



June 9, 2021
Office of the Compliance Advisor Ombudsman (CAO)

COMPLIANCE INVESTIGATION REPORT

IFC Investments in Indorama Eleme Fertilizer & Chemicals Limited (Project #30967 and 40420)

Complaint 01

CAO Investigation of IFC's Environmental and Social Performance in relation to its investments in Indorama Eleme Fertilizer & Chemicals Limited

Office of the Compliance Advisor Ombudsman
for the International Finance Corporation (IFC) and the
Multilateral Investment Guarantee Agency (MIGA),
Members of the World Bank Group

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).

CAO's compliance function oversees investigations of IFC/MIGA's environmental and social performance, particularly in relation to sensitive projects, to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC/MIGA involvement, with the goal of improving IFC/MIGA environmental and social performance.

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

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Executive Summary

Indorama Corporation is a leading global conglomerate in the petrochemical industry. In 2007 Indorama purchased a petrochemical facility at Port Harcourt, Nigeria and in 2010 it established a subsidiary, Indorama Eleme Fertilizer & Chemicals Limited (IEFCL or “the Company”). In 2013, IFC provided a loan to IEFCL to support the construction, next to the petrochemical facility, of a fertilizer facility. This fertilizer facility commenced operations in 2016. In 2018 and 2020, IFC provided additional loans to IEFCL to support an expansion of the fertilizer facility.

Complaint and CAO Case Handling

In April 2018, CAO received a complaint from 134 IEFCL employees (“the Complainants”) raising concerns regarding the Company’s labor and working conditions and use of security forces. The complaint included concerns about salary and welfare, health and safety hazards, and freedom to join unions, among others. It also claimed violent treatment by Company security and the Nigerian Military, as a response to a worker protest in July 2017 (July 2017 incident).

During CAO’s Assessment, the Complainants indicated they had little trust in the Company’s workers’ grievance mechanism (WGM) and expressed concern over reprisals for their complaints about work-related issues. The complainants describe an incident on July 27, 2018 where employees gathered to question the short notice transfer of two of their colleagues to a Company facility in Kano State (1,000 kilometers from Port Harcourt). Following this incident, the Company initiated disciplinary procedures against seven employees. This led to the dismissal of three employees. According to the complainants, these disciplinary procedures and dismissals constituted retaliatory measures and were a means to dissuade them from complaining about their working conditions. The Company states that it has a good relationship with its employees and its decision to dismiss three employees followed an internal investigation of allegations of employee gross indiscipline and actions that created an unsafe work environment.

The complaint was referred to CAO’s compliance function and in December 2019 CAO released a compliance appraisal report. CAO’s appraisal report noted that, following the July 2017 incident, IFC enhanced supervision of the project with a focus on the Company’s approach to labor issues and security. Where gaps against Performance Standard requirements were identified, IFC documented implementation of corrective actions in relation to these issues. However, CAO’s appraisal also identified questions regarding the adequacy of IFC’s response to allegations that the Company has taken a retaliatory approach to workers who had raised grievances with the Company. Given the negative impact that retaliations can have on targeted individuals, the work environment, and related IFC compliance requirements, CAO decided that a compliance investigation was warranted. Given positive measures taken during supervision in relation to other issues raised in the complaint, CAO decided to limit the scope of its compliance investigation to IFC’s pre-investment review and supervision of the Company’s disciplinary procedures and approach to grievance handling, including its response to the specific retaliation allegations raised by the complaint.

IFC Requirements and CAO Investigation Summary

In its pre-investment review, IFC is required to assure itself that the Company has developed a WGM which provides a clear and safe channel for workers to raise concerns which will be addressed expeditiously and fairly without retribution (IFC Performance Standard 2, para. 20). During supervision, IFC is required to establish the Company’s degree of compliance with this standard and consider the effectiveness of the Company’s WGM.

CAO notes that IFC enhanced its supervision of the Company's WGM since 2018 and has documented improvements. However, IFC's WGM reviews have focused on the Company's documentation and have not adequately considered how the WGM works in practice. In this context, CAO finds that IFC's supervision does not provide sufficient evidence of the effectiveness of the Company's WGM considering PS2 requirements. Considering risk factors such as the history of worker protest and specific retaliation allegations against workers, CAO finds that IFC lacks assurance that the Company is implementing a WGM which reflects PS2 provisions regarding non-retribution. In particular, IFC lacks assurance that the Company is implementing a WGM which provide workers with a channel to address their concerns in a manner that is perceived as safe and fair.

The right of workers to organize and raise grievances without fear of reprisal is a key tenant of IFC PS2. IFC is required to assess and document compliance with PS requirements during project supervision. IFC affirms that it does not tolerate any action by an IFC client that amounts to retaliation against those who voice their opinion regarding the activities of IFC or its clients. In this case, IFC was informed of complainant allegations of Company retaliation against workers in October 2018 following the dismissal of three workers. In response, IFC discussed the issue with the Company and was informed that the Company followed its disciplinary procedures in relation to these workers. CAO finds this response insufficient to assess compliance with PS2 anti-retaliation requirements. An appropriate IFC response would have included actions aimed to further understand and assess the situation, such as: engaging with workers alleging instances of reprisals to reviewing their claims and concerns, and/or a more in-depth review of whether the company's worker grievance mechanism was effective and whether disciplinary procedures had been properly applied.

When IFC was presented with allegations of retaliation against workers in relation to the Company, IFC did not have technical guidance for staff or clients on how to respond to such risks. There are model policies and good international industry practice for addressing retaliation at the company level. These include separate procedures to handle allegations of retaliation and a process for allegations of retaliatory action to be investigated and rescinded if substantiated. CAO concludes that a lack of guidance at the IFC and client level on handling allegations of retaliation was an underlying cause of its non-compliance findings in this instance. While at the time IFC did not have technical guidance for staff or clients on handling allegations of worker retaliation, in March 2021, IFC and IDB Invest released *Good Practice Note for the Private Sector: Addressing the Risks of Retaliation Against Project Stakeholders*. This guidance note is directed to IFC and IDB Invest clients to support them in addressing risks of retaliation against project stakeholders. This is a positive action by IFC to support its clients in handling this issue.

CAO's compliance function is also called upon to reach conclusions as to any adverse environmental and/or social outcomes, including the extent to which these are verifiable. Retaliation is generally understood as an employer's adverse treatment of a worker as a result of the worker's exercise of a right or protected activity. Direct evidence of retaliation may not be available. Instead, there may only be indirect evidence to substantiate an allegation of retaliation. In such cases, retaliation may be inferred through the assessment of available information. However, in practice, it can be difficult to substantiate retaliation.

CAO's review of available information in this case does not produce direct evidence of retaliation. It remains unclear to CAO whether the events of July 2018 which precipitated the commencement of disciplinary procedures against seven employees were retaliatory. Accordingly, CAO concludes that available evidence is insufficient to make findings of adverse outcomes in relation to the complainants' allegations of retaliation.

In summary, CAO's compliance investigation identified shortcomings in IFC's pre-investment review and supervision of the project with regard to PS2, particularly requirements to: (a) implement an effective WGM, and (b) prevent retaliation against workers who raise grievances. CAO identified a lack of technical guidance for IFC staff and clients on how to respond to allegations of retaliation against workers as an underlying cause of the non-compliance.

CAO Monitoring

Further IFC action is required in order to assure itself of compliance. CAO will monitor (a) actions taken by IFC to assure itself of the effectiveness of the client's WGM in accordance with PS2 requirements and (b) development of guidance provided for IFC staff on responding to allegations of reprisals against workers.

Acronyms

Acronym	Definition
AMR	Annual Monitoring Report
CAO	Office of the Compliance Advisor Ombudsman (IFC and MIGA)
CDC	Company Disciplinary Committee (IEFCL)
E&S	Environmental and Social
EHS	Environmental, Health and Safety
EIA	Environmental Impact Assessment
EPCL	Eleme Petrochemicals Company Limited
ESAP	Environmental and Social Action Plan
ESRS	Environmental and Social Review Summary (IFC Disclosure)
ESRP	Environmental and Social Review Procedures
GIIP	Good International Industry Practice
GN2	Performance Standard Guidance Note 2
HR	Human Resources
IDB	Inter-American Development Bank
IEFCL	Indorama Eleme Fertilizer & Chemicals Limited
IFC	International Finance Corporation
ILO	International Labour Organization
MIGA	Multilateral Investment Guarantee Agency
NUPENG	National Union of Petroleum, Natural Gas
PS	Performance Standards (IFC)
PS2	Performance Standard 2: Labor and Working Conditions
SII	Summary of Investment Information
SSV	Site Supervision Visit
WGM	Workers' Grievance Mechanism

Overview of the CAO Compliance Process

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).

CAO's approach to its compliance mandate is set out in its *Operational Guidelines* (March 2013).¹

When CAO receives an eligible complaint, it first undergoes an assessment to determine how CAO should respond. If CAO's compliance function is triggered, CAO will conduct an appraisal of IFC's/MIGA's involvement in the project and determine whether an investigation is warranted. CAO's compliance function can also be triggered by the World Bank Group President, the CAO Vice President, or senior management of IFC/MIGA.

CAO compliance investigations focus on IFC/MIGA and how IFC/MIGA assured itself/themselves of a project's E&S performance. The purpose of a CAO compliance investigation is to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC/MIGA involvement, and thereby improve the institution's environmental and social (E&S) performance.

In the context of a CAO compliance investigation, at issue is whether:

- The actual E&S outcomes of a project are consistent with or contrary to the desired effect of the IFC/MIGA policy provisions
- A failure by IFC/MIGA to address E&S issues as part of the appraisal or supervision resulted in outcomes contrary to the desired effect of the policy provisions

In many cases, in assessing the performance of a project and implementation of measures to meet relevant requirements, it is necessary to review the actions of the IFC client and to verify outcomes in the field.

CAO has no authority with respect to judicial processes. CAO is neither a court of appeal nor a legal enforcement mechanism, nor is CAO a substitute for international court systems or court systems in host countries.

Upon finalizing a compliance investigation, IFC/MIGA is given 20 working days to prepare a public response. The compliance investigation report, together with any response from IFC/MIGA is then sent to the World Bank Group President for clearance, after which it is made public on CAO's website (www.cao-ombudsman.org).

In cases where IFC/MIGA is found to be out of compliance, CAO keeps the investigation open and monitors the situation until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the noncompliance. CAO will then close the compliance investigation.

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

¹ CAO's Operational Guidelines (2013) available at <http://bit.ly/3cVyvVt>.

1. Background to CAO Investigation

1.1. IFC Investments

Indorama Corporation is a large global conglomerate. It employs 30,000 people in 30 countries producing petrochemicals, polyester, polyethylene terephthalate, fertilizer, spinning and textiles.²

In January 2007, IFC provided a US\$75 million loan to Indorama to finance the acquisition and refurbishment of Eleme Petrochemicals Company Limited (EPCL), a then Nigerian government owned petrochemical company in Port Harcourt, Nigeria.³ The loan was repaid in 2012.

In 2010, Indorama Eleme Fertilizer & Chemicals Limited (IEFCL, “the Company”) was established for the purpose of developing and operating a nitrogenous fertilizer facility at Indorama’s site in Port Harcourt.⁴ In December 2012, IFC agreed to support IEFCL to finance the construction of the fertilizer facility (‘Line I’). This included: (a) US\$150 million loan from IFC’s own account; (b) US\$75 million in syndicated loans; and (c) US\$150 million mobilized from several other development finance institutions.⁵ The fertilizer facility was commissioned in June 2016.⁶

In July 2016, IFC agreed to provide a US\$52.5 million loan from its own account and US\$21 million in syndicated loans to finance the development of a multi-purpose port terminal at Onne in Port Harcourt. The port is a joint venture between Indorama and a local partner, Oil and Industrial Services Ltd. Part of the port is dedicated to transport the Company’s fertilizer product.⁷

In June 2018, IFC agreed to finance the Company’s expansion of its fertilizer facility (‘Line II’). IFC provided: (a) a loan of US\$100 million from its own account; (b) a US\$50 million loan acting in its capacity as the implementing entity for the Managed Co-Lending Portfolio Program (MCP); and (c) up to \$850 million in syndicated loans.⁸

In June 2020, IFC agreed to provide IEFCL with a US\$35 million loan from its own account and up to US\$115 million in syndicated loans to finance the construction of an add-on gas processing facility to Line II. The processing facility will recover carbon-dioxide from gas used in the production process to increase polymer production in Indorama’s petrochemical facility.⁹

Collectively, this report refers to IFC’s active investments with the Company as “the project.”

² Indorama, *About Us*. Available at <http://bit.ly/2K8w7M6>.

³ IFC Disclosure, Summary of Proposed Investment, project number 24802. Available at <http://bit.ly/2K82D18>.

⁴ Bloomberg, Indorama Eleme Fertilizer and Chemicals Ltd Available at <https://bloom.bg/2zqs73u>.

Indorama Corporation has majority ownership and control of IEFCL.

⁵ IFC Disclosure, Summary of Investment Information, project number 30967. Available at <http://bit.ly/2OydgFS>.

⁶ IFC Disclosure, Summary of Investment Information, project number 42187. Available at <http://bit.ly/2RdTrdH>.

⁷ IFC Disclosure, Summary of Investment Information, project number 38096. Available at <http://bit.ly/2tR1q8P>.

⁸ IFC Disclosure, Summary of Investment Information, project number 40420. Available at <http://bit.ly/2GGN6Da>. CAO Assessment Report, February 2019. Available at <http://bit.ly/33nkM2j>.

⁹ IFC Disclosure, Summary of Investment Information, project number 42187. Available at <http://bit.ly/2RdTrdH>.

1.2. Complaint, and CAO Assessment and Compliance Appraisal

In April 2018, CAO received a complaint from 134 IEFCL employees (“the Complainants”) raising a series of concerns regarding the Company’s labor and working conditions and use of security forces. As detailed in their complaint and CAO’s assessment report, the Complainants allege that:

- a) Salary and welfare are not commensurate to the work they do and below industry standard.
- b) The Company discriminates between expatriate and Nigerian employees, with expatriate employees treated better.
- c) They should be free to join a union of their choosing.
- d) Some taxes and union dues were illegally withdrawn from their salaries.
- e) They have experienced reprisals as a result of their work-related complaints.
- f) They are exposed to a series of health and safety hazards.
- g) The Company provided healthcare plan is inadequate.

The Company presented a response to each concern¹⁰ and noted it has implemented a number of initiatives and improved facilities to create a conducive work environment for staff.¹¹ The Company asserts that it operates in accordance with, or beyond, the requirements of national law.

The Complainants also allege that workers were violently treated during a protest on July 12-13, 2017 (July 2017 incident). They note that on July 12, 2017, workers protested labor and working conditions. Some workers remained at the Company’s site overnight. The Complainants assert the following morning Company security, accompanied by armed members of the Nigerian military and police forces, attacked workers with live ammunition, chemical spray, tear gas, and horse-whips, and eventually forced them to run to the Company entrance gate. The Complainants claim to have been brutalized by Nigerian military personnel, allegedly ordered by Company management. The Complainants claim that they sustained injuries as well as mental trauma as a result of the incident.¹² In relation to this incident, the Company claims that workers protested on Company premises without following due process and occupied an area that was highly unsafe. The Company asserts that when security personnel (including Nigerian mobile police) required the protestors to leave the area, some protestors did leave, but other remained. The Company notes that a scuffle broke out between protestors and security personnel supported by the police. The Company claims that there was no inappropriate use of force by security personnel.

During the course of CAO’s assessment process, the Complainants indicated they had little trust in the Company’s workers’ grievance mechanism (WGM) and expressed concern over reprisals for their complaints about work-related issues. The complainants alleged that three employees were unlawfully dismissed in October 2018 for gathering at the Company’s control office to ask Human Resources (HR) for an explanation for the short notice transfer of two of their colleagues to a Company facility in Kano State, 1,000 kilometers (km) from Port Harcourt. The Complainants claim the dismissals are not legally grounded and constitute a retaliation measure by the Company for complaining about their working conditions and a means to silence them or dissuade them from complaining about their working conditions. The Company denies such allegations.

CAO finalized its assessment report in February 2019. As there was no agreement to a dispute

¹⁰ See CAO’s Appraisal report and CAO Assessment report. Available at <http://bit.ly/33nkM2j>.

¹¹ See CAO’s Appraisal report and CAO Assessment report. Available at <http://bit.ly/33nkM2j>.

¹² The complaint letter is confidential. A summary of Complainant allegations is presented in CAO Assessment Report, February 2019. Available at <http://bit.ly/33nkM2j>.

resolution process under CAO auspices, the complaint was referred to CAO's compliance function for appraisal.¹³

In December 2019, CAO completed a compliance appraisal of this case. CAO's compliance appraisal report noted questions regarding IFC's pre-investment review and initial supervision of the Company. However, CAO's appraisal report also noted that, following the July 2017 incident, IFC enhanced supervision with a focus on the Company's approach to labor issues and security with a result that gaps against Performance Standard requirements were identified, and corrected.¹⁴

At the time CAO completed its appraisal, however, questions remained as to IFC's response to allegations that the Company has taken a retaliatory approach to workers who have raised grievances with the Company in their pursuit for furthering and defending their labor conditions. Given the potentially chilling impact of such decisions, CAO's compliance appraisal concluded that they raised substantial concerns regarding the application of PS2 to the project. Accordingly, CAO triggered an investigation in relation to these issues. The other issues raised in the complaint (see a, b, c, d, f & g above) were found not to merit further investigation by CAO as they either did not raise compliance concerns for IFC, or CAO found that they had been appropriately considered in the course of IFC's supervision of the Company post 2017.¹⁵

1.3. CAO Investigation Scope and Methodology

CAO's compliance mandate is focused on IFC's E&S performance. In accordance with CAO's Operational Guidelines, this report documents investigation findings with respect to IFC's compliance with relevant requirements; adverse environmental and/or social outcomes in relation to the project, and the extent to which these are verifiable; and underlying causes for identified non-compliance findings.

The scope of this investigation is defined in Terms of Reference (TOR) issued by CAO in December 2019.¹⁶ Given the outcome of CAO's compliance appraisal, CAO's investigation is limited in scope to IFC's review and supervision of the Company's disciplinary procedures and approach to grievance handling, including its response to the specific grievances raised in the complaint.

Specifically, the TOR established the following questions as the focus of the compliance investigation:

1. Whether IFC's pre-investment review and supervision of its investments provided assurance that the Company's workplace disciplinary procedures and approach to grievance handling were consistent with PS2 requirements.
2. Whether IFC took sufficient action to assure itself of the Company's PS2 compliance in response to allegations of reprisals against workers.

CAO's investigation considers IFC's performance in relation to application of IFC policies and procedures, which applied to IFC, and IFC E&S requirements, which applied to the Company. As

¹³ CAO Assessment Report, February 2019. Available at <http://bit.ly/33nkM2i>.

¹⁴ For further details, see CAO Compliance Appraisal report available at <http://bit.ly/33nkM2i>.

¹⁵ For further details, see CAO Compliance Appraisal report available at <http://bit.ly/33nkM2i>.

¹⁶ CAO Terms of Reference: IEFCL. Available at <https://bit.ly/3ciNXHW>.

applied to IFC this includes IFC's 2012 Policy on Environmental and Social Sustainability ("Sustainability Policy", SP). As applied to the Company, this includes IFC 2012 Performance Standards (PS).¹⁷ In interpreting these requirements, CAO has also considered relevant international standards referenced in IFC's PS, including those of the International Labour Organization (ILO). More detailed guidance in relation to PS requirements is set out in IFC's 2012 Guidance Notes to Performance Standards on Environmental and Social Sustainability (Guidance Notes, GN), IFC's 2008 Labor Toolkit (Labor Toolkit) and IFC's 2010 publication *Measure & Improve Your Labor Standards Performance: Performance Standard 2 Handbook for Labor and Working Conditions* (PS2 Handbook).¹⁸ This report also references IFC commitments in its October 2018 *Position Statement on Retaliation Against Civil Society and Project Stakeholders*. While the position statement is not a compliance requirement, it sets out IFC's approach to allegations of reprisals.¹⁹

In considering IFC's E&S performance in relation to this investment, CAO is conscious not to expect performance at a level that requires the benefit of hindsight. Rather, the question is whether there is evidence that IFC applied relevant requirements considering sources of information available at the time.

CAO's investigation report was prepared on the basis of (a) review of IFC documentation; (b) review of publicly available information and documentation provided to CAO by the Complainants and the Company;²⁰ (c) telephone or video interviews with IFC staff, Company staff, and the Complainants; and, (d) an interview with an expert on Nigerian law. Given the COVID-19 travel restrictions and considering it was possible to interview relevant parties remotely, CAO did not conduct a site visit. This approach limited CAO's ability to talk to Company workers other than the complainant representatives.

The CAO compliance investigation was conducted by CAO staff with inputs from an external expert. CAO's external expert has over 20 years of experience in labor and employment law and international labor standards, with previous work for Asian Development Bank, ILO and the World Bank Group.

2. Analysis and Findings

This section presents a (i) summary of applicable IFC policies, procedures and Company requirements; and, (ii) CAO analysis and findings on IFC's pre-investment review and supervision as relevant to the issues raised in this case.

2.1. IFC E&S Commitments and E&S Requirements

IFC E&S Commitments

IFC's investments in the Company were made under its 2012 Sustainability Policy and Performance Standards. The Sustainability Policy outlines IFC's commitment to E&S

¹⁷ The Sustainability Policy and Performance Standards are collectively referred to as the IFC Sustainability Framework.

¹⁸ IFC PS2 Guidance Notes (2012), available at <http://bit.ly/2MTIvVq>. IFC, 2008, Labor Toolkit, internal document on file with CAO.

¹⁹ IFC October 2018, IFC Position Statement on Retaliation Against Civil Society and Project Stakeholders, available at <http://bit.ly/33DNBYb>.

²⁰ The Complainants provided CAO with documentation in relation the employee transfer and dismissal. The Company provided CAO with (a) Employee Handbook; (b) data related to its grievance mechanism, employee transfer and disciplinary process.

sustainability and provides that “IFC seeks to ensure, through its due diligence, monitoring, and supervision efforts, that the business activities it finances are implemented in accordance with the requirements of the Performance Standards.”²¹ The PS are E&S standards that IFC requires its clients to follow throughout the life of IFC’s investment. The PS are supplemented by detailed Guidance Notes, Labor Toolkit, and the PS2 Handbook which provide guidance on implementation.²² Prior to investment, IFC’s role is to conduct an E&S review of the client’s E&S assessment, policy and performance and identify “any gaps therewith, and corresponding additional measures” required to meet IFC’s PS.²³ Where gaps are identified, IFC includes an E&S Action Plan (ESAP) as necessary condition of its investment agreement. The ESAP details actions for the client to implement.²⁴ Prior to seeking IFC Board approval for an investment, IFC publishes an E&S Review Summary (ESRS) and the ESAP on its disclosure website.²⁵

Post disbursement, IFC implements a regular program of supervision in order to obtain information to assess the status of the client’s compliance with the PS, general and sector-specific Environmental, Health and Safety (EHS) Guidelines, and the ESAP; to assess the current level of E&S risk; to provide advice to clients on how to address critical E&S issues; and to identify opportunities for improvement and good practices that could be applied to similar projects.²⁶ IFC does this through review activities, including a review of an annual E&S monitoring report (AMR) prepared by the client and all other project-related information, site visits and commissioning third party reviews of client performance.²⁷ Upon review of a client’s AMR and/or a site visit, IFC assigns its client an E&S Risk Rating (ESRR),²⁸ indicating IFC’s view of the client’s E&S performance. IFC’s E&S supervision procedures provide for staff to carefully consider the effectiveness of the client’s grievance mechanism.²⁹ In the event of client non-compliance with IFC E&S requirements, IFC is required to “work with the client to bring it back into compliance, and if the client fails to reestablish compliance, IFC [is required to] exercise its rights and remedies, as appropriate.”³⁰

²¹ IFC, 2012, Sustainability Policy, para. 7.

²² IFC 2012 Performance Standards and Guidance Notes are available at <https://bit.ly/2U04xVO>.

²³ IFC, 2012, Sustainability Policy, para. 28.

²⁴ IFC, 2012, Sustainability Policy, para. 28.

²⁵ IFC Access to Information Policy, para 31.a.

²⁶ IFC, 2012, Sustainability Policy, para. 45. & ESRP 6, para 1. Version August 2013).

²⁷ IFC ESRP 6 (version April 2013), para. 2.1.

²⁸ ESRR are 1: Excellent; 2: Satisfactory; 3: Partly Unsatisfactory; 4: Unsatisfactory. An ESRR of 3 or 4 indicates a company is non-compliant with IFC’s E&S requirements.

²⁹ IFC ESRP 6 (version April 2013), para 2.3.

³⁰ Sustainability Policy, para. 24.

Relevant Requirements in Relation to Labor and Working Conditions

Relevant to the issues considered in this compliance investigation, Performance Standard 2 (PS2): Labor and Working Conditions provides IFC clients “will base the employment relationship on the principle of equal opportunity and fair treatment, and will not discriminate with respect to any aspects of the employment relationship, such as... termination of employment or retirement, and disciplinary practices.”³¹ PS2 requires clients to not “discriminate or retaliate against workers who participate, or seek to participate, in [workers’] organizations and collective bargaining.”³² IFC’s PS2 Guidance Notes elaborate that “a workers’ organization is any organization of workers for the purpose of furthering and defending the interests of workers with regard to working conditions and terms of employment.”³³ Demoting or re-assigning workers, as well as outsourcing or shifting workers among facilities, in response to legitimate organizing activities would constitute discrimination or retaliation.³⁴

PS2 calls for the adoption and implementation of HR policies and procedures consistent with PS2 requirements, and for the provision of documentation that is clear and understandable for workers.³⁵ Disciplinary policies and measures are integral to HR policies and procedures, and clients should inform workers of applicable disciplinary procedures upon commencement of their employment.³⁶ PS2 also requires the client to provide “reasonable working conditions and terms of employment”, defined by IFC as including “disciplinary practices, reasons and process for termination of workers and respect for the worker’s personal dignity (such as avoiding physical punishment or abusive language).”³⁷ Following PS2 “reasonable working conditions and terms of employment could be assessed by reference to (i) conditions established for work of the same character in the trade or industry concerned in the area/region where the work is carried out; (ii) collective agreement or other recognized negotiation between other organizations of employers and workers’ representatives in the trade or industry concerned; (iii) arbitration award; or (iv) conditions established by national law.”³⁸

The client is required to provide a WGM to handle workplace concerns. The WGM should provide a clear and safe channel for workers to raise concerns which will be addressed expeditiously and fairly without reprisal. As set out in PS2 and the accompanying GN2, the WGM should clearly establish the policy and procedures for handling grievances, it should be easily accessible and the client should inform workers of the WGM at the time of their recruitment and train and encourage workers on its use. Relevantly, PS2 and GN2 provide that the WGM should bar retribution for filing complaints.³⁹

As relevant to this case, international labor standards on employment grievances establish the right of workers to submit grievances without suffering any prejudice whatsoever;⁴⁰ and good international industry practice (GIIP) calls for the inclusion of implementable safeguards for those who raise grievances or means to address any related claims of retribution or discrimination.⁴¹

³¹ IFC 2012, PS2, para. 15.

³² IFC 2012, PS2, para. 14.

³³ IFC 2012 GN2, para. GN33.

³⁴ IFC 2012 GN2, para. GN37.

³⁵ IFC 2012, PS2, paras 8 and 9

³⁶ IFC 2012 GN2, Annex C; IFC Labor Toolkit (2008).

³⁷ IFC 2012, PS2, para 10; PS2 GN2, para. GN21.

³⁸ IFC 2012, PS2, para 10 (FN6).

³⁹ IFC 2012, PS2, para. 20 and PS2 GN 57.

⁴⁰ ILO, Examination of Grievances Recommendation, 1967 (No. 130), para. 2a. Available at: <https://bit.ly/38VvG4k>.

⁴¹ As example, see PS2 Handbook.

IFC's Position on Stakeholder Retaliation and Related International Practice

In October 2018, IFC released a position statement on retaliation against civil society and project stakeholders. In this statement, IFC noted that it “does not tolerate any action by an IFC client that amounts to retaliation – including threats, intimidation, harassment, or violence – against those who voice their opinion regarding the activities of IFC or our clients. We take seriously any credible allegations of reprisals.”^{42,43}

When such complaints are raised with IFC, IFC works with its client or other appropriate parties to address them. Specifically, IFC will “make our position against reprisals clear, and take follow up action as and where appropriate.”⁴⁴

While IFC has not outlined procedures for assessing allegations of retaliation against communities or other stakeholders, there are model policies and good international industry practice for addressing retaliation.⁴⁵ This includes separate procedures to handle allegations of retaliation and a process for the allegation of retaliatory action to be investigated and rescinded if substantiated. In the context of employment, retaliation is generally understood as an employer’s adverse treatment of a worker as a result of the worker’s exercise of a right or protected activity, such as raising a complaint about workplace conditions.⁴⁶ Retaliation may be found to occur even if the employer has produced evidence to support a legitimate reason for the adverse worker treatment. In practice, it can be difficult to substantiate retaliation. *Direct evidence* may be scarce to prove an employer’s adverse treatment of a worker was plainly caused by the worker exercising a right. Instead, where an allegation of worker retaliation arises, there may only be *indirect evidence* available that a worker’s exercise of a right and the employer’s initiation of adverse treatment are causally connected, even if not explicitly so. In these instances, retaliation may be inferred through the assessment of available information.

⁴² IFC 2018, IFC Position Statement on Retaliation Against Civil Society and Project Stakeholders, available at <http://bit.ly/33DNBYb>.

⁴³ In advice to IFC client during the COVID-19 pandemic, IFC clarified that examples of reprisal include “violence against community activists for opposition to projects or the firing of company whistleblowers, to security crackdowns on peaceful community protests or legal action used to silence critics. Reprisals can also take less visible forms; for example, penalizing workers who complain by affecting the assignments of their shifts or workloads or making anonymous phone calls to community members or union leaders with threats or other forms of harassment.” IFC (2020), Addressing Increased Reprisals Risk in the Context of COVID-19, available at <https://bit.ly/2NkUVVz>.

⁴⁴ IFC 2018, IFC Position Statement on Retaliation Against Civil Society and Project Stakeholders, available at <http://bit.ly/33DNBYb>.

⁴⁵ U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), *Recommended Practices for Anti-Retaliation Programs*, Available at: <https://bit.ly/2KDtaX1>; International Labor Office, Office Directive 551 – *Reporting Misconduct and Protection from Retaliation*, November 2019, available at: <https://bit.ly/3oagvsc>. World Bank Staff Rules 8.02: Protections and Procedures for Reporting Misconduct (Whistleblowing), available at <https://bit.ly/2Z2kD3q>.

⁴⁶ U.S. Equal Employment Opportunity Commission, *Retaliation/Reprisal*, Available at: <https://bit.ly/3pmxQzy>. UN High Commissioner for Human Rights states that retaliation “refers to any harmful conduct undertaken in order to prevent or discourage a person from, or punish a person for, accessing, or interacting with, a non-State-based grievance mechanism. Retaliation can include physical, psychological and economic harm, can take place both online and offline and can be perpetrated by both State and non-State actors”. *Improving accountability and access to remedy for victims of business-related human rights abuse through non-State based grievance mechanisms: explanatory notes*, A/HRC/44/32/Add.1, June 3, 2020. Available at: <https://bit.ly/3iK1sVd>.

Applicable National Law

Nigeria has ratified several International Labor Organization (ILO) conventions, including the ILO fundamental conventions.⁴⁷ The Nigeria Labour Act includes legal protections against discrimination or retaliation on the basis of trade union affiliation or activity, including the prohibition of dismissal based on these conditions.⁴⁸ However, Nigerian labor law has not integrated ILO standards on worker protection in employment termination.⁴⁹ This includes ILO standards on unfair dismissal, the prohibition of employment termination “unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”.⁵⁰ Nigerian law and courts generally favor an employer’s right to dismiss an employee at any time or without any reason.⁵¹

Nigerian law does not include any specific regulations for work-place disciplinary procedures. Some due process guarantees, such as the right to a fair hearing, have been upheld by Nigerian courts in specific cases as an employee’s right in the frame of work-place disciplinary procedures.⁵² Nigerian law does not require employers to maintain worker grievance procedures.⁵³

2.2. CAO Analysis on IFC’s Pre-Investment Review and Supervision of the Project

The following presents a summary of IFC’s pre-investment review and supervision, including documentation provided to CAO by stakeholders, and CAO’s analysis and findings regarding IFC’s performance regarding E&S requirements for pre-investment review and supervision

IFC Pre-Investment Review: 2012

In 2012, IFC conducted a pre-investment review for a loan to the Company. The purpose of the investment was to finance construction of a new fertilizer plant at Indorama’s facility in Port Harcourt and an 84km gas pipeline linking the plant to a gas supply (“the project”, “Line I”). The fertilizer facility also required the development of a port terminal at the nearby Orne Port. This port terminal was financed by IFC in 2016.

IFC conducted a site visit in March 2012 to review EPCL’s existing operations and the site for Line I. IFC reviewed the project’s Environmental Impact Assessment, EPCL’s existing ESMS and human resources documentation, as well as a third-party E&S due diligence report for the project. IFC categorized the E&S risk of the project as Category B, concluding that the project was expected to “have limited environmental and social impacts that will be site-specific and temporary, and none are expected to be significant.”⁵⁴ In assigning this categorization, IFC noted

⁴⁷ ILO, Ratifications for Nigeria. Available at <https://bit.ly/2K7vGES>.

⁴⁸ Nigeria Labor Act, 1990. Part I, *Contracts of Employment*, Art. 9.6.

⁴⁹ ILO, *Employment Protection Legislation: Summary indicators in the area of terminating regular contracts (individual dismissals)*, 2015. Available at: <https://bit.ly/2M4l0as>.

⁵⁰ ILO. C158 - Termination of Employment Convention, 1982 (No. 158). Available at: <https://bit.ly/3l7sKV6>.

⁵¹ Abugu, Joseph, 2009, *ILO Standards and Nigerian Law of Unfair Dismissal*, Africa Journal of International and Comparative Law. ; Obidimma, Emmanuel O.C, 2016, *Unfair Dismissal in Nigeria: Imperative for a Departure from the Common Law*, Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol. 7.

⁵² Abugu, Joseph, 2009. *ILO Standards and Nigerian Law of Unfair Dismissal*, Africa Journal of International and Comparative Law.

⁵³ Udoma and Belo-Osagie, March 2019, *Employment & Labour Law in Nigeria*. Available at <http://bit.ly/3c8rWON>.

⁵⁴ IFC ESRS, project 30967. Available at <https://bit.ly/3sLSATB>.

that the plant was to be located within the confines of EPCL's existing petrochemical site and did not pose a significant risk to the surrounding environment or communities.⁵⁵

IFC's PS2 review for the project was largely based on EPCL's policies and procedures for its existing petrochemical facility. IFC noted that EPCL had an Ethics Policy, a Human Resources Policy and associated employment procedures and conditions. EPCL's collective bargaining agreements with the Union of Petroleum and Natural Gas Workers (NUPENG) defined the approach to remuneration, policies related to training and medical cover, life insurance, disciplinary procedures, grievance mechanism, leave availability, various benefits provided to workers such as loans, allowances and subsidies along with the retrenchment mechanism. IFC concluded the Company's employment conditions complied with PS2 requirements.⁵⁶

IFC and the other lenders hired a third-party consultant ("the Lenders' Consultant") to conduct a due diligence report for the project, which IFC reviewed. The consultant noted that EPCL's existing labor and working procedures were well established and would be extended to the fertilizer plant. The consultant concluded that the project was in compliance with PS2 requirements relating to HR policies and procedures, working conditions and terms of employment, workers' organizations, non-discrimination and equal employment, retrenchment, child labor, forced labor, OHS, and workers engaged by third parties. However, the consultant identified gaps against PS2 requirements in the WGM as it did not provide for anonymous complaints nor did it include a statement prohibiting retribution for lodging a complaint. A review of EPCL's WGM implementation is absent from the report.

While the Lenders' Consultant recommended that gaps in the WGM be resolved, the ESAP subsequently prepared did not include an action item to address this issue. The ESAP was included in IFC's investment agreements with the Company and a summary disclosed by IFC.⁵⁷

CAO Findings: *In relation to IFC's 2012 pre-investment review, CAO finds that IFC did not conduct an assessment of the Company's WGM procedures which was commensurate to risk. However, no mitigation measures were incorporated as necessary conditions of IFC's investment (Sustainability Policy para. 28) to address gaps identified in the WGM procedure regarding (a) handling of anonymous complaints and (b) prohibiting retribution for lodging a complaint.* This is significant as in this case the Complainants have raised their concerns anonymously and allege retaliation for raising grievances.

IFC Supervision 2013-2016

In December 2012, IFC committed to the investment and, in April 2013, IFC completed its first disbursement. IFC and the other lenders appointed a Lenders' Consultant to review the project's ESAP implementation and E&S performance in accordance with national law and IFC PS during the construction period.

IFC visited the project site in November 2013, June 2014 and May 2016. IFC also reviewed E&S monitoring reports prepared by the Lender's Consultant during this period. IFC's supervision reports for this period summarize the construction progress, ESAP implementation and E&S

⁵⁵ IFC ESRS, project 30967. Available at <https://bit.ly/3sLSATB>.

⁵⁶ IFC ESRS, project 30967. Available at <https://bit.ly/3sLSATB>.

⁵⁷ IFC Disclosure, Environmental and Social Review Summary, project number 30967. Available at <https://bit.ly/3sLSATB>.

performance. IFC's supervision documentation generally presents a favorable view of the Company's performance.

The fertilizer facility was commissioned in June 2016, and thus transitioned from construction to operations.⁵⁸

IFC Supervision 2017-present

Following commencement of the facility's operations, IFC no longer retained a Lenders' Consultant. From mid-2016 and 2017, the client reported on its E&S performance directly to IFC and other lenders. As part of IFC's 2018 investment, IFC and other lenders again retained a Lenders' Consultant to review the client's E&S performance.

- Grievance Handling and Disciplinary Procedures

In July 2017, approximately 200 employees held a protest at the fertilizer plant raising grievances over salaries and employee welfare ("the July 2017 protest").⁵⁹ The protest took place between July 12-13, 2017 and led to media reports of alleged mistreatment of employees. As noted in section 1.2, the Complainants and the Company present different accounts of this protest and whether the company's security personnel were involved in inappropriate use of force.

In early October 2017, 15 workers staged a protest as they feared that they would be dismissed due to their involvement in the July 2017 protest. The October 2017 protest was diffused when the Company provided assurance what they would not face disciplinary measures.

Between September - November 2017, IFC conducted its pre-investment review for a second investment in IEFCL. The objective of this investment was to double the capacity of the fertilizer facility with the construction of a second line urea fertilizer plant ("Line II").⁶⁰ IFC management considered and approved the investment in November 2017. IFC's pre-investment review documentation records that wages were increased as a result of the July 2017 protest and that there was an ongoing HR engagement program with workers to identify and address their grievances. Details about the worker protest including reported allegations of mistreatment and violence were not presented in IFC's investment summary to management.

In January 2018, subsequent to IFC management's approval of the investment, but prior to IFC Board Approval, IFC and other lenders appointed a Lenders' Consultant to conduct a site visit to assess the operational E&S performance of the fertilizer facility. Regarding the Company's WGM, the consultant noted that a written grievance register was not being kept and procedures for handling anonymous grievances were not in place. The consultant did not assess the Company's disciplinary procedures or their implementation. A few days after the Lenders' Consultant's site visit, the consultant received an anonymous email from IEFCL workers. The email raised concerns regarding the Company's labor and working conditions and use of security forces similar to those in the complaint to CAO. An IFC social specialist also conducted a site supervision visit to the Company in January 2018 and specifically considered the Company's approach to (a) unionization and collective bargaining; (b) working conditions and terms of employment; (c) the July 2017 protest; and, (d) security arrangements.

⁵⁸ IFC Disclosure, Summary of Investment Information, project number 42187. Available at <http://bit.ly/2RdTrdH>.

⁵⁹ Vanguard, July 14 2017, *Workers Shut Rivers firm over welfare*. Available at <http://bit.ly/2MeBCvb>.

⁶⁰ IFC Disclosure 40420. Available at <https://bit.ly/3o6wuHR>.

Following IFC's site visit, IFC commissioned a third-party Labor Consultant to prepare a Labor Assessment of the Company including compliance with PS2. In March 2018, IFC staff and the Labor Consultant visited the Company. Thereafter, IFC summarized its PS2 assessment of the Company in its ESRS disclosure for the second investment. IFC noted that the Company had developed a WGM and workers periodically raised grievances through it. IFC also noted that, following the July 2017 protest, the Company had improved the WGM by: i) appointing management and human resources staff to proactively engage with workers; ii) placing boxes on Company site to provide for anonymous complaints and suggestions; and, iii) promoting the grievance mechanism to workers.⁶¹ Based on IFC's review and as a condition of IFC's investment, IFC noted that the Company would formalize and further enhance its WGM to ensure it met PS2 requirements such as i) providing for confidentiality in the process; ii) ensuring roles and responsibilities are assigned to specific grievances; iii) setting target timelines for handling grievances; and, iv) communicating it to workers on a regular basis.⁶²

In May 2018, IFC received the Labor Assessment. The Labor Consultant concluded that the Company operated in compliance with national law, and in most part, with PS2 requirements.⁶³ The consultant noted that the Company had a comprehensive grievance process on paper, however, it was not possible to assess the degree to which it is implemented in practice as many grievances are reported to be resolved informally. The consultant concluded the Company could improve its grievance policy promotion and management. The Labor Assessment did not include analysis of the worker disciplinary procedures or their implementation.

On June 12, 2018, IFC committed to the second investment. Later that month, the Company finalized a standalone WGM procedure. As amended from the prior version included in the Company's Employee Handbook,⁶⁴ this document included: a policy on handling workers grievances; guidance on why grievances are submitted; Company objectives for how grievances should be handled; process, responsibility and practice for Company grievance handling; procedures for anonymous grievance handling, and a statement prohibiting victimization of grievants.⁶⁵

In July 2019, IFC conducted a site visit to the Company. IFC's site supervision report summarized the Company's approach to worker grievance handling and noted that the Company now routinely conducted grievance assessments. IFC's report does not document a review of the worker disciplinary procedures. On November 27, 2019, IFC's Board approved a third investment in the Company. The objective of the third investment was to finance construction of a feed conditioning unit and an add-on gas processing facility.⁶⁶ IFC's ESRS disclosure for this investment noted improvements the Company had implemented since the 2018 investment. In particular, IFC noted that the Company had further enhanced its WGM (a) with more detailed procedures; (b) provisions to address anonymous complaints; and, (c) routine grievance assessments to identify trends and prevent issues from scaling up. IFC committed to the investment in June 2020.⁶⁷

In April 2020, the Lenders' Consultant finalized taken by the Company between these visits a report assessing the Company's E&S operational performance. The report was prepared on the

⁶¹ IFC ESRS. Available at <https://bit.ly/2LK8o8V>.

⁶² IFC ESRS 40420, ESAP. Available at <https://bit.ly/2LK8o8V>.

⁶³ IFC ESRS 40420. Available at <https://bit.ly/2LK8o8V>.

⁶⁴ The company's Employee Handbook was disclosed as part of IFC's ESRS 40420. Available at <https://bit.ly/2LK8o8V>.

⁶⁵ IFC ESRS, 42187. Available at <https://bit.ly/3aCRuRs>.

⁶⁶ IFC Summary of Investment Information, 42187. Available at <http://bit.ly/2RdTrdH>.

⁶⁷ IFC ESRS, 42187. Available at <https://bit.ly/3aCRuRs>.

basis of two visits to the Company and documented actions. In relation to the WGM, the report recorded from its first visit that the Company did not record all grievances in its register and did not conduct an evaluation of reported grievances. Following the Lenders' Consultant second visit to the Company, the report noted that these gaps had been resolved. The consultant's report did not include an assessment of the Company's worker disciplinary procedures or their implementation.

In July 2020, complainant representatives reiterated to CAO their concerns of a persisting climate of fear at the workplace and their fear that raising workplace concerns would lead to retaliatory actions by the company.

CAO Findings: CAO finds that IFC has enhanced its supervision of the client's WGM since 2018, by requiring a third-party labor assessment and requiring the Company to formalize and enhance its WGM. However, IFC's reviews have focused on the Company's WGM documentation, and have not adequately assessed how the WGM works in practice. IFC E&S supervision is required to establish client's degree of compliance with the PS and consider the effectiveness of the client grievance mechanism in particular (ESRP 6.2.3). IFC has not assured itself that the Company's has complied with PS2 requirements that a WGM be easily accessible, use an understandable and transparent process and adequately bar any retribution.⁶⁸ Risk factors such as: (a) incidents of protests by workers regarding labor and working conditions, and (b) specific allegations of reprisals against workers of which IFC was aware, required IFC to enhance its supervision in order to ensure the Company's implementation of the WGM was consistent with PS2 requirements.

While CAO's review did not identify specific shortcomings in the client's disciplinary procedures, CAO observes that IFC's supervision did not address the PS2 requirement that a client provide reasonable disciplinary practices, reasons and process for termination of workers.⁶⁹ In light of worker protests in 2017, and dismissals in 2018, CAO considers that this issue merited closer supervision by IFC.

- *Transfers, Dismissals and Allegations of Reprisals*

On July 26, 2018, two workers received letters from the Company notifying them of their transfer to another Company facility in Kano State, 1,000km away from Port Harcourt. The letters informed them that the Company would pay costs associated to the transfer and they were to take up their new assignments within five days. The client's position is that the transfers were allowable under the workers' employment contracts and that they were driven by business need and the desire to provide cross functional exposure. However, the Company did not have an established practice of transferring workers.

On July 27, 2018, some workers gathered outside the Company's control office to inquire about the transfer of the employees to Kano State the day before. Following this incident, the Company initiated disciplinary procedures against seven employees who gathered, alleging, among other things, gross indiscipline for creating an unsafe environment by abandoning their respective workstations. Company Disciplinary Committees (CDC) were constituted to investigate employee indiscipline, and five employees were determined to be liable to varying degrees. Company management decided to terminate the employment of three employees. The Complainants claim that the dismissals were not legally grounded and constituted retaliation by the Company for

⁶⁸ IFC 2012, PS2, para. 20 and PS2 GN 57-60.

⁶⁹ IFC 2012, PS2, para 10; PS2 GN2, para. GN21.

complaining about their working conditions and a means to silence them.⁷⁰ In February 2019, the three dismissed employees initiated a legal complaint against the Company alleging their dismissal was unfair.

IFC was informed of these events in October 2018, during CAO's Assessment process. IFC's documentation does not record any action in response to these events. IFC staff explained to CAO that once aware of these events, they discussed the issue with the Company. IFC staff explained that the transfer of two employees was a business decision based on skill requirements. IFC staff explained that it discussed the dismissals with the Company. IFC staff noted that the Company confirmed that the disciplinary process as outlined in the Employee Handbook was followed. In response to CAO's request in 2019, IFC requested and received from the Company documentation in relation to each employee's dismissal. IFC did not document a review of this material.

In December 2019, the legal process between the Company and the three dismissed employees concluded through a 'no-fault' settlement agreement.

CAO Findings: After becoming aware of allegations of retaliation against workers in late 2018, CAO finds IFC did not take sufficient action in response in order to assure itself that the Company's actions reflected PS2 commitments to "fair treatment" of workers and the requirement that workers should be able to raise grievances "without any retribution" (para. 15 and 20).

Upon learning of the allegations of reprisals against workers, IFC's response was limited to a brief verbal inquiry with the Company. This does not reflect IFC's commitment to "take seriously any credible allegations of reprisals."⁷¹ Underlying this finding is the absence of IFC staff guidance on how to respond to allegations of retaliations against workers.

The CAO compliance function is also called upon to reach conclusions as to any adverse environmental and/or social outcomes, including the extent to which these are verifiable. Where present, reprisals against workers who raise workplace grievances should be considered as having a serious adverse impact both for the workers themselves and because of the chilling effect that such actions have on the ability of other workers to raise concerns about workplace issues. As noted in section 2.1, retaliation is generally understood as an employer's adverse treatment of a worker as a result of the worker's exercise of a right or protected activity. Direct evidence of retaliation may not be available. Instead, there may only be indirect evidence to substantiate an allegation of retaliation. In such cases, retaliation may be inferred through the assessment of available information.

While CAO's review of available information in this case does not produce direct evidence of retaliation, questions remain in relation to important aspects of the client's treatment of the complainants.

Available documentation regarding the Company's decision to dismiss three workers following the July 27 gathering: (a) is consistent with the Company's stated reason for proceeding with a disciplinary process; (b) indicates that a disciplinary process was followed in accordance with the Employee Handbook; (c) indicates that three employees were dismissed for reasons of misconduct; and (d) indicates that four other employees went through a similar disciplinary

⁷⁰ CAO Assessment Report. Available at <https://bit.ly/3p8o7wJ>.

⁷¹ IFC 2018, IFC Position Statement on Retaliation Against Civil Society and Project Stakeholders, available at <http://bit.ly/33DNBYb>.

process in relation to the same incident and were not dismissed due to differences in facts of each case. However, a key aspect of the Company's case for dismissing the workers could not be tested on the basis of the information available: namely whether the gathering of workers outside the Company's control office on July 27, 2018 did in fact create an unsafe environment. CAO is similarly unable able to reach a conclusion in relation to the Company's rationale for deciding to transfer the two workers to Kano State on July 26, 2018 which precipitated the gathering of workers on July 27.

As a result, CAO concludes that the evidence is insufficient to make findings of adverse outcomes in relation to the complainants' allegations of retaliation.

3. Conclusion

The right of workers to organize for the purpose of furthering and defending their interests without fear of reprisal is a key tenant of IFC PS2. IFC affirms that it does not tolerate any action by an IFC client that amounts to retaliation against those who voice their opinion regarding the activities of IFC or its clients. In this case, the Complainants state that some workers gathered at the Company's office on July 27, 2018 to query the Company's decision the previous day to transfer two workers to another location at short notice. Following this incident, the Company initiated disciplinary procedures against seven employees who gathered, with a final decision in October 2018 to dismiss three of these employees. The Complainants allege that the dismissal of three employees was a retaliation measure against them for raising grievances about working conditions and a means to silence them. The Company affirms that it has a good relationship with its employees and its decision to dismiss three employees followed an internal investigation of allegations of employee gross indiscipline as they created an unsafe work environment.

Worker protests at the Company during the period 2017 - 2018 evidenced workers' stated lack of confidence in the existing WGM as a means to channel their concerns about work-related issues. The Complainants state that a climate of fear continues to exist in their workplace with regards to raising grievances. While CAO notes that IFC enhanced its supervision of the client's WGM since 2018 and has documented improvements, CAO finds that IFC's supervision does not provide sufficient evidence of the effectiveness of the Company's WGM considering PS2 requirements. Considering risk factor such as the history of worker protest and specific allegations of reprisals against workers, CAO finds that IFC lacks assurance that the Company is implementing a WGM which reflects PS2 provisions regarding non-retribution and which, in practice, does provide workers with a channel to address their concerns that is perceived as safe and fair.

Retaliatory responses against workers who raise workplace grievances are not permissible under PS2, para. 26. As part of the PS, IFC is required to assess and document compliance with this requirement during project supervision.

In the context of employment, retaliation is generally understood as an employer's adverse treatment of a worker as a result of the worker's exercise of a right or protected activity, such as raising a complaint about workplace conditions. Retaliation may be found to occur even if the employer has produced evidence to support a legitimate reason for the adverse worker treatment. In practice, it can be difficult to substantiate retaliation. Direct evidence may be scarce to prove an employer's adverse treatment of a worker was plainly caused by the worker exercising a right. Instead, where an allegation of worker retaliation arises, there may only be indirect evidence available that a worker's exercise of a right and the employer's initiation of adverse treatment are causally connected, even if not explicitly so. In these instances, retaliation may be inferred through the assessment of available information.

In this instance, IFC was first informed of complainant allegations of Company retaliation against workers in October 2018 following the dismissal of three workers. In response, IFC discussed the issue with the Company and was informed that the disciplinary process as outlined in the Employee Handbook was followed. CAO considers this response insufficient in order to assess compliance with PS2 anti-retaliation requirements. An appropriate IFC response would have included actions aimed to further understand and assess the situation, such as: engaging with workers alleging instances of reprisals to reviewing their claims and concerns, and/or a more in-depth review of whether the company's worker grievance mechanism was effective and whether disciplinary procedures had been properly applied.

While IFC affirms that it does not tolerate any retaliation action by an IFC client against a project stakeholder, when allegations of worker retaliation were presented in this case, IFC did not have technical guidance for staff on how it should respond. Similarly, while IFC client requirements bar retaliation against workers who advocate for their rights, IFC had not developed guidance for clients on how to handle allegations of worker reprisals when they arise. Subsequent to the worker retaliation allegations in this case, in March 2021, IFC and IDB Invest released *Good Practice Note for the Private Sector: Addressing the Risks of Retaliation Against Project Stakeholders*.⁷² This guidance note is directed to IFC and IDB Invest clients to support them in addressing risks of retaliation against project stakeholders. This is a positive action by IFC to support its clients in handling this issue. Taken together, CAO concludes that the lack of guidance at the time at the IFC and client level on handling allegations of retaliation to be an underlying cause of its non-compliance finding regarding IFC's response to such allegations in this instance.

CAO will monitor (a) actions taken by IFC to assure itself of the effectiveness of the client's WGM in accordance with PS2 requirements and (b) guidance provided to IFC staff on responding to allegations of reprisals against workers.⁷³

⁷² IFC-IDB Invest, March 2021, *Good Practice Note for the Private Sector: Addressing the Risks of Retaliation Against Project Stakeholders*, available at <https://bit.ly/3wYg1dQ>.

⁷³ See Annex A for CAO's compliance monitoring framework for this case.

Annex A: CAO Compliance Findings and Monitoring Framework

CAO FINDING	CAO MONITORING FRAMEWORK <i>Findings to be Monitored (See Note)</i>
IFC's Pre-Investment Review and Risk Mitigation Measures	Project Level Response
<p>In relation to IFC's 2012 pre-investment review, CAO finds that IFC did conduct an assessment of the Company's WGM procedures which was commensurate to risk. However, no mitigation measures were incorporated as necessary conditions of IFC's investment (Sustainability Policy para. 28) to address gaps identified in the WGM procedure regarding (a) handling of anonymous complaints and (b) prohibiting retribution for lodging a complaint.</p>	
IFC Supervision	Project Level Response
<p>CAO finds that IFC has enhanced its supervision of the client's WGM since 2018, by requiring a third-party labor assessment and requiring the Company to formalize and enhance its WGM. However, IFC's reviews have focused on the Company's WGM documentation, and have not adequately assessed how the WGM works in practice. IFC E&S supervision is required to establish client's degree of compliance with the PS and consider the effectiveness of the client grievance mechanism in particular (ESRP 6.2.3). IFC has not assured itself that the Company's has complied with PS2 requirements that a WGM be easily accessible, use an understandable and transparent process and adequately bar any retribution.</p>	<div data-bbox="1388 813 1640 873" style="background-color: #4a7ebb; color: white; padding: 5px; display: inline-block;">MONITORING</div>
<p>After becoming aware of allegations of retaliation against workers in late 2018, CAO finds IFC did not take sufficient action in response in order to assure itself that the Company's actions reflected PS2 commitments to "fair treatment" of workers and the requirement that workers should be able to raise grievances "without any retribution" (para. 15 and 20).</p>	
Underlying cause of non-compliance (See Note)	
<p>While IFC affirms that it does not tolerate any retaliation action by an IFC client against a project stakeholder, when allegations of worker retaliation were presented in this case, IFC had not outlined staff guidance for how it should respond. Similarly, while IFC client requirements bar retaliation against workers who advocate for their rights, IFC had not developed guidance for clients on how to handle allegations of worker reprisals when they arise. There are model policies and good international industry practice for addressing retaliation at the company level. This includes separate procedures to handle</p>	<div data-bbox="1398 1300 1646 1360" style="background-color: #4a7ebb; color: white; padding: 5px; display: inline-block;">MONITORING</div>

allegations of retaliation and a process for the allegation of retaliatory action to be investigated and rescinded if substantiated. Taken together, CAO concludes that the lack of guidance at the time at the IFC and client level on handling allegations of retaliation to be an underlying cause of its non-compliance finding regarding IFC's response to such allegations in this instance

Note: *In some instances, it may not be possible for IFC commit to project / sub-project actions in response to findings. For example, where CAO has found IFC to be non-compliant in regard to past events (e.g. a shortcoming in IFC's pre-investment due diligence), no action will bring IFC back into compliance. While some CAO findings do not anticipate a project/sub-project level response, where relevant, CAO will monitor IFC's response to address underlying causes of non-compliance findings.*