these risks in accordance with the Performance Standards. For the purposes of this compliance appraisal, a key question is whether IFC conducted an adequate pre-investment review of the risks associated with the Project as they relate to the working conditions of Bidco's workforce, the workers' freedom of association, as well as their ability to file grievances and raise concerns away from retaliation.

Requirements

As a matter of policy, CAO notes IFC's commitment to carrying out its investment operations in a manner that "do no harm" to people or the environment. Central to this, is the adoption of a "mitigation hierarchy", which calls for the anticipation and avoidance of adverse impacts on workers, communities, and the environment. Where avoidance is not possible, it requires the minimization of impacts and the compensation or offsetting the residual risks and impacts, as appropriate.¹⁰

Prior to making an investment, IFC reviews the E&S risks and impacts of a project. IFC's E&S due diligence is required to be "commensurate with the nature, scale, and stage of the business activity, and with the level of environmental and social risks and impacts."¹¹

IFC's E&S due diligence includes a review of all available information related to the environmental and social risks and impacts; site inspections and interviews and an analysis of the business activity's E&S performance in relation to the requirements of the Performance Standards and the World Bank Group (WBG) Environmental, Health and Safety (EHS) Guidelines. If gaps with the requirements of the PSs or the WBG's EHS are identified, IFC works with the client to identify measures to fill such gaps. In case IFC finances activities with a clearly defined E&S footprint, IFC's review covers the E&S risks as they relate to such activities. However, the Sustainability Policy also provides that "IFC will encourage clients to manage E&S risks consistently in all their operations."¹² In relation to significant E&S impacts "associated with the business activity" including past impacts, the Sustainability Policy requires IFC to work with its client to determine possible remediation measures.¹³

As set out in PS1, the client is required to meet the standards of PS2 through PS8 throughout the life of IFC's investment. Where E&S risks are identified, the client is required to manage them through an Environmental and Social Management System (ESMS), that is consistent with PS1. IFC encourages the client to apply the ESMS to all its activities, regardless of financing source.¹⁴

As relate to the specific claims in the complaint, PS2 requires the client to base the employment relationship on the principle of "equal opportunity and fair treatment" (para. 15). It also requires the Client to avoid discrimination and avoid making employment decisions on the basis of personal characteristics unrelated to inherent job requirements (para. 15).¹⁵ PS2 also requires the client to "provide workers with documented information that is clear and understandable, regarding their rights under national labor and employment law and any applicable collective agreements, including their rights related to hours of work, wages, overtime, compensation, and benefits" (para. 9). In cases of dismissal, PS2 requires the client to ensure that all workers receive notice of dismissal and severance pay as mandated by law (para. 19).

Concerning protection of workers while on the work site, PS2 requires the client to provide workers with a safe and healthy work environment, taking steps to prevent accidents, injury, or diseases associated with their tasks (para. 23).

PS2 requires the client to allow for workers to organize and bargain collectively without interference (para. 13). It also requires the client to provide a grievance mechanism for workers to raise concerns related to the workplace (para. 20).

¹⁰ 2012 Sustainability Policy, para. 6.

¹¹ 2012 Sustainability Policy, para. 26.

¹² 2012 Sustainability Policy, para. 29.

¹³ 2012 Sustainability Policy, para. 26.

¹⁴ 2012 Overview of Performance Standards on Environmental and Social Sustainability, paras. 2-4.

¹⁵ 2012 Performance Standard 2, para. 15, defines "personal characteristics" to include: gender, race, nationality, ethnic, social and indigenous origin, religion or belief, disability, age, or sexual orientation.

Finally, Guidance Note 2 relating to Labor and Working Conditions notes that a labor assessment may be carried out at different levels, depending on the risk posed by labor practices. It may take place as part of a social and environmental assessment process or as a stand-alone exercise. Any labor assessment should include a review of the potential client's employment policies, the adequacy of existing policies, and management's capacity to implement (GN2, Annex A).

IFC's pre-investment review of the Project

For each proposed investment IFC discloses a summary of its E&S review, findings, and recommendations, in the ESRS. The ESRS identifies key measures to mitigate risks and impacts, specifying any supplemental actions that will need to be implemented to undertake the project in a manner consistent with the Performance Standards, as part of the ESAP.

IFC's E&S review was completed in May 2014. As documented in the ESRS, the process included site visits to Bidco's existing plant, the review of Bidco's human resources policy, E&S policies and management plans, emergency responses, and OHS information.¹⁶ The review noted Bidco's different ISO certifications¹⁷ and related audits as well as Bidco's use of the Kaizen management system. As a result of its review, IFC included an ESAP with specific measures that the client would need to take to ensure that the Project would be "designed and operated in accordance with the Performance Standards objectives."¹⁸ Relevant requirements of the ESAP are described below.

An Environmental Impact Assessment (EIA) for the Project is also referred to in the ESRS though this was not disclosed by IFC.¹⁹ A subsequent version of the EIA was disclosed by the Kenyan regulator. The EIA notes occupational safety and health as a potential risk area and provides a list of general mitigation measures. These include use of different types of PPE (hard hats, safety goggles, dust masks, gloves and safety shoes) during construction and operation of the facilities. The EIA describes safety measures in cases of emergency, fire, or explosion. It also describes safety measures for the storage and use of chemicals and the development of a health and safety training manual for the employees.²⁰ The EIA does not address other PS2 related issues.

¹⁶ ESRS, Overview of IFC's Scope of Review, <https://disclosures.ifc.org/#/projectDetailESRS/1064> (accessed March 7, 2017). IFC also reviewed documentation provided at the manufacturing facilities, including but not limited to: Occupational Health and Safety Assessment Series (OHSAS) external audit reports; OSHAS Legal compliances; training log form, Recognition Agreement of Kenya Chemical and Allied Workers Union; the company's health & safety code; grievance resolution process; first-aid emergency response; Environmental audits and reporting as of 2013.

¹⁷ The ESRS states that Bidco is certified to ISO 9001:2008 (Quality Management Systems), ISO 14001:2006 (Environmental Management Systems), BS OHSAS ISO 18000 (British Standard for Occupational Health and Safety Assessment Series) and ISO 22000 (Food Safety Management Systems). It adds that the company agreed to develop and implement an integrated EHS Management System consistent with ISO 14001, OHSAS 18001 and HACCP/ISO 22001 (Hazard Analysis and Critical Control Point).

¹⁸ ESRS, Overview of IFC's Scope of Review, <https://disclosures.ifc.org/#/projectDetailESRS/1064> (accessed March 7, 2017).

¹⁹ IFC should disclose any environmental and social impact assessment documentation prepared by or on behalf of the client at this stage. 2012 Access to Information Policy, para. 31.

²⁰ Environmental Impact Assessment, September 2013, pp 118-121, available at: http://www.nema.go.ke/images/docs/EIA%20-%201170%20-%20201979/EIA_1149%20Bidco%20Oil%20Block%20370.pdf (accessed March 6, 2017).

Labor and Working Conditions

In terms of labor and working conditions, the ESRS notes that Bidco employs over 2200 workers of which 1400 are contract workers with a potential for the workforce to grow to over 2500. Although only 100 women work at Bidco, the ESRS states that Bidco is committed to equal opportunity, gender equality, and is against discrimination. The ESRS also states that all workers are employed under either fixed-term or open-ended contracts and all are provided workplace accident and occupational illnesses insurance.

The ESRS states that, in accordance with Kenya's labor laws, working hours at Bidco are 52 per week spread over 6 days. It adds that all employees are entitled to annual leave after the completion of 12 months of employment. The ESRS considers that a grievance mechanism exists within the factory. The mechanism, according to IFC, meets PS2 requirements and is found in the human resources manual.

The ESRS considers that the Client has a comprehensive OHS management system in place with ongoing monitoring. It adds that the OHS procedures are followed rigorously and employees are provided with PPE in accordance with their job description and the company's PPE policy. The ESRS states that employees are generally compliant and do use PPE. It states that hazard and safety warning signs are clear and posted in order to avoid incidents. Further, it states that specific training on first aid is conducted every six months.

Generally, the ESRS notes that Bidco effectively implements its EHS management systems. It also notes that these systems will be replicated with the same rigor for the new facilities.

Relevant to the issues considered in this compliance appraisal, the ESAP required the Client to design and implement an integrated environmental, OHS, and social management system in accordance with IFC requirements. The ESAP also required the certification of an EHS quality assurance manager, the employment of appropriately qualified EHS personnel, and the creation of an EHS committee to oversee the operations.

More specifically in relation to labor issues, the ESAP included requirements that the Client:

- i. develop and implement Human Resources Policies and Procedures appropriate for its workforce that set out the approach to managing workers consistent with the requirements of Performance Standard 2 and Kenya's labor laws, including a grievance mechanism; and
- ii. develop and implement OHS policies and procedures demonstrating compliance with WBG's EHS requirements. The policies and procedures should include identification of managers responsible for OHS performance, on-going training, and a mechanism for reviewing deviations from procedures and improving performance both during construction and operational phases.

In December 2015, about six months prior to first disbursement, IFC first noted media coverage alleging that the Client was treating its workers unfairly. IFC's documentation did not provide details of the nature or severity of these issues, noting only that Bidco, as a high profile company in East Africa, would continue to get adverse media coverage. Although IFC indicated to CAO that the team carried out research on the Client through various online resources, earlier public reports of labor disputes at Bidco were not noted in IFC's review documentation.

Conclusion

IFC's E&S review addressed issues related to the application of PS2 to the Project, noting that the Client had strong human resources and occupational health and safety systems. At the same

time, IFC required the Client to ensure that these systems met IFC and other relevant international standards.

While noting these measures, CAO has questions as to whether IFC's pre-investment E&S review was commensurate to risk. In this context, CAO notes that the client was subject to a number of labor related law suits at the time of IFC's E&S review. These law suits involved issues relevant to those in the CAO complaint, including recognition of labor unions, allegations of unfair dismissal, and the safety of the Client's workplace. It is not evident from IFC's documentation that IFC considered these ongoing law suits as part of its pre-investment E&S review. Given the size of the Client's workforce, the existence of ongoing litigation in relation to labor issues, and adverse media coverage of the Client's labor practices, CAO has questions as to whether a stand-alone labor assessment should have been required prior to IFC's investment.

Project Supervision

This section considers IFC's supervision of the Project. It identifies relevant requirements and reviews steps taken by IFC to supervise the Project's E&S performance in light of the issues raised in the complaint.

Requirements

IFC is required to supervise a client's E&S performance in accordance with its Sustainability Policy and ESRP. As part of supervision, IFC is required to obtain information to assess the status of project's compliance with the Performance Standards and other E&S requirements.²¹ This includes reviewing project performance against client commitments in the investment agreement and in the ESAP. PS1 provides that client monitoring should be commensurate with the project's environmental and social risks and impacts and with compliance requirements.²² It also provides that the client should use dynamic mechanisms to verify compliance and progress toward the desired outcomes.²³ In instances where a client is not fulfilling its commitments, IFC is required to work with the client to bring it into compliance, and to exercise appropriate remedies if such client fails to reestablish compliance.²⁴

Supervision

IFC's supervision consisted of site visits to the Client's new and existing facilities, the review of the ESAP implementation, and the review of the Client's Annual E&S Monitoring Reports.²⁵ In addition, IFC requested, and regularly received internal and external audit reports from the Client. These audit reports were designed to assess the Client's performance against various ISO standards and to determine effectiveness of the Client's integrated ESMS. Bidco carried out quarterly internal audits and two annual external audits.

Although IFC's loans were committed by December 2014, first disbursement occurred in June 2016. It was at this time that IFC's first site visit was scheduled.

²¹ Environmental and Social Review Procedures, Version 7, April 15, 2013, ESRP 6 para. 1.

²² 2012 Performance Standard 1, paras. 22.

²³ 2012 Performance Standard 1, paras. 23.

²⁴ 2012 Sustainability Policy, para. 24.

²⁵ The Annual Environmental and Social Monitoring Report set out the specific social, environmental and developmental impact information as provided by the Client in respect to the Project.

In January 2015, IFC was already receiving information on the implementation of ESAP-related activities. However, many of the ESAP requirements had not fallen due because they had deadlines that were linked to construction, which was delayed. IFC updated the ESAP timeline in June 2016 to reflect these changes. IFC's records note that by the time of first disbursement in June 2016, the Client had reviewed its human resources policy and had already eliminated the practice of hiring casual workers. At this time, IFC also noted that the Client had met its ESAP requirements to employ EHS staff and form an EHS committee.

Following an October 2016 supervision mission, IFC noted that it had inspected existing facilities as well as the construction of the new facilities, in relation to compliance with the Performance Standards, and the ESAP. IFC noted that once the plant under construction was operational, Bidco would apply its existing environmental and OHS systems to the new plant.

In relation to PS2 and more specifically in terms of overall health and safety, IFC noted that first aiders were trained on an ongoing basis and that one trained first aid person was always on duty on the site. Nevertheless, IFC noted that fire and life safety training needed to be provided more often to all workers in accordance with the emergency preparedness procedures. IFC noted that all Bidco employees were provided with workplace accident and occupational illness insurance, as well as medical aid, and a pension fund.

In terms of labor and working conditions, IFC's supervision documentation noted that Bidco had eliminated the appointment of casual workers and that work shifts had changed from two shifts of 12 hours to 3 shifts of 8 hours. IFC noted that the employee attrition rate was low and that satisfaction among workers had increased. IFC noted that policies and practices that guide the Client's management of human resources had been amended and that a whistleblower policy was put in place. IFC's supervision documentation also noted that Bidco was committed to non-discrimination, equal opportunity and gender equality. IFC considered that Bidco's human resources policies and practices broadly complied with PS2.

IFC added that an agreement with a union had been in place since 2015 and that this union represented about 13% of employees. IFC's reported on the cooperation between the union and Bidco, noting that worker concerns or issues were presented to Bidco for discussion and resolution. IFC's supervision documentation described the grievance process and noted that on average approximately 1 major and 3 minor grievances were logged each month. The grievance mechanism was considered to be functioning effectively, as most issues were resolved satisfactorily. IFC noted that according to Bidco, since the time of reviewing the human resources policies, the number of grievances sharply declined.

Concerning OHS, IFC noted that a company survey raised the provision of PPE as a negative issue despite generally high levels of job satisfaction. IFC added that Bidco had taken action in relation to this point noting that employees were provided with PPE in accordance with their job description and the PPE issuance policy. IFC noted that OHS incidents in the previous year had been minor (backaches, cuts and bruises). It added that employees with injuries were taken to the local hospital and treated at the company's expense or under the compulsory National Hospital Insurance Fund.

IFC noted that during future supervision activities, it needed to confirm the implementation of the ESMS across the various activities at the oil and soap factory.

IFC's supervision documentation did not comment on public reports of labor disputes involving the Client or decisions of the Kenyan courts which included adverse findings in relation to the Client's human resources and workplace safety practices in 2014, 2015 and 2016. October 2016

reports that the Kenyan parliament would investigate the Client over claims that it mistreated workers may also be of relevance in this context.

Conclusion

While some improvements in the Client's labor practices are acknowledged by the complainants, such as the change in work shifts and hours as well as the transfer of casual workers to regular contracts, they assert that their concerns in relation to other aspects of Bidco's operations remain unaddressed.

CAO notes that IFC's supervision reaches favorable conclusions in relation to the Client's performance against the requirements of PS2.

Nevertheless, CAO has questions as to whether IFC's supervision was sufficient to establish compliance, particularly in a context where the Client was the subject of significant negative press coverage and adverse judicial decisions in relation to its labor practices.

IV. Decision

The purpose of a CAO compliance appraisal is to ensure that compliance investigations are initiated only for those projects that raise substantial concerns regarding environmental or social outcomes or issues of systemic importance to IFC/MIGA. In deciding whether to initiate an investigation, CAO weighs factors including the magnitude of the environmental and social (E&S) concerns raised in a complaint, the results of a preliminary review of IFC's E&S performance in relation to these issues, and a more general assessment of whether a compliance investigation is the appropriate response in the circumstances.

The complaint in this case, raises concerns that potentially affect a large number of the Client's workforce, which is expected to grow to over 2500 employees. While the complainants acknowledge improvements in some areas of the client's labor practices, they assert ongoing concerns regarding a range of issues that are governed by IFC Performance Standard 2. These include concerns regarding discrimination, limitations on freedom of association, conditions of employment and occupational safety.

Based on an initial review of project documentation, publically available information regarding the client's labor practices, and discussions with IFC staff, CAO has questions as to IFC's review and supervision of related aspects of the project. In this context, CAO has decided to conduct a compliance investigation of IFC's E&S performance in relation to the project. The investigation will focus on the adequacy of:

- IFC's review of the company's labor practices, particularly as they relate to the concerns raised by the complainants;
- IFC's supervision of the Client's E&S and OHS performances, in particular after becoming aware of labor related concerns in 2015.

Terms of Reference for this compliance investigation will be issued in accordance with CAO's Operational Guidelines.