

GLASS GLASS HALF FULL? FULL!

THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE

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JANUARY 2016

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ACRONYMS

ADB	Asian Development Bank
AfDB	African Development Bank
BIC	Bank Information Center
CAO	Compliance Advisor Ombudsman
CM	Compliance Mechanism
CR	Compliance Review
CSO	Civil society organisation
CSRC	Corporate Social Responsibility Counsellor
DEG	German Development Bank
DFI	Development Finance Institution
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
E&S	Environmental and social
Exs.	The Examiners for the Guidelines
FMO	Dutch Development Bank
IAM	International Accountability Mechanism
ICM	Independent Complaints Mechanism
IDB	Inter-American Development Bank
IFC	International Finance Corporation
ILO	International Labour Organization
IP	Inspection Panel
IRM	Independent Review Mechanism
ITF	International Transport Workers' Federation
ITUC	International Trade Union Confederation
JBIC	Japan Bank for International Cooperation
JICA	Japan International Cooperation Agency
MICI	Independent Consultation and Investigation Mechanism
MIGA	Multilateral Investment Guarantee Agency
NAPE	National Association of Professional Environmentalists
NFC	New Forests Company
NJGM	Non-Judicial Grievance Mechanism
OA	Office of Accountability
OECD	Organisation for Economic Co-operation and Development
OPIC	US Overseas Private Investment Corporation
PBS	Protection of Basic Services
PCM	Project Complaint Mechanism
PS	Problem-solving
SEZ	Special economic zone
SPF	Special Project Facilitator
SME	Small- and medium-sized enterprise
UETCL	Uganda Electricity Transmission Company Ltd.
UNDP	United Nations Development Programme
UNGP	United Nations Guiding Principles on Business and Human Rights
WB	World Bank

GLOSSARY

COMPLAINT: An official, written submission to an IAM that describes an actual or potential harm that has or will occur as a result of an activity financed by a DFI. Several IAMs refer to this as a request.

COMPLAINANT: The person, people, or organization who have signed and filed the complaint. Most, but not all, IAMs require that the complainant be directly affected by the activity that is the subject of the complaint. Several IAMs refer to complainants as requestors. Filer, a more general term for complainant, is also used in this report. In addition to those that are directly affected by the activity, their representatives or CSOs, filers can also include corporations and IAM or DFI leadership.

CONCLUDED CASES: Concluded cases are those that are either closed or in monitoring.

DEVELOPMENT FINANCE INSTITUTIONS (DFIs): Also known as development banks or international financial institutions, DFIs invest in activities intended to contribute to economic development. These activities may include building hydro-electric dams, railway projects, or reform of laws and institutions.

RESULT: A complaint process that has produced a result is one in which there has been a settlement reached in problem-solving and/or a publicly disclosed compliance review report. Not considered a 'result' are settlements that concerned only procedural agreements regarding the conduct of the dialogue process or minor agreements about interim issues. Data concerning settlements was based on information reported by the IAMs themselves. Since researchers did not follow up with complainants to determine their perspective, it is important to note that recording a case as involving a settlement did not entail a judgement on the quality or acceptability of that settlement.

SUBSTANTIVE PHASE: A 'substantive' phase of a complaint process refers to either problem-solving or compliance review. Where the report refers to complaints reaching a substantive stage, what is being measured is how often a dialogue process or a full compliance investigation was initiated, not how often they were actually completed.

SUPPORTING ORGANISATION: A CSO that provides assistance to a complainant, including undertaking research; reviewing complaints; advising complainants as they move through the IAM process; and/or assisting with advocacy at the relevant institutions. A supporting organisation is generally not named in the complaint or is named in a supporting capacity only.

USER: This term is used to refer to a combination of two groups: 1) people who have been directly affected by the DFI-financed activities and have filed complaints to the IAMs (complainants); and 2) the CSOs that support them.

EXECUTIVE SUMMARY

Real development respects human rights and is shaped by the people it is designed to benefit. However, 'development' – the way it is currently practised by Development Finance Institutions (DFIs) – in many cases has been associated with the dispossession of land, loss of resources, diminished livelihoods and environmental degradation. Each of the 758 complaints submitted over the past 21 years to the II Independent Accountability Mechanisms (IAMs) administered by DFIs covered in this report, tells the story of a community whose lives were made worse by so-called 'development projects'. This number probably represents only the tip of the iceberg because most project-affected people are not aware of the availability of the IAMs.

While the aim of this report is to ensure that people who have been harmed by these development projects receive adequate remedy, the ultimate goal of the II organisations¹ that have authored this report is that DFIs should pursue a development model based on human rights.² The authors would like to see less need for the IAMs because fewer people are harmed. And they would also like to make sure that complaints are handled better in the future. Until then, the accountability systems at the DFIs provide a vital but crude backstop for those people and communities that have been harmed by the current development model.

The accountability system is made up of two halves – the IAM and the DFI, which in turn is composed of its management and board of directors. Each must fulfil its responsibility for the system to work and provide remedy to those who are harmed. The organisations that wrote this report undertook both quantitative and qualitative research to assess how well each functions. They drew on their own experiences as experts, as well as analysing the procedures and practices of the IAMs and DFIs, and, most importantly, the experiences of complainants.

What the authors found is that the glass of accountability is half full or half empty, depending on your perspective. Complainants are undoubtedly better off than they would be in the absence of any complaint procedure, as they often have nowhere else to turn to seek redress. However, the outcome rarely provides adequate remedy for the harm that people and communities affected by development projects have experienced. Their concerns may be validated, their issues may receive attention at the international level, and sometimes, though not often enough, their lives may be changed for the better as a result of their complaints.

¹ Accountability Counsel; Both ENDS; Center for International Environmental Law (CIEL); Central and Eastern European Bankwatch Network; Center for Human Rights and Global Justice, New York University School of Law; Centre for Research on Multinational Corporations (SOMO); Counter Balance; Foundation for the Development of Sustainable Policies (FUNDEPS); Inclusive Development International (IDI); Natural Justice; Program on International & Comparative Environmental Law, American University Washington College of Law.

² For a vision of what real development looks like, see International Accountability Project, *Back to Development: A Call for What Development Could Be* (2015), available at bit.ly/backtodevelopment [hereinafter IAP, *Back to Development*].

What is preventing the system from working better for complainants? IAMs can and should do more to improve their practices. For example, they should provide complainants with regular updates on the status of their cases; they should develop procedures to prevent and respond more effectively to reprisals against complainants; they should meet their deadlines, publish complete information about their cases online, and recognise and take measures to overcome the power imbalance between complainants and the DFIs and their clients.

Ultimately, however, these accountability mechanisms operate in a constrained environment constructed by the DFIs that administer them. The DFIs impede the accessibility of the IAMs from the very beginning by failing to require their clients to disclose the IAMs' existence to project-affected people. They limit the window of time during which an IAM can accept a complaint. They do not contribute to solutions achieved through problem-solving processes. They do not consistently respond to the findings of non-compliance by their IAMs. And when they do develop an action plan to address the findings, they rarely consult adequately with the complainants.

These deficiencies combined result not just in a diminished outcome for complainants but in fewer complaints that produce an outcome at all. Of all 684 concluded complaints (complaints closed or in monitoring),³ less than half (43%) were even found eligible. Just under 20% of concluded complaints resulted in a successfully negotiated settlement (8%) or a publicly disclosed compliance report (11.5%). DFI management produced action plans in only 7% of concluded cases.

Whether you see the glass of accountability as half full or half empty, the authors hope there is agreement that the system can be improved. The current report provides two sets of recommendations. The first set seeks to perfect the current system by identifying best practices that should be adopted by all IAMs and DFIs. The authors of this report, however, have concluded that simply adopting best practice will not be enough to ensure that complainants receive remedy for the harms that have occurred. The current system was premised on the assumption that the DFIs would uphold their responsibility in the accountability system. However, more than 20 years after the first IAM, the Inspection Panel, was established by the World Bank in 1993, the DFIs have demonstrated that they are either unwilling or unable to fulfil their responsibilities.

A new accountability system must be established as a matter of urgency with mechanisms that are empowered to make binding decisions and DFIs that no longer claim immunity in national courts. DFIs will only revisit their development model when they are truly held accountable for the harms caused to people and communities around the world by the activities they finance.

³ These are cases that have closed or are in monitoring, which make up 90% of all cases filed to IAMs (N=758).

INTRODUCTION

1.1. BACKGROUND

Development Finance Institutions (DFIs, see Glossary), also known as development banks, invest in activities intended to contribute to economic development. These activities might include building hydro-electric dams, railway projects, or reform of laws and institutions. While these projects strive to alleviate poverty and create employment, experience has shown that DFI-financed projects may in fact harm the very people they are seeking to help. Despite the intention of DFI policies to prevent adverse environmental and social impacts, DFI-financed activities can cause, and in fact have resulted in, various harms. These include air and water pollution from coal-fired power plants, forced evictions to make way for mining and infrastructure projects, loss of biodiversity, and many others.

Independent Accountability Mechanisms (IAMs) were created to hold the DFIs and their clients accountable to the DFIs' own policies and to provide access to remedy for individuals and communities that are adversely affected by DFI-financed activities. The IAMs vary in their structure, functions and procedures. In 1993, the Inspection Panel of the World Bank was the first such mechanism created, and the first complaint (see Glossary) was filed in 1994.⁴ Today, there are more than a dozen. Over ten years ago, the mechanisms formed a network,⁵ and since then, there have been several efforts to evaluate the effectiveness of one or more of the mechanisms.⁶ In 2012, on the occasion of the twentieth anniversary of the UN Conference on Sustainable Development, the IAMs themselves published a report on their collective work.⁷ What has been lacking to date, however, is a systematic, comparative analysis of the functioning of the DFIs' accountability systems, and an evaluation of their effectiveness from the perspective of users (see Glossary). This report aims to help fill that gap.

The majority of previous studies have focused exclusively on the effectiveness of the mechanisms themselves. However, IAMs make up only half of the accountability system at DFIs. The DFIs' boards of directors and management – the other half of the accountability system – must also be evaluated. At any given DFI, it is the board that grants the IAM its mandate. The board often selects the IAMs' personnel, provides its budget, imposes limitations on its functions, and ultimately,

⁴ Int'l Bank for Reconstruction & Dev. & Int'l Dev. Ass'n, *World Bank Inspection Panel*, Resolution No. IBRD 93-10/IDA 93-6 (Sept. 22, 1993), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf> (establishing the Inspection Panel).

⁵ While it is unclear which IAMs officially belong to the network, a non-exhaustive list of IAMs can be found here: <http://www.iadb.org/en/mici/partners.8163.html>

⁶ See Martijn Willem Scheltema, *Assessing the Effectiveness of Remedy Outcomes of Non-Judicial Grievance Mechanisms*, Dovenschmidt Q. 2014, Feb. 12, 2014, at 190-97; Mathieu Vervynckt, *An assessment of transparency and accountability mechanisms at the European Investment Bank and the International Finance Corporation* (Eurodad, Oct. 2015), <http://www.eurodad.org/files/pdf/560bbcee7a3d1.pdf>; see generally Maartje van Putten, *Policing the Banks* (2009).

⁷ Kristen Lewis, *Citizen-driven Accountability for Sustainable Development: Giving Affected People a Greater Voice - 20 Years On* (June 2012), <<https://www.opic.gov/sites/default/files/files/citizen-driven-accountability.pdf>>.

is responsible for the outcome of the activities it finances. The DFI's management also plays a critical role in the system by, inter alia, responding to the IAM's findings, consulting with complainants (see Glossary) on the development of an action plan to address instances of non-compliance, and applying lessons learned from cases to future projects. The system only functions if both halves of the mechanism work and work well.

1.2. AIM

The research presented in this report was guided by the following question: *To what extent are IAMs and the DFIs that administer them effective in providing remedy for human rights harm to complainants?*⁸ This research evaluates the policies and practices of II IAMs and corresponding DFIs from the perspective of the users – both those people who have been directly affected by the DFI-financed activities and have filed complaints to the IAMs (complainants), and the civil society organisations that support them.

The research team has used a variety of methods to solicit input from civil society networks and complainants in order to capture users' experiences. In the view of the report's authors, an important measure of how well an accountability system provides remedy is whether the individual or community member who has filed a complaint believes that they have been provided with adequate remedy. In other words: subjective satisfaction is an important criterion of effectiveness in affording remedy. The research also assesses the functioning of the accountability system through collection and analysis of publicly available data about the complaints submitted and their outcomes.

The insights developed through this research project are intended to help improve the accountability system – regarding both the DFIs and the IAMs – in order to provide adequate remedy for complainants. While the evaluation is critical and the recommendations are ambitious, they are offered in a constructive spirit. The organisations that contributed to this report all seek an effective, functioning accountability system that provides remedy for individuals and communities that have been adversely affected by development activities. Our ambition is to contribute to the strengthening of these systems and to efforts to ensure that the DFIs fulfil their responsibilities to those who are harmed by the activities they finance.

1.3. METHODOLOGY

This report seeks to analyse publicly available data on complaints filed to all IAMs.⁹ Consequently, the research on which it is based includes only those IAMs that publish information about complaints received and excludes those that have not made public any information about complaints received or that have not received any complaints to date.¹⁰ Thus the report assesses the following II IAMs and corresponding DFIs:

- The Independent Review Mechanism (IRM) of the African Development Bank (AfDB)
- The Accountability Mechanism (AM) of the Asian Development Bank (ADB)
- The Canadian Office of the Extractive's Sector's Corporate Social Responsibility Counsellor (Canadian CSR Counsellor)¹¹
- The Independent Complaints Mechanism (ICM) of the Dutch Development Bank (FMO) and German Development Bank (DEG)
- The Project Complaint Mechanism (PCM) of the European Bank for Reconstruction and Development (EBRD)
- The Complaints Mechanism (CM) of the European Investment Bank (EIB)
- The Independent Consultation and Investigation Mechanism (MICI) of the Inter-American Development Bank (IDB)
- The Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA)
- The Examiners for the Guidelines of the Japan International Cooperation Agency (JICA) and the Japan Bank for International Cooperation (JBIC).
- The Office of Accountability (OA) of the US Overseas Private Investment Corporation (OPIC)
- The Inspection Panel (IP) of the World Bank (WB).

This report is the result of collaboration among civil society organisations (CSOs) that advocate for greater accountability at DFIs and improved remedy for complainants. The collaboration included shared data collection, online sharing of results and analysis, written contributions and peer reviews.

The data collection consisted of several components:

⁹ By doing this, the report builds on Accountability Counsel's report. Accountability Counsel, *Recent Trends in Accountability: Charting the Course of Complaint Offices* (2014).

¹⁰ Like the Ombudsperson of the Brazilian Development Bank, the Compliance Officer of Export Development Canada, the Examiner of Nippon Export and Investment Insurance, and the General Counsel of the Australian Export Finance and Insurance Corporation.

¹¹ The Canadian CSR Counsellor is an anomaly in this list because it is not a DFI, but rather a state-based mechanism with jurisdiction over the Canadian extractives sector. It is included in this report because it has participated in the IAMs network, which this report aims to engage.

⁸ Mechanisms use different terms to refer to complainants and the complaints they receive. Other terms used are 'requests' or 'requestors'. Throughout this report, the 'complainant' and 'complaint' concepts are used as a catch-all for all similar terms.

1. Quantitative analysis of the complaints filed to IAMs and the stages they reach, using a database consisting of all complaints filed to all II IAMs.
2. Qualitative process evaluation of the IAMs and their administering DFIs, using an assessment framework based on the United Nations Guiding Principles on Business and Human Rights (UNGP) effectiveness criteria for Non-Judicial Grievance Mechanisms (NJGMs).
3. Qualitative outcome evaluation of the IAMs and their administering DFIs based on complaints that have closed or reached a result (i.e. a settlement reached in problem-solving or a publicly disclosed compliance review report, see Glossary) during the period 1 July 2014 to 30 June 2015.
4. Review by mechanisms and experts.

Information that would not be available to users (such as information internal to the IAMs or DFIs) was not considered in the preparation of this report. The data were collected solely from information that was publicly available at the time of writing, combined with information provided directly by the users of the mechanisms. Information provided by the IAMs during the review period is explicitly referenced as such. The qualitative assessment of the IAMs and the corresponding DFIs is based on the effectiveness criteria for NJGMs described in Principle 31 of the UNGPs.¹² The effectiveness criteria apply to all State-based and non-State-based grievance mechanisms, and to both adjudicatory (eg. compliance review) and dialogue-based (eg. problem-solving) mechanisms. Although intended for use in the business and human rights arena, the authors consider the effectiveness criteria to be relevant to a broader context and generally consistent with criteria used by CSOs prior to the development of the UNGPs.¹³

The qualitative sections of the present report incorporate the perspectives of the complainants and users, among whom are the report authors. Inherent to this qualitative method, the user experiences and perspectives captured in this study are theirs alone and are not representative of all IAM users. Similarly, because not all IAMs/DFIs had complaints that reached a result during the research period and because the report authors were unable to contact all complainants for the complaints that were concluded, the case studies in Chapter 4 are not intended to compare effectiveness across IAMs/DFIs in terms of providing remedy to complainants. More detail about the research methodology, including its limitations, can be found in Annex I of this report, available online at www.glass-half-full.org.

¹² United Nations Human Rights Office of the High Commissioner. Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy", 2011 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

¹³ Principle 31 includes eighth effectiveness criteria for non-judicial grievance mechanisms: Legitimacy, Accessibility, Predictability, Equitability, Transparency, Rights compatibility, a Source of continuous learning, and Based on engagement and dialogue. The last criterion is only applicable to operational-level grievance mechanisms and, thus, is not relevant to the DFI accountability systems.

1.4. READING GUIDE

The report is structured as follows:

Chapter 2 provides a quantitative analysis of complaints filed to the IAMs; Chapter 3 evaluates the procedural aspects of the IAMs and DFIs against the UNGP effectiveness criteria for NJGMs; Chapter 4 evaluates the outcomes of cases that have closed in the last year; Chapter 5 makes recommendations to both IAMs and DFIs on two levels:

1. Reforms that would harmonise best practice within the current accountability system; and
2. More fundamental changes to the accountability system that would increase the likelihood that adequate remedy is provided to those who have suffered harm.

In addition, the following annexes are available online, at www.glass-half-full.org, for those who are interested in the assessments of the individual IAMs/DFIs and the methodology used in the report:

- Annex 1: Detailed Methodology
- Annex 2: Assessment template based on United Nations Guiding Principles Effectiveness Criteria for Non-Judicial Grievance Mechanisms
- Annex 3: Survey questions for users of the mechanisms
- Annex 4: Interview questions for case studies
- Annex 5: The Independent Review Mechanism of the African Development Bank
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- Annex 14: The Office of Accountability of the US Overseas Private Investment Corporation
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FUNCTIONING OF THE IAMs IN FACTS AND FIGURES

2.1. INTRODUCTION AND KEY FINDINGS

This chapter provides a comprehensive, quantitative analysis of complaints filed to all IAMs from their establishment until 30 June 2015. Explanatory remarks on the methods used are available in Section 2.2 below, with additional details available in Annex I ('Detailed Methodology', available at www.glass-half-full.org) and in footnotes throughout the text. The quantitative analysis presented here focuses on the progress of complaints through IAMs, particularly looking at whether cases are reaching and achieving results in the substantive phases of the complaints process. A 'substantive' phase refers to either problem-solving or compliance review (see Glossary).

A SUMMARY OF THE KEY FINDINGS IS AS FOLLOWS:

- More than half of complaints were about infrastructure projects, and the most commonly raised concerns related to inadequate consultation and disclosure, insufficient due diligence and the environmental repercussions of projects.
 - Infrastructure projects were the subject of 57% of complaints for which such information is publicly available (see Figure 6).
 - 42% of complaints for which such information is publicly available raised concerns about consultation and disclosure; 42% concerned due diligence, and 44% concerned specific environmental issues, such as pollution and biodiversity (see Figure 7; note that one complaint can involve several concerns).
- Steep attrition is visible at every phase of the complaints process, meaning many eligible complaints leave the process before they are able to achieve results. In the 684 concluded cases (see Glossary), complaint progress was as follows (see Figure 12):
 - Nearly 43% of concluded complaints (complaints closed or in monitoring) were found to be eligible;
 - 28% reached a substantive phase;
 - Just under 20% produced results. This 20% of concluded complaints that produced results is broken down as follows: parties successfully negotiated settlements in 8% of concluded cases and publicly disclosed compliance reports were produced in slightly less than 12% of concluded cases;
 - DFI management produced action plans in 7% of concluded cases.
- Many complaints that have been found eligible never actually proceed to problem-solving or compliance review. This often occurs because of IAM decisions.
 - Of the 291 eligible, concluded cases, only 66% reached a substantive phase.¹⁴
 - In 59% of the 78 concluded cases eligible for (and where the complainant wanted) problem-solving, but in which it did not occur, problem-solving did not proceed because the IAM decided that it was unnecessary or inappropriate.
 - In 73% of eligible, concluded cases that could have proceeded to compliance

¹⁴ What is being measured here is simply how often a dialogue process or a full compliance investigation was initiated, not how often they were actually completed.

review but did not, the compliance review was not initiated because the IAM decided it was unnecessary or inappropriate (see Figure 10).

- Slightly less than half (44%) of the 291 eligible, concluded complaints achieved results.¹⁵ Of the 192 concluded complaints that reached a substantive phase, 67% achieved results.
- Of the 76 concluded cases that resulted in findings of non-compliance, 64.5% resulted in a Management Action Plan.
- Communities and individuals using IAMs without support from CSOs face higher attrition rates than cases involving CSOs. CSO involvement in cases appears to have a strong, positive effect on case outcomes (see Figure 14).
 - Overall, of concluded cases filed without any CSO support, 62% were found eligible, 38% reached a substantive phase and only 19% achieved results. In contrast, of concluded cases that involved an international CSO, 87% were found eligible, 70% reached a substantive phase, and 63% achieved results.
 - As compared to eligible complaints filed by individuals or community organisations without any CSO support, the odds that an eligible complaint will achieve results increase by nearly 40% when the case involves a domestic CSO. When an international CSO is involved in an eligible complaint, either alone or alongside a domestic CSO, those odds increase by nearly 175%.

2.2. ADDITIONAL METHODOLOGICAL NOTES

The quantitative analysis that follows is drawn from a database compiled by the authors containing all publicly-reported cases filed with IAMs from their establishment until 30 June 2015.¹⁶ Information on the cases was collected from the mechanisms' websites and their annual reports or similar publications produced by the mechanisms. A few methodological points are worth emphasising here.

First, instead of performing statistical analyses on all 758 cases filed, the pool of cases analysed was often limited to the 684 'concluded' cases, which are cases that are either closed or in monitoring. This limitation was imposed to balance simplicity, clarity and completeness. Restricting the analysis to these cases avoids inaccuracies resulting from the inclusion of active cases that have not had a chance to reach certain phases of the process. Additionally, including cases that are still at the monitoring phase, rather than limiting the analysis to only closed cases, ensures the inclusion of the most successful cases at IAMs: those that have produced a result needing to be monitored. When another subset of cases is analysed other than the two mentioned above, the total number is indicated in the text or footnotes.

¹⁵ A 'result' was counted in any case that produced a settlement through problem-solving and/or a publicly disclosed compliance review report.

¹⁶ The authors last checked mechanisms' case registries and published annual reports on 8 October 2015. After that date, additional information about cases was only added to the database based on feedback from mechanisms on specific cases where new information had been recently publicly disclosed.

Second, the analysis frequently references complaints that reach a 'substantive phase' of the process, which refers to either problem-solving or compliance review. A complaint 'reached a substantive phase' if a dialogue process or full compliance investigation was initiated, without regard to whether the complaint actually completed the dialogue process or compliance investigation. Complaints deemed by the mechanism to have entered a problem-solving or compliance review process, but where the process ended prior to initiation of a dialogue or a full investigation, were not counted as reaching a substantive phase. For example, complaints that ended at the appraisal stage of compliance review were not counted as having reached compliance review.

Third, in this analysis, a 'result' was counted in any case that produced a settlement in problem-solving and/or a publicly disclosed compliance review report. Where possible, the analysis attempted to report only on those settlements involving substantive agreements regarding issues raised in complaints. It did not include settlements that concerned only procedural agreements regarding the conduct of the dialogue process or minor agreements about interim issues. Data concerning settlements was based on information reported by the IAMs themselves. Since the researchers did not follow up with complainants to determine their perspective, it is important to note that recording a case as involving a settlement did not entail a judgement on the quality or acceptability of that settlement.

2.3. FACTS AND FIGURES

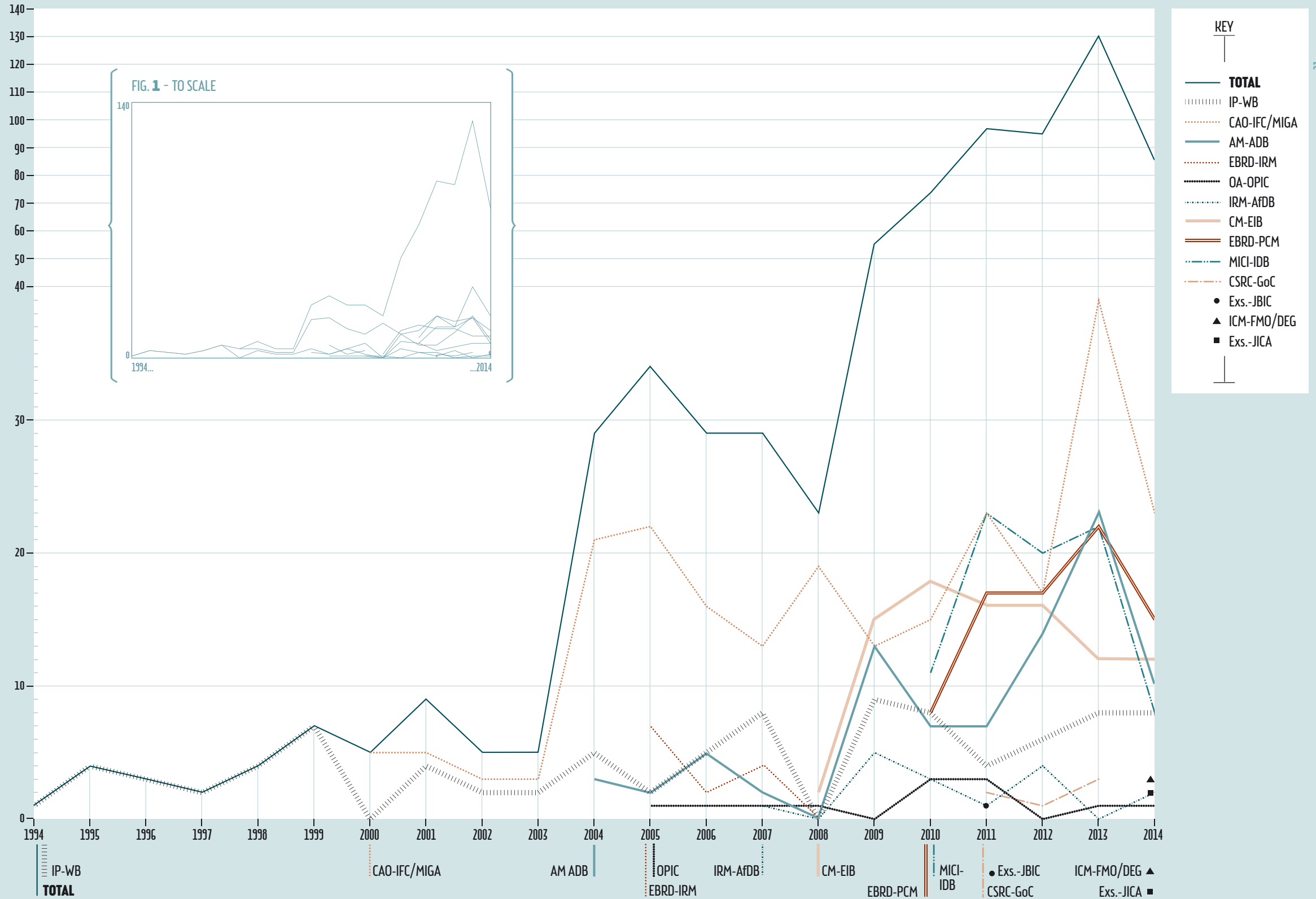
This section lays out a series of descriptive statistics concerning the main features of IAM complaints, such as: the year in which complaints were filed; the number of complaints IAMs received; the regions in which complaints originated; the current status of complaints; who filed them; what types of projects they concerned; and which issues they raised.

2.3.1. COMPLAINTS OVER TIME

In the 21 years since 1994, when the first IAM complaint was filed at the World Bank's Inspection Panel (one year after its establishment), IAMs have proliferated widely and have witnessed substantial increases in visibility and case volume. As of 30 June 2015, a total of 758 cases had been submitted to various IAMs.

FIGURE 1 provides a graphical overview of the number of cases filed at IAMs per year. As a whole, the number of complaints filed at IAMs has increased substantially over the past two decades, with a record 130 complaints being submitted in 2013 alone. The largest increases in cases filed per year occurred between 2008 and 2013, when the number of cases per year jumped from 23 to 130. This sharp increase is likely to have occurred in part because a number of new

FIG. 1 - COMPLAINTS PER YEAR



IAMs were established during those years, such as the International Development Bank (IDB)'s Independent Consultation and Investigation Mechanism (MICI) and the European Bank for Reconstruction and Development's Project Complaint Mechanism (PCM).

Trends shown in Figure 1 are generally encouraging. The steady rise in complaints each year until 2013 suggests an increase both in the number of pathways for remedy open to people negatively affected by international development projects, as well as an increase in the visibility and accessibility of existing mechanisms. While the number of complaints filed fell in 2014, it is unclear whether that drop represents a levelling off of an unusual spike or the beginning of a downward trend. The number of cases filed in 2014 was 82, close to 2012 levels, when 95 complaints were received. The spike in cases that occurred in 2013 seems to be due to corresponding spikes in the number of cases received by the Compliance Advisor Ombudsman (CAO) and the Asian Development Bank (ADB)'s Accountability Mechanism (AM). The drop observed in 2014 was accentuated by a decline in the number of complaints filed at the MICI, which had only eight cases filed in 2014, down from more than 20 complaints per year from 2011-2013. The World Bank's Inspection Panel is the only mechanism that did not experience a drop in case filings between 2013 and 2014, with eight cases filed in each year.

The number of cases filed in 2015 may reveal whether the IAMs system as a whole is experiencing a downward trend in the number of complaints filed. According to publicly available information as of 8 October 2015, only 35 complaints were received from 1 January to 30 June 2015. If the second half of the year sees a similarly low number of complaint filings, total annual complaint filings for 2015 will fall to figures similar to those in 2010.

2.3.2. WHERE ARE COMPLAINTS FILED?

FIG. 2 - COMPLAINTS FILED BY IAM¹⁷

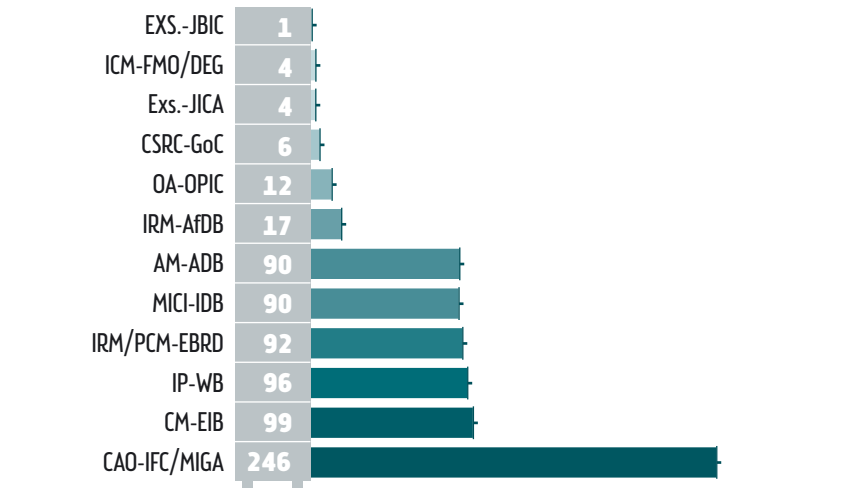


FIGURE 2 shows the distribution of complaints by mechanism. The CAO is by far the most commonly used mechanism: since it first began receiving complaints in 2000, the CAO of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) has handled 246 cases and overall has received 32% of all complaints filed at IAMs.

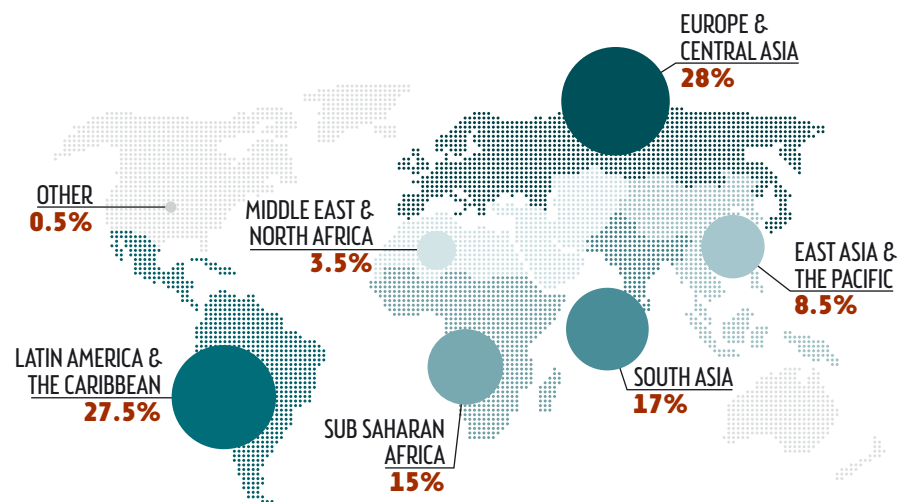
Despite the CAO's dominance in terms of total complaints received, other IAMs handle a comparable yearly caseload at times. The IAMs of certain regional development banks – notably the IDB's MICI, the ADB's AM, and the EBRD's PCM – have had case volumes nearly as high as the CAO's in some years. For example, in 2012, the CAO received 17 complaints, the MICI received 20, the AM received 14, and the PCM received 17. In other years, the number of complaints filed at the CAO was significantly higher than case volumes at any other mechanism. In 2014, for example, the CAO received 23 complaints, while the PCM received 15, the AM ten and the MICI only eight.

¹⁷ Methodological note regarding the European Investment Bank (EIB) Complaints Mechanism (CM): Although in total the EIB has received over 300 complaints, many of those complaints were not included in this analysis. The EIB CM's mandate is much larger than other IAMs. It accepts cases related to procurement and other issues raised by bank clients, in addition to cases related to project impacts on communities. For the purposes of this analysis, many of the EIB CM's cases were excluded to make the EIB CM more comparable to other mechanisms. Only cases relating to social or environmental issues, as well as a subset of those relating to disclosure, were included in this dataset. Complaints related to governance, procurement, human resources and customer and investor relations were not included because these generally do not relate to the impacts of EIB projects on local affected people.

An important caveat to remember when interpreting this data is that IAMs have different levels of disclosure. Whereas some, like the MICI and the ADB's AM, report on all cases, even those that are unregistered, other IAMs – such as the African Development Bank (AfDB)'s Independent Review Mechanism (IRM) and the Japan International Cooperation Agency (JICA) Examiner – only report on cases that meet their criteria for registration.

2.3.3. WHERE DO COMPLAINTS COME FROM?

FIG. 3 - COMPLAINTS BY REGION¹⁸
N=679*



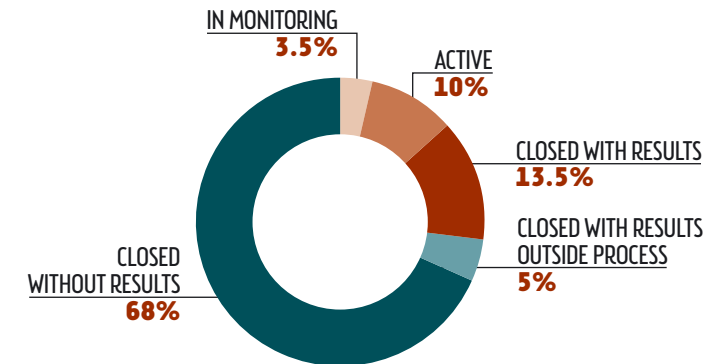
*Total number of cases for which region is known

FIGURE 3 illustrates where cases come from by region. The greatest number of cases originates in Europe and Central Asia, making up 28% of the 679 cases for which information on region is available. Latin America and the Caribbean is a close second, with just under 28% of complaints. Only a small number of complaints originate from the Middle East and North Africa: less than 4% of all cases.

¹⁸ In this chart, the 'Other' category is made up of four complaints filed to the CAO from the United States. Little information is available on them since they were all ineligible (eligibility is the first hurdle at the CAO, since it does not have a registration stage).

2.3.4. WHAT IS THE STATUS OF ALL FILED COMPLAINTS?

FIG. 4 - COMPLAINTS BY STATUS
N=757*



*Total number of cases for which status is known

FIGURE 4 breaks down all complaints based on their status as of 30 June 2015. Of the 757 complaints whose status was known,¹⁹ 87% of complaints had been closed and only 13% were active or in monitoring. Overall, 17% of cases have achieved results through the IAM process.²⁰ If one considers only concluded cases, this number jumps to 19%.

Interestingly, IAMs reported 5% of complaints as having been 'closed with results outside process'. Most of those cases were filed at the World Bank's Inspection Panel (IP), which has two controversial practices that encourage resolution of complaints outside the mechanism's typical complaints process: the Pilot Program and Footnote 7.²¹ Two of the cases in this category were handled through the IP's Pilot Program, and the majority of others were handled through the IP's Footnote 7 process or earlier variants of this practice, which provides World Bank Management with an opportunity to resolve the issues raised in the complaint before the Panel launches a formal investigation.

When the designation 'closed with results outside process' was used for cases filed at IAMs other than the IP, those cases were typically classified as such due to a successful outside negotiation between the complainants and the company or government involved.

¹⁹ There is one case at the CSR Counsellor for which the status is unknown.

²⁰ This figure combines the cases closed with results and the cases in monitoring, all of which achieved results.

²¹ Footnote 7 refers to the process set out in footnote 7 of the Inspection Panel's Operating Procedures. While both Footnote 7 and the Pilot Program are provided for in the Panel's Operating Procedures, results achieved through these processes are considered outside the Panel's process because they involve the Panel suspending its typical process to allow Bank Management an opportunity to resolve issues through its own actions. See Section 4.1.2 for more information about the Pilot Program and Footnote 7.

2.3.5. WHO FILES COMPLAINTS?²²

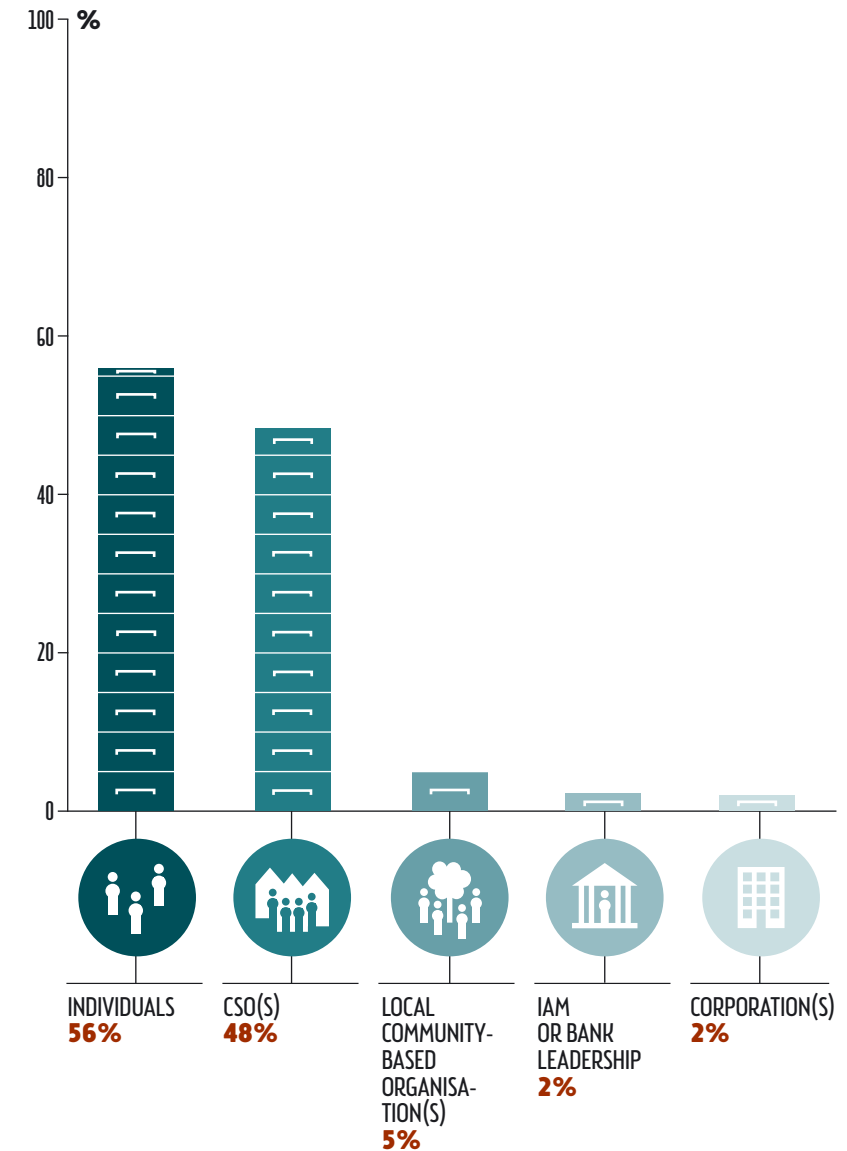
FIGURE 5 breaks down cases by the type of filer, based on the 456 complaints for which this information is known. Since each case could have multiple types of filers, Figure 5 shows each group based on the percentages of cases they filed.

Individuals were the most common filers, acting as sole or joint filer in 56% of cases. CSOs were the second most frequent filers, solely or jointly filing 48% of complaints. It is important to note that, when CSOs were filers, they usually filed with or on behalf of community members.

International CSOs were involved in a large percentage of complaints, although they often supported complaints rather than directly filing them.²³ Supporting activities that CSOs can undertake are more informal than serving as a filer and may include: assisting with research; reviewing complaints; advising complainants as they move through the IAM process; and/or assisting with advocacy at the relevant institutions. All told, international CSOs were involved in 26% of cases as either a filer or as a supporting organisation (see Glossary).

IAMs themselves or members of bank leadership filed 2% of complaints.²⁴ Almost all of these complaints, nine out of ten total, were CAO cases. Of these, the IFC Executive Vice President requested one complaint, the President of the World Bank Group requested another, and the CAO Vice President requested seven. The only other complaint of this type was an EIB CM case that was submitted by the EIB President.

FIG. 5 - COMPLAINTS BY FILER
N=456*



*Total number of cases for which filer is known

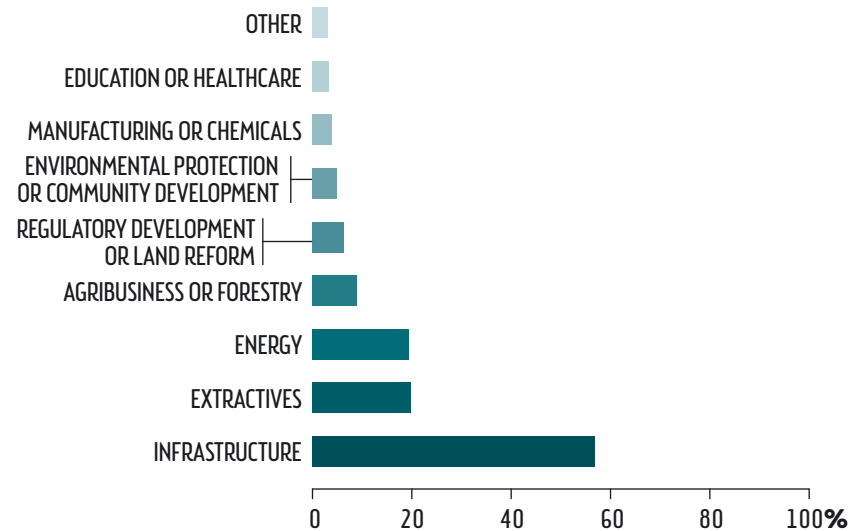
²² This section includes data regarding the types of organisations and actors that file or otherwise support complaints. For these purposes, a filer is a party that formally signs the complaint or is formally identified in the complaint as a representative of complainants. Filers are also usually reported as such by IAMs. An organisation supporting a complaint is generally not named in the complaint, or is named in a supporting capacity only. While some of the information on supporting organisations is publicly available, much of it is not. Therefore, the data collected regarding supporting organisations relied heavily on self-reporting from CSOs themselves. This was the only aspect of the quantitative analysis that did not rely exclusively on publicly available information.

²³ The Detailed Methodology in Annex I (*available at: www.glass-half-full.org*) provides a detailed explanation of the distinction between filer and supporter and how information regarding supporting organisations was collected.

²⁴ At some IAMs, the procedural rules do not allow complaints to be filed by the mechanism or bank leadership, whereas at other mechanisms, such filings are permitted, but have never occurred.

2.3.6. WHAT TYPES OF PROJECTS LEAD TO COMPLAINTS?

FIG. 6 - COMPLAINTS BY SECTOR
N=502*



*Total number of cases for which sector is known

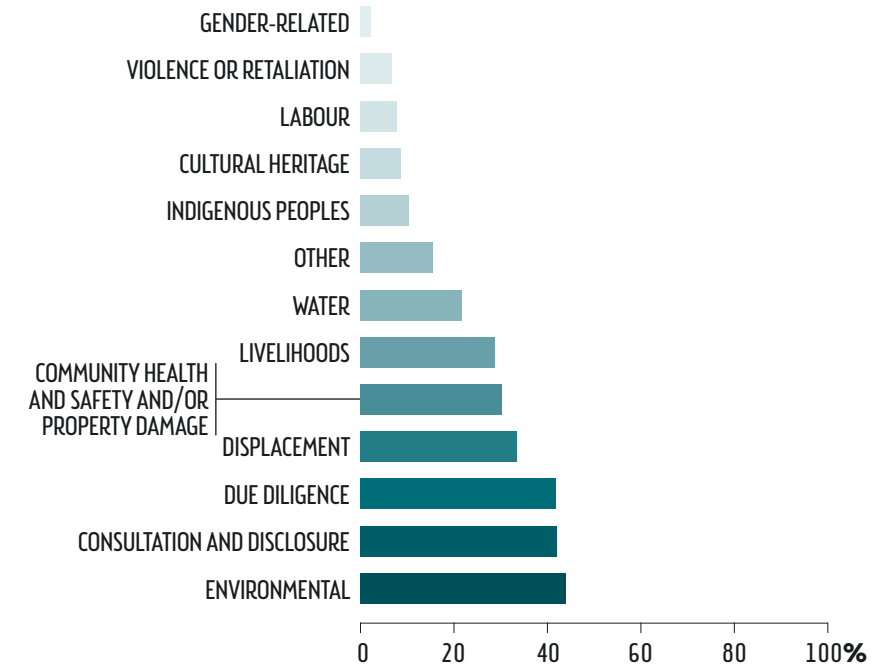
FIGURE 6 displays the sectors about which complaints have been filed, based on the 502 cases for which such information was available. Many complaints relate to more than one sector. For instance, a complaint regarding the construction of an oil pipeline would be recorded as involving both extractive industries and infrastructure. Figure 6 presents the percentage of cases related to each sector.

Three sectors stand out: infrastructure, extractive industries and energy. Of those three, infrastructure was by far the most common sector, with 57% of complaints relating to projects in that area. The energy and extractive industries sectors each accounted for approximately 20% of cases.

Unsurprisingly, these sectors are commonly associated with the types of concerns often referenced in complaints, such as displacement and pollution. However, complaints also arise from a broad range of other sectors, including from projects explicitly geared towards producing direct social or environmental benefits. For example, projects related to education or healthcare, both generally seen as socially desirable sectors, were the subject of 4% of complaints. Similarly, 6% of complaints related to projects designed to improve environmental protection and conservation or promote sustainable community development.

2.3.7. WHAT TYPES OF CONCERNS DO COMPLAINANTS RAISE?

FIG. 7 - COMPLAINTS BY ISSUES RAISED
N=480*



*Total number of cases for which issues raised are known

FIGURE 7 presents data concerning the issues raised in complaints, many of which are related to human rights, based on the 480 complaints for which such information was known. Most complaints raised multiple issues – some as many as ten. Therefore, just as for the two preceding charts, Figure 7 presents the percentage of complaints that raised each issue.

The largest issue categories – consultation and disclosure, due diligence and environmental issues – were each raised in more than 40% of complaints. The ‘environmental’ category in this chart is a composite category created by combining mentions of pollution, biodiversity and other environmental issues, such as deforestation.

Several other issues also deserve to be highlighted. Violence and other retaliation was a concern in 7% of cases, a category which was composed of issues of violence (nearly 4% of cases) and issues of other retaliation (4% of cases). Gender-related issues – including gender-based violence, discrimination and other concerns – were only mentioned in 2.5% of cases.

The 'other' category in this chart encompasses a truly wide range of issues. Whereas some of the issues classified as 'other' were issues outside the mandate of IAMS, such as corruption or procurement, other complaints raised a broad array of specific issues that were difficult to categorise, such as faulty execution of the project in question, school closures and energy prices for consumers.

2.4. COMPLAINT PROGRESS THROUGH MECHANISMS

This section tracks the progress of cases through IAM processes – in particular, showing how far through the process they advance and how often results are achieved. The pool of cases analysed here is typically limited to concluded cases, which are cases that have closed or are in monitoring. In this dataset, 684 complaints were concluded, making up 90% of all cases filed to IAMS.

Since not all mechanisms involve a formal registration period, the phases of the process generally considered here are eligibility, problem-solving and compliance review. As noted earlier, problem-solving and compliance review are collectively referred to as 'substantive' phases. An important measure of case outcomes used in this section is what percentage of concluded cases achieved results. As noted above, cases were recorded as having achieved results if a settlement was reached in problem-solving and/or a compliance report was publicly disclosed.

2.4.1. ELIGIBILITY

FIG. 8 - COMPLAINTS FOUND ELIGIBLE VS INELIGIBLE
N=684

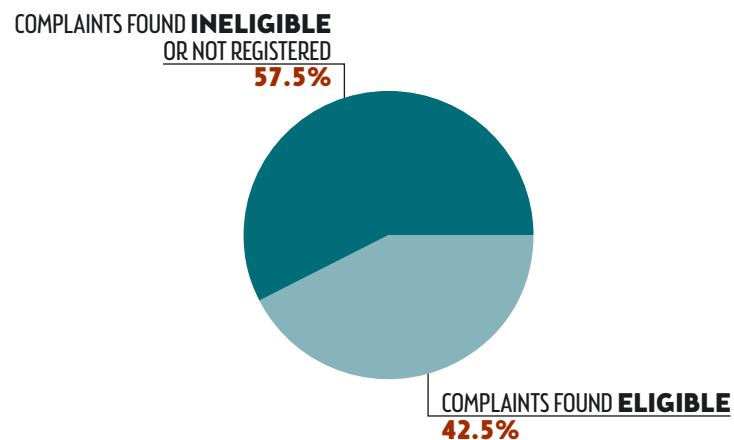


FIGURE 8 illustrates the percentage of the 684 concluded complaints found eligible by IAMS. More than half of all concluded complaints were either not registered or found ineligible – only 42.5% of complaints were eventually found eligible.

The data collected on all complaints did not attempt to track the reasons why complaints were not registered or were found to be ineligible. It is therefore difficult to assess why less than half of complaints were found to be eligible. All of the IAMS for which such data is available have procedural rules governing their registration and eligibility decisions, some of which are straightforward to apply and some of which may require judgement calls on the part of the IAM. Presumably some percentage of unregistered and ineligible cases were indisputably ineligible based on these rules (e.g. complaints regarding procurement or corruption filed to a mechanism that does not accept such complaints). However, other cases may have been found ineligible or may not have been registered due to decisions by the mechanism about which there could potentially be disagreement. A separate analysis in Section 4.1, focused on complaints closed without reaching or completing a substantive phase between 1 July 2014 and 30 June 2015, provides valuable insight into the reasons behind these decisions and discusses the controversy surrounding some eligibility and registration decisions.

2.4.2. COMPLAINT PROGRESS: ATTRITION

After a complaint has cleared the eligibility phase, it is still far from certain that it will reach a substantive phase of the IAM process. Overall, 33% of the 291 eligible, concluded cases failed to reach a substantive phase. An attrition rate of more than 30% between eligibility and substantive phases raises questions about the ability of IAMS to provide effective remedy, which need to be further explored.

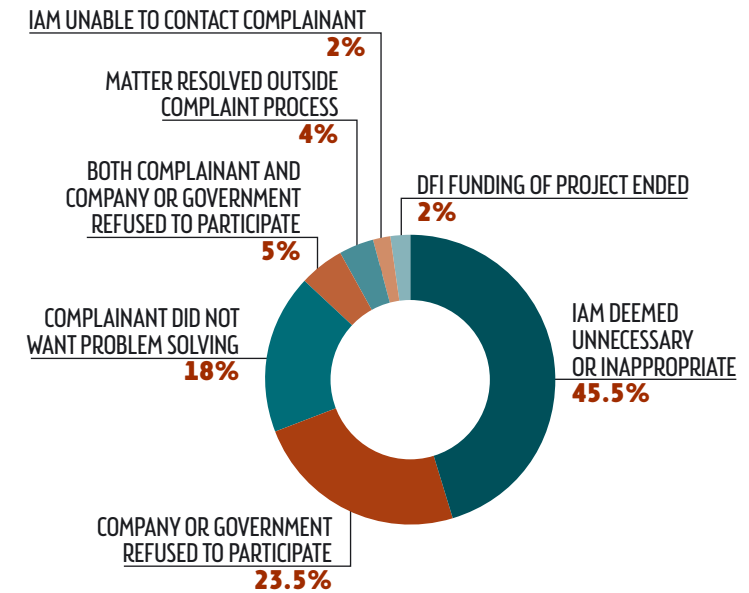
Eligible complaints may not proceed to a substantive phase for a variety of reasons. Figures 9 and 10 present these reasons graphically, based on the 101 eligible, concluded cases that could have reached problem-solving but did not and the 128 eligible, concluded complaints that could have reached compliance review but did not. The most common reasons why an eligible complaint did not reach a substantive phase are that: the IAM independently decided that problem-solving or compliance review was unnecessary or inappropriate; the complainant chose not to pursue problem-solving or compliance review; the company or government carrying out the project in question refused to participate in problem-solving; or the institution's board refused to authorise a compliance investigation.

IAMS and bank leadership are behind a large portion of the eligible cases that do not reach a substantive phase. On the problem-solving side, in 59% of the 78 eligible cases, concluded cases that failed to reach problem-solving despite complainants' wishes, problem-solving did not occur because the IAM decided that it was unnecessary or inappropriate. Even more significantly, for eligible, concluded cases

that did not go through compliance review, nearly 74% did not reach compliance review because the IAM deemed it unnecessary or inappropriate. An additional 5.5% of such cases did not proceed to compliance review because the DFI's board refused to authorise an investigation. This situation has occurred at only two institutions: the IDB, whose board has refused to authorise three MICI compliance investigations in the last five years, and the World Bank, whose board refused to authorise four Inspection Panel investigations during the Panel's first few years of operation.²⁵

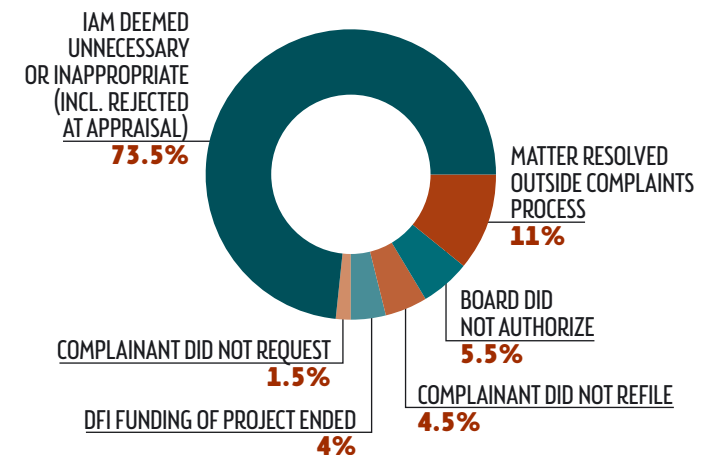
One additional point regarding Figure 10 deserves further explanation. The only complaints that did not reach compliance review because the 'complainant did not re-file' were those filed at the ADB AM during the earlier years of its operation, before its procedures were revised. Under the old procedures, problem-solving and compliance review were treated as separate complaint processes, and complainants had to explicitly re-file with the compliance review function after undergoing or being found ineligible for problem-solving. However, this is a historical issue and under the new procedures adopted in 2012, re-filing is no longer required.

FIG. 9 - WHY DID ELIGIBLE COMPLAINTS NOT REACH PROBLEM SOLVING
N=101*



*Total number of eligible concluded cases which could have reached problem solving (they were found eligible at mechanisms that provide problem solving), but did not.

FIG. 10 - WHY DID ELIGIBLE COMPLAINTS NOT REACH COMPLIANCE REVIEW
N=128*



*Total number of eligible concluded cases which could have reached compliance review (they were found eligible at mechanisms that offer compliance review), but did not.

²⁵ The World Bank Board has not blocked a Panel investigation since 1998.

**FIG. 11 - PROGRESS OF ELIGIBLE CONCLUDED COMPLAINTS
N=291**

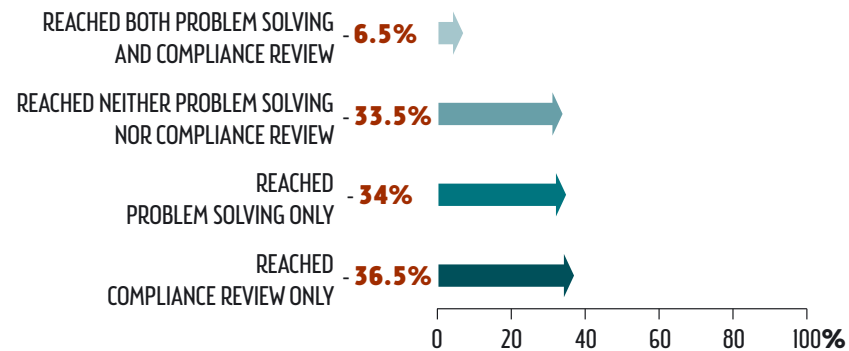


FIGURE 11 summarises the percentages of the 291 eligible, concluded cases that reached problem-solving, compliance review, both, or neither.²⁶ It was relatively uncommon for complaints to reach both problem-solving and compliance review: 34% reached problem-solving only and 36% reached compliance review only, whereas only 6.5% went through both. As was mentioned above, a substantial portion – 33% of eligible, concluded complaints – never reached either substantive phase. A further elaboration of the reasons why complaints may drop out of the complaint process before reaching a result is provided in Section 4.1.

2.4.3. COMPLAINT PROGRESS: STEPS AND OUTCOMES

FIGURE 12 (see next page) breaks down concluded cases based on which steps in the IAMs process were reached and what type of results were achieved. There is marked attrition at each phase of the process. Of all 684 concluded complaints, the following phases of the complaints process were reached: nearly 43% were found eligible; 28% proceeded to a substantive phase; and just under 20% produced results. This 20% of concluded complaints that produced results is broken down as follows: parties successfully negotiated settlements in 8% of concluded cases and publicly disclosed compliance reports were produced in slightly less than 12% of concluded cases. Further, DFI management produced action plans in 7% of concluded cases. This represents 64.5% of the 76 cases that led to findings of non-compliance.²⁷

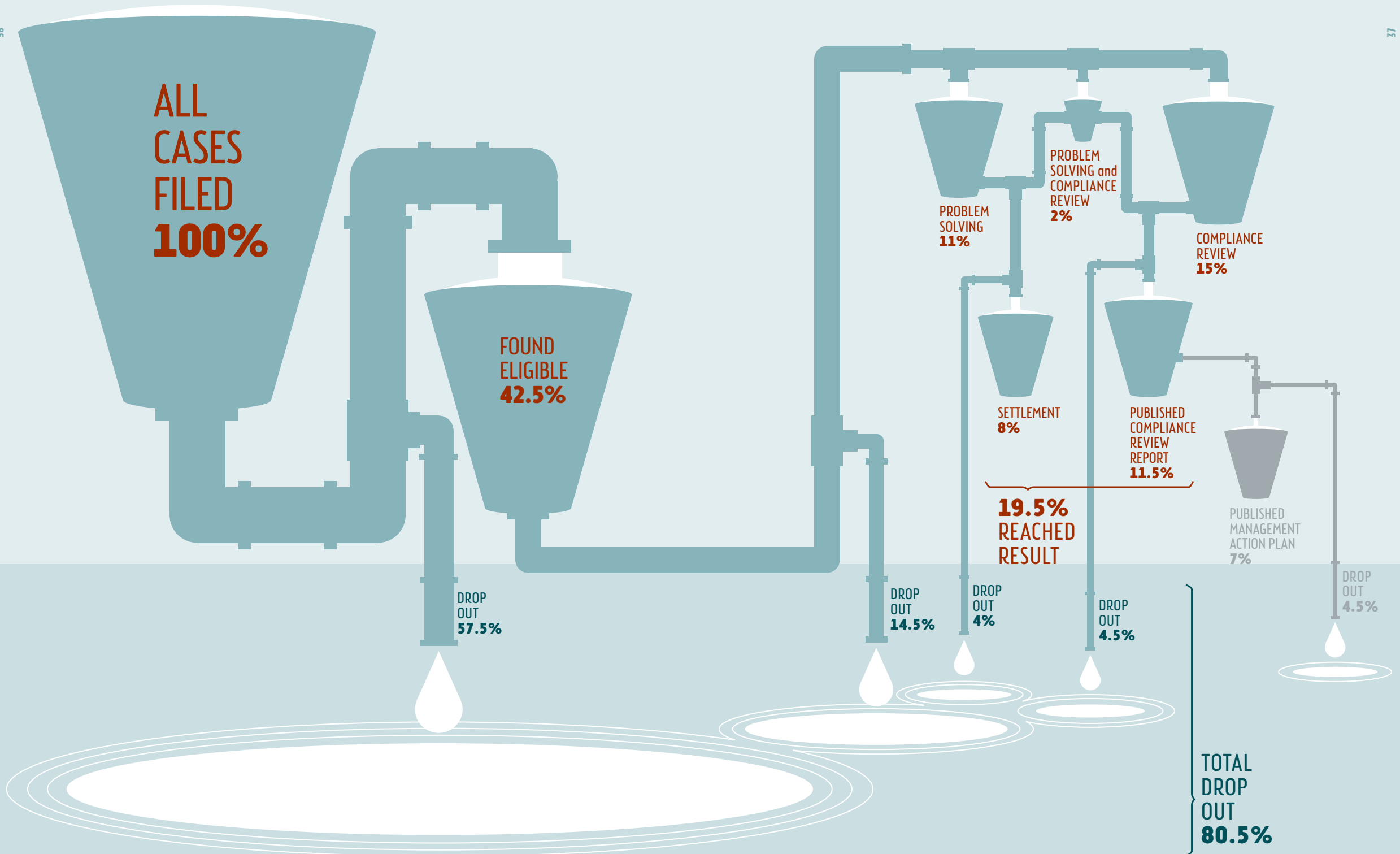
Figure 12 should be interpreted as a descriptive rather than an evaluative figure, since not all complaints filed were qualified to reach a result. For example, not all filed complaints will meet eligibility criteria. Consequently, the drop outs between the different phases in Figure 12 do not imply a system failure per se, but they do require further analysis.

Focusing on the 291 concluded complaints that were found eligible, it can be observed that nearly half (44%) achieved results. It is important to remember, however, that the classification of cases that produced 'results' does not take into account the findings of compliance reports, implementation of settlements or action plans or complainants' satisfaction with outcomes, as such information was generally outside the scope of the data available. Had this study been able to track such information for all concluded cases and include it within the definition of 'results', it is possible that fewer cases would have been recorded as having achieved results. Chapter 4 provides insights into complainants' satisfaction with the results that were achieved in several cases between 1 July 2014 and 30 June 2015.

²⁶ Percentages for cases that reached problem-solving only, compliance review only, and both problem-solving and compliance review are controlled for the functions that were available to each complaint, depending on which IAM it was filed to and how it was filed. For example, the 'problem-solving only' percentage excludes all Inspection Panel cases (since it does not provide problem-solving); the 'compliance review only' percentage excludes all CSR Counsellor cases (because it does not provide for compliance review); and the 'both problem-solving and compliance review' percentage excludes Inspection Panel and CSR Counsellor cases. Exclusions also occurred because of the way certain complaints were filed – in particular, complaints that were brought to the CAO by bank or IAM leadership and those brought to the Project Complaint Mechanism (PCM) by CSOs who are not acting on behalf of directly affected people are only eligible for compliance review, and are therefore excluded from percentages for 'problem-solving only' and for 'both problem-solving and compliance review'. Because of these controls, these percentages add up to more than 100%.

²⁷ This number includes all cases in which a mechanism made findings of non-compliance, regardless of whether the compliance report was publicly disclosed.

FIG. 12 - COMPLAINT PROGRESS AND ATTRITION
N=684 (TOTAL CONCLUDED COMPLAINTS)



2.4.4. PROGRESS OF COMPLAINTS BY IAM

FIG. 13 - PROGRESS OF COMPLAINTS THROUGH IAMs

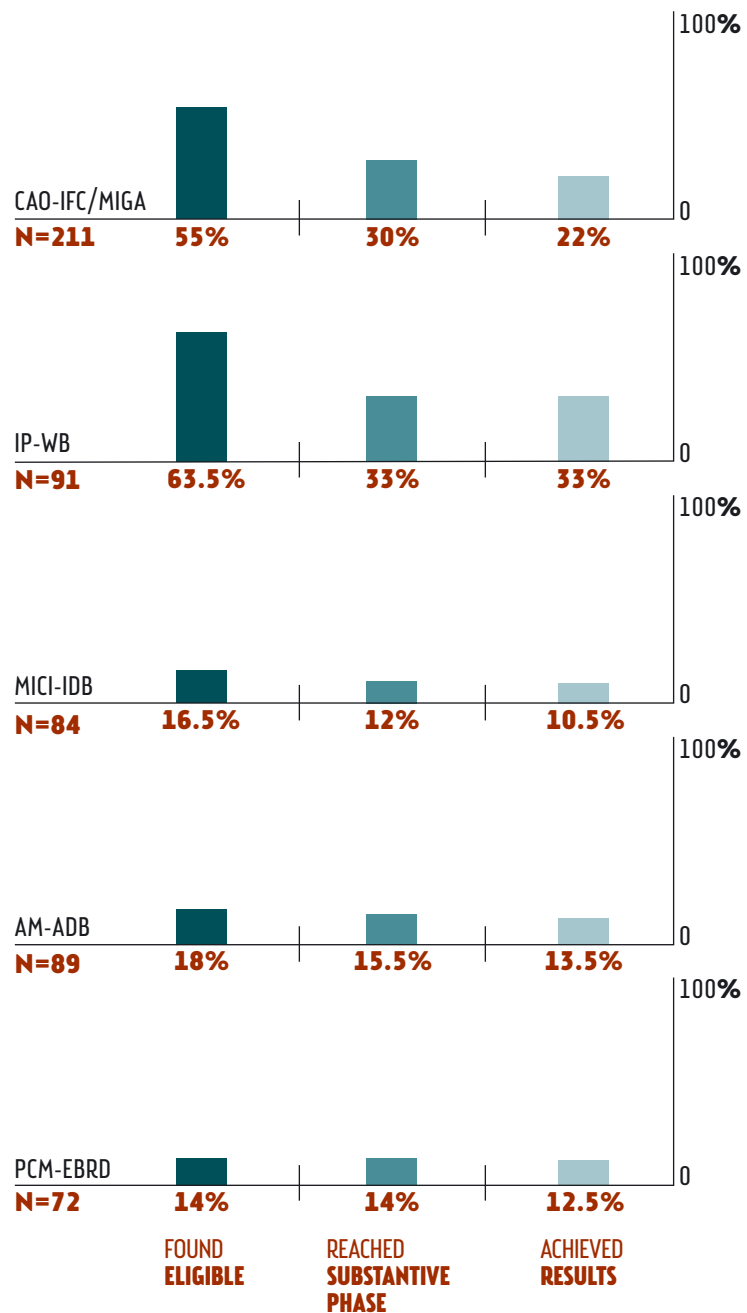


FIGURE 13 compares the progress of concluded cases through the major IAMs.²⁸

There is significant variation among IAMs, both in terms of the percentage of complaints that reach each phase of the process and in terms of the ultimate outcomes of cases. The World Bank Group mechanisms – the CAO and the Inspection Panel – generally have lower case attrition rates throughout the complaint process compared to cases filed to the regional development bank mechanisms. However, an exception to this is the percentage of eligible complaints that achieve results, which is higher at the regional development bank mechanisms.

The Inspection Panel found 63.5% of concluded cases eligible and 33% of concluded cases reached a substantive phase. Notably, all cases that reached a substantive phase went on to achieve results. This high rate of results in part reflects the Inspection Panel's procedures, which do not include a problem-solving phase and therefore remove from the complaint process the many uncontrolled variables involved in achieving a result through problem-solving. Of the Inspection Panel's eligible, concluded cases, 51.5% achieved results.

The CAO, which has higher attrition rates of the two World Bank Group IAMs, found 55% of its concluded cases to be eligible, 30% proceeded to a substantive phase and 22% achieved results. Of the CAO's eligible, concluded cases, 40% achieved results.

Among the IAMs affiliated with regional development banks, the ADB AM shows the lowest rates of case attrition, with 18% of its concluded cases found eligible, 15.5% reaching a substantive phase and 13.5% achieving results. Of the ADB AM's eligible, concluded cases, 75% have achieved results. For the AM and the other regional development bank mechanisms, this statistic should be read taking into account the relatively small total numbers of concluded complaints found eligible, between ten and 16 complaints.

The PCM found only 14% of concluded cases eligible, but all of those found eligible then proceeded to a substantive phase and 12.5% achieved results. Of the five mechanisms shown in figure 13, the PCM is the only one that does not show any

²⁸ Despite the fact that the AfDB is considered a major regional development bank, it is not included in this chart because the bank's Independent Review Mechanism (IRM) has only received 17 complaints (only ten of which were registered) and this small sample size may lead to misleading results. Likewise, the EIB's Complaints Mechanism is not included in this chart because of the limited information available about its cases. The publicly available information for many EIB CM cases is limited to a few words describing the complaint and the process it went through. Where a longer case summary is provided, it often contradicts information given elsewhere on the case page. Contradictory information often relates to the phases in the EIB CM process to which the complaint progressed, making it particularly difficult to gather the type of information relied on in Figure 13. Moreover, although the CM's 2013 policy indicates that reports produced at the conclusion of a compliance review process will be publicly disclosed on the mechanism's website, in practice the EIB CM has only rarely disclosed reports produced through the complaint process. At the time of publication, the EIB CM had recently begun disclosing additional case information, including reports and other case documents, on its online case registry. The CM indicates that additional disclosures will continue to be made, which may enable better review of the progress of CM complaints in the near future.

case attrition between eligibility and reaching a substantive phase. This may be explained at least in part by the PCM procedures, which do not include steps that often lead to such attrition at other mechanisms, such as an appraisal process or a board approval requirement prior to proceeding with a substantive phase (see figures 9 and 10, showing why complaints do not reach substantive phases). Of the PCM's eligible, concluded cases, 90% achieved results.

At the MICI, a slightly higher 16.5% of concluded cases were found eligible, but only 12% reached a substantive phase and 10.5% achieved results. Of the MICI's eligible, concluded cases, 64.5% achieved results.

2.4.5. COMPLAINT PROGRESS: WITH AND WITHOUT CSO INVOLVEMENT

FIGURE 14.1 & 14.2 illustrate the progress and outcomes of concluded cases based on whether or not an international or domestic CSO was involved in the complaint.²⁹ A CSO is considered to be involved in a case if it either filed the complaint – solely or jointly with community-based complainants – or supported the complainants.

Complaints filed by individuals or community organisations without CSO support generally did not progress as far in the IAM process or achieve results as often as those whose cases were filed or supported by domestic CSOs. Cases that involved international CSOs (often, but not always, in tandem with community-based complainants and/or domestic CSOs) progress even further through the IAM process and reach results even more often than complaints involving domestic CSOs.

Of complaints filed by communities or individuals acting alone, without support from CSOs, 62% were found eligible, 38.5% reached a substantive phase, and 19% achieved a result. In contrast, 80% of complaints that involved a domestic CSO were found eligible, 53% reached a substantive phase and 41% achieved results. Complaints involving an international CSO performed even better: 87% were found eligible, 70% reached a substantive phase and 63.5% achieved results.

FIG. 14.1 -
PROGRESS OF COMPLAINTS
BY CSO INVOLVEMENT

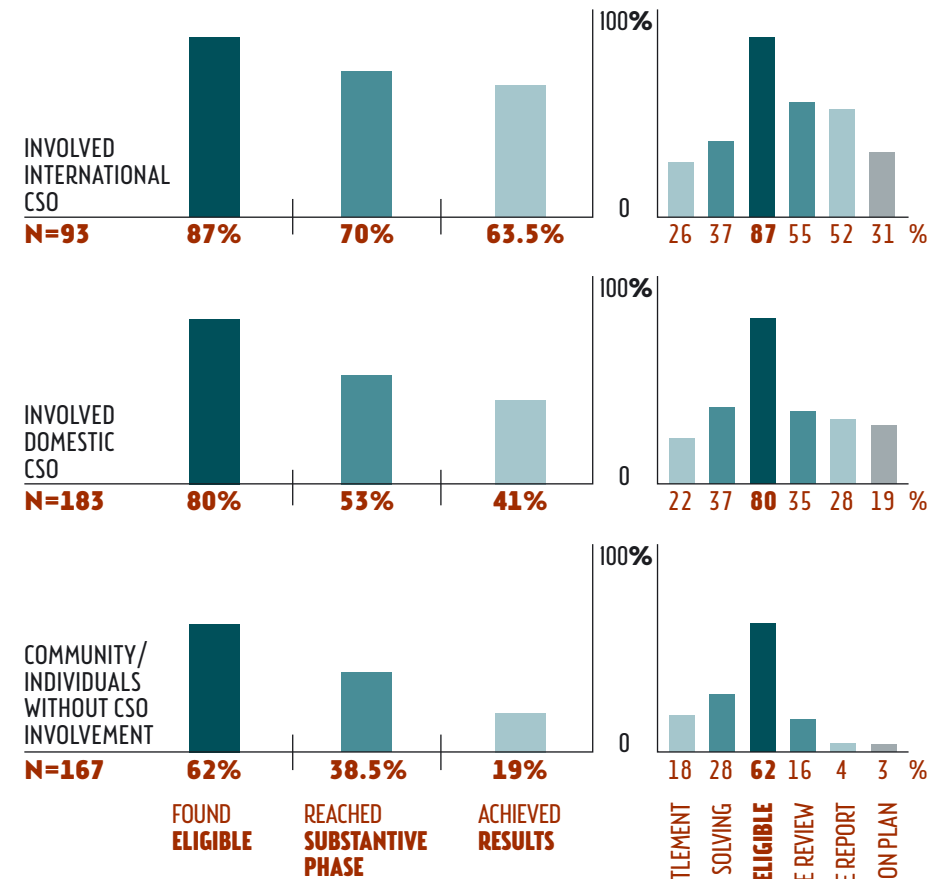
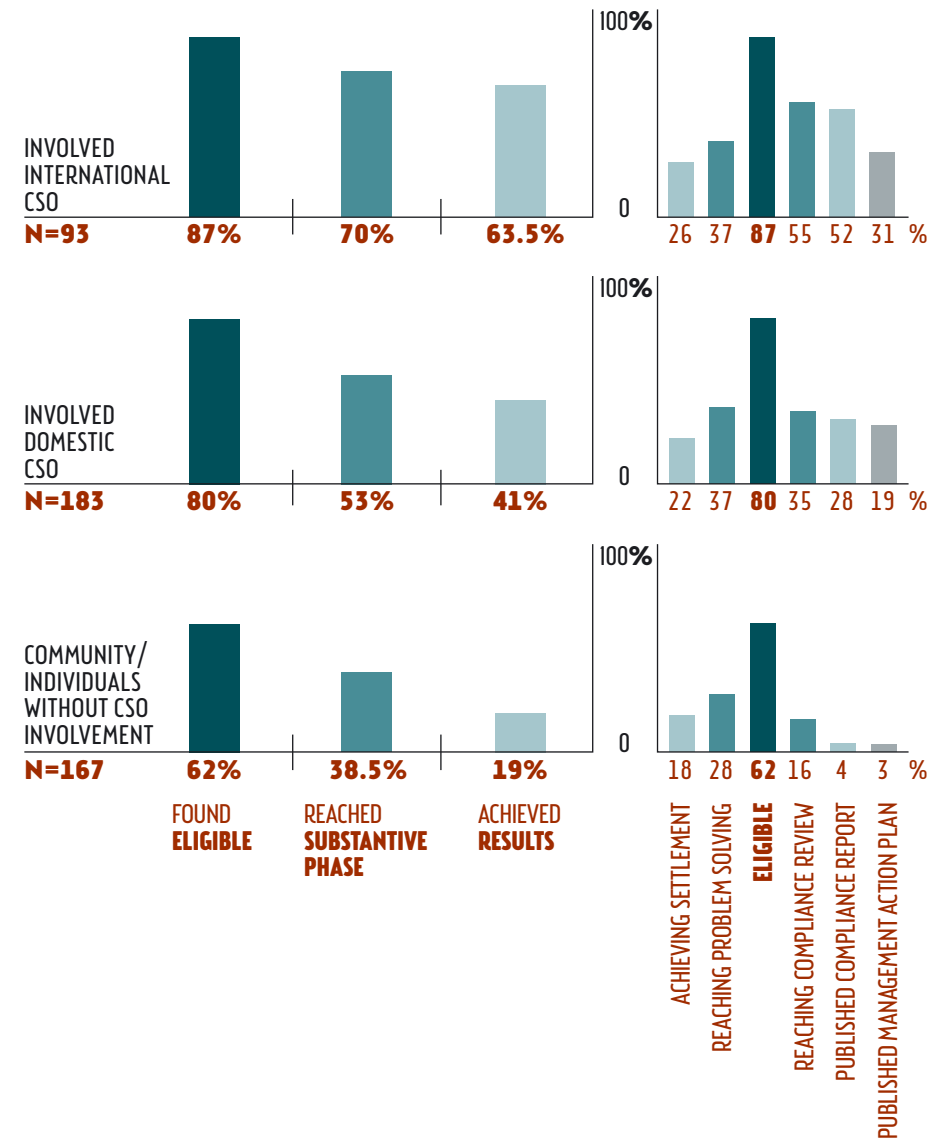


FIG. 14.2 -
DETAILED PROGRESS
OF COMPLAINTS BY CSO
INVOLVEMENT



²⁹ The calculations in Figure 14.1 and 14.2 regarding the percentage of cases reaching problem-solving or compliance review, or achieving a result (an outcome that relies on a complaint first reaching a substantive phase) controlled for cases that were filed at a mechanism that did not offer both functions or were restricted to compliance review because of the type of filer. For example, the Inspection Panel only offers compliance review and the CSR Counsellor only offers problem-solving. Additionally, cases filed at the EBRD's PCM by CSOs that are not representing directly affected people are only eligible for compliance review

Additional results presented in Figure 14.2 address percentages of each type of complaint reaching problem-solving and compliance review, as well as percentages that achieved a settlement, a publicly disclosed compliance report or a publicly disclosed Management Action Plan. Overall, a far greater percentage of complaints not involving a CSO reached problem-solving than compliance review (28% reached problem-solving, compared to 16% reaching compliance review). In contrast, a far greater percentage of complaints involving international CSOs (again, often in tandem with local communities and/or domestic CSOs) reached compliance review than problem-solving (55% reached compliance review, as compared to 37% reaching problem-solving). Complaints involving domestic CSOs (often in tandem with or as representatives of local communities) reached problem-solving about as often as compliance review (37% reached problem-solving, as compared to 35% reaching compliance review).

Framed differently, the variance in percentages of complaints reaching problem-solving was much smaller than with compliance review. There is a wide disparity in the percentage of complaints that reach compliance review based on CSO involvement: only 16% of complaints filed without CSO support reached compliance review, whereas 55% of complaints supported by an international CSO reached that phase.

The difficulties that individuals and communities acting without the support of CSOs face when using the complaints process was substantiated using a regression analysis, which tested the effect that CSO involvement has on the odds that eligible complaints will eventually achieve results. Annex I ('Detailed Methodology', available at www.glass-half-full.org) contains detailed results of this regression, along with notes on methodology. This regression considered only concluded, eligible complaints and controlled for the IAM to which complaints were filed.

Complaints filed only by individuals or community organisations, without the support of any CSO, performed less well in the IAM process than those filed with additional organisational support. As compared to eligible complaints filed by individuals or community organisations without any CSO support, the odds that an eligible complaint will achieve results increase by nearly 40% when the case involves a domestic CSO. When an international CSO is involved in an eligible complaint, either alone or alongside a domestic CSO, those odds increase by nearly 175%.

2.4.6. COMPLAINT PROGRESS: HOW MUCH TIME DOES THE IAM PROCESS TAKE?

FIG. 15 - AVERAGE DURATION OF COMPLAINT PROCESS
N=268

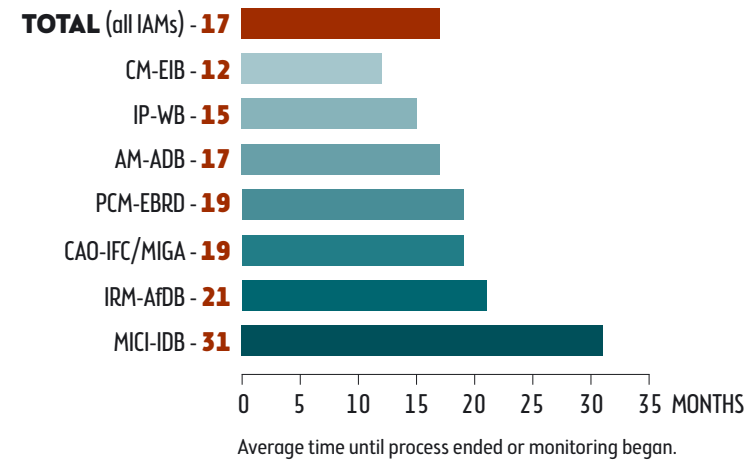


FIGURE 15 presents the average time until the complaint process ended or monitoring began for the larger IAMs. Additional statistics, including durations for problem-solving and compliance review, are presented in Table 1.³⁰

Overall, the average length of time until an eligible complaint exited the IAM process or entered monitoring was 17 months. The average length of the problem-solving and compliance review phases was the same: 12 months.

Variation in duration among the mechanisms was quite limited – average durations for individual IAMs generally stayed within five months of the overall average. A notable exception to this general trend is the MICI. The average length of time until eligible MICI cases exited the process or entered monitoring was 31 months, more than double the overall average. Equally notable is the average length of compliance review for MICI cases – 23 months. However, only two cases have completed compliance review at the MICI.³¹

³⁰ In order to prevent duration statistics for some IAMs from being artificially deflated due to high numbers of complaints that were not registered or found ineligible very shortly after being filed, the durations presented here were calculated using only data from eligible complaints.

³¹ Although the MICI recently underwent a restructuring process, that restructuring does not appear to have affected the duration numbers presented here. Case durations at the MICI have been relatively consistent over time since the mechanism's establishment. However, several cases that have been delayed due to the restructuring were still active as of 30 June 2015. Once they close, they may increase the average durations at the MICI.

TABLE 1 - ADDITIONAL DURATION STATISTICS IN MONTHS (ELIGIBLE CASES ONLY)

IAM	AVERAGE DURATION OF PROCESS *	AVERAGE DURATION PROBLEM SOLVING	AVERAGE DURATION COMPLIANCE REVIEW
TOTAL	17 (268) **	12 (63)	12 (92)
CAO-IFC/MIGA	19 (103)	14 (31)	16 (12)
IP-WB	15 (57)	N/A	17 (30)
MICI-IDB	31 (11)	13 (9)	23 (2)
AM-ADB	17 (14)	10 (12)	13 (7)
PCM-EBRD	19 (10)	2 (3)	12 (9)
CM-EIB	12 (51)	N/A ***	2 (24)
IRM-AfDB	21 (5)	12 (5)	20 (2)

* The process measured here is the length of time before the complaints process ended or complaints went to monitoring.

** The number of cases that compose each statistic is listed in parentheses.

*** No data on duration of problem-solving is available for the CM-EIB.

2.5. DISCUSSION

Over the past two decades, IAMs have proliferated widely, offering a necessary forum for access to remedy for people and communities harmed by development projects. Both their proliferation and the growing number of complaints they have received over time is an encouraging sign that reflects well on their visibility and accessibility. However, IAMs may be experiencing a downward trend in the number of complaints being filed. Data regarding total complaints filed in 2015 should be watched closely, and if a downward trend is indeed occurring, the causes should be identified and corrected if needed.

Moreover, despite the encouragement rightly provided by the rising number of IAMs and complaints received, the attrition that occurs at every phase of the IAM process is worrying. More than half of complaints do not proceed past the registration or eligibility phase, and a significant number of those found eligible never proceed to a substantive phase of the process. While it is a positive indicator

that 44% of eligible, concluded complaints achieved results, IAMs should continue striving to strengthen their ability to produce useful outcomes on the ground for complainants. Additionally, more information is needed about why such a high percentage of cases are closed at registration or eligibility.³²

Similarly, IAMs should focus on making the process more accessible and worthwhile for communities and individuals filing without support from CSOs. The struggles faced by individuals and communities filing without CSO support are a cause for concern, as these represent at least 24% of concluded complaints. Moreover, individuals and communities filing alone may be more vulnerable and isolated than those who have support from CSOs, making it even more imperative that the IAM process function well for these types of filers. For IAMs to be effective grievance mechanisms that are capable of providing remedy for those harmed by DFI projects, IAMs and DFIs must do more to ensure that their complaints processes are equally accessible to all complainants, regardless of their knowledge of the system or capacity to file complex and detailed complaints.

Major gains must be made towards consistently providing people affected by development projects with an effective process for securing remedy for harms suffered. Overall, the data analysed here suggests that IAMs and civil society should work together towards this end.

³² See Chapter 4 for a discussion of case attrition throughout various stages of the mechanism process.

PROCEDURAL GAPS: A QUALITATIVE ANALYSIS OF POLICY AND PRACTICE

The research team assessed the policies and practice of the IAMs and their DFIs against the effectiveness criteria of the UN Guiding Principles on Business and Human Rights (UNGPs). The evaluation of each mechanism and DFI can be found in Annexes 5-15, available online at www.glass-half-full.org. Below is a synthesis of the findings from those analyses. The research reveals several examples of best practice, but it does not appear that those practices are being widely replicated or adopted across all the IAMs and DFIs. On the contrary, the reforms adopted by DFI boards in recent IAMs reviews have decreased their effectiveness in a number of ways, as described in more detail below. Instead of a race to the top in which IAMs and DFIs vie to provide the most robust and fair process, it seems that many IAMs and DFIs are adopting policies and practices that accommodate their own interests and those of their clients, but not the people whom the accountability processes were designed to help.

3.1. LEGITIMACY

IAMs face an uphill battle in establishing trust with CSOs and project-affected communities. After all, the mechanism is housed in the very institution that financed the project alleged to have caused harm. Often the mechanism staff will be the only individuals from the DFI whom the complainants meet. One way to establish trust and, as a result, enhance the legitimacy of the IAMs is to demonstrate the independence of mechanism staff from the DFIs by having a selection process that includes CSOs and other external stakeholders. Of the IAMs reviewed for this report, the **Compliance Advisor Ombudsman (CAO)** of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) provides the best example. A nomination committee is established with representatives from CSOs, academia and the private sector to recommend a candidate for CAO Vice President (VP) to the President of the World Bank Group. The **Project Complaint Mechanism (PCM)** of the European Bank for Reconstruction and Development (EBRD) is another example in which external stakeholders – though not necessarily CSOs – are involved in the selection of the PCM Officer and Experts.

Having diverse perspectives represented in the selection process may result in greater diversity among IAM staff. While some IAMs, such as the World Bank's **Inspection Panel**, strive to ensure the geographical diversity of their staff, their professional backgrounds can be quite similar. Experience working at environmental, labour and human rights CSOs would serve IAMs well given the need for the mechanisms to interact regularly with local, national and international CSOs. Yet few IAMs staff have come from the civil society community. Without access to the hiring process, it is impossible to determine whether that is the result of a lack of CSO applicants or that CSO candidates do not advance.

Another way for IAMs to solicit the views of CSOs and other external stakeholders is by establishing an advisory group to provide guidance and feedback. For

example, the **CAO** has a seven-member Strategic Advisors Group made up of representatives from the private sector, academia and civil society. Conflicts of interest are avoided because none of the members are actively involved in supporting complaints to the CAO.

3.2. ACCESSIBILITY

Over the more than two decades since the first IAM was created, one of the biggest challenges to ensuring the effectiveness of these mechanisms remains one of the most fundamental: project-affected people are not aware of their existence. The users of the mechanisms and even the mechanisms themselves confirm this general lack of awareness.³³ A recent report, which surveyed 800 people affected by development activities in eight countries, found that 83% had never heard of the World Bank Inspection Panel.³⁴ Although the IAMs have made significant efforts to raise awareness by organising CSO workshops and attending public events,³⁵ there is more that they can and should do to improve outreach, including providing information in multiple languages and improving their websites. However, the single most important measure to guarantee the accessibility of the IAMs is for the DFIs to require their clients to publicise the existence and availability of the mechanisms during consultation processes with project-affected people.

Increasingly, DFIs are requiring their clients to establish project-level grievance mechanisms. While these mechanisms may be useful in addressing discrete concerns, project-affected people may not trust that a project-level mechanism would adequately address their issues because they are often designed and operated by the same actor that may have caused the harm.³⁶ For that reason, project-level grievance mechanisms should also provide information about the availability of an IAM in the event that users are not satisfied with the result or when communities lack the confidence to use them. Failure to proactively provide such information creates a de facto eligibility requirement for complainants – namely, that complainants have sufficient resources and capacity to discover the mechanism on their own.

³³ Compliance Advisor/Ombudsman, Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information (May 2010), http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf; Edward S. Ayensu, Second Review of the Independent Review Mechanism (IRM) of the African Development Bank Group, Report of the Consultant (Sept. 2014), http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/2nd_IRM_Review_-_Consultant_s_Report_-_ENG.pdf.

³⁴ For a vision of what real development looks like, see IAP, Back to Development, *supra* note 2.

³⁵ Inspection Panel, IAMs – CSO Outreach Workshop in Turkey (May 2015), <http://ewebapps.worldbank.org/apps/ip/Lists/NewsFromThePanel/NewsFromThePanelDisp.aspx?ID=211&source=http://ewebapps.worldbank.org/apps/ip/Pages/News-fom-the-panel.aspx>; Inspection Panel, CSO Outreach Workshop in Zagreb, Croatia (July 2015), <http://ewebapps.worldbank.org/apps/ip/Lists/NewsFromThePanel/NewsFromThePanelDisp.aspx?ID=217&source=http://ewebapps.worldbank.org/apps/ip/Pages/News-fom-the-panel.aspx>

³⁶ Centre for Research on Multinational Corporations (SOMO), The Patchwork of Non-Judicial Grievance Mechanisms (Dec. 2014), http://grievancemechanisms.org/resources/brochures/non-judicial-grievance-mechanisms-a-patchwork-1/at_download/file.

The IAMs were created to serve project-affected communities, and yet, the DFIs currently rely on chance to ensure that those who need them will actually find them. The **Asian Development Bank (ADB)** is unique among the banks in requiring its staff to work with clients to disclose information about the mechanism. While not explicitly referenced in the loan agreement, it is understood that the ADB's disclosure and safeguard policies require the clients to disclose this information.³⁷

The **World Bank** recently included a reference to the Inspection Panel in its project documentation, which is available online. However, it is unclear whether it is translated and actively provided to project-affected people. Moreover, the text also makes reference to the World Bank's Grievance Redress System and project-level grievance mechanisms. Both of those processes are operated by Bank management and clients, respectively, and as such are not considered independent grievance mechanisms. Reference to them in project documents may confuse project-affected communities and divert them from the Inspection Panel.

Once the complainants have found the appropriate mechanism, they may face barriers to filing a complaint. Both the **Independent Consultation and Investigation Mechanism (MICI)** of the Inter-American Development Bank (IDB) and the EBRD's **PCM** have recently adopted changes to their procedures that prevent complainants from requesting problem-solving and/or compliance review regarding a project that is being considered for financing but for which final approval has not yet occurred. A substantial number of client requirements precede project approval, including environmental and social due diligence and consultation with project-affected people, for which DFIs can and should be held accountable. In general, the earlier people can raise their concerns about a project, the easier it will be to accommodate them by modifying the design or improving mitigation measures, which can be addressed through a compliance review or via problem-solving. Such an early complaint opportunity would enable the IAMs to prevent negative impacts instead of addressing them after the damage has been done.

Several IAMs only allow complaints that are filed within a certain period of loan disbursement. However, as long as the loan is outstanding, the environmental and social requirements in the loan agreement apply and the DFI is required to monitor and supervise their implementation. Complainants should have an opportunity to hold DFIs accountable if they fail to ensure the implementation of environmental and social requirements. Alternatively, the complainant may wish to engage in problem-solving. Whether the complainants and the DFI client want to engage in dialogue depends very little on the status of the loan disbursement, but rather on whether both parties stand to benefit from resolving the conflict. The restrictions are particularly problematic when there is no way for potential complainants to know whether their complaint is eligible because information about loan disbursements is not disclosed. For example, the EBRD's **PCM** does not accept

³⁷ Based on review comments provided by ADB's AM, received 19 October 2015.

complaints seeking problem-solving that are filed more than 12 months after the last loan disbursement. However, because information regarding the status of loans is not publicly available, complainants must risk investing time and resources into developing a complaint that may later be dismissed on the grounds that it was filed too late. At the same time, the **PCM** also provides a positive example by accepting complaints for compliance review even after the loan has been repaid and the project is closed. Allowing complaints following project closure ensures that the DFI learns lessons and improves its practice in future projects, although there may be little immediate benefit to those affected by the closed project.

These limitations on accessibility due to restrictions on when complaints may be filed are either the result of the IAM's own decisions regarding its rules of procedure or they may be imposed by the board of directors of the DFI with which it is associated. Empowering the mechanisms to adopt and modify their own rules of procedure, as necessary and with the opportunity for all stakeholders to comment, would fortify their independence, and thus, their legitimacy.

An additional limitation on accessibility arises during the complaint process: too often IAM practices disadvantage less sophisticated complainants who do not have the capacity to file complex complaints that identify the DFI policies at issue and analyse how they have been breached. While most IAMs do not formally require these elements in an initial complaint, in practice IAMs appear to favour more sophisticated complainants. While several IAMs – including the IFC and MIGA's CAO; the EIB's Complaints Mechanism (CM); EBRD's PCM; the Canadian Office of the Extractive Sector's Corporate Social Responsibility Counsellor (CSRC); and the US Overseas Private Investment Corporation's Office of Accountability (OA) – only require one person to file a complaint, as shown in the statistics provided in Chapter 2, a much higher percentage of complaints filed with CSO support have been found eligible compared to complaints filed by individuals or community organisations without CSO support, and the odds of such complaints achieving results are much higher. This trend is particularly disheartening given the stated focus of many IAMs to provide a complaint process that local communities can use to resolve issues. The ability of local communities to raise grievances with a mechanism on their own, without needing to seek legal counsel or other assistance from outside groups, is often highlighted as an advantage of IAMs over traditional judicial avenues. In order to effectively deliver this advantage, however, IAMs and DFIs must do more to ensure that their complaints processes are equally accessible to all complainants, regardless of their knowledge of the system or capacity to file complex and detailed complaints.

3.3 PREDICTABILITY

A frequent issue raised by mechanism users is the delay in processing their complaints and the failure to meet deadlines required by the IAMs' rules of

procedure. The result is an unpredictable process. Delays could be explained by: lack of capacity at the mechanism to handle the workload; failure of the DFI to meet its deadlines in responding to the IAM; and simple mismanagement. IAMs, of course, may only be in control of the last factor. The other two are the responsibility of the DFIs. It is the DFI that approves the mechanism's budget, so if the IAM needs more staff to process the volume of complaints received, it can only do so if the DFI approves a budget increase. As seen in the case studies in the following chapter, delays, whatever the cause, can lead complainants to believe that there has been interference in what should be an independent process. This is especially true when the mechanism does not communicate adequately with the complainants about the status of their complaint, which is a widely occurring practice.

Lack of communication with complainants is an issue that arises not only when complainants experience delays in the process. Users express a desire for the mechanisms to be more proactive about providing status updates to complainants, even if it is only to say that the complaint is proceeding according to plan. Frequent communication helps complainants know what to expect from the process. The extent to which mechanisms communicate with complainants appears to vary not just between mechanisms but also from case to case.

Endowing mechanisms with the mandate to monitor the outcomes of their investigations and dispute resolution processes improves the predictability of the process by helping to ensure that commitments are implemented and measures are taken to address instances of non-compliance. However, not all mechanisms have a monitoring mandate, and many that do have only limited authority. For example, in the case of compliance reviews, many IAMs are limited to monitoring the implementation of the Management Action Plan prepared by the DFI to address the instances of non-compliance found by the mechanism's investigation. If the Management Action Plan is not adequate to address the findings of the mechanism, however, then full implementation of the Plan might still leave instances of non-compliance unaddressed and complainants without a response to their concerns.

3.4. EQUITABILITY

An equitable complaint process would allow complainants the same rights of participation as the DFI and its client, but few do. The rules of procedure of many IAMs allow the DFIs to review and comment on draft reports, but do not afford the same opportunity to complainants. For example, the **CAO** shares a draft of its investigation with IFC for its comments, but does not provide the same opportunity to the complainants. At the conclusion of the process, when the IAM and the DFI management discuss the report and the appropriate response with the DFI's board of directors, the complainants are never in the room and they seldom have the opportunity to present their perspectives in writing. The procedures of the **PCM**

and the **AM** provide good practice in this regard by including the complainants' comments when the final report is submitted to the relevant board.

Similarly problematic is the frequent failure of DFIs to respond adequately to the findings of non-compliance made by the IAMs in their investigation reports. This issue crops up repeatedly in the case studies detailed in the next chapter and in the user survey (see Annex 3). In general, complainants are not satisfied with the steps taken by DFIs and their clients to respond to complainants' concerns, either with regard to process or content. Complainants report that DFIs fail to consult with them when developing Management Action Plans (MAPs) that are intended to address the IAMs' findings. In order for meaningful consultation to occur, the complainants must first have access to the findings of the IAMs. In eight DFIs, the complainants do not have access to the IAM report prior to being consulted by DFI staff on the MAP. That means that complainants do not know whether and to what extent the mechanism has found instances of non-compliance, if and when they are asked by DFI staff about what measures to include in the MAP to correct them. The **IFC** is not even required to consult with complainants at all. Instead, both the **CAO's** investigation report and the **IFC's** proposed action plan are sent to the World Bank Group President for review and approval. The first time complainants see either document is after the President has approved them. This failure to consult explains, in part, complainants' dissatisfaction with the measures that DFIs and their clients propose to take to address their concerns.

More often than not, when IAMs find that DFIs have failed to comply with their own policies or procedures, causing harm to individuals or communities, the response of the DFI does not contemplate actions that are proportional to the violations, nor do they address the needs and concerns of the very people the DFIs seek to benefit. As seen in the next chapter, for those complainants who request or are limited to compliance review, after investing resources and several years going through the process, they might not – and often do not – see any concrete benefits or changes in their circumstances because of the failure of the DFI to respond meaningfully to the issues they have raised.

This inadequate response by DFIs is compounded by the absence of any appeals process. Complainants must accept a decision handed down by the same body – namely, the board of directors – that approved the project at issue. Complainants cannot appeal to a truly independent entity if they are dissatisfied with the outcome. The one striking exception is the **EIB's Complaints Mechanism**. If complainants are dissatisfied with the process or EIB's response, they can appeal to the European Union Ombudsman, who can determine if there has been maladministration, interpreted by the Ombudsman to include compliance with law and respect for human rights.³⁸ However, there are too few cases that have gone

through the appeals process to determine whether it improves the complainants' chances of a successful outcome (see Annex 9 for more information). For the other DFIs to establish a similar appeals process, they would have to delegate power to or submit to the jurisdiction of an external body.

3.5. TRANSPARENCY

IAMs must operate transparently in order to remain accountable to stakeholders, build confidence in their effectiveness, and respect the public interests at stake. The authors' analyses reveal wide variation in the kinds and amounts of information that the IAMs disclose regarding the complaints they receive. At one extreme, some IAMs provide no information regarding the content of past or pending complaints, the outcomes of closed cases or the rationale for determinations regarding individual complaints.³⁹ At the other extreme are those mechanisms that publish a list of all past and pending complaints along with a description of the status of each, links to documentation submitted by the complainant, the DFI's response to the allegations raised in the complaint, other documents related to the complaint process and a reasonably detailed analysis of the IAM's decision regarding its treatment of the complaint.⁴⁰ Even within that group, not all mechanisms publish ineligible complaints. Approximately half of the IAMs fall somewhere between these two extremes. For example, the EIB's **CM** has only this year published online a complete registry of complaints received. However, due to EU privacy laws, it has yet to provide documentation or information regarding most of those cases.⁴¹ Other IAMs post the text of complaints and disclose some

³⁹ For example, the following IAMs do not post any information regarding past or existing complaints on their respective websites, and are therefore excluded from the present research: Ombudsperson of the Brazilian Development Bank, www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Navegacao_Suplementar/Ouvidoria; Compliance Officer of Export Development Canada, <http://www.edc.ca/EN/About-Us/Management-and-Governance/Compliance-Officer/Pages/default.aspx>; Examiner of Nippon Export and Investment Insurance, <http://www.nexi.go.jp/en/environment/objection.html>; or Australian Export Finance and Insurance Corporation, <http://www.efic.gov.au/about-efic/our-organisation/complaints-mechanism/>.

⁴⁰ The Independent Review Mechanism of the African Development Bank, <http://www.afdb.org/en/about-us/structure/independent-review-mechanism-irm/requests-register/>, Inspection Panel of the World Bank, <http://ewebapps.worldbank.org/apps/ip/Pages/AllPanelCases.aspx>, Compliance Advisor/Ombudsman of the International Finance Corporation and Multilateral Investment Guarantee Agency, <http://www.cao-ombudsman.org/cases/>, Office of Accountability of the Overseas Private Investment Corporation, <https://www.opic.gov/who-we-are/office-of-accountability/public-registry-cases>, and Independent Complaints Mechanism of FMO, <https://www.fmo.nl/project-related-complaints>), and DEG, <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Beschwerdemanagement/#4>), provide most of this information for each case, including the text of the complaint, management's response, and the analysis undertaken by the respective IAM.

⁴¹ The website of the Complaints Mechanism of the European Investment Bank contains an index listing the names of complaints received along with limited information concerning the nature of the allegations. See European Investment Bank, Complaints Mechanism Cases, <http://www.eib.org/about/accountability/complaints/cases/index.htm>. However, except in a few recent instances, see, e.g., Belgrade By-Pass, Serbia, <http://www.eib.org/about/accountability/complaints/cases/belgrade-by-pass.htm>, the index generally does not provide copies of related documentation and for many cases lacks a description of the CM's analysis of complaints received. The CM publishes an annual Complaints Mechanism Activity Report, which provides (1) casework statistics, including an overview of the number of complaints received, deemed inadmissible, closed, or registered; (2) descriptions of some closed and pending cases; and (3) an annex containing a full list of all complaints received, their general

³⁸ *At your service*, European Ombudsman, <http://www.ombudsman.europa.eu/atyourservice/couldhehelpyou.faces> (last visited Nov. 12, 2015).

information about their own analyses and the status of cases, but in varying degrees of detail.⁴²

For a complaint process to work, complainants not only need information about and from the IAMs: first and foremost, they need access to information regarding the activities financed by DFIs. The amount of information available and the format in which it is available varies across DFIs and even across activities. For example, the AfDB posts project documents but not all in one place, requiring potential complainants to search through the DFI's database for all relevant information. The Dutch Development Bank FMO only recently started disclosing some of the activities it finances. However, the information provided is extremely limited, even for projects with the highest environmental and social risk. For each project disclosed, FMO publishes three paragraphs identifying the client, the objective and FMO's justification for the project. There is no link to an environmental and social impact assessment.

DFIs not only support traditional project finance where the funds are destined to one particular activity or project, but now also make use of many different types of financing vehicles that make it more difficult for those affected to discover the source of the financing. One example is financing through other 'financial intermediaries', such as private equity funds or commercial banks. DFIs that fund financial intermediaries, like the IFC, will identify their direct client, but often not the final recipients of the funds. In other words, the identities of their clients' clients are rarely disclosed and nor are the location and purpose of the sub-projects supported by their clients. Although those affected by these sub-projects are entitled to file a complaint to the relevant IAM should they experience harm, in practice it is almost impossible for project-affected people to know that a DFI is involved in a project at all.⁴³

subject matter, status within the complaint procedure, and outcome, where relevant. See, e.g., European Investment Bank, Complaints Mechanism Activity Report 2014 (Nov. 2014), <http://www.eib.org/infocentre/publications/all/complaints-mechanism-annual-report-2014.htm>.

⁴² For example, the Independent Consultation and Investigation Mechanism (MICI) of the Inter-American Development Bank (<http://www.iadb.org/en/mici/public-registry.1805.html>) and the Project Complaint Mechanism (PCM) of the European Bank for Reconstruction and Development (<http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>) provide the complaint as well as a reasonably detailed analysis of the determination made in respect of the complaint, but do not consistently provide DFI management's response to the allegations raised in the complaint as a separate and independent document. The Examiner for Environmental Guidelines of the Japan International Cooperation Agency (http://www.jica.go.jp/english/our_work/social_environmental/objection/index.html) provides a link to requests for examination, an indication of the phase of assessment, and a link to a document setting forth the ultimate determination made by the Examiner for the Guidelines, but provides very limited or no analysis of the reasoning that led to its determination. The Special Project Facilitator (SPF) of the Asian Development Bank (<http://www.adb.org/site/accountability-mechanism/problem-solving-function/complaint-registry-year>) posts complaints and analysis of complaints accepted for review, but does not provide a detailed analysis when complaints are rejected for further handling. However, the ADB's Compliance Review Panel (CRP) does publish comprehensive information about the complaints it handles (<http://compliance.adb.org/dir0035p.nsf/alldocs/BDAO-7XGAWN?OpenDocument>). The Canadian Office of the Extractive Sector's Corporate Social Responsibility Counsellor provides only limited analysis of its assessment of complaints that are rejected or do not proceed to full review (http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?lang=eng).

⁴³ Kate Geary, Oxfam. Int'l, The Suffering of Others: The Human Cost of the International Finance Corporation's

3.6. RIGHTS-COMPATIBILITY

The outcomes of complaints processes can only be **rights-compatible** if the standards against which the mechanisms are measuring DFI performance are themselves rights-compatible. Unfortunately, very few of the DFIs make explicit commitments to human rights. Those DFIs that do so – like the US Overseas Private Investment Corporation (**OPIC**) and the European Investment Bank (**EIB**) – fail to operationalise them in the form of enforceable policies and guidance notes, integrated into project design. The UN Special Rapporteurs have urged the World Bank to adopt human rights standards in its environmental and social safeguards, currently under review.⁴⁴ In a recent report to the UN General Assembly, the UN Special Rapporteur on Extreme Poverty and Human Rights concluded that, “*the existing approach taken by the [World] Bank to human rights is incoherent, counterproductive and unsustainable. For most purposes, the World Bank is a human rights-free zone. In its operational policies, in particular, it treats human rights more like an infectious disease than universal values and obligations.*”⁴⁵

DFIs and their IAMs can also do more to protect the security of everyone involved in the complaint process – including complainants, consultants and CSOs. A recent report by Human Rights Watch documents the reprisals, threats, intimidation and baseless criminal charges faced by some complainants who have sought to use the Inspection Panel and the CAO (see Box I).⁴⁶ Beyond offering to keep complainants' identities confidential, IAMs have no other system in place to prevent or respond to reprisals when they occur. Because DFIs often have country or regional offices – unlike the IAMs, which are located at DFI headquarters – their staff may be in the best position to intervene in the event of reprisals against complainants. However, DFIs seemingly have no system or protocol in place to address security risks to those who criticise DFI-financed activities. The ability to raise concerns about DFI-financed activities, without fear for one's safety or security, is critical to ensuring sustainable development, not to mention the adequate implementation of DFI consultation requirements. Without adequate guarantees of protection, the risk of reprisals may prevent people from filing complaints to IAMs, thus limiting access to remedy. Unfortunately, the **Inspection Panel's** Ethiopia case described in the next chapter, demonstrates what can happen when DFIs and IAMs lack the systems to assess, prevent and address security risks.

Lending Through Financial Intermediaries (Apr. 2015), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf [hereinafter Oxfam Int'l, The Suffering of Others].

⁴⁴ Letter from UN Special Mandate Holders, to Jim Yong Kim, World Bank Pres. (Dec. 12, 2014) (available at <http://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf>).

⁴⁵ United Nations General Assembly, Report of the Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. on the Human Rights Policy of the World Bank*, U.N. Doc. A/70/274 (Aug. 4, 2015), http://www.un.org/ga/search/view_doc.asp?symbol=A/70/274.

⁴⁶ Human Rights Watch, At Your Own Risk: Reprisals against Critics of World Bank Group Projects 3 (June 22, 2015), https://www.hrw.org/sites/default/files/report_pdf/worldbank0615_4up.pdf.

BOX #1:

ASSAM
TATA
TEA

DFI/IAM:	IFC/CAO
DFI CLIENT:	Assam Tata Tea
COMPLAINANT:	Peoples' Action for Development (PAD), Promotion and Advancement of Justice, Harmony and Rights of Adivasis (PAJHRA) and Diocesan Board of Social Services (DBSS)
SUPPORTING CSO:	Accountability Counsel
DATE OF FILING:	2 February 2013
REASON FOR FILING:	The complaint was about numerous labour rights violations, including living and working conditions, inability to form a democratically elected union, failure to pay minimum wages and violations regarding a worker shareholder programme.
STATUS:	The case is currently in compliance review

In 2013, three local organisations in the northeast Indian state of Assam filed a complaint to the CAO on behalf of workers living and working in tea plantations owned by Amalgamated Plantations Private Limited (formerly Tata Tea Ltd). Throughout the CAO process, the company has restricted representative and supporting organisations from freely accessing workers' living quarters to engage with them on understanding and making decisions about the CAO process. Furthermore, workers have reported numerous instances of intimidation and retaliation by tea plantation management for participating in the complaint process. During both the assessment and compliance review phases, the complainant organisations informed the CAO of instances of company retaliation against workers, as well as their own concerns of potential retaliation by government authorities as a result of their role in the complaint.

None of the IAMs has the authority to compel action to prevent or end adverse human rights impacts caused by DFI-financed projects. That authority currently rests only with the entity that initially approved the project, and often that is the DFI's board of directors. Some mechanisms, however - including the **PCM, IRM, CM** and **MICI** - may at any time during the complaint process, recommend to the DFI that it suspend financing or processing of the project at issue if they believe that serious, irreparable harm will be caused. It appears, however, that this power has never been invoked. All other IAMs could benefit from having (or asserting) the same authority, although the extent to which it helps ensure respect for human rights depends on their willingness to use it.

3.7. LESSONS LEARNED

The frequency with which IAMs find the same policy violations in their investigations demonstrates that DFIs are not sufficiently and systemically learning lessons from IAMs' cases to improve the implementation of their policies. One of the most striking pieces of evidence of this failure is the **World Bank's** recent Involuntary Resettlement Portfolio Review, which found "significant potential failures in the Bank's system for dealing with resettlement".⁴⁷ This dysfunction, and the attendant harms to those displaced, has continued despite the **Inspection Panel's** repeated findings of non-compliance with the involuntary resettlement policy over the years.⁴⁸ Improving the integration of IAM findings and lessons into future project design and implementation could be achieved through a management tracking system, perhaps similar to that used at the **ADB** with regard to ineligible complaints,⁴⁹ which records the measures taken by the DFI to address the concern(s) raised by complainants and the lessons the DFI has learned and will apply in the future.

Many DFIs invest repeatedly in the same client or sector, despite complaints filed related to those clients or activities. DFIs should not provide financing to clients found to be in non-compliance for activities likely to have similar environmental and social impacts unless and until those clients have remedied the situation and demonstrated their commitment and capacity to fully implement the environmental and social standards and prevent future harm.

⁴⁷ Social Development Department, World Bank, Involuntary Resettlement Portfolio Review: Phase II: Resettlement Implementation, (June 16, 2014).

⁴⁸ Submission to the World Bank's Safeguard Review and Update Process from the Inspection Panel, Lessons from Panel Cases: Inspection Panel Perspectives (May 2013), http://ewebapps.worldbank.org/apps/ip/Documents/IPN_Inputs_SafeguardsReview_May2013.pdf [hereinafter Inspection Panel Comments on World Bank's Safeguard Review].

⁴⁹ Asian Dev. Bank, *Accountability Mechanism Policy* 37, ¶1196 (2012), <http://www.adb.org/sites/default/files/institutional-document/33440/files/accountability-mechanism-policy-2012.pdf> (stating "At the end of the process of addressing the ineligible complaints forwarded to the operations departments by the OSPF or CRP, the operations department will produce a report summarizing the complaint, issues, actions taken to address the problems or issues, decisions or agreements by parties concerned, results, and lessons.").

Having an advisory mandate, like the **CAO's**, can also help IAMs shine a light on where DFI policy or its implementation should be improved. But even those IAMs without an official advisory mandate have found creative ways to identify and highlight trends in their own caseloads, often including their analyses in annual reports or, in the case of the ADB's **AM**, a 'Learning Report', which it publishes every three years. Regardless of the form it takes, however, this advice too often seems to go unheeded by the DFIs. For example, it should be obvious that lessons learned from the Inspection Panel's cases should inform the update of the World Bank's environmental and social safeguard policies. The cases provide a rich source of information about implementation challenges and policy gaps. Nonetheless, in the initial approach paper outlining the consultation process for the World Bank's safeguard review, the **Inspection Panel** was not mentioned.⁵⁰ In the absence of CSO demands and the Panel's own initiative, it is unclear whether the World Bank would have benefited from the Panel's insights.⁵¹

⁵⁰ World Bank, The World Bank's Safeguard Policies Proposed Review and Update: Approach Paper (Oct. 2012), <http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/safeguardsreviewapproachpaper.pdf>.

⁵¹ Inspection Panel Comments, Comments on the Second Draft of the Proposed Environmental and Social Framework from the Inspection Panel (June 17, 2015), <http://ewebapps.worldbank.org/apps/ip/Style%20Library/Documents/Inspection%20Panel%20Comments%20on%202nd%20Draft%20ESF%20-%2017%20June%202015.pdf>.

4

REFLECTIONS FROM THE GROUND: A QUALITATIVE OUTCOME ANALYSIS

Using the UNGP effectiveness criteria to assess the IAMs and DFIs presents a challenge because the criteria are focused primarily on the process, not the outcome. The true test of the effectiveness of a complaints process, however, is whether the grievance is resolved. Are complainants better off for having submitted a complaint? In this chapter, the authors examine the results produced by the IAMs and DFIs. Because the effectiveness of the IAMs and DFIs varies over time, the authors have focused on cases that have concluded during the year period from 1 July 2014 to 30 June 2015. As a result, the current chapter provides a snapshot of the recent performance of the IAMs and DFIs.

As discussed in Chapter 2, the majority of complaints filed to date have been closed prior to achieving any results. While many of these complaints are closed because they fail to meet the minimum registration and eligibility criteria, a substantial number are found eligible, but still fail to proceed to a substantive phase of the complaints process. The first section of this chapter takes a look at all complaints that failed to reach or complete a substantive phase of the process during the research period and why, according to the IAMs, they failed to do so.

There are relatively few IAM complaints that reached a result, as defined in Chapter 2, within the last year. The case studies that follow in the second section of this chapter are presented from the complainants' perspectives, describing how they experienced the process and what they think of the result. Because the cases are unevenly distributed across institutions, it is not possible to undertake a comparative analysis. Rather, the case studies present complainants' recent experiences from which to benefit when considering reforms to make the accountability system more responsive to the needs of rights-holders.

The theme emerging from the case studies mirrors what the authors heard from the broader spectrum of users: on the positive side, complainants generally report that they are treated fairly by the IAMs and appreciate that their concerns are taken seriously. In the Avianca case, for example, the CAO's compliance review validated the complainants' grievances. In terms of real changes on the ground, however, there is little to be seen. Half of the complainants in the Bujagali case received a commitment of compensation, although this has yet to be realised. However, the other half are still waiting to see if they can obtain a similar commitment.

The case studies also confirm what Human Rights Watch has already reported:⁵² complainants describe feeling pressure and receiving threats after filing complaints. In the following cases, neither the DFI nor the IAM seemed to respond adequately, confirming the need for both to develop systems to better protect complainants and respond to reprisals, if they occur.

⁵² Human Rights Watch, *At Your Own Risk: Reprisals against Critics of World Bank Group Projects*, *supra* note 46.

One conclusion that repeats itself throughout the case studies and the surveys that informed the previous chapter is that the failure to ensure redress for complainants is the result of the DFI's inability or unwillingness to commit to and implement measures that address complainants' grievances. Too often, complainants are left with a strong, compelling report by the IAM detailing significant deficiencies in the implementation of the DFI's environmental and social standards, but without an equally robust response from the DFI. Similarly, even where the DFI's client has made meaningful commitments to complainants through a dialogue process, the DFI rarely, if ever, contributes to the remedy, although it has contributed to the harm.

4.1. END OF THE ROAD: CASES THAT CLOSE PRIOR TO ACHIEVING A RESULT

The authors have no expectation that every complaint can or should complete the complaint process. For example, complaints that relate to activities in which the DFI is not involved are rightly dismissed. The significant number of complaints that have closed prior to achieving a result, however, merits a closer look in order to determine whether there are any unnecessary barriers or burdens that could be removed or alleviated.

Section 2.4 provides an overview of the percentage of complaints that fail either to meet eligibility requirements or reach a substantive phase of the complaint process. As indicated in Figures 9 and 10, some complaints do not advance through the substantive phase of the complaint process for reasons beyond the control of the mechanisms. This section focuses on the reasons why complaints do not advance that are the result of decisions made by the IAMs.⁵³ The report authors analysed the information provided on each IAM website regarding complaints closed prior to achieving a result during the period 1 July 2014 until 30 June 2015. That information (or the lack thereof) gave rise to the following seven broad categories:

1. *No explanation*: The mechanism provided no explanation for closing or dismissing the complaint.
2. *Withdrawn*: The complaint was withdrawn by the complainant(s).
3. *Complaint incomplete*: The complaint did not provide all of the requisite information to be eligible for consideration by the mechanism.
4. *Resolution outside IAM process*: The mechanism deemed the complaint resolved or in the process of resolution between complainant(s) and the DFI or borrower/client, outside the IAMs process, either: 1) through dialogue, consultation, mediation or similar dispute-resolution activities; or 2) through other actions undertaken by the DFI or borrower/client independently.
5. *Outside the mechanism's mandate*: The complaint fell outside the mechanism's mandate, 'jurisdiction', or authority because: 1) the activity or conduct that is

the subject of the complaint is not part of the DFI's active or proposed portfolio (i.e., it is not financed by, and/or is not being considered for financing from, the DFI); 2) the harm alleged in the complaint is not of the type that the mechanism is empowered to review; 3) the complainants failed to comply with one or more procedural prerequisites; and/or 4) the activities at issue otherwise fall outside of the substantive jurisdiction of the mechanism (for example, see Box 2).

6. *Parallel proceeding*: The mechanism declined to proceed to the substantive phase of the complaint process because there was pending litigation or other ongoing formal proceedings external to the financial institution regarding the subject of the complaint.
7. *Insufficient causal link*: The mechanism determined that the challenged conduct and/or alleged harm were too spatially or temporally attenuated from activities financed by the DFI or that the complaint had otherwise failed to assert a sufficient causal link between the conduct or harm in question and institutional financing.

BOX #2:

MINING DIALOGUE TECHNICAL ASSISTANCE, HAITI



DFI/IAM: World Bank/Inspection Panel

DFI CLIENT: Government of Haiti

FILER: *Kolektif Jistis Min an Ayiti* (Haiti Justice in Mining Collective) and affected communities

SUPPORTING CSO: NYU CHR&GJ and Accountability Counsel

DATE OF FILING: 7 January 2015

DATE OF CLOSURE: 6 February 2015

⁵³ Specifically, this section focuses on the reasons for ineligibility in Figure 8, the reasons why IAMs deemed problem-solving and compliance review were "unnecessary or inappropriate" in Figures 9 and 10, and the reasons why the IAMs deemed complaints resolved outside the complaint process in Figures 9 and 10.

REASON FOR FILING: The World Bank provided technical assistance to help the government of Haiti to draft a new national mining law. Complainants raised concerns that: 1) the mining law does not contain adequate protections for local communities and the environment; 2) the government lacks the capacity to adequately enforce any regulations in the new law anyway; and 3) the people of Haiti (and especially communities likely to be directly impacted by mining) have not been provided with adequate information about the new law and have not been adequately consulted about its development.

REASON CLOSED: Despite finding that the concerns were ‘serious and legitimate’, the Panel determined that reviewing the case would be outside its operational mandate, because the project was financed through a Bank-Executed Trust Fund to which the Bank’s operational policies (including the safeguard policies) do not apply.

Among the reasons why cases closed without reaching or completing a substantive phase of the complaint process, at least two merit further examination. The first is that DFIs and some IAMs are narrowly defining the scope of the project, which may exclude potential complaints that seek to challenge that definition through complaint processes. The second is that barriers to compliance review, due to narrow project definitions or discretion by the mechanisms, are exacerbated when IAMs pursue alternative processes that deviate from their procedures.

4.1.1. DEFINING THE SCOPE OF THE PROJECT

How a DFI – and its IAM – defines the scope of a given project can determine the availability of redress for project-related grievances. One reason several IAMs gave for not advancing certain cases to the substantive phases of the complaint process was the absence of a sufficient causal link between a project supported by the relevant DFI and the alleged conduct or harm. The IAMs’ reliance on this rationale underscores the importance of how a project’s scope is defined and how its impacts are understood. Defining the boundaries of a project always involves a judgement call: does the project encompass only those activities directly financed by the DFI or does it extend to other activities, not financed by the institution, but necessary to the viability of the project, or which would not occur *but for* the existence of the DFI-financed project? Does the project scope encompass the consequences of DFI-financed activities, and if so, what are the temporal or spatial limits on attribution of responsibility for adverse impacts to a project? These hotly contested questions⁵⁴

⁵⁴ See, e.g., Alf Jerve, Chairperson, World Bank Inspection Panel, Defining the boundaries of a project: Where does Bank accountability stop? Lessons from Panel cases and beyond, Presentation at World Bank Spring Meetings (Apr. 18, 2013) (presentation available at ewebapps.worldbank.org/apps/ip/Documents/IPN_SpringMeetingsAreaofInfluence_session_Apr2013.pdf).

are particularly thorny when a DFI provides budget support for broad, sector-wide reforms or activities (especially at the national level), but not necessarily specific activities undertaken within that sector pursuant to the reforms. Similar questions arise when a DFI finances the early, preparatory stages of a project, such as mineral exploration or large-scale infrastructure feasibility studies, but not the production or implementation phase, such as mineral extraction or the construction of a hydropower dam or other infrastructure installation.

Some IAMs appear more willing than others to question DFIs’ definitions of their own projects. In one example, the CAO did not accept the IFC’s narrow definition of a project’s scope. IFC had provided support for the development of a legal framework for special economic zones (SEZ) in Papua New Guinea, and a complaint raised concerns about one of the SEZ’s governed by the framework.⁵⁵ The IFC asserted that the alleged harms were not causally related to its project, which did not finance individual SEZs.⁵⁶ Although the CAO ultimately closed the case before undertaking a compliance review, it did not do so based on the IFC’s project definition but because the IFC’s advice had not yet been incorporated into Papua New Guinea’s legal framework. The CAO thus left open the possibility that the IFC could be held accountable for the consequences of its advice once implemented.

Not all IAMs adopt this approach, however. In another case, complainants asserted that the EBRD’s investment in a gold mining company, Lydian International, could lead to environmental and social harms from mining activities at the Amulsar Gold Mine, due to the inadequacy of social and environmental assessments.⁵⁷ The EBRD maintained that its equity investment in the mining company was approved for use only in mineral exploration and project preparation, not mining extraction or production activities. Accepting this narrow framing of the project, the PCM determined that the complaint was ineligible for compliance review because it focused on the potential impacts of the eventual mine, which the EBRD had not yet committed to fund.⁵⁸ This interpretation of the project scope fails to take into account the singular purpose of mineral exploration and project preparation activities – that is, to lay the groundwork for eventual mining – and the fact that, if

⁵⁵ Before being appraised for compliance review, this case had gone to the CAO’s problem-solving phase, resulting in a signed agreement between the parties. Consequently, according to the methodology described in Chapter 2, the case is considered to have reached a substantive phase, but because the agreement was not implemented, it is not considered to have reached a result. Following the ultimately unsuccessful problem-solving phase, the CAO considered whether to pursue compliance review and ultimately decided against it. Thus, while this case did reach a substantive phase (dispute resolution) the project provides a useful illustration of an IAM closing a case prior to compliance review because of an insufficient causal link between the harm alleged and the project.

⁵⁶ International Finance Corporation, Compliance Advisor/Ombudsman, Papua New Guinea/PNG SEZ-01/Madang Province, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=175.

⁵⁷ European Bank for Reconstruction and Development, Project Complaint Mechanism, DIF Lydian (Amulsar Gold Mine), Request Nos. 2014/03 and 2014/3, <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>.

⁵⁸ See Letter from CEE Bankwatch & SOMO to the EBRD Board of Directors (Feb. 24, 2015) (available at <http://grievancemechanisms.org/ltronaAmulsarfinal.pdf>).

successful, such activities would lead to a variety of environmental and social impacts associated with mineral extraction.

A determination about a project's boundaries relates to the substance of the complaint, and cannot be made without due consideration of the allegations or a thorough appraisal by the IAM. Unquestioning reliance by the IAMs on the DFIs' own descriptions of their projects undermines the IAMs' ability to fulfil their role of providing relief to complainants when a DFI violates either the letter or the spirit of applicable policies and guidelines. Moreover, DFIs may be unwittingly limiting their own effectiveness by narrowly defining their projects and thereby excluding potential benefits as well as adverse impacts from their scope.

4.1.2. BALANCING COMPLIANCE REVIEW AND PROBLEM-SOLVING

Data regarding cases that have closed before reaching or completing a substantive phase of the complaint process this past year reflect persistent obstacles for complainants seeking a full compliance review. As highlighted in Chapter 2, of the 128 eligible, concluded cases that did not reach compliance review, in 73% the compliance review was not initiated because the IAM decided it was unnecessary or inappropriate. Even after a complaint had been deemed eligible, if problem-solving was unavailable or had proven unsuccessful, or if complainants sought compliance review directly, IAMs still retained significant discretion in deciding whether to evaluate the DFI's adherence to its own policies. That discretion may be exercised in unclear and unpredictable ways.

At some mechanisms, like the CAO, which have both a problem-solving function and a compliance function, there were notable discrepancies in the types of issues that the IAM was willing to address through each function. Although IAM procedures may indicate that the same complaint can be pursued through problem-solving, compliance review, or both,⁵⁹ that is often not the case. Some types of grievances may in fact be too individual or specific to be addressed through a formal compliance investigation aimed at addressing systemic problems or patterns. But it is not always clear where that line is drawn.⁶⁰ For example, in

some cases in which problem-solving was unsuccessful, the CAO went on to determine that the grievances at issue were not of the type amenable to compliance review because, even though they related to the social impacts of an IFC-finance project, they were not of sufficient magnitude or severity.⁶¹ This is a particularly troubling outcome when the client is the one whose unwillingness to engage in dispute resolution or preference for compliance review is what triggers the complaint's transfer to the IAM's compliance function – only to then have the complaint closed without a full investigation.⁶² In such cases, complainants are left without any meaningful response by the IAM/DFI to their grievances.

In other instances, the IAMs' use of alternative procedures or discretion authorized by their standard procedures forecloses compliance review while simultaneously falling short of problem-solving. For example, the World Bank's Inspection Panel (IP) handled two complaints under its new 'Early Solutions approach' (or 'Pilot Program').⁶³ In another case closed this past year, the IP used a controversial interpretation of its standard procedures by first suspending consideration of the complaint while World Bank Management sought to address the concerns raised by the complaint and subsequently recommending against investigation after determining that Management's actions sufficiently addressed the substance of the complaint (see Box 3). The use of these procedures, especially when it is unclear how they will apply, threatens predictability for complainants.

Complainants have a right to opt for problem-solving as an alternative to compliance review or as a first step in addressing their grievances. Indeed, directing complaints to mediation or other negotiated dispute resolution as a first step may prove to be an effective way to prevent or mitigate harms. But the approach taken in the IP's Early Solutions approach does not qualify as mediation or problem-solving. The pilot programme lacks any procedural safeguards to counteract the inherent power imbalance between the complainants and bank management, as well as other project actors. The absence of a mediator, for example, or any of the other protections, checks and balances that mediation would have, sets the pilot programme apart from formal problem-solving processes. The pilot programme is not well suited to ensuring that complainants

investigation." IFC Compliance Advisor/Ombudsman, Compliance Appraisal: Summary of Results, Yanacocha, Complaints 04-07 (May 29, 2015), http://www.cao-ombudsman.org/cases/document-links/documents/CAOAppraisalofYanacocha_May292015_forweb_000.pdf (emphasis added).

⁵⁹ See, e.g., European Inv. Bank, The EIB Complaints Mechanism—Principle, Terms of Reference and Rules of Procedures (Oct. 2012), http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf; European Bank for Reconstruction and Dev., *Approval of New Governance Policies*, <http://www.ebrd.com/what-we-do/strategies-and-policies/approval-of-new-governance-policies.html> (linking to the 2014 updates of the Environmental and Social Policy, Public Information Policy, and PCM Rules of Procedure); Dutch Development Bank [FMO], *Independent Complaint Mechanisms* (2013), https://www.fmo.nl/1/en/library/download/urn:uuid:el5d0940-2f57-4dd8-be94-cfe11101218a/independent+complaints+mechanism+fmo.pdf?format=save_to_disk&ext=.pdf; German Development Bank [DEG], *Independent Complaints Mechanism* (2013), https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/DEG_Complaints-Mechanism_2014_05.pdf.

⁶⁰ It is not clear, for example, what the CAO means by "substantial concerns" or "systemic importance," in the following oft-repeated phrases: "complaints ... indicative of *substantial* concerns regarding the environmental and social outcomes of the project or issues of *systemic importance* for IFC such that would merit a compliance

⁶¹ See, e.g., IFC Compliance Advisor/Ombudsman, Compliance Appraisal Report: Appraisal of IFC investment in Harmon Hall, Mexico (Apr. 8, 2015), http://www.cao-ombudsman.org/cases/document-links/documents/CAOCompliance_AppraisalReport_Mexico_HarmonHall02-06and08_Apr082015.pdf

⁶² See, e.g., CAO Cases, Chile: Hidromaule-01/San Clemente, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=226; IFC Compliance Advisor/Ombudsman, Compliance Appraisal: Summary of Results, IFC Investment in Hidromaule, Chile (June 22, 2015), http://www.cao-ombudsman.org/cases/document-links/documents/CAOCompliance_AppraisalReport_Chile_Hidromaule-01_06222015_forweb.pdf.

⁶³ World Bank Inspection Panel, Paraguay: Sustainable Agriculture and Rural Development Project, <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?Caselid=100>; World Bank Inspection Panel, Nigeria: Lagos Metropolitan Development and Government Project, <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?Caselid=94>.

meaningfully participate in the design and implementation of measures to address their own grievances.

The sequencing of IAM functions may affect the ability of the complaint to reach the other phase, or the outcomes of either or both phases. Complainants should be allowed to choose which phase they want to go to first (problem-solving or compliance), or to pursue both simultaneously. The efficacy of dialogue and negotiated dispute resolution depends greatly on the complainants' knowledge of and capacity to assert their rights. Sometimes, having the benefit of the information and analysis of an IAM's compliance review may help to rectify power imbalances between the complainants and the DFI or its client. At other times, the substance and process of the problem-solving phase (including its successes and failures) may actually bring to light systemic issues that require review through a compliance phase. At a minimum, whatever the sequence in which complaints are examined, IAMs should ensure that the results of problem-solving are no less protective than what is required by the DFI's environmental and social standards.

BOX #3:

SECOND RURAL ENTERPRISE SUPPORT PROJECT, UZBEKISTAN



DFI/IAM:	World Bank/Inspection Panel
DFI CLIENT:	Republic of Uzbekistan
COMPLAINANT:	Association for Human Rights in Central Asia, Human Rights Society of Uzbekistan 'Ezgulik' and Uzbek-German Forum for Human Rights
DATE OF FILING:	4 September 2013
DATE OF CLOSURE:	19 December 2014
REASON FOR FILING:	No adequate measures in place to prevent World Bank funds from contributing to forced and child labour
REASON CLOSED:	The Panel found that Management was taking adequate measures to address the non-compliance.

The Inspection Panel determined that an investigation was not warranted without taking into full account complainants' input and research, relying instead, wholly, on promises from the Government of Uzbekistan and World Bank Management. The result is that the World Bank continues to finance key components of Uzbekistan's forced labour system for cotton production, even though the Panel found *"it is plausible that the Project can contribute to perpetuating the harm of child and forced labour"*, a violation of international law. The combined actions of the World Bank Management and the IP have sent the message that the Bank is willing to finance forced labour.

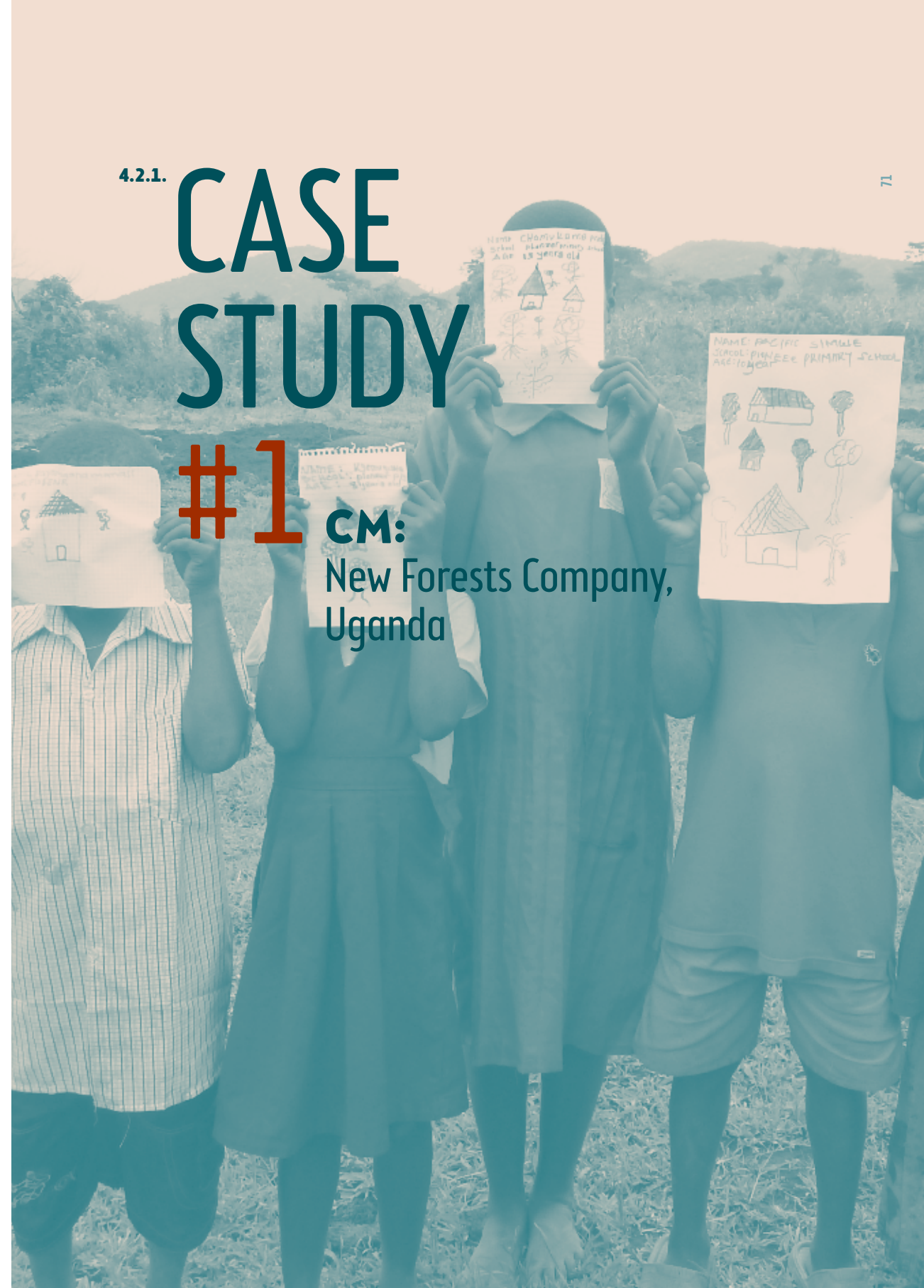
Bank Management did not make progress with the Government on implementing measures to address the root causes of forced labour that "go beyond the farm level". The government controls the entire cotton sector, including inputs, procurement and sales of cotton. Farmers are legally obliged to deliver an annual, state-established quota under threat of penalty, and the government sets its procurement price below its own estimate of the cost of production. While the low procurement price precludes farmers from hiring labour or investing in equipment or farm improvements, all income from cotton sales disappears into the Selkzofond, a fund in the Finance Ministry to which only the highest-level officials have access.

Bank Management's mitigation measures at the project level cannot be implemented in a manner that will prevent Bank financing from being linked to the government's centralised system of forced labour. In particular, one of the key measures – effective, independent third-party monitoring – is not currently feasible in Uzbekistan. While Bank Management expects the International Labour Organization (ILO) to conduct monitoring, two fundamental obstacles remain unresolved: 1) the government refuses to acknowledge its violation of ILO Convention No. 105; and 2) the government's control of the trade unions' and employers' groups deprives the ILO of social partners to conduct independent monitoring. Another mitigation measure, a 'feedback mechanism', lacks all fundamental features of a complaint system: protection of the complainant from retaliation, providing remediation to the victim of the harm and holding the perpetrator of the harm accountable to prevent repeat occurrence. Finally, Bank Management has not worked to enable independent civil society monitoring of the project areas without risk of reprisals. Nor has Bank Management taken direct measures when reprisals have occurred;⁶⁴ instead, it has relied on UN agencies to address reprisals with the Uzbek government.

⁶⁴ See Cotton Campaign, *Uzbek government subjects human rights defenders to body-cavity searches* (Oct. 1, 2015), <http://www.cottoncampaign.org/uzbek-government-subjects-human-rights-defenders-to-body-cavity-searches.html>.

4.2. THE LUCKY FEW: CASES THAT ACHIEVED RESULTS

Twelve cases achieved results during the year period from 1 July 2014 to 30 June 2015: five at the CAO of the International Finance Corporation (IFC); three at the IP of the World Bank; one at the AM of the Asian Development Bank (ADB); one at the Examiners of the Japan International Cooperation Agency (JICA); one at the ICM of the Dutch Development Bank (FMO) and the German Development Bank (DEG); and one at OA of the US Overseas Private Investment Corporation (OPIC).⁶⁵ One further case is included here, at the CM of the European Investment Bank (EIB), because information initially provided on the CM's public registry indicated that it had achieved a result, but the case registry has since been updated, which clarified that no result had been achieved. Inability to contact complainants and practical considerations prevented the authors from researching all 12 cases. What follows are case studies for the seven cases in which the authors were able to interview the complainants, using the questions listed in Annex 4.



4.2.1.

CASE STUDY

#1

CM:

New Forests Company,
Uganda

⁶⁵ The OA/OPIC case relates to OPIC's investment in Buchanan Renewables Biomass. The OA received a complaint from affected communities regarding this investment, but it was declared inadmissible because the project had already closed. OPIC management then requested that the OA should perform an independent review of the project. For more information, see: <https://www.opic.gov/who-we-are/office-of-accountability/buchanan-renewables>.

This case was originally included in this report because, at the time of drafting, the EIB website indicated that it was closed on 20 November 2014 and had achieved a mediated solution.⁶⁶ However, as discussed in more detail below, the CM has since released additional public information about this case clarifying that the CM never undertook a mediation process, nor did it complete a compliance review. Instead, complaints were addressed by the CAO, and the last process of dispute resolution associated with this complaint closed in May 2014, outside the research window. Nevertheless, a brief background is provided below.

In 2004, the New Forests Company (NFC), a London-based commercial timber company, began negotiating with the Ugandan Government to establish timber plantations in Uganda. NFC's investors in the proposed project included the commercial bank HSBC as well as the EIB and the IFC through its investment in a private equity fund called the Agri-Vie Agribusiness Fund. Uganda granted NFC a licence to develop three timber plantations totalling around 20,000 hectares in the Mubende and Kiboga districts in central Uganda and the Bugiri district in eastern Uganda. By 2011, NFC had planted around 12 million pine and eucalyptus trees on 9,300 hectares and was employing more than 1,400 people. However, the establishment of the plantations led to the forced removal of around 22,500 or more people in Mubende and Kiboga districts combined.⁶⁷

As this report was going to press, the CM posted its Conclusions Report on this project,⁶⁸ dated November 2014, which detailed its engagement in the case. In October 2011, in response to a report by Oxfam that documented the evictions,⁶⁹ the EIB President requested that the CM should investigate the allegations. The CM suspended its investigation after one week, "pending the results of different investigation and mediation processes" including the mediation facilitated by the CAO.⁷⁰ However, the CAO did not receive complaints about NFC's activities in Mubende and Kiboga until a month after the CM suspended its investigation. These complaints were accepted, and while initially the CAO considered pooling resources with the EIB, the mediation process began and ended without the formal involvement of the CM. The CAO mediation process resulted in final agreements being reached in July 2013 and May 2014 in the Mubende and Kiboga district complaints, respectively. The agreements represent the 'full and final settlement'

⁶⁶ EIB Complaints Mechanism, NFC Forestry Project, Uganda, <http://www.eib.org/about/accountability/complaints/cases/nfc-forestry-project.htm>.

⁶⁷ For more information, see generally Oxfam Int'l, *The New Forests Company and its Uganda Plantations: Oxfam Case Study* (Sept. 2011), <https://www.oxfam.org/en/research/new-forests-company-and-its-uganda-plantations-oxfam-case-study>.

⁶⁸ EIB Complaints Mechanism, NFC Forestry Project, Complaint MC/E/2011/13, Conclusions Report (Nov. 20, 2014), <http://www.eib.europa.eu/attachments/complaints/2014-11-20-letter-from-eib-sg-nfc-forestry-project-final-reply-annex-conclusions-report.pdf> [hereinafter EIB Complaints Mechanism, NFC Forestry Project Conclusions Report].

⁶⁹ Oxfam Int'l, *The New Forest Company and its Uganda Plantations: Oxfam Case Study*, *supra* note 67.

⁷⁰ EIB Complaints Mechanism, NFC Forestry Project Conclusions Report, *supra* note 66.

between the communities and NFC on the issues set out in their respective complaints before the CAO.⁷¹ Pursuant to the agreements, the NFC agreed to support the founding of a local cooperative society and to "work closely with the co-operative and its members to build more solid and lasting mutually beneficial relations with the community".⁷² Currently the CAO is monitoring the implementation of the agreements over the course of four years to ensure their "smooth implementation, sustainability and success".⁷³

After the conclusion of the CAO's mediation process, the CM determined that a full investigation was unnecessary and closed the case.⁷⁴ According to the CM's website, a follow-up is scheduled for 20 November 2015.⁷⁵ The CAO's Operational Guidelines that were in effect at the time the complaints were filed precluded the possibility of a compliance review following the successful conclusion of a mediation process. As a result, there will be no investigation of this project by either IAM to determine whether the lenders complied with relevant environmental and social standards, no contribution by the lenders to redress the harms the community suffered, and no lessons learned to improve future projects.

⁷¹ CAO Cases, Uganda/Agri-Vie Fund-02/Mubende, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=181.

⁷² CAO Cases, Uganda/Agri-Vie Fund-01/Kiboga, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=180; CAO Cases, Uganda/Agri-Vie Fund-02/Mubende, *supra* note 70.

⁷³ CAO Cases, Uganda/Agri-Vie Fund-01/Kiboga, *supra* note 72; CAO Cases, Uganda/Agri-Vie Fund-02/Mubende, *supra* note 71.

⁷⁴ EIB Complaints Mechanism, NFC Forestry Project Conclusions Report, *supra* note 66, at 6.

⁷⁵ EIB Complaints Mechanism, NFC Forestry Project, Uganda, *supra* note 66.

CASE STUDY

#2

CAO:

Aerovías del Continente
Americano S.A. (Avianca),
Colombia

BACKGROUND: Avianca (*Aerovías del Continente Americano S.A.*) is one of the largest commercial airlines in Latin America and operates from its main base at El Dorado International Airport in Bogotá, Colombia. In 2009, the IFC provided a US\$50 million corporate loan to Avianca and its subsidiaries to facilitate the company's plans to renew its fleet. The aim was to reduce costs, improve efficiency and safety, and to provide a better passenger service.

THE COMPLAINT: In November 2011, a complaint was submitted by the International Trade Union Confederation (ITUC)/Global Unions Washington Office in cooperation with the International Transport Workers' Federation (ITF). The complaint also reflected consultation with Colombian affiliates of ITF: the national airline workers' union (*Asociación Colombiana De Auxiliares De Vuelo - ACAV*) and the national civil aviation union (*Asociación Colombiana De Aviadores Civiles - ACDAC*), representing workers at Avianca.⁷⁶ The complainants raised various concerns related to labour rights violations at Avianca, as well as violations surrounding the right to freedom of association. First, that Avianca violated IFC Performance Standard 2 (PS2) – Labor and Working Conditions – in particular by discriminating against union members and taking various measures to discourage union membership. Secondly, that IFC failed at various stages in the project cycle to properly manage issues related to its client's compliance with PS2. Thirdly, that IFC and/or its client failed to disclose documents as required by the IFC Performance Standards and Access to Information Policy. The final allegation was that IFC failed to conduct a rigorous assessment of PS2 compliance of Taca Airlines subsequent to its merger with Avianca.⁷⁷

THE RESULT: During the assessment process, local unions expressed their willingness to engage in a dispute resolution process with Avianca convened by the CAO. However, Avianca was not willing to engage as they believed the unions had not yet exhausted the internal channels of communication. As a result, the case was transferred to CAO compliance. The CAO compliance investigation was disclosed on 18 May 2015, nearly four years after the complaint was submitted and over two years after the CAO appraisal determined that an investigation was warranted.⁷⁸ It is sharply critical of IFC's handling of serious deficiencies at Avianca in respecting its employees' freedom of association. The report states that, in light of information IFC had received from Colombian unions and the ILO prior to approval of the

⁷⁶ Letter of complaint regarding Avianca, Colombia, to the IFC Compliance Advisor/Ombudsman (Nov. 14, 2011) (available at http://www.cao-ombudsman.org/cases/document-links/documents/Aviancacomplaint_111411_web.pdf).

⁷⁷ IFC Compliance Advisor/Ombudsman, Compliance Appraisal for Audit of IFC regarding Avianca S.A., Colombia: Case of Complaint from Global Unions on behalf of unions representing employees of Avianca January (Jan. 8, 2013), http://www.cao-ombudsman.org/cases/document-links/documents/CAOAppraisalReport_Avianca_January82013.pdf.

⁷⁸ IFC Compliance Advisor/Ombudsman, CAO Investigation of IFC Investment in Avianca, Colombia (May 18, 2015), <http://www.cao-ombudsman.org/cases/document-links/documents/CAOInvestigationReportAvianca-May182015.pdf>

Avianca loan, it should not have made loan disbursements in 2009.⁷⁹ The CAO also criticises IFC for its failure to require Avianca to disclose its action plans and assessments regarding compliance with IFC's labour standard obligations, in violation of IFC's 2006 Environmental and Social Sustainability Policy. CAO will monitor IFC's actions in response to this report and expects to issue a monitoring report within one year of the date of publication.⁸⁰

OUTCOME SATISFACTION:⁸¹ In general terms, the complainants are satisfied with CAO's compliance review, but dissatisfied with IFC's response to it. The complainants think that CAO's investigation report published on 18 May 2015 "was very well done, well documented and researched" and they are "really satisfied with its findings and the documentation of the facts, which is a 95% confirmation of the concerns presented in the submission of 2011".⁸² The complainants are particularly pleased with one specific finding: CAO finds that IFC's decision to disburse US\$35 million to the client in July 2009 was made without sufficient basis to meet the requirement of the 2006 Sustainability Policy that "IFC does not finance new business activity that cannot be expected to meet the Performance Standards over a reasonable period of time". They believe this may prevent comparable violations in the future, if the finding is taken into serious consideration by the IFC. In the Avianca case, it was clear for the complainants that "at the moment the company received the money, its attitude was that meeting the Performance Standards made no difference".⁸³ In a recent public statement, Sharan Burrow, ITUC General Secretary, said, "It is obvious that once Avianca received the payments on its IFC loan it ceased to take the standards seriously and saw compliance as voluntary".⁸⁴

The complainants' satisfaction with the CAO's report is in strong contrast to their opinion about the IFC's response to it, which they consider to be very weak and unsatisfactory. According to ITUC Director Peter Bakvis, there were no significant changes made to the project with regards to workers' rights: "The company practices that were documented when the complaint was submitted, continue

⁷⁹ Press Release, ITUC-ITF, *Avianca-Colombia: IFC should follow ombudsman's recommendations for labour standards compliance, say unions* (May 19, 2015) (available at <http://www.ituc-csi.org/avianca-colombia-ifc-should-follow?lang=es>) [hereinafter ITUC-ITF Avianca Press Release].

⁸⁰ *Id.*

⁸¹ This assessment is based on a telephone interview with Peter Bakvis, Director of the International Trade Union Confederation (ITUC)/Global Unions - Washington, DC office on June 29, 2015. Peter Bakvis, who speaks on behalf of one of the organisations that submitted the complaint did not wish to remain anonymous and agreed to have the interview recorded. The recording of the interview with Bakvis (in Spanish) is available for consultation. Telephone interview with Peter Bakvis, President, Int'l Trade Union Confederation (ITUC)/Global Unions - Washington, DC office (June 29, 2015).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ ITUC-ITF Avianca Press Release, *supra* note 79.



today and workers' rights are still not being respected".⁸⁵ Moreover, the complainants wrote a letter to the World Bank's president, Jim Yong Kim, at the beginning of June, asking him to address the CAO's findings. However, at the time of the interview they had not received any response from the Bank. A major change that the complainants did see as a result of submitting the complaint was that "Avianca repaid the whole loan in 2013, even before the term had expired. Thus, now despite the findings of CAO's report, the IFC has no capacity to leverage the company by financial measures to modify its practices."

When asked whether they would advise others to use this mechanism, ITUC's Director Bakvis responded he would do so "but as a last resort, taking into consideration the limitations of the CAO and its lack of capacity to modify the client's practices and the length of time of the whole process". In summary, they would recommend the use of the mechanism to obtain a well-documented and thoroughly researched investigation but not necessarily to resolve concrete immediate problems.

PROCESS SATISFACTION: On the whole, the complainants are satisfied with the complaint process, even though the many delays were frustrating and the process put further pressure on the complainants.

In terms of **accessibility** of the mechanism, the complainants highlighted that "the information available on the CAO's webpage explains quite well the process to

⁸⁵ Telephone interview with Peter Bakvis, *supra* note 81.

submit a complaint”.⁸⁶ Moreover, they feel that the process to file the complaint was not difficult and they were also supported throughout the process by the CAO’s staff. They were informed about the documents they required for the submission and other relevant information. The complainants did not encounter any obstacles regarding languages or costs. Nonetheless, the complainants feel that the complaint process added to the already existing pressure on Avianca workers by the company.⁸⁷

With regard to **legitimacy**, the complainants feel that the CAO made their best efforts to handle the complaint well. In their experience, the mechanism had a constructive attitude. Consequently, they considered the process, in general, to be fair. The only aspect that they identify as unfair, were the constant delays at each stage of the process. The complainants repeatedly expressed the view that the delays caused significant frustration, but they were always able to share that with the mechanism. Also, the requirement in the previous version of the CAO’s Operational Guidelines that the case must first go through the Ombudsman process was seen as an unnecessary delay and a “waste of time”⁸⁸ for the complainants, because the company had been reluctant to solve the problems from the very beginning.

In terms of **predictability**, the complainants were well aware before submitting the complaint, “that the process was not going to be quick, and that the process would not result in a cancellation of the loan”.⁸⁹ The CAO explained its limitations to the unions involved and warned them that the process would probably not resolve their problems regarding their objective to allow freedom of association.⁹⁰

Regarding **equitability**, the complainants were satisfied with CAO’s work, as the requirements for submitting the complaint were explained well. They felt supported with information and advice to fully understand the whole process and its objective. Finally, the complainants expressed some frustrations regarding **transparency** and the lack of information during the process. For example, “the CAO officially informed them about the decision of not carrying out a dispute resolution process several months after the decision was made”.⁹¹ Also, Bakvis stated that some CAO staff informed him in August 2014 that the final CAO investigation report was ready, but they had to wait nine more months until the CAO finally published the report in May 2015.⁹² According to Bakvis, this only happened after a personal meeting with

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

the CAO’s Vice-President, when he requested the publication of the document.⁹³ The complainants also mentioned that the CAO was privy to information it could not share with complainants.⁹⁴ In general terms, the complainants reported that the CAO informed them when there were particular obstacles or delays during the process, but did not do so proactively.⁹⁵ Moreover, there is still some information that has not yet been published on the webpage.

Because of IFC’s failure to respond to the CAO’s findings, the CAO process did not result in **rights compatible** remedies for the complainants. As stated before, complainants considered that “in terms of workers’ rights, which were the basis of the complaint, there were no significant changes or outcomes: the company practices that were documented when the complaint was submitted, continue today and workers’ rights are still not being respected,”⁹⁶ specifically workers still do not have freedom of association.

According to the IFC, they have **learned lessons** from this case. In its response to the CAO Compliance Investigation Report,⁹⁷ the IFC states that:

“in the eight years since IFC’s investment in Avianca, we have taken a number of steps to strengthen our practice regarding labor issues, including through capacity building and training of environmental and social (E&S) specialists on assessing and managing labor-related risks, developing internal and external guidance on managing labor issues, relying on the support of independent international labor experts, and having regular interaction with the Global Unions. IFC has also improved its disclosure practice as a result of the 2012 Access to Information Policy. We remain committed to continuous learning and improvement of our E&S risk management practice. IFC also agrees with CAO’s observations regarding the importance of looking at country and sector risks beyond the scope of IFC’s investment. As communicated in other recent IFC Management responses, we have made procedural and organisational changes to improve in this area.”⁹⁸

However, there are no systems in place to verify IFC’s claims of improved attention to labour issues. The only way to follow this up is after the next complaint to the CAO regarding labour issues.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ IFC Response to CAO Compliance Investigation Report in respect of IFC’s Investment in Avianca, Colombia (May 5, 2015), http://www.cao-ombudsman.org/cases/document-links/documents/Avianca_IFCPublicResponse_InvReport_May52015.pdf.

⁹⁸ *Id.*

CASE STUDY

#3

CAO:
Banco Financiera
Comercial Hondureña
(Ficohsa), Honduras

BACKGROUND: *Banco Financiera Comercial Hondureña* (Ficohsa) is the third largest bank in Honduras and one of Central America's most important banks. Following earlier investments in Ficohsa in 2008 to support trade finance, housing and loans to small- and medium-sized enterprises (SMEs), in May 2011 the IFC Board approved an equity investment (US\$32 million) and sub-ordinated debt investment (US\$38 million) in Ficohsa. Prior to making its equity investment, IFC identified that Ficohsa provides corporate financing in sectors that have significant, potential environmental and social (E&S) risk, such as energy, construction and agribusiness. It was the relationship between Ficohsa and *Corporación Dinant* that triggered CAO's concerns about IFC's investment in Ficohsa. *Corporación Dinant* (Dinant) is an integrated palm oil and food company with plantations totalling over 20,000 hectares in northern Honduras. In 2009, IFC committed a US\$30 million loan to Dinant of which US\$15 million was disbursed in November 2009. A second disbursement of US\$15 million has been delayed due to concerns regarding security and conflict issues around Dinant's plantations in the *Aguán Valley* since mid-2010.⁹⁹

THE COMPLAINT: In 2012, the CAO Vice-President triggered a compliance investigation on IFC's investment in Dinant.¹⁰⁰ This was in response to allegations about violence against farmers on and around Dinant's plantations in the Aguan Valley (Honduras) as the result of inappropriate use of private and public security forces under Dinant's control or influence. In the course of this investigation - the findings of which demonstrated significant failures in the IFC's assessment of risk and implementation of its environmental and social policies - CAO became aware that Dinant is one of Ficohsa's largest borrowers. As a result IFC had a significant exposure to Dinant through its equity stake in Ficohsa. As a result, the CAO Vice-President initiated a compliance appraisal of IFC's investment in Ficohsa in August 2013. In its appraisal report, released in December 2013,¹⁰¹ CAO concluded that IFC's environmental and social performance with regard to its investments in Ficohsa merited further enquiry and initiated a compliance investigation.

THE RESULT: CAO's investigation focused on IFC's performance, and, as such, does not make findings about Banco Ficohsa's action or inaction. CAO completed the investigation on 13 June 2014 and submitted the report to IFC for official response. Following clearance by the President, the final investigation report and IFC's response was released by CAO on 11 August 2014.¹⁰² The report describes material

⁹⁹ IFC Compliance Advisor/Ombudsman, CAO Investigation of IFC Environmental and Social Performance in relation to Investments in Banco Financiera Comercial Hondureña S.A. (Ficohsa) (Aug. 6, 2014), http://www.cao-ombudsman.org/cases/document-links/documents/CAOInvestigationofIFCRegardingFicohsa_C-1-R9-Y13-F190.pdf [hereinafter CAO Compliance Investigation Report - Ficohsa].

¹⁰⁰ See CAO Cases, Honduras/Dinant-01/CAO Vice President Request, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=188.

¹⁰¹ IFC Compliance Advisor/Ombudsman, CAO Compliance Appraisal of IFC investments in Banco Ficohsa (Dec. 4, 2013), http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Appraisal_Ficohsa_C-1-R9-Y13-F190.pdf.

¹⁰² CAO Compliance Investigation Report - Ficohsa, *supra* note 99.

shortcomings in the way that IFC discharged its environmental and social obligations in relation to the Ficohsa investment.

Thus, the report criticised the IFC for supporting Ficohsa without proper vetting, as its earlier findings against Dinant meant the IFC was now re-exposed to a company accused of fomenting land conflict and violence. The approval of the Ficohsa loan went ahead even after the IFC knew about the problems with the Dinant loan. Not only was Dinant Ficohsa's third largest client at the time of the loan, but the CAO also noted that, in 2012, Ficohsa reported a financial relationship with 64 Category A clients – those at high risk of causing negative environmental or social impacts. Of these, only 48% were in compliance with its environmental and social policies. The CAO found that despite this, the IFC did not identify measures its client should take to mitigate these risks: a large-scale failure of due diligence. The CAO investigation report also notes that, "Reviewing information available through the media, CAO notes reports of E&S concerns in relation to a number Ficohsa clients operating in the agribusiness, tourism, construction and hydropower sectors". IFC's lack of transparency regarding the identity of Ficohsa's high-risk clients makes it impossible to verify the full impact of these failures.¹⁰³ Finally, the report established that CAO will monitor IFC actions in response to the CAO findings and issue a monitoring report within the next year.¹⁰⁴

OUTCOME SATISFACTION: As described above, the CAO's investigation of IFC's investment in Ficohsa was triggered not by a complaint from affected communities, but by the CAO VP. One of the organisations active on the issue – the Plataforma Agraria Regional del Valle del Aguán – has engaged with the CAO and the IFC on this case. While they are not able to provide input about the process as complainants, they were able to express their views and perceptions about the outcomes and the way they were (or not) involved in the whole process, regarding both the Ficohsa and Dinant cases.

In the words of the interviewees,¹⁰⁵ "this is an unusual case because there was an audit at the request of CAO's Vice President but there was no complaint, so the campesino movements didn't have a participation space in the process."¹⁰⁶ That's why the conflict resolution phase was not contemplated and the complaint went directly to compliance. The same happen with regards the elaboration of the

¹⁰³ Oxfam Int'l, *The Suffering of Others*, *supra* note 43, at 7-10.

¹⁰⁴ CAO Communique, Summary of Key Findings - Compliance Investigation of IFC Environmental and Social Performance in relation to Investments in Banco Financiera Comercial Hondureña S.A. (Ficohsa) (Aug. 11, 2014) (available at http://www.cao-ombudsman.org/cases/document-links/documents/CAOCommunique_Ficohsa_SummaryofFindings_August112014.pdf).

¹⁰⁵ Telephone interview with members of the *Plataforma Agraria Regional del Valle del Aguán* (Aug. 7, 2015).

¹⁰⁶ Despite not having a formal participation space in the process, the interviewees affirmed that the CAO contacted them to get and provide information about the case when they were working on the audits.



action plans to follow up on the IFC's responses to the audits in the Dinant and Ficohsa cases: there was neither space nor recognition for the participation of the campesino movements. This, in turn, led to the presentation of two complaints to the CAO in 2014, this time directly by the affected communities, regarding Dinant and a Financial Intermediary (OLEOPALMA).¹⁰⁷

In terms of the outcomes of the process, interviewees agreed that the best outcome of CAO's involvement in the Dinant and Ficohsa cases were the reports produced. Generally, and with a few caveats, the interviewees thought the reports "helped support the claims and demands of the campesino movement."¹⁰⁸ The reports also "helped raise concern in the national and international media and public opinion about the situation of the campesino movement and the constant violations of human rights in the Aguán."¹⁰⁹ The CAO's reports were also useful as advocacy tools at the international level.

Despite this, interviewees were not satisfied with "the lack of formal participation before the audits" and, above all, "with the process following CAO's presentation of the reports to the IFC."¹¹⁰ In this sense, interviewees expressed the view that their

¹⁰⁷ See CAO Cases, Honduras/Dinant-03/Aguán Valley, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=223; CAO Cases, Honduras/Financial Intermediary (FI)-01, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=231. Even though the interviewees expressed a series of concerns and views regarding these cases, they were not considered for the purpose of this report.

¹⁰⁸ Telephone interview with members of the *Plataforma Agraria Regional del Valle del Aguán*, *supra* note 105.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*



main dissatisfaction is related to IFC's involvement: "even though the institution was well aware of human rights violations in the Bajo Aguán and the irregularities that the campesinos had been highlighting regarding land transfer, they decided to finance Corporación Dinant anyway, and it was only after CAO's audits that this situation was unmasked."¹¹¹

Moreover, interviewees were also dissatisfied with IFC's responses to the findings of CAO's investigations and the institution's lack of commitment to solving the problem, specifically, and addressing poverty more generally: "IFC, as part of the World Bank Group, is breaking the mandate for which it was created after the Second World War: to fight poverty. Thus, through financing of corporations that manage lands and promote the displacement of campesinos, it is actually promoting more poverty, not fighting against it."¹¹²

PROCESS SATISFACTION: Since interviewees were not involved as complainants in the process, this evaluation is mostly not possible.

IFC's lessons learned: In April 2014, in response to pressure from both civil society and its own Board following the CAO's investigation report on the IFC's loan to Dinant, the IFC formulated an Action Plan and hired the Washington, DC-based Consensus Building Institute to determine whether mediation to resolve the conflicts between the government, Dinant and affected communities is possible.

¹¹¹ *Id.*

¹¹² *Id.*

The IFC also contracted the law firm Foley Hoag to advise it on security forces and human rights issues related to Dinant's Security Action Plan, and to facilitate an inquiry by a credible third party into past allegations related to the actions of Dinant's security forces in the Aguán Valley. Dinant has committed itself to implementing the Voluntary Principles on Security and Human Rights. For its part, the Honduran Government has created a special unit to investigate 147 killings that have taken place in the framework of the Aguán Valley conflict to determine the real causes, identify those responsible and secure their capture and prosecution.¹¹³

On 14 July 2014, the IFC published its *Management Response to the CAO Compliance Investigation Report on Banco Financiera Comercial Hondurena S.A. (Ficohsa)*.¹¹⁴ In its response, IFC management recognised some of CAO's findings and mentioned a series of institutional lessons learned from the report, including, *inter alia*:

"Overall the report correctly identifies shortcomings in previous practice, particularly as regards gaps in IFC's appraisal, prior to the IFC investment in Ficohsa in 2011 and a lack of due consideration of the potential environmental and social risks in the Bank's portfolio. Our practices and procedures at that time did not require us to cross check our FI client's key exposures against our own direct investment portfolio projects. Since then we have taken steps to close these gaps and facilitate better information sharing among staff working in different parts of the institution."

"IFC has been taking a number of steps that address many of the report findings, including through the 2012 Sustainability Framework updates and the Action Plan developed as a result of CAO's audit of IFC investments in Financial Intermediaries."

"IFC E&S risk management practice is constantly evolving and we seek to continually improve in this regard. When there are gaps in our approach, as was the case with our investments in Ficohsa, we remain committed to acting quickly, learning from our mistakes, and making the necessary course corrections for our future endeavours."

"We are also seeing positive progress in our work with Ficohsa to strengthen its E&S risk management systems and practices."

¹¹³ Oxfam Int'l, *The Suffering of Others*, *supra* note 43, at 10.

¹¹⁴ IFC Management Response to the CAO Compliance Investigation Report on Banco Financiera Comercial Hondurena S.A. (Ficohsa) (July 14, 2014), http://www.cao-ombudsman.org/cases/document-links/documents/IFCResponsetoCAOregardingFicohsa_July142014.pdf.

4.2.4. CASE STUDY

#4

CAO:
Bujagali Energy Project,
Uganda

BACKGROUND: The Bujagali Energy Project involved construction of a dam, hydropower plant and transmission lines at Uganda's Bujagali Falls, in south-eastern Uganda, between 2007 and 2012. The transmission line was built by the Uganda Electricity Transmission Company Ltd. (UETCL), Uganda's national transmission company. The IFC contributed US\$130 million in loans to the project,¹¹⁵ and several other financial institutions, including the EIB and the AfDB also provided financing and loan guarantees.

THE COMPLAINT:¹¹⁶ On 16 May 2011, community members impacted by the project filed a complaint with the CAO, designated Bujagali-5.¹¹⁷ In the Bujagali-5 complaint, community members alleged impacts caused by the main components of the project, including land taken for the transmission line, and damage to houses and health caused by blasting.¹¹⁸ The complaint also alleged numerous problems with the level of compensation offered to the community to offset these impacts. The CAO found the Bujagali-5 complaint eligible for further assessment in June 2011, which subsequently resulted in a CAO-led mediation process.

Prior to filing the Bujagali-5 complaint, a complaint naming approximately 550 community members was filed in 2008 in the Uganda national court against UETCL, alleging that community members had not received fair and adequate compensation for impacts caused by the project. Those named in the court case represented only a fraction of the several thousand people (possibly as many as 5,000¹¹⁹) who were impacted by the transmission line. The filing of the court case resulted in the creation of two groups within the community: those who were named in the court case (hereinafter 'Group 1') and those who were not named (hereinafter 'Group 2'). This became an important issue in the CAO mediation, as discussed below.

¹¹⁵ Press Release, World Bank, World Bank Group Approves Support for Bujagali Hydropower Project That Will Address Uganda's Power Shortages (Apr. 26, 2007) (available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:21315008~pagePK:41367~piPK:279616~theSitePK:40941,00.html>).

¹¹⁶ The project has resulted in numerous grievances, and since the year 2000, seven complaints related to the project have been filed with the CAO alone. The CAO has given numerical designations to each of these complaints. Compliance Advisor/Ombudsman, *CAO Cases, Uganda/Bujagali-02/Bujagali Falls*, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=114. See also National Association of Professional Environmentalists, *Unsettling Business: Social Consequences of the Bujagali Hydropower Project I2* (2014), http://nape.or.ug/wp-content/uploads/Bujagali_unsettlingbusiness.pdf [hereinafter "Unsettling Business"].

¹¹⁷ Complaint from the Bujagali Affected Community to the CAO (May 10, 2011), http://www.cao-ombudsman.org/cases/document-links/documents/2011_May16Complaint_redacted.pdf. The Bujagali-5 Complaint is the fifth of seven complaints related to the dam that have been filed with the CAO starting in 2000. It is the second of four complaints filed against BEL, which all remain open. This is the first of two cases that went through the CAO Ombudsman; the other two went through the CAO compliance function.

¹¹⁸ See Compliance Advisor/Ombudsman, *Ombudsman Assessment Report: Fifth Complaint (Bujagali Energy-05) Regarding the Bujagali Energy Ltd. Project 6-7* (Dec. 2011).

¹¹⁹ See *Unsettling Business*, *supra* note 116, at 8 (noting that approximately 5,000 individuals were affected by the transmission lines in the Bujagali interconnection project).

THE RESULT: The CAO lists the current status of the Bujagali-5 complaint as “facilitating settlement”.¹²⁰ The mediation process resulted in UETCL agreeing to make payments to Group 1 members no later than July 2015, with the exact amount of each payment to be decided on a case-by-case basis. UETCL did not meet its July 2015 deadline to make payments, but at the time of writing, it had started the process. There has been no official word yet on when another mediation process will begin to address the Group 2 members.

OUTCOME SATISFACTION:¹²¹ It is important to note that UETCL’s willingness to mediate at all – which the complainants attribute to the involvement of the CAO – was itself an important milestone for the community. UETCL had previously offered inadequate compensation to the community and then refused to engage in meaningful dialogue thereafter. Lack of progress in the Ugandan courts left the community feeling that they were out of options. Therefore, a new opportunity for dialogue with UETCL was a positive development. Nevertheless, the complainants were not satisfied with the outcome of the CAO mediation process for two main reasons. First, they felt that the schedule of rates of compensation that UETCL ultimately agreed to in the mediation were too low. Second, the complainants felt that the Group 2 members had been “left behind” because the mediation only addressed the claims of the Group 1 members, who made up a small fraction of the total population who suffered damages caused by the transmission line.

With regard to the agreed compensation, the complainants felt that, although UETCL did agree to mediation, in the end the community had to accept UETCL’s offer of compensation even though they did not consider it to be fair. They recognised that the CAO could not force UETCL to agree to pay a particular amount and felt that they had no choice but to agree to UETCL’s terms. With regard to the exclusion of the Group 2 community members from the mediation, both Aisha and Tom (two of the complainants) expressed dissatisfaction. As noted above, a large percentage of the impacted members of the community were not a part of the mediation because of UETCL’s position that those not named in the court case could not participate. Aisha felt that the “CAO left us out”. For Aisha and the other Group 2 members, the outcome of the mediation means little because they will not be receiving any compensation at this time. As Tom stated, “we are not all that satisfied because there are still some members who may be [left] behind, and they also need assistance”.

¹²⁰ Compliance Advisor/Ombudsman, *CAO Cases, Uganda/Bujagali Energy-05/Bujagali*, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=172.

¹²¹ The case study is based upon interviews with three members of the community named in the Bujagali-5 complaint: Tom Mpandi, Aisha Pande and Vincent Kamoga (collectively “complainants”), as well as inputs from the National Association of Professional Environmentalists (NAPE), the Ugandan organisation that helped the complainants to file their complaint. The complainants did not wish to remain confidential. They said, “We want our stories to be public, because our land was taken”. Additionally, although Vincent’s contributions are greatly appreciated, they are not discussed in detail in this case study because they focused mainly on a different mediation process.



PROCESS SATISFACTION: With regard to **accessibility**, the complainants felt that the CAO was accessible in the sense that, once they were informed of its existence, the National Association of Professional Environmentalists (NAPE), a Ugandan CSO, was able to file a complaint on their behalf with relative ease. In filing their complaint, the complainants stressed the importance of NAPE’s assistance. However, none of the complainants knew about the CAO or the possibility of filing a complaint until NAPE informed them of that option. Additionally, to their knowledge, neither Tom nor Aisha had ever been contacted by or met with the IFC during the course of the project or during the mediation process.

However, beyond the filing of the Bujagali-5 complaint, at the insistence of UETCL the CAO mediation was inaccessible to Aisha and the other people in Group 2.¹²² It was apparently UETCL’s position that, if community members did not join in the court case, that meant they were satisfied with the compensation that had initially been offered, and therefore were barred from challenging those amounts in another forum. However, Aisha noted that the fact that many community members were not named in the court complaint was not a “decision” on their part to accept the compensation that UETCL initially offered.

Finally, the CAO mediation only addressed impacts caused by the transmission line. Other issues raised in the Bujagali-5 complaint, including impacts caused by the

¹²² Aisha did state that, although she could not participate in this mediation, the CAO had been communicating with her so she felt involved in the process.

blasting, were not addressed in this process. The complainants would have preferred for all issues to have been handled in the same mediation.

The **predictability** of the process was also a mixed experience for the complainants. For example, initially, the CAO focused on the Group 2 members because they had grievances that were not yet being heard. The CAO mobilised the Group 2 members, registered them and said they would ensure that their grievances would be addressed. However, as discussed above, UETCL ultimately refused to negotiate with the Group 2 members. On the positive side, despite being a Group 2 member, Aisha noted that the CAO explained to her what it does, what the community should expect in the current mediation and provided updates on the process after the mediation began.

Despite the lack of satisfactory outcomes from the mediation, both Tom and Aisha seemed to agree on the **legitimacy** of the CAO. The main reason for this is that, prior to the CAO's involvement, UETCL refused to revisit its initial offers of compensation, and there was little prospect that the court case would change that position. The CAO was able to bring UETCL to the table, and according to Tom, the "CAO tried its best to make us meet and talk". Aisha stated that "the CAO itself has done good work" and she believed that the CAO would help the Group 2 members once the Group 1 mediation was finished.

The complainants' experience with the **transparency** of the CAO was also mixed. Aisha noted that the CAO's system for sharing information with the community – which involved designated contact people within the community – worked for her.



She stated, "they have helped us, because they were bringing information from the mediation parties". On the other hand Aisha and the other Group 2 members have no information on when another mediation that will address their claims might begin.

With regard to the **equitability** of the process, Tom noted that the community representatives felt free to present their feelings during the mediation. However, at times the UETCL representatives were rude and refused to listen to what the community was saying. Tom also recognised that the CAO "did what they could" to facilitate the process and did not necessarily have control over UETCL's behaviour.

The **rights compatibility** of the mediation process is an open question as of August 2015. While UETCL has agreed to compensate Group 1 members, it remains to be seen what compensation will actually be paid. Tom is already of the view that the range of rates agreed to by UETCL is too low. Tom's sense was that, after years of negotiations, the community essentially had to accept whatever UETCL decided to offer. Additionally, the Group 2 members, who make up a majority of those who were impacted, will not see any compensation as a result of this mediation.

The integration of **lessons learned** in the mediation process was not prioritised. Tom noted that since the mediation only resulted in compensation for past harm, there may be violations by the company again in the future.

In conclusion the interviews with the complainants made clear that the process of mediating a complaint with the CAO is extremely complex. For the community members, the fact that UETCL would even agree to negotiate seemed to be the greatest benefit of the CAO's involvement. However, those negotiations did not lead to the level of compensation that the complainants sought for the damages they suffered. Furthermore, the negotiations only addressed the claims of a small percentage of the community represented in the Bujagali-5 complaint. While the CAO does not necessarily have control over the behaviour of the parties regarding the mediation or the outcome of negotiations, this case study highlights the difficulties inherent in trying to get companies to agree to compensate community members for damage caused by large-scale development projects.

4.2.5. CASE STUDY

#5 ICM: Barro Blanco Hydroelectric Project, Panama

BACKGROUND: In August 2011, the Dutch and German development banks, FMO and DEG, each provided a US\$25 million loan to Generadora del Istmo S.A. (GENISA) for the construction of the Barro Blanco dam on the Tabasará River in the Province of Chiriquí in western Panama.¹²³ The project has been the subject of controversy and has garnered attention at the national and international levels.¹²⁴ In February 2015, the Government of Panama temporarily suspended construction of the dam after determining that the project was not in compliance with its own environmental impact assessment.¹²⁵ At the time of the loan agreement, neither FMO nor DEG had an independent accountability mechanism. In January 2014, FMO and DEG jointly established the ICM.¹²⁶

THE COMPLAINT: The dam, once completed, will flood 6.7 hectares of land belonging to the indigenous Ngöbe-Buglé territory (known as the comarca), created by law in 1997. The complaint was filed in May 2014 by the Cacica General of the Ngöbe-Buglé, the highest elected office representing the Ngöbe-Buglé people, and the Movimiento 10 de Abril (M-10), a grassroots organisation that represents the people who will be most directly affected by the dam. The complainants requested a compliance review. This was the first complaint handled by the ICM.

The complaint alleges a series of impacts to the environment and the rights of the Ngöbe-Buglé people. First and foremost, the complainants assert that they were not consulted about the project nor was the free, prior and informed consent of the Ngöbe-Buglé people obtained in a manner consistent with the procedures set forth in the law establishing the comarca. The area to be flooded is home to six large,

¹²³ FMO-DEG Independent Complaints Mechanism, Panel Report No. I: Barro Blanco Hydroelectric Project - Panama 8 (May 29, 2015), https://www.fmo.nl/1/en/library/download/urn:uuid:963b97fd-6f82-473d-b323-128a995130f5/150529_barro+blanco+final+report+rev.pdf?format=save_to_disk&ext=.pdf [hereinafter ICM Barro Blanco Report].

¹²⁴ See generally, United Nations Development Programme, Presentan resultados del peritaje independiente al proyecto hidroeléctrico Barro Blanco (Sept. 6, 2013), <http://www.pa.undp.org/content/panama/es/home/presscenter/articles/2013/09/06/presentan-resultados-del-peritaje-independiente-al-proyecto-hidroelectrico-barro-blanco-.html>; James Anaya, Declaración del Relator Especial sobre los derechos de los pueblos indígenas al concluir su visita oficial a Panamá (July 26, 2013) <http://unsr.jamesanaya.org/statements/declaracion-del-relator-especial-sobre-los-derechos-de-los-pueblos-indigenas-al-concluir-su-visita-oficial-a-panama>.

¹²⁵ Press Release, SOMO Human Rights and Grievance Mechanism Programme, Panama Suspends Construction of FMO-funded Barro Blanco hydroelectric dam over environmental and human rights abuses (available at <http://grievancemechanisms.org/news/panama-suspends-construction-of-fmo-funded-barro-blanco-hydroelectric-dam-over-environmental-and-human-rights-abuses>). See also Panama National Environmental Authority (ANAM), Order to Suspend Dam Construction (available at <http://miambiente.gob.pa/index.php/homepage/ultimas-noticias/otras-noticias/959-anam-ordena-paralizacion-de-obras-del-proyecto-hidroelectrico-barro-blanco-por-incumplimientos-de-eia>).

¹²⁶ For more information on ICM, see DEG/FMO Independent Complaints Mechanism, Annual Report: First Panel Report January 2014-2015 (Aug. 6, 2015), https://www.fmo.nl/1/en/library/download/urn:uuid:a202083c-a943-47b3-ab16-8375dc68885c/icm+annual+report+2014+-+hy+2015.pdf?format=save_to_disk&ext=.pdf. For a CSO perspective on its establishment, see Press Release, SOMO Human Rights and Grievance Mechanisms, Dutch development bank FMO now has a grievance mechanism, (available at <http://grievancemechanisms.org/news/dutch-development-bank-fmo-now-has-a-non-judicial-grievance-mechanism>).



extended families of up to 40-50 people each, all of whom will have to be relocated. However, that is likely to be an underestimate of the number of people affected by the loss of the land. The United Nations Development Programme (UNDP), which produced a series of studies on the dam's impact, found that because of the cohesion within Ngöbe-Buglé people, *“the impact with respect to access and use of resources will affect not only the families that will suffer the flooding of their lands, but also those impacts will affect directly and indirectly all of the inhabitants of the three communities [Quebrada Caña, Kiad, and Nuevo Palomar].”*¹²⁷

Impacts affecting the Ngöbe-Buglé's natural resources and cultural heritage also require their consent. The location of the first and only school to teach the Ngöbe-Buglé language is located on the land to be flooded when the dam is completed. The gallery forest that will be inundated is an important source of wood, medicinal plants and other natural resources that the Ngöbe-Buglé use for traditional and artisanal products. The petroglyphs located in the river, which the Ngöbe-Buglé still use for religious and cultural ceremonies, will also be submerged.

THE RESULT: The ICM published its final compliance report in May 2015. The ICM only assessed compliance against the IFC's Performance Standards on Environmental and Social Sustainability (Performance Standards), although FMO also requires its clients to comply with the Organisation for Economic Co-operation and

¹²⁷ United Nations Development Programme, *Peritaje Al Proyecto Hidroeléctrico Barro Blanco*, at ¶T 15 (Sept. 2, 2013), available at http://www.pa.undp.org/content/dam/panama/docs/documentos/undp_pa_barro_blanco_aspectos_ecologicos.pdf.

Development (OECD) Guidelines on Multinational Enterprises, among other policies. The ICM found that FMO and DEG were not in the position to assure themselves that the Barro Blanco project was fully compliant with Performance Standards 1 (on Social and Environmental Assessment and Management Systems), 5 (Land Acquisition and Involuntary Resettlement), 6 (Biodiversity Conservation and Sustainable Natural Resource Management), 7 (Indigenous Peoples) and 8 (Cultural Heritage).

More specifically, the ICM found that *“while the [loan] agreement was reached prior to significant construction, significant issues related to social and environmental impact and, in particular, issues related to the rights of indigenous peoples were not completely assessed prior to the [loan] agreement.”*¹²⁸ FMO/DEG's failure to identify the potential impacts of the project led to a subsequent failure to require their client to take any action to mitigate those impacts. The environmental and social action plan appended to the loan agreement *“contains no provision on land acquisition and resettlement and nothing on biodiversity and natural resources management. Neither does it contain any reference to issues related to cultural heritage.”*¹²⁹

With regard to compliance with the Indigenous Peoples policy, the ICM found that *“there are serious questions as to whether the lenders could be satisfied that the consultations with the affected communities have been conducted in a format and intensity (good faith negotiations) that is required by PS7, paragraph 13. The panel is of the opinion the lenders have not taken the resistance of the affected communities has not been taken [sic] seriously enough. This may be, to an extent, because a legal agreement was reached between [GENISA] and the regional council of the Comarca and this was considered by the lenders to be sufficient to deal with the issue. Nevertheless, the Indigenous Peoples report clearly documented that the directly affected communities challenged the legitimacy of such agreements. This should have triggered the further steps identified in the IP Report.”*¹³⁰

FMO and DEG's response to the ICM's report made very few concrete commitments to address the outstanding policy violations.¹³¹ The response explains that many of the issues must be resolved by the Government of Panama, and that they and their client are *“facing limitations in their influence”* over

¹²⁸ Centre for Research on Multinational Corporations (SOMO) and Both ENDS, A summary of the Independent Complaints Mechanism's findings on Barro Blanco and FMO-DEG management response (Jun. 1, 2015) (available at http://somo.nl/news-en/indigenous-communities-and-civil-society-shocked-by-fmos-inadequate-response-to-the-findings/at_download/attachment).

¹²⁹ *Id.*

¹³⁰ ICM Barro Blanco Report, *supra* note 123, at ¶T 146.

¹³¹ DEG and FMO Management Response to the Independent Expert Panel's Compliance Review Report regarding the Complaint on the Investment in the Barro Blanco Hydroelectric Project (May 29, 2015), https://www.fmo.nl/1/en/library/download/urn:uuid:3766a880-119e-44f6-9e8c-eae30583194c/150529+management+response.pdf?format=save_to_disk&ext=.pdf.

government processes to come to a satisfactory agreement with all stakeholders involved. FMO and DEG also committed to “*strive for a more elaborate formal opinion from lawyers or other experts, with defined expertise in indigenous peoples’ rights and the local legal context*” with regard to land, resettlement and displacement issues. It is unclear, however, whether that opinion, if obtained, will be shared with the complainants or if it will lead to any follow-up. Following the publication of the ICM’s report and FMO/DEG’s response, the complainants and their CSO allies sent a letter to the relevant Dutch and German ministers, expressing their dissatisfaction with FMO/DEG’s response.¹³²

As a result of the complainants’ own initiative, a representative of the M-10 met with representatives from FMO, DEG and the ICM in The Hague, Netherlands at the end of June. FMO/DEG would not agree to request that their client should suspend construction on the dam to allow a dialogue to take place, but they did commit to hiring a mediator to work with the parties to come to an agreement on the conditions necessary for a dialogue to occur. In the meantime, the Government of Panama attempted to initiate a dialogue with the Ngöbe-Buglé. According to FMO/DEG, the Government of Panama did not accept their offer to provide a mediator for that process. Currently, the government is in talks with the Cacica General and other indigenous leaders, but the M-10 has not been invited to participate. FMO/DEG have not been in communication with the complainants for several months.

OUTCOME SATISFACTION:¹³³ According to Manolo Miranda, the M-10’s contact point for this complaint, the M-10 was satisfied with the ICM’s investigation report because it showed that there was no consent for the project. Miranda believes that the report, because it was written by independent experts, helped to make their concerns more credible and helped to ensure that the international community understands the conflict about the Barro Blanco dam.

Ultimately, however, the response from FMO/DEG was extremely disappointing. Miranda said, “*nothing has changed... the banks and the company have done nothing to prevent the impacts on our culture, territory and religion*”. He would recommend using complaints mechanisms to other communities because it helps to bring attention to the issues. However, in order for complaints to result in outcomes for communities, the human rights commitments of DFIs and international institutions should not be in paper only. He said: “*rules are one thing, but their implementation is another*”.

¹³² Press Release, SOMO Human Rights and Grievance Mechanisms Programme, Movimiento 10 de Abril presents letter of concern to Dutch and German embassies in Panama (available at <http://grievancemechanisms.org/news/movimiento-10-de-abril-presents-letter-of-concern-to-dutch-and-german-embassies-in-panama>).

¹³³ This case study draws on an interview with Manolo Miranda, the M-10’s contact person for the complaints process, in addition to publicly available information and information from Both ENDS and the Centre for Research on Multinational Corporations (SOMO), international NGOs that supported the complainants in the case.

The efforts of the M-10 to defend their rights have not come without costs. The company has filed complaints against community leaders with the Public Ministry. There is a pending lawsuit against Miranda, allegedly for trespassing on the dam site, a charge that he vehemently denies. Defending these charges not only takes time, they also have an economic impact on the community. The Government of Panama has also, at times, used force to break up protests against the project.¹³⁴

PROCESS SATISFACTION: While Miranda expressed general satisfaction with their interaction with the ICM Panel members, noting that they “*allowed us to tell the truth about what is happening*”, their trust in the process was significantly undermined because of a confidential, side agreement made between FMO/DEG, the ICM and the company in order to gain the client’s cooperation in the complaints process.

The loan agreement with GENISA was signed before the ICM was established, and, as a result, there was no provision in the agreement that required the company’s cooperation with the ICM. This situation is not unique to the ICM. Notwithstanding that every existing IAM was created well after the establishment of the DFI with which it is associated, there is no evidence that any other IAM/DFI has had to make a special accommodation in order to handle complaints regarding activities financed before the IAM was operational.

As complainants understand it, the company refused to cooperate in the process or to allow the ICM Panel members access to project documentation until the side agreement was reached. As a result, the Panel members were unable to have access to non-public information until five months after the complaint was submitted. Complainants were only informed about the reason for the delay after sending a letter to the ICM in October 2014, expressing concern about the progress of the complaint. The contents of the side agreement have never been shared with complainants.

The side agreement superseded the publicly available procedures of the ICM and allowed GENISA to review the draft and final investigation reports before they were shared with complainants. Complainants were informed that the purpose of the company review was to ensure that the ICM did not publish any business confidential information. In practice, the company review caused significant delays in the process, with the company and/or the DFIs refusing to allow the ICM to share the reports with complainants until the complainants threatened to go to the media. The draft compliance report shared with complainants already

¹³⁴ See generally, TVN Noticias, Desde este domingo, unidades policiales vigilan a indígenas en Barro Blanco (July 12, 2015), http://www.tvn-2.com/nacionales/antimotines-custodian-hidroelectrico-Barro-Blanco_0_4252824738.html; La Prensa, Trabajadores de Barro Blanco ingresan a la obra (July 15, 2015), http://www.prensa.com/provincias/Trabajadores-Barro-Blanco-ingresan-obra_0_4255074608.html; La Estrella de Panama, Conversaciones por Barro Blanco, diálogo de sordos (July 28, 2015) <http://laestrella.com.pa/panama/nacional/conversaciones-barro-blanco-dialogo-sordos/23881928>.

reflected the comments of FMO/DEG and their client, although complainants and their advisors interpreted the ICM's rules of procedures to mean that they would review the same draft as FMO/DEG. The company review combined with the sequencing of the disclosure undermined the complainants' confidence in the report's contents, despite reassurances from the ICM Panel members: *"The banks and the company were the first to know about the report, and that was very worrying because it gave them the opportunity to change information that was not favourable to them"*.

FMO/DEG have said that it may have to conclude similar side agreements in future complaints regarding activities financed prior to the creation of the ICM. Doing so would seriously put in jeopardy the **legitimacy, transparency** and **predictability** of the ICM.

The M-10 attributes the **accessibility** of the mechanism to the support they received from CSO allies, including Chiriqui Natural, Both ENDS, and the Centre for Research on Multinational Enterprises (SOMO). M-10 had been in contact with FMO/DEG several years before it was possible to file a complaint. However, Miranda perceived that FMO/DEG did not trust them or recognise them as a directly affected stakeholder until Both ENDS became involved. The ICM Panel members also helped M-10 to understand FMO/DEG's policies and the role of the ICM. Although the ICM Panel members met with complainants during a site visit and organised several teleconferences, at times it was difficult to obtain information about the status of the case for the reasons described above.

According to Miranda, not only was the outcome of the process not **rights-compatible**, due to the lack of an adequate response by FMO/DEG, the ICM's report did not fully analyse the human rights impacts of the projects, even though FMO/DEG's policies require compliance with national law and international human rights standards. At the time the project was approved, FMO required its clients to comply with the OECD Guidelines on Multinational Enterprises ("Guidelines"). The Guidelines contain a chapter on human rights that reflects the UN Guiding Principles on Business and Human Rights (UNGP), which state that corporations have a responsibility to respect all internationally recognised human rights, including those related to indigenous rights, when applicable.¹³⁵ The Panel, however, only assessed compliance against the IFC's Performance Standards, reasoning that, *"lender's application of the Performance Standards was the appropriate way to seek to align project performance with both the UNGPs and the OECD guidelines"*.¹³⁶ As described in Annex I2, however, the IFC's Performance Standards do not require assessment of human rights impacts, as expected by the OECD Guidelines and the UNGPs, nor explicitly incorporate human rights standards.

¹³⁵ OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, chapter IV, ¶ 1, Commentary ¶ 40 (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹³⁶ ICM Barro Blanco Report, *supra* note 123, at ¶ 56.



Finally, the M-10 felt that FMO/DEG did not treat them equally. In Miranda's words: *"It made us nervous to know that the banks thought the company was more important than we were. They never asked us information, they never talked to us, they never came to give us information. But the banks did give the company information. It made us feel that we were insignificant and the company was the priority."*

Indeed, FMO/DEG were lobbying on behalf of the company during the complaints process. Following the suspension of the project by the Government of Panama in February 2015, FMO/DEG sent a letter to the Vice President of Panama, expressing their *"great concern and consternation"* about the suspension and requesting that the construction on the project be allowed to resume.¹³⁷ The lenders continued by saying that the government's decision *"may weigh upon future investment decisions, and harm the flow of long-term investments into Panama"*. They discredited the basis for the Government's decision by asserting that their consultants had not reported the same non-compliances of relevant standards. The government's decision to suspend the project cited, in part, the company's lack of agreement with the affected communities and absence of an approved management plan to address impacts to cultural heritage.¹³⁸ At the time FMO/DEG sent the letter to the Vice President, they had already reviewed the ICM's draft compliance review, which raised these very issues.

¹³⁷ Press release, Both ENDS, Dutch FMO pushed Panama to continue construction Barro Blanco dam (May 18, 2015) (available at http://www.bothends.org/en/News/newsitem/413/Dutch-FMO-pushed-Panama-to-continue-construction-Barro-Blanco-dam#_ga=1.75074836.742010282.1427962178). The letter sent by the FMO/DEG to the Vice President of Panama is on file with the authors.

¹³⁸ Panama National Environmental Authority (ANAM), Order to Suspend Dam Construction, *supra* note 125.

4.2.6.

CASE STUDY

#6

IP:

Promoting Basic Services Project, Ethiopia

BACKGROUND: In the wake of the Ethiopian Government's violent crackdown on opposition supporters following the 2005 parliamentary elections, the World Bank and other donors suspended direct budget support to Ethiopia.¹³⁹ This left a large budgetary gap for recurrent expenditures necessary for the operation of government. To fill this gap, the World Bank designed the Protection of Basic Services (PBS) Project.¹⁴⁰ Under PBS, block grants are transferred to sub-national government budgets for recurrent expenditures to expand access to and improve the quality of basic services in five sectors: education, health, agriculture, water and sanitation, and rural roads. Since 2006, PBS has been renewed twice, and in total, the World Bank has committed almost US\$2 billion to the project.¹⁴¹

THE COMPLAINT: In September 2012, representatives of Anuak indigenous people living in refugee camps in Kenya and South Sudan submitted a complaint to the World Bank Inspection Panel regarding the PBS project. The complainants allege that they were forcibly relocated from their fertile ancestral lands in Ethiopia's Gambella Region into centralised villages as a part of the regional government's Commune Development Programme, otherwise known as 'villagisation'. According to the complaint, the official objective of villagisation was to make it easier to improve access to basic services in the very same sectors targeted by PBS.¹⁴²

The complaint details mass forced displacement of the Anuak from their fertile ancestral land, and relocation to sites that were unsuitable for farming and lacked access to basic services such as schools, clinics and wells.¹⁴³ According to the complaint, access to food was limited at the relocation sites, in some cases leading to starvation.¹⁴⁴ Those who opposed the relocation were allegedly arrested, beaten, raped, tortured and killed.¹⁴⁵ The complaint highlights the mutual objectives of PBS and the villagisation programme in Gambella, and that, according to World Bank documents, PBS provides the main source of financing for the Gambellan Government, particularly for the salaries of public servants who were responsible for carrying out villagisation.¹⁴⁶

¹³⁹ World Bank, Project Information Document (PID), PBS Project, 1 (2006).

¹⁴⁰ *Id.* at 3.

¹⁴¹ World Bank, Project Information Document Concept Stage Ethiopia PBS Program Phase III Project, (Apr. 4, 2012); World Bank, Ethiopia: PBS 3 Project, Summary of Discussion Meeting of Executive Directors (Sept. 25, 2012).

¹⁴² Request for Inspection by World Bank Inspection Panel, 1 (Sept. 24, 2012), [http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Request%20for%20Inspection%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Request%20for%20Inspection%20(English).pdf).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

THE RESULT: In the final investigation report, released in November 2014, the Inspection Panel did “not seek to verify allegations of specific human rights abuses linked to [villagisation].”¹⁴⁷ Having determined that the relocation of people under the villagisation programme was not necessary to achieve PBS objectives, the Inspection Panel found the involuntary resettlement policy did not apply and that the Bank was therefore in compliance with OP/BP 4.12. However, the Inspection Panel found “an operational link” between PBS and the villagisation programme, as they both “have the objective of providing improved basic services to the same populations, operate in the same geographical areas, and overlapped during a span of more than three years (2010-2013) when they were implemented concurrently.”¹⁴⁸ The Panel also noted that the civil servants responsible for implementing the villagisation programme “are the same workers whose salaries are being paid under the PBS.”¹⁴⁹ As such, the Inspection Panel concluded that the Bank’s design, appraisal, risk analysis, and project supervision were insufficient, in non-compliance with OMS 2.20, OP/BP 10.00, and OP/BP 10.02.¹⁵⁰ It determined that the weakness of internal controls supports the possibility that funds could have been diverted, and that Bank’s assertion that it could fully track PBS expenditures “cannot be sustained.”¹⁵¹ The Panel also found the Bank in non-compliance with OP 4.10 on Indigenous Peoples, as it failed to take the Anuak’s livelihoods, well-being and access to basic services into account in designing PBS.¹⁵² Nonetheless, the Inspection Panel concluded that the Bank was not responsible for the harm suffered by the complainants.¹⁵³ Dissatisfied with the rigour of the investigation, Inclusive Development International prepared a detailed critique of the Inspection Panel’s findings.¹⁵⁴

Bank management responded to the investigation’s findings with an Action Plan in January 2015.¹⁵⁵ It noted that, since the complaint was filed, it had begun applying

¹⁴⁷ World Bank Inspection Panel, *Ethiopia: Promoting Basic Services Phase III Project Investigation Report*, ¶ 311 (Nov. 24, 2014), <http://ewebapps.worldbank.org/apps/ip/PanelCases/82-%20Inspection%20Panel%20Investigation%20Report%20Ethiopia%20PBS%20Phase%20III%20Project.pdf>.

¹⁴⁸ *Id.* at ¶ 309.

¹⁴⁹ *Id.* at ¶ 98.

¹⁵⁰ *Id.* at ¶¶ 31-32.

¹⁵¹ *Id.* at ¶¶ 30-31.

¹⁵² *Id.* at ¶ 208.

¹⁵³ *Id.* at ¶ 310.

¹⁵⁴ Inclusive Development International, *Ethiopia PBS Request for inspection: Analysis of World Bank Inspection Panel Investigation and Findings*. (2015), <http://www.inclusivedevelopment.net/wp-content/uploads/2015/06/IDI-Analysis-of-WBIP-Ethiopia-Investigation.pdf>.

¹⁵⁵ *Ethiopia: Promoting Basic Services Project, Management Report and Recommendation in Response to the Inspection Panel Investigation Report* (Jan. 31, 2015), <http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Management%20Report%20and%20Recommendation%20-%20Ethiopia%20PBS%20-%20Phase%20III%20Project.pdf>. [hereinafter *Management’s Response: Ethiopia Case*].

OP/BP 4.10 on Indigenous Peoples to relevant projects in Ethiopia, something the government had previously refused.¹⁵⁶ It committed to various measures to improve accountability in development programmes in Ethiopia, including supporting the effectiveness of the Ethiopian Institution of the Ombudsman and district grievance redress officers, and building the capacity of district-level civil servants to implement the Bank’s safeguard policies.¹⁵⁷ It also announced that it would replace PBS block grants with a Program for Results operation.¹⁵⁸ In a press release following the Board’s approval of the Management Action Plan, the Bank further committed to supporting small-holder farmers in Gambella and ensuring that national programmes aimed at improving the quality of services and alleviating hunger reach people across Gambella. Importantly for the complainants, who have lived in refugee camps for several years, the Bank also said it would strengthen its work on improving the development prospects of refugees and other people living in borderland areas such as Gambella as part of its new Horn of Africa Initiative.¹⁵⁹

OUTCOME SATISFACTION:¹⁶⁰ Representatives of the complainants expressed dissatisfaction with the outcomes of the process, despite the Inspection Panel making several findings of non-compliance.

Complainants felt aggrieved that the Inspection Panel’s final investigation report did not sufficiently document the most serious harms alleged in their complaint. One complainant stated: “When [the Inspection Panel] were in the [refugee] camp, they recorded every human rights abuse [... so] we expected that they would include the land grabbing, rapings, beatings, and torture in the report, but they didn’t include that.”

The complainants felt that their complaint to the Inspection Panel had some impact on the Government’s actions and may have prevented further harm, but the process did not result in redress. One complainant noted that the negative publicity brought by the complaint has put “the Government in a position to try their best to downplay their activities... But the damage – the displacement – had already been done.”

In an open letter to World Bank President Jim Yong Kim on 30 January 2015, the

¹⁵⁶ *Id.* at ¶ 36.

¹⁵⁷ *Id.*; Press Release, World Bank, World Bank Board Discusses Inspection Panel Case in Ethiopia (Feb. 27, 2015) (available at <http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Press%20Release%20-%20World%20Bank%20Board%20Discusses%20Inspection%20Panel%20Case%20in%20Ethiopia.pdf>) [hereinafter *Press Release: Ethiopia Case*].

¹⁵⁸ *Management’s Response: Ethiopia Case*, *supra* note 155, ¶ 53.

¹⁵⁹ Press Release: Ethiopia Case, *supra* note 157.

¹⁶⁰ This assessment is based on a focus group of six complainants. They were interviewed via Skype for this case study on June 21, 2015. The complainants’ identities cannot be revealed for security reasons.

complainants appealed for support to “return to their ancestral land without fear of retribution” and demanded that their people should be consulted and have “ownership of our development”.¹⁶¹ They did not feel that their appeals were listened to by the Bank or reflected in its Action Plan.

Asked whether they would advise others to use the Inspection Panel, the complainants responded that, even though they are not satisfied with the result, they had “no other option” for seeking justice.

PROCESS SATISFACTION: The complainants experienced many difficulties during the complaints process. The complainants said that, without the assistance of Human Rights Watch and Inclusive Development International (IDI), the Inspection Panel would not have been **accessible**. The complainants only learned that it was possible to submit a complaint through Human Rights Watch when they came to document human rights abuses for a report. They were only able to submit the complaint with the support of IDI, which explained to them the World Bank safeguard policies and the complaints process and helped them to prepare and submit their complaint. The complainants also noted that it would have been impossible to file the complaint from inside Ethiopia, and that they were only able to do so because they were refugees in surrounding countries: “the first thing in Ethiopia is that you don’t have human rights there – you can’t speak openly without getting put in jail or killed. If we were in Ethiopia, we wouldn’t have submitted a complaint at all.”

The complainants did not think the Inspection Panel operated **transparently**. They told us: “from the time the Inspection Panel left the camp in South Sudan [after interviewing the complainants to assess the eligibility of the complaint], we never heard anything from them. They never updated or communicated with us: the only information we get is from IDI.”

Complainants also raised concerns relating to the **legitimacy, predictability, and equitability** of the process. Most importantly, although the Inspection Panel spoke to complainants during the eligibility site visit, they did not return to interview them during their investigation: “they never came back to us – they did their investigation in Gambella [but didn’t come to the refugee camps], and then went back and did their own report.” As a result, the complainants did not feel as though their views were taken into consideration by Bank management. It was “not only on what they said to us, [but] their body language [as well]. We already knew that they came just to present their case – the action plan – but weren’t expecting to listen to us or hear from us.” The complainants said after the World Bank “explained their action plan, we totally rejected it. They promised they would come back with a better action plan, but they never came back.”

¹⁶¹ Open letter from Annual Ethiopian Refugees to Jim Yong Kim, President, World Bank (Jan. 31, 2015) (available at <http://www.inclusivedevelopment.net/open-letter-from-anuak-ethiopian-refugees-to-the-president-of-the-world-bank-jim-yong-kim/>).

The Inspection Panel process did not result in **rights-compatible** remedies for the complainants. Although the complainants believed that villagisation in Gambella stopped because of the complaint to the Inspection Panel and the international attention that the advocacy garnered, they did not believe that they or others in Gambella received redress. They said, “we’re still waiting for the impact”. The complainants remain in refugee camps that lack access to health clinics and schools, and they continue to fear for their safety. Many of the human rights abuses, including killing, rape, torture, beating and arrests, documented during the Inspection Panel’s preliminary visit and in leaked transcripts from the Panel’s interviews in Gambella,¹⁶² were not recorded in their final investigation report and remain unaddressed. Moreover, the complainants are concerned about retaliation from the Ethiopian Government and did not feel as though the World Bank did enough to protect their security. A complainant commented that, during the consultation meeting on the action plan, “[we] could even tell that they don’t care about us and didn’t do anything at all to protect us”.

In the Management Report and Recommendation, the Bank says regarding **lessons learned** that the “key lesson from implementation is the importance of improving citizen voice and accountability”.¹⁶³ Management also comments that it learned “to identify constraints to achieving program goals”, and “the continuous need for training and support to improve capacity at [the local government] level, whether it is with respect to fiduciary, safeguard, citizen voice or implementation issues”.¹⁶⁴ World Bank President Jim Yong Kim also said in a press release, “We draw important lessons from this case to better anticipate ways to protect the poor and be more effective in fighting poverty”.¹⁶⁵

According to IDI’s Legal Director Natalie Bugalski, “the Panel’s decision not to consider allegations of human rights abuses and the forcible nature of the relocations, despite this being a central issue in the Request for Inspection, coupled with its finding that the Bank was not responsible for harms, despite a raft of policy violations, limited the potential for the Bank to learn lessons from the case”. The result, Bugalski said, “was a missed opportunity for institutional reflection on the deficiency of the current system for environmental and social protections and accountability for direct budget support financing”.

¹⁶² Gambella Inspection Panel Interviews, Word-for-Word Translated Transcripts (Feb. 2014) (available at <http://www.inclusivedevelopment.net/wp-content/uploads/2015/03/Gambella-Inspection-Panel-Transcripts.pdf>).

¹⁶³ *Id.* at ¶ 49.

¹⁶⁴ *Id.*

¹⁶⁵ Press Release: Ethiopia Case, *supra* note 157.

4.2.7.

CASE STUDY

#7

IP:

Vishnugad Pipalkoti
Hydro Electric Project,
India

BACKGROUND: In June 2011, the World Bank approved a loan of US\$648 million to a joint venture of the Government of India and the regional government of Uttarakhand, known as THDC.¹⁶⁶ It was used for the building of a hydroelectric power plant in the Alaknanda River, a major tributary of the Ganga River.

THE COMPLAINT: For some members of the local communities, the building of the dam raised environmental, social and cultural concerns. They filed a complaint with the Inspection Panel in July 2012.¹⁶⁷ Their complaint describes many different aspects, including damage to houses, agricultural lands and forests, fear of loss of aquatic biodiversity, loss of benefits from the river such as sand, fish and drinking water, increased risk of landslides and earthquakes, and a fear for increased global warming through deforestation and methane gas emission. Also, the complainants were concerned about decreased freedom of local women, due to the large number of incoming construction workers. As the Alaknanda is a tributary to the religiously significant Ganga River, they worried about the loss of spiritual and cultural values of the river too. After the Inspection Panel had visited the project site, the complainants provided the Panel with supplementary information. They had received death threats and experienced strong pressure from the police for protesting against the project.¹⁶⁸

THE RESULT: The compliance investigation resulted in a final report, dated July 2014. The Panel concluded that the World Bank “for the most part is not only in compliance with its policies and procedures, but has also introduced best practice when possible, except for some gaps”.¹⁶⁹ These gaps relate to two findings of non-compliance. The first concerns non-compliance with the Bank’s policy on Environmental Assessment, finding that the Bank had not identified the necessary measures to take regarding whether the community’s sources of drinking water were lost. The second related to the Bank’s policy on Involuntary Resettlement, finding that the World Bank had not adequately assessed the situation of one local community.¹⁷⁰ This issue was not raised in the initial complaint, but was added after the eligibility visit of the Panel.

¹⁶⁶ World Bank, Project and Operations, *Vishnugad Pipalkoti Hydro Electric Project*, <http://www.worldbank.org/projects/P096124/vishnugad-pipalkoti-hydro-electric-project?lang=en> (last visited June 11, 2015).

¹⁶⁷ Request for inspection, regarding the Loan to the THDC India Ltd. for the Vishnugad Pipalkoti Hydro Electric Project to the Executive Secretary, The Inspection Panel (July 23, 2012), <http://ewebapps.worldbank.org/apps/ip/PanelCases/81-Request%20for%20Inspection%20%28English%29.pdf>.

¹⁶⁸ Human Rights Watch, *At Your Own Risk: Reprisals against Critics of the World Bank Group Projects*, *supra* note 46, at 60.

¹⁶⁹ Inspection Panel, *Investigation Report: India – Vishnugad Pipalkoti Hydro Electric Project 93* (July 1, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/81%20-%20Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/81%20-%20Investigation%20Report%20(English).pdf).

¹⁷⁰ *Id.* at 95.

In response to the Investigation Report, the management's action plan was published in September 2014. It addressed the first finding of non-compliance, loss of water sources, by committing to monitor the change in water sources. If a source dries up, the Bank will assess the replacement options THDC has suggested and will supervise the implementation. Regarding the involuntary resettlement, management committed to monitoring the resettlement after the community members have chosen one of the two options THDC has offered them.¹⁷¹

OUTCOME SATISFACTION:¹⁷² Even though the Panel found two instances of non-compliance, the outcome of the complaint process is considered very disappointing by the complainants' representative, Dr. Bharat Jhunjhunwala.

This is mainly due to three factors. First, the final report does not address all the issues that were raised: *"It is fair if you find my request not viable, but give me reasons for dismissing it. You cannot just keep quiet on the important parts of the request."* This feeling is exacerbated by the second factor, namely that there was no way to express that dissatisfaction to the Bank's leadership: *"I have written to all Executive Directors of the Bank, I have written to the President of the Bank. And finally I got a reply from the Executive Director of the Netherlands. He forwarded my complaint to the Panel. But all I heard from them was that I could file a new complaint. So that was it."* The third factor contributing to the strong dissatisfaction about the outcome of the complaint is the belief that the Bank's management did not actively address the findings of non-compliance. Especially this latter factor has led to a general feeling that the whole complaints process was not worthwhile: *"We have spent huge amounts of resources to file the complaint. Even the small violations that were recorded by the Panel have not been acted upon. It is a colossal waste of resources of poor people. We have been taken for a ride."*

PROCESS SATISFACTION: Although the outcome was considered to be very unsatisfactory, Dr. Jhunjhunwala's opinion about the Panel's role in the complaints process is generally more positive: *"I should put on record that the whole process, up to the Panel's visits, was quite satisfactory. I have no complaints about that."* At the same time, the satisfaction was undermined somewhat by the complainants' belief that the Panel failed to address their security concerns.¹⁷³

¹⁷¹ Inspection Panel, *India - Vishnugad Pipalkoti Hydro Electric Project, Summary of Management Actions* (2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/81-Summary%20of%20Management%20Actions\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/81-Summary%20of%20Management%20Actions(English).pdf) (hereinafter Inspection Panel, *Summary of Management Actions: Vishnugad Project*).

¹⁷² Although this case study is based on an interview with the complainants' representative, Dr. Bharat Jhunjhunwala, who consented to the publication of his name, two additional, unnamed complainants reviewed and approved the final text. This case study also builds on the Human Rights Watch report "At Your Own Risk," which focuses on acts of reprisals against community members who protest World Bank Group projects, including reprisals against the protesters of the Vishnugad project. Human Rights Watch, *At Your Own Risk: Reprisals against Critics of the World Bank Group Projects*, *supra* note 46.

¹⁷³ Human Rights Watch, *At Your Own Risk: Reprisals against Critics of the World Bank Group Projects*, *supra* note 46, 67.



Dr. Jhunjhunwala considers the Panel to be **accessible** and **predictable**, although this seems mainly due to the help of an international NGO, the Bank Information Centre (BIC). BIC explained and advised Dr. Jhunjhunwala and the other complainants on the complaint process.

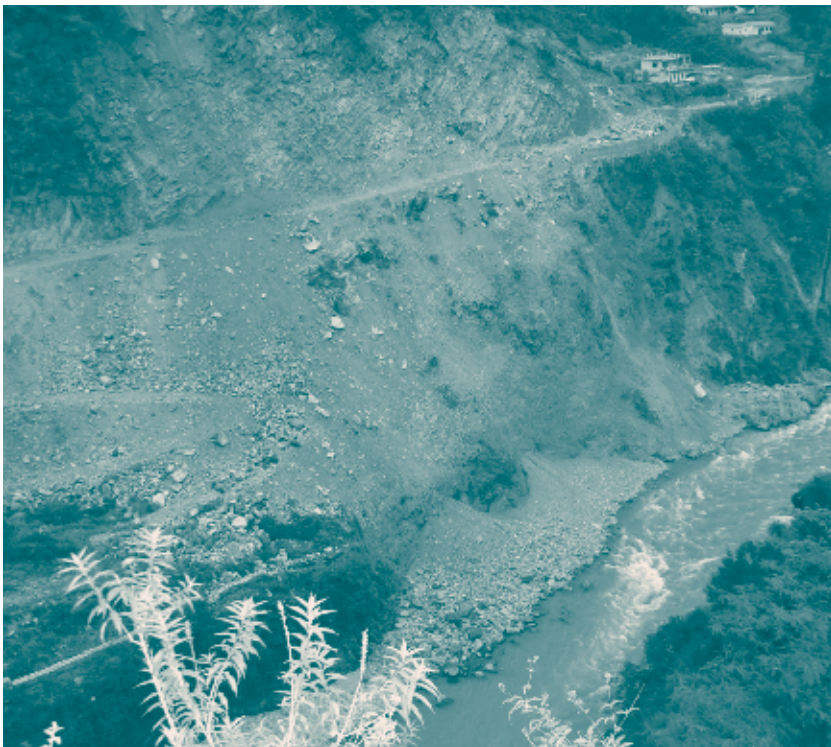
The **legitimacy** of the Panel is also positively assessed. Dr. Jhunjhunwala states he appreciated the measures the Panel took to maintain its independence during the site visits. For instance, he appreciated that the Panel made their own independent travel arrangements during their visit to the project site, and their willingness to communicate with everyone. However, he states that *"insiders"* told him that the final investigation report was not written by the people who visited the site. In his experience, this greatly damages the legitimacy of the report. His opinion of the conduct of the World Bank's staff during their visits is more negative. He felt that Bank staff members were not independent from THDC. For instance, THDC employees accompanied World Bank staff whenever they visited the area.¹⁷⁴ Human Rights Watch's report, however, describes a few notable exceptions.¹⁷⁵

¹⁷⁴ *Id.* at 68.

¹⁷⁵ For instance, The World Bank country director had given his contact details to a community member in case he experienced any problems. Also, the country director made an effort to ensure he could talk with community members, separate from the THDC. Human Rights Watch, *At Your Own Risk: Reprisals against Critics of the World Bank Group Projects*, *supra* note 46, at 68.

Transparency and **equitability** were also problematic in this complaint process. According to Dr. Jhunjhunwala, they waited 21 months between the visit and the final report. It was very unclear to the complainants what was happening in the meantime. This raised questions about the influence of the Bank management: *"We only got one phone call from the Panel, asking whether the Management had contacted us. We told them they had not, and that was it. So why did it take 21 months? I think there was some politics, somewhere."*

Rights compatibility is a major concern in this case. First of all, according to the complainants, the situation has not improved in the areas where promises were made to do so. They feel that the commitments made by Bank management were simply ignored. For example, despite the commitments to increase women's safety, some women still experience feelings of insecurity as they go about their daily life.¹⁷⁶ Also, doubts exist regarding the solutions for the community's loss of water. Complainants are doubtful that the replacement options are actually feasible. For instance, providing water by trucks will be very challenging because of the difficult mountainous terrain. Finally, Dr. Jhunjhunwala states that the commitment to creating new packages regarding involuntary resettlement, which would comply with the Bank policies, has not been honoured.



¹⁷⁶ *Id.* at 70.

Concerns regarding rights compatibility are not limited to only the outcomes of the compliance review. Even before the complaint was filed, community members experienced tremendous pressure from THDC. Those who protested against the project indicate they faced several years of threats, including gender-based threats, intimidation and acts of violence by THDC employees and contractors.¹⁷⁷ The HRW report shows that the filing of the complaint and the subsequent visit of the Panel put further pressure on the local community. THDC staff issued threats, trying to prevent the community from filing their complaint with the Inspection Panel. Even during the Inspection Panel's visit, THDC staff supposedly continued threatening the community, telling at least one member they would kill him.¹⁷⁸ Since the Panel's visit, THDC seems to have increased its harassment. Community members who were seen communicating with the Panel feel they are specifically targeted, having their activities monitored by THDC employees and contractors. At least one of those members says he is being followed by a THDC car whenever he leaves home.¹⁷⁹ In some instances, the threats have escalated to physical violence. One community member witnessed her son being assaulted for protesting against the destruction of her shed and fruit trees by THDC in the middle of the night in order to clear the land to build a road. Even though the Panel was informed about harassment of the complainants and had even written about the intimidation by THDC in the eligibility report, the issue was not addressed in the investigation report, nor was it taken up in management's action plan.

There seem to be no **learning processes** related to this complaint. No lessons learned for future projects are taken up in management's action plan.¹⁸⁰

¹⁷⁷ *Id.* at 58.

¹⁷⁸ *Id.* at 59.

¹⁷⁹ *Id.* at 60.

¹⁸⁰ Inspection Panel, *Summary of Management Actions: Vishnugad Project*, *supra* note 171.

RECOMMENDATIONS

Each complaint tells a story: a story about real people whose lives have been adversely affected by a development activity that was supposed to benefit them. At the same time, every complaint provides an opportunity, an opportunity for the DFIs to fulfil their missions and improve peoples' lives. They are a chance for the DFIs to learn and understand how to make development work for people. Thus while the aim of this report is to ensure that people who are harmed by development activities receive adequate remedy, the ultimate goal of the organisations that authored this report is that DFIs pursue a development model based on human rights that does not cause harm.¹⁸¹ Until then, it is imperative that the accountability system is strengthened to ensure that anyone harmed by a development activity is provided with remedy.

The research undertaken for this report led to two types of recommendations to ensure those harmed by development activities receive remedy. One set of recommendations seeks to perfect the current system. The following section and the Table 2 below contain those general recommendations to the DFIs and IAMs. Annexes 5-15 (available at: www.glass-half-full.org) also include recommendations specific to each institution. Ultimately, though, the authors have concluded that the current system is inadequate to consistently provide remedy to those affected by DFI-financed activities. To do so requires the next evolution in DFI accountability. The second set of recommendations, then, seeks to inform that conversation.

5.1. PERFECTING THE SYSTEM

The following recommendations will improve the current accountability system. They contain practices that are currently in use by one or more institutions or measures that can easily be incorporated into the current system. In many cases, these recommendations are the bare minimum to make the system work better.

LEGITIMACY

- The committee formed to select the IAM principals should include outside stakeholders, including representatives of civil society.
- IAM principals should be required to respect a cooling-off period before joining the mechanism if they have previously worked for the DFI. And the principals should be restricted from working for the DFI following their tenure on the IAM.
- IAMs should establish official external stakeholder advisory groups to provide them with feedback and guidance on their work.

ACCESSIBILITY

- DFIs should require their clients to disclose the availability of the IAMs to project-affected people at the same time as they are required to disclose the potential environmental and social impacts of the DFI-financed activity. Subsequently,

¹⁸¹ For a vision of what real development looks like, see IAP Back to Development, *supra* note 2.

the client's project-level grievance mechanism should be required to provide information about the IAMs to any interested stakeholder.

- IAMs should accept complaints requesting either compliance review or problem-solving from when the DFI has indicated it is considering financing. Complaints requesting problem-solving should be accepted as long as the loan is in repayment or the DFI maintains its investment. Complaints requesting compliance review should be accepted after the project is closed.
- DFIs should provide a highly visible link on their homepages to their IAMs' websites.
- IAMs should allow complaints in the language of the complainant and should provide information on their websites in multiple languages.

PREDICTABILITY

- IAMs must consistently meet their deadlines in processing complaints.
- DFIs must provide IAMs with a sufficient budget to allow them the capacity to handle their caseloads.
- IAMs should provide regular status updates to complainants.
- DFIs should develop Management Action Plans that address every finding of non-compliance made in investigations undertaken by IAMs with a time-bound, implementation plan.
- All IAMs should be given the mandate to monitor commitments made through dispute resolution and instances of non-compliance found through compliance investigation. One important distinction to be made here is that the IAM should monitor whether the instances of non-compliance have been remedied, not whether the Management Action Plan has been implemented, as the Action Plan may not adequately address the instances of non-compliance. IAMs should publish monitoring reports at least once a year, which incorporate information provided by complainants on the implementation of the commitments made by the DFI or its client.

EQUITY

- Complainants should be given the same opportunity as the DFIs to review and comment on the IAMs' reports. The final report should be sent to the complainants at the same time it is sent to the board of directors, and it should contain the perspectives of the complainants.
- DFIs should develop and implement procedures for robust and participatory consultation with complainants prior to the development of Management Action Plans.
- IAMs should respect the role of complainants' advisor(s) and representative(s).
- DFIs should create an appeals process for those complainants who are unsatisfied with the results of the complaints process or the implementation of commitments by the DFI or its client.
- DFIs should provide sufficient resources to their IAMs to allow them to carry out their mandate and ensure complainants can meaningfully participate in the process.

TRANSPARENCY

- IAMs should ensure their case registries contain all relevant information.
- DFIs should publish comprehensive information on the activities they finance, including environmental and social assessments, in a format and language that is accessible for those who will be affected by them. DFIs should publish information regarding the sub-projects supported by their financial intermediary clients.

RIGHTS COMPATIBILITY

- Make an explicit commitment not to fund projects that would cause, contribute to or exacerbate human rights abuses. To operationalise that commitment, DFIs should require clients to undertake assessments of human rights impacts. Assessments should include whether there are sufficient protections for civil society to voice objections about the activity being financed. DFIs should refrain from financing activities in contexts where it is not possible to comply with their policies, including provisions related to consultation and information disclosure.
- DFIs and IAMs should adopt protocols for protecting complainants from reprisals and responding to them should they occur.
- IAMs should be given the mandate to make recommendations to suspend financing or processing DFI-financed activities when they believe imminent harm could occur.

LESSONS LEARNED

- DFIs should develop a publicly available management tracking system that documents how they have responded to IAMs' findings and recommendations, what lessons they have learned from IAMs cases, and how they will apply those lessons to future investments.
- DFIs should refrain from providing additional financing for similar activities to clients who have been found to be in non-compliance with environmental and social standards until those clients have rectified the non-compliance. Prior to financing other clients for activities that pose similar risks, DFIs should ensure that they have applied the lessons of previous cases.
- IAMs should document lessons learned from their cases in order to facilitate improved DFI policy or practice.
- IAMs should have the primary responsibility of developing and reforming their own rules of procedure. Only reforms that would result in significant changes to an IAM's structure or mandate should require approval by the board of directors. Consultation processes for reviews of the IAMs' rules of procedure or the policies establishing them should be standardised and should include opportunity for comment from the DFIs and civil society and the disclosure of the final version to be considered for approval.

TABLE 2 contains the recommendations derived from the UNGP assessment of each IAM/DFI found in Annexes 5-15 (available at: www.glass-half-full.org). The recommendations describe the reforms needed to the policy and practice of each actor, the IAM and the DFI. It should be noted, however, that the power to implement some of these recommendations regarding the IAMs rests with the DFIs' boards of directors.

TABLE 2 - RECOMMENDATIONS FOR PERFECTING THE SYSTEM

	IRM-AfDB	AM-ADB	CSRC-GoC	PCM-EBRD	CM-EIB	ICM-FMO/DEG	MICI-IDB	CAO-IFC/MIGA	Exs.-JICA/JBIC	OA-OPIC	IP-WB
LEGITIMACY											
IAM	●	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●
DFI	●	●	●	●	●	●	●	●	●	●	●
ACCESSIBILITY											
IAM	●	●	●	●	●	●	●	●	●	●	●
	●	●	×	●	●	●	●	●	●	●	●
DFI	●	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●
PREDICTABILITY											
IAM	●	●	●	●	●	●	●	●	●	●	●
	○	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●
DFI	●	●	×	●	●	●	●	●	●	●	●
EQUITABILITY											
IAM	●	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●
	●	●	×	●	●	●	●	●	●	●	●
DFI	●	○	●	●	○	●	●	●	○	●	●
	●	●	●	●	●	●	●	●	●	●	●

GLASS HALF FULL? - THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE

5 - RECOMMENDATIONS

	IRM-AfDB	AM-ADB	CSRC-GoC	PCM-EBRD	CM-EIB	ICM-FMO/DEG	MICI-IDB	CAO-IFC/MIGA	Exs.-JICA/JBIC	OA-OPIC	IP-WB
TRANSPARENCY											
IAM	●	●	●	●	●	●	●	●	●	●	●
DFI	●	●	●	●	●	●	●	●	●	●	●
RIGHTS COMPATIBILITY											
IAM	●	●	●	●	●	●	●	●	●	●	●
	●	●	×	●	●	●	●	●	●	●	●
DFI	●	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●
LESSONS LEARNED											
IAM	●	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●
DFI	●	●	●	●	●	●	●	●	●	●	●
	●	●	●	●	●	●	●	●	●	●	●

KEY: ● = means that this specific recommendation applies to this actor ● = means the actor has implemented this recommendation × = not applicable ○ = not sufficient information to determine

5.2. ACCOUNTABILITY IN THE 21ST CENTURY

The following recommendations chart a bold new course for accountability. They are ambitious and, as such, the authors do not expect them to be adopted immediately. Nor are they exhaustive. They are intended to contribute to a wider and much-needed dialogue regarding what real development looks like and to whom it is accountable.

- IAMs must be given the mandate to compel action. The accountability system for DFIs, as it was developed more than 20 years ago, depends on the DFI board and management assuming responsibility for the harm that occurred to project-affected people as a result of activities it financed. However, as this report demonstrates, DFIs have proven unable or unwilling to discharge that responsibility. The result is that the findings and/or recommendations made by the IAMs go unheeded and the complainants are left without remedy for their harms. IAMs should have the mandate to direct DFI staff and clients to take action to address non-compliance and remedy harm.
- All development financing should fall under the jurisdiction of an IAM. This recommendation applies to both existing and new DFIs. The financial instruments offered by DFIs are becoming increasingly complex, while the environmental and social standards applied to them have become more limited and flexible, if they exist at all. For IAMs to fulfil their accountability mandates, they must be able to assess compliance against rules-based standards regardless of the activity that is financed. The DFI landscape is changing rapidly as well, with new or different actors financing development activities. IAMs must not be seen as an impediment to development, but as a crucial element to achieving development outcomes. New DFIs, such as the Asian Infrastructure Investment Bank and the New Development Bank, must establish state-of-the-art IAMs in order to fulfil their development missions. Existing bilateral DFIs without an IAM could consider sharing an IAM with another DFI, like FMO and DEG have done.
- DFIs should create a remedy fund for complainants. Complainants must be made whole if they have experienced harm as a result of DFI-financed activities. Bringing the activity back into compliance with the DFI's environmental and social standards may result in the cessation of the harm but may fail to compensate complainants for the harm that occurred. Similarly, even successful mediation with DFI clients may leave complainants with unmet needs. In those cases, as part of meeting their own responsibility in causing or contributing to the harm, the DFI must be prepared to use their own funds to make the complainants whole again.
- DFIs should abandon their claims to immunity for environmental and social harms. The UN Office of the High Commissioner on Human Rights and the OECD have made it clear that financial institutions, including state-owned enterprises and

minority shareholders, can cause or contribute to human rights abuses.¹⁸² There is no argument, development or otherwise, that DFIs should be immune from liability for those harms. Development outcomes are undermined when rights are denied and people are harmed. While IAMs will always have an important role to play, project-affected communities should have the option of bringing a lawsuit to court or arbitration tribunal. One way for DFIs to implement this recommendation is to grant project-affected people third party rights under the agreement with their clients. Project-affected people would then have access to contractual remedies should the client violate the environmental and social provisions of the agreement.

- Complainants should participate in DFI board meetings when cases are discussed. Currently, the board only has the benefit of the perspectives of the IAM, which is supposed to be neutral, and management, but no one is present to represent the views of the complainants. Complainants should be invited to participate in board meetings to express their views on the findings and/or recommendations of the IAMs and the adequacy of the Management Action Plan. Those board meetings should also be live-steamed online so that project-affected people have access to the decisions that affect them.

¹⁸² OECD, Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector (June 2014), available at <http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-3.pdf>.

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