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*Office of the Compliance Advisor Ombudsman (CAO)*

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## **COMPLIANCE INVESTIGATION REPORT**

*IFC Investment in Bidco Bev. & Det., Kenya (Project #33385)*

*Complaint 01 & 04*

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### **CAO Investigation of IFC's Environmental and Social Performance in relation to its Investment in Bidco Bev. & Det., Kenya (Project #33385)**

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

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## Executive Summary

In June 2016, CAO received a complaint regarding an IFC client, Bidco Africa Limited (“the client” or “the company”), and its operations in Thika, Kenya. The complaint was filed by a group known as Bidco Truth Coalition on behalf of current and former workers of the company. The complaint alleges violations of IFC Performance Standard 2 (Labor and Working Conditions). In May 2017, CAO received a second complaint filed raising similar and related concerns.

The client is a Kenyan private limited liability company, which makes and sells fast moving consumer goods (FMCG): cooking fats, edible sunflower, soybean, maize and palm oils, soaps and detergents, baking powder and animal feed. In 2012, IFC considered an investment targeted at an extension of the client’s existing detergent facility and the development of a new beverage facility (“the project”). 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. First disbursement occurred in June 2016.

The issues raised in the complaints are grouped into four overarching categories: i) terms of employment and termination of casual workers; ii) occupational health and safety conditions; iii) union recognition; and, iv) grievance procedure, discrimination and retaliation.

### Terms of employment and termination of casual workers

Up to September 2015, the client employed workers on open-ended contracts, on fixed term contracts, and as casual workers. By September 2015, the client had eliminated casual employment ceasing to employ some workers and reemploying others on fixed term or open-ended contracts.

The process of elimination of the casual workers category resulted in a number of grievances including legal challenges filed by workers in national courts on the basis that the client did not adhere to the Kenya Employment Act. CAO’s review of Kenyan court decisions, shows that the client has lost a number of cases involving the termination of former casual workers. In these cases, the former casual workers were considered to have been regular employees based on the length and regularity of their service.

While the client ceased to employ casual workers as of 2015, CAO finds that IFC’s review and supervision in relation to this issue were not sufficient to provide assurance that the client’s employment policies with regard to casual workers were consistent with national law as required by IFC Performance Standard 2. As a result, compliance issues in relation to these workers arise. In particular, CAO finds that IFC has not ensured that payments to former casual workers upon termination were consistent with Kenyan legal requirements as provided by the Employment Act.

Similarly, CAO finds that IFC has not ensured that casual workers who were converted to regular employment were properly credited with benefits accrued during their period of casual employment. Given findings of Kenyan courts that the client has unfairly dismissed and under compensated former casual workers in a number of instances, CAO finds that an audit of the client’s employment practices against Kenyan law, including an assessment of possible under compensation of former casual workers is required.

### Occupational health and safety conditions

The complainants allege that accidents are common at the plant and that first aid care is not adequate. They also raise concerns that the client does not provide Personal Protective Equipment (PPE) as would be necessary to protect workers.

CAO finds that IFC properly assured itself at pre-investment that risks and potential hazards to workers, were identified. A system was required to provide workers with a safe and healthy work environment including preventive and protective measures, OHS training, and

emergency preparedness and response arrangements. This is in compliance with Performance Standard 2.

While, the client provides an Occupational Health and Safety (OHS) environment that is above the standard likely to be encountered in many other factories in Kenya, CAO finds that IFC lacks assurance that the client's OHS performance meets the IFC requirement for "good international industry practice." In particular, CAO finds that IFC lacks assurance that the client is systematically implementing preventive and protective measures as required by IFC standards. Similarly, CAO finds that IFC lacks assurance that the client has in place adequate systems for reporting on accidents and incidents, analyzing their root causes and implementing corrective measures. This has been indicated in audit reports and verified by IFC during its site supervision, however, the issues persist without a clear corrective action plan. Thus, CAO finds that IFC has not provided adequate supervision in relation to OHS requirements of PS2 and the EHS Guidelines.

#### Union recognition and grievance procedure, discrimination and retaliation

The complainants raise a range of concerns regarding union recognition, retaliation and discrimination.

On the topic of union recognition, CAO found that this is not a compliance issue from an IFC perspective, since Kenyan Courts have ruled on this issue resulting in a 2012 union recognition agreement that remains in force.

On the topic of grievance handling CAO notes that IFC has identified shortcomings in the client's procedures, which confuse grievance redress with a process for disciplinary, ethical and anti-corruption enforcement. IFC communicated this to the client and requested corrective actions in accordance with Performance Standard 2. This is consistent with IFC's supervision duty.

On the topic of discrimination and retaliation, CAO finds that IFC has verified that the client has in place policies against discrimination and retaliation. However, IFC supervision does not provide assurance that the client's policy commitments in these respects are being implemented. CAO's investigation does not provide a basis to determine whether discrimination and retaliation are occurring, however, considering publicly available allegations of discrimination and retaliation, CAO finds that further supervision by IFC is required to verify compliance with the non-retaliation and anti-discrimination requirements of PS2, paras. 14 to 16. While such allegations can be difficult to verify, IFC standards provide for the use of audit and assessment tools to verify compliance in accordance with good international industry practice, as required by PS1, paras. 7 and 23, and Guidance Note 1, para. GN22. In this context, CAO finds that an analysis of potential discrimination comparing salaries, contract terms and seniority between different groups is warranted.

#### Systemic aspects

CAO has identified a number of underlying causes of IFC's non-compliance in this case. These include a lack of labor expertise on the IFC team responsible for the project and an overreliance on client documentation and self-assessment.

At the same time, CAO notes positive developments, arising from IFC's engagement with the client. During the course of this investigation, CAO noted that IFC increased the intensity of its supervision efforts. This led to improvements in relation to OHS issues and the grievance procedure.

Considering the identified non-compliances, CAO will keep this case open and will monitor IFC's response to the investigation findings.

## **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 the private sector lending and insurance members of the World Bank Group, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (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 IFC and MIGA.

CAO's compliance function oversees investigations of the environmental and social performance of IFC and MIGA, 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](http://www.cao-ombudsman.org).

## Acronyms

AMR	Annual Monitoring Report
BS	British Standard
CAO	Office of the Compliance Advisor Ombudsman
CBA	Collective Bargaining Agreement
CEO	Chief Executive Officer
E&S	Environment and Social
EHS	Environmental, Health and Safety
ESAP	Environmental and Social Action Plan
ESMS	Environmental and Social Management System
ESRP	Environmental and Social Review Procedures
ESRS	Environmental and Social Review Summary
FMCG	Fast Moving Consumer Goods
GIIP	Good International Industry Practice
GN2	Guidance Note 2 Labor and Working Conditions
HIV	Human Immunodeficiency Virus
HR	Human Resources
IFC	International Finance Corporation
ILO	International Labour Organization
ISO	International Organization for Standardization
KCAAWU	Kenya Chemical and Allied Workers' Union
KCFAWU	Kenya Commercial Food and Allied Workers' Union
MIGA	Multilateral Investment Guarantee Agency
NHIF	National Hospital Insurance Fund
NSSF	National Social Security Fund
OHS	Occupational Health and Safety
OHSAS	Occupational Health and Safety Assessment Series
OHSMS	Occupational Health and Safety Management System
PPE	Personal Protective Equipment
PS	Performance Standard
PS2	IFC Performance Standard 2: Labor and Working Conditions
SII	Summary of Investment Information
TOR	Terms of Reference

## 1. Overview of the CAO Compliance Process

CAO's approach to its environmental and social (E&S) compliance function is set out in its Operational Guidelines (March 2013).

When CAO receives an eligible complaint, the complaint first undergoes an assessment to determine how CAO should respond. If the CAO compliance function is triggered, CAO will conduct an appraisal of IFC's/MIGA's involvement in the project, and determine if an investigation is warranted. The CAO 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 of the E&S performance of an IFC/MIGA project. 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 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; or
- A failure by IFC/MIGA to address E&S issues as part of the appraisal or supervision resulted in outcomes that are contrary to the desired effect of the policy provisions.

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

CAO's compliance function oversees investigations of the E&S performance of IFC and MIGA. 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 the countries where IFC/MIGA operates.

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. It is then made public on the CAO website.

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.

## 2. Background

### 2.1 Investment

Bidco Africa Limited (previously known as Bidco Oil Refineries Limited) is a Kenyan private limited liability company, which produces and sells fast moving consumer goods (FMCG) such as cooking fats, edible sunflower, soybean, maize and palm oils, soaps and detergents, baking powder and animal feed.<sup>1</sup>

In 2012, IFC began considering an investment in the client to support construction and operation of new facilities to expand its capacity in FMCG. The investment focused on an extension of the client's existing detergent facility and the development of a new beverage facility ("the project").

In June 2013, IFC initiated its due diligence review of the investment. In May 2014, IFC published its Environmental and Social Review Summary (ESRS) and the agreed Environmental and Social Action Plan (ESAP) for the project.<sup>2</sup> Among other things, the ESAP required the client to develop and implement human resources (HR) policies and procedures appropriate for its workforce and consistent with the requirements of Performance Standard 2 (PS2 - Labor and Working Conditions) and Kenya's labor laws.<sup>3</sup> The investment was classified as category B according to IFC's Policy on Environmental and Social Sustainability, meaning that IFC considered it to have limited potential E&S risks and impacts.<sup>4</sup>

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.<sup>5</sup> In addition to financing the project, 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.<sup>6</sup> Total project cost was estimated at US\$46 million. Commitment of the A-loan took place in June 2014 and the B-loan commitment was in December 2014. First disbursement of the A and B loans occurred in June 2016.

### 2.2 Complaint

In June 2016, CAO received a complaint regarding the client's operations in Thika. The complaint was filed by a group known as Bidco Truth Coalition on behalf of current and former workers of the company. The complaint alleges violations of IFC Performance Standard 2 (Labor and Working Conditions). The issues raised in the complaint relate to: i) casual workers; ii) terms of employment; iii) occupational health and safety conditions; iv) union recognition; and, v) grievance procedure, discrimination and retaliation. These aspects are described in further detail below. CAO determined that the complaint was eligible and carried out an assessment.

During the assessment phase, CAO sought to determine the willingness of the client and complainants to explore options for dialogue. The client expressed its willingness to engage in dialogue. Its view is that it meets relevant requirements and that in many cases its policies and practices go beyond what is required by Kenyan law. However, the complainants were not able to provide a clear indication about how they wished to move forward with the

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<sup>1</sup> In February 2015, Bidco Oil Refineries Limited changed its name to Bidco Africa Limited.

<sup>2</sup> Environmental and Social Review Summary, <https://goo.gl/imaubK> (accessed March 14, 2018, "ESRS").

<sup>3</sup> ESRS, Environmental & Social Action Plan ("ESAP"). Action item 7.

<sup>4</sup> ESRS, E&S Project Categorization and Applicable Standards.

<sup>5</sup> 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.

<sup>6</sup> Summary of Investment Information, <https://goo.gl/ujomQd> (accessed March 14, 2018, "SII"). Development Result.



complaint. As a result, CAO was unable to complete the assessment process and the complaint was transferred to the compliance function for appraisal in December 2016.

In March 2017, CAO released its compliance appraisal in relation to the complaint and decided to conduct a compliance investigation of IFC's E&S performance in relation to the issues raised in the complaint.

In May 2017, CAO received a new complaint filed on behalf of a group of former workers raising concerns related to unfair dismissal, occupational health and safety, and claims that the client prevented workers from joining a trade union.<sup>7</sup> During CAO's assessment, the client expressed willingness to engage the complainants in a CAO-facilitated dialogue. However, the complainants could not agree among themselves on which CAO process they wanted to proceed with. Therefore, in accordance with the CAO's Operational Guidelines, the complaint was transferred to the CAO's compliance function. Considering the similarity of the issues raised, CAO determined that the two complaints should be merged and dealt with through this compliance investigation.<sup>8</sup>

### **2.3 Contextual information**

It is relevant for the reader to understand certain aspects of the client's employment practices. The client's policies and practices guiding its approach to management of human resources are set out in HR manuals, collective bargaining agreements (CBA) and other materials. Such documents are updated periodically.

In mid-2014, the client employed 2256 workers.<sup>9</sup> During that period, and up to September 2015, the client employed workers on open-ended contracts, on fixed term contracts, and as casual workers. The client subsequently determined to eliminate casual employment and by September 2015, all workers had fixed term or open-ended contracts.

In 2012, the client signed an agreement by which it recognized the Kenya Chemical and Allied Workers Union (KCAAWU) as the sole trade union representing the interests of workers.<sup>10</sup> In June 2015, it signed a Collective Bargaining Agreement (CBA) with KCAAWU. The client negotiated and signed a second CBA (CBA 2016-18) with KCAAWU, which is currently in effect.

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<sup>7</sup> Complaint, Kenya / Bidco Bev. & Det.-04/Thika, <https://goo.gl/jUcR5q> (accessed March 14, 2018).

<sup>8</sup> CAO, Compliance Appraisal, Kenya / Bidco Bev. & Det.-04/Thika, <https://goo.gl/aJdAtc> (accessed March 14, 2018).

<sup>9</sup> ESRS, Environmental and Social Mitigation Measures.

<sup>10</sup> Memorandum Relative to Recognition Agreement, December 1, 2012 ("Recognition Agreement").

## 2.4 Project Timeline

Date	Milestones, Events and Documents
<b>2011</b>	
July	Government of Kenya developed a system that allowed registration of all workers (including casuals) on an individual basis for payment of National Social Security Fund (NSSF).
<b>2012</b>	
November	Ballot held to decide which union would represent workers at Bidco.
December	Recognition agreement signed, establishing KCAAWU as the sole union representing Bidco workers.
<b>2013</b>	
June	IFC initiated E&S due diligence.
<b>2014</b>	
May	IFC disclosed ESRS and ESAP.
June	IFC Board approves investment.
<b>2015</b>	
March	KCAAWU sent letter to Bidco in relation to the wrongful termination of 12 workers.
March	Submission of first Annual Monitoring Report (AMR)
April	Bidco replied to KCAAWU letter stating that the 12 individuals were not employees of Bidco because they worked on a casual basis. Changeover process to convert casual workers to contract workers started.
June	Bidco signed CBA with KCAAWU (CBA 2014-16).
August	KCAAWU sent letter to Bidco expressing concerns about conversion from casual workers to contract workers.
September	Changeover process to convert casual workers to contract workers completed. Grievance mechanism was included in the HR Handbook. Bidco changed from 2 to 3 shifts per day and reduced normal working hours to 8 hours per day.
October	296 workers filed lawsuit against Bidco in relation to changeover from casual to contract workers. Media coverage stating that in 2015 there had been 4 worker demonstrations demanding better wages and benefits.
<b>2016</b>	
March	Bidco updated grievance mechanism procedure.
June	IFC First disbursement. First complaint to CAO.
July	CAO notified IFC of complaint
October	IFC supervision site visit – second AMR.
November	Petition was filed at the Kenyan Parliament requesting that the client be investigated for unfair labor practices.
December	Complaint transferred to CAO compliance function.
<b>2017</b>	
March	CAO released compliance appraisal report in relation to the project.
May	CAO received second complaint from workers in relation to the project. CAO compliance site visit.
June	Bidco signed second CBA with KCAAWU (CBA 2016-18).
	Bidco reviewed and updated its HR Manual (including a new complaint and grievance procedure).
<b>2018</b>	
March	Bidco further updated HR Manual with enhanced grievance procedure and several other additions
March/April	Commissioning of Bidco's beverage plant.

### **3. Investigation Framework**

#### **3.1 Scope of a Compliance Investigation**

In accordance with terms of reference (TOR) issued in March 2017, this compliance investigation considers whether IFC's investment in the client was appraised, structured and supervised in accordance with applicable IFC policies, procedures and standards. Considering the issues raised in the complaint, the TOR states that this investigation will focus on:

- IFC's review of the client's labor policies and practices, particularly as they relate to the concerns raised by the complainants, and related allegations of non-compliance that were publicly reported at the time of IFC's pre-investment due diligence;
- IFC's supervision of the client's E&S and OHS performances, in particular after becoming aware of labor related concerns in 2015.

Where relevant, the TOR provide that CAO will consider the underlying causes of any non-compliance found.<sup>11</sup>

#### **3.2 Methodology**

This investigation was conducted by CAO in accordance with its Operational Guidelines (2013), with inputs from two external experts with experience and knowledge in relation to:

- The assessment and management of labor issues, including in the labor context in Kenya;
- Occupational health and safety, particularly in adequacy and quality of the relevant personal protective equipment (PPE);
- Freedom of association, workers' rights and labor contracts in the private sector;
- IFC's E&S policies, standards and procedures, particularly Performance Standard 1 (Social and Environmental Assessment and Management Systems), Performance Standard 2 (Labor and Working Conditions) and the World Bank Group Environmental, Health and Safety (EHS) Guidelines.

The CAO investigation team reviewed a range of relevant documents and conducted informational interviews with representatives of IFC. The investigation team visited Kenya where it met representatives of the client's management team.

The investigation team met representatives of the complainants (current and former employees of the client). The group comprised mostly shop-floor workers and members of the Kenya Chemical and Allied Workers' Union (KCAAWU). Several had been working for the client for many years, often as casual workers. The investigation team met the representatives of KCAAWU and representatives of the Kenya Commercial Food and Allied Workers' Union (KCFAWU). The team also toured the client's Thika facilities where it met with workers who were not affiliated with the complainants.

The focus of this CAO compliance investigation is on IFC, and how IFC assured itself of the environmental and social performance of its investment during pre-investment due-diligence and supervision. In considering the adequacy of IFC's E&S performance in relation to this project, 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. In accordance with CAO's Operational Guidelines, this report documents investigation findings with respect to IFC's compliance with relevant requirements and adverse environmental and/or social outcomes, including the extent to which these are verifiable.

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<sup>11</sup> CAO, Terms of Reference for compliance Investigation, Kenya / Bidco Bev. & Det.-01/Thika, <https://goo.gl/THhJP1> (accessed March 14, 2018).

### 3.3 Applicable Standards

As set out in its Operational Guidelines (2013), CAO oversees investigations of IFC's environmental and social performance by ensuring compliance with IFC policies, Performance Standards, guidelines, procedures, and requirements whose violation might lead to adverse environmental and/or social outcomes.<sup>12</sup>

IFC's investment in this project was made under its 2012 Policy on Environmental and Social Sustainability ("Sustainability Policy") and its 2012 Performance Standards (PS), together referred to as the Sustainability Framework.<sup>13</sup> The CAO team reviewed compliance with this framework considering international labor standards and good international industry practice (GIIP), where applicable. The team also reviewed national labor and employment laws and the industrial relations context in Kenya, as needed for this analysis.

Per IFC's 2012 Sustainability Policy, central to the institution's development mission are its efforts to carry out investment operations with the intent to 'do no harm' to people or the environment. In doing this, IFC adopts 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.<sup>14</sup>

Performance Standard 2 - Labor and Working Conditions establishes requirements relevant to, among others, labor and working conditions and terms of employment, retrenchment, grievance mechanisms, occupational health and safety, and freedom of association. PS2 objectives include the promotion of compliance with national employment and labor laws and the promotion of safe and healthy working conditions.<sup>15</sup> These requirements are analyzed further below in the relevant sections.

Associated with PS2 are Guidance Note 2 (GN2 - Labor and Working Conditions),<sup>16</sup> IFC's Performance Standard 2 Handbook for Labor and Working Conditions (2010).<sup>17</sup>

IFC recognizes the responsibility of business to respect human rights. Both the Sustainability Policy and PS2 specifically refer to the ILO Core Conventions, including Convention 87 on Freedom of Association and Protection of the Right to Organize (1948) and Convention 98 on the Right to Organize and Collective Bargaining Convention.<sup>18</sup> In this case, the complaint to CAO raises issues implicating fundamental rights of workers, including freedom of association. In accordance with the Performance Standards, clients are also required to comply with applicable national law.<sup>19</sup> Relevant national laws in this case include, but are not limited to the: Constitution of Kenya; Employment Act (2007); Occupational Safety and Health Act (2007); and, Labour Relations Act (2007).

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<sup>12</sup> CAO, Operational Guidelines 2013, para. 4.3, <https://goo.gl/xhuKhy> (accessed March 14, 2018).

<sup>13</sup> IFC, 2012 Sustainability Framework, <https://goo.gl/j8tqeX> (accessed March 14, 2018).

<sup>14</sup> IFC, 2012 Sustainability Policy, paras. 6 and 9.

<sup>15</sup> IFC, 2012 Performance Standard 2, Objectives, <https://bit.ly/2t9KjO7> (accessed April 03, 2018).

<sup>16</sup> IFC, 2012 Guidance Note 2, <https://bit.ly/2JjmpqN> (accessed April 03, 2018).

<sup>17</sup> IFC, 2010 Measure & Improve Your Labor Standards Performance: Performance Standard 2 Handbook for Labor and Working Conditions, <https://bit.ly/2svXaXN> (accessed April 03, 2018).

<sup>18</sup> IFC, 2012 Sustainability Policy, para. 12; IFC, 2012, Performance Standard 2, paras. 1 and 2.

While Kenya has ratified Convention 98, it has not ratified Convention 87; nonetheless, as recognized by IFC's Guidance Note 2, the ILO's 1998 Declaration on the Fundamental Principles and Rights at Work commits all Member States, including Kenya, to respect and promote principles and rights related to the core labor standards, regardless of having ratified the relevant Conventions.

<sup>19</sup> IFC, 2012 Performance Standard 2, Overview, para. 5.

### Pre-investment requirements

When financing a project, IFC first conducts an appraisal aimed at assessing the potential risks and opportunities associated with the investment.<sup>20</sup> IFC is required to assess the project against IFC's Performance Standards, the World Bank Group EHS Guidelines and other internationally recognized sources.<sup>21</sup> IFC's analysis should identify any gaps and propose additional measures needed to meet IFC requirements. These should be included in the Environmental and Social Action Plan as conditions of IFC's investment.<sup>22</sup>

### Supervision requirements

Once a project is approved and IFC invests, the 2012 Sustainability Policy requires that IFC monitor the investment to ensure compliance with IFC's legal agreements, applicable policies and standards. IFC implements a regular program of supervision for business activities with environmental and social risks or impacts in accordance with its Environmental and Social Review Procedures (ESRP),<sup>23</sup> which are updated periodically. This investment was approved under ESRP version 7 (2013), and supervised under subsequent updated versions of the ESRP.

As part of supervision, IFC is required to obtain information to assess the status of the project's compliance with the Performance Standards and other E&S requirements.<sup>24</sup> 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.<sup>25</sup> It also provides that the client should use dynamic mechanisms to verify compliance and progress toward the desired outcomes.<sup>26</sup> 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.<sup>27</sup>

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<sup>20</sup> IFC, 2012 Sustainability Policy, para. 21.

<sup>21</sup> IFC, 2012 Sustainability Policy, para. 28.

<sup>22</sup> IFC, 2012 Sustainability Policy, para. 28.

<sup>23</sup> IFC, 2012 Sustainability Policy, para. 45.

<sup>24</sup> IFC, ESRP version 7, section 6 para.1, April 15, 2013.

<sup>25</sup> IFC, 2012 Performance Standard 1, para. 22.

<sup>26</sup> IFC, 2012 Performance Standard 1, para. 23.

<sup>27</sup> IFC, 2012 Sustainability Policy, paras. 24 and 45.

#### 4. Analysis and Findings

This section considers IFC's role in ensuring adherence to the Sustainability Framework. It analyzes IFC's pre-investment review of the client's E&S system, actions proposed to fill identified gaps, and supervision of the investment along the four thematic areas identified from the complaint: i) terms of employment and termination of casual workers; ii) occupational health and safety; iii) union recognition; and, iv) grievance procedure, discrimination and retaliation. Each sub-section presents a summary of the related claims, the client's position, IFC's response, followed by a summary of the IFC requirements as per the Sustainability Framework, an analysis of IFC's pre-investment and supervision efforts, followed by CAO's findings.

In relation to each issue, CAO answers the two key questions raised in the terms of reference for the investigation. First, whether IFC's pre-investment review of the client's labor policies and practices was adequate; and second, whether IFC's supervision of the client's E&S performance was sufficient to provide assurance of compliance with relevant standards, particularly after becoming aware of labor related concerns in 2015.

##### 4.1 Terms of Employment and Termination of Casual Workers

###### Summary of Findings:

While the client ceased to employ casual workers as of 2015, IFC's review and supervision in relation to this issue were not sufficient to provide assurance that the client's employment policies were consistent with national law as required by PS2, paras. 8 and 9.

IFC has not ensured that payments to former casual workers upon termination were consistent with Kenyan legal requirements as provided by the Employment Act. Similarly, IFC has not ensured that casual workers who were converted to regular employment were properly credited with benefits accrued during their period of casual employment. Given findings of Kenyan courts that the client has unfairly dismissed and under compensated former casual workers in a number of instances, CAO finds that an audit of the client's employment practices against Kenyan law, including an assessment of possible under compensation of former casual workers is required.

The decision to terminate this group of workers, albeit with an intention to rehire many and provide employment security, raises questions as to the application of the PS2 requirements on retrenchment. CAO finds no evidence that IFC drew the client's attention to this issue or considered how the requirements for retrenchment under PS2 should be applied to this case. This was not consistent with the requirements of PS2, paras. 18 and 19.

###### 4.1.1 Claims and Responses

While recognizing that the client no longer employs casual workers<sup>28</sup> and changed certain employment terms and conditions in September 2015, the complaint raises two outstanding issues.

First, after the client ended the practice of hiring casual workers, some were re-hired on fixed-term contracts. Such workers claim that their previous years of service and accrued rights and benefits under law, were lost when they were re-hired. This has implications, for example, on workers' retirement benefits, which are dependent upon accrued years of service.

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<sup>28</sup> The Kenya Employment Act 2007 (2012 revision), Clause 2 Definitions, defines 'casual employee' as "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time", <https://goo.gl/WxQvZR> (accessed March 14, 2018, "Kenya Employment Act").

Second, workers who were no longer employed by the client when it stopped employing casual workers claim they received no or insufficient severance payments, given their length of service with the client. Although the client called these workers “casual workers”, the complainants argue that, under Kenyan law, many of them had established sufficient length of service and a continuity of employment as to be entitled to the rights and privileges of a regular employee, including termination notice and severance payment.

The complainants also argue that prior to September 2015, casual workers’ hours and overtime was not properly recorded or paid. They claim that the client failed to recognize or pay for sick, annual, and maternity leave. They claim that leave was not awarded to casual workers. The complainants further allege that casual workers were not registered for the National Social Security Fund (NSSF).

From the client’s perspective, casual workers were provided all rights in accordance with Kenyan law and were selected by the client on a day-to-day basis as needed for its operation. According to the client, following the workers’ requests for job security, it was agreed that some permanent positions would be created and workers would have to apply for these positions. This process was completed by September 2015. Some former casual workers applied for the advertised jobs and were successful, while others did not apply or were not successful.

According to the client, currently, all workers are on contract and all benefits are extended to them through the duration of their employment (including overtime, unused annual leave, and sick, maternity, or paternity leave, as well as registration in the NSSF).

#### **4.1.2 IFC Requirements**

PS1 and PS2 require that clients comply with national labor law in addition to the Performance Standards.<sup>29</sup> PS2 also requires the client to provide workers with clear and understandable documentation regarding their rights under national labor and employment law and any applicable collective agreements, including such rights as they relate to working hours, wages, overtime, compensation, and benefits.<sup>30</sup>

In cases where a client intends to carry out a collective dismissal or retrenchment of workers, PS2 requires the client to analyze alternatives to retrenchment. If there are no viable alternatives, the client is required to develop a retrenchment plan to reduce adverse impacts on workers.<sup>31</sup> The client must also provide retrenched workers with notice, outstanding back pay and any mandated severance or other benefits due in connection with the termination.<sup>32</sup> PS2 defines collective dismissals broadly to include all multiple dismissals that are a result of an economic, technical or organizational reason or other reasons that are not related to performance or personal reasons.<sup>33</sup>

#### **4.1.3 IFC Review and Supervision**

##### Background

In or about April 2015, the client initiated a process to eliminate the casual worker category of employment and asked workers to re-apply for jobs many were already performing. This created discontent and tension. The tension was expected as the structural change in the

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<sup>29</sup> IFC, 2012 Performance Standard 1, para. 15, Performance Standard 2, Objectives and para. 8.

<sup>30</sup> IFC, 2012 Performance Standard 2, para. 9.

<sup>31</sup> IFC, 2012 Performance Standard 2, para. 18.

<sup>32</sup> IFC, 2012 Performance Standard 2, para. 19.

<sup>33</sup> IFC, 2012 Performance Standard 2, footnote 10. Guidance Note 2 further provides retrenchment means “the elimination of a number of work positions or the dismissal or layoff of a number of workers by an employer” (GN48).

workforce affected a large portion of workers even though the client's intention was to provide employment security to the workers who transitioned to regular contracts. In this context, workers raised concerns about hours of employment, overtime, severance pay, accrued pension rights and benefits.

By September 2015, according to the client, 1200 individuals were added to its payroll, many of whom belonged to the casual worker category.<sup>34</sup> In October 2015, 296 casual workers filed a lawsuit against the client alleging unlawful termination and unfair labor practices.<sup>35</sup>

In relation to the hiring of casual workers during the period pre-dating the adoption of the September 2015 HR Handbook, CAO notes claims related to unrecorded and improperly paid work hours and overtime, or failure to award sick, annual, and maternity leave, or failure to register workers for the National Social Security Fund (NSSF). The complainants confirm that these are no longer issues.

#### IFC pre-investment review (2013 - May 2016)

IFC initiated its due diligence in June 2013 and disclosed the ESRS and the ESAP for the project in May 2014, about a year before the client started the process of eliminating the category of casual workers.

The ESRS sets out IFC's findings regarding total employees, disaggregated by contract workers and gender as well as projections for employee growth. The ESRS adds that individuals are on "either open-ended contracts, or fixed term employment, but all are regarded as employees and have equal rights and benefits." The ESRS notes that the E&S requirements include "adherence to Kenyan labor law, working conditions, standards."<sup>36</sup>

IFC's due diligence did not identify the existence of a sizeable part of the workforce as casual, nor did it detect the risks associated with the practice of hiring workers under such terms. The ESRS includes two references to casual workers, however no information is provided to distinguish such category of employment and no risks are identified or assessed with respect to the use of casual employees.<sup>37</sup> The ESRS provides no information about the number of casual employees or their roles.<sup>38</sup>

IFC's E&S review documents make no reference to the client's planned –and later implemented– decision to eliminate casual employment and transition some of these workers to fixed-term contracts. IFC informed CAO that the client did not disclose these plans to IFC during the pre-investment phase.

The client's submitted its first Annual Monitoring Report (AMR) to IFC in March 2015. The AMR contained little information relating to labor issues as the beverage plant was still under construction and most actions were deferred to the operation stage. IFC documentation does not identify demonstrations by workers in relation to related issues during the period May to October 2015 as reported in local media.<sup>39</sup> IFC documentation is similarly silent in relation to the client's position, as conveyed to workers, that these demonstrations were in violation of

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<sup>34</sup> "Clarifications by Bidco Africa on Various Allegations Raised in the Smear Campaign", August 3, 2017 ("Bidco Clarifications"), available at <https://bit.ly/2xuuXqg> (accessed April 2018), p. 3.

<sup>35</sup> Republic of Kenya in the Employment and Labour Relations Court of Kenya at Nairobi, Cause No. 1936 of 2015, Martin Wamae Wangu & 295 others v. Bidco Africa Ltd <https://bit.ly/2A6TaE7> (accessed July 24, 2018).

<sup>36</sup> ESRS, Environmental and Social Mitigation Measures.

<sup>37</sup> The ESRS, Environmental and Social Mitigation Measures, states that "Casual workers also receive training but are not required to work for more than five (5) consecutive days in a seven (7) day week. Casual workers are also provided with uniforms and required safety equipment while at work."

<sup>38</sup> The ESRS, Environmental and Social Mitigation Measures, states that the client has 2256 employees of which 1403 are contract workers. The ESRS does not provide information about the size of the client's casual workforce.

<sup>39</sup> Nairobi Business Monthly, October 9, 2015, <https://bit.ly/2kB3k5o> (accessed April 3, 2018).



its HR policies and Kenyan law and that participants would be subject to legal and disciplinary action.

In November 2015, IFC documentation notes media campaigns initiated against the client and its labor practices, claiming unfair treatment of workers. In response to these issues, IFC notes that the client has a high-profile in East Africa and would continue to attract controversial media attention. IFC recommended to monitor the client closely, but made no inquiry into the details of the disputes or the allegations regarding the client.

IFC informed CAO that it did not carry out any legal due diligence in relation to labor issues and did not ask whether there were any outstanding labor related lawsuits against the client. CAO found no documentation to suggest that IFC was aware of national legal requirements or of their potential relevance to the client's approach to employment of casual workers. This was confirmed in interviews with IFC staff.

IFC informed CAO that it advised the client, on issues relevant to other aspects of the complaint and on possible solutions (safety posters, emergency number, use of PPEs, grievance handling), prior to disbursing the loan. IFC considered that during its review of the client's human resources policy the client was very responsive to the team's comments on working hours and number of shifts.

#### IFC supervision (as of June 2016)

At first disbursement, in June 2016, IFC noted that the client had reviewed labor arrangements with respect to casual workers and issued formal contracts to all workers, thus reducing labor uncertainty. IFC did not inquire whether the process to eliminate the category of casual workers was carried out in accordance with Kenyan law, and did not inquire about the terms of workers' separation from the client. IFC did not inquire whether the client carried out any analysis of alternatives to its plan to eliminate the casual worker category of employment, or how the client intended to reduce adverse impacts on such workers. IFC did not ask for any information about notice, severance payments or other benefits to workers affected by the elimination of the casual worker positions.

The client submitted its second AMR to IFC in October 2016. IFC's supervision documentation from October 2016 notes that the client produced an updated HR manual, that its approach to HR issues had evolved and that the client ceased to employ casual workers. IFC considered this, along with the client's addition of a third shift, to constitute major improvements, leading to an increase in workers' satisfaction. IFC considered the client's low worker turnover rate, as an indicator of worker satisfaction.

IFC's 2016 supervision findings do not make reference to multiple lawsuits that were filed against the client in relation to the termination of casual employment, including one in October 2015 on behalf of 296 workers. The client's October 2016 AMR does not mention the conversion of casual workers nor the existence of any labor lawsuits against the client. However, IFC was aware of the issues at this time due to the complaint, which CAO shared with IFC in July 2016. IFC informed CAO that it was surprised by the complainants' allegations and initiated discussions with the client to verify them. Prior to the complaint, IFC believed that casual workers were seasonal workers and therefore did not attempt to find out how long they had been working for the client. IFC did not inquire as to legal, reputational or financial risks the lawsuits lodged by former casual workers may have on the client.

In April 2017, IFC received from the client a description of the 2015-2016 labor cases. In early 2018, IFC requested from the client an update on the labor cases and labor tribunal resolutions. On February 14, 2018, the client shared with IFC the updated status of the cases filed between 2011 and 2016.

#### Overview of the legal issues raised by the complainants

The client has been the subject of several lawsuits filed by former casual workers. The complainants provided CAO with copies of a number of these lawsuits. Information is also

available in public records. A common theme among the lawsuits is the claim that many of the client's casual workers should have been considered as regular employees, based on the client's practice of employing casual workers on a continuous basis for extended periods.

Kenya's Employment Act, defines a casual employee as "a person the terms of whose engagement provide for ... payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time."<sup>40</sup> Under the same law, casual employees who work "continuously for two months or more" are entitled to terms and conditions of service as "[they] would have been entitled to under this Act had [they] not initially been employed as a casual employee."<sup>41</sup> This includes benefits for termination. CAO's review of relevant court decisions involving the client, shows that courts have ruled that once a casual worker "works continuously for at least one month, the employment automatically converts to monthly contract terms." The judge in the same instance considered that days on which the employee did not work during that month would be normal off days that would be taken by any regular employee.<sup>42</sup>

CAO's review of Kenyan court decisions, shows that the client has lost a number of cases involving the termination of former casual workers. In these cases, the former casual workers were considered to have been regular employees based on the length and regularity of their service. Workers in these cases were awarded a combination of: a) salary in lieu of notice; b) pay for each year of service; c) payment in lieu of leave days not taken; and d) compensation for unfair termination.<sup>43</sup> In the specific case of the 296 former casual workers, the Nairobi Employment and Labour Relations Court, found that the workers met the requirement of Kenya's Employment Act entitling them to terms and conditions of service for employees who had not initially been employed as casual workers. The court awarded the workers one month's salary in lieu of notice of termination of service and one month's salary in lieu of leave for each complete year of service from 2009 to 2013 for those in service during this period.<sup>44</sup>

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<sup>40</sup> Kenya Employment Act §2.

<sup>41</sup> Kenya Employment Act §37(3).

<sup>42</sup> See Republic of Kenya in the Industrial Court of Kenya at Nairobi, Cause No. 690 of 2013, George Ochieng Amolo vs. Bidco Oil Refineries <https://goo.gl/t3V9jc> (accessed March 14, 2018, "Amolo vs. Bidco"). See also Republic of Kenya Industrial Court of Kenya, Cause No. 671 of 2012, Wilfred Bukachi Opwaka vs. Ready Consultancy Company Limited, <https://goo.gl/kciNfm> (accessed March 14, 2018); the judge ruled "an employee employed on casual terms who works continuously for one month is deemed to be converted to monthly terms of contract terms at the expiry of one month. Having worked for more than 1 month continuously the claimant was no longer a casual employee but employed on monthly contract. He was therefore entitled to annual leave and termination notice as provided in Section 37 of the Act."

<sup>43</sup> See Nairobi Industrial Court cases: i) Cause No. 175 of 2011, Peter Adongo Achola vs. Bidco Oil Refineries Limited, <https://goo.gl/jrQtzC> (accessed March 14, 2018); ii) Cause No. 1077 of 2013, Josephat Gichuki Mwangi vs. Bidco Oil Refineries, <https://goo.gl/hZh3Hg> (accessed March 14, 2018, "Mwangi vs. Bidco"); iii) Amolo vs. Bidco. See also Nairobi Employment and Labour Relations Court cases: i) Cause No. 1105 of 2011, Moses Njue Nguru vs. Bidco Oil Refineries, <https://bit.ly/2LamDh5> (accessed March 14, 2018); ii) Cause No. 1916 of 2011, Robert Kipkemboi Kirwa and Patrick Isaac Injendi vs. Bidco Oil Refineries Limited, <https://goo.gl/fRXVKq> (accessed March 14, 2018, "Kirwa and Injendi vs. Bidco"). And see Nakuru Employment and Labour Relations Court cases: i) Cause No. 171 of 2015, Hosea Akunga Ombwori vs. Bidco Oil Refineries Limited, <https://goo.gl/WLukxs> (accessed March 14, 2018, "Ombwori vs. Bidco"); and, ii) Cause No. 366 of 2013, Robert Njihia Mwangi vs Bidco Oil Refineries Limited, <https://bit.ly/2IZkNTD> (accessed March 14, 2018).

<sup>44</sup> Republic of Kenya in the Employment and Labour Relations Court of Kenya at Nairobi, Cause No. 1936 of 2015, Martin Wamae Wangu & 295 others v. Bidco Africa Ltd <https://bit.ly/2A6TaE7> (accessed July 24, 2018).

#### 4.1.4 Observations and Findings

Prior to investing in the client IFC conducted a review of the client's E&S performance which included labor related issues. While noting that the client employed more than 2000 workers, IFC's pre-investment E&S review did not include a labor audit, an evaluation of the client's HR policies against the requirements of Kenyan law, or a review of ongoing labor related litigation involving the client.

CAO notes that the Kenyan Employment Act provides casual employees with the entitlements and protection of regular employees if they are engaged by an employer for an extended period of time. CAO also notes a number of court cases (including at least 12 open cases of unlawful termination of employment) filed by former casual employees of the client, both prior to and during the period of IFC's pre-investment review.

While the client ceased to employ casual workers as of 2015, CAO finds that IFC's review and supervision in relation to this issue were not sufficient to provide assurance that the client's employment policies with regard to casual workers were consistent with national law as required by PS2, paras. 8 and 9. As a result, compliance issues in relation to these workers arise. In particular, CAO finds that IFC has not ensured that payments to former casual workers upon termination were consistent with Kenyan legal requirements as provided by the Employment Act. Similarly, CAO finds that IFC has not ensured that casual workers who were converted to regular employment were properly credited with benefits accrued during their period of casual employment. Given findings of Kenyan courts that the client has unfairly dismissed and under compensated former casual workers in a number of instances, CAO finds that an audit of the client's employment practices against Kenyan law, including an assessment of possible under compensation of former casual workers is required.

CAO notes that the client's decision to cease employing casual workers in 2015 affected a significant proportion of its workforce. The decision to terminate this group of workers, albeit with an intention to rehire many and provide employment security, raises questions as to the application of the PS2 requirements on retrenchment. CAO finds no evidence that IFC drew the client's attention to this issue or considered how the requirements for retrenchment under PS2 should be applied to this case. This was not consistent with the requirements of PS2, paras. 18 and 19.

## 4.2 Occupational Health and Safety Conditions

### Summary of Findings:

IFC properly assured itself pre-investment that risks and potential hazards to workers, were identified. A system was required to provide workers with a safe and healthy work environment including preventive and protective measures, OHS training, and emergency preparedness and response arrangements. This is in compliance with PS2, para. 23.

However, IFC lacks assurance that the client is systematically implementing preventive and protective OHS measures according to good international industry practice. Similarly, IFC lacks assurance that the client has in place adequate systems for reporting on accidents and incidents, analyzing their root causes and implementing corrective measures. Thus, CAO finds that IFC has not provided adequate supervision in relation to OHS requirements of PS2 and the EHS Guidelines.

#### 4.2.1 Claims and Responses

The complainants state that the client does not provide Personal Protective Equipment (PPE) as would be necessary to protect workers. They claim that safety boots are replaced every three years although they last only two weeks. They claim that workers must bear the cost of replacing degraded equipment.

They allege that accidents are common at the plant and that first aid care is not adequate as supervisors are not trained to provide first aid, and first aid kits are not of good quality. They claim that there is no medical staff on site and referrals to hospital are made under the sole discretion of supervisors. They allege that many workers do not get medical coverage or compensation due to job related injuries.

The client points to health and safety certifications (OHSAS 18001 and ISO 14001) in support of its safe working environment. The client states that PPE is provided, that it is of good quality (meeting the requirements of the Kenya Bureau of Standards), and that it is warranted. The client adds that, unless lost or stolen, PPE is replaced for free. It adds that its safety officer makes rounds to ensure conformity with safety measures.

The client states that no medical staff is required on site, however cars are available to transport injured workers to the hospital, which is located approximately 12 minutes away. The client states that all of its workers are covered by workers' compensation insurance.

#### **4.2.2 IFC Requirements**

IFC requires that clients provide workers with "a safe and healthy work environment." Clients are expected to take steps to prevent accidents and injuries "associated with, or occurring in the course of work by minimizing, as far as reasonably practicable, the causes of hazards. In a manner consistent with good international industry practice" (GIIP).<sup>45</sup> Clients are also expected to address areas that include the (i) identification of potential hazards to workers; (ii) provision of preventive and protective measures; (iii) training of workers; (iv) documentation and reporting of occupational accidents, diseases, and incidents; and (v) emergency prevention, preparedness, and response arrangements.<sup>46</sup>

IFC's guidance note related to PS2 provides that OHS practices should include the identification of potential hazards and responses to eliminate sources of risk or minimize workers' exposure to them.<sup>47</sup> The guidance expects clients to comply with national laws regulating OHS and workplace conditions.<sup>48</sup>

The guidance expects training to be provided to all workers on relevant aspects of OHS associated with their daily work, including emergency arrangements.<sup>49</sup> The client is to document and report occupational injuries, illnesses and fatalities.<sup>50</sup> The client's management system should include regular monitoring and review of OHS matters and, as a good practice, apply information compiled and any corrective measures in a continuous process to improve OHS conditions and management.<sup>51</sup>

IFC's Sustainability Policy also requires that environmental and social due diligence include analyzing the business activity's environmental and social performance in relation to the World Bank Group EHS Guidelines.<sup>52</sup> The EHS Guidelines require training be provided to ensure workers are oriented to the specific hazards of the work assignments. They require workers with rescue and first-aid duties to receive dedicated training.<sup>53</sup> They recommend distribution

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<sup>45</sup> IFC, 2012 Performance Standard 2, para. 23, footnote 14, defines good international industry practice as the exercise of professional skill, diligence, prudence, and foresight that would reasonably be expected from skilled and experienced professionals engaged in the same type of undertaking under the same or similar circumstances, globally or regionally.

<sup>46</sup> IFC, 2012 Performance Standard 2, para. 23.

<sup>47</sup> IFC, 2012 Guidance Note 2, para. GN76.

<sup>48</sup> IFC, 2012 Guidance Note 2, para. GN77.

<sup>49</sup> IFC, 2012 Guidance Note 2, para. GN80.

<sup>50</sup> IFC, 2012 Guidance Note 2, para. GN81.

<sup>51</sup> IFC, 2012 Guidance Note 2, para. GN83.

<sup>52</sup> IFC, 2012 Sustainability Policy, para. 28.

<sup>53</sup> Environmental, Health, and Safety (EHS) Guidelines; General EHS Guidelines: Occupational Health and Safety, p. 64 (EHS Guidelines); available at <https://bit.ly/2sqzjZq>.

and use of PPE if alternative technologies, work plans or procedures cannot eliminate a hazard or exposure. They add that PPE should be appropriate to protect individuals without incurring inconveniences as it be maintained and replaced when damaged or worn out.<sup>54</sup>

In terms of OHS monitoring, the EHS Guidelines require a system in place to enable workers to report any situation they believe presents a danger to life or health. The EHS Guidelines add that all incidents and near misses should be investigated to establish what happened, determine the cause, and identify measures to prevent a recurrence.<sup>55</sup>

### **4.2.3 IFC Review and Supervision**

#### IFC pre-investment review

Project documents, including the May 2014 ESRS, indicate that IFC reviewed the client's OHS policies and procedures.<sup>56</sup> The ESRS states that the client has comprehensive OHS management system procedures, which are followed rigorously. IFC states that its due diligence was conducted in accordance with PSs and Kenyan labor law and that anything not aligned with Kenyan labor law or IFC's PSs was noted in the action plan.

The ESRS indicates that employees are provided with PPE in accordance with their job descriptions and the PPE issuance policy. It adds that employees are generally compliant and use PPE. It also adds that OHS incidents, in the year prior to the ESRS, had been minor. IFC states that the client is OHSAS 18000 certified and OHS Risk Assessments are performed by an independent certified OHS auditor to maintain certification and fulfill Kenyan Occupational Health & Safety Act requirements. IFC also states that the reports arising from these audits, including the most recent of 2012, were verified during the due diligence. IFC did not provide any assessment of the quality of the client's OHS auditing (whether internal or external).

The ESRS indicates that the client agreed to develop and implement an environmental, OHS and food safety management system, including policies, plans, manuals and procedures as part of an Integrated EHS Management System. IFC considered this to be in compliance with PS1 requirements and EHS Guidelines.<sup>57</sup>

The ESRS states that incident reports are displayed on a white board and records kept for all injuries.<sup>58</sup> The ESRS adds that, while there is no nurse or doctor on duty in the plant, employees with injuries are given first aid treatment and taken to the local hospital and treated at the client's expense or under the National Hospital Insurance Fund (NHIF).<sup>59</sup> IFC reported that specific training on first aid is conducted on an ongoing basis with refresher courses given every six months.<sup>60</sup> IFC also reported that all employees were provided with workplace accident and occupational illness insurance.<sup>61</sup>

The agreed upon ESAP, required the client to develop and implement OHS policies and procedures demonstrating compliance with the EHS Guidelines prior to construction or upon

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<sup>54</sup> EHS Guidelines, pp. 73-74.

<sup>55</sup> EHS Guidelines, p. 76.

<sup>56</sup> In the ESRS, Overview of IFC's Scope of Review, IFC reports that it reviewed the client's BS OHS documentation; health and safety code; OHSMS Manual; safety training; OHS poster; PPE issuance policy; OHSAS monitoring and control; BS OHSAS 18001 certificates, and first aid emergency response.

<sup>57</sup> ESRS, Environmental and Social Mitigation Measures.

<sup>58</sup> ESRS, Environmental and Social Mitigation Measures.

<sup>59</sup> ESRS, Environmental and Social Mitigation Measures. According to the client, it "contracted hospitals in Thika Naidu, Thika Nursing Home, Avenue Hospital, Medihealth wherein professional Health Care is administered to employees." See, Bidco Clarifications, p. 2.

<sup>60</sup> ESRS, Environmental and Social Mitigation Measures.

<sup>61</sup> The client has a fully paid insurance cover for Workplace accidents with Kenindia Insurance Company. See, Bidco Clarifications, p. 2.

the factory's commissioning.<sup>62</sup> In its submission for Board approval, on June 03, 2014, IFC identified that key environmental and social issues applicable to the investment included OHS.

In February 2015, IFC noted that the client had obtained the certificate of registration as a workplace under the Occupational Safety and Health Act, which was a condition for disbursement. IFC stated that the client had developed and implemented OHS policies and procedures demonstrating compliance with the World Bank Group's EHS Guidelines as per the ESAP.

IFC staff explained to CAO, that the client's policies and procedures were reviewed and cross-checked against verifiable information (e.g. safety posters, emergency number, workers' understanding of policies, use of PPEs, etc.). IFC staff also stated that they checked on the enforcement and monitoring of PPE-use. IFC staff stated that all employees were trained on PPE-use during induction and informed of related policies. IFC informed CAO that the client's PPE issuance policy gives a replacement period of 2 years and does not state that employees would be required to replace equipment. However, under certain conditions where PPE equipment is continually lost or misplaced the client's policy provides that employee may be fined, warned or suspended. In this context CAO notes provisions of Kenyan law prohibit costs of OHS compliance from being shifted to workers.<sup>63</sup>

### IFC supervision

IFC supervision documentation from 2016 confirmed that the client employed an EHS manager for each factory and that there were three EHS champions per section (Safety, Health/First Aid, and Environment) on the factory floor, each, trained to spot non-compliant behavior and to manage incidents.

IFC staff stated that they reviewed the client's OHS audit reports, including the client's annual external audits and monthly and quarterly internal audits. While generally positive in relation to OHS performance, one such audit report (from June 2016) pointed out that root cause analysis of incidents and development of corrective actions should be enhanced. The same report also noted that PPE usage enforcement should be emphasized. A January 2014 audit report noted similar conclusions relating to PPE and development of corrective actions. A client initiated anonymous workers' survey from May 2016, reviewed by IFC, also identified the issuance of PPE as an issue in need of resolution. IFC reported that the client stated that it had acted on this finding.

By October 2016, IFC was aware that enforcement of the usage of PPE remained an area for improvement. IFC was also aware that the client's records of safety incidents lacked root cause analysis and that non-conformity in relation to washrooms and hygiene existed. IFC reviewed a register of OHS incidents for the period from December 2015 to February 2016, mentioning 15 injuries. Among these four related to splashing of chemicals or acid oil in workers' eyes; one of which resulted in a four-day period of incapacity. The other most common incident was 'slip and fall', which was reported three times. The records did not indicate corrective measures adopted to avoid future occurrences. IFC also reviewed the client's OHS incidents report from January to September 2016, in which eleven health and

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<sup>62</sup> ESAP, Action Item 1. Such measures include, the designing and implementation of an Integrated Environmental and Social Management System ("ESMS"), which includes OHS; the composition of an Environmental, Health and Safety ("EHS") Committee; evidence of complete and effective implementation of the ESMS. The ESAP requires the client to develop and implement OHS policies and procedures demonstrating compliance with the World Bank Group's EHS Guidelines. It requires the client to adopt key performance indicators (Safety – Lost Time Incidence Frequency Rate and Accident Free Days). It also required the client to submit annual EHS reports to IFC as part of the Annual Monitoring Report.

<sup>63</sup> The Kenya Occupational Safety and Health Act, No. 15, (2007) prohibits an employer from making "any deduction from an employee's remuneration or levy, or permit to be levied on any of his employees any charge in respect of anything done or provided in pursuance of this Act" <https://goo.gl/pk1WVN> (accessed March 14, 2018), see, para. 10.

safety incidents were recorded; all resulting in minor injuries. In response to IFC's several requests for information between October 2016 and February 2017, on whether incidents were investigated and corrective measures taken, the client provided a sample investigation report.

In early 2018, IFC requested that the client provide assurance of OHS policy implementation, including: installation of non-slip flooring in at-risk areas like the bottling plant; re-siting or renovating toilet facilities as needed; records of PPE provision and adherence to the PPE policy; continuing refresher training for all workers on OHS; effective root-cause analysis, and detailed corrective actions for all OHS incidents recorded on the OHS registers.

IFC also requested that the client provide detailed documentation of OHS incidents and corrective actions, as well as root cause analysis. In February 2018, the client provided with IFC a register of OHS incidents for the period January to March 2017. This included brief summary information in relation to 13 injuries including their causes and preventative measures taken. The client also provided a sample injury investigation report which provided more details in relation to a single incident from 2015. Following an initial review of this information, IFC requested a more recent OHS incident list and root cause analysis reports covering a full year including more details in relation to incidents, near misses, lost time, corrective actions and OHS trends, as would usually be expected in the client's AMR.

#### Observations from CAO site visit

An announced site visit by the CAO team to the client in May 2017 also raised concerns regarding the provision of PPE. CAO's observation was that PPE was generally worn, with some significant exceptions. During a walk-through of the factory, CAO observed that some workers were not wearing protective footwear. A worker explained that he had been waiting for six months to be issued new safety footwear. CAO also observed that the floor in one of the facilities was slippery and workers interviewed spoke of falls and injuries to arms and knees resulting from slipping. The client was aware of this issue and indicated that it was considering means to address it.

The CAO team met with a worker responsible for providing first aid assistance. He had received basic training for his task and was knowledgeable. He also showed the team a reasonably stocked first aid cabinet on the floor of the workshop. CAO was shown current incident reports displayed on a white board and records kept for injuries.

#### **4.2.4 Observations and Findings**

CAO finds that IFC properly assured itself at pre-investment that risks and potential hazards to workers, were identified. A system was required to provide workers with a safe and healthy work environment including preventive and protective measures, OHS training, and emergency preparedness and response arrangements. This is in compliance with PS2, para. 23.

However, CAO finds that IFC lacks assurance that the client is systematically implementing preventive and protective measures according to good international industry practice. Similarly, CAO finds that IFC lacks assurance that the client has in place adequate systems for reporting on accidents and incidents, analyzing their root causes and implementing corrective measures. This has been indicated in audit reports and verified by IFC during its site supervision, however, the issues persist without a clear corrective action plan. Thus, CAO finds that IFC has not provided adequate supervision in relation to OHS requirements of PS2 and the EHS Guidelines.

CAO notes that the client provides an OHS environment that is above the standard likely to be encountered in many other factories in Kenya, however, IFC lacks assurance that the client's OHS performance meets the IFC requirement for "good international industry practice." Weaknesses in OHS performance as documented by IFC and observed by CAO

could be promptly corrected, if expert guidance is provided to the client. Some of these weaknesses are recurrent in the client's audit reports (such as enforcement of PPE compliance). CAO notes that ISO audits are undertaken with the objective of continuous improvement to motivate reaching higher levels of compliance. Audits usually require an escalation process, whereby an issue that remains uncorrected, is raised to a higher level of non-conformity during the following audit. Ultimately, certification may be put in question if recurrent non-conformities are not addressed. IFC has not ensured that such escalation occurred with regard to systemic enforcement of PPE-use. CAO also notes concerns regarding persistent allegations that workers are required to pay for damaged or lost PPE in certain circumstances, given requirements of Kenyan law that no deduction from wages is permitted in relation to OHS matters.<sup>64</sup>

### 4.3 Union Recognition

#### Summary of Findings:

The complaints allege that the client has made it difficult for workers to obtain collective representation by favoring the Kenya Chemicals & Allied Workers Union (KCAAWU) over the Kenya Commercial Food and Allied Workers Union (KCFAWU). CAO notes that Kenyan Courts have ruled on this issue resulting in a 2012 union Recognition Agreement that remains in force. As a result, CAO finds that this does not raise a compliance issue from an IFC perspective.

#### 4.3.1 Claims and Responses

The complainants allege that the client has made it difficult for the workers to obtain collective representation. They allege that workers have insisted on being represented by the Thika-based Kenya Commercial Food and Allied Workers Union (KCFAWU), but are represented instead by the Kenya Chemical and Allied Workers Union (KCAAWU) based in Nairobi. They allege that KCAAWU leadership has a close relationship with the client's management. The complainants consider that, in violation of Kenyan law, the client compelled them to join its preferred union.

The client considers that the existence of a Collective Bargaining Agreement (CBA) and unionized workers is proof of the freedom of workers to associate. The client considers that claims of anti-unionism are baseless.

#### 4.3.2 IFC Requirements

IFC's PS2 recognizes the fundamental rights of workers with reference to the ILO Conventions on Freedom of Association and Collective Bargaining.<sup>65</sup> Relevant client requirements under PS2 include: (a) compliance with national law; (b) non-interference in workers' decisions to form or join workers organizations of their choosing, or to bargain collectively, and (c) protections against discrimination or retaliation against workers who participate, or seek to participate in union activities.<sup>66</sup>

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<sup>64</sup> Kenya Occupational Safety and Health Act, No. 15, (2007), para. 10 (see footnote 63 above).

<sup>65</sup> IFC, 2012 Performance Standard 2, para. 1.

<sup>66</sup> IFC, 2012 Performance Standard 2, para. 14. See also 2012 Guidance Note 2, para. GN37, for examples of such discrimination including refusing hire, demoting or re-assigning workers in response to union activities.



### Background on Kenyan law

Kenyan law recognizes workers' rights to form and join trade unions and employers are required to recognize trade unions for purposes of collective bargaining,<sup>67</sup> if a trade union represents a simple majority of unionisable employees.<sup>68</sup> Requiring a simple majority means that one union can secure exclusive rights to represent unionisable workers; this is called a 'sole union' system. The status of a 'sole union' may result in a situation whereby workers either become members of the recognized union or remain unrepresented for the purposes of collective bargaining. Under Kenyan law, however, a union with a registered CBA can request (via the Ministry) that the employer deduct agency fees (almost equivalent to a membership fee) from wages of unionisable employees who are not members of the union.<sup>69</sup> This provides a way for the union to act on behalf of non-member employees in matters of grievance or other discussions with the client.<sup>70</sup>

#### **4.3.3 IFC Review and Supervision**

IFC's May 2014 ESRS reports that there are 2-3 dominant unions in Kenya that employees are free to join. It also reports that the client and KCAAWU have had a Recognition Agreement since November 2012.<sup>71</sup> IFC reported that prior to this arrangement, the client's workers were not unionized.<sup>72</sup>

In 2016, IFC supervision documentation notes that a CBA with KCAAWU is in place. It also notes that less than 268 employees are represented by KCAAWU, constituting less than 13% of the workforce. IFC reports meeting with a shop steward from KCAAWU to explore the extent of the cooperation between union and employee representatives and the client's management, confirming that the client's management meets with the shop stewards weekly. IFC also reports that the shop stewards regularly compile reports on workers' concerns or issues and present them for discussion and resolution.

IFC states that the union representative it met with was comfortable talking and stated that everything was functioning properly and that the client seemed comfortable with workers joining the union. IFC notes that the discussions between client and union form the basis of the CBA. IFC notes that according to the shop steward the union is kept informed and issues that remain unresolved are escalated to the Ministry of Labour. IFC does not report any tension relating to the choice of union representing the client's workers.

### Background on the choice of union (KCFAWU and KCAAWU)

In October 2012, the Industrial Court in Nairobi determined that by 2009 both unions mentioned in the complaint (KCFAWU and KCAAWU) were "fighting a tuff (sic.) war over the

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<sup>67</sup> Collective bargaining consists of discussions and negotiations between employers and representatives of workers' organizations to agree jointly on working conditions and terms of employment.

<sup>68</sup> Kenya Labour Relations Act, No. 14 of 2007, <https://goo.gl/Vn5KuU> (accessed March 14, 2018, "Kenya Labour Relations Act"), Sections 54-55.

<sup>69</sup> Kenya Labour Relations Act, Section 49.

<sup>70</sup> See Republic of Kenya in the Industrial Court at Mombasa, Cause No. 340 of 2014, Tailors and Textiles Workers Union vs. Ashton Apparels [EPZ] Limited, <https://goo.gl/Q4Ko1o> (accessed March 14, 2018) an "Agency Shop allows an Employer to hire Union and Non- Union Members. Employees need not join the Union, to remain employed. Non- Union Members may however, be required to pay agency fees, to cover the costs incurred by the Trade Union, in negotiating the Collective Bargaining Agreement. It must be noted that Trade Unions in most cases negotiate CBAs which cover all the Unionisable Employees at the workplace, and not merely those who are signed up Members of the Union."

<sup>71</sup> A recognition agreement is an agreement by which a company formally recognizes a union for the purpose of collectively bargaining on behalf of the workers

<sup>72</sup> ESRS, Environmental and Social Mitigation Measures.

proper and valid union to represent the interests of the unionisable employees” and ordered a ballot to determine the workers’ preferred union.<sup>73</sup> The ballot was held on November 10, 2012, and was overwhelmingly in favor of KCAAWU (971 votes to 18 votes). As the legal requirement for a simple majority of members of the unionisable workforce was satisfied, the Court ruled on November 23, 2012, that KCAAWU should be recognized.

The Recognition Agreement was signed on December 1, 2012, and considered KCAAWU as the sole labor organization representing the interests of the client’s workers in matters concerning wages, work hours and overtime, method of payment, paid leave, duration of employment, collection of dues, retirement and medical benefits, promotion, redundancy, and other generally accepted terms and conditions of service.

On June 15, 2015 a CBA was signed between KCAAWU and the client. The agreement was set to be in effect from June 1, 2014, to May 31, 2016. A new CBA was negotiated and registered on June 7, 2017, and is effective for the period from June 1, 2016, to May 31, 2018.

CAO notes that Kenyan courts have established that employer recognition of a union is a continuous process and other unions can compete for members and challenge recognition.<sup>74</sup> CAO inquired with officials of KCFAWU whether they intended to challenge the position of the current union and was told that KCFAWU has not challenged the Recognition Agreement. As a result, the 2012 Recognition Agreement remains in force.

#### **4.3.4 Observations and Findings**

The complaints allege that the client has made it difficult for workers to obtain collective representation by favoring the Kenya Chemicals & Allied Workers Union (KCAAWU) over the Kenya Commercial Food and Allied Workers Union (KCFAWU). The complainants’ concerns regarding the client’s recognition of a union that currently represents a minority of workers’ is understandable. However, this does not represent a compliance issue from an IFC perspective, given the decision of the courts in 2012 that KCAAWU should be recognized, and the acknowledgment of KCFAWU that KCAAWU remains the legally recognized union for the client’s workers.

#### **4.4 The Grievance Procedure, Discrimination and Retaliation**

##### **Summary of Findings:**

Throughout the investment cycle, IFC has reviewed the client’s grievance handling policies and procedures and advised the client to make improvements to ensure compliance with PS2, para. 20. In particular, IFC noted that the client’s 2017 grievance procedure confuses grievance redress with a process for disciplinary, ethical and anti-corruption enforcement. IFC communicated to the client that the grievance procedure in the 2017 HR Manual was a regression and requested corrective actions to bring it back into compliance.

IFC has verified that the client has in place policies against discrimination and retaliation. However, IFC supervision does not provide assurance that the client’s policy commitments in

<sup>73</sup> See Republic of Kenya in the Industrial Court of Kenya at Nairobi, Cause No. 369 of 2009, Kenya Chemical and Allied Workers Union vs. Bidco Oil Refineries Limited, <https://goo.gl/ktUE8s> (accessed March 14, 2018), Ruling.

<sup>74</sup> See Republic of Kenya in the Industrial Court at Nairobi, Cause No. 1731 of 2011, Kenya Union of Printing, Paper Manufacturers and Allied Workers vs. Packaging Industries Limited and Kenya Chemical and Allied Industries Workers Union, <https://goo.gl/mqK6zX> (accessed March 14, 2018), “the Union is granted recognition if the Union represents the simple majority of the Unionisable Employees. The presence of a simple majority is a continuous requirement, so that if there is a claim by another Trade Union such as the Claimant that the Recognized Trade Union has lost its simple majority, the validity of the existing Recognition Agreement must be questioned.”

these respects are being implemented. CAO's investigation does not provide a basis to determine whether discrimination and retaliation are occurring, however considering publicly available allegations of discrimination and retaliation, CAO finds that further supervision by IFC is required to verify client compliance with the non-retaliation and anti-discrimination requirements of PS2, paras. 14 to 16. While such allegations can be difficult to verify, IFC standards provide for the use of audit and assessment tools to verify compliance in accordance with good international industry practice, as required by PS1, paras. 7 and 23, and Guidance Note 1, para. GN22. In this context, an analysis of potential discrimination comparing salaries, contract terms and seniority between different groups is warranted.

#### **4.4.1 Claims and Responses**

The complainants present a number of allegations related to lack of grievance redress, reprisal, and discrimination. The complainants allege that employees are not aware of a grievance redress mechanism. They also allege that when they complain, they receive no response or follow-up to the issues raised. They allege that workers fear having their contracts terminated or not renewed 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 complainants allege that the client discriminates against "Kenyan workers" by employing "Indians at management positions and Kenyans at lower level positions". The complainants allege that "Indian workers' salaries are much higher than Kenyans". They state that some of the client's employees are "Indians" working illegally on tourist visas.

Workers claim that they are discouraged from joining trade unions, and those who do are denied promotion or access to better health treatment or benefits from the client-sponsored credit services. They claim that members of the union receive shorter contract terms than non-union members.

The client considers that its grievance mechanism is documented and was reviewed in its different iterations. This is in addition to a recently released new code of ethics.<sup>75</sup> The client recognizes that education about the grievance mechanism is not up to expectation and sensitization could be improved. The client has also put in place a hotline for workers who seek confidentiality.

The client denies any discrimination is occurring against its workers. It states that management positions are occupied by both ethnicities. The client also denies that it employs workers on tourist visas. The client denies any discrimination is occurring against union members.

#### **4.4.2 IFC Requirements**

PS2 requires clients to provide a grievance mechanism for workers. The client is expected to inform the workers of such mechanism at the time of recruitment and make it easily accessible to them. The mechanism should address concerns promptly without retribution. The mechanism should allow for anonymous complaints (2012 PS2, para. 20).

IFC also requires the client to comply with national laws in countries where national law provides for non-discrimination in employment (2012 PS2, para. 16). IFC requires the client to not make decisions based on personal characteristics (e.g. gender, race, nationality, ethnicity, origins, belief, disability, age, or sexual orientation) unrelated to inherent job requirements. The client is required to base the employment relationship on the principle of equal opportunity and fair treatment, and to not discriminate with respect to any aspects of

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<sup>75</sup> Bidco Africa, Code of Ethics, <https://bit.ly/2kC9UZr> (accessed May 31, 2018).

this relationship, such as recruitment, working conditions, terms of employment, etc. (2012 PS2, para. 15). Further, IFC requires the client not to discriminate or retaliate against workers who participate or seeks to participate in workers' organization and collective bargaining (2012 PS2, para. 14).

#### 4.4.3 IFC Review and Supervision

##### IFC pre-investment review

IFC's ESRS notes that the client has an established grievance mechanism, which "includes steps to be taken for workers to raise concerns, discuss solutions, and provide feedback." The ESRS notes that during the induction training awareness-raising on grievance mechanism procedures takes place. The ESRS concludes that the client's grievance mechanism meets PS2 requirements.<sup>76</sup> Nevertheless, IFC and the client agreed to include a grievance mechanism as part of its HR policy.<sup>77</sup>

Concerning discrimination, the ESRS states that the client is "committed to equal opportunities, gender equality, and is against sexual harassment and discrimination," as articulated in its HR Manual.<sup>78</sup> The ESAP does not contain any provisions specific to this issue beyond the general requirement for the client to have HR policies and procedures that are consistent with PS2.<sup>79</sup>

IFC's pre-investment review documentation does not mention concerns regarding retaliation. At the same time, CAO notes available information which includes allegations similar to those raised by the complainants. For example: Kenya's parliamentary record from 1997 and 2001 includes allegations that the client had prevented workers from joining a union and that workers were threatened if they attempted to join a union.<sup>80</sup> News reports from 2011 indicate that workers went on strike protesting "poor working conditions, harassment by senior managers and inadequate wages."<sup>81</sup> An unfair dismissal case lodged by two former workers in 2011 alleged that the client had terminated their employment on the basis that they had encouraged other workers to go on strike.<sup>82</sup> KCAAWU representatives advised CAO that they believed discrimination was occurring during the period before the signature of the Recognition Agreement in 2012. Strikes and protests over pay and working conditions were reported in 2015.<sup>83</sup> In this context, CAO was presented with a document issued by the client's management in April 2015 warning workers of disciplinary and legal action should they participate in a strike. CAO found no evidence that IFC was aware of any of the above information.

Available documentation shows that IFC's pre-investment review of PS2 requirements on grievance mechanism and discrimination focused on the client's HR policies and did not consider their implementation. IFC's pre-investment review did not address aspects of

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<sup>76</sup> ESRS, Environmental and Social Mitigation Measures.

<sup>77</sup> ESAP, Action Item 7.

<sup>78</sup> ESRS, Environmental and Social Mitigation Measures.

<sup>79</sup> ESAP, Action Item 7.

<sup>80</sup> National Assembly Official Report Question N. 684 Union for Bidco Workers (October 21, 1997), <https://bit.ly/2xtUgbZ> (accessed May 11, 2018); National Assembly Official Report Question N. 301 Action Against Bidco Management (June 06 and 07, 2001), <https://bit.ly/2JhT93L> and <https://bit.ly/2zvB9ir> (accessed May 11, 2018).

<sup>81</sup> The Star, September 6, 2011, "Kenya: Thika Bidco Workers Stage Strike", <https://bit.ly/2sn3ktX> (accessed May 31, 2018).

<sup>82</sup> See Republic of Kenya in the Employment and Labour Relations Court at Nairobi, Cause No. 1961 of 2011, Robert Kipkemboi Kirwa and Patrick Isaac Injendi vs. Bidco Oil Refineries Limited, <https://bit.ly/2m9cEhB> (accessed March 14, 2018).

<sup>83</sup> Citizen Digital, March 24, 2015, "BIDCO Workers Down Tools Over delayed, Poor Pay", <https://bit.ly/2zrzryN> (accessed March 14, 2018).

retaliation although information was available in public records to indicate this was an area of concern.

#### IFC supervision

IFC's October 2016 supervision document notes a site visit and an interview with a worker and HR staff to find out whether the new grievance mechanism was functioning as expected. This document does not mention the labor grievances or strikes that were reported in 2015. Nevertheless, IFC notes that the number of grievances reported by the client declined sharply. IFC also reports that this was difficult to confirm from the register provided.

During discussions with CAO, IFC stated that following its advice, by March 1, 2016, the client had adopted a new grievance handling policy. The new policy's first step emphasizes dialogue for resolution (verbal complaints) at the workshop level and the presence of a personal representative (who must be an employee) in case of escalation. IFC also stated that it had advised the client to maintain more comprehensive reports on the resolution of grievances and noted to CAO that the client did this.

The client's 2017 revision of the HR Manual included a Complaint and Grievance Procedure, which are of a disciplinary nature. In February 2018, IFC advised the client that this revised grievance procedure was not compliant with PS2. IFC considered the tone and language focused on enforcement rather than on employees' right to complain or log a formal grievance, either openly or anonymously. Grievances are characterized as breaches of the client's governing documents and are recorded as compliance incidents. IFC informed CAO that this was communicated to the client, pointing out the regression and requesting a commitment to bring the grievance procedure back into compliance. IFC further informed CAO that it will request from the client monthly or quarterly reporting until IFC is satisfied that the grievance procedure adopted are PS2-compliant.

Concerning discrimination and retaliation, IFC's October 2016 supervision documentation notes the client's commitment to non-discrimination, equal opportunity and gender equality. IFC reports that the client employed 1728 workers, of whom 18 were expatriates. IFC received the client's 2017 HR Manual, which contains language condemning discrimination including in the hiring, remuneration, access to training, promotion, termination or retirement based on race, national or territorial or social origin, caste, birth, religion, disability, gender, sexual orientation, family responsibilities, marital status, political opinions, age or any other condition that could give rise to discrimination. CAO's discussion with the KCAAWU union representative, indicated that currently, unlike prior the Recognition Agreement in 2012, this union believed that no discrimination is occurring.

The client's HR manual as submitted to IFC states that the client shall ensure that union members, representatives of workers and any personnel engaged in organizing workers are not subjected to discrimination, harassment, intimidation or retaliation for being union members, representatives of workers or engaged in organizing workers.

IFC informed CAO that it did not assess or investigate whether discrimination or retaliation was occurring against the client's workers alleging that this would require other means of verification such as witnesses, corroboration, audits and interviews with workers.

#### **4.4.4 Observations and Findings**

Throughout the investment cycle, IFC has reviewed the client's grievance handling policies and procedures and advised the client to make improvements to ensure compliance with PS2, para. 20. In particular, IFC noted that the client's 2017 grievance procedure confuses grievance redress with a process for disciplinary, ethical and anti-corruption enforcement. IFC communicated to the client that the grievance procedure in the 2017 HR Manual was a regression and requested corrective actions to bring it back into compliance with PS2, para. 20.

IFC has also verified that the client has in place policies against discrimination and retaliation. However, IFC supervision does not provide assurance that the client's policy commitments in these respects are being implemented. CAO's investigation does not provide a basis to determine whether discrimination and retaliation are occurring, however, considering publicly available allegations of discrimination and retaliation, CAO finds that further supervision by IFC is required to verify compliance with the non-retaliation and anti-discrimination requirements of PS2, paras. 14 to 16. While such allegations can be difficult to verify, IFC standards provide for the use of audit and assessment tools to verify compliance in accordance with good international industry practice, as required by PS1, paras. 7 and 23, and Guidance Note 1, para. GN22. In this context, CAO finds that an analysis of potential discrimination comparing salaries, contract terms and seniority between different groups is warranted.

## 5. Conclusion

This report provides CAO's analysis of IFC's application of its environmental and social standards to an investment in Bidco Africa Limited, a Kenyan private limited liability company. IFC's investment was designed to support the expansion of the client's fast moving consumer goods business. IFC commenced its pre-investment E&S review of the client in 2013 and approved the investment in 2014. First disbursement occurred in June 2016.

The report responds to a complaint filed by a group known as Bidco Truth Coalition on behalf of current and former workers of the client. The complaint raised several issues, which were grouped into four overarching categories: i) terms of employment and termination of casual workers; ii) occupational health and safety conditions; iii) union recognition; and, iv) the client's grievance procedure, discrimination and retaliation. CAO's review noted two predominant compliance failures related to these issues as well as some positive developments.

**Concerning the client's employment and termination of casual workers,** CAO finds that IFC's review and supervision was not sufficient to provide assurance that the client's employment policies were consistent with national law as required by PS2, paras. 8 and 9.

CAO also finds that IFC has not ensured that payments to former casual workers upon termination were consistent with Kenyan legal requirements as provided by the Employment Act. Similarly, CAO finds that IFC has not ensured that casual workers who were converted to regular employment were properly credited with benefits accrued during their period of casual employment. Given findings of Kenyan courts that the client has unfairly dismissed and under compensated former casual workers in a number of instances, CAO finds that an audit of the client's employment practices against Kenyan law, including an assessment of possible under compensation of former casual workers is necessary.

The decision to terminate this group of workers, albeit with an intention to rehire many and provide employment security, raises questions as to the application of the PS2 requirements on retrenchment. CAO finds no evidence that IFC drew the client's attention to this issue or considered how the requirements for retrenchment under PS2 should be applied to this case. This was not consistent with the requirements of PS2, paras. 18 and 19.

**Concerning occupational health and safety,** CAO finds that IFC properly assured itself at pre-investment that risks and potential hazards to workers, were adequately identified. A system was required to provide workers with a safe and healthy work environment including preventive and protective measures, OHS training, and emergency preparedness and response arrangements. This is in compliance with PS2, para. 23.

However, CAO finds that IFC lacks assurance that the client is systematically implementing preventive and protective measures according to good international industry practice. Similarly, CAO finds that IFC lacks assurance that the client has in place adequate systems for reporting on accidents and incidents, analyzing their root causes and implementing corrective measures. Thus, CAO finds that IFC has not provided adequate supervision in relation to OHS requirements of PS2 and the EHS Guidelines.

**Concerning union recognition,** CAO notes that Kenyan Courts have ruled on this issue resulting in a 2012 union Recognition Agreement that remains in force. As a result, this is not a compliance issue.

**Concerning the client's grievance procedure, discrimination and retaliation,** CAO finds that throughout the investment cycle, IFC has reviewed the client's grievance handling policies and procedures and advised the client to make improvements to ensure compliance with PS2, para. 20. In particular, IFC noted that the client's 2017 grievance procedure confuses grievance redress with a process for disciplinary, ethical and anti-corruption enforcement. IFC communicated to the client that the grievance procedure in the 2017 HR Manual was a regression and requested corrective actions to bring it back into compliance.

IFC has also verified that the client has in place policies against discrimination and retaliation. However, IFC supervision does not provide assurance that the client's policy commitments in these respects are being implemented. CAO finds that further supervision by IFC is required to verify compliance with the non-retaliation and anti-discrimination requirements of PS2, paras. 14 to 16. While such allegations can be difficult to verify, IFC standards provide for the use of audit and assessment tools to verify compliance in accordance with good international industry practice, as required per PS1, paras. 7 and 23, and Guidance Note 1, para. GN22.

CAO has identified a number of underlying causes of IFC's non-compliance in this case.

**Lack of labor expertise.** The IFC team did not involve labor expertise during its pre-investment review or supervision of the investment. The lack of specialist labor expertise (either staff or consultants) on the IFC team contributed to a situation in which PS2 related risks and impacts did not receive necessary attention. Adequate staffing is crucial to the effectiveness of IFC's E&S mandate. While labor expertise will not be required for every investment the principle of review and supervision that are commensurate to risk requires specialist expertise in relation to projects with flags for labor risk. In this case a large workforce and reports of labor related grievances presented such flags.

**Over reliance on client documentation and self-assessment.** IFC's pre-investment review of the client's approach to human resources management was based primarily on client policy documentation and self-assessment. Other relevant sources of information were not considered or required. For example: (a) IFC did not require a labor audit to verify implementation of the client's policies and procedures or their consistency with national law; (b) IFC did not conduct legal due diligence in relation to labor issues as a result of which ongoing court cases between the client and former workers regarding unfair dismissal and under compensation were not identified; and (c) Media reports of labor disputes, and other allegations of unfair labor practices involving in the client were not reviewed.

At the same time, CAO notes **positive developments**, arising from IFC's engagement with the client. During the course of this investigation, CAO noted that IFC increased the intensity of its supervision efforts. This led to improvements in relation to OHS issues and the grievance procedure. Regarding OHS, CAO notes that the client is operating at a higher standard than many other companies in Kenya but still short of good international industry practice. In this context there are opportunities for IFC to provide practical advice to its client on how to achieve its higher standards. CAO also notes constructive advice that IFC has provided in relation to the grievance procedure.

CAO will keep this case open and will monitor IFC's response to the investigation findings.



## Annex Summary of Investigation Findings

<b>Terms of employment and termination of casual workers</b>	
IFC's due diligence in identifying the casual workers employment category and the client's process to convert casual workers to fixed term employees	While the client ceased to employ casual workers as of 2015, IFC's review and supervision in relation to this issue were not sufficient to provide assurance that the client's employment policies were consistent with national law as required by PS2, paras. 8 and 9.
IFC's consideration and advice to the client concerning the PS2 provisions on retrenchment of workers	The decision to terminate this group of workers, albeit with an intention to rehire many and provide employment security, raises questions as to the application of the PS2 requirements on retrenchment. CAO finds no evidence that IFC drew the client's attention to this issue or considered how the requirements for retrenchment under PS2 should be applied to this case. This was not consistent with the requirements of PS2, paras. 18 and 19.
<b>Occupational health and safety conditions</b>	
IFC's assessment of the client's OHS systems	IFC properly assured itself at pre-investment that, in compliance with PS2, para. 23, risks and potential hazards to workers, were adequately identified. A system was required to provide workers with a safe and healthy work environment including preventive and protective measures, OHS training, and emergency preparedness and response arrangements.
IFC's supervision that the client is operating its OHS systems in accordance with good international industry practice, reporting incidents, analyzing their root causes and implementing corrective measures	IFC lacked assurance that the client is systematically implementing preventive and protective measures according to good international industry practice. Similarly, IFC lacks assurance that the client has in place adequate systems for reporting on accidents and incidents, analyzing their root causes and implementing corrective measures. Thus, IFC has not provided adequate supervision in relation to OHS requirements of PS2 and the EHS Guidelines.
<b>Union recognition</b>	
IFC's assurance that the client is not interfering in the workers' decisions to form or join workers organizations of their choosing	As the Kenyan Courts have ruled on this issue resulting in a 2012 union recognition agreement that remains in force, it is not a compliance issue.
<b>Grievance procedure, discrimination and retaliation</b>	
IFC's assurance that the client has in place PS2 compliant grievance handling policies and procedures	Throughout the investment cycle, IFC has reviewed the client's grievance handling policies and procedures and advised the client to make improvements to ensure compliance with PS2, para. 20
IFC's assurance that the client has in place policies against discrimination and retaliation	IFC has verified that the client has in place policies against discrimination and retaliation. However, further supervision by IFC is required to verify compliance with the non-retaliation and anti-discrimination requirements of PS2, paras. 14 to 16