

**The American University Washington College of Law
Program on International and Comparative Environmental Law**

**Comments on the IFC/MIGA Compliance Advisor/Ombudsman's
Draft Revised Operating Guidelines**

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Submitted by Email

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Re: Comments on the Proposed Revised Operating Guidelines

The following are comments prepared by the American University's Washington College of Law's Program on International and Comparative Environmental Law, on the November 9, 2006 draft revisions to the Operating Guidelines for the International Finance Corporation's (IFC's) Compliance Advisor/Ombudsman (CAO). We would like to thank the CAO for the opportunity to provide comments on the revised rules, and to commend them on balancing the many competing interests that are vested in the CAO's operating rules.

In general, the rules significantly clarify and improve the CAO's procedures. The new rules will strengthen the potential for successful mediations by focusing the early part of the CAO's involvement on bringing the parties together rather than evaluating the accuracy of any party's position. Moreover, by clarifying that all claims not successfully addressed through the ombudsman function will be forwarded automatically to the compliance role, the CAO has both increased the chances of successful mediation and provided more certainty for those affected communities who seek to vindicate their rights under IFC's policies. We also welcome the clarifications regarding the CAO's role in monitoring implementation both of negotiated settlements and of management's actions in response to a compliance audit. As experience has shown at this and other accountability mechanisms, monitoring is critical to ensuring that outcomes on the ground are improved.

Although we generally endorse the CAO's proposed revisions, we do have several concerns about the new procedures. Most importantly, we believe the claimants should be afforded more opportunity to control the fate of their claim as it enters and proceeds through the compliance audit function. In particular, the complainant should be allowed to withdraw or restate their complaint at the point in which the ombudsman process is deemed to be over *before* the compliance audit takes place. This will allow those claimants who really only wanted an ombudsman process the opportunity to withdraw from what can be viewed as a confrontational process of compliance auditing. Just as importantly, claimants may have decided not to raise all compliance issues initially, if they had hopes of a constructive dispute resolution process. Their initial claims might not be structured in terms of alleged compliance violations, and they should be given the opportunity to restate their concerns as it is being appraised for compliance.

This general concern as well as other additional specific concerns are discussed further below with reference to specific provisions of the proposed revised Guidelines. Text excerpted from the revised procedures is italicized and suggested comments are provided in red.

Paragraph 1.4: In the third paragraph, we would recommend the following addition to reflect the CAO's current practice of meeting with locally affected communities and their representatives to share information about the complaint process and CAO's operations. The suggested change would read:

The CAO seeks to enhance interactions with local communities in the following ways:

- *Publishing these Operational Guidelines, the CAO's terms of reference, information brochures, and other materials in the predominant languages of the World Bank Group and making them available through the Office of the CAO, on the World Wide Web, and by other culturally appropriate means.*
- *Making information about the CAO and its objectives accessible within developing countries through the World Bank Group contacts, sponsors, nongovernmental organizations, and other avenues.*
- *Meeting with local communities or their representatives, upon request, to provide information about the CAO's operations, including how to file a complaint.*
 - *Where possible, communicating in the language of the communities affected by projects.*
 - *Seeking advice of those with expert knowledge within countries and gathering local knowledge as a basis for interventions.*
 - *Being sensitive to the locally specific factors affecting communities' abilities to participate in problem solving and to communicate openly.*

Paragraph 1.5 Information Disclosure and Confidentiality. The second paragraph should also include a statement that the CAO will respect the confidentiality of information provided by the claimants, including if requested their identities. This can also include a cross-reference to Paragraph 2.5. The suggested change would read:

*The CAO's terms of reference limit the ability of the CAO to disclose information publicly on its own initiative. The CAO is bound by IFC and MIGA disclosure policies that require the confidentiality of certain business information to be respected during communications with parties. The CAO is also bound by the Staff Rules of the World Bank Group, which require staff to treat information with discretion and not to disclose information improperly. **The CAO will also keep confidential any information at the request of the claimants, including their identities, as described further in paragraph 2.5.***

Paragraph 2.2. Grounds for Complaint. The reference in this section to the transfer of a complaint to the Compliance auditor may not be necessary, but at the very least the language should more closely track the process described in section 3.3, perhaps with a cross-reference. The suggested change would read:

*~~If, after examination of all alternatives,~~ **anytime after completion of the Assessment (see Section 3.3),** the CAO Ombudsman believes that resolution of the complaint is unlikely to be possible, or that it would be an inefficient use of resources, the complainant will be advised of the reasons for the decision to conclude the Ombudsman process, and the case will be transferred to CAO Compliance for appraisal.*

Paragraph 2.7. Timelines for complaint handling. We have several small comments that do not warrant any exposition. The proposed change would read:

Figure 1 outlines the process CAO adopts in addressing complaints. The CAO is committed to ensuring that complaints are handled in a timely and prompt manner. Complaint handling will be tracked using internal systems; the general procedures outlined in ~~the~~ Figure 1 will be adhered to. If the nature of the complaint or special circumstances makes this impractical, the timeline for handling the complaint will be discussed and agreed upon between the CAO and the parties.

The following steps will normally be followed in response to a complaint that is received:

Step 1: Acknowledgement of receipt together with decision of whether to proceed (5 working days)

Step 2: Assessment of potential for achieving resolution of the complaint (120 working days)

*Step 3: Decision: either continuation with ~~the~~ Ombudsman problem-solving role or transfer to **the Compliance auditor** for appraisal*

*Step 4: If continuation of Ombudsman process then definition of a Memorandum of Understanding for facilitation/mediation, joint-fact finding or other agreed resolution process, **with the goal of** leading to a Settlement Agreement where appropriate*

Step 5: Monitoring and follow-up

4.5 Monitoring and Follow-up. We believe that the second paragraph should be edited to reflect that the CAO expects to regularly monitor implementation, and will also monitor on the request of any party. The change would read as follows:

*Any agreements reached by the parties, or CAO recommendations included in reports to the President, will usually contain a program and timelines for implementation. Monitoring of any changes made in response to agreements or recommendations should be integrated into IFC's or MIGA's normal project management and monitoring. The CAO will **regularly, or on request of any of the parties**, monitor and publicly disclose whether the agreements or recommendations have been implemented, to the extent that this is practicable. The CAO may request that IFC or MIGA staff or other agencies on the ground provide assistance in monitoring implementation of agreements that relate to what happens on a project site.*

5.1 Introduction and purpose of compliance auditing. We recommend that the purpose of the compliance auditing be clarified to reflect a primary purpose of bringing IFC/MIGA projects back into compliance. We would suggest the following changes to this section.

CAO oversees project-level audits of the social and environmental performance of IFC and MIGA. The purposes of CAO auditing are

- to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC and MIGA involvement;*
- to improve social and environmental performance.*

*The primary focus of compliance auditing will be on IFC, MIGA and project sponsors. CAO may also consider the influence of other parties or factors on ensuring or hindering compliance. If auditing identifies noncompliance, the emphasis will be on **promoting constructive solutions and avoiding recurrences—identifying and implementing positive steps that can bring the project back into compliance and mitigate any negative impacts on affected people.***

5.2. Definitions and outline of approach. We recommend that the audit criteria not be restricted to IFC's environmental and social policies, etc., but that all policies be open for compliance review—assuming that violation of the policies could have a social and environmental impact. In other words, the restriction on the audit should not be on the label given the policy, but the potential for violations of any given policy to have a negative social and environmental impact. Thus, for example policies or guidelines on information disclosure or project supervision may not be labeled as environmental or social policies at IFC/MIGA, but may nonetheless have significant environmental and social implications. The suggested changes would simply be the deletion of “environmental and social” as shown below:

The audit criteria applicable to IFC include the ~~environmental and social~~ policies, performance standards, guidelines (including those outlined in the World Bank Group's Pollution Prevention and Abatement Handbook and additional IFC Environment, Health, and Safety Guidelines), procedures, host country legal and regulatory requirements

(including international legal obligations), and conditionality applied to a loan or guarantee (some of which may have its origins in the Environmental Assessment or Environmental Management Plan). The audit criteria for MIGA are broadly similar, and the applicable ~~environmental and social~~ policies and guidelines are identified in the agency's procedures.

Section 6. Initiating and scoping compliance audits. In general, we believe that this section contains too much technical information to be understandable for affected communities and, as a result, we suggest a number of edits as described below with respect to different paragraphs.

Paragraph 6.1. Initiating a compliance audit. We would make several changes to shorten and clarify this section. For example, we suggest deleting the reference to appraisals for projects brought through the ombudsman function, because an appraisal is a necessary step in the compliance process, regardless of how the need for an audit is triggered. The proposed language seems to discriminate against claims triggered by external affected communities through the ombudsman process. As described above, would also add a provision that allows the original complainant to amend or withdraw their complaint after they are advised that their complaint has been forwarded from the Ombudsman to the Compliance Auditor. This shows the proper respect for the affected people who have originally brought this matter to the CAO's attention, and it gives them some limited control over the plight of their complaint.

A compliance audit might be ~~called for initiated~~ in response to any of the following circumstances:

- A request from Senior Management or the President: ~~If Senior Management or the President have concerns regarding a project, they may request that a compliance audit be conducted.~~
- A complaint transferred from the Ombudsman where no resolution was possible: ~~CAO compliance will appraise the project for an audit of the issues raised in the complaint.~~
- At the discretion of the CAO Vice President: ~~During the normal course of the CAO's activities, concerns may arise regarding a specific project that justify the conduct of a compliance audit.~~

~~After the Ombudsman has notified the complainant that they have forwarded the complaint to the Compliance Auditor, the complainant shall have ten business days either to withdraw their complaint, to provide an amended complaint or to provide supplemental information for the Compliance Auditor's consideration in the appraisal process. Such submissions or requests from Senior Management or the President for a compliance audit should be made to the CAO in writing. Each request for a compliance audit will be subject to an appraisal process to determine whether it should be acted upon.~~

Paragraph 6.2. Appraising audit requests. We believe this section is more technical and provides more information than is necessary. The series of questions that are offered are difficult to differentiate and to understand for affected people (whom we believe should be the primary audience for this document). Similarly, we do not believe the paragraphs that are added relating to “causal factors” are clear in how they relate to the auditing criteria. Finally, we think that the appraisal process should not pre-judge the outcome of the audit and should thus provide a relatively wide screen for complaints. Evidence should not be required in the appraisal stage, but rather reasonable allegations of non-compliance and reasonable perceptions of risk of impacts should be enough. The audit (not the appraisal) would then be the place for more fully exploring whether actual non-compliance has occurred; whether it has caused any impacts; and what steps should be taken to bring the project into compliance and mitigate any harm. We would thus recommend that paragraph 6.2 be changed to read as follows:

The purpose of the appraisal process is to ensure that compliance audits are initiated only for those projects ~~containing~~ raising substantial concerns regarding social or environmental outcomes.

Although it is inadvisable to prescriptively limit the conditions under which a compliance audit should take place, CAO applies several basic criteria through audit appraisal. These are framed as a series of questions to test the value of undertaking a compliance audit:

- Is there ~~an allegation–evidence~~ (or perceived risk) of adverse social and environmental outcomes that indicates that ~~a policy Social and Environmental Sustainability Policy provisions~~ (or other audit criteria) may not have been adhered to ~~or properly applied~~?

- Is there ~~an allegation–evidence of or perceived~~ risk of significant adverse social and environmental outcomes that indicates that ~~Social and Environmental Sustainability IFC/MIGA’s Policy provisions, standards, guidelines, etc.,~~ whether or not complied with, have failed to provide an adequate level of protection?

- ~~Is there evidence (or perceived risk) of significant adverse social and environmental outcomes where Social and Environmental Sustainability Policy provisions, standards (or other audit criteria) were not thought to be applicable but perhaps should have been applied?~~

- ~~Is there–evidence an allegation~~ that the application ~~or misapplication~~ of some aspect of a policy, standard, guideline or procedure resulted in adverse social and environmental outcomes?

- ~~Can the cause of adverse social and environmental outcomes not be readily identified and corrected through the intervention of the project team without a detailed investigation of the underlying causes or circumstances?~~

- Could a compliance audit yield information or findings that might ~~better inform~~ ~~improve~~ the application of policies (or other audit criteria) to future projects?

~~In answering these questions, the appraisal will consider the following:~~

~~Causal factors are critical—The causal factors that give rise to adverse social and environmental outcomes are critical to understand, irrespective of whether all applicable policies, guidelines, etc., are interpreted correctly.~~

- ~~Multiple causation is often prevalent—Adverse environmental or social impacts often result from a combination of circumstances or conditions, rather than a single isolated cause.~~

- ~~Immediate as well as underlying causes typically apply—In addition to the immediate causes of adverse environmental or social outcomes (such as a ruptured chemical storage tank), the underlying causes that created the pre-conditions for the adverse outcomes must also be understood.~~

- ~~Underlying causes are typically systemic—Underlying causes are often the result of formal and informal organizational and management policies, practices or systems, rather than the actions of individuals.~~

- ~~A major thrust in the work of IFC and MIGA’s environmental and social specialists is to ensure sponsor compliance with applicable policies, standards and guidelines. The application of professional judgment is integral to this work.~~

~~• The occurrence of unanticipated adverse social or environmental outcomes is not necessarily indicative of noncompliance but does justify a considered assessment of the underlying causes that may help prevent a recurrence.~~

*In conducting the appraisal, CAO will hold discussions with the project team, **the complainant**, and other relevant parties to understand the validity of the concerns and to explore whether an audit is the appropriate response.*

Paragraph 6.2, Footnote 2: If footnote 2 is retained in the final, we believe it should be slightly stronger in differentiating the financial audit’s definition of what is “significant” or “material” from that in a compliance audit. Moreover, the CAO should clarify that it will evaluate “significance” and “materiality” from the perspective of the affected community. The compliance audit should not be viewed simply as a technical exercise in evaluating compliance, but should also be viewed as an opportunity for affected communities to vindicate those rights they receive under the applicable IFC/MIGA policies. Significant impacts on culture, on the dignity of a community’s as reflected in its right to participate, or on its local natural resource base, for example, may be very significant from the complainant’s perspective. Thus, we would revise footnote 2 as follows:

*The definition of what is “significant” or “material” is an important consideration in financial auditing and relates to information to which most investors would attach importance in making investment decisions. In the context of compliance auditing within IFC/MIGA, at issue is **the “significance” or “materiality” of the potential impacts on the environment, health, dignity and well-being of the affected communities.** In this regard, **the CAO will review** whether (i) the actual social or environmental outcomes are consistent with or contrary to the intent behind policy provisions or (ii) the failure to address social or environmental issues as part of the review process resulted in outcomes that are contrary to the intent behind policy provisions.*

Paragraph 6.6. Staffing Compliance Audits. Although we recognize the necessity and wisdom of using external auditors to conduct the compliance audits, we believe it should be clear that the CAO will review and take responsibility for the substance of those audits. Our suggested changes would read:

*A compliance audit team will consist of external experts managed by the CAO. CAO staff will be responsible for managing the audit process, determining the knowledge and skills required to undertake the audit, ~~and~~ hiring specialist expertise as appropriate, **and reviewing and accepting all draft and final reports.** The key considerations in hiring external experts for audit teams are competence, independence and impartiality. The auditors will have a contractual obligation not to discuss the audit process or related findings with local or international press or media.*

Paragraph 8.1 Report Preparation. Where a compliance audit has been initiated in response to a complaint originally filed with the Ombudsman, the CAO should provide the complainants with an opportunity to comment on any draft audit report, to the same extent that IFC/MIGA management. Our suggested changes to the second and third paragraphs would thus read as follows:

A draft audit report will be circulated to Senior Management ~~and~~, all relevant departments, and the original complainant, for factual review and comment. Comments should be submitted in writing to the CAO within 15 working days of receipt by the departments.

On receipt of comments from IFC, ~~or~~ MIGA, or the claimant on the consultation draft, CAO will finalize the report. The final report will be submitted to IFC or MIGA's Senior Management for a response. A notification will be posted on the CAO's web site. IFC or MIGA have 15 days to submit a written response to the CAO. The audit report and any response from IFC or MIGA will then be forwarded to the Office of the President. The Office of the President will have no editorial input to the content of the audit report. The President may take the opportunity to discuss the audit findings with the CAO. Once the President is satisfied with the Senior Management response, the Office of the President will provide clearance for the audit report and the response. After clearance, the CAO will share the audit report and Senior Management response with the Board and will disclose both documents on the CAO web site.

8.3 Monitoring and Closure of Audits. We fully support the clarification in these revisions of CAO's role in monitoring. The CAO should also be prepared to monitor implementation of any project found in non-compliance, if it receives credible allegations of further non-compliance. We believe it is also important for the CAO to disclose in their annual reports the status of any projects that had previously been found to be in compliance, with an explanation where necessary of what aspects of the project remain in non-compliance. Our suggested changes to the section would read as follows:

In cases where IFC, MIGA and/or project sponsors are in compliance, or are non-compliant and resolve the compliance issue by the time CAO issues its audit report, CAO will close the audit.

In cases where IFC, MIGA and/or project sponsors are not in compliance and provide an action plan and timetable for achieving compliance, CAO will ~~normally~~ regularly monitor progress, and close the audit after verification of compliance. The CAO will consider any information, including information provided by the complainants or other external sources, in their monitoring of compliance. In each of the CAO's annual reports, the CAO shall report on the status of any project that has been found in non-compliance, including information on what aspects of the project remain in non-compliance.

12.2. Confidentiality and Disclosure in the Advisory Role. As suggested in the draft, the CAO should normally not be in a position of having providing undisclosed advice, but we recognize there may be times when such non-disclosure is required given the nature of the requested advice. This should always be decided at the beginning of an advisory process, so that disclosure of the CAO's advice is not determined by the substance of the CAO's advice. In other words, IFC/MIGA management should not get

to receive CAO's advice before deciding whether it is appropriate for public disclosure, in part at least that this could lead to a negotiation between the CAO and management over the substance of the advice before it can be disclosed. To avoid this, it should be clear from the outset and CAO should agree at the outset if any advice is to be kept confidential. Our suggested change would read as follows:

*The CAO is bound by the disclosure policies of IFC and MIGA (but as stated previously, within these constraints there is a strong presumption in favor of disclosure). In exceptional circumstances (such as in dealing with highly sensitive issues), the CAO **may accept an advisory role where, at the beginning, there is agreement that the final** advisory memoranda or reports may not be disclosed ~~at the request of the President or Senior Management~~. However, the CAO would still exercise discretion as to whether or not to accept an advisory request under such constraints. In general, the presumption is in favor of disclosure, if not immediately, then within a reasonable time frame.*

Thank you for this opportunity to comment on the proposed operating guidelines. Should you have any questions regarding these comments, please do not hesitate to contact me.

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