

# Accountability & International Financial Institutions

COMMUNITY PERSPECTIVES ON THE WORLD BANK'S OFFICE  
OF THE COMPLIANCE ADVISOR OMBUDSMAN

*March 2017*



International Human Rights Law Clinic  
University of California, Berkeley, School of Law



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Roxanna Altholz & Chris Sullivan

**INTERNATIONAL HUMAN RIGHTS LAW CLINIC**  
**UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW**

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# EXECUTIVE SUMMARY

This report presents findings from a study of the Office of the Compliance Advisor Ombudsman (CAO), an accountability mechanism the World Bank Group (World Bank) created to ensure that it finances development projects that are sustainable and benefit the poor. In the 1970s and 1980s, the World Bank prompted an international outcry for greater transparency and accountability when it financed infrastructure projects that devastated the lives and environment of several communities. In 1999 the World Bank created CAO to review complaints from private citizens who believe they have been harmed by private sector development projects financed by the World Bank's International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). CAO was the first independent oversight body among international financial lenders to review complaints about private companies. In the last two decades, CAO has facilitated agreements between communities and private companies and issued reports that critique failures by World Bank officials to follow the bank's social and environmental policies.

CAO is part problem-solver, part investigator. During its problem-solving process, CAO intervenes in disputes between communities and private companies through joint fact-finding, mediation, and negotiation; during its compliance review process, CAO investigates compliance with bank policies designed to protect people and the environment. Every major International Financial Institution (IFI), like the World Bank, including the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, and the Inter-American Development Bank has now established an accountability mechanism. These

mechanisms are a crucial and sometimes, the only form of potential redress available to communities harmed by internationally-financed development projects. CAO has to date responded to the largest number of complaints of any IFI accountability body.<sup>1</sup>

This study, *Accountability & International Financial Institutions: Community Perspectives on the World Bank's Office of the Compliance Advisor Ombudsman*, uses quantitative and qualitative methods to assess CAO's effectiveness during its first decade of operation. Out of a data set of cases that CAO decided between 2000 and 2011, we identified variables that might affect the outcomes of CAO interventions. We also interviewed CAO staff, bank officials, complainants, and community members regarding CAO's response to complaints about development projects in five countries: Ecuador, Guatemala, Indonesia, Kazakhstan, and Peru. The quantitative and qualitative findings provide insight into the nature of the conflicts addressed by CAO, the factors that influenced CAO's approach to accountability and outcomes, and community perceptions of CAO's effectiveness.

The study's main findings are as follows:

**1. CAO acted as a convener of dispute-resolution meetings and not as an investigator in most cases.**

During its first 10 years of operation, CAO rarely investigated whether the World Bank violated its own social and environmental policies. This despite ample evidence that the World Bank routinely failed independently to assess or to mitigate negative project impacts and that the bank established CAO to ensure that its projects are environmentally and socially sound and contribute to sustainable development. CAO audited the bank's compliance with its policies in only 7% of cases in our data set. Although the rate at which CAO cases reached the compliance stage increased over time, the pace at which CAO conducted audits—i.e., determined whether the bank adhered to its social and economic policies—did not increase significantly. Many complainants and representatives criticized CAO's decision to forgo

audits in their cases. Some viewed CAO's decision not to conduct an audit as evidence of CAO's weak authority and lack of independence.

**2. CAO had some success as a problem solver.** CAO has emphasized its role as a “creative problem-solver” that works to resolve concerns about environmental and social impacts by facilitating agreements between affected communities and companies. Of the 72 cases in our analysis, 32% (23 cases) reached an agreement and 68% (49 cases) did not result in an agreement. CAO facilitated more agreements over time as changes were implemented in CAO's procedures, however. In interviews, complainants and community members raised concerns about the process used to reach agreement and the quality of the agreements reached. CAO's lack of authority, the voluntary nature of the dispute resolution process, and the intractability of the conflict contributed to the impasse between parties. Complainants also criticized CAO's dispute process for failing to address underlying causes of conflicts between communities and companies.

**3. Many CAO complaints involve intractable conflicts that are resistant to resolution through problem solving.** Most of the complaints CAO found eligible for further action between 2000–2011 were filed about projects that the World Bank expected to have significant and irreversible adverse social and environmental impacts. According to the IFC, these projects would lead to job creation, increase energy production, and attract foreign investment to the region. Although the extractive industries (oil/gas/mining/chemicals) represent a small portion of the World Bank's IFC/MIGA projects (9% of their investment portfolio in 2010), 61% of the eligible complaints examined concerned extractive industry projects. Interviews indicate that in extractive industry cases complainants and extractive industry companies held deeply divergent views about the social and environmental impacts of the projects and the rights of community members. The deep divisions



between companies and communities may explain in part why, according to statistical analysis, complainants who filed complaints about extractive industries projects were significantly less likely to reach an agreement with the company. CAO's intervention also lasted significantly less time in cases against extractive industry projects compared to cases against non-extractive industry projects.

**4. *Stark power imbalances exist between the parties involved in CAO cases.*** IFC/MIGA finances projects in some of the world's poorest countries. According to the United Nations' Human Development Index (HDI), a composite measure of life expectancy, income per capita, and education levels of the world's nations, more than half of the countries where CAO complaints originate are among the least developed in the world. Yet complainants are up against companies whose IFC/MIGA financing alone stretches into the multimillions of dollars and whose revenues may stretch into the billions. The enormous differences in access to power or resources—such as money, information, technical expertise, and time—profoundly disadvantage communities that seek redress. Additionally, a number of complainants and community members believed that the mediation rules exacerbated power imbalances and created questions about undue company influence and CAO's independence. Some claimed that the “ground rules” CAO itself imposed on the problem-solving process left complainants without a role in the selection of a mediator, forbade them from discussing the problem-solving process with outside parties, and prohibited them from selecting NGO staff or lawyers to represent them directly in mediation or negotiations.

**5. *Who filed the complaint influenced CAO's process and outcome.*** Civil society organizations and other actors from outside the community played a significant role in CAO cases. Civil society organizations alerted community members to the opportunity to file a complaint with CAO; garnered media

attention on project impacts; conducted community outreach and education; trained community members to participate in CAO's dispute resolution process; provided advice, counsel, and research for meetings with CAO and companies; and participated in efforts to monitor compliance with agreements. When an international organization helped file the complaint, the cases were much more likely to reach the audit stage. CAO also spent more time on cases involving organizations. The contending parties were more likely to reach agreement, though, if complainants included members of communities harmed by a project.

**6. *The wealth of companies influenced CAO's process and outcome.*** The companies that receive IFC/MIGA financing are under no obligation to participate in CAO's dispute-resolution process. Some companies, after complaints were filed against their projects, simply repaid the loan early and severed all contractual duties with the World Bank. Our data suggest company revenue and the size of the IFC/MIGA project financing may have influenced CAO's process and outcome. The higher the revenue of the company involved in the project, the less likely it was for the complaint to progress to compliance review. Cases involving companies with annual revenue higher than \$50 billion took significantly less time and were less likely to be investigated by CAO for compliance with bank social and environmental policies than cases involving companies with lower revenues. Cases involving IFC's largest borrowers—projects with loan commitments greater than \$20 million—had significantly shorter duration than complaints with smaller project loans. Researchers note some of these findings included only a subset of our cases. Future research will include additional cases and control variables to further examine these relationships.

**7. *There was no outcome in the majority of CAO cases.*** CAO did not mediate an agreement or conduct an audit in 62% of the cases it deemed eligible

for review during the time period studied. Many of the complainants interviewed believed that participation in CAO's process failed to produce positive results. The lack of results may have motivated communities to file multiple complaints about the same project: of the 72 cases in our analysis, 42 complaints were brought against 7 projects. Some complainants claimed that adverse consequences resulted from filing a complaint with CAO, such as harassment and reprisals by company employees, exhaustion of resources, and the deterioration of their relationship with the company.

## RECOMMENDATIONS

Based on our findings, we offer the following recommendations:

1. ***Strengthen the accountability mandate of the World Bank Group's Office of the Compliance Advisor Ombudsman.*** In the Office of the Compliance Advisor Ombudsman (CAO), the World Bank Group (World Bank) has created the expectation of accountability, according to interviews with complainants and community members. CAO does not currently have the authority to fulfill that expectation, however. CAO cannot issue a binding decision or order the bank or company to remedy harms caused by a development project. Nor can CAO stop a project that causes grave, irreparable, and unaddressed harms. If CAO finds that the International Finance Corporation (IFC) or the Multilateral Investment Guarantee Agency (MIGA) failed to comply with social and environmental policies during the compliance audit, it is bank officials, not CAO, who decide whether and how to move the project into compliance. The World Bank should take steps to expand CAO's authority to hold a company and the IFC/MIGA accountable for breaches of bank policies by, for example, contractually obligating companies receiving World Bank financing to inform communities about CAO's complaint mechanism and to participate in CAO's

dispute resolution process. The World Bank should also require bank officials to address CAO's findings regarding compliance.

2. ***Identify violations of international human rights standards.*** According to its operational guidelines, CAO should not support agreements that violate international law. The World Bank's failure to fully integrate human rights standards into its mandate and sustainability policies, the voluntary nature of CAO's dispute resolution process, and CAO's reluctance to determine the applicability of human rights norms to cases it investigates has undermined this commitment. In some of the cases examined, CAO failed to address potential human rights violations and focused instead on issues that were amenable to consensus by the parties, interviews with those involved indicate. CAO should act proactively and diligently to identify concerns that implicate human rights violations by conducting an analysis of project impacts, applicable international and domestic laws, and local practices. Such investigations of human rights issues should be part of CAO's initial assessment of a complaint.

3. ***Address power imbalances between the parties.*** Companies receiving World Bank financing include some of the world's largest and most influential companies while the affected communities often have little access to political, economic, or social resources. This study found that stark differences in access to power or resources—such as money, information, technical expertise, and time—between the parties may influence CAO's procedure, outcomes, and community perceptions of its fairness. Although CAO met with parties, offered trainings, and contracted with local mediators in an effort to “level the playing field,” these measures did not adequately address the communities' lack of information, expertise, or power relative to a company. The World Bank, IFC/MIGA, and CAO should redouble efforts to ensure that communities can meaningfully participate in CAO's process. This could be done in the following ways:

**a. Improve community access to information.**

Access to information provides local communities the opportunity to identify and voice concerns, which is key to accountability. While the IFC's Policy on Disclosure of Information establishes a presumption of disclosure, it also establishes far-reaching exceptions to the rule. This study found that complainants often lacked access to key information about a company's project, which undermines their ability to seek accountability before CAO. The IFC/MIGA should expand its disclosure policy to require dissemination of investment and project information, especially information related to the potential environmental and social impacts, to affected communities in relevant languages; create a public registry for project information that is routinely updated; and contractually obligate companies receiving IFC/MIGA financing to disclose project information to communities. If the IFC/MIGA decides not to disclose information, the reasons for this decision should be made public.

**b. Ensure that ground rules for negotiation and mediation do not exacerbate power imbalances.**

The ground rules CAO used during the problem solving process exacerbated power differences with the company, a number of complainants interviewed reported. The voluntary nature of the problem-solving process limits CAO's ability to prevent companies from dominating the process to force concessions from complainants. CAO should reconsider ground rules for negotiation and mediation that may exacerbate power imbalances, such as rules that require strict confidentiality, limit the role of communities' representatives, prohibit communities' contact with the media, and inhibit access to other forms of accountability, such as litigation. CAO also should raise security risks, particularly the risk of harassment or violence against opponents to the project, with the parties and identify an action plan to address ac-

tual or threatened reprisals against complainants before initiating a problem-solving process.

**c. Respect the autonomy of complainants to select their representatives.** This study found that CAO's decision to limit the participation of civil society organizations and legal representatives during negotiation and mediation engendered distrust among complainants and in some cases prompted their decision to withdraw from the dispute resolution process. Several complainants believed that CAO's approach to representation also exacerbated power imbalances. Although direct contact with affected communities is critical to CAO's work, CAO should respect complainants' autonomy to engage legal representation or to enjoy the support of organizations. CAO should reform its operational guidelines to allow organizations standing to file complaints, to recognize complainants' autonomy in the selection of their representatives, and to allow for the participation of representatives selected by complainants in mediation and negotiation.

**d. Ensure adequate access by complainants to technical expertise.** Many of the projects entail complex technical issues, but complainants and affected communities often do not have the resources to bring in technical experts or gain access to proprietary information. CAO should ensure complainants have access to technical expertise by using a mediator who has the requisite technical expertise or experience and/or making funds available for complainants to hire experts in order to equalize access to technical information and expertise.

**4. Expand scope of CAO's compliance review.**

During its compliance review, CAO determines whether the bank complied with its own policies and protections. The focus of CAO's audit is the IFC/MIGA and not the company. During the appraisal process, however, CAO should determine whether

the project “raise[s] substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to [the] IFC/MIGA.” In practice, according to our case studies, CAO had a much narrower view of the purpose of its appraisal. Its decision to conduct an audit turned on whether the IFC/MIGA took steps to assure itself of compliance with bank operational policies, regardless of whether the bank’s approach led to the intended outcome on the ground. CAO should clarify that the performance of the company is a focus of compliance audits in addition to auditing due diligence by the IFC/MIGA. CAO should also independently verify whether the company effectively implemented bank policies and whether those policies prevented or mitigated social and environmental impacts.

5. *Clarify the role of complainants.* CAO’s rules of procedure and practices do not offer complainants—the signatories of the complaint—opportunities for meaningful participation in the process. This study found that CAO determined who mediated discussions, who was at the negotiation table, and what issues were discussed. Additionally, CAO’s rules of procedure do not require staff to consult with the complainants or to visit the project site to determine whether or not a complaint merits an audit. CAO’s operational guidelines should specify the positive role of complainants during the problem-solving process, should require staff to consult with complainants during compliance appraisal and audit, and should allow complainants the same opportunity as IFC/MIGA management to respond to draft and final audit reports.

# INTRODUCTION

For over seven decades, the World Bank Group (“World Bank”), an international financial institution created by the United States and 43 other countries in 1944 to support the reconstruction of war-torn Europe, has provided governments and private companies billions of dollars in financing to develop infrastructure, create jobs, and improve access to food, health, education, and electricity in the world’s poorest countries. By facilitating access to capital and technical assistance for new roads, dams, mines, and power plants, the World Bank seeks to promote economic growth and reduce poverty in developing nations. Some bank-financed projects, however, not only have failed to benefit the poor, they forcibly have displaced people, destroyed livelihoods, and irreparably damaged the environment.

The World Bank has financed dam projects in dozens of countries that have forced thousands of indigenous peoples from their ancestral land;<sup>2</sup> rural development and agricultural settlement projects that have led to the destruction of tropical forests at unprecedented rates;<sup>3</sup> and large-scale agricultural projects that require the misuse and overuse of pesticides and fertilizers to the detriment of public health and agricultural yields.<sup>4</sup> Intense scrutiny of its lending practices by environmental organizations, human rights groups, and governments prompted the World Bank in recent decades to develop policies and mechanisms intended to mitigate harms to local communities. In announcing a set of reforms in 1987, World Bank President Barber Conable said, “If the World Bank has been part of the problem in the past, it can and will be a strong force in finding solutions in the future.”<sup>5</sup>



In the late 1980s, the World Bank developed environmental and social policies designed to influence the selection of projects it financed as well as the projects' implementation. These policies aimed to identify, avoid, and mitigate risks to people and to the environment by establishing requirements for issues ranging from public disclosure of project information and environmental assessments to the protection of community health, safety, and cultural heritage. Social and environmental safeguards became a cornerstone of the bank's approach to development, but they failed to prevent some bank-financed projects from causing severe environmental and humanitarian harm. The World Bank routinely ignored its own policies to fund projects that displaced millions from their land and way of life.<sup>6</sup> Former World Bank officials charged that the environmental and social policies were "window dressing" and that the bank's culture of loan approval incentivized staff to prioritize "getting money out the door" and to ignore human rights and environment concerns.<sup>7</sup>

Bank culture and the failure to properly consider social and environmental safeguards resulted in bank-financed projects that deepened social inequities and accelerated environmental degradation. In 1985, for example, the World Bank chose to finance the construction of the Sardar Sarovar dam on India's Narmada River without conducting a full environmental impact study. The 535-foot-high dam would forcibly displace more than 140,000 Indian farmers and tribal people.<sup>8</sup> An international outcry compelled the World Bank to commission the first independent review of a bank-financed project. Although the independent experts urged the bank to "step back from the [project] and consider [it] afresh" due to a number of issues related to the environment and forced resettlement, the World Bank pressed forward with the loan and established benchmarks to address project deficiencies.<sup>9</sup> Unable to satisfy bank social and environmental safeguards, the Indian government later decided to forgo World Bank financing.<sup>10</sup>

In the 1990s the World Bank created ways for people and communities that believed they had been harmed by its projects to voice their concerns to the bank's high-

est authorities and thereby strengthen accountability in bank operations. In 1993 the World Bank established the Inspection Panel, the first independent accountability mechanism to address the complaints of private citizens harmed by international development projects. The Inspection Panel was authorized to conduct independent investigations to determine whether the bank complied with its own operational policies and safeguards in providing financing to governments, though not to private companies. In 1999 the World Bank established a similar mechanism, the Office of the Compliance Advisor Ombudsman (CAO), to consider complaints filed by local communities who believed they were harmed by bank-backed private companies.

Today every major International Financial Institution (IFI), including the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, and the Inter-American Development Bank, has followed the World Bank's lead by adopting social and environmental safeguards, and by establishing accountability mechanisms. These IFI accountability mechanisms share a common mission to provide private citizens with the opportunity to seek compliance with the particular institution's environmental and social policies.<sup>11</sup> Most address community concerns through dispute resolution (e.g., mediation) and/or by auditing bank compliance with its social and environmental policies.

This study, *Accountability & International Financial Institutions: Community Perspectives on the World Bank's Office of the Compliance Advisor Ombudsman (CAO)*, offers an empirical view of how one of these mechanisms works, what factors influence its approach and outcomes, and when communities believe it is effective and fair. In 2012, Berkeley Law's International Human Rights Law Clinic (IHRLC) began this study of CAO, which reviews complaints from anyone adversely affected by a private company financed by the World Bank's International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), to understand the effectiveness of accountability measures established by IFIs. IHRLC used its experience with

international accountability mechanisms to inform this assessment of CAO's effectiveness. This study was conducted independently and funded through private donors. We interviewed dozens of members of CAO and World Bank staff and provided the Vice-President of CAO the opportunity to comment on the content of the report before publication.

Although a popular term in political discourse and policy debates, "accountability" is an elusive concept with no universally accepted definition. With respect to international institutions, one scholar has defined accountability as a vertical relationship "between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences."<sup>12</sup> IFI accountability mechanisms are an innovative form of citizen-driven accountability, but have significant structural limitations.

Historically, private citizens who were affected by IFI operations had no recourse to hold international financial institutions directly accountable.<sup>13</sup> Like most international organizations, IFIs enjoy immunity from suit by private citizens in national courts.<sup>14</sup> IFIs are legally accountable to their constituent member states, the parties to which they have contractual obligations (i.e., the governments and companies receiving financing), and their staff.<sup>15</sup> Over the last several decades, the growing influence of international institutions over issues previously regulated domestically and the development of international human rights law have given rise to calls for greater accountability and transparency of international institutions, including IFIs.<sup>16</sup> Sustained campaigns by environmental and human rights groups are credited with pressuring IFIs to develop more responsive social and environmental policies and accountability mechanisms.<sup>17</sup>

While the creation of IFI accountability mechanisms is a step forward, these mechanisms share some significant deficiencies: they lack the authority to compel reform or remedies, are prohibited from disclosing project information, and are beholden to the IFIs for their budgets. IFI accountability mechanisms, however, have in certain

instances secured compensation for people harmed by IFI-financed development projects and prompted changes to IFI social and environmental policies.<sup>18</sup> In their decisions about the nature and scope of IFI obligations to comply with social and environmental standards, IFI accountability mechanisms have also influenced the development of international human rights, environmental, and administrative law.<sup>19</sup> The World Bank's Inspection Panel, for example, has used international principles to draw attention to the human impact of bank policies and to assess compliance with bank environmental and social policies.<sup>20</sup> One scholar notes that "[i]n this way, [decisions by IFI accountability mechanisms] are contributing to the accretion of precedents that inform the creation of international customary law and the principles incorporated into international agreements."<sup>21</sup>

The scholarly literature on accountability acknowledges the limited impact of IFI accountability mechanisms.<sup>22</sup> Nevertheless, research describes the promise of IFI accountability mechanisms in resolving conflicts between local communities and governments/companies.<sup>23</sup> Several scholars have pointed out that the problem-solving aspect of these accountability mechanisms is essential because private citizens "are more interested in having the problems caused by the organization's operations solved than they are in ensuring that the staff and management comply with the applicable operational policies and procedures, which may not be well known by them."<sup>24</sup>

This study contributes to the existing literature in at least three important ways. First, we look not only at CAO's procedural rules, but also at its practice in order to examine closely its response to eligible complaints during its first decade of operations. Second, through interviews with dozens of complainants and community members, we offer the first detailed look at the experiences of those who use CAO to address their concerns. IFIs, including the World Bank, have engaged teams of experts to review IFI accountability mechanisms in operation to assess their effectiveness.<sup>25</sup> In formulating their recommendations, though, the reviews have not rigorously examined the perspective of complainants or community members on CAO's effectiveness or its im-

pact. Indeed, only one of the three teams of experts that have previously reviewed CAO's work interviewed complainants, and none interviewed community members harmed by IFC/MIGA development projects.<sup>26</sup> Third, we draw on three important areas of scholarship—alternative dispute resolution, human rights, and procedural justice—to interpret our quantitative and qualitative findings. These fields offer valuable frameworks and criteria for assessing CAO's effectiveness from the perspective of affected communities.

## A. GOALS

We selected CAO for study for several reasons. The IFC has described itself as “the world's largest global development institution focused on the private sector”—it has delivered more than \$245 billion in financing to businesses since it was created 60 years ago.<sup>27</sup> Its Performance Standards are the most widely accepted social and environmental framework among actors involved in international financing, including MIGA.<sup>28</sup> MIGA offers political risk insurance for all 179 World Bank members. In 2016, MIGA insured a total of \$4.2 billion.<sup>29</sup> CAO has fielded the largest number of complaints of any IFI recourse mechanism. Relative to other IFI recourse mechanisms, CAO is well-resourced and staffed, and it has made public ample and updated information about its procedures, including case material, guidelines, annual reports, and internal audits.

This study is intended to provide a glimpse into the world of accountability at IFIs and on-the-ground bank-financed development sites.<sup>30</sup> Its goals are to:

1. Understand how CAO attempts to address complaints by private citizens and what factors influence its process and outcomes;
2. Capture the views of complainants and community members about the effectiveness of CAO's process and outcomes; and
3. Identify ways the World Bank, IFC, MIGA, and CAO can improve CAO's accountability process.

## B. METHODS

To investigate CAO's process and outcomes, we used quantitative and qualitative methods. We first created a coded data set of CAO complaints filed between 2000 and 2011—the first 11 years of CAO—and used various statistical techniques to explore individual variables and relationships between variables as possible explanations of CAO decisions and results. We also examined in detail CAO's responses to five selected cases filed by individuals, communities, and organizations about projects in Ecuador, Guatemala, Indonesia, Kazakhstan, and Peru by conducting semi-structured interviews with key informants, complainants, and community members.

### Quantitative Data

To examine what factors may most affect the outcomes of CAO interventions, we coded CAO complaints filed between 2000 and 2011 using over 80 variables, including geographic location of the project, status of the project, duration and type of CAO's intervention, financial commitment by IFC/MIGA, revenue of the project company, characteristics of the complainant(s), and the types of harms alleged. Data was obtained from CAO's case registry (available on its website), case reports, annual reports, and other publications; company websites; and other online sources.

We employed two approaches in our statistical analyses. First, we examined summary statistics of individual variables and how these differed both over time and across regions. This study includes a discussion of frequency distributions and summary statistics for key dependent and independent variables related to CAO's response to complaints, the complainants, and project-level characteristics. Second, we examined how different variables were statistically related to each other. The analysis focused on three key dependent (or outcome) variables that indicated the strength and type of CAO intervention: (1) whether an agreement was reached between parties; (2) whether CAO considered conducting a compliance audit of bank policies; and (3) the duration of CAO's process. The statistical analyses considered how



TABLE 1: CASE CHARACTERISTICS

<i>Procedural Category</i>	<i>Agreement Reached: YES</i>	<i>Agreement Reached: NO</i>
Ongoing Ombudsman / Settled After Dispute Resolution	Ecuador-Interagua 01/Guayaquil	Guatemala-Marlin-01/Sipacapa
Closed After Dispute Resolution and Compliance Appraisal	N/A	Peru-Maple Energy-01/Nuevo Sucre and Canaán
Ongoing Compliance Case/ Closed After Dispute Resolution and Compliance Audit	Indonesia-Wilmar Group-01/ West Kalimantan	Kazakhstan-Lukoil Overseas-01/Berezovka

TABLE 2: INTERVIEWS CONDUCTED

	<i>Non-Project Specific Interviews</i>	<i>Lukoil Project in Kazakhstan</i>	<i>Interagua Project in Ecuador</i>	<i>Marlin Project in Guatemala</i>	<i>Maple Energy Project in Peru</i>	<i>Wilmar Project in Indonesia</i>	<i>Total</i>
Key Informant Interviews	13	8*	6*	5	3*	2	34
Complainants & Community Member Interviews	N/A	6	10	3	2	2	23
							57

\*Includes key informants who were interviewed about multiple projects.

these three variables were related to several independent variables, including region, project category, company revenue, types of harms alleged by complainants, and size of the IFC loan. The analysis used cross-tabulations, chi-squared tests, t-tests, and regression analyses to examine significant associations between each of the three main dependent variables and several independent variables of interest. Where possible, researchers created bar-graphs, pie-charts, and histograms to display key findings.

### Qualitative Data

We also studied five cases in depth to gain a better understanding of CAO's practice. Rather than randomly select cases, we used a three-tiered sampling strategy to choose them. We looked at cases opened by CAO between 2000 and 2011 and included them in our data set

based on three criteria: (1) the strength of CAO's intervention (measured by complaint duration, diversity of alleged harms filed by complainants, and the diversity of complainants);<sup>31</sup> (2) the procedure used by CAO to address the complaint; and (3) our determination of whether or not an agreement had been reached between parties. Finally, we prioritized more recent cases and selected only those that were filed in 2004 or later.

The five cases selected for further analysis are given in Table 1.

The five case studies examined CAO's response to complaints filed about projects in Ecuador, Guatemala, Indonesia, Kazakhstan, and Peru. We used a semi-structured questionnaire to conduct one- to two-hour interviews with key informants, complainants, and community members about these cases (see Table 2). Key

informants included academics, CAO staff, World Bank officials, project company representatives, and NGO representatives. Key informants were selected based on publicly available case material; a literature survey; and discussions with bank, company, and NGO representatives. Complainants and community members were asked about their perspectives on the effectiveness of CAO procedures along three key dimensions: the fairness of the process and its outcome, satisfaction with the process and outcome, and perceptions about how the relationship with the project company was changed by CAO's intervention. We travelled to Washington, D.C. as well as to project sites in Ecuador, Guatemala, and Kazakhstan to conduct interviews in person; where that was not feasible, we conducted the interviews by phone.

We also did extensive desk research to document in detail the procedure CAO used and the outcome of its intervention. The case study materials were drawn from primary CAO documents and publically available secondary sources including scholarly articles, books, reports, newspapers, and official documents.

## Limitations

The mixed methods approach (quantitative data analysis, key informant interviews, literature survey, and case studies) to understanding the effectiveness of CAO's interventions, we believe, has helped to increase the overall validity of the research findings. While every effort was made to ensure data were collected and analyzed in a systematic fashion, several potential limitations to the study also must be addressed.

The quantitative data set offers a population of all 69 complaints that individuals and organizations filed with CAO between August 2000 and June 2010 that were deemed eligible for CAO assessment—a time period that reflects the first 10 fiscal years of CAO's operation. In addition, we included three complaints from the 2011 fiscal year, for a grand total of 72 cases. The data set does not include either complaints deemed ineligible by CAO or cases initiated by request of senior management of IFC/MIGA or the president of the World Bank Group.<sup>32</sup> The 72 complaints addressed by CAO between

August 2000 and May 2011 on which we focused may not be representative of complaints brought to the attention of other International Financial Institutions (IFIs). Nonetheless CAO is the largest organization of its type, and it has proved a model for how other IFIs may handle complaints. Insights gleaned from our quantitative findings may serve as testable hypotheses in alternative settings. For a full list of the cases included in the data set, please refer to Appendix A.

The time period covered by this analysis includes several iterations of CAO's rules of procedure. CAO made further significant changes to its procedures in 2013 (outside the scope of our data set). Under the new rules, individuals harmed by projects may request a compliance review directly, while prior to 2013, complainants had first to exhaust the dispute resolution process before CAO or bank management would transfer the case for compliance review. This reform, enacted subsequent to the complaints included in the data set, may significantly affect the experience later complainants have with CAO. Indeed, based on preliminary examination of post-2013 data, it appears cases filed between 2013 and 2016 were significantly more likely to reach the compliance review stage (appraisal/audit) compared to cases filed before 2013. Researchers will examine this additional data in more detail in a forthcoming study.

From a statistical perspective, the size of the data (72 cases) made it difficult to assess complicated multi-variate relationships between independent and dependent variables. For ease of interpretation, our statistical analysis focuses on describing individual variables and examining relationships between only two variables considered at a time. While we are confident in presenting these statistical relationships, the findings may need to be revised when additional variables are considered in the analysis. A forthcoming report will use an expanded data set (which includes complaints addressed by CAO between 2000 and 2016) to examine these more complicated relationships using additional variables and data from other years and recourse mechanisms.

Additional limitations include incomplete data. While the purpose of the quantitative data analysis

was to examine variables that may affect the outcomes of CAO interventions, the data set does not include all factors that may have a significant effect on the outcome of complaints. Characteristics of CAO staff (including individual and office-level characteristics), for example, may also influence how complaints were handled. While it is difficult to directly assess these characteristics, researchers separated CAO's handling of complaints into three different time periods that reflected broader changes in CAO's mandate and rules of procedure, and may capture broader trends in how CAO handled complaints at the organizational level.

We were also unable to obtain the financial information for several companies associated with the projects involved. Portions of the quantitative analysis were thus restricted to those cases that contained complete data.

Although there were 72 individual complaints coded in the quantitative data set, these complaints were filed against only 37 distinct IFC/MIGA sponsored projects. Thirty of the cases brought to CAO entailed multiple single complaints brought against a single project; the remaining 42 complaints were part of multiple separate complaints (often filed in different years) brought against only seven different projects. One project in par-

ticular, the BTC Pipeline in Georgia and Turkey, was the object of 27 unique complaints. Since we were primarily interested in variation in CAO's handling of cases at the complaint level, each of the 72 complaints was treated as a separate unit of analysis. The presence of multiple complaints directed against single projects may introduce bias in our findings. To account for this bias, we made statistical adjustments to correct for project-level grouping effects on complaint level outcomes.

Finally, the non-random sampling methods we utilized in selecting the key informants and case studies may also introduce bias in the study findings. The five cases selected may not be representative of the experiences of complaints filed in other geographic or temporal settings. Our sampling strategy sought to maximize the breadth of experiences with CAO's process and our evaluation of whether agreement was reached between the parties involved. Of primary concern, though, is not whether these cases are representative of a larger whole, but rather understanding the mechanisms and processes regarding how CAO addressed complaints filed under these conditions. Additional follow-up surveys or studies may address issues of representativeness and generalizability to additional settings.

# BACKGROUND

In the late 1990s the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) adopted social and environmental policies designed to regulate the types of projects World Bank agencies would agree to finance and how those projects were implemented.<sup>33</sup> These policies include a set of performance standards that the borrower or insured is contractually obligated to follow throughout the life of a bank-financed project.<sup>34</sup> The performance standards establish the obligation for companies to assess social and environmental risks; the duty to consult with local communities and to provide project-related information; and the duty to identify social and environmental impacts that require particular attention, such as labor and working conditions, pollution, community health, safety and security, land acquisition and involuntary resettlement, biodiversity conservation and management, treatment of indigenous peoples, and respect for cultural heritage.<sup>35</sup>

World Bank-financed projects, however, have not always complied with these social and environmental policies in practice. According to its terms of reference, the Office of the Compliance Advisor Ombudsman (CAO) was created “as an additional pillar . . . to ensure that projects are environmentally and socially sound and enhance IFC’s and MIGA’s contribution to sustainable development.”<sup>36</sup> CAO addresses this mission through three functions: dispute resolution, compliance oversight, and provision of advice to World Bank management about relevant policy. Dispute resolution and compliance oversight are triggered either by a request from bank management or a complaint submitted by a person who believes he or she has been, or might be, harmed by a bank-financed project. During the dispute-resolution phase, CAO uses a problem-solving approach to address conflicts

between the affected community and the company. The focus of the compliance phase is on IFC/MIGA and how IFC/MIGA assured itself that the project complied with bank policies, standards, and guidelines.<sup>37</sup> Although the focus of CAO compliance is on the bank and not the company, CAO recognizes that “[i]n many cases . . . it will be necessary to review the actions of the [company] and verify outcomes in the field, in assessing the performance of the project and implementation of measures to meet the relevant requirements.”<sup>38</sup> In its advisory role, CAO reflects on lessons learned from its caseload to provide guidance to the World Bank president and senior management about policies and standards. This study focuses only on the dispute resolution and compliance functions to examine how CAO responds to complaints from communities about social and environmental impacts. Through CAO’s advisory role, CAO provides systemic advice at the request of bank management. The advisory report is not project-specific or initiated by a community complaint and therefore is beyond the scope of this study.

The head of CAO is appointed and can be terminated by the president of the World Bank.<sup>39</sup> Meg Taylor, a diplomat from Papua New Guinea, led CAO from 1999 to 2014 when Ovaldo Gratacós, an attorney and the former inspector general of the Export-Import Bank of the United States, replaced her. The head of CAO reports directly to the president of the World Bank and is structurally independent of the management of both IFC and MIGA.<sup>40</sup> During the period examined by this study, CAO’s administrative budget increased from approximately \$800,000 in 2000 to more than \$3.5 million in 2011.<sup>41</sup> CAO’s staff also grew from only four members in 2000 to 12 in 2011.<sup>42</sup> CAO also has access to an emergency contingency fund provided by IFC and MIGA to pay for “extraordinary mediation and conflict resolution activities”<sup>43</sup> and to hire independent mediators and auditors if needed.<sup>44</sup>

CAO intervenes in site-specific disputes that emerge from different political, economic, and social contexts. Many of the complaints share some broad characteristics. They typically involve multiple parties, multiple issues, technical complexity, scientific uncertainty, and

significant power imbalances between the parties. Most complaints are rooted in conflicts over natural resources, the distribution (or the lack) of socioeconomic benefits to communities, and the failure to avoid or to mitigate harms to communities, but most complaints are triggered by uncertainties or inadequacies related to project approval and oversight. Many of the complaints CAO receives involve disputes over rights, values, and world-views that are highly resistant to resolution.

This section will provide an overview of the procedural approach CAO used between 2000 and 2011 to address complaints submitted by persons affected by IFC/MIGA financed projects. It draws on statistical information gathered by CAO and our descriptive quantitative findings based on that information.

## A. CAO’S MANDATE

CAO’s mission is “to serve as a fair, trusted, and effective independent recourse mechanism and to improve the social and environmental accountability of [the] IFC/MIGA.”<sup>45</sup> CAO has authority to consider complaints about projects that the IFC/MIGA is either participating in or actively considering for financial support. It is the primary vehicle communities have to voice their concerns to bank officials and shape development projects.<sup>46</sup> Companies receiving IFC/MIGA financing, however, are under no obligation to participate in CAO procedures although some recent loan agreements require companies to allow CAO staff access to project sites, if given reasonable notice. The IFC/MIGA does not require companies to inform communities that they are receiving international financing or that CAO’s complaint procedure is available to them.

In 2000, CAO drafted and issued its first set of operational guidelines.<sup>47</sup> Under its rules of procedure, CAO is required to address complaints from affected persons “in a manner that is fair, constructive and objective.”<sup>48</sup> CAO responds to complaints with two procedures: (1) dispute resolution or problem solving through its ombudsman role and (2) through its compliance role, auditing compliance by the bank with the bank’s social and environmental policies (Figure o).

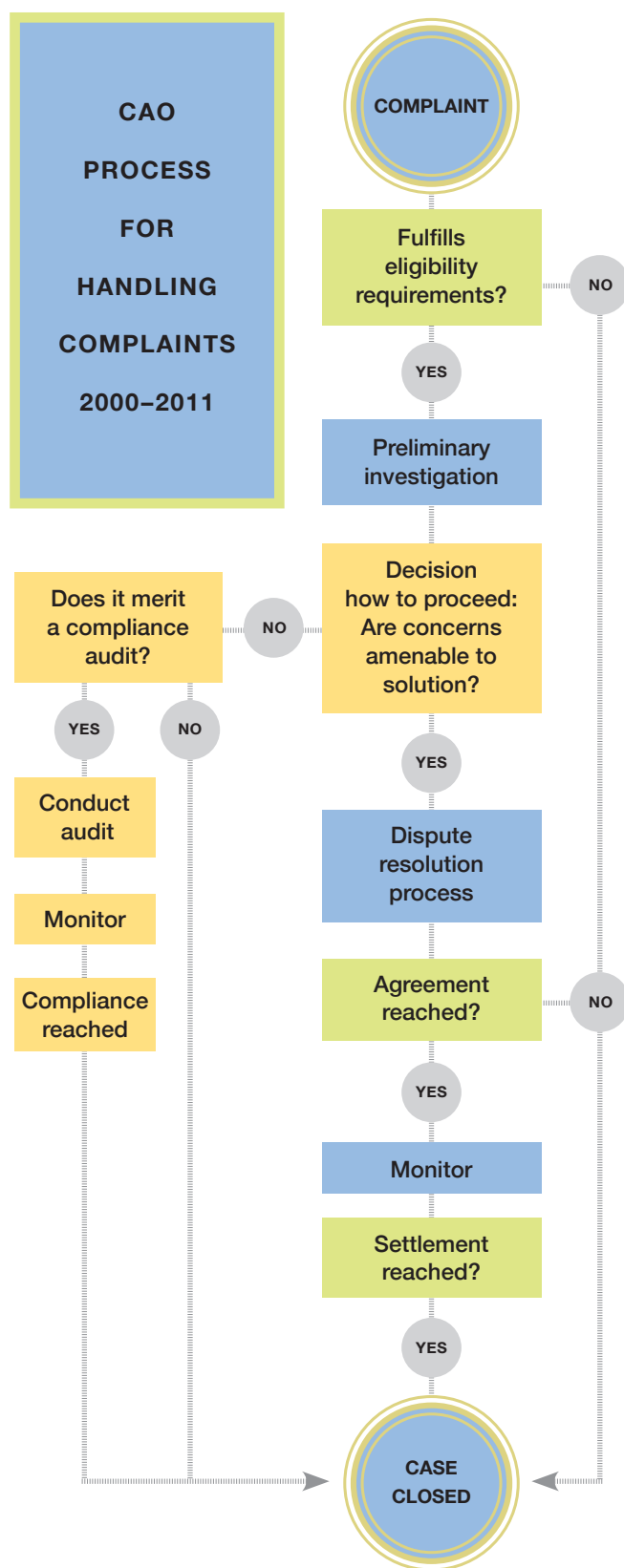
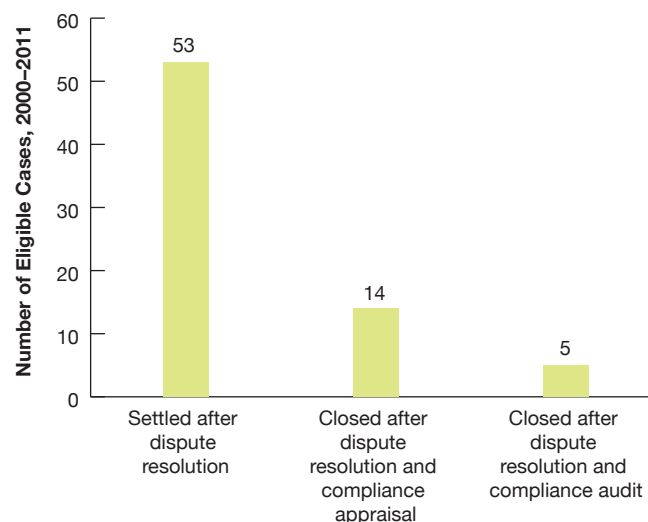


FIG. 0  
CAO Process for Handling Complaints 2000–2011

In the 15 years since its creation, CAO has positioned itself as a “constructive problem solver” rather than a “purely investigative” agency.<sup>49</sup> As such, it has focused on its ombudsman role rather than its compliance role. Of the 72 complaints deemed eligible for CAO assessment in our data set, 53 (nearly 74%) were closed without proceeding to compliance review. A further 14 complaints were closed after compliance appraisal. CAO conducted a compliance audit in only 5 instances (approximately 7% of the 72 cases in our data set) (Figure 1). However, preliminary results find an increase in the number of compliance audits conducted for cases filed post-2013. As this study focuses on CAO’s first 10 years of operation, further details will be provided in a forthcoming report that includes all cases filed between 2000 and 2016.

FIG. 1  
Number of Cases by Procedural Category



## B. CAO’S PROCEDURE

### 1. The complaint

According to CAO’s 2007 rules of procedure, “[a]ny individual, group, community, entity, or other party that believes it is affected—or potentially affected—by the social and/or environmental impacts of an IFC/MIGA project may make a complaint to the CAO Ombudsman.”<sup>50</sup> An authorized representative may also submit a complaint on behalf of an affected individual or group.<sup>51</sup> Complaints “may relate to any aspect of the planning, implementation, or impact of IFC/MIGA projects.”<sup>52</sup>

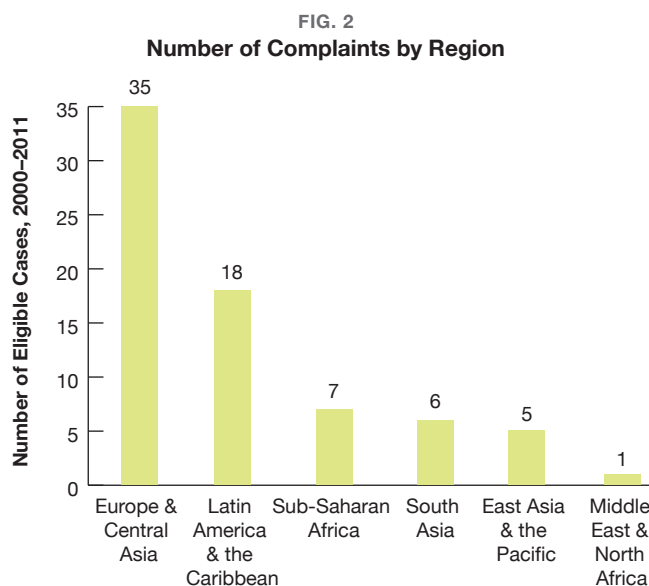


Organizations filed most complaints in our data set, although community members also signed a significant portion of the complaints.<sup>53</sup> In 2010, 24% of the eligible complaints filed with CAO were signed solely by community members without representation of an organization.<sup>54</sup> In 2013 CAO changed its rules to limit who can lodge a complaint to individuals and groups of individuals who believe they are affected or potentially affected by the project—entities are no longer eligible to lodge complaints on their own.<sup>55</sup> In 2015, 46% of eligible complaints were filed directly by local community members without the representation of an organization.<sup>56</sup>

Once a complaint is filed, CAO assesses its eligibility. CAO eligibility requirements are consistent with, but arguably less onerous than, those of other IFI accountability mechanisms. To determine complaint eligibility, CAO examines whether the complaint: relates to an IFC/MIGA backed-project; raises social and environmental concerns related to that project; and involves individuals, communities, or groups who are, or may be, impacted by those concerns. If CAO determines that the petition is ineligible, it will close the file on the complaint and inform the complainant in writing of the reasons for the decision.<sup>57</sup> Between 2000 and 2010, CAO received 127 complaints and determined that approximately 40% were not eligible for review.<sup>58</sup>

From 2000 to 2011, most of CAO's eligible complaints involved projects in Europe and Central Asia, although 27 of the complaints filed in Europe, as noted above, involved just one project, the Baku-Tbilisi-Ceyhan (BTC) oil and gas pipeline, which stretches from the Caspian Sea to the Mediterranean Sea and passes through Azerbaijan, Georgia, and Turkey (Figure 2).

The World Bank's mission is to end extreme poverty and boost shared prosperity. In pursuit of those goals, the IFC has supported the micro finance sector in Bosnia, the Caribbean, India, and Latin America; launched a large-scale gender initiative to support women-owned businesses; invested in IT start-ups in India; and provided \$225 million to local banks to maintain their lending to small business as part of the response to the Ebola crisis in West Africa.<sup>59</sup> For over 60 decades, the IFC has deliv-



ered \$245 billion in financing to businesses in emerging markets. Many of these projects involve environmental and social risks and impacts. The World Bank categorizes all its projects, including IFC/MIGA projects, based on potential for negative impacts and taking into account project type and scale, sensitivity of the location of the project site, and the nature and magnitude of anticipated social and/or environmental impacts: Category A refers to projects expected to have significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented; Category B refers to projects expected to have limited adverse social and/or environmental impacts that can be readily addressed through mitigation measures; Category C refers to projects expected to have minimal or no adverse impacts; and Category FI refers to projects involving simply a financial investment.<sup>60</sup>

Not surprisingly, most of the complaints found eligible by CAO between 2000 and 2011 in our data set involved Category A projects (48 projects), those expected to carry the highest risk of adverse social and environmental impact (Figure 3).

Across the 72 complaints examined by this study, 11 types of harm were cited. The most frequently cited harm (60 of the 72 complaints) was related to socioeconomic impacts. The second and third most frequently cited (54 of the 72 complaints each) were harms related

FIG. 3

## Number of Cases by Project Category

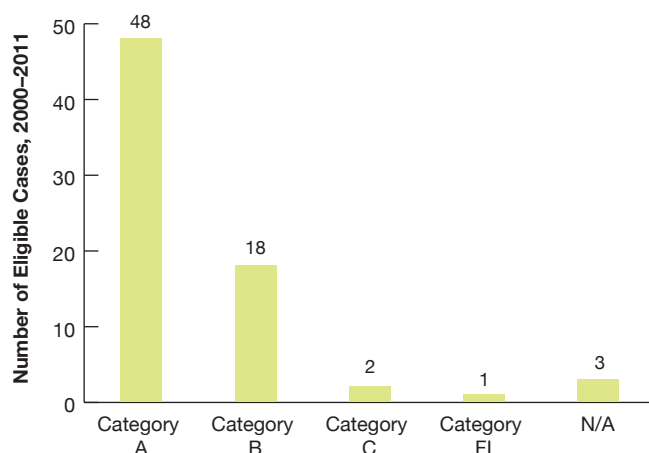
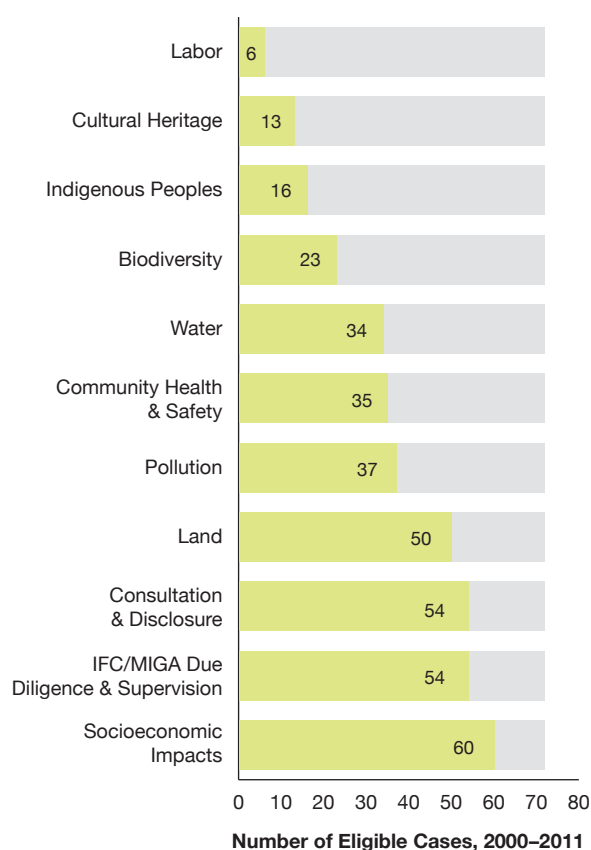


FIG. 4

## Number of Cases Citing Type of Harm



to lack of due diligence and adequate supervision by the IFC/MIGA of companies and harms related to consultation and disclosure, while another 50 complaints cited harms related to land (Figure 4).

## 2. Dispute Resolution Process

While company and complainant participation in dispute resolution is voluntary, CAO views the process as a unique and central feature of its mandate. The CAO dispute process is comprised of three stages: assessment, problem solving, and monitoring. The primary objective of the process, according to CAO, is to help resolve issues raised about the social and environmental impacts of IFC/MIGA projects and improve outcomes on the ground by supporting the parties' efforts to identify mutually satisfactory solutions.<sup>61</sup>

CAO's Operational Guidelines indicate that the assessment must be completed within 120 working days from the date of the eligibility decision<sup>62</sup> although assessments have lasted much longer. The assessment phase concludes when CAO publishes an assessment report to notify complainants and other stakeholders of the results.<sup>63</sup> If then, or at any time during the ombudsman stage, CAO determines that collaborative settlement is unlikely or that the ensuing dispute-resolution process is an inefficient use of resources, CAO may transfer the complaint to compliance review or simply close the case.<sup>64</sup> (The options of arbitration or adjudication are not available to parties through CAO.)

If CAO instead determines that there are stakeholders and issues amenable to collaborative settlement, it initiates the problem-solving phase.<sup>65</sup> CAO's dispute resolution process is, in its own words, a "nonjudicial, nonadversarial, neutral forum"<sup>66</sup> that does not make judgments about the merits of a complaint, nor does it impose solutions or find fault.<sup>67</sup>

The aim of the problem-solving process is "to identify problems, recommend practical remedial actions, and address systemic issues that have contributed to the problems."<sup>68</sup> To this end CAO's Ombudsman may use one or more of several approaches, including facilitation and information sharing, joint fact-finding, dialogue and



negotiation, and/or conciliation and mediation. CAO's course of action should take into account local governance structures and customary methods of resolving disputes.<sup>69</sup>

The problem-solving process may lead to agreements on proposals for future action.<sup>70</sup> Of the 72 cases, 23 (32%) in our estimation produced an agreement according to our analysis and 49 (68%) did not. To determine if an agreement was reached, we reviewed CAO's case registry and other CAO reports to see whether CAO reported a "substantive" agreement had been reached; procedural agreements (e.g., an agreement simply to enter into negotiations) were not counted as "substantive."

If a satisfactory settlement is reached, CAO may close the complaint.<sup>71</sup> Nevertheless CAO is still expected to monitor whether the agreements or recommendations are implemented and publicly disclose these findings in monitoring reports.<sup>72</sup>

### 3. Compliance

In certain circumstances, CAO oversees project-level audits of the environmental and social performance of IFC/MIGA to ensure compliance with policies and conditions of IFC/MIGA involvement.<sup>73</sup> In contrast to the dispute resolution stage, CAO will identify "wrong-doing" by IFC/MIGA during the audit if it believes that such a judgment is warranted. In our data set, CAO referred 14 cases (19%) after conducting a compliance appraisal to determine if an audit should be carried out. CAO conducted compliance audits in five cases (7%).

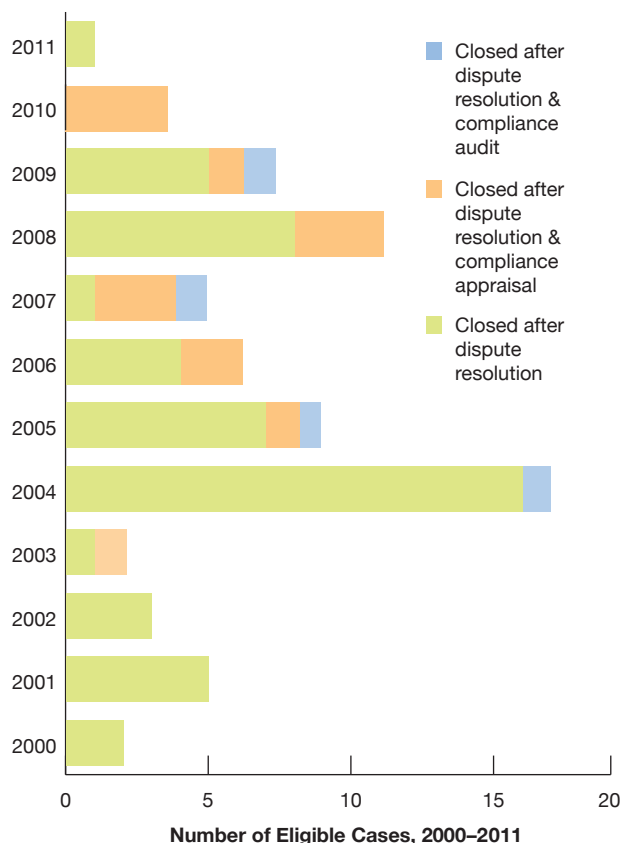
The compliance review is comprised of two phases: appraisal and audit. The purpose of the appraisal is "to ensure that compliance audits are initiated only for those projects that raise substantial concerns regarding social or environmental outcomes."<sup>74</sup> Unlike dispute resolution, where the parties are the principals in the dialogue, compliance reviews are largely internal. CAO officials use information gathered during the Ombudsman process, including the complaint and IFC/MIGA documents. Although the appraisal is primarily conducted through desk research, CAO audit officials regularly contact IFC/MIGA officials with questions regarding the project.

If CAO Compliance determines that the issues do not meet the appraisal criteria, the case will be closed.<sup>75</sup> If the appraisal criteria do appear to be met, CAO officials will provide a memorandum explaining the rationale for an audit to IFC/MIGA management. CAO will then make the final decision of whether to conduct the audit in consultation with the bank's management. During the audit, the audit team will conduct an initial review of the documents, prepare audit protocols, and conduct on-site verification visits.<sup>76</sup> While in practice affected individuals and communities might participate during these site visits, CAO's guidelines do not require CAO staff to contact affected individuals and communities.

A compliance audit concludes with the preparation of an audit report. The audit report will describe the project; explain the rationale for the audit; describe the objectives, scope, and criteria of the audit; and explain the audit findings "with respect to noncompliance and any adverse social and environmental outcomes, including the extent to which these are verifiable."<sup>77</sup> Senior management of IFC/MIGA and all relevant departments—but not complainants or affected communities—have the opportunity to comment on a draft of the audit report before a final draft is submitted to the senior management of IFC/MIGA for an official response.<sup>78</sup> Lastly, the Office of the President of the World Bank Group must authorize the public release of the final version of the audit report and senior management's response.

Although CAO was created to hold the IFC and MIGA accountable to social and environmental policies, its mandate to conduct an audit is limited. In conducting an audit, CAO will consider whether: (a) the actual social or environmental outcomes are consistent with or contrary to the desired effect of the policy provisions; and (b) the failure to address social or environmental issues as part of the IFC/MIGA review process resulted in outcomes that are contrary to the desired effect of the policy provisions.<sup>79</sup> During the audit, CAO is not required to verify on-site conditions as to whether the company effectively implemented bank policies to pre-

FIG. 5  
Procedural Outcome by  
Year Complaint Filed



vent or mitigate social and environmental impacts if the IFC/MIGA took steps to assure itself of compliance with bank operational policies.

CAO conducted its first audit in 2004 in a case filed by an organization representing indigenous communities in Bolivia. The previous year, the organization had filed a complaint against a gold-silver-copper mine located in a remote region and owned by the country's largest privately-owned mining company. Although cases were transferred to the compliance stage with greater frequency over the course of the time period we reviewed, the pace at which CAO conducted audits did not increase significantly because CAO closed several cases after the audit appraisal (see Figure 5).

In cases that CAO determines that the IFC/MIGA is out of compliance, CAO will monitor the actions taken by IFC/MIGA to move back into compliance.<sup>80</sup> Where the IFC, MIGA, and/or project sponsors move back into compliance, CAO Compliance will close the audit.<sup>81</sup>

# QUANTITATIVE ANALYSIS

We collected and analyzed quantitative data to explore factors that might account for variation in CAO's response to individual complaints. Our quantitative analysis is divided into four sections. Section A explores the context and parties involved in CAO complaints, including country-level characteristics, project-level variables, and characteristics associated with the complainants and companies. Section B examines factors that explain variation in the type of CAO intervention, including whether or not complaints progressed to compliance review. In this section, we examined what factors might explain why a particular complaint would receive a CAO compliance appraisal and sometimes even an audit, while other complaints were closed after the dispute resolution phase without progressing to a compliance review.

Section C explores what factors promote (or hinder) agreement between complainants and project companies. Section D examines factors associated with variation in case duration. We examined what factors might explain why some cases were resolved in a few months, while other cases took years to close.

We looked at how over 80 variables affected the strength and type of CAO intervention. These factors ranged from characteristics of complainants to information about the projects and stakeholders themselves; from qualities associated with the location of the projects involved to characteristics of the project industries and broader social context. In part, the goal of the quantitative analysis is to uncover potential associations between variables. We are careful to note these associations do not imply a causal relationship between variables.

## A. CONTEXT AND PARTIES INVOLVED IN CAO COMPLAINTS

### 1. Country Level Characteristics

The 72 cases examined in our study centered on complaints brought against 37 IFC/MIGA-sponsored proj-

ects in 25 countries around the world. Of these 25 countries, 11 were the locus of 2 or more complaints, while 14 each had only a single complaint during the period of study (August 2000–May 2011). Table 3 includes information about the number of complaints filed in each country; the number of projects involved in the com-

**TABLE 3: COUNTRY LEVEL CHARACTERISTICS**

Region	Country	Number of Complaints by Country	Number of Projects by Country	Human Development Index (HDI)			Inequality- adjusted Human Development Index (HDI)	GDP per capita (2011 PPP USD)
				2000	2005	2010	2011	2011
East Asia and the Pacific	Cambodia	1	1	0.419	0.491	0.536	0.38	2,646
	Indonesia	3	2	0.606	0.635	0.665	0.504	8,442
	Philippines	1	1	0.623	0.64	0.654	0.516	5,719
Europe and Central Asia	Georgia	25	1	0.672	0.711	0.735	0.63	6,322
	Kazakhstan	3	1	0.679	0.746	0.766	0.656	20,772
	Russian Federation	3	1	0.717	0.75	0.783	0.67	22,502
	Turkey	4	3	0.653	0.687	0.738	0.542	17,998
Latin America and the Caribbean	Bolivia	1	1	0.603	0.616	0.641	—	5,462
	Chile	3	2	0.752	0.788	0.814	0.652	20,169
	Colombia	1	1	0.654	0.679	0.706	0.479	11,364
	Ecuador	2	2	0.674	0.698	0.717	0.535	9,569
	Guatemala	1	1	0.552	0.576	0.611	0.393	6,962
	Nicaragua	1	1	0.565	0.595	0.619	0.427	4,103
	Panama	1	1	0.714	0.733	0.761	0.579	15,299
	Peru	6	4	0.677	0.691	0.718	0.557	11,049
	Uruguay	2	2	0.742	0.756	0.78	0.654	17,345
Middle East and North Africa	Jordan	1	1	0.705	0.733	0.743	0.565	11,292
South Asia	India	5	5	0.496	0.539	0.586	0.392	4,883
	Sri Lanka	1	1	0.679	0.712	0.738	0.579	8,112
Sub-Saharan Africa	Botswana	1	1	0.561	0.612	0.681	—	13,984
	Kenya	1	1	0.447	0.482	0.529	0.338	2,071
	Nigeria	1	1	—	0.467	0.493	0.278	5,240
	Tanzania	1	1	0.392	0.448	0.5	0.332	1,596
	Uganda	2	1	0.393	0.43	0.473	0.296	1,334
	Zambia	1	1	0.433	0.49	0.555	0.303	2,879
Countries in the Global North	France	—	—	0.848	0.867	0.881	0.804	36,248
	Germany	—	—	0.855	0.887	0.906	0.842	40,980
	Japan	—	—	0.857	0.874	0.884	—	34,266
	United Kingdom	—	—	0.865	0.89	0.906	0.791	34,800
	United States	—	—	0.883	0.897	0.909	0.771	49,854
	Australia	—	—	0.898	0.912	0.927	0.856	41,588

\* Country data for the Human Development Index (HDI) and Inequality-adjusted HDI were obtained from <http://hdr.undp.org/en/data>. Country data for the GDP per capita (2011 PPP) were obtained from <http://hdr.undp.org/en/content/gdp-per-capita-2011-ppp>.

plaints; and information about each country's Human Development Index (HDI) for selected years, Inequality-adjusted HDI from 2011, and Gross Domestic Product (GDP) per capita based on purchasing power-parity (PPP) from 2011. As can be seen in the table, projects are distributed around the world, except in North America, Western Europe, Japan and Australia, and no matter the country, the number of complaints equals or exceeds the number of projects (Table 3).

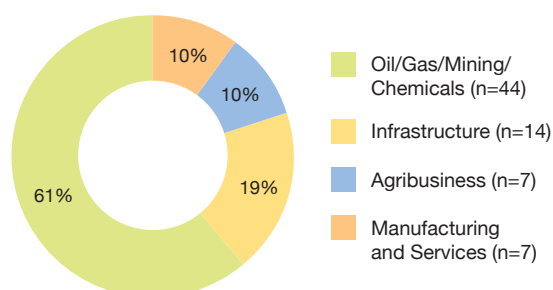
Of the 72 complaints, 27 are related to the BTC Pipeline project, which accounted for all 25 complaints in Georgia along with 2 of the 4 complaints in Turkey. Though the BTC Pipeline project spanned complaints filed in two countries, many variables computed at the project level (including the IFC loan commitment amount and project revenue discussed in the following sections) for these 27 complaints do not vary. We are cautious to note how characteristics of this single BTC Pipeline project may have a disproportionate influence in explaining how broader project-level variables affect complaint-level outcomes (including complaint duration and procedural outcome).

## 2. Project and Parent-Company Characteristics

### *Type of Industry*

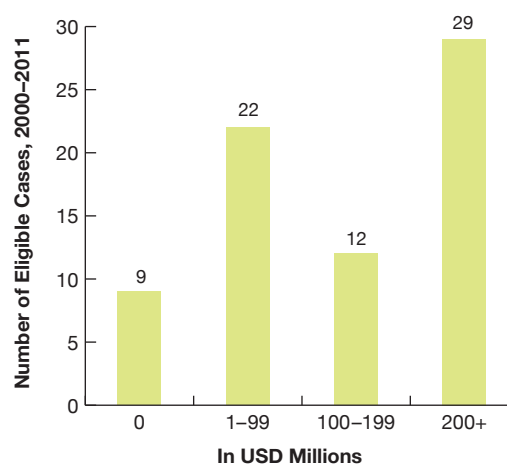
We classified all 37 projects mentioned in the complaints by their industrial sector: manufacturing and services; agribusiness; infrastructure; and extractive industry (oil/gas/mining/chemicals) (Figure 6). Of the 72 cases eligible for CAO review between 2000 and 2011, 44 (61%) involved a project in the extractive in-

FIG. 6  
Cases by Industrial Sector (n=72)



dustries of oil, gas, mining, and chemicals, though as just mentioned, 27 of these complaints involved just one project—the BTC Pipeline project in Turkey and Georgia—which we have classified as extractive rather than infrastructure. Of the eligible cases, 14 (19%) involved a project related to infrastructure; 7 (10%) were complaints against projects in the agribusiness sector; and 7 (10%) were complaints against projects in the manufacturing and services sector.

FIG. 7  
IFC Loan Commitment Category Amount



### *IFC Loan Commitment Amount*

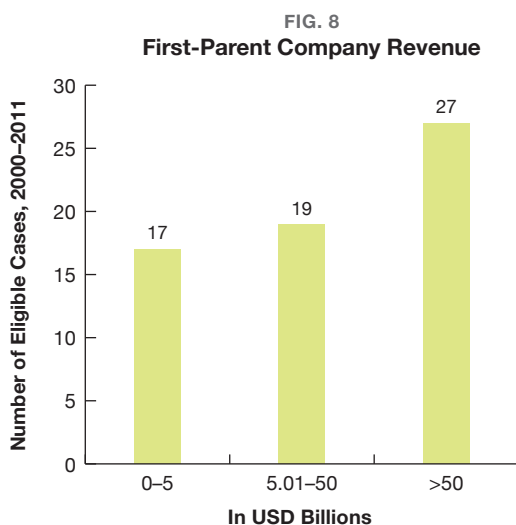
We also collected information on the size of the bank's loan commitment for each project. The commitments ranged from zero to \$250 million. Projects with a zero loan commitment included: (a) financial projects handled by MIGA that issued insurance or guarantees and (b) IFC-financed projects that issued an equity commitment to the project, but had a loan commitment of zero.

Of the 72 CAO cases, 9 (13%) involved projects where the loan commitment was zero; 22 (31%) involved projects where the IFC loan commitment fell between \$1 and \$99 million; 12 (17%) involved projects with an IFC loan commitment of between \$100 and \$199 million; and 29 (40%) involved projects where the IFC loan commitment amount was \$200 million or above (Figure 7).

### First-Parent Company Revenue

We also obtained information on the annual revenue of the parent companies involved in each IFC/MIGA sponsored project. A parent company is a private company that is involved in executing the IFC/MIGA financed project. At the project level, 18 of the 37 projects involved in the complaints involved only one parent company (21 complaints), while 17 projects involved two or more parent companies (49 complaints). Information on parent companies was not available for 2 projects (2 complaints). Where multiple parent companies existed, we used the parent company with the largest stake in the project, what we termed the “first-parent company.”

Of the 63 complaints for which we were able to obtain revenue figures for the first-parent company involved, the minimum revenue was \$190,000, while the maximum was \$386 billion. Revenue in 17 of the 63 cases fell between \$0 and \$5 billion (27% of complaints); 19 of the cases fell between \$5 billion and \$50 billion (30% of complaints); and 27 involved companies with annual revenues in excess of \$50 billion (43% of complaints) (Figure 8).



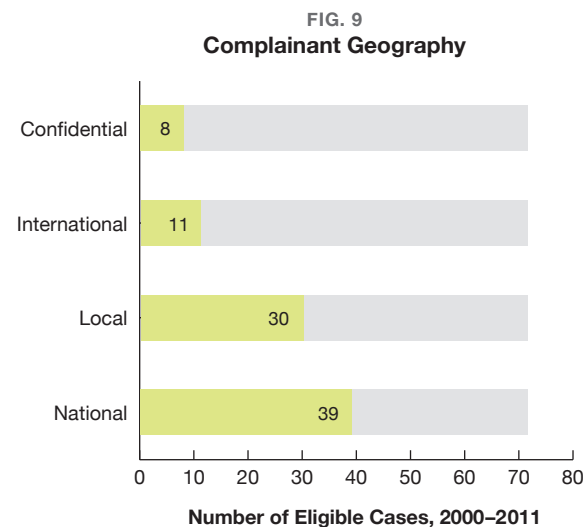
## 2. Complainant Characteristics

We distinguished signatories to complaints according to: a) their location or geography, and b) their kind (individual, organization, or confidential). For geography, we

sorted signatories by whether they were *local* to the community; non-local, but *national*; *international*; or labeled by CAO as “confidential.” In some instances, information was collected on complainant geography (local, national, or international) while the complainant kind (individual or organization) was listed as “confidential” (or vice versa). Neither the numbers of kind nor geography add up to 72 because in some instances there were multiple signatories on a single complaint.

### Complainant geography

We first examined the geographic location of the complainants. Of the 72 CAO cases, 39 (54%) had at least one national signatory; 11 (15%) had at least one international signatory, 30 (42%) had at least one person from the local community who signed the complaint; while 8 (11%) had at least one signatory listed as confidential (Figure 9).



### Complainant kind

Of the 72 CAO complaints, 31 (43%) had at least one individual listed as a signatory; 44 (61%) had at least one organization listed as a signatory; and 7 (10%) had at least one signatory listed as confidential (Figure 10).

### Complainant kind & geography interactions

Finally, we tallied the different combinations of complainant geography and kind that were present in our



FIG. 10  
Complainant Kind

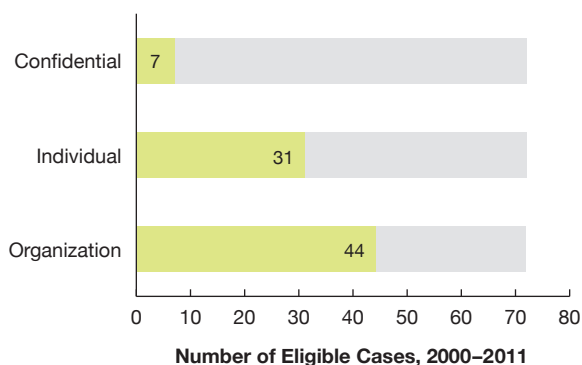


FIG. 11  
Complainant Characteristics  
Geography and Kind Interactions



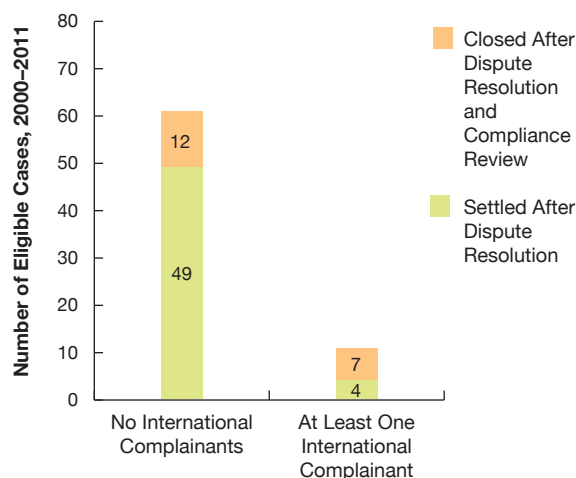
sample (see Figure 11), which, as will be seen, turned out to be useful in subsequent analysis.

## B. PROCEDURAL INTERVENTION BY CAO

Quantitative data indicate that the kind and geography of the complainant, the size of the companies involved in the project, the size of the World Bank's investment in the project, the types of harms alleged, and the year the complaint was filed may all have influenced the type of intervention CAO used.

Complaints may be classified as: (1) closed after dispute resolution without proceeding to compliance re-

FIG. 12  
Type of CAO Intervention by  
Complainant Geography



view; (2) closed after dispute resolution and compliance appraisal; or (3) closed after dispute resolution, compliance appraisal, and compliance audit.<sup>82</sup> Of the 72 cases that occurred in the 2000–2011 period that we examined, 53 (74%) were closed after dispute resolution, 14 (19%) were closed after dispute resolution and compliance appraisal, and only 5 (7%) progressed to CAO's audit stage.

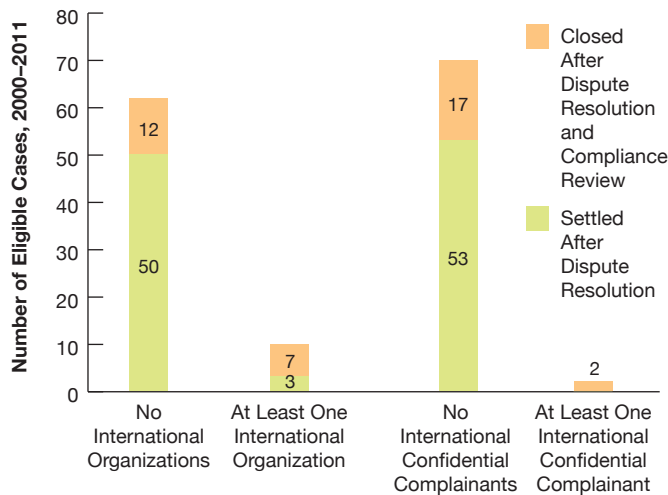
Since so few CAO complaints reached the audit stage, we grouped these complaints with those that proceeded only to compliance appraisal in order to facilitate statistical analysis. This yielded two groups, those cases that were closed after dispute resolution without proceeding to compliance review (53 of the 72 complaints), and those that were not closed until a compliance appraisal occurred (14 cases) or sometimes an audit (5 cases). We then examined the effects of a range of variables on the likelihood that a case would reach the compliance review stage.

Complaints involving certain geographies and kinds of complainants were more likely to reach compliance review (Figure 12).

Complaints with at least one international complainant were significantly more likely to progress to either the compliance audit or appraisal stage. Of the 11 complaints with at least one international complainant, 64% progressed to either the audit/appraisal stage, compared to only 20% of 61 complaints with no international complainant.<sup>83</sup>

FIG. 13

### CAO Intervention by Complainant Kind & Geography



We also examined the effects several combinations of complainant kind and geography had on the type of CAO intervention. Two such combinations proved to be statistically significant predictors of the type of CAO intervention.

The bars on the left in Figure 13 show that complaints with at least one international organization complainant were significantly more likely to progress to compliance review, ignoring the effects of other variables. Of the 10 complaints with this particular combination of complainants, 70% progressed to the compliance review stage, compared to 19% of cases that lacked a participating international organization.<sup>84</sup>

The bars on the right in Figure 13 show that complaints with at least one international, but confidential complainant were also significantly more likely to progress to compliance review, ignoring the effects of other variables. However, only two complaints met this definition, making it difficult to further interpret the results in this instance.

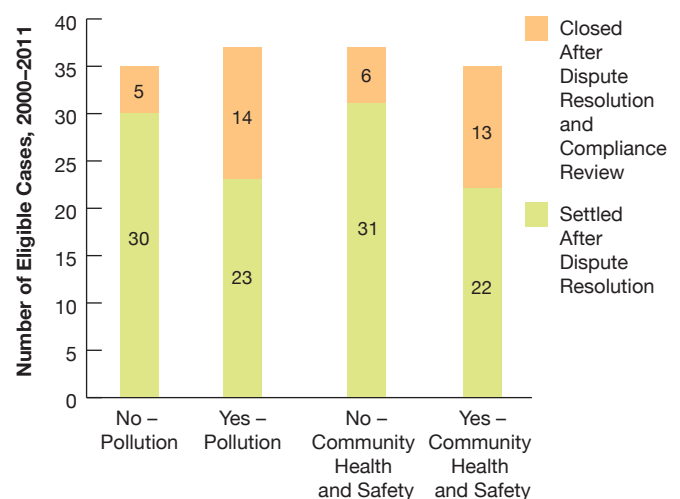
### Type of Harms

We also examined how 11 different types of alleged harms might have affected whether a case progressed to compliance review.<sup>85</sup>

Of these harms, two types were found to have a statistically significant association with the type of CAO

FIG. 14

### Type of CAO Intervention by Harm Alleged



intervention. First, 38% of cases (14 out of 37) with an alleged harm related to pollution progressed to either the compliance appraisal or audit stage, compared to only 14% of cases (5 out of 35) that did not allege this particular harm<sup>86</sup> (Figure 14).

Second, 37% of cases (13 of 35) alleging harms related to community health and safety progressed to compliance review, compared to only 16% of cases (6 of 37) that did not allege harm to community health and safety.<sup>87</sup>

### First-Parent Company Revenue

We also examined whether the type of CAO intervention was affected by the revenue of the first-parent company, data for which was only available for 63 of the 72 complaints.

A statistically significant association was found between first-parent company revenue (when grouped as three distinct revenue categories) and type of CAO intervention (see Figure 15).<sup>88</sup> Of complaints lodged against companies in the 0–\$5 billion revenue category, 53% progressed to the compliance appraisal or audit stage. Thirty-one percent of complaints lodged against companies with revenues in the \$5–\$50 billion category and only 10% of complaints against companies with revenues greater than \$50 billion progressed to either compliance appraisal or audit.



FIG. 15  
Type of CAO Intervention by  
Revenue of the First-Parent Company

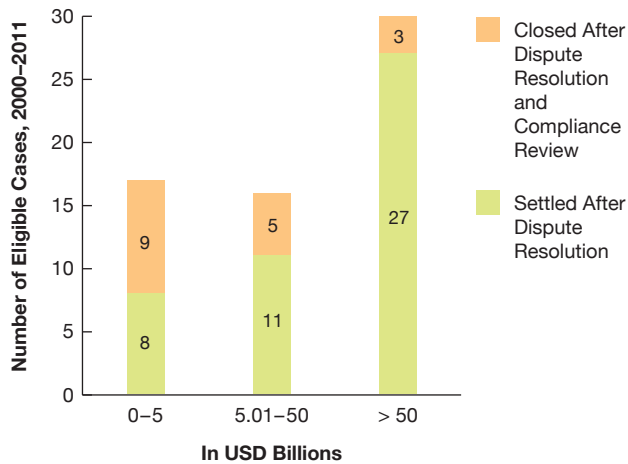
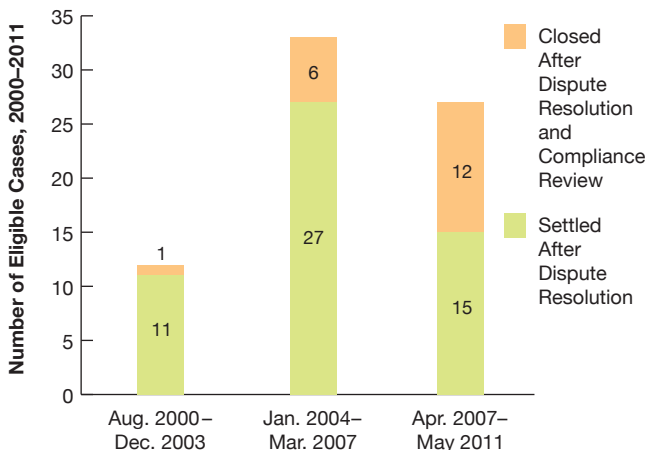


FIG. 16  
Type of CAO Intervention  
by Time Period



### Time Period

To explore whether the period of filing affected the extent of CAO intervention, we sorted the cases by time periods reflecting changes in the guidelines set forth by CAO.

As can be seen in Figure 16, only 8% of complaints filed between August 2000 and December 2003 progressed to the compliance appraisal stage (or beyond), while 18% of complaints filed between January 2004 and March 2007 and 44% of complaints filed between April 2007 and May 2011 progressed at least to compliance investigation.<sup>89</sup> There has been a clear trend over time towards reaching the compliance appraisal/audit stage

for all cases, ignoring the impact of additional variables. Future research will examine how additional factors, including levels of staffing, may relate to a greater likelihood of progressing to compliance review over time.

## C. PROCEDURAL OUTCOME

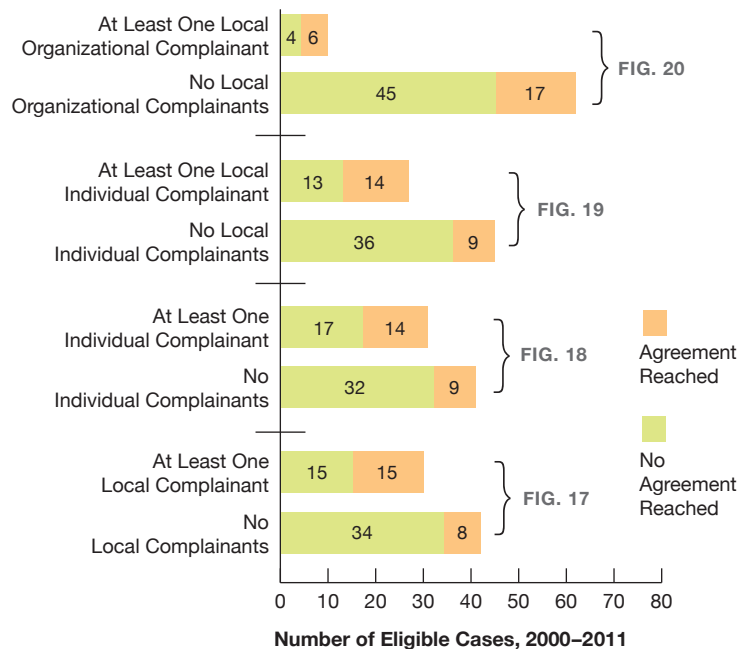
Of the 72 CAO cases, 23 (32%) reached agreement, while 49 (68%) did not. One goal of this study is to understand what factors shape these variations in procedural outcomes. Of the factors investigated, we found significant associations with certain complainant characteristics, types of harms alleged, project industry type, and time period.

### Complainant Characteristics

The kind and geography of the complainant influenced procedural outcome. Complaints submitted by local signatories, as well as complaints submitted by individuals were more likely to end in an agreement.

Complaints with at least one local signatory reached agreement 50% of the time, while complaints without a local signatory reached agreement only 19% of the time (Figure 17).<sup>90</sup>

FIGS. 17–20  
Procedural Outcome by  
Complainant Geography and Kind



Complaints with at least one individual complainant reached agreement 45% of the time, while in cases without an individual complainant agreement, was reached only 22% of the time (Figure 18).<sup>91</sup>

We next examined complainant geography and kind together. Having at least one complainant that is a local individual resulted in agreement 52% of the time, compared to 20% for complainants without a local individual as signatory (Figure 19).<sup>92</sup>

Further, having at least one local organization as signatory results in agreement 60% of the time, compared to 27% for other complainants (Figure 20).<sup>93</sup> Having a local organization or local individual as signatory increased the likelihood of agreement, ignoring the effects of additional variables.

#### *Types of Harms Alleged in CAO Complaints*

We next examined the effects on outcome of 11 different types of harm alleged in the complaints. Of these, three types showed a statistically significant association with CAO-facilitated outcomes (Figure 21).

First, 54 complaints alleged a harm related to IFC/MIGA due diligence and supervision. Of these, only 26% of cases alleging this harm reached agreement, compared to 50% of cases that did not.<sup>94</sup>

Second, 35 complaints alleged a harm related to community health and safety. Only 20% of these cases reached agreement, compared to 43% of cases that did not.<sup>95</sup>

Finally, 16 complaints alleged a harm related to Indigenous Peoples. In these cases, 56% of cases reached agreement, while agreement was reached in only 25% of complaints in cases in which harm to Indigenous Peoples was not an expressed issue.<sup>96</sup>

To summarize, cases where complaints alleged harms related to IFC/MIGA due diligence and supervision, or harms related to community health and safety, were significantly less likely to end in an agreement. In contrast, cases in which complaints alleged a harm related to Indigenous Peoples were significantly more likely to reach agreement.

#### *Project Industry*

Complaints related to projects in the extractive industries (oil, gas, mining, and chemicals) were significantly less likely to reach agreement compared to complaints against other industries, such as manufacturing and services, agribusiness, and infrastructure (see Figure 22). Only 20% of complaints filed against projects in the extractive industries reached agreement, whereas 50% of those filed against projects in non-extractive industries did.<sup>97</sup>

FIG. 21  
Procedural Outcome by  
Type of Harm Alleged

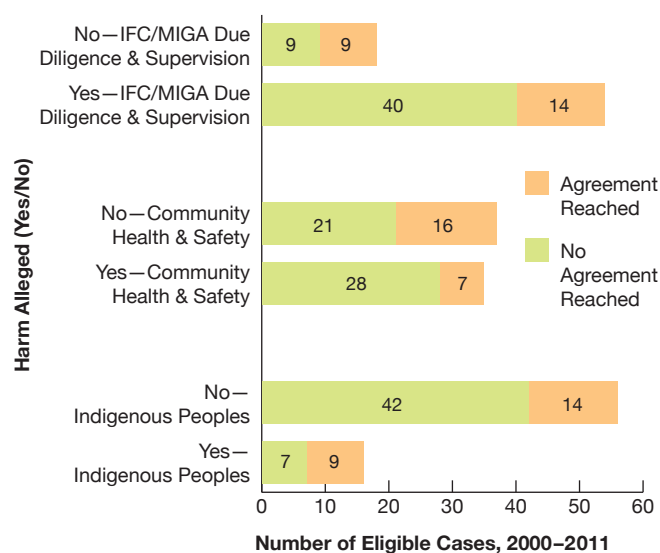


FIG. 22  
Procedural Outcome by  
Project Industry Type

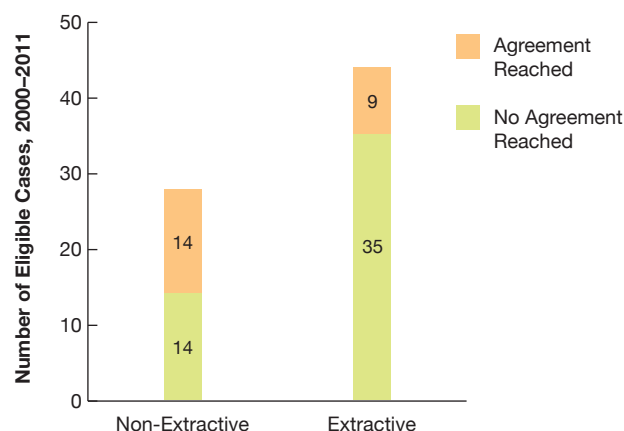
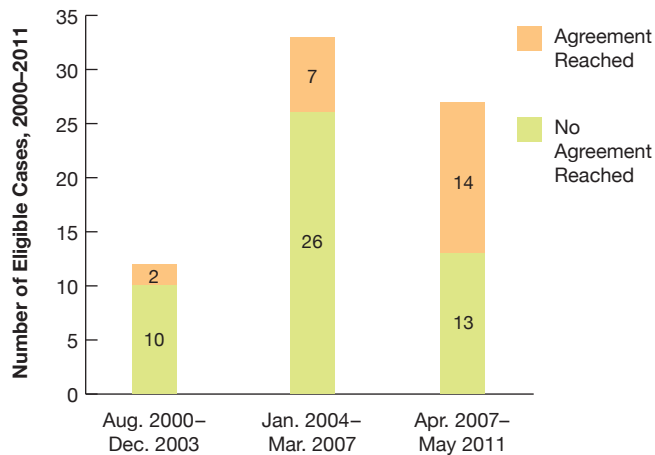


FIG. 23  
Procedural Outcome  
by Time Period



#### Time Period

Finally, we found a statistically significant association between the procedural outcome and the filing date of the complaint.

Of the complaints filed between August 2000 and December 2003, 17% reached agreement, 21% of complaints filed between January 2004 and March 2007 reached agreement. However, 52% of complaints filed between April 2007 and May 2011 reached agreement.<sup>98</sup> The progression of bars in Figure 23 indicate a trend over time towards reaching agreements, ignoring the impact of additional variables. The increasing trend towards agreement over time may be related to these guideline changes, to changes in CAO staffing levels, or to other changes in the broader structure of the organization over these time periods. Future research will attempt to separate out these effects.

#### D. DURATION OF CAO INTERVENTION

What factors affect how long a case remains open? In our analysis, the duration of CAO intervention (case duration) was measured by the number of months that elapsed between the date the complaint was filed and the date CAO recorded the case as closed. Using bivariate regression analysis and other inferential statistical techniques, we examined how more than eighty independent variables affected case duration.<sup>99</sup>

Statistically significant relationships were found with several variables, including characteristics of the com-

plainant; one type of harm alleged; four variables related to project/parent company financial data; project category; and type of industry.

#### Complainant Characteristics

A statistically significant relationship was found between an organization's involvement in a case and its duration. The 44 cases with at least one organization as a complainant took, on average, 20.4 months to reach closure, while the 28 cases without an organization listed as signatory averaged 13.9 months (Figure 24).<sup>100</sup>

The number of organizations listed as signatories was also significantly associated with the duration of CAO intervention (Figure 25). Of the 37 cases in which only

FIG. 24  
Complaint Duration by  
Complainant Type

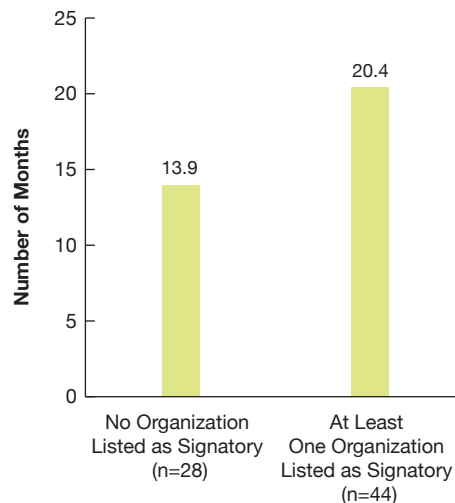
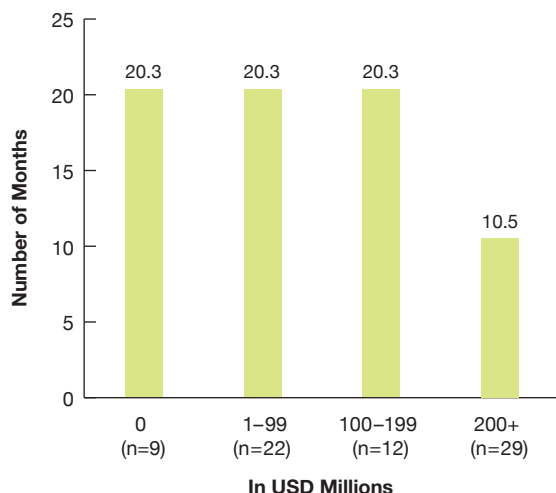


FIG. 25  
Complaint Duration by Number  
of Organizations Listed as Signatory



FIG. 26

**Complaint Duration by  
IFC Loan Commitment Category Amount**



one organization was listed as a signatory, the average duration was 18.8 months—however, this was not found to be statistically significant from the average duration for cases in which there was no organization listed as a signatory. However, the 7 cases with two organizations listed averaged 32 months to reach closure.<sup>101</sup>

#### *Financial variables*

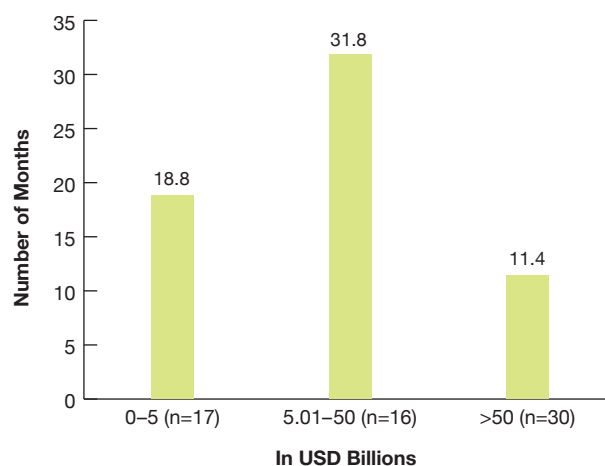
Both independent variables related to the project and/or parent company financial information were found to have significant relationships with case duration.

First, the amount of the IFC loan commitment was found to be significantly associated with case duration in cases where the loan was particularly large: \$200 million or over (Figure 26). In cases in which the loans were less than 200 million, the average duration was 20.3 months, whereas in cases where the loan was \$200 million or over, the average duration was considerably shorter, 10.5 months.<sup>102</sup>

We also found a statistically significant relationship between first-parent company revenue amount and case duration (Figure 27). The 17 complaints in which the first-parent company revenue was between \$0 and \$5 billion took, on average, 18.8 months to reach closure, and the 16 cases in which the first-parent company revenue was between \$5 billion and \$50 billion took, on average, 31.8 months to reach closure. However, 30 complaints

FIG. 27

**Complaint Duration by  
First-Parent Company Revenue Category**



in which the first-parent company revenue was greater than \$50 billion took, on average, only 11.4 months to reach closure.<sup>103</sup>

#### *Project Category*

We also found a statistically significant (though limited) relationship between project category and case duration. No statistically significant difference was found between projects labeled as “Category A” (potential significant adverse risks and/or impacts) (48 cases) and “Category B” (potential limited adverse risks and/or impacts) (18 cases)—these cases averaged 15.1 months in length. However, the 3 cases labeled by the IFC as either “Category C” (minimal or no adverse risks and/or impacts) or “Category FI” (involving investments in financial institutions) averaged just over 53 months to reach closure. While a statistically significant difference was found,<sup>104</sup> the number of cases was so small that it is difficult to assess the soundness of this relationship (Figure 28).

#### *Industry Type*

Finally, we found a statistically significant relationship between industry type and complaint duration (Figure 29). On average, those cases involving projects in extractive industries took 13.8 months to reach closure, while cases in which projects were in non-extractive industries averaged 25.7 months in duration.<sup>105</sup>

FIG. 28  
Complaint Duration by  
Project Category

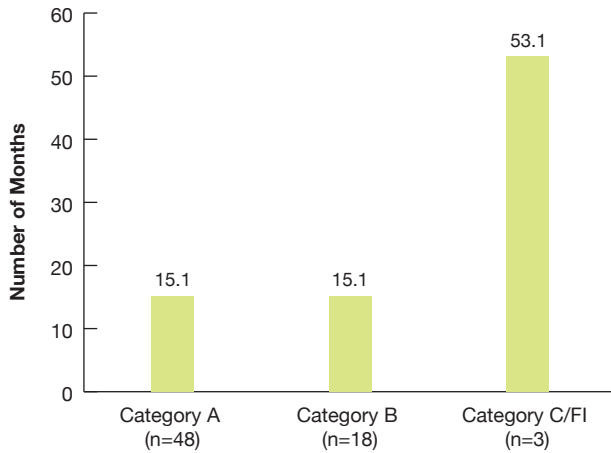
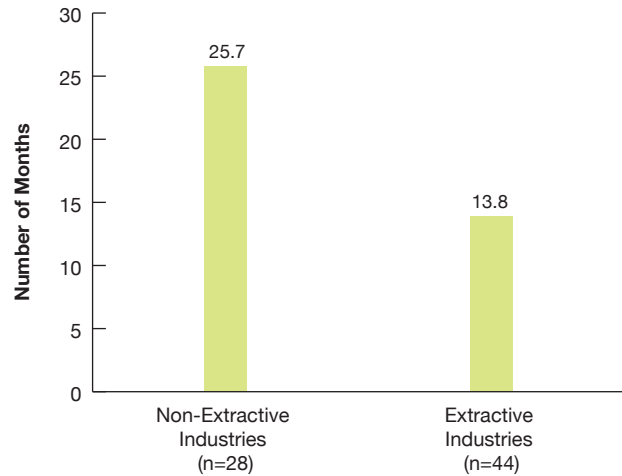


FIG. 29  
Complaint Duration by  
Project Industry Type



The quantitative analysis points to a group of factors that influenced: (1) the type of procedural intervention used by CAO, (2) the procedural outcome between parties involved, and (3) the duration of CAO intervention. This analysis indicates that the identity of the parties (for example, the involvement of local community members as complainants, the participation of international organizations, and the wealth of the companies involved; the kind of project (e.g. extractive industry project); and the size of the bank's financial commitment may influ-

ence the nature, outcome, and duration of CAO's intervention. One limitation to our approach is the lack of additional "control" variables. Researchers are creating a data set with additional cases from the 2000–2006 time period and variables that will test the associations uncovered in our analysis. The next section examines interviews with key stakeholders to offer insights into how these factors impact CAO's work as a problem-solver and an investigator.

# QUALITATIVE ANALYSIS: CASE STUDIES

Case studies provide an opportunity to explore community perspectives on CAO's process and complaint outcomes in some depth. CAO used a range of approaches to intervene to address community concerns and harms—including mediation, negotiation, fact-finding, facilitation of negotiations, and auditing. The case studies that follow focus on the experience and perspectives of the community members and their representatives who submitted complaints to CAO.

The five case studies we chose to exemplify key case characteristics are: (1) a complaint villagers submitted in 2004 about harms suffered in conjunction with an oil and gas extraction project in Kazakhstan; (2) a complaint submitted in 2005 by a NGO on behalf of indigenous peoples harmed by a mining project in Guatemala; (3) a complaint submitted in 2007 by NGOs on behalf of indigenous peoples harmed by a palm oil project in Indonesia; (4) a complaint submitted in 2008 by NGOs on behalf of low-income communities harmed by a water privatization project in Guayaquil, Ecuador; and (5) a complaint submitted in 2010 by indigenous peoples harmed by an oil exploration project in the Peruvian Amazon (see Methods section for case-selection details).

In developing these case studies, we reviewed publically available material from the IFC, MIGA, and CAO about each project as well as reports and articles released by NGOs, academics, and media outlets. As noted in the Methods section, we used semi-structured questionnaires to interview in person at the project sites, or by phone, 23 complainants and/or community members and 34 key informants including academics, CAO staff, World Bank officials, project company representatives, and NGO representatives.



Although a range of expectations exist about what CAO interventions could and should achieve, individuals and groups who seek to resolve conflicts through formal processes are generally concerned about similar issues. According to one study reviewing a decade of experience using dispute resolution mechanisms to resolve environmental disputes, complainants are interested in their influence on a decision, the fairness and efficiency of a process, “and to the degree that the parties have or wish to have a continuing relationship, they care about the quality of that relationship and their ability to communicate with one another.”<sup>106</sup> We interviewed complainants and community members to ascertain their perceptions about the fairness of the CAO’s process and the outcome, their satisfaction with the process and outcome, and the impact of CAO’s intervention on their relationship with the project company.

## **A. NATURAL GAS & OIL EXTRACTION PROJECT IN KAZAKHSTAN**

### **1. Background**

In 2002, the IFC approved a \$150 million financial package to support the development of the Karachaganak Oil and Gas Condensate Field (Karachaganak field) by OAO Lukoil, JSC (Lukoil),<sup>107</sup> one of the world’s largest oil companies.<sup>108</sup> Located in Western Kazakhstan, the Karachaganak field is bordered by nine villages, including the small village of Berëzovka. On September 10, 2004, Berëzovka residents submitted to CAO a complaint that air emissions and water contamination produced by the field were adversely affecting the health and livelihood of village residents and requested that the village “be relocated to an ecologically clean zone.”<sup>109</sup>

At the core of this dispute is the claim that the Karachaganak field, one of Kazakhstan’s biggest development projects, endangers the lives of Berëzovka villagers and warrants the relocation of the village. Stakeholders disagreed whether the field harmed villagers and about who would be responsible for relocating the village residents, the conditions of resettlement, and when the villagers should be resettled. CAO did not ad-

dress this core dispute, but focused its intervention on improving communication among stakeholders and air quality monitoring.

The Karachaganak field contains one of the world’s largest gas and oil deposits.<sup>110</sup> Located in a remote, rural part of Western Kazakhstan near the Russian border, the deposit holds an estimated 1.2 billion tons of oil and more than 1.35 trillion cubic meters of natural gas, nearly half of Kazakhstan’s estimated total gas reserves.<sup>111</sup> The crude contains high levels of hydrogen sulfide, also known as “sour gas,” which is difficult and expensive to extract. After Kazakhstan gained independence in 1991, the development of the Karachaganak field became a key component of the new government’s strategy to attract international investment and become a major oil producer.

In 1997 an international consortium of multi-national oil companies, Karachaganak Petroleum Operating, B.V. (KPO), signed a 40-year production sharing agreement (PSA) with the Republic of Kazakhstan. At the time, the consortium included Italy’s Eni-Agip (32.5% share), the United Kingdom’s British Gas Group (32.5% share), the United States’ Chevron (20% share), and Russia’s Lukoil (15% share).<sup>112</sup> The confidential agreement establishes the terms of development and operation of the field until 2038.<sup>113</sup> The PSA requires the consortium to improve existing facilities, construct new facilities to increase production, build a new export pipeline, invest \$10 million annually to improve the social welfare of the region, and develop an environmental management plan.<sup>114</sup> In 2013 KPO reported that the Kazakhstan government had reaped a profit from development and production on the Karachaganak field of approximately \$14 billion.<sup>115</sup>

In May 2002 the IFC approved the Lukoil Overseas Project to finance Lukoil’s role in the development of the Karachaganak Field by KPO.<sup>116</sup> Lukoil is one of the world’s largest vertically-integrated oil and gas companies and the second largest company in Russia.<sup>117</sup> Headquartered in Moscow, Lukoil has annual revenue of almost 140 billion<sup>118</sup> and over 110,000 employees.<sup>119</sup> The IFC approved a \$150 million financial package—\$75 million in direct loans and an arrangement for syndica-

tion of a \$75 million loan from commercial banks—to support a Lukoil subsidiary's share of the costs associated with KPO's development of the Karachaganak Field.<sup>120</sup> According to the IFC, the loan would support the country's efforts to develop its under-exploited natural resources; result in significant economic benefits for Kazakhstan, including thousands of new construction jobs and new contracts for local businesses; and facilitate investment in community development by the company and international consortium.<sup>121</sup> The IFC reported that the international consortium, which included Lukoil, would invest \$10 million annually to "implement [ ] a number of locally vital projects, such as the reconstruction and refurbishments of several hospitals in the area, installation of the new gas distribution system, road repairs, water distribution system repairs, built a new school for 800 students, and repairs of the local theater."<sup>122</sup>

The IFC also recognized that the Lukoil Overseas Project was "expected to have significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented" and therefore classified the project as a "Category A" project.<sup>123</sup> At the time of the IFC's investment, the KPO consortium of multinational oil companies claimed to have "an extensive monitoring program in place . . . to continuously monitor air, soil and water quality."<sup>124</sup> The consortium also reported that "[t]he results of the monitoring show minimal impact on the environment within the field area and beyond."<sup>125</sup>

Villagers of Berëzovka, like residents of other villages located near the Karachaganak field production facilities, eke out a humble existence. A state-run collective farm during Soviet times, Berëzovka remains an agricultural community of approximately 1300 residents,<sup>126</sup> about one-third of whom live below the poverty line.<sup>127</sup> The main crops are wheat and barley and almost all village households have livestock and gardens.<sup>128</sup>

At first, many villagers felt optimistic that the involvement of foreign companies in the development of the Karachaganak Field would bring jobs and improvements to the production facilities and their community. Their optimism turned to concern after Tungush, a nearby vil-

lage, was relocated in accordance with Kazakhstan law, which requires protective buffer zones be established to limit the exposure of the general public to emissions from gas and oil production. In 2002, the Kazakhstan Ministry of Environment informed the villagers of Berëzovka that they also would be relocated because of safety and health dangers posed by the village's proximity to the field.<sup>129</sup> The village of Berëzovka is located just five kilometers from the field and therefore ostensibly within the "sanitary protection zone" (SPZ), as the buffer zone was called. Local authorities, however, later reduced the SPZ to three kilometers and rescinded the plan for relocation.<sup>130</sup>

As oil and gas production on the field was setting new records,<sup>131</sup> many villagers observed a deterioration of health in their community,<sup>132</sup> and a group of villagers formed the Berëzovka Initiative Group to investigate.<sup>133</sup> Later in 2002, the Berëzovka Initiative Group contacted Crude Accountability, a U.S.-based environmental justice organization with experience working with communities in the Caspian Sea basin.<sup>134</sup> With support from Crude Accountability, Berëzovka villagers in 2003 conducted a house-to-house survey of approximately 400 homes and found that about 45% of the residents reported chronic illnesses:

People from our village had skin problems, hair loss, frequent nosebleeds and running eyes. We interviewed children who reported that they didn't have any memory and came home from school exhausted. Their bones hurt, especially their legs, as well as their muscles, chests and stomachs. Twenty-five of the hundred children we surveyed reported having fainted.

Our village mid-wife in Berëzovka reported that most pregnant women were anemic with hemoglobin levels two to three times lower than they should have been. New mothers were reporting that their babies frequently screamed, and only one in ten was able to breastfeed because they couldn't produce milk.<sup>135</sup>



According to environmental health specialists, “many of the villagers’ severe health problems [were] consistent with exposure to toxic chemicals, including hydrogen sulfide, carbon monoxide, and other by-products of petroleum extraction and processing.”<sup>136</sup> Subsequent blood tests indicated that villagers had compromised immune systems.<sup>137</sup>

KPO met with affected communities on a monthly basis and emission levels were a frequent topic of discussion. Some villagers believed that their health problems were directly caused by oil and gas production on the field. The company and the IFC rejected this view and questioned the validity of the data collected by villagers. KPO argued that health problems could be the result of a variety of factors, such as the contamination and pollution generated during Soviet management of the field, high rates of alcoholism, and the practice of burning garbage. According to the consortium, emissions from the Karachaganak Field had decreased due to the introduction of new technologies. KPO later was fined millions of dollars for environmental malpractice by the Kazakh government.<sup>138</sup>

In 2003 Crude Accountability financed and organized travel by the Berēzovka Initiative Group’s leaders, Svetlana Anosova and Rosa Khusainova, to Washington D.C. to speak directly with the World Bank and IFC officials about their concerns.<sup>139</sup> During conversations with IFC officials, the Executive Director of Crude Accountability, Kate Watters, learned about CAO and encouraged community members to submit a formal complaint.

## 2. Procedure

### *a) The Complaint*

On September 10, 2004, Crude Accountability submitted to CAO a complaint drafted and signed by Berēzovka residents, including Svetlana Anosova. The complaint raised concerns about the impact of air emissions and water contamination on the health and livelihood of the residents<sup>140</sup> and requested that the village “be relocated to an ecologically clean zone.”<sup>141</sup> The complaint argued that the project failed to socially and economically ben-

efit the community and deteriorated the livelihoods of residents by polluting their environment.

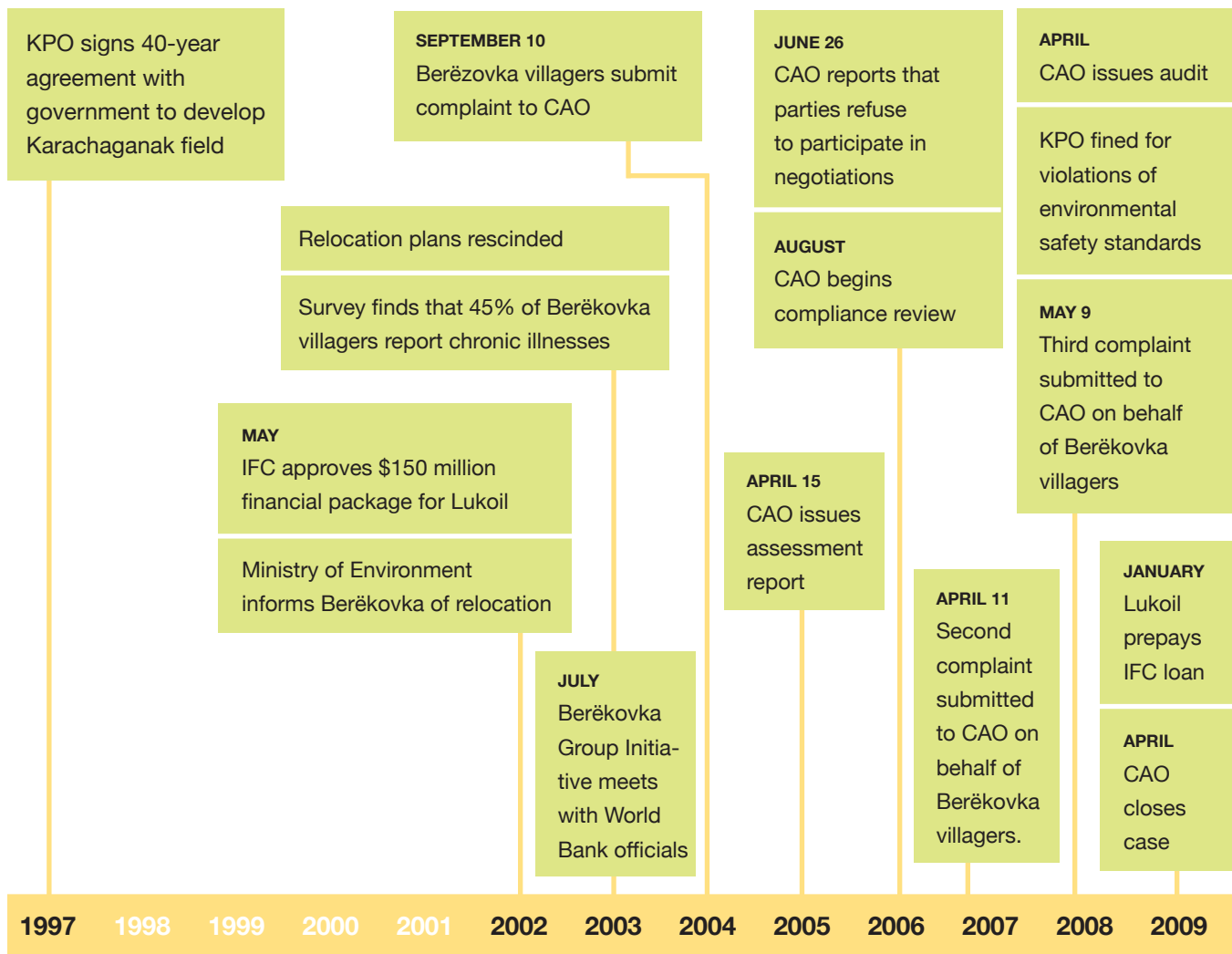
After filing the complaint, Crude Accountability and the Berēzovka Initiative Group contacted Green Salvation, an environmental organization headquartered in Almaty, Kazakhstan, and devoted to improving Kazakhstan’s environment through education, awareness-building, monitoring, legislative reform and litigation.<sup>142</sup> In the course of his research on the matter, Green Salvation’s lawyer, Sergey Solyanik, discovered that the government had reduced the size of the SPZ without either an environmental impact assessment or public hearings as required by national and international law. By 2008, Green Salvation had initiated legal actions to obtain environmental information from the government and company<sup>143</sup> and compel relocation of the village.<sup>144</sup>

### *b) Dispute Resolution*

In October 2004, CAO began its assessment of the social and environmental issues raised by the complaint. CAO reviewed relevant documents, travelled to the project area, and interviewed stakeholders to assess the viability of collaborative settlement. By the end of a two-year ombudsman process, CAO had narrowed the scope of its inquiry to focus on air quality monitoring. Both the complainants and the company parties declined to participate in a CAO-facilitated dispute resolution process.

CAO conveyed its initial findings and recommendations in an ombudsman’s assessment report issued on April 15, 2005. The report summarized CAO’s view on several issues raised in the complaint, including the adverse health and economic impacts of the Karachaganak field and the request for relocation of Berēzovka in accordance with Kazakh law.<sup>145</sup> First, CAO determined that it lacked the necessary information to “provide any meaningful conclusions about possible links between the health problems of Berēzovka residents ... [and the Karachaganak field].”<sup>146</sup> Second, CAO concluded that “there [was] no evidence of economic deterioration of Berēzovka resulting from the KPO operations, nor [was] there an indication of the project’s adverse impacts on social or human development.”<sup>147</sup> CAO did confirm, howev-

## OIL &amp; GAS EXPLORATION PROJECT IN KAZAKHSTAN TIMELINE



er, that local Kazakh authorities had reduced the size of the Sanitary Protection Zone (SPZ), and that Berëzovka as a result was now located outside the newly defined zone. Based on these findings, CAO recommended that KPO disclose health and environmental assessments and studies; appoint, with input from affected community members, external independent reviewers to assess environmental and health impacts; work with the government to monitor, evaluate, and disclose information about social investment spending; and hold public meetings to clarify its roles and responsibilities regarding resettlement.

In advance of its release, CAO's report was intensely criticized by the IFC and Crude Accountability, albeit for different reasons. For its part, the IFC complained

that CAO had made recommendations that only the Kazakh government and not the company had authority to implement. While the IFC supported the release of the "various health studies commissioned by the Government of Kazakhstan and the Project operators," it said, only the government had the right to release such information. IFC also observed that only the government had the authority to decide whether to relocate the residents of Berëzovka.<sup>148</sup>

Crude Accountability, in its prepublication critique of the CAO presentation, noted the report's failure to address adequately several issues raised by the complainants, including the toxic emissions from the field which were "at the heart of the complaints' concern" and "the basis for

the demand for relocation.”<sup>149</sup> The group also expressed concern that CAO had failed to appreciate the unequal balance of power between the KPO and complainants.<sup>150</sup> Crude Accountability pointed out that CAO’s report relegated to footnotes many of the factual errors identified by complainants<sup>151</sup> and insisted that harassment by local authorities of Berëzovka villagers and Crude Accountability staff after CAO visited the region, “deserve[d] more than a footnote in the CAO report.”<sup>152</sup>

The following year, on June 26, 2006, CAO issued a progress report based on its efforts to support a community engagement program designed by KPO and local authorities. The Village Council (VC) was made up of individuals, local authorities appointed from the rural areas near the Karachaganak field, and company representatives and members of the Berëzovka Initiative Group.<sup>153</sup> KPO hoped the VC could serve as a grievance mechanism and a place to discuss the design and implementation of a collaborative air quality monitoring program. The CAO progress report concluded that “the VC process may be a viable mechanism for collaboratively addressing the environmental and social concerns raised in both the complaint and by residents not connected with the Initiative Group.”<sup>154</sup> Additionally, the report made suggestions about the design and implementation of a collaborative air quality monitoring program. The report did not discuss the other issues raised in the complaint, such as threats and intimidation suffered by complainants or non-disclosure by the government and the company of baseline health and environmental data.

According to CAO, “[b]oth parties’ responses [to the progress report] indicated their lack of willingness to engage in a collaborative process. . . .”<sup>155</sup> Complainants explained that they refused to engage in formal negotiations for three reasons: (i) at the KPO’s request, CAO had prohibited participation by Crude Accountability and other partners of the Berëzovka Initiative Group at the negotiation table;<sup>156</sup> (ii) residents were unwilling to negotiate their *right* to resettlement;<sup>157</sup> and (iii) the air quality monitoring program had an uncertain legal status.

### c) Compliance Audit

In August 2006, two years after the complaint was filed, CAO began a compliance appraisal to determine whether CAO should conduct an audit of the IFC’s compliance with social and environmental policies. The appraisal concluded that air quality was the only issue that merited an audit because it was not evident to CAO’s appraisal team how the IFC assured itself that the project complied with bank standards.<sup>158</sup> CAO determined that other issues raised by complainants—including issues related to resettlement, economic impact, effects of contaminants on the soil and water quality, and alleged violations of national and international law—did not fulfill CAO audit criteria.<sup>159</sup> Specifically, CAO found that the project was unlikely to affect the village’s water and “the issue of whether or not the villages should be relocated is a consequence of decision by national authorities,” and therefore “outside the scope of an audit [by CAO].”<sup>160</sup> This determination was made without consultation with the complainants or a visit to the field, but only on the basis of the original complaint and IFC documentation.

For the audit, CAO hired a group of experts who traveled to the project site and discussed the project’s history and its impacts with stakeholders over a five-day visit in June 2007. In April 2008, CAO concluded that the IFC had failed to ensure that the project satisfied IFC air monitoring standards prior to project approval and during implementation.<sup>161</sup> For a significant period of time, from 2003 to 2006, CAO found, the Karachaganak Field was not adequately reporting emissions.<sup>162</sup> CAO did not investigate how the IFC approved the project without assuring baseline air quality measurements, but observed that IFC air quality guidelines failed to influence the terms of the production-sharing agreement or monitoring programs.<sup>163</sup>

IFC responded to the audit report by insisting that “the Project is in compliance with World Bank Group policies and is compliant with results as intended by the health, safety and environmental guidelines that are applicable to the Project and meets applicable country regulations.”<sup>164</sup> In January 2009, Lukoil prepaid the

outstanding balance due on its loan, thereby ending the IFC's obligations to assure itself of project performance. Nevertheless, KPO did cooperate with the IFC's efforts to verify compliance by creating an action plan to improve air quality monitoring. CAO reported that it received evidence and documentation that confirmed the adequacy of air quality monitoring programs,<sup>165</sup> but the IFC had not addressed the underlying causes for non-compliance, including the failure of the IFC to conduct due diligence and assure adequate monitoring of air emissions.<sup>166</sup> CAO closed the case in April 2009.

Despite assurances by CAO, IFC, and KPO, villagers continue to suffer from the adverse impacts of the field production. On November 27, 2014, three adults and 19 children complained of nosebleeds and dizziness, fainted at a local school, and were rushed to a local hospital. According to local government officials, a hydrogen sulfide release from the Kazakhstan field caused the illnesses.<sup>167</sup> In 2015, the United Nations' Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes visited Kazakhstan and reported that

the community [of Berēzovka] appears to be at risk of and suffering from chronic health problems, not just at risk of major accidents. A medical examination of the residents of Berezovka discovered that 80 per cent of the children suffered from lung diseases; 21 per cent of the population had cardiovascular diseases and 14 per cent had digestive system diseases. . . . Regrettably, the population in Berezovka still lives in a toxic environment, at great risk of infringements on their right to health.<sup>168</sup>

### 3. Community Perspectives

This section will examine the view of complainants, their representatives, and community members of the process used by CAO, its outcomes, and how CAO's intervention affected their relationship to the company.

#### *a) On Process*

An early and crucial task for any dispute resolution process is to identify the interested stakeholders and define the issues to be explored during the process. Such early determination has far-reaching implications for the process.<sup>169</sup> Like many IFC projects, the Lukoil Overseas Project included multiple stakeholders and a range of impacts. During the assessment process, CAO broadened its focus beyond the complainants to include a range of potential stakeholders, including members of the Berēzovka Initiative Group, the residents of other villages located near the Karachagank Field, local authorities, IFC staff, and company personnel. At the same time, CAO narrowed the scope of its inquiry to focus solely on air quality monitoring.

CAO did not accord the villagers who submitted the complaint (the complainants) any special status compared to that of villagers who were not involved in the filing of the complaint. CAO's inquiry focused on air quality monitoring although the priority for the complainants, who believed that the village's proximity to the gas field was the cause of the residents' health problems, was to convince the government and the company to relocate the village. One complainant attributed CAO's focus to a lack of impartiality and believed that CAO "need[ed] to move away slightly from the bank, to forget who finance[d] them. . . . [a]nd, perhaps, even to the detriment of the Bank . . . go to meet [affected] people and to reconsider their priorities."

According to the complainants' representative, the complainants refused to participate in a CAO-sponsored dispute resolution because they perceived that CAO's agenda was inconsistent with their priorities:

[T]he offer came to sit at the table and talk about how to improve the public participation process while people are . . . having difficulty, grieving, children are sick, people have all kinds of sores and fiscal problems, their vegetables are dying, their cows are getting sick, they can't harvest their crops for canning because the quality is so low. The idea that they would sit and talk again about



[air quality] monitoring was just not appealing. . . . [T]he CAO had essentially lost the trust of the community, partially because it took so long, and partially because the community felt that the CAO was not willing to really listen to their concerns in a serious way.

Although CAO officials spoke with complainants throughout the process and met with some of them during the visits to the region, some villagers said they had not been treated equally by CAO. As evidence of bias, they pointed to CAO's first assessment report in which the information provided by complainants, including observations about factual errors, were placed in footnotes while information provided by the company was featured in the body of the text. The report only served to legitimize existing company policy and ignored community concerns, one complainant commented.

Perceptions of unequal treatment were reinforced by the striking power imbalances between the parties. KPO is an international consortium, comprised of rich, influential, and technologically sophisticated companies, that generates hundreds of millions of dollars in oil and gas revenues for themselves and the Kazakh government every year. The IFC, the world's largest and most influential global development institution, focused on the private sector, and had approved financing for the project, providing the project the imprimatur of international approval. The complainants are villagers with limited access to political, economic, or informational resources. They alleged that KPO exploited these power imbalances to its advantage.

KPO, for example, refused to disclose relevant non-financial information to stakeholders, including various KPO and government-commissioned studies related to the health and environmental impacts of the Karachaganak field. The complainants' limited access to information affected their ability to justify their priorities, assess impacts, and shape a potential agreement during CAO's dispute-resolution process. The villagers attempted to overcome informational deficiencies by conducting their own research, including a door-to-door health survey, ambient air monitoring, and blood and

soil testing.<sup>170</sup> CAO did not accept the complainants' findings without access to full results or methodologies (although Crude Accountability had made the information available on its website or upon request) and claimed that it was not possible to draw "any meaningful conclusions" about links between the health problems of Berēzovka residents, the field's emissions, and the proximity of the village to the Karachaganak field.<sup>171</sup>

The complainants' decision to forego the dispute resolution process also came after CAO prohibited the complainants' legal representatives from participating in mediation with the company. According to interviews, the complainants relied on Green Salvation and Crude Accountability for advice, counsel, and resources. Crude Accountability had introduced the idea of submitting a complaint before CAO, delivered the complaint, trained villagers on monitoring, helped draft responses to CAO, facilitated the travel of Berēzovka residents to D.C. to meet with CAO and IFC officials, and coordinated site visits by CAO staff to Kazakhstan. Kate Watters, the director of Crude Accountability, believed that representation would have helped address power imbalances:

I think that there's a really important role for a representative, and part of that is just negotiating this massive international institution that is opaque and complicated to somebody in Washington, D.C., never mind somebody living in a village of 1,300 people in Kazakhstan. . . . The notion that you can somehow bridge that gap with some goodwill on the part of the CAO, I think is really naïve.

Some villagers viewed CAO's process as an unproductive drain on their resources. Svetlana Anosova explained that the complaint process went on so long that the seven or eight core people who were actively engaged in the process became exhausted and disillusioned. In Svetlana's words, "they lost faith." Other villagers commented that they believed the main point of CAO's process was just to calm the villagers down so that the project could continue as planned.

### b) *On Outcomes*

The complainants and other the Berëzovka community members interviewed were generally critical of the outcomes of CAO's intervention. Several villagers criticized CAO's failure to address the complainants' primary motivation for bringing the complaint—relocation—and the lack of positive results. Several villagers believed that CAO defined its mandate to benefit the company and the IFC and, therefore, deliberately limited the scope of the process to monitoring air quality.

Svetlana Anosova bemoaned the IFC's lack of oversight of the project, including monitoring of emissions, and inferred wrongdoing by the bank, "How is it? . . . in the top ten of the most productive fields . . . the biggest, right? And the air is not monitored! How is it? Especially, it was not for some weeks when, for example, the equipment is being calibrated . . . , right? But for three years!" In describing a meeting with community members about the CAO process, Anosova recalls "I saw such boredom on the faces of [the villagers]. . . . People just [wanted] to ask a question and get an answer. . . . [We] do not [get] positive results." She claimed that "not even one person in Berëzovka was any better from [CAO's intervention]." Rosa Khusainova, another complainant, asked rhetorically "if there is no result, why work with CAO?"

In an effort to force CAO to address the issue of relocation, Crude Accountability and Green Salvation filed a second and a third complaint with CAO that focused on the issue of resettlement. CAO's response to the second complaint was that relocation of the villagers "related to national decisions, legislation, and/or requirements, and not to [the] IFC's performance, or [the] IFC's requirements or conditions for involvement."<sup>172</sup> The third complaint requested that the villagers of Berëzovka be relocated "to a safe and environmentally clean location in a manner that complies with World Bank Operational Directive 4.30."<sup>173</sup> After an eight-month ombudsman assessment, CAO proposed in January 2009 a "multi-stakeholder meeting, overseen by an independent, neutral facilitator contracted through CAO."<sup>174</sup> The complainants requested another CAO compliance audit, but CAO "con-

cluded that an audit was not merited" after finding the issue of relocation of villagers was not related to IFC performance or policy, and in October 2009, closed the case.<sup>175</sup>

Several villagers and their representatives claimed that CAO's process led to adverse outcomes, including police threats and surveillance of their activities. Svetlana explained: "Our organization [Berëkovka Initiative Group] is inconvenient. It raises questions that neither the authorities nor the company want to discuss; it is preferabl[e] not to talk about emissions, not to say that people get sick." Although the complainants were not subjected to violence, some among them as well as their representatives reported that they were intimidated by local officials and derided by media outlets. Svetlana, a schoolteacher, was prohibited from using a government building where she had taught for twenty years. Kate Watters explained, "Every single member of the Initiative Group . . . has been under some kind of pressure from the police, from the local authorities; their families have been threatened." She added, "We all were threatened. We were all . . . questioned and interrogated by [security forces]; we were followed, police officers sitting outside their homes, demands for documents, checks on the border. . . ."

### c) *On Relationship with Project Company*

Before the initial CAO complaint was filed, KPO had established several ways to interact with communities. Svetlana Anosova recalls that KPO "had these advisory boards. Then they had a department of public relations, now called the department of sustainable development. They had regularly visited villages, met with the public." Despite consistent interaction between the company and villagers, Rosa Khusainova, a complainant, believed that the company had not taken their concerns seriously and instead attributed villagers' health problems to the villagers' practice of burning manure and trash.

Several community members criticized CAO's process for failing to improve their relationship with the company. CAO's final report in the dispute-resolution stage encouraged the parties to engage in additional dialogue and made suggestions about the implementa-



tion of a collaborative air-quality-monitoring program. Several villagers explained that they did not trust the company and were suspicious of the emissions data that KPO released. Others resented KPO's efforts to improve village infrastructure, describing the school renovation and other repairs as "purely cosmetic" and a misuse of funds that "could [have been used] to relocate our village."

During interviews, CAO and company representatives expressed *their* distrust of the complainants and their representatives. Some questioned the villagers' decision to file a complaint before CAO and their efforts to "prove" their claims. One former CAO official said that "basically one woman was behind the complaint. I remember that she wasn't legitimate . . . it was a process driven by the complainant." Another former member of CAO's staff who worked on the case faulted Crude Accountability for the lack of progress in reaching a collaborative settlement: "the international NGO was stuffing things up for the community or stopping them from moving forward based on principle and not on their interests and that really frustrated the company."

According to a member of CAO's compliance team, the community did not unanimously support the goal of relocation, "[i]t was certain individuals in that community that really wanted, pursued this or had the assistance of Crude Accountability to pursue this." The company's corporate affairs manager at the time stated that KPO had reason to suspect "the legitimacy of the group that was bringing [the complaint] forward and whether it was broadly representative of the community or whether it was just actually a small advocacy group."

CAO staff also questioned whether the complainants were representative of the broader community. One staff member recalled:

I don't really think that some of the other communities and the wider community of Berëzovka were fully represented, that their interests were represented by the group or . . . we ever really understood the broader interests of the whole community. And that's . . . a challenge on any of these cases where, you know, a partic-

ular interest group raises a complaint and . . . typically they'll say, we represent a lot of people, it's never really clear . . . unless you do surveys. . . .

In November 2005, Crude Accountability had in fact published a survey of members of 258 of the 370 households located in Berëzovka and found that 90% favored the relocation of their village.<sup>176</sup> According to several complainants, their relationship with KPO has deteriorated further since CAO closed the case. One complainant said, "KPO ignores the opinion of the people" and rarely meets with the villagers. The villagers continue to suffer chronic health problems as a result of their exposure to emissions from the field, according to a United Nations expert in toxic waste.<sup>177</sup>

The complaint against Lukoil is one of three case studies about complaints against projects in the extractive industry. Extractive projects often generate intractable conflicts over rights, world views, and values. Similar to the case studies involving a mining project in Guatemala and oil exploration in Peru, the natural gas project in Kazakhstan illustrates the limitations of using a problem solving process to address conflicts over claims about rights. Berëkovka villagers sought to assert their right to be relocated under national law. The next case study explores the right of indigenous communities to make decisions regarding the extraction of natural resources on their land under international law.

## B. MINING PROJECT IN GUATEMALA

### 1. Background

In 2004, the IFC approved a \$45 million loan for operation of an open-pit gold and silver mine located in the Western Highlands of Guatemala, approximately 200 km from Guatemala City, the country's capital. Known as the Marlin Mine project, the extractive project was originally owned by Montana Exploradora de Guatemala, a 100% subsidiary of Glamis Gold Ltd ("Glamis"). In 2006, Goldcorp, a multinational company headquartered in Denver, Colorado, acquired Glamis

and all its assets, including the mine, and in the same year repaid the IFC loan.

The construction of the Marlin Mine engendered a conflict between, on one side, traditional Mayan indigenous community members and leaders supported by environmental organizations and the Catholic Church and, on the other side, some individual community members, the mine's owners, and the Guatemalan government. The conflict centered on the right of indigenous communities to make decisions regarding the extraction of natural resources on their land. It brought to the surface legal tensions between the rights afforded to indigenous peoples under national and international law and state ownership of subsoil resources under domestic law. And it entailed disputes about the scope and nature of adverse social and environmental impacts associated with the project's development.

In 1996, Guatemala's 36-year civil war ended in peace accords between the government and an insurgency. According to a United Nations truth commission, approximately 83% of the 200,000 victims killed during the civil war were indigenous. As part of the peace agreement, Guatemala signed and ratified the International Labor Organization's Convention 169 (ILO 169), which affords indigenous and tribal peoples the right to decide their development priorities and obligates the state to consult with them prior to initiating extractive activities on their land.<sup>178</sup> To attract foreign investment to the mining sector, the government in the following year issued a decree reducing state royalties, simplifying mine site access, abolishing limits on foreign ownership of mines, and granting mining operations duty-free imports.<sup>179</sup>

As part of its attempt to stimulate economic development,<sup>180</sup> in 2003 the Guatemalan government granted Montana Exploradora de Guatemala a 25-year exploration license for the Marlin Mine. The mine was expected to produce an annual average of 250,000 ounces of gold (worth approximately \$312,500,000) and 3.6 million ounces of silver (worth approximately \$59,400,000) over a 10-year period.<sup>181</sup>

The IFC's \$45 million loan to support the Marlin Mine's operation came directly on the heels of an exter-

nal, independent review of the World Bank's relationship to the extractive industries sector.<sup>182</sup> Known as the Extractive Industries Review (EIR), the report concluded that extractive industries could contribute to poverty reduction if the World Bank "positively influenced industry standards" by strengthening indigenous community participation in project development and the bank's policies regarding the disclosure of project-related information to the public.<sup>183</sup>

After the EIR's release, World Bank management pledged to "require a process of free, prior, and informed consultation with affected communities" and to "only support extractive industry projects that have the broad support of affected communities. . . ."<sup>184</sup> The new policy, however, fell well short of international standards which required free, prior, and informed *consent* by affected communities. Nonetheless, the Marlin Mine was envisioned by the IFC "as a showcase of profitable and responsible development."<sup>185</sup> According to the IFC, the Marlin Mine would encourage new investment in Guatemala's mining sector, create new jobs for local residents, and increase investment in community services, such as health care, schools, and utilities.<sup>186</sup> The IFC also committed to supporting efforts to strengthen environmental protection and community development by funding locally run nurseries to meet reforestation needs.<sup>187</sup>

The IFC determined that the Marlin Mine project would have a range of significant adverse social, health, safety, and environmental impacts and therefore was a "Category A" project.<sup>188</sup> Open pit mining has the potential to cause lasting environmental harm.<sup>189</sup> The Marlin Mine's facilities would include two open pits, one underground tunnel mine, an ore processing facility using cyanide vat-leaching techniques, a smelter, a tailings storage facility including a dam and pond, and a waste rock facility. In its extraction of gold and silver, the company used a cyanide vat leach process that involves soaking crushed ore in a solution of sodium cyanide and water contained within a steel vat to separate the gold and silver from the ore.<sup>190</sup>

The gold and silver extracted at Marlin are found in sulfide ore deposits that, once broken and exposed to

air and water, emit acid mine drainage (AMD),<sup>191</sup> the metal-rich water which, in the words of one study, is “the greatest source of long-term risk from mining operations.”<sup>192</sup> Open pit mines also pose a danger of seepage or spillage of highly toxic metals.<sup>193</sup> Exposure to these highly toxic metals can affect the entire body, particularly those organ systems most sensitive to low oxygen levels: the central nervous system (brain), the cardiovascular system (heart and blood vessels), and the pulmonary system (lungs).<sup>194</sup>

The department of San Marcos where the Marlin Mine is situated is one of the most impoverished regions in Guatemala.<sup>195</sup> Spanning five square kilometers, approximately 85% of the mine is located in the municipality of San Miguel de Ixtacán and 15% in the municipality of Sipacapa, which itself is comprised of 13 villages. The 14,000 inhabitants of Sipacapa are Mam-Mayan and Sipacapense-Mayan indigenous peoples and speak Mam and Sipacapense.<sup>196</sup> Most of these villagers rely on subsistence farming of beans and corn for their livelihood. Agricultural yield is low due to poor soil quality and a lack of irrigation infrastructure. Approximately 98% of the population of Sipacapa lives in poverty and 80% lives in absolute poverty, i.e., is severely deprived of basic human needs, such as food, water, health, and shelter.<sup>197</sup> When construction of the mine began, Sipacapa was a socially and culturally cohesive community that practiced traditional rituals and spoke their native language while most San Miguel de Ixtacán residents no longer spoke their ancestors’ native language or practiced traditional rituals.

In recent years, Guatemalan indigenous groups have become the country’s most vocal opponents to mining projects.<sup>198</sup> Land is central in Mayan conceptions of personhood and spirituality.<sup>199</sup> Open pit mines are an affront to the Mayan world vision and are considered a threat to their survival. As subsistence farmers, Mayans are especially vulnerable to the environmental impacts of mining methods. Acid mine drainage, a cyanide spill, or contamination of water supplies could easily push subsistence farmers into destitution.<sup>200</sup>

According to a report commissioned by Goldcorp, the company made its first contact with community residents in 2003.<sup>201</sup> One indigenous villager we interviewed recalled:

[I]n the year 2000, we began to hear that there was a company that was coming to offer gold but not everything was out in the open. . . . [The company] did not arrive in open to the people, but arrived very slowly and only with individual families, it went looking for people, buying land. And when they were ready, when they had secured their area to work, then they let it be known that it was a mining company.

According to one study, approximately 3,000 persons eventually participated in meetings organized by the project company throughout the affected area.<sup>202</sup> At the meetings, the company pledged an array of incentives for the local community, including payment of school-teachers’ salaries, construction of local roads, creation of a corporate-funded foundation to finance community development initiatives, and jobs for one of Guatemala’s most marginalized regions.<sup>203</sup> The project company interpreted attendance at the meeting as endorsement of the Marlin Mine project, although many residents criticized the meetings for failing to constitute an opportunity for full and free consultation about environmental and social impacts. Regardless, construction of the mine began in 2004 and concluded in 2005.

Once the project became public knowledge, it generated both local and national controversy. As described in one report:

Local concerns . . . stem[ed] from perceived violations of indigenous rights, including the potential for water contamination from the mine that could undermine health, agriculture-based livelihoods and traditional lifestyles. At the national level . . . the debate focuse[d] on the benefits and costs of mining as a development strategy.<sup>204</sup>

In November 2004, after the IFC decided to provide financing for the mine despite intense opposition by local

indigenous communities, community members began a 40-day strike and blocked the main highway to the mine.<sup>205</sup> In January 2005, police shot and killed a protester, injured 16 others, and accused demonstrators of terrorism.<sup>206</sup> With the conflict escalating, Magali Rey Rosa, a lawyer at *Madre Selva Colectivo*, a Guatemala City-based environmental organization that works with local Guatemalan communities to protect natural resources<sup>207</sup> contacted community members to help them submit a CAO complaint. Other local groups also began to raise concerns about the project. The Catholic bishop of San Marcos, Monsignor Alvaro Ramazzini, became a vocal opponent of the project and publically challenged the company's claims about project benefits and environmental impacts.

In June 2005, leaders from the local villages met to discuss the project. Eleven villages opposed the Marlin Mine project, one supported it, and one abstained from participating in the process. The villages also held a referendum later that month: 98% of 2,500 Sipacapa voters cast ballots against mining in the municipality.<sup>208</sup> According to CAO's assessment, "the popular consultations and ballot referendum against mining had the clear intent of reasserting the voice of people who felt their views had not been heard or respected."<sup>209</sup>

The Guatemalan government and Goldcorp argued that the referendum was not legally binding and quickly filed lawsuits to challenge the vote. Municipal autonomy laws in Guatemala permitted communal consultation on matters that local communities determine are relevant.<sup>210</sup> Further, national laws had also established that community referendums, such as the San Marcos referendum that overwhelmingly rejected the development of the Marlin Mine, were legally binding.<sup>211</sup> International law also supported the communities' position. Signed by Guatemala in 1996, ILO 169 requires a state to "establish or maintain procedures through which they shall consult [indigenous] peoples . . . before undertaking or permitting any programmes for the exploration or exploitation of...resources pertaining to their lands."<sup>212</sup> The Guatemalan Constitution further provides that any treaty signed by Guatemala takes precedence over

national Guatemalan law in matters of human rights.<sup>213</sup> Mayan community members thus believed their decision to reject the project was taken in compliance with national and international law and would be legally binding.

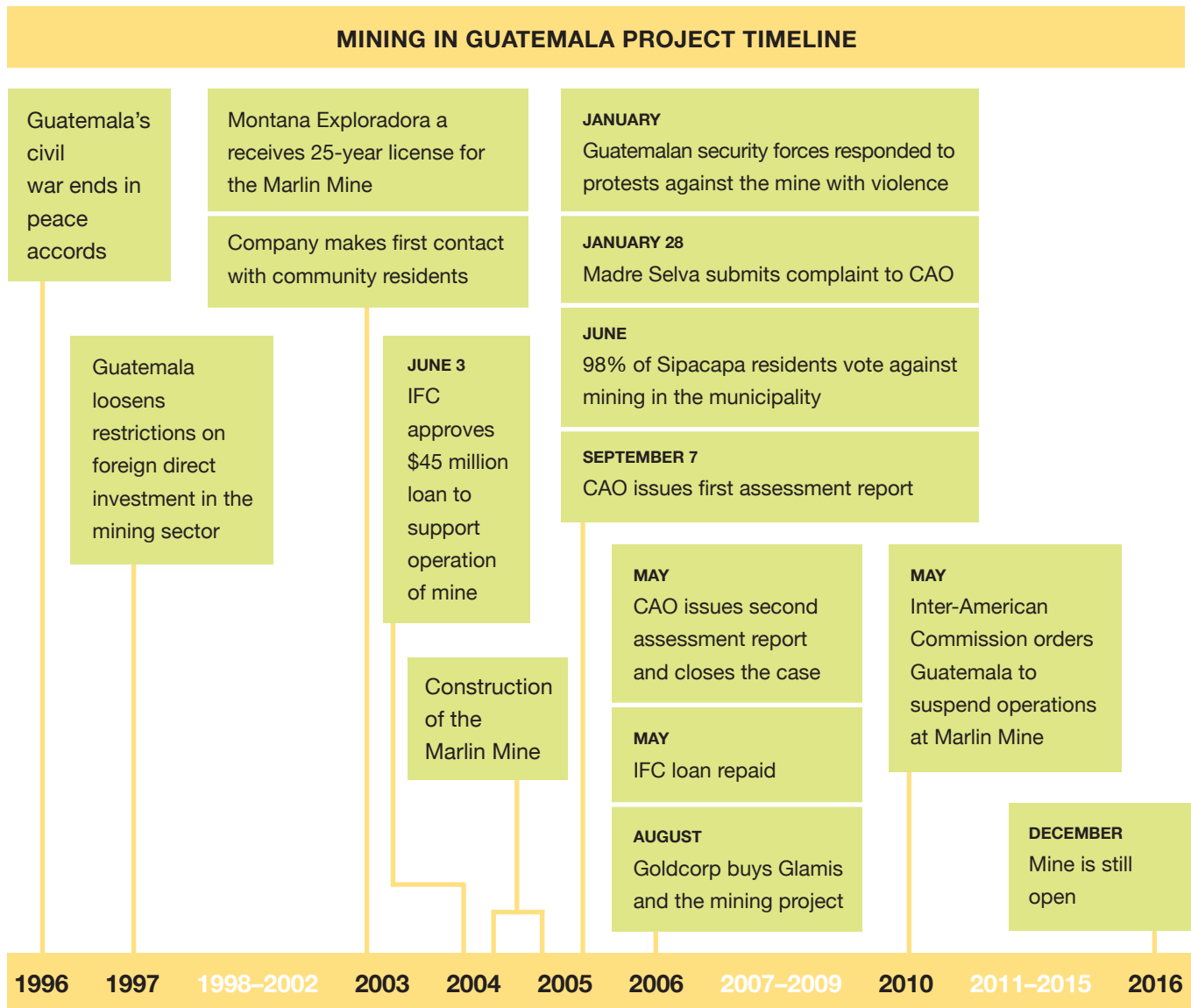
The Guatemalan Constitution, however, also establishes the national government's ownership of subsoil resources as well as the state's duty to exploit non-renewable resources in the public interest.<sup>214</sup> The Guatemalan Mining Law does not address the issue of community participation in decision-making or create a legal mechanism to enforce the right to consultation;<sup>215</sup> its purpose is to attract international investment to the mining sector by streamlining the approval process. And indeed, on May 8, 2007, the Guatemalan Constitutional Court ruled that the community consultation on the Marlin Mine was not binding.<sup>216</sup>

Communities believing they had been harmed by Marlin Mine operations subsequently submitted petitions to the Canadian National Contact Point of the Organization for Economic Cooperation and Development (OECD) against Glamis Gold, which is registered in Canada;<sup>217</sup> several complaints to the ILO;<sup>218</sup> an "urgent measures" request and petition to the Inter-American Commission on Human Rights; and a request for a visit by the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples.<sup>219</sup> The ILO, the Inter-American Commission, and the Special Rapporteur condemned the failure by the company and the government to respect the indigenous communities' right to voluntary, prior consultations and urged Guatemala to suspend the mining activities and halt land acquisition until the affected communities were properly consulted.<sup>220</sup> Goldcorp refused to abide by these decisions.

## 2. Procedure

### a) The Complaint

On January 28, 2005, *Madre Selva*, submitted a complaint to CAO.<sup>221</sup> The complaint alleged the project would have adverse environmental and social impacts



on San Miguel, Sipacapa, and surrounding communities.<sup>222</sup> More specifically, the complaint argued that the government granted Goldcorp a mining license without an objective evaluation of the mine's health impacts, concealed impact information from affected communities, and failed to inform or consult with the affected indigenous communities in accordance with international standards.<sup>223</sup> The complaint also alleged that the project threatened to contaminate and deplete local water sources and caused violent conflict between local communities and the government.<sup>224</sup> On March 9, 2005, CAO admitted the complaint and began its assessment with the stated aims of: (i) providing a "fair and objective" and "neu-

tral and unbiased" analysis of the reasons for the dispute and (ii) supporting the parties to resolve the dispute.<sup>225</sup>

#### *b) Dispute Resolution*

CAO conducted two assessments of project impacts: the first in May 2005 and the second in February 2006. During the first visit, CAO staff interviewed company representatives, complainants, affected individuals, and government representatives in Guatemala City, Sipacapa, and the project site.<sup>226</sup> Based on this 10-day field mission, CAO issued an assessment that addressed four main issues: (i) the environmental risks that may result from the project and who was likely to be adversely



affected by it; (ii) the social and economic impacts of the project; (iii) the adequacy of the disclosure and consultation process; and (iv) security concerns, deaths, and death threats against opponents of the mine.<sup>227</sup> CAO also commissioned an independent expert in hydrology to review public and private project documents relevant to water and dam safety issues.

On September 7, 2005, CAO issued its first written assessment of the dispute. Regarding environmental impacts, CAO concluded that the project posed no substantial risks to Sipacapa residents. It relied heavily on the hydrologist's findings that Marlin Mine posed no significant risk of water-supply competition with local communities and that Sipacapa residents did not face risks of dam failure or water contamination.<sup>228</sup> The hydrologist in turn based his finding on simply a desk review of project documents: he did not visit the mine site.<sup>229</sup> In addition, CAO concluded that future air quality could be affected by "traffic and the on-site processing facilities" but these impacts would not be dangerous to human life.<sup>230</sup> CAO recommended that Goldcorp, independent experts, the government, and the community "create a comprehensive program of participatory environmental monitoring and . . . conduct a comprehensive and publicly released assessment of . . . potential for stream depletion and water competition to occur as a result of the mine's activities."<sup>231</sup>

Regarding IFC policy, the CAO report suggested that the IFC had exercised no meaningful oversight of requirements for community consultation and disclosure, or on the adequacy of a mandated Environmental and Social Impact Assessment (ESIA) of mine-related activities. CAO found "no formal notification or records" indicating that the government informed or consulted with local communities regarding the Marlin project, and it recommended that Goldcorp conduct "enhanced consultations about impacts with local community groups" in a "culturally appropriate" and "understandable format."<sup>232</sup>

The IFC's evaluation of environmental and social impacts had furthermore been deficient, CAO concluded:

The basis on which the IFC determined that the ESIA was adequate is not clear. At the time of this assessment no documentation was made available that reflects that any detailed and specific consideration had been given to how the IFC has and will ensure that the project complies with each of the applicable IFC policies and other basic procedural requirements.<sup>233</sup>

The IFC, the CAO report said, had disbursed funds without an assessment of the cumulative impacts associated with the finalized plans to expand the mine, a plan for management of dangerous materials or emergencies, or details about mine closure.<sup>234</sup>

CAO determined that Sipacapa community members were concerned about the current and future distribution of economic benefits in the community. Goldcorp had, CAO said, invested in the community by hiring local workers, funding salaries of school teachers, constructing new roads, and sponsoring health fairs. According to company reports, the Marlin Mine employed approximately 1,100 local residents in 2009 although a large portion were "rotational" workers who worked in shifts of one week on-one week off.<sup>235</sup> CAO predicted that the "financial benefits to the Guatemalan economy are expected to be over \$220 million over the 11-year life of the mine."<sup>236</sup> CAO recommended the communities and government continue to engage in "productive debate" regarding the impact of the mine in the community.<sup>237</sup>

Both complainants and the IFC expressed criticism of CAO's report. *Madre Selva* alleged that the report downplayed the seriousness of the project's social and environmental impacts, including the impacts on water.<sup>238</sup> They were not interested in a dialogue with the company, the complainants stressed, alleging that CAO had a record of involving "communities in protracted processes with results so poor that they only cause great social frustration."<sup>239</sup> Instead, the complainants emphasized the need for adequate public, independent monitoring of the project's environmental performance.<sup>240</sup>



*Madre Selva* also released a critical report by the hydrogeologist and geochemist Robert E. Moran. He had this to say about CAO's report:

The CAO Assessment incorrectly concluded that the citizens of Sipacapa would not suffer significant impacts to their water quality nor would they be subject to increased competition for water. Both statements are based on inadequate data and result from incorrect interpretations of the existing data. In addition, the CAO chose to arbitrarily ignore potential impacts to citizens residing outside the region of Sipacapa.<sup>241</sup>

For its part, the IFC also noted the confusion created by CAO's focus on the village of Sipacapa even though the "complaint itself is concerned about the impact on the region."<sup>242</sup> The IFC urged CAO to adopt a prospective perspective to ensure that moving forward the project "is peaceful and respectful of all stake holders." It claimed, however, that "[m]ost of the CAO's recommendations specific to the Project are already being implemented."<sup>243</sup>

From January 23 to February 1, 2006, CAO conducted a second field visit to Guatemala "to explore the feasibility of creating a stakeholder dialogue process that would identify and resolve issues related to the conflict."<sup>244</sup> The initiative was undertaken at the request of the World Bank's president after he met with *Madre Selva* and environmental and indigenous rights organizations about the Marlin Mine project.<sup>245</sup> During their second field visit, CAO staff interviewed Sipacapa community members, the World Bank country representative, Guatemala's Minister of Energy and Mines, and *Madre Selva* advocates.

In its 2006 assessment report and in the field visit's wake, CAO concluded that because the principal actors in the case did not "believe entering a jointly agreed process is appropriate" and the mechanism was "unable to contribute further value," they had closed the case file in May 2006.<sup>246</sup> The report explains that the parties had refused to engage in a stakeholder dialogue process, the complainants because the communities had already rejected the Marlin Mine project through a popular referendum. The complainants feared that dialogue would

give the project legitimacy, and they were concerned that the dialogue process would aggravate power imbalances.<sup>247</sup> The company pursued negotiations with individual villages rather than the municipality as a whole despite the strategy's impact on social cohesion and the risk that it would escalate tensions.<sup>248</sup>

#### c) Compliance audit

CAO did not conduct an audit appraisal or audit despite the parties' failure to reach an agreement. An official explanation of this decision is not publicly available.

### 3. Community Perspectives

#### a) On Process

Dispute resolution processes function best to resolve disagreements involving conflicts over interests or miscommunication between parties. There is another category of disputes—often referred to as intractable conflicts—that, as the name implies, are particularly resistant to resolution. Intractable conflicts are less amenable to dialogue, negotiation, and mediation because they involve disputes over basic rights, values, or conflicting world views.<sup>249</sup> The available documents and interviews about CAO's intervention indicate that the conflict over the Marlin Mine had many of the characteristics typical of intractable conflicts: the disputes involved fundamental or deep-rooted moral conflict, value differences between parties, stark power imbalances, high levels of hostility and acts of violence, threats to collective identity, allocation and protection of public goods, many and diverse stakeholders, and multiple layers of government (municipal, traditional, and national).<sup>250</sup>

#### i) LACK OF TRUST

According to research, parties to Alternative Dispute Resolution (ADR) procedures will assess whether a dispute resolution process is fair based in part on whether they perceive the third-party as trustworthy.<sup>251</sup> As one account has put it, "When the authorities provide evidence that they have listened to and considered the views of the parties, and tried to take them into account

in thinking about how to respond to the issues, they are viewed as more trustworthy.”<sup>252</sup> CAO has stressed the relationship between independence and trust. According to CAO, “independence and impartiality are of primary importance to foster the trust and confidence of local communities . . . involved in a dispute. This trust and confidence are prerequisites for the CAO to help solve problems on the ground.”<sup>253</sup>

During its intervention in the Marlin Mine project, CAO acknowledges that its assessment and dispute mechanism “was [un]able to maintain the trust and confidence of all of the parties[.]”<sup>254</sup> CAO attributes this lack of trust to its decision to issue an assessment report with findings about the social and environmental impacts generated by the project. Reflecting on the intervention, one report notes, “We found that when we made judgments at this early stage of the process, as we did in 2005 in Guatemala in response to a complaint against the Marlin gold mine . . . the CAO was drawn into the conflict. We could no longer claim to be neutral . . .”<sup>255</sup>

According to several interviews we conducted, community members did not trust CAO from the outset, well before CAO issued its initial assessment report. Rather than providing a “fair and objective” and “neutral and unbiased” analysis of the conflict dispute, the goal of CAO’s process was to provide political legitimacy to IFC’s investment, one community member suggested: “This is not a financial loan, strictly speaking, this is a political loan . . . it is a strategic and political play because . . . the company did not need [the] money of the [World Bank] back then. It need[ed] its political backing through a loan.” A member of *Madre Tierra* echoed that concern: “The purpose of CAO is to legitimize the financial investments of the World Bank . . .” In the view of this advocate, there was a contradiction between CAO’s mandate and the interests of community members: “They don’t satisfy our concerns because they are not strong mechanisms to ensure compliance with the rights of affected communities, but instead are legitimizers . . . If you comply with CAO’s rules, comply with its recommendations, the project becomes legitimate and then those who are challenging the project are the bad guys of

the film. . . .” One scholar we interviewed explained that “the community just didn’t, couldn’t believe that CAO was independent because in its reports and in its evaluations of the situation, it was in a lot of ways echoing what was already said by the company and IFC.”

Although CAO conducted on-site visits and expert evaluations to gain the “trust” of the communities, these measures were not only insufficient for some of the complainants but may even have further alienated them. For example, several respondents criticized the approach CAO used to conduct its fieldwork. One community member suggested that CAO’s visits to the area were too short to be meaningful: “It was a process that lasted 20 days, if that. In other words, they came and went.” Another observed that during CAO’s visit to the project site, the staff “didn’t go with us at all . . . we didn’t mingle[.]” which may have created the impression that CAO’s staff was part of the company because at the time it was assumed by community members that all foreigners worked with the mine. An academic who studied the project echoed this perception and criticized CAO for its “very narrow focus in the field.” From this person’s perspective, “[CAO’s approach] was wrong from the beginning. [T]hey should have talked more with community leaders and they should have taken this more culturally-sensitive and socially-sensitive approach. Then, of course, the community would have been more inclined to trust those people and consider them as a party suitable for mediating, but they failed this opportunity. . . .”

## ii) USE OF EXPERTS

The Marlin Mine project involved complex technical issues and scientific uncertainty. The parties’ reliance on different technical information, use of different models or assumptions for interpreting data, and involvement of multiple disciplinary perspectives further complicated the dispute. During the interviews, several complainants and other affected community members raised concerns about CAO’s level of expertise and the legitimacy and credibility of CAO’s expert reports.

Several complainants and academics who studied the process expressed concern that the members of CAO’s

staff did not have the requisite skills or expertise to understand the issues at the site. A cultural anthropologist, for example, noted that CAO staff did not include an anthropologist or sociologist and, therefore, the office's intervention failed to reflect an understanding of indigenous rights issues and collective land title issues. "They didn't look at land rights. They didn't look at social disruption in the community. . . . [O]bviously there was a conflict going on there. But still, they only had this very narrow-focused understanding of this conflict . . . ." The anthropologist believed that CAO's approach was similar to the company's: "[community members] were approached by the company as individuals and not as a community, while they should have been . . . they have a communal title that still has legal validity."

The hydrogeologist Robert Moran raised a similar concern about CAO's failure to include "hard scientists"—"people who knew geology, who knew the water sciences, none of those people would show up on the CAO team." As a consequence, CAO's assessment, he said, was "fairly naïve technically in both the water sense and the geochemical sense." He pointed out that the expert CAO hired to assess water and air impacts was not allowed to visit the mining site or given sufficient time to conduct a credible assessment. CAO's finding that the project posed no significant environmental risk to Sipacapa was suspect, Moran said, because open-pit mining inevitably creates negative environmental impacts:

If you expose mineralized rock, either by making an open pit or underground workings, you now totally change the chemistry. And in doing all of that, you start to degrade the water quality, both the surface water and the groundwater, and you expose the mineralized rock to air and water and bacteria that start changing the chemistry. You also blast the rock into much smaller pieces, which aggravates all of these chemical reactions, makes all the surface area now allow for everything to start reacting. So a generalization is that you inevitably get water quality degradation when you do mining of any kind. And some of the responses from the CAO staff on that were just juvenile.

#### b) On Outcomes

The complainants and community members interviewed were uniformly critical of CAO's intervention and skeptical of its impact. Magali Rey Rosa, who drafted the complaint and represented community members during the process, said CAO's conclusions were neither relevant nor useful: "I see CAO as a big disappointment and a [waste] of time, and I would not recommend to any indigenous resistance movement . . . to get involved in that at all. That would be my personal recommendation." Similarly, Bishop Ramazzini, who interacted with CAO during their field missions, concluded that the process had "no positive result," while another community member pointed to a destructive side of CAO's intervention:

[T]he impact is distrust, it is distrust, it is that people stop believing in this type of investigation, in this type of institution . . . what happens at the end is that people say, 'how does it help me to talk with these *gringos* if in the end they do what they want and behave as they want and do not respect me—it is of no use to me to speak and to take positions because absolutely nothing happens.' So, of course the impact is negative.

According to a 2012 report, Goldcorp was the single largest taxpayer in Guatemala. However, local communities received less than 1% of total mine royalties and taxes of mine revenues,<sup>256</sup> and the total amount of Goldcorp's social investment stagnated at around \$1 million per year<sup>257</sup> although mine revenues had increased from \$109 million in 2006 to \$331 million in 2009.<sup>258</sup> According to one fact-finding report, the opening of the mine has led to an increase in alcohol consumption, domestic violence, prostitution, and HIV/AIDS.<sup>259</sup> In 2010, researchers from the University of Michigan and Physicians for Human Rights studied metal contamination in the blood and urine of mine workers and residents living near the mine. The results showed that "higher levels of lead, mercury, arsenic, zinc and copper were found in the urine of residents living near to the mine."<sup>260</sup> The study indicated "most of the metals were detected at con-

centrations below values associated with clinical harm, but little is known about their cumulative and combined health impacts on humans following chronic exposure to complex, real world mixtures near toxic waste sites.”<sup>261</sup>

*c) On Relationship with Project Company*

At the time that the CAO complaint was filed, the conflict between the company and the communities was intense and distrust was high. Community members had organized protests that blocked the passage of mining equipment and lodged complaints about health impacts and discrimination by the company. According to a UN report, “the army and police were used against indigenous populations during [the] blockade of trailers carrying milling cylinders for Glamis Gold’s Marlin Mine in the western department of San Marcos, and led to the killing of Raul Castro Bocel and Miguel Tzorín Tuy on 11 January 2005.”<sup>262</sup> Two years later, in January 2007, several months after CAO closed the case, 400 indigenous families again blocked several roads to the mine to protest the companies’ failure to repair houses damaged by explosives used at the mine or subsidize the independent monitoring of impacts on their water.<sup>263</sup>

Almost ten years after CAO closed the case, little had changed: the mine is still in operation although it will be reportedly shut down in 2017.<sup>264</sup> The hydrogeologist Robert Moran observed: “I think in hindsight we can see that the Marlin area has been one dispute after another . . . . So it doesn’t seem as though the CAO process did much in the long run to fix the problem.” CAO itself also recognized that, after its process, “[t]he cycle of conflict simply continued. Years after our departure from Guatemala, the case remains controversial and unsatisfactory for the parties concerned.”<sup>265</sup> Some of those interviewed believe that the communities became more intensely polarized after CAO issued its final report because the company sought to reach agreements with individuals and not the communities. According to Monsignor Ramazinni, in the town of San Miguel de Ixtahuacan “little by little” there developed “a division among the people who received economic benefits and work” and those that did not.

There is little evidence that CAO helped to develop the communities’ ability to resolve disputes or deepen the complainant’s understanding of the mining project and its impacts. The communities had little understanding of the mining process because, as one community member, explained “[Guatemala] is not a mining country.” According to Moran, the company actually kept basic information necessary for evaluating the mine’s impact secret, including how much cyanide the company used during a year, how much water the company used, and how much explosives. The company also failed to release all the baseline information necessary to assess water quality. From the perspective of some complainants, lack of information continues to characterize the project. A community member explained: “Right now, . . . [the company] say[s] that they will soon finish the work . . . but it is unclear because . . . we had heard that when [the company] arrived there was 10 years of work, then it increased to 15 years and then we heard the period increased to 25 years . . . because they found more gold. So in the end nobody knows . . . Since there is no clear information, there is no oversight over the work of the company. . . .”

The plan to close the mine at the end of 2016 generated additional concerns. One investigation notes: “The water which may discharge from an abandoned mine is commonly acidic and may contain high concentrations of dissolved minerals and metals. This water can pollute rivers and streams. Guatemala law does not regulate the process for closing a mine including the remediation of the environment.”<sup>266</sup>

For over a decade, the Marlin Mine project has created controversy and impacts that went unaddressed by CAO’s intervention. Subsequent to CAO’s decision to close the case, independent studies found that the company had not properly consulted with local communities in compliance with international law<sup>267</sup> and failed to adequately monitor the mine’s impact on water quality.<sup>268</sup> In deciding to forgo a compliance audit in this case, CAO declined the opportunity to incentivize the IFC to address these issues. The palm oil project in Indonesia, is one of the first cases in which CAO conducted an audit and thus spurred reform of IFC policy.



## C. PALM OIL PROJECT IN INDONESIA

### 1. Background

Indonesia recently became the world's largest producer of palm oil, most of which originates in Indonesian plantations located in West Kalimantan on the island of Borneo.<sup>269</sup> Between 2003 and 2006, the IFC made four investments in Wilmar Group International, a Singapore-based agribusiness conglomerate specializing in the production of and trade in palm oil, to strengthen the supply chain of trade facilities and refineries processing Indonesian palm oil fruit.<sup>270</sup> According to the IFC, these projects would "ensure the continuous operation of the [] supply chain and the preservation of all economic interests and employment associated with that chain such as plantation, transportation, storage, processing and shipping."<sup>271</sup>

In 2007, local and international groups filed a complaint that raised serious concerns about the Wilmar Group's activities in West Kalimantan. The complaint alleged that the conglomerate had destroyed forests in clearing land for palm oil plantations, including lands customarily used by indigenous peoples, and displaced communities in violation of Indonesian law and IFC policies.<sup>272</sup> In response to the complaint, CAO investigated, set up a dispute resolution process that produced several agreements between local communities and the company, and issued an audit report that prompted the World Bank in September 2009 to place an 18-month moratorium on palm oil investments.<sup>273</sup>

Indigenous peoples—principally the Dayak and the Melayu—comprise roughly 70% of West Kalimantan's population.<sup>274</sup> The Wilmar Group has several operations in West Kalimantan's Sambas District, a relatively poor region predominantly inhabited by indigenous communities living in scattered villages and settlements.<sup>275</sup> Until the 2000s, these communities mainly harvested rubber, coconut, rattan, pepper, coffee, rice, and oranges.<sup>276</sup>

During the 2000s, the Indonesian government delegated the authority to make decisions related to land acquisition and permitting to local governments and decentralized regulation of the plantation estate sec-

tor which spurred a massive transfer of land rights. In 2003, indigenous peoples in West Kalimantan held 6.9 million hectares of communal land but by 2006 only 60,000 hectares.<sup>277</sup> Most of their communal land was transferred to private landowners, including palm oil plantation owners. One study of West Kalimantan explains:

To eliminate violent conflict and to smooth the development of palm oil plantations, especially during the land acquisition process (the transfer of control over land from indigenous communities to private hands), many local governments have issued regulations on partnership schemes for oil palm plantations.<sup>278</sup>

Under these partnership schemes, a management company controlled the bulk of the plantation but was required to allocate a small portion of the plantation to local families (typically about two hectares per family).<sup>279</sup> Local governments established the task forces which issued the necessary permits and licenses to establish an oil palm plantation. According one study of West Kalimantan palm oil plantations, "[t]hese task forces typically include representatives from the military, the police[,] and local government as well as village chiefs and Adat leaders. The members of each task force are supported financially through monthly payments from the company seeking to acquire lands for plantations."<sup>280</sup>

The sharp rise in commodity prices in the palm oil industry and the growth of the industry combined with favorable climatic conditions and pro-business policies made Indonesia an attractive investment for companies like Wilmar Group. One of the largest oil palm plantation owners in Indonesia with 2011 company revenues of approximately US \$47 billion,<sup>281</sup> Wilmar has a large ownership stake in its oil palm cultivation and milling operations in West Kalimantan.<sup>282</sup>

Between 2004 and 2007, IFC made three investments in and one grant to Wilmar, for a total financial commitment of more than \$101 million.<sup>283</sup> Two of the loans, or approximately \$83.33 million, were directly invested in

projects in Indonesia. In 2004, IFC loaned Wilmar \$33.33 million to finance its export program in Indonesia and support efforts to expand refining operations.<sup>284</sup> And in 2006, IFC made a second loan in the amount of \$50 million to Wilmar's Indonesia operations "to meet its working capital needs to purchase crude palm oil (CPO) from palm oil plantations in Indonesia and process them into refined oil for export."<sup>285</sup> According to the IFC, the \$50 million investment would have "a positive effect" on farmers and others along the supply chain by increasing demand for palm oil.<sup>286</sup> The IFC concluded that both projects would have "minimal or no direct, adverse social or environmental impacts" and categorized them as "Category C" projects, thus requiring minimal oversight.

A third loan of \$17.5 million to Wilmar to develop a palm-oil processing facility in the Ukraine occasioned an IFC visit to West Kalimantan in 2006 to appraise the company's supply chain operations.<sup>287</sup> IFC did not conduct a similar assessment of the social and environmental impacts of the two West Kalimantan projects even though the IFC had adopted new environmental and social impacts review procedures months before the bank's second loan to Wilmar.<sup>288</sup> The new performance standards required IFC to conduct a social and environmental assessment of a project's risks and impacts on labor and working conditions, land acquisition and involuntary resettlement, biodiversity conservation and sustainable natural resource management, indigenous peoples, and cultural heritage, among other issues.<sup>289</sup>

The Indonesian Constitution requires local government to recognize the rights of indigenous peoples, and Indonesia has ratified several international human rights treaties related to indigenous rights.<sup>290</sup> Nonetheless, local government in West Kalimantan has not recognized any indigenous peoples or their collective right to land,<sup>291</sup> even though sacred forest lands, burial grounds, and sites claimed to be inhabited by spirits, play a particularly important role in the lives of the hunter-gatherer indigenous communities there.<sup>292</sup> The majority of the land acquired by Wilmar and its subsidiaries for palm oil production in West

Kalimantan was the customary lands of the Dayak.<sup>293</sup> Land is an essential component of the Dayak sense of personhood and the majority of Dayak land is communal.<sup>294</sup> Family plots of land are ancestral, passed from one generation to the next.<sup>295</sup> Indigenous villagers conserve these lands, and as a result, sacred forest beliefs are integral to the preservation of endangered plant and animal species there.<sup>296</sup> The fruits and plants that grow in these areas are unique and attract mammals and other game, which also makes sacred forests prime hunting grounds for indigenous peoples living in the area.<sup>297</sup>

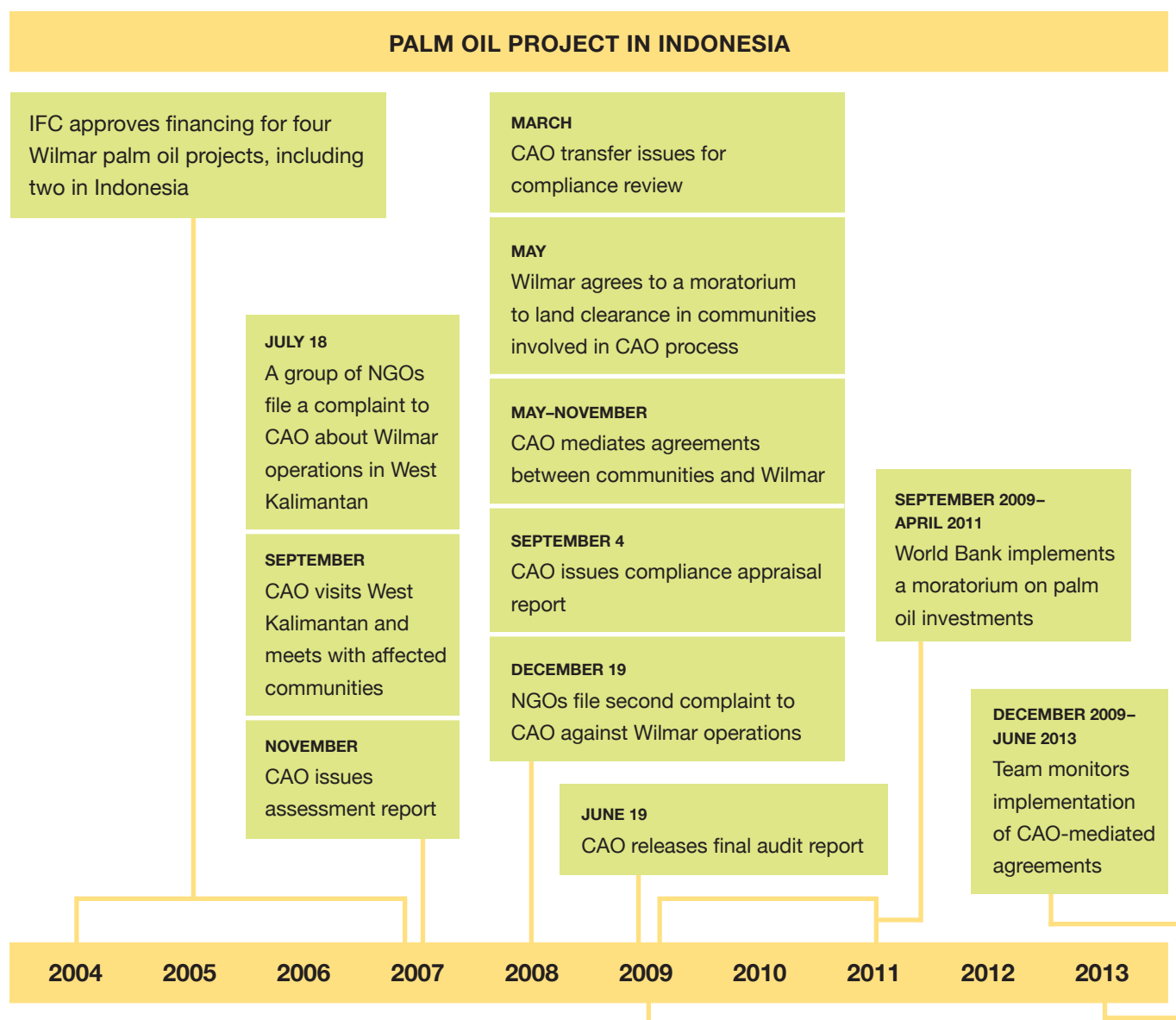
Deforestation in Indonesia for palm oil and illegal logging is so rampant that a 2007 report by the United Nations Environment Programme (UNEP) predicted that most of the country's forest will be destroyed by 2022.<sup>298</sup> Between 2009 and 2011 alone, approximately 95,000 hectares of West Kalimantan forest was cleared, the majority destroyed to clear the land for palm oil production, according to Indonesia's Ministry of Forestry.<sup>299</sup> International and local groups have claimed that Wilmar-owned mills and refineries routinely process fruit bunches grown on plantations that operate on land that has been illegally cleared and used without community consent.<sup>300</sup> Several groups have lodged complaints against Wilmar and its subsidiaries before the Roundtable for Sustainable Palm Oil (RSPO), a non-profit organization established to implement a global standard and certification system for sustainable palm oil, for failing to adequately consult with local communities,<sup>301</sup> unlawfully acquiring land,<sup>302</sup> and disregarding environmental impacts.<sup>303</sup>

## 2. Procedure

### a) *The Complaint*

On July 18, 2007, a group of international and local organizations filed a complaint with CAO against the two IFC-funded Wilmar operations in West Kalimantan.<sup>304</sup> The complainants included the Forest People's Programme, an organization based in the United Kingdom that supports indigenous efforts to prevent deforestation; Friends of the Earth, a Dutch environ-





mental organization that documented Wilmar Group practices in the Sambas District; Sawit Watch, a membership-based organization in West Java, Indonesia, that works with 50 local partners to assist more than 40,000 heads of families affected by oil palm plantations in Indonesia; Lembaga Gemawan, an organization that was founded by Kalimantan students in 1999 to mobilize women, poor people, and farmers and that had filed a complaint against Wilmar before the RSPO; and KONTAK Rakyat Borneo, a small activist organization involved in the monitoring of palm oil companies in West Kalimantan.<sup>305</sup> Prior to filing the for-

mal CAO complaint, the groups had raised concerns about Wilmar's operations with the IFC on multiple occasions.<sup>306</sup>

The complaint lodged with CAO centers on land conflict between the company and indigenous peoples. According to the complaint, the majority of the lands acquired by Wilmar subsidiaries in West Kalimantan were Dayak communal lands.<sup>307</sup> It alleged that the Wilmar Group had destroyed lands that were used by indigenous peoples and had high conservation value without free, prior, and informed consent; without the permits Indonesian law required; and without an environmen-

tal impact analysis.<sup>308</sup> The complaint also alleged that Wilmar used fire to clear these lands, took repressive actions against local residents, and forced local communities to relocate without developing a resettlement action plan in consultation with affected communities.<sup>309</sup> These actions, according to the complainants, violated national laws, IFC policies, and RSPO standards.<sup>310</sup> Finally, the complaint alleged that the IFC had not exercised adequate oversight to ensure that Wilmar acquired land with the seller's consent<sup>311</sup> and that it had miscategorized the project as a "Category C" endeavor (and thus requiring little oversight) by disregarding the seriousness of its environmental and social impacts.<sup>312</sup>

#### *b) Dispute Resolution*

CAO quickly admitted the complaint, and in September 2007, a CAO ombudsman team visited Wilmar headquarters in Singapore and then travelled to visit communities in West Kalimantan for six days.<sup>313</sup> Based on discussions with the company, IFC representatives, and the complainants, CAO identified three broad topics to address: (i) issues related directly to project impacts on local communities in Sambas; (ii) issues related to Wilmar's compliance with national laws and procedures, particularly with respect to environmental permits and burning; and (iii) issues related to the IFC's lack of implementation of its Performance Standards on Social and Environmental Sustainability as well as its categorization of the project as merely a "Category C" potential threat to environment and social well-being when it should have been "Category A."<sup>314</sup>

CAO decided initially to focus on three villages in addressing project impacts: Desa Senuju, Sajingan Kecil, and Sasak; but they neglected to consult the complainants about the selection. When CAO discovered that Wilmar did not own the company operating the plantation in Sasak, the village was dropped from consideration.

The people of Sajingan Kecil are mainly hunter-gatherers and well-known as skilled boat-makers. Due to Wilmar's operations, they had lost most of the land they had used to collect wood and gather food. As a result,

they had turned to farming.<sup>315</sup> At the time of CAO's visit, the peoples of Sajingan Kecil were engaged in negotiations with Wilmar regarding its palm oil operations on village land.

The community of Desa Senujuh is located in the sub-district of Sejangkung, an area of about 6,100 hectares on which 275 families had been living primarily from rubber tapping and wetland agriculture. There are few facilities for schooling there, and average family cash income is as low as Rp300,000 (US\$34) per month.<sup>316</sup> One of Wilmar's subsidiaries, acting without the requisite legal permits, had cleared forestland traditionally used by the community for ceremonial purposes.<sup>317</sup>

From May to November 2008, community representatives and the company participated in CAO-facilitated mediation which resulted in several confidential agreements whose text is unavailable to the public.<sup>318</sup> The first established the conditions and grounds rules for the negotiation. Wilmar agreed to a moratorium on land clearance per the complainants' request and both parties signed a memorandum of understanding and code of conduct. The agreements established expectations related to representation, confidentiality, decision-making, and information sharing.<sup>319</sup>

Under these agreements, community representatives were permitted to select representatives from within communities to participate in the mediation. Civil society groups, including the organizations that submitted the complaint, were allowed to observe company-community negotiations but did not have the right to participate in them. During meetings, community representatives had to request a break to discuss an issue with sympathetic civil society representatives.

Another agreement signed by Wilmar subsidiaries and both Senujuh and Sajingan Kecil required Wilmar to replant destroyed forestland, compensate landowners for land acquired without consent and for the adverse impact on their livelihoods, and provide community investment funds.<sup>320</sup> In return, the communities consented to allow Wilmar to cultivate palm oil on communal lands for 35 years.

Under the agreements, Wilmar apologized for acquiring land without the communities' consent<sup>321</sup> and agreed to pay a total of Rp\$255,286,200 (approximately US\$19,000 in today's currency) in monetary compensation. The agreements identified a team of village elders and officials to distribute the compensation among individual landowners. The agreements also obligated the company and communities to participate in binding arbitration to resolve future disputes. Lastly, the agreements established a group of evaluators—including community, CAO, company, and NGO representatives—to monitor the implementation of the agreements.

### c) *Appraisal and Audit*

On March 26, 2008, the CAO ombudsman transferred issues related to IFC compliance with bank policy for compliance appraisal and possible audit.<sup>322</sup> This is the first case in which CAO had begun an audit appraisal while the dispute resolution process was on-going. CAO focused its audit appraisal on supply chain issues and the scope of the IFC's obligation to review plantation operations.<sup>323</sup>

On September 4, 2008, CAO released its first Compliance Appraisal Report.<sup>324</sup> The goal of the appraisal was to "consider how IFC/MIGA assured itself/themselves of compliance with national law, reflecting international legal commitments, along with other audit criteria." CAO's appraisal included an assessment of "evidence [or] risk of adverse social and environmental outcomes . . . evidence [the] policy provisions [ . . . ] failed to provide [ . . . ] adequate [ . . . ] protection, [and] evidence [that the IFC] failed to apply policy provisions."<sup>325</sup>

In response to the appraisal, the IFC defended its categorization of the projects and claimed it considered supply chain issues when appropriate under bank policy.<sup>326</sup> Despite these assurances, CAO went on to conduct a formal audit, finding that the IFC had inconsistently considered supply chain issues:

While, during its review process, IFC identifies potential impacts outside the legal entities that are the recipi-

ents of IFC investments, these potential impacts are not consistently addressed. [The] IFC did assess the performance of the Wilmar Group's plantations, but not to any fixed, or agreed, set of standards.<sup>327</sup>

Additionally, CAO concluded that without sufficient guidance for staff when conducting reviews of supply chain issues, "there is a possible failure in addressing social and environmental outcomes as part of the review process, and that this might lead to outcomes contrary to the desired effect of the policy provisions."<sup>328</sup> On March 11, 2009, CAO expanded the audit to issues related to Wilmar's compliance with national laws and procedures, particularly with respect to environmental permits and burning.<sup>329</sup>

On June 19, 2009, CAO released its final audit report. The compliance audit concluded that the IFC had allowed "commercial pressures [ . . . ] to prevail and overly influence the categorization[,] scope[,] and scale of environmental and social due diligence."<sup>330</sup> According to CAO, the bank's skewed priorities led to willful disregard for the project's impacts on villagers and ecologically sensitive resources and the incorrect categorization of the project. CAO was emphatic in its criticism of the IFC's deference to commercial pressures, stating "[d]espite awareness of the significant issues facing it, [the] IFC did not develop a strategy for engaging in the oil palm sector. In the absence of a tailored strategy, deal making prevailed."<sup>331</sup> CAO concluded that this approach was completely contrary to the IFC's mandate and mission to engage in sustainable development.<sup>332</sup>

After CAO published its audit, the World Bank did develop new policies for palm oil investments. The new framework requires IFC clients to assess and disclose the social and environmental impacts of their supply chain in accordance with higher standards.<sup>333</sup> It appears that the IFC itself has not complied with this new framework, however. In a case involving a Honduran palm oil company, for example, CAO in 2015 issued an audit that criticized the IFC for failing to implement the new social and environmental policies. The IFC had approved a \$80 million investment in this palm

oil company that stood accused of using death squads to kidnap, kill, and forcibly evict peasant farmers who claimed to own land the company was using for palm oil production.<sup>334</sup> The CAO audit describes the IFC's oversight failure as a "byproduct" of a bank setting in which "results defined primarily in financial terms may incentivize staff to overlook, fail to articulate or even conceal potential [environmental and social] and reputational risks."<sup>335</sup>

### 3. Community Perspectives

#### *a) On Process*

CAO's problem solving process among two communities and the company took place over 18 months. The mediator who facilitated the procedure was from Indonesia and had experience in the subject matter: Indonesian land disputes related to the palm oil industry. During interviews, the complainants expressed satisfaction with the mediator's abilities and performance; however, they expressed concern about power imbalances inherent to the process. Looking back on the experience, some complainants also felt disadvantaged by mediation ground rules, although they acknowledged they had agreed at the time to the ones CAO proposed.

One complainant was disturbed by CAO's lack of authority and the company's control of the process:

[I]t's inadequate that the CAO can only look into issues with the client companies where the company consents. It suggests that the company controls the process where this is meant to be something that gives equal opportunity to the communities . . . . [I]t turns out that the communities can only raise issues insofar as the company will agree to their being raised. And actually, that's not really justice. That's kind of partial justice.

Another complainant noted the imbalances in power among the negotiating parties and highlighted the differences between the parties' access to resources and recourse:

If you talk about all the different companies . . . they are paying for well-educated persons and, of course, they have money. . . . These local communities and the affected people, they don't have access to the legal system, to capital . . . and this creates a measure, a serious gap in the mediation and [at the] negotiation tables.

Complainants also highlighted the positive role NGOs could play in mitigating power imbalances. One stated: "[L]ocal NGOs like us, myself and others who try to support them, that is the starting point when we talk about power balance." Another complainant provided an example of how NGOs safeguarded the rights of community members, particularly in the context of palm oil plantations where local families were provided with a small portion of the plantation to cultivate:

We were particularly concerned from our knowledge of what happens with smallholder arrangements that the terms under which communities should accept the offer of smallholding should be very carefully scrutinized because we were aware that many communities have signed these agreements without realizing the amount of debt burden that they imply, which they then have to pay back with the harvests from their small holdings. And so we . . . undertook to provide the communities with legal advice and with advice from a small, independent smallholder organization who we . . . arranged to go and visit the communities, to warn them of some of the pitfalls that there can be in these agreements, [and to] try to help them negotiate a fair deal.

Concerns about CAO's mandate, rather than the effectiveness of its staff, underlie complainants' critiques about the impact of power imbalances. According to a complainant: "[CAO] did take care during the [mediation] to very carefully explain the procedures and the limitations of the CAO's mandate." Another complainant observed, however, that CAO could do more to address power imbalances and that the mediation process "should [have been] a good learning process for CAO, if they would like to improve their mediation and om-



budsman role . . . in terms of including issues of power imbalances.”

Some community members were also disturbed by the power imbalances that seemed inherent in the agreements governing participation, representation, confidentiality, and decision-making. While a former CAO staff member described the mediation ground rules as “simple” and “straightforward,” some complainants thought the rules exacerbated power differences, hampered efforts to advocate on behalf of community interests, and imposed obligations on stakeholders ill-equipped to meet them. Furthermore, the mediation meetings took place in a city located in West Kalimantan, six to seven hours from the villages.

The rules related to representation also came under fire. Some community members argued that the official representative of the community that the government had designated should not represent the community at negotiations with the company. Instead, they wanted members of the community who had been directly affected by Wilmar’s activities to represent their interests. According to this complainant, in the end, though, CAO allowed representatives of both factions to be present. Another complainant suggested that the communities should have greater autonomy in selecting their representatives: “I think there needs to be a discussion about how communities are represented. It’s our contention that [the communities] should have the right to select their own representatives . . . . Self-representation is a principle we think is very important.” This complainant also lamented communities’ decision to agree to “the request for us not to use the media . . . because as NGOs, it’s about the only lever you have . . . .”

In 2009, CAO established a team comprised of company, community, NGO, and government representatives to monitor implementation of the agreements reached during the mediation process. A complainant, who participated in the monitoring, described it as “necessary” and “fair” but “onerous” for the community and NGOs participants:

[T]here was an agreed [upon] procedure we all signed on to, an agreement to monitor the implementation . . . which we were all keen to do. It was only later on we realized this was a bit of a blank check, because of course our costs weren’t covered, and so it was quite stressful for us to find the time and the money to go into the field, often with very little time [or] warning. . . . [P]robably there should be greater resources for that monitoring provided by the CAO so that the parties can all monitor properly.

Lastly, complainants expressed concern about the lack of transparency in the audit process. A complainant observed that “[d]uring the audit process, there’s really very little role for the NGOs. The whole thing goes into a kind of black box.”

#### *b) On Outcome*

Several complainants recognized that agreements between the communities and the company resulted in tangible results for two communities comprised of approximately 1,000 villagers. By July 2011, less than two years after signing the agreement, Wilmar had fulfilled its obligations to the Senujuh community. When CAO closed the case in 2014, however, the company had not yet complied with the terms of the agreement with the Sajingan Kecil community. The company had not managed the land designated for the smallholder oil palm plantation as promised or reforested all the area cleared by the company without authorization. Instead of the reforestation of 47 acres cleared by the company, Sajingan Kecil agreed to accept compensation (approximately \$16,000 in today’s currency) from Wilmar.<sup>336</sup>

Several complainants expressed disappointment that CAO’s process had not achieved more systemic changes. One complainant explained that the goal of the group of international and local organizations that had filed the complaint was to prevent “more harms and destructions of forests and lands [and end] illegal activities harming the environment and forest and wetland so as [to] prevent future conflict and . . . [make the] IFC [accountable for] the impacts of the client operations on the ground.”

According to this complainant, however, the CAO-facilitated agreements fulfilled only the “minimum level of satisfaction for parties;” he suggested that CAO “try to raise the bar.”

Other complainants also voiced concerns that CAO’s process failed to address in a systemic manner harms created by Wilmar Group operations. Several organizations involved in filing the first complaint filed two additional complaints “to get the company to address systemic issues” and “change the way [Wilmar] deals with communities,” according to one complainant involved in all three complaints. While the aim of the petitions had been to press the company “to adopt revised standard operating procedures,” the additional complaints apparently “just led to [the company] trying to address a handful of further cases [through] direct mediation. . . .”

This complainant believed that outcomes of the mediation were modest in comparison to the scale of the problems created by Wilmar:

“[T]hrough this process, we collectively have been able . . . to address the concerns of between three and six small settlements when there are hundreds of communities in Wilmar’s estates, we believe, who are facing similar problems. . . . [T]he problem’s getting worse, not better, even though, you know, we can’t deny there hasn’t been gain for the handful of communities that have been reached.”

The other complaints submitted to CAO about the Wilmar Group’s activities highlight evidence of additional abuses. For example, the third complaint, filed in 2011, alleged that one of Wilmar’s subsidiaries, with the assistance of local police, evicted 83 families from customary land the company had acquired without community consent and, subsequently, bulldozed their homes.<sup>337</sup> The community joined in a CAO-facilitated mediation process to obtain compensation and prevent future harms. But in the middle of negotiations Wilmar sold its majority stake in the company and the new management withdrew from the process, thus ending the me-

diation.<sup>338</sup> Groups involved in the mediation accused the Wilmar of “bad faith” and a “lack of transparency.”<sup>339</sup> The tone of the conflict continued to escalate. In a 2015 press release, Forest Peoples Programme accused Wilmar Group of resorting to “dirty tricks” after the World Bank revealed that company officials had attempted to bribe the mediator appointed by CAO during the first mediation process.<sup>340</sup> A complainant explained, “sadly, we have not been able to persuade Wilmar to address the problems in its supply chain or even to adopt improved operating procedures, and they continue to be in violation of the rights of the communities on whose lands they are operating . . . .”

### *c) On Relationship with the Company*

In letters to the company, the IFC, World Bank, and CAO, the complainants, including local and international organizations, made serious allegations about Wilmar’s operations in West Kalimantan and their impact on local communities and on the environment. Although highly critical of the company, the correspondence had a professional and respectful tone. Early in CAO’s process, the Wilmar Group declared a moratorium on further land clearance and the parties agreed to engage in mediation. According to a former member of CAO’s staff who participated in the mediation:

This [situation] was clearly high stakes to both parties—you know, all of the parties around the table – and it was something that was widely seen as a systemic problem. In a way, we were in a situation . . . where no one denied that there was a problem.

The beginning of the mediation marked a de-escalation of the conflict and improved relations between the communities and the company. One complainant remarked that the mediation process itself seemed to helped the company recognize that it needed to address the communities’ claims and concerns:

[D]uring the first mediation, the company representatives took a very legalistic approach and said, well, we



can only recognize [community members'] rights insofar as they are a part of Indonesian law. And so then we had to write to the company saying, well . . . it's contrary to the undertaking for this negotiation. And so subsequently, the company people were much more positive or in line with the agreement and the terms of the engagement . . .

While the CAO-facilitated mediation process resulted in the parties coming to agreements on certain issues, it did not lead to systemic changes in company practices, according to interviews. According to one complainant who was part of the team monitoring implementation of the CAO-facilitated agreements, "Wilmar still has many weaknesses of management . . ." <sup>341</sup> Another complainant echoed this perspective in describing the communities' view of their relationship with the company:

Our understanding is that the members of the community who are complainants are somewhat satisfied to have gotten redress but still do not really trust the company because of the problems . . . so they still feel that there is not a good-faith relationship . . .

As mentioned above, those who submitted the complaint that triggered the first mediation process filed three additional complaints in July 2007, December 2008, and November 2011 which included serious concerns about social and environmental impacts.

Stark power imbalances between the communities and Wilmar, which today controls 45% of the global palm oil trade, influenced the nature, scope, and outcome of CAO's dispute resolution process. CAO prohibited the direct involvement of the civil society organizations that submitted the complaint in mediation and contact with media although these decisions appear to have exacerbated power imbalances between the parties. While CAO mediation led to monetary compensation for some communities, some complainants did not feel CAO's process pressed Wilmar to reform practices that harmed communities. Residents who filed a complaint against the water privatization project in Ecuador simi-

larly expressed concern that CAO's process failed to lead to systemic change.

## D. WATER PRIVATIZATION PROJECT IN ECUADOR

### 1. Background

In January 2008, residents of Guayaquil, Ecuador and members of the Asociación Movimiento Mi Cometa (Mi Cometa) and Observatorio Ciudadano de Servicios Públicos (OCSP) filed a complaint with CAO. The complaint alleged that a municipal water privatization program, insured by the World Bank's Multilateral Investment Guarantee Agency (MIGA), had engendered adverse social and environmental impacts and failed to comply with MIGA performance standards. <sup>342</sup> From 2008 through 2010, CAO convened multi-stakeholder meetings to address community complaints regarding access to clean water, overbilling, customer service, and debt forgiveness. These meetings led to several agreements between the private water provider and complainants, and the resolution of hundreds of user complaints. CAO did not conduct an audit assessment or an audit in this case. <sup>343</sup>

Access to clean water has been a perennial problem in Guayaquil, a port city with a population of over 2.2 million. <sup>344</sup> Faced with limited financial resources, low municipal capacity, and intense urbanization, Guayaquil's government consistently failed to provide potable water services and an adequate sanitation system to its poorest residents. <sup>345</sup> Without access to potable water, residents of marginalized communities purchased water at high cost from *tanqueros* (private water delivery trucks) or went without. In 1997, the Inter-American Development Bank (IADB) loaned the Ecuadorian government \$40 million to improve municipal water provision in Guayaquil, <sup>346</sup> with the proviso that the city's water services be privatized. <sup>347</sup> Two years later, Ecuador's state water utility, Empresa Cantonal de Agua Potable y Alcantarillado de Guayaquil (ECAPAG), granted a 30-year concession to a private company, International Water Services Guayaquil (Interagua). <sup>348</sup> The conces-

sion required Interagua to: (a) expand the water system to provide more than 55,000 new potable water and sewerage connections in the marginalized sectors of the city in the first five years of the contract; (b) invest \$520 million in infrastructure by the end of the 30-year contract; (c) achieve 95% potable water and 90% sewerage coverage across the city; and (d) during its first five years respect the pricing structure established by ECAPAG.<sup>349</sup> The concession was expected to help attract \$1 billion worth of new investment to the city.

In 2001, MIGA, in its first water-insurance venture,<sup>350</sup> provided Interagua's privatization project an \$18 million guarantee to protect "against the risks of expropriation and war and civil disturbance . . ."<sup>351</sup> As a Category A project, MIGA recognized that the Interagua project "may have potentially significant adverse social or environmental impacts that are diverse, irreversible, or unprecedented." MIGA's contract stipulated that ECAPAG would monitor and regulate Interagua's water and sanitation services concession.<sup>352</sup>

When Interagua signed the concession contract, International Water Services BV de Holanda, a subsidiary of the Bechtel Group, owned the company. Notably, Bechtel signed the Guayaquil contract only months after withdrawing from a municipal water privatization project in Cochabamba, Bolivia. Increases in water rates in Bolivia had prompted massive protests that led the government to rescind its contract with the company. In 2008, shortly after the CAO complaint was submitted, Bechtel sold the majority of its shares in Interagua to Proactiva Medio Ambiente, a conglomerate of businesses headquartered in Spain.<sup>353</sup>

Guasmo Sur, home to the two organizations that filed the complaint with CAO, is a low-income community of approximately 400,000 residents located on Guayaquil's South side. The standard of living of Guasmo Sur residents lags far behind the rest of Guayaquil: approximately one-third of Guasmo residents earn below Ecuador's monthly minimum wage of \$200. Many of the homes in the community are built of bamboo, have metal roofs, and no access to clean water. Although the community had existed for more than twenty-five years, Guasmo

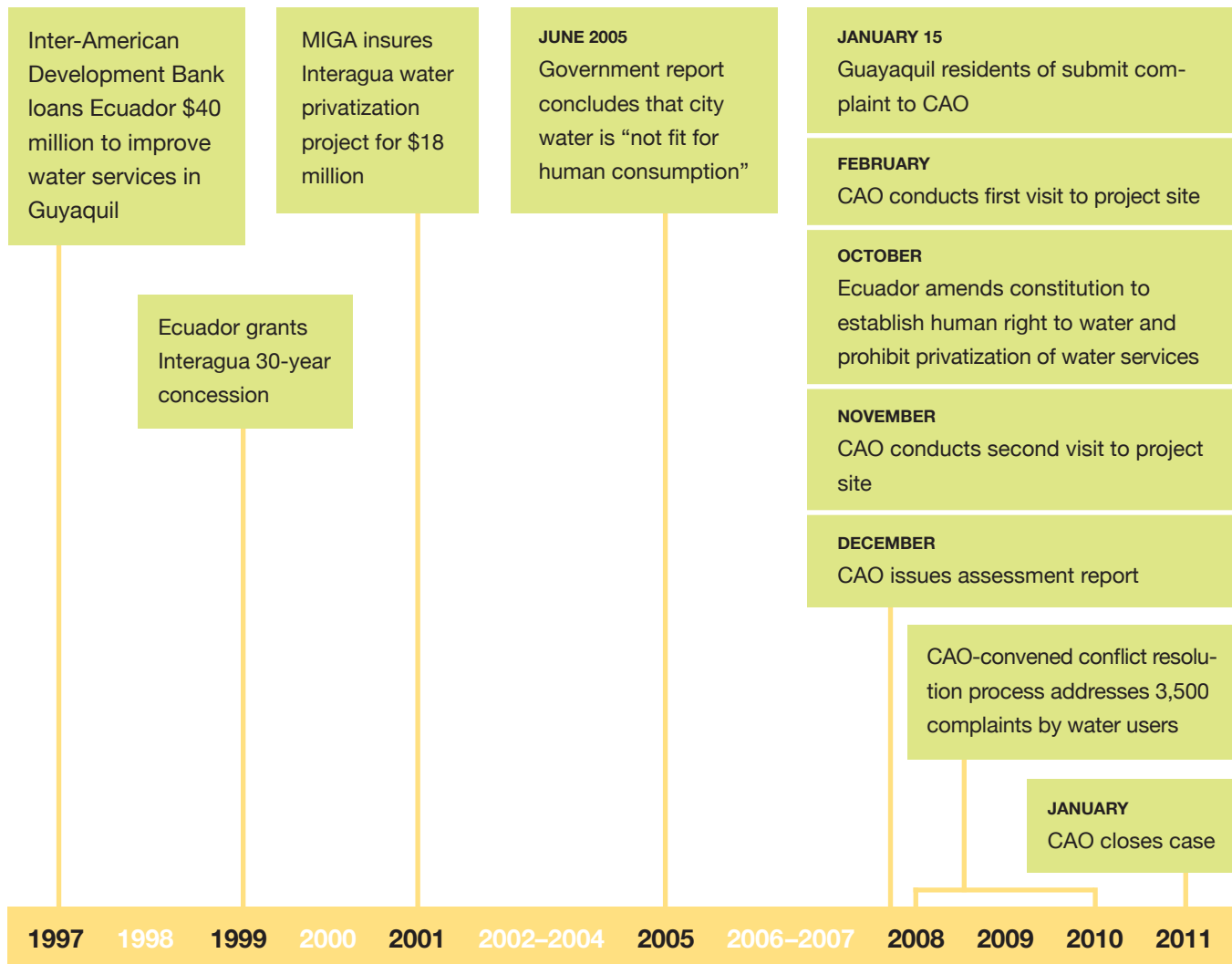
Sur did not have a sewage system at the time the 2008 complaint was filed.<sup>354</sup> Stagnant water, trash, and human waste collected in open sewage ditches that lined the mostly unpaved streets. Poor infrastructure and lack of basic services caused a range of health problems for community residents.

Lack of access to basic services led some community residents to participate in local civic organizations such as Mi Cometa, founded in 1990 to promote and defend the community members' human rights. The organization provided classes in leadership and technology and organized housing and microfinance projects in Guasmo Sur. In April 2005, Mi Cometa members founded Observatorio Ciudadano de Servicios Públicos (OCSP) to improve sanitation, water, and drainage services for the Guasmo Sur community. OCSP is comprised of 42 local organizations including neighborhood groups and professional associations from Guasmo Sur.<sup>355</sup>

Despite the privatization program, improved access to water and sanitation had failed to materialize for many residents.<sup>356</sup> After the concession was granted to Interagua, Guasmo residents consistently complained of foul-smelling water, lack of water pressure, and high water bills. One complainant remembered that before the concession he would wake at 4 a.m. to get water from the *tanqueros*. Although Interagua installed new pipes after the concession, he explained, testing revealed that the water contained fecal matter. In 2002, the media reported that in fact Interagua was treating only 5 percent of the sewage and releasing the rest into the Guayas River.<sup>357</sup> In June 2005, government officials concluded that city water was "not fit for human consumption" and it had caused an outbreak of Hepatitis A.<sup>358</sup> The local health department documented cases of skin ailments, respiratory problems, and gastric illnesses among residents.<sup>359</sup> A study of water coverage in Guayaquil commissioned by the Inter-American Development Bank found that after the concession to Interagua, the probability of households in the lowest income quintile receiving water services decreased while their water rates increased.<sup>360</sup>

Between 2001 and 2008, the local media published hundreds of articles about problems with Interagua's

## WATER PRIVATIZATION PROJECT IN ECUADOR TIMELINE



services.<sup>361</sup> Many community members complained to Interagua about ongoing water shortages, incorrect or excessive water bills, and persistent sanitation problems.<sup>362</sup> One resident we interviewed for this study explained that after the concession his water bill climbed from \$7 dollars to more than \$120 dollars per month. Residents of Guasmo Sur filed hundreds of complaints with local authorities who then initiated investigations on health problems and water quality.<sup>363</sup> Unsurprisingly, a municipal poll of 40,000 Guayaquil residents in 2005 found a high level of dissatisfaction among respondents: more than 88% of respondents did not think Interagua and ECAPAG were meeting their obligations to provide

potable water and an adequate sewage system, and 93% supported municipal action to rescind Interagua's concession.<sup>364</sup> Faced with substandard service and mounting bills, some affected residents stopped paying their water bills.<sup>365</sup>

As community residents continued to experience problems with access to water, Mi Cometa and subsequently OSCP initiated extensive organizing efforts. The organizations trained community observers, established monitoring protocols, documented problems, and organized protests.<sup>366</sup> By the time they filed the CAO complaint, the organizations had established extensive networks in the neighborhood, brought the issue to the

attention of the media and government officials, and compiled 3,500 complaints from Guasmo residents.

## 2. Procedure

### *a) The Complaint*

Members of Mi Cometa learned about CAO from Food & Water Watch, a NGO based in Washington, D.C. that advocates for safe food and access to clean water. On January 15, 2008, Guasmo residents and representatives of Mi Cometa and OSCP Eugenia Parrales de Cordero, Diógenes Hurtado, and César Cárdenas Ramírez filed the complaint with CAO<sup>367</sup> alleging that Interagua had caused a range of social and economic harms to the low-income communities of Guasmo, including Guasmo Sur.

Guasmo residents argued Interagua had failed to improve or expand access to clean water; interrupted or cut off water service because of users' inability to pay without regard to the age, health, or socioeconomic status of the water user; failed to treat water and sewage, which resulted in a Hepatitis A outbreak and other health problems; and caused environmental contamination due to the lack of treatment of residual waters.<sup>368</sup> Additionally, the complaint alleged that MIGA violated its own performance standards that regulated social and environmental management systems, pollution prevention and abatement, protection of public health and safety, and MIGA norms on social policy, environmental sustainability, and elimination of liquid effluents.<sup>369</sup> The complainants requested that Interagua address citizen complaints locally and in consultation with residents, forgive outstanding balances for water services, reconnect water services to residents it had cut off, comply with contract obligations regarding the refurbishment and expansion of water services and the treatment of residual waters, and comply with Ecuadorian laws and regulations related to clean-water access.<sup>370</sup>

### *b) Dispute Resolution*

CAO began its assessment of the issues Guasmo residents had raised shortly after the complaint was filed and

rapidly decided the case met its eligibility requirements. CAO then reviewed relevant documents, travelled to the project area in February 2008, and interviewed stakeholders to assess the viability of collaborative settlement.<sup>371</sup> The goal of the assessment, according to the ombudsman specialist who handled the case, was to

characterize the complaint: here's what it says, here are the issues, here are the different stakeholders and here are their different perspectives, here are [our] different ideas for how we think it can be resolved based on everything that we've seen and heard, [and] these are our recommendations for moving forward.

In the middle of CAO's assessment, 65% of Ecuadorian voters approved an amendment to the country's constitution that established a human right to water and prohibited the further privatization of water services.<sup>372</sup> Subsequent to the constitutional change, Interagua agreed to reconnect water service to users who paid their October 2008 water bill; suspend debts until the government formally defines "extreme poverty;" no longer cut off services as long as users pay the current and future bills; and establish flexible payment agreements for categories of vulnerable users.<sup>373</sup>

In December 2008, after a second visit to Guayaquil to assess the impact of the new constitutional framework on the dispute between community residents and project sponsor, CAO issued its assessment report. The report described the issues the complaint raised and the parties involved, summarized the commitments the parties had made, and recommended continued dialogue between the parties in the form of "a permanent mechanism for company-community engagement and issue-resolution."<sup>374</sup> The report did not address MIGA's alleged breaches of bank performance standards. MIGA did not participate in the dialogue between the parties, and there is no mention in the public record of a formal CAO discussion regarding compliance with bank policies.

CAO then convened a dispute resolution process that ultimately produced nine signed agreements between the company and complainants and created the

Conflict Resolution Table to address approximately 3,500 complaints by Guasmo Sur water users.<sup>375</sup> The dialogue between parties was overseen by a CAO-selected mediator and governed by a set of “ground rules” established by CAO. According to the rules of conduct, only a handful of representatives of the community were allowed to attend mediation meetings and the parties were prohibited from speaking to the media without first consulting with the dialogue participants. Between November 2008 and July 2010, the CAO-appointed mediator, Antonio Bernales, participated in meetings at which the parties discussed debts, billing rates, suspension of services, humanitarian issues and socio-economic challenges faced by water users, overcharging, and testing of Interagua’s water meters by an accredited, independent third party.<sup>376</sup> The parties also discussed community participation and proposed the creation of a consumer protection unit—distinct from the customer service centers—within Interagua.<sup>377</sup> The contending parties reached agreements on some of these issues and those agreements informed how Interagua resolved the more than 3,500 customer complaints at the Conflict Resolution Table.

#### *c) Compliance audit*

According to CAO officials, CAO did not conduct a compliance audit because complainants did not request one although at the time CAO had the authority to transfer a case. The ombudsman official in charge of the case, surmised that

community members were primarily interested in lowering their water bills, receiving free water or—more ideologically—ensuring that their government reject privatization projects funded by MIGA, issues that would not be addressed by a potentially complicated and time consuming compliance audit.

At the time, complainants did not have standing to have a case transferred for compliance review and possible audit. Only CAO or bank management had the discretion to transfer the case and only after trying to reach

an agreement through the dispute resolution process.<sup>378</sup> After a final meeting with stakeholders, CAO closed the case in January 2011.

### **3. Community Perspectives**

#### *a) On Process*

Complainants, community members, and their representatives expressed a range of concerns about the mediation ground rules and their impact on community engagement. Several complainants and community members believed that the mediation rules exacerbated power imbalances and raised questions about the company’s influence on CAO. One complainant commented that “a confidentiality agreement really puts [the community] in a position of helplessness” and another echoed this concern:

It was the first thing [CAO staff] said, no media because they said it could affect the process. . . . I imagine that to an extent they were protecting the company, I suppose, because there are interests involved. . . . I do not think [the mediation rules were] very fair. . . . [The company] had the power. . . .

When one complainant used the media and organized a public protest, techniques that had been used successfully in the past to draw attention to the underlying and on-going problems with water provision, members of CAO staff worried he was trying to sabotage the process, according to an interview with CAO staff.

Several complainants, representatives, and community residents also expressed concern about the lack of public access to the process. The lack of public participation undermined the goals of the process, one community resident said:

We wanted not only us who submitted the complaint to be the ones involved, but also people from the area, the public, but personally there’s something I did not like, when groups of citizens wanted to at least attend a meeting, they were not allowed to participate.



The community's legal representative described how the rules of mediation not only limited public participation but the public's access to information about recourse options:

The public was not informed. The public never knew the CAO was here. The public does not even know what CAO is, they think it is something else, but don't know it's important that they know there exists a mechanism that they can submit complaints against this company. . . .

Two of three complainants interviewed said they were unfamiliar with CAO and what CAO did to resolve their complaints. One complainant said the first time he heard about CAO was when he was invited to participate in an interview for this study.

Additionally, several community members expressed unhappiness with CAO's unilateral selection of the mediator. One complainant commented, "They called us to a meeting in the city of Guayaquil before which we were introduced to a mediator who we had never met, in fact, we had not even participated in the selection process. . . ." Other community members expressed similar concerns. One recalled, "The mediator? They decided!"

#### *b) On Outcomes*

Approximately 80% of the 3,500 individual complaint cases were resolved through the Conflict Resolution Table created during CAO's intervention. According to several complainants, the Conflict Resolution Table was "the single most valuable outcome of the year-long dialogue process." One complainant stated, "Overall, [the Conflict Resolution Table] worked very well. I think it was the most positive aspect of the CAO process. . . ."

While complainants valued the resolution of individual complaints, they criticized the failure to address systemic issues such as water quality.<sup>379</sup> As one complainant expressed it:

[W]e emphasized the main underlying problems in all meetings but we were also fully aware that it was neces-

sary to resolve the most immediate problems . . . . [B]ut those underlying problems were never touched upon during this process of mediation.

One community resident believed that the community's situation worsened after CAO's intervention:

We informed CAO of countless complaints, countless failures, countless breaches of contract and services that were happening. CAO advised Interagua to correct those mistakes, but those things were not addressed. To the contrary, they have returned stronger, with more motivation to cut [services] . . . . [I]n other word there is no compliance.

Problems have persisted since CAO closed the case in January 2011, including issues with water quality, frequent flooding, and interruptions in the water supply, according to several community residents. In 2011, Interagua was fined for multiple contract violations.<sup>380</sup> One complainant remarked that "[Interagua] attended [the meetings with CAO], was good in the meetings, made agreements, signed documents, but never complied. To the contrary, we are worse off than before." Another community member described some of the problems she still encounters with water quality, "To use water from there, I have to add chlorine, I have to use a liquid which is for mosquito larvae and what is said is that one has to put more than anything a lot of chlorine . . . ."

Another community resident questioned the enforceability and impact of the agreements produced during CAO's process: "I'll tell you one thing, when I go to Interagua they tell me that everything is fine, everything is fine. I talk to the users and they tell me otherwise."

#### *c) On Relationship with Project Company*

From the outset, Interagua was motivated to cooperate with the CAO dispute-resolution process. It stood to derive substantial benefits from improving its relationship with customers, according to a company representative interviewed. By improving relations, Interagua could reduce conflict, possibly avoid litigation, potentially expand



its customer base, and possibly retain its role as water provider. Ecuador had, after all, approved a constitutional amendment that recognized the human rights to water and city residents overwhelmingly supported the company's ouster. At the close of the CAO process, Interagua reported substantial improvements in customer service and community relations and more transparent and productive relationships.<sup>381</sup> There is evidence that CAO's dispute resolution process helped Interagua change its ways of operating and shift its perceptions of its users' needs and interests. Several complainants and community members commented on the durability of these changes.

In addition to institutional reforms, a dispute resolution process has the potential to effect change beyond the relationship between the parties by expanding a community and its sense of its own capacity to handle challenges. CAO staff did not seem to recognize the opportunity to improve the Guasmo Sur community's sense of empowerment through the dispute resolution process, however. The Ombudsman disapproved of efforts by complainants and community representatives to leverage the CAO process to enhance community engagement and pursue systemic change. A former member of CAO staff believed that these efforts revealed a tension between the community members' goals and the complainants'/NGO's agenda:

[The NGO] had a very strong interest in the sort of position that water is a human right, and so projects that involve water-for-profit are morally objectionable, and their interest was probably to just basically ensure that the public, that the water provision was done by the public and not by a private sector entity. So I would say their interest would be to get the company out of there. . . . I think they wanted . . . anyone who had had an outstanding water bill, they wanted it to be eliminated. They wanted no debt. . . . They wanted an expansion of the connections, an immediate expansion of the connections of water . . . there were a lot of poor people who still didn't have taps and the company had committed to quite a few more connections by a certain date than they had been able to achieve.

The staff member continued:

[A] lot of them got their bills reduced, they got their debts forgiven, they got payments regularized. A lot of people, a lot of the community members or the representatives of community members were saying, this is going well for us, whereas the NGO would continually move the bar. Now that you've done this, you also need to address all this sewage running through the communities . . . .

There is little evidence that the relationships formed during the process served to increase the affected community's ability to handle conflict or that community relationships have been reactivated to address new problems. Mi Cometa and OSCP continue to raise concerns about access to clean water.

The case study illustrates some of the challenges and pitfalls that complicate CAO's relationship to civil society organizations. In its most recent revision of its operational guidelines, CAO has codified a limited role for civil society organizations and their representatives by removing their standing to act as complainants and eliminating references to representatives.<sup>382</sup> The case study of the oil and gas extraction project in Peru demonstrates that by limiting the role of representatives CAO has caused communities to question the fairness of CAO's process.

## E. OIL & GAS EXTRACTION PROJECT IN PERU

### 1. Background

In 2007, the IFC provided Maple Gas with \$40 million in financing to develop crude oil production in the Peruvian Amazon. According to the IFC, the project would "create jobs for Peruvians and generate income for the state."<sup>383</sup> Three years later people of two Shipibo-Konibo indigenous communities, Canaán de Cahiyacu ("Canaán") and Nuevo Sucre,<sup>384</sup> lodged a complaint with CAO alleging that the oil extraction project had contaminated their land and water, causing widespread illness. According to the complaint, the project had already resulted in several oil spills that endangered their

welfare, livelihoods, and environment.<sup>385</sup> Both parties agreed to participate in CAO-facilitated negotiations, but after several months, the affected communities withdrew from the process without having resolved their core complaints. CAO subsequently denied their request that a compliance audit be conducted.

The Shipibo-Konibo is one of Peru's largest indigenous groups.<sup>386</sup> Like most of indigenous peoples in Peru, the Shipibo-Konibo live along the Amazon River and its tributaries in the department of Loreto.<sup>387</sup> Approximately 35,000 to 38,000 Shipibo-Konibo live in 150 communities—most only accessible by boat—along the Ucayali River. Of the two communities that filed the original complaint, Canaán sits on the banks of the Ucayali River, adjacent to the Cachiyacu tributary and has a population of 1,280 people, while Nuevo Sucre is a village of 300 inhabitants, neighboring Canaán.<sup>388</sup>

The Shipibo culture is rooted in a physical, cultural, and spiritual relationship to the rainforest. Historically, these villages relied on farming—yucca, corn, plantain, and beans—and fishing for their livelihoods.<sup>389</sup> Over 60% of Shipibos use rivers as their source of water (only 22% use a well).<sup>390</sup> More than 40% of this population lives on less than \$1.25 per day, and nearly one-third of children under five years old are chronically malnourished.<sup>391</sup>

In the Peruvian Amazon, indigenous peoples are organized into local, regional, and national federations. The Shipibo-Konibo of Canaán and Nuevo Sucre were part of three indigenous federations: the Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP), the largest national indigenous federation in Peru;<sup>392</sup> the Organización Regional Aidesep Ucayali (ORAU), the regional chapter of AIDESEP that represents the Ucayali region; and the Federación de Comunidades Nativas del Bajo Ucayali (FECONBU), a local federation of indigenous groups. In late 2009, the Shipibo also established an autonomous tribal government by electing their first Tribal Country Council, which represents 42 villages.<sup>393</sup>

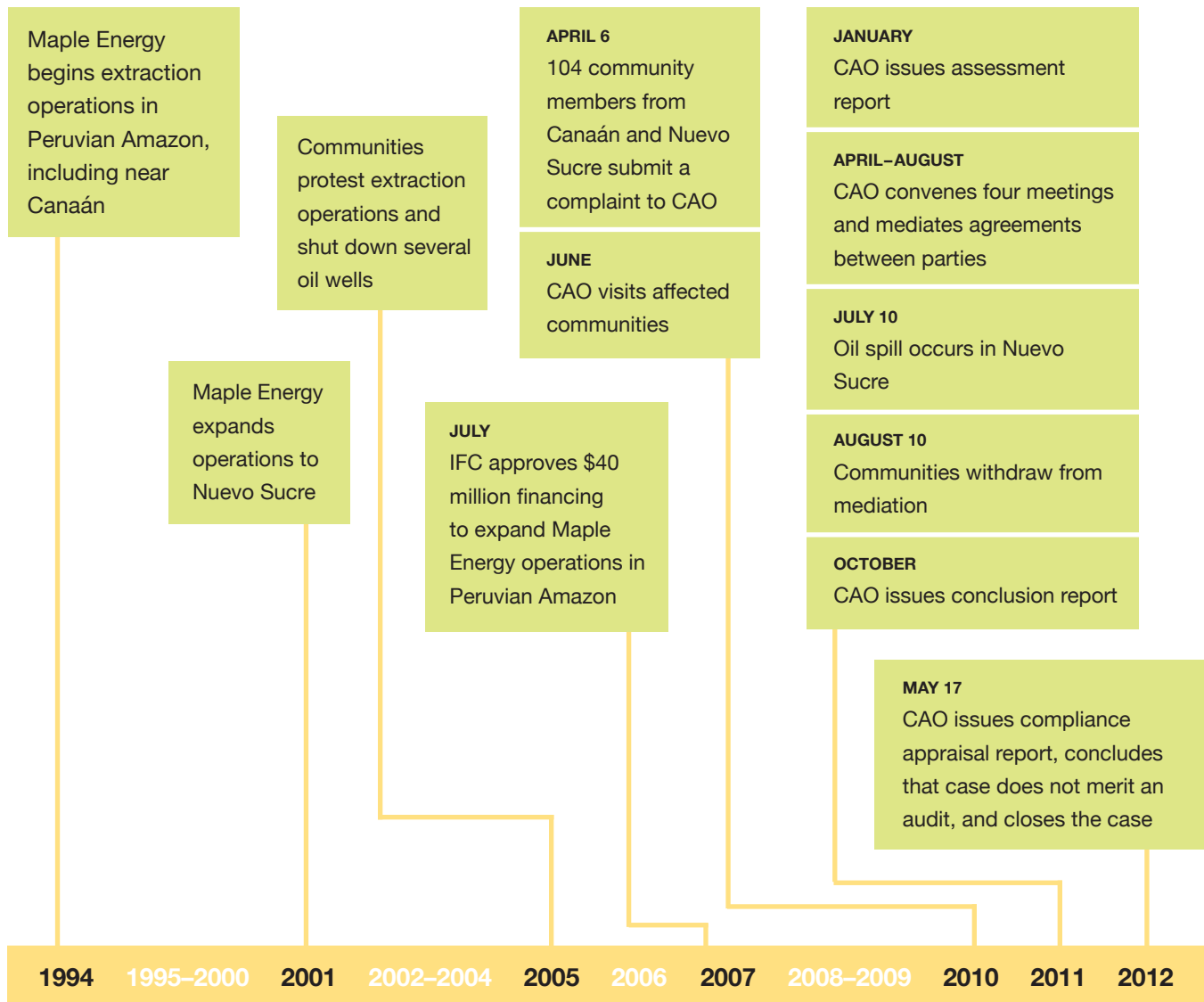
During the 2000s, oil exploration in the Peruvian Amazon intensified dramatically. The area the government licensed for oil exploration and production was

increased exponentially; by 2009, the government had licensed 59% of the Peruvian Amazon to oil companies. The growth of oil operations directly affected indigenous groups living, hunting, and farming on the land. Conflicts between companies engaging in oil production and indigenous groups protesting encroachment on their land became frequent and, at times, deadly.<sup>394</sup>

In 1994, more than a decade before the IFC investment, Maple Energy—a publicly traded energy company that produces ethanol, oil, and gas<sup>395</sup>—began its extraction operations in the Peruvian Amazon when a subsidiary acquired several oil fields.<sup>396</sup> Maple Energy initiated extraction activities in Canaán quickly and began operating in Nuevo Sucre in 2001.<sup>397</sup> By 2004, complaints from inhabitants about the project's adverse impacts had emerged, spurring international organizations to investigate.<sup>398</sup> International organizations concluded that Maple Energy's operations had contaminated the community's environment; undermined their health, specifically residents' nutrition; and endangered the safety of local inhabitants.<sup>399</sup> The following year, indigenous communities staged several protests against the company and shut down several oil wells.<sup>400</sup> Communities also sent letters of protest and attempted redress of their complaints by meeting with Maple representatives directly.<sup>401</sup> Despite this stormy history, in July 2007 the IFC approved a \$30 million loan to Maple Energy and made a \$10 million equity investment in the company to reactivate and expand oil exploration on Maple's existing fields.<sup>402</sup>

At the time the IFC approved its financing of Maple Energy, the company had 28 active oil producing wells on or adjacent to Shipibo-Konibo land and was seeking to expand its operations with an additional 14 development wells.<sup>403</sup> The IFC recognized that the Maple Energy project could have adverse social and environmental effects on indigenous peoples and their cultural heritage, community health, biodiversity conservation and sustainability, and air quality.<sup>404</sup> The IFC, however, decided that the project would have only a "limited number of specific environmental and social impacts [that] may result [and] which can be avoided or miti-

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gated by adhering to generally recognized performance standards, guidelines or design criteria;" on that basis they classified the loan as "Category B," or one of limited and avoidable social and environmental harms.<sup>405</sup> In its analysis, the bank commended Maple's prior community engagement: "Maple has maintained a sound relationship with neighboring communities for over a decade through a series of community development programs.... At the various oil and gas fields being operated by Maple, they have extensive knowledge of local communities."<sup>406</sup>

## 2. Procedure

### a) The Complaint

Shortly before submitting the complaint, the Shipibo-Konibo communities learned through an NGO of Maple Energy's award of both IFC financing and the CAO complaint mechanism. The same NGO put the two communities in touch with Accountability Counsel (AC), a San Francisco-based organization, which offered to assist Canaán and Nuevo Sucre in submitting a complaint to CAO and, later, to represent them before CAO.

On April 6, 2010, a complaint signed by 104 community members from Canaán and Nuevo Sucre was filed with CAO.<sup>407</sup> The complaint alleged serious social and environmental impacts, including contamination of community water and land, illness, forced labor, and inhumane working conditions, and it extensively detailed the communities' unsuccessful efforts to address their concerns with the company. At the time of the CAO complaint, company annual revenue was approximately \$ 71 million and the IFC owned nearly 2% of the company.<sup>408</sup>

According to the complaint, Maple did not adequately consult with the communities of Nuevo Sucre or Canaán before or during their operations. The complaint also alleged that extraction and production operations had resulted in several oil spills and leakage of contaminated waters. It cited Miguel Anuonari Teco ("Anuonari"), a Canaán resident and employee of Maple, who testified that the company maintained a hidden and uncovered tank of "produced waters" (contaminated water) that regularly overflowed into the Cachiyacu tributary when it rained.<sup>409</sup> Other community members complained that the water and fish persistently smelled and tasted like petroleum.<sup>410</sup>

The complaint detailed severe health impacts—including several deaths—caused by oil spills and contamination.<sup>411</sup> According to the complaint, Maple exacerbated these harms by failing to:

notify affected communities about any of the spills; properly contain the spills; study the environmental impacts of the spills and report [the] results to the community; remediate contaminated areas after the spills; provide medical treatment due to widespread health problems resulting from the spills; provide the affected communities with alternative sources of water for drinking, bathing, and washing after the spills; provide the affected communities with food sources when fishing areas were contaminated after the spills, [and] provide the communities with food sources when crop yields were depressed after the spills.<sup>412</sup>

Maple also failed to provide the indigenous communities with emergency preparedness or emergency response training in case of an oil spill, the complaint said.<sup>413</sup> Instead, according to the complaint, Maple pressured community members in Nuevo Sucre to clean up a spill without proper training or protective equipment. The complainants also alleged that Maple employees sexually harassed and assaulted community women and that the company discriminated on the basis of race and ethnicity in hiring decisions.

The complainant also stated that the IFC failed to exercise due diligence in conducting its social and environmental assessment of the project, disregarded these harms, and mis-categorized the project.<sup>414</sup>

#### *b) Dispute Resolution*

The same day the complaint was filed, CAO determined that the complaint was eligible for consideration and began an assessment of the issues it raised. In June 2010, CAO visited the communities with a mediator and found both the communities and the company amenable to mediation. Six months later, CAO issued a Stakeholder Assessment Report identifying the steps for a mediated process.<sup>415</sup> CAO and the parties agreed that the mediation would address all the problems raised by the complaint, including "community access to safe drinking water, improving communication between the parties, development of environmental and health studies, and options for community monitoring."<sup>416</sup>

During the mediation process each party selected a limited number of representatives to attend the negotiations according to what CAO characterized as "jointly developed ground rules."<sup>417</sup> The communities' advisors, AC, and FECONBU representatives, were permitted to be present at dialogue meetings and provide counsel during breaks, but could not speak or vote at the table. Additionally, CAO required representatives to keep the content of the discussions confidential.

Between April and August 2011, the CAO convened four meetings and the parties signed two agreements. The meetings were held at the Maple Gas facility (over

the objections of community members), in the communities, and in one of the nearest towns. In the first agreement, Maple committed itself to assessing and improving the communities' water infrastructure. According to CAO, an initial test of the Nuevo Sucre's well showed a high level of bacteria and below-threshold levels of heavy metals and petroleum-derived substances.<sup>418</sup> A second agreement yielded a company commitment to provide the community with internet access.<sup>419</sup> The third meeting did not result in an agreement after the company refused to pay for an independent water quality and health impact study to measure the impacts of the spills.<sup>420</sup>

In the midst of the negotiations, on July 10, 2011, an oil spill occurred in Nuevo Sucre. According to the complainants:

The company had men from Nuevo Sucre clean up the spill with no training, protective gear, or information about the impacts of exposure to crude oil. Women and children continued to use the water during the spill because it was their primary water source.<sup>421</sup>

On August 10, 2011, during the fourth dialogue meeting, the two communities withdrew from the dialogue process. Maple had exposed villagers to crude oil, the community representatives said, and refused to determine the extent of damage, pay for clean-up, or provide medical treatment to those affected by the July 2011 spill or other spills.<sup>422</sup>

In a public letter to CAO, the complainants explained their decision to withdraw from CAO's dispute resolution process. Maple was negotiating in bad faith, they claimed, and the negotiation conditions were coercive. According to the letter, CAO had prohibited the communities' advisors—ORAU, FECONBU, and AC—from speaking during negotiations. The letter requested that CAO conduct a compliance audit as well.<sup>423</sup>

Two months later, CAO issued its Conclusion Report. The Report summarizes achievements in the early stages of the dialogue process and identifies lessons learned. According to CAO, "the dialogue table opened up spaces where both company and community representatives

could work collaboratively with each other and learn how better to manage their relationship in the future."<sup>424</sup> The Conclusion Report also examined the successes and failures of the process from CAO's perspective. It recognized that the dialogue process had failed "to establish mutually agreeable scientific facts around the question of impacts on the communities' health from the company's operations" or resolve concerns about water contamination.<sup>425</sup> At the time of the report's publication, both communities still lacked access to safe drinking water and their new water infrastructure still required water quality testing.

After the two communities withdrew from the dialogue process, they signed an agreement with Peru's Ministry of the Environment to form a commission to investigate Maple's oil spills on Shipibo territory in Nuevo Sucre and Canaán.<sup>426</sup> On September 8, 2011, a commission of Peruvian Government Vice-Ministers visited the communities. The investigation confirmed the negative impacts of Maple Energy's operations on Shipibo health and the environment.<sup>427</sup>

### c) Audit

On May 17, 2012, CAO released a Compliance Appraisal Report. The report concluded that the case did not merit a full audit because

[the] IFC identified and assessed all the major concerns that relate to the direct impacts of the project that were later raised by the complainants. Throughout the various project investment phases, [the] IFC worked with Maple to improve its information disclosure, community participation, and environmental and social protections.

CAO explained that in 2007, the IFC had determined that Maple's project had caused some environmental and health problems in the area, and promptly worked with Maple to develop an Environmental and Social Action Plan (ESAP).<sup>428</sup> From 2007 to 2010, the IFC followed up with Maple to ensure compliance with the ESAP and conducted site visits.<sup>429</sup> Following the oil spill



in June 2011, the IFC conducted an additional site visit and determined that Maple had followed the procedures outlined in its ESAP contingency plan.<sup>430</sup> Finally, CAO concluded that “[s]ince the IFC identified and acted upon this concern, it does not constitute a failure on [the] IFC’s part to assure itself of the performance of the client.”<sup>431</sup> Nonetheless, the Appraisal Report questioned the IFC’s assessment of the client’s commitment and capacity to implement the actions identified in the ESAP and its willingness to enforce implementation of agreed actions.<sup>432</sup>

### 3. Community Perspectives

#### *a) On Process*

After withdrawing from the dispute resolution process, complainants and their representatives sent a public letter to CAO that cataloged the success and failures of the process from their perspective. The letter was signed by the chiefs of both communities and their representatives from AC and the indigenous federations. The letter is highly critical of the rules used during the mediation. It described the CAO mediation process, in particular the restrictions on “the right of the communities to determine who would speak for them at the dialogue table” and the secrecy rules at the negotiation table, as “coercive and unfair.”

These concerns were echoed by the complainants and representatives interviewed for this study. One complainant recalled that the company opposed the participation of NGOs and explained that “we as a community were worried because we wanted the presence of [our representatives], so that in that manner, they would give strength, they would give us strength to face an oil company that in a certain way was violating our rights.” Similarly, one of the communities’ representatives stated that it was procedurally unfair to restrict the participation of the representatives selected by the communities. She expressed concern about the stark power imbalances between the indigenous communities and petroleum companies.

Other aspects of the negotiation process were burdensome or culturally inappropriate, the same represen-

tative noted. Maple, for example, had required community representatives to take a 12-hour boat ride to attend meetings in a town, she said, and the confidentiality rules obstructed communication between community members by preventing them from using a Shipibo radio show which was the most effective and efficient way of disseminating information within the communities.

Some complainants did say they “learned a lot” from the process about mediation and effective advocacy, although it is unclear how CAO contributed to this outcome. CAO did not prepare community members for mediation, according to one complainant. AC, according to a staff attorney that worked with the organization, conducted extensive trainings to prepare community members for mediation and provided advice, counsel, and research during the meetings. Some community members developed a new sense of their capacity to handle disputes with the company after having received training on negotiation. One complainant explained,

The ...Canaán community failed to achieve 100% [of our goals] through this dialogue process between the company and the community, but in truth it has made the community of Canaán or members and community leaders of the community of Canaán become more prepared because of the training.

#### *b) On Outcome*

The complainants recognized that CAO’s problem-solving process produced tangible results, including internet access, a study of Nuevo Sucre’s wells, and support from the company to deepen Nuevo Sucre’s wells.<sup>433</sup> However, in the words of one complainant, “[W]e [did] not achieve what we wanted.” What they had wanted, this and other complainants had remarked, included a commitment from the company to address the environmental and health impacts of the oil spills.

Some complainants attributed the lack of progress to the company’s obstinacy. “CAO’s process supported us a lot,” Nuevo Sucre’s Chief explained, “but Maple did not want to be accountable for the environmental impact or health issues and that was it.”

For one complainant, dissatisfaction with the outcome stemmed, at least in part, from dissatisfaction with the process:

I think that it was not a very positive result neither from the company nor from CAO. It was not very positive from my perspective because the company never wanted the participation of a nongovernmental organization . . . they did not want that any nongovernmental organization acts on behalf of the community of Canáan.

*c) On Relationship with Project Company*

Before submitting a complaint before CAO, community members reported high levels of conflict with and distrust of Maple Energy. In addition to environmental impacts, community members claimed, as previously mentioned, that company employees sexually harassed local women. In addition, according to some interviewed, they treated community members with disrespect and failed to pay on time for products sold by community members.<sup>434</sup> Community members also reported that the company had failed to fulfill promises regarding devel-

opment made to the communities or to carry out a community relations plan.<sup>435</sup> In protest against these “broken promises,” community members took over several of the company’s wells.<sup>436</sup> The protests prompted the company during 2005 and 2006 to reach agreements on community relations, including economic development and environmental training,<sup>437</sup> though community members allege that the company failed to fulfill many of these commitments.<sup>438</sup>

During CAO’s problem solving process, community representatives had the opportunity to meet with company officials to discuss their concerns. Although trust levels were described as low, the mediation process provided a more formal, structured process to discuss disputes and third party oversight. One community member expressed hope that at a future “negotiation table we can achieve a lot of things for the people.” This hope has not yet materialized and conflict and hostility between communities and the company remains. In September 2012, for example, locals from the two communities peacefully occupied nine Maple wells to protest several new oil spills.<sup>439</sup>

# DISCUSSION OF FINDINGS

The quantitative and qualitative data provide a snapshot of CAO's casework during the first decade of its operation, including who filed complaints, what processes CAO used to address complaints, what matters were addressed, and what outcomes resulted. Statistical analyses have suggested several factors—including several related to the power imbalances between the parties, such as the wealth of the company, the involvement of international NGOs, and the size of the World Bank's loan—influenced CAO's process and outcomes. Interviews with complainants and community members have provided insight through respondents' perceptions of the fairness of CAO's interventions. This section reflects on these empirical findings to discuss their implications for CAO's mandate, procedures, and complainants.

## **A. CAO'S LIMITED AUTHORITY**

The World Bank established CAO in 1999 to address complaints voiced by communities harmed by development projects and to provide some independent oversight of compliance with the bank's environmental and social policies. The qualitative and quantitative data indicate that CAO in many cases has failed to pursue this mission aggressively.

During the 11-year period running from 2000 to 2011, CAO intervened as an auditor—i.e., CAO investigated whether or not the World Bank violated its social and environmental policies by financing or failing to adequately monitor projects—in only 7% of the cases included in our study's data set. CAO instead emphasized its role as a “creative problem-solver.” CAO required contending parties to consider dis-

pute resolution before moving to the stage of compliance appraisal.<sup>440</sup> CAO facilitated an agreement in 32% of the cases we examined.<sup>441</sup> It was the potential for facilitating an agreement rather than for making a judgment about the bank's compliance with social and environmental policies that animated CAO's casework.

CAO's emphasis on mediation rather than accountability led many complainants to conclude that CAO was "untrustworthy," acting simply as a "buffer" between the community and the bank, or as "window dressing." Many of the civil society organizations, complainants, and community members interviewed had expected CAO to hold the bank and company accountable for adverse impacts and craft a remedy for the harms suffered, and were subsequently disappointed.<sup>442</sup> Many used the language of human rights to express their concerns and shape their expectations.<sup>443</sup> For example, the complainants who claimed to have suffered harms caused by the Marlin Mine and Maple Energy projects believed CAO should uphold their collective property rights as indigenous peoples, specifically the right to free, prior, and informed consent established by international human rights law, while in Ecuador complainants framed their concerns about the water privatization project as a violation of the human right to water.

CAO, however, lacked the authority to meet complainants' expectations of accountability. CAO is not in a position to require companies to respond to complaints by community members, to participate in its problem-solving or audit process, or to provide remedies for harms caused. Nor does CAO have the authority to require the IFC/MIGA to participate in its dispute resolution process or to implement recommendations based on CAO's compliance review. Neither the IFC nor MIGA is required to disclose details about the bank's investment to the project-affected community, inform the community about their right to bring their concerns to CAO, or terminate a project that generates more harms than benefits for a community. Thus CAO offers a limited forum for airing grievances and is not empowered to provide remedial action.

Human rights protection is also missing from CAO's mandate, and the World Bank itself appears ambivalent about using human rights standards to evaluate investments, address risks, and measure outcomes. In 2005, Peter Woike, then Executive Vice-President of the IFC and a Managing Director of the World Bank, stated that "[t]here are three *lingua franca* of globalization: the languages of finance, environmental sustainability, and human rights."<sup>444</sup> At the time, according Mr. Woike, the IFC was not conversant in the language of human rights and was considering "along with an increasing number of global corporations . . . whether and how human rights can be incorporated into its operations."<sup>445</sup> More than 15 years later, the IFC has yet to fully integrate human rights into its framework.

Members of the international community have pressed forward in efforts to clarify the responsibilities of corporations to abide by human rights standards and the role of International Financial Institutions (IFI) in promoting corporate compliance. In 2011, the UN's Human Rights Council adopted global standards on the human rights impacts of business activities.<sup>446</sup> The Guiding Principles on Business and Human Rights identify three "pillars" on which a human rights accountability framework rests: (1) the state's duty to protect its residents against human rights abuses by third parties, including business enterprises; (2) the corporate responsibility to respect human rights; and (3) the state's duty to ensure access to effective remedy for victims of business-related human rights violations.<sup>447</sup> These principles recognize that judicial systems are indispensable in ensuring effective remedies, but are not always accessible to communities harmed by business activities. The Guiding Principles thus call on states to expand access to non-judicial remedies and businesses to establish or participate in non-judicial procedures, such as CAO.<sup>448</sup>

CAO's focus on problem solving is a reflection of its limited authority. Human rights and other sources of law may shape complainants' expectations, but law does not "dictate" the outcome of CAO's dispute resolution process. According to a CAO staff member,

[D]omestic laws, international laws and norms and performance standards and the whole framework that we function in . . . will set the context within which these discussions take place. But the discussions are more around what is it you want, what do you need, and can we have those needs addressed through this process.

In the context of an entirely voluntary process, CAO must convince bank and company officials to address community concerns case-by-case and issue-by-issue. According to our quantitative analysis, whether CAO reaches an agreement may be influenced by what kind of industry is involved (e.g., CAO is much less likely to reach an agreement on a complaint about a project in the extractive industry), who files the complaint (e.g., complaints with at least one international organization complainant were significantly more likely to progress to compliance review), and the wealth of the company involved (CAO was less likely to transfer companies with revenues greater than \$50 billion and these cases were less likely for compliance review).

CAO's focus on problem solving and the severe limitations of its authority may reflect the bank's efforts to protect its financial activities from community pressures and environmental influences or resist compliance with law, including international human rights law. Scholars Laurel Edelman, Howard Erlanger, and John Lande in studying internal dispute resolution mechanisms, have noted that:

[o]rganizations may create complaint-handling procedures in part to buffer or insulate their core activities from the threats posed by their legal environment: By handling complaints internally rather than allowing them to reach formal legal channels, organizations avoid the cost, time, and harm to public image that may result from litigation. Thus, internal complaint handling enhances organizational efficiency by insulating organizations (to varying extents) from interaction with the external legal system. A complaint-handling procedure is an adaptive mechanism, facilitating organizational rationality in the face of (what is to management) envi-

ronmental irrationality. The rational perspective, then, suggests that employers' primary goal in complaint handling will be to keep the complaints out of the formal legal system.

Insulating the technical core does not necessarily imply compliance; it may instead imply greater emphasis on grievance resolution . . .<sup>449</sup>

In the cases examined in this study, CAO was only able to provide a space for community members to have a conversation with company representatives about a subset of their interests and needs. In CAO, then, the World Bank has created the expectation of accountability, but seldom the reality.

## B. UNADDRESSED POWER IMBALANCES

CAO's dispute resolution processes involve many of the approaches common to what is termed "alternative dispute resolution" (ADR)—the collection of techniques and practices used to resolve disputes outside the courtroom including conciliation, negotiation, mediation, and arbitration.<sup>450</sup> ADR has been used in a variety of contexts to provide communities with convenient, affordable dispute resolution mechanisms to further a range of social, legal, economic, and political goals.

The promise if not always the result of ADR is to deliver redress, efficiency, and empowerment outside the courtroom. Proponents of ADR argue that parties are better able to discover and address their real interests and needs once freed from the restrictions of preexisting legal doctrine or remedies. Accordingly, "ADR may allow 'extralegal justice,' or the achievement of goods or rights to which parties have no legal right," write Edelman, Erlanger, and Lande.<sup>451</sup> For example, CAO facilitated a negotiation that resulted in the Wilmar's commitment to pay compensation to indigenous communities affected by the company's palm oil operations although Indonesian law did not recognize the communities' collective property rights.

While CAO's lack of legal formalism may foster flexibility and open the door to opportunities to address pressing community needs and interests, it also



may exacerbate the vulnerability of complainants and project-affected communities. Critics of ADR such as Edelman, Erlanger, and Lande have argued:

[L]egal rights are important—especially when they protect people who do not enjoy political and social power—and [] ADR may seriously undermine those rights by ignoring them, lowering parties' expectations of what they are entitled to, or changing the way disputes are framed.<sup>452</sup>

Where the possibility of judicial redress is available, though, mediation and conciliation may be a low cost alternative, that maintains privacy between parties, involves constituencies, links issues, and provides a neutral opinion—assuming an impartial mediator has been chosen.<sup>453</sup> But, the streamlined resolution provided by ADR requires political support, stakeholder education, consistency with local dispute resolution norms, parity between parties, recourse to judicial review, trained personnel as well as monitoring mechanisms to enforce the conditions of the resolution.<sup>454</sup>

CAO's caseload is rife with stark power imbalances that complicate the successful implementation of ADR. CAO intervenes in cases involving complainants living in some of the poorest countries of the world up against companies with revenues in the tens of billions of dollars. Complainants and companies obviously have enormous differences in access to power or resources, such as money, information, technical expertise, and time. Not just anecdotal evidence but our statistical analysis indicates that these differences may influence CAO's procedure and outcomes. For example, the revenue size of a company involved in a project may influence whether the case will progress to compliance review: the greater the revenue of the company, the less likely CAO is to investigate the World Bank's compliance with its operational policies.<sup>455</sup> By contrast, cases involving civil society organizations, particularly international organizations are significantly more likely to reach the compliance stage.

CAO has developed a few strategies to address these stark power imbalances. According to interviews with

CAO staff, the agency attempts to "level the playing field" by engaging in bilateral meetings with each party to help them understand the process, hiring independent experts to examine alleged harms, and using mediators and facilitators with experience in local conditions. CAO has also encouraged stakeholders to implement joint monitoring of conditions in projects with disputes regarding air and water quality.

Several complainants and community members questioned CAO's ability to level the playing field through such palliative measures. While CAO's efforts may help communities better understand CAO's process, they do not address the communities' lack of knowledge, resources, expertise, or skills relative to the company, according to interviews. Several respondents also challenged CAO's approach to representation, as is evident in the discussions of some of the individual case studies. The community's NGO or legal representatives are typically barred from direct participation in mediation or negotiations, for example. A former member of CAO's staff explained how from his vantage point he saw this approach as a positive in a case:

We had . . . community representatives that self-selected, and then we had a group of observers who were the wider sort of civil society groups that were associated with the complainants, and we've done this in many cases, and it seems to be a reasonable way of operating where the parties themselves want to feel empowered to actually be sitting across the table from their counterpart from a company side and they're the kind of principals in the dialogue, and then they have a group of advisors, lawyers, civil society, whoever it is, off the table listening to the conversation, but they don't have a right to necessarily participate in the immediate discussion.

Several complainants, however, stated that by excluding their representatives from direct participation in mediation or negotiations CAO, rather than empowering the community side, actually undermined the ability of complainants and community members to participate effectively in dispute resolution. As we've seen, commu-

nities even withdrew from CAO-sponsored mediation/negotiations with Lukoil and Maple Energy projects after the complainants' representatives were denied a seat at the negotiating table.

Several members of CAO's staff expressed the view that legal representation was not necessary during ADR because the process is supposed to be non-adversarial and lawyers may interfere with the process by focusing on legal doctrines and redress. Empirical research, though, indicates that the participation of legal representation during ADR processes may help address power imbalances and increases the probability and the quality of collaborative settlements.<sup>456</sup> Representatives may contribute procedural and strategic expertise, conduct legal and factual research, organize information and training, present arguments, and provide support. Lawyers, serving as "process experts," can help to structure a process carefully tailored to the satisfaction of their clients' interests.<sup>457</sup> An arbiter or mediator cannot make up for lack of representation or undertake the range of tasks inherent to representation without jeopardizing their neutral stance.<sup>458</sup>

Analysis of case material and interviews with complainants and their representatives substantiate this view. Civil society organizations and legal representatives alerted community members to the opportunity to file a complaint before CAO; garnered media attention on project impacts; conducted community outreach and education; trained community members to participate in CAO's dispute resolution process; provided advice, counsel, and research for meetings with CAO and companies; and participated in efforts to monitor compliance with agreements.

### C. THE UNCERTAIN FATE OF COMPLAINANTS

Both organizations and individuals filed complaints before CAO over the 11-year period covered by the study: almost half of eligible complaints were submitted by local or international organizations, while 37% were lodged by members of the project-affected community.<sup>459</sup> According to statistical analysis, the identity of the complainants appears to influence the interventions and

outcomes of CAO's process. For example, if an international complainant was involved, the case was significantly more likely to reach the compliance/audit stage, while a case involving a complainant who was a member of a project-affected community was significantly more likely to reach an agreement during dispute resolution.

In publications and interviews, CAO staff affirmed that the agency's mandate to intervene in development projects flows directly from the complainants. CAO's rules of procedure or practices, however, do not afford complainants any special role or specific status. During the assessment stage, before deciding to initiate a dispute resolution process, CAO maps the stakeholders and defines the "project-affected community," often including in it individuals who did not submit the complaint but who are in similar situations. For example, CAO expanded its intervention to several villages located near the Karachaganak Field although the CAO complaint was filed by only one village's residents. In the case against the Marlin Mine project, CAO decided to focus its intervention on one indigenous village even though the complaint concerned the project's impact on the region.<sup>460</sup> In the case of the Wilmar Group's palm oil operations in Indonesia, the complainants and representatives of several organizations were not allowed to participate directly in negotiations with the company.

David Hunter, a Professor at American University Washington College of Law and academic and strategic advisor for CAO, explained:

[T]he reality for communities is that the people who bring the complaint . . . don't have any kind of heightened priority in the negotiating process. . . . [T]hey have to understand that they may lose some control of their complaint as it goes through the process, and they may be only one stakeholder in a multiple-stakeholder dispute resolution. [This] causes potential problems for the people who are brave enough and took the initiative to file the complaint in the first place.

Many of the complainants interviewed expressed dissatisfaction with CAO's process and questioned its

fairness. Complainants we interviewed, both members of the community and representatives of civil society organizations, described CAO as an extension of the bank and questioned the agency's independence. They were well aware they lacked influence over CAO's critical decisions and the determinations made by agency. Some believed that CAO alone determined who mediated the negotiations, who was allowed to be at the negotiating table, and what issues were discussed. Some complainants also indicated they were disturbed that they had no say during critical moments, such as the compliance stage.

"Procedural justice" is a concept developed by social psychologists in the 1970s to describe how individuals experience encounters with decision-makers and to identify what aspects of those encounters affect a person's appraisal of the process and its outcome.<sup>461</sup> Many studies have also employed the procedural justice concept to understand individuals' interactions with law enforcement and participation in court proceedings.<sup>462</sup> The basic idea behind the concept of procedural justice is that if a participant perceives a process is fair, he or she is more likely to accept the outcome, even if it is unfavorable to his or her position.<sup>463</sup>

While there is significant disagreement about what makes a process fair, the procedural justice literature has identified four factors that typically play an important role in participants' assessment of the fairness of procedures and willingness to accept the outcome: 1) *input*—people value opportunities to state their arguments, especially when it is clear that those arguments are being listened to; 2) *neutrality*—people value having an unbiased and factual decision-making process in which the rules are applied in a consistent manner; 3) *respect*—people are more likely to consider a process fair when they are treated with dignity and courtesy and their rights are acknowledged; and 4) *trust*—people are more positive about the fairness of a process if they feel they are dealing with people whose motives they can trust.<sup>464</sup>

In assessing the fairness of CAO's procedures, complainants, their representatives, and community members expressed concerns regarding the fairness of CAO's

interventions. Several complainants questioned CAO's motives and biases, alleging that CAO acted to protect the interests of the World Bank and company. In part, complainant dissatisfaction with CAO's process may stem from the role afforded to the complainant, in particular when the complainant is a representative of an organization or is represented by an organization. In practice and policy, CAO has sought to limit the role of organizations by imposing conditions on who complainants select as representatives and the participation of representatives at the negotiation table. These limitations impacted complainants' views of CAO's trustworthiness and neutrality. While CAO has justified these decisions and policies as necessary to ensure that the CAO staff has direct contact with and gains the direct participation of community members, studies show that these limitations typically would exacerbate the power imbalance in favor of the more powerful party, in these cases the companies.

In general, CAO staff also believed that community members and civil society organizations had very different concerns. A former member of CAO's staff provided a common perspective in describing CAO's efforts to facilitate an agreement between farmers in Indonesia and the palm oil company known as the Wilmar Group:

My sense was, and I think this is quite common, the farmers and those directly impacted had some quite proximate objectives about their interaction with land and their relationship with their land and with their government and with Wilmar as a corporate entity in their midst. I think that some of the national and international NGOs had additional objectives around governance policy reform, reform of global institutions, reform of national laws of regulation and . . . human rights as well as . . . full consent.

Marcus Colchester, who submitted three complaints against the Wilmar Group on behalf of project-affected communities, held a decidedly different view, one echoed by many of the complainants, community members, and members of civil society organizations we interviewed:

[I]t's our assessment that there would never have been a complaint without an international NGO being involved. . . . CAO staff consistently viewed differences in NGO and community agendas. CAO seemed to feel that community members never wanted deep change, structural reform but prioritized day-to-day concerns. CAO's way to deal with these differences was to relegate the NGOs to the status of observers and question the legitimacy of community members who advocated for structural change. CAO seemed ill prepared to deal with these differences even though they encountered them over and over.

CAO's approach may also be motivated by other factors. One member of CAO's staff expressed concern that bank officials felt the agency was too aligned or had too much contact with NGOs supportive of complainants and affected communities.

Prior to 2013, CAO admitted complaints from any "individual, group, community, entity, or other party." After 2013, CAO narrowed the category of eligible complainants to "any individual or group of individuals." This change to the operational guidelines likely will increase the power imbalance between complainants and companies, decrease community sense that processes will be fair, and likely reduce complainant petitions for redress.

# CONCLUSIONS AND RECOMMENDATIONS

The study's main findings are as follows:

- 1. CAO acted as a convener of dispute-resolution meetings and not as an investigator in most cases.** During its first 10 years of operation, CAO rarely investigated whether the World Bank violated its own social and environmental policies. This despite ample evidence that the World Bank routinely failed independently to assess or to mitigate negative project impacts and that the bank established CAO to ensure that its projects are environmentally and socially sound and contribute to sustainable development. CAO audited the bank's compliance with its policies in only 7% of cases in our data set. Although the rate at which CAO cases reached the compliance stage increased over time, the pace at which CAO conducted audits—i.e., determined whether the bank adhered to its social and economic policies—did not increase significantly. Many complainants and representatives criticized CAO's decision to forgo audits in their cases. Some viewed CAO's decision not to conduct an audit as evidence of CAO's weak authority and lack of independence.
- 2. CAO had some success as a problem solver.** CAO has emphasized its role as a “creative problem-solver” that works to resolve concerns about environmental and social impacts by facilitating agreements between affected communities and companies. Of the 72 cases in our analysis, 32% (23 cases) reached an agreement and 68% (49 cases) did not result in an agreement. CAO facilitated more agreements over time as changes were implemented in CAO's procedures, however. In interviews, complainants and community members raised concerns about the process used to reach agree-



ment and the quality of the agreements reached. CAO's lack of authority, the voluntary nature of the dispute resolution process, and the intractability of the conflict contributed to the impasse between parties. Complainants also criticized CAO's dispute process for failing to address underlying causes of conflicts between communities and companies.

**3. Many CAO complaints involve intractable conflicts that are resistant to resolution through problem solving.** Most of the complaints CAO found eligible for further action between 2000-2011 were filed about projects that the World Bank expected to have significant and irreversible adverse social and environmental impacts. According to the IFC, these projects would lead to job creation, increase energy production, and attract foreign investment to the region. Although the extractive industries (oil/gas/mining/chemicals) represent a small portion of the World Bank's IFC/MIGA projects (9% of their investment portfolio in 2010), 61% of the eligible complaints examined concerned extractive industry projects. Interviews indicate that in extractive industry cases complainants and extractive industry companies held deeply divergent views about the social and environmental impacts of the projects and the rights of community members. The deep divisions between companies and communities may explain in part why, according to statistical analysis, complainants who filed complaints about extractive industries projects were significantly less likely to reach an agreement with the company. CAO's intervention also lasted significantly less time in cases against extractive industry projects compared to cases against non-extractive industry projects.

**4. Stark power imbalances exist between the parties involved in CAO cases.** IFC/MIGA finances projects in some of the world's poorest countries. According to the United Nations' Human Development Index (HDI), a composite measure of life expectancy, income per capita, and education levels of the world's nations, more than half of the countries where CAO

complaints originate are among the least developed in the world. Yet complainants are up against companies whose IFC/MIGA financing alone stretches into the multimillions of dollars and whose revenues may stretch into the billions. The enormous differences in access to power or resources—such as money, information, technical expertise, and time—profoundly disadvantage communities that seek redress. Additionally, a number of complainants and community members believed that the mediation rules exacerbated power imbalances and created questions about undue company influence and CAO's independence. Some claimed that the “ground rules” CAO itself imposed on the problem-solving process left complainants without a role in the selection of a mediator, forbade them from discussing the problem-solving process with outside parties, and prohibited them from selecting NGO staff or lawyers to represent them directly in mediation or negotiations.

**5. Who filed the complaint influenced CAO's process and outcome.** Civil society organizations and other actors from outside the community played a significant role in CAO cases. Civil society organizations alerted community members to the opportunity to file a complaint with CAO; garnered media attention on project impacts; conducted community outreach and education; trained community members to participate in CAO's dispute resolution process; provided advice, counsel, and research for meetings with CAO and companies; and participated in efforts to monitor compliance with agreements. When an international organization helped file the complaint, the cases were much more likely to reach the audit stage. CAO also spent more time on cases involving organizations. The contending parties were more likely to reach agreement, though, if complainants included members of communities harmed by a project.

**6. The wealth of companies influenced CAO's process and outcome.** The companies that receive IFC/MIGA financing are under no obligation to partic-

ipate in CAO's dispute-resolution process. Some companies, after complaints were filed against their projects, simply repaid the loan early and severed all contractual duties with the World Bank. Our data and statistical analysis suggest company revenue and the size of the IFC/MIGA project financing may have influenced CAO's process and outcome. The higher the revenue of the company involved in the project, the less likely it was for the complaint to progress to compliance review. Cases involving companies with annual revenue higher than \$50 billion took significantly less time and were less likely to be investigated by CAO for compliance with bank social and environmental policies than cases involving companies with lower revenues. Cases involving IFC's largest borrowers—project with loan commitments greater than \$200 million—had significantly shorter duration than complaints with smaller project loans. Researchers note some of these findings included only a subset of our cases. Future research will include additional cases and control variables to further examine these relationships.

**7. *There was no outcome in the majority of CAO cases.*** CAO did not mediate an agreement or conduct an audit in 62% of the cases it deemed eligible for review during the time period studied. Many of the complainants interviewed believed that participation in CAO's process failed to produce positive results. The lack of results may have motivated communities to file multiple complaints about the same project: of the 72 cases in our analysis, 42 complaints were brought against 7 projects. Some complainants claimed that adverse consequences resulted from filing a complaint with CAO, such as harassment and reprisals by company employees, exhaustion of resources, and the deterioration of their relationship with the company.

## RECOMMENDATIONS

Based on our findings, we offer the following recommendations:

- 1. *Strengthen the accountability mandate of the World Bank Group's Office of the Compliance Advisor Ombudsman.*** In the Office of the Compliance Advisor Ombudsman (CAO), the World Bank Group (World Bank) has created the expectation of accountability, according to interviews with complainants and community members. CAO does not currently have the authority to fulfill that expectation, however. CAO cannot issue a binding decision or order the bank or company to remedy harms caused by a development project. Nor can CAO stop a project that causes grave, irreparable, and unaddressed harms. If CAO finds that the International Finance Corporation (IFC) or the Multilateral Investment Guarantee Agency (MIGA) failed to comply with social and environmental policies during the compliance audit, it is bank officials, not CAO, who decide whether and how to move the project into compliance. The World Bank should take steps to expand CAO's authority to hold a company and the IFC/MIGA accountable for breaches of bank policies by, for example, contractually obligating companies receiving World Bank financing to inform communities about CAO's complaint mechanism and to participate in CAO's dispute resolution process. The World Bank should also require bank officials to address CAO's findings regarding compliance.
- 2. *Identify violations of international human rights standards.*** According to its operational guidelines, CAO should not support agreements that violate international law. The World Bank's failure to fully integrate human rights standards into its mandate and sustainability policies, the voluntary nature of CAO's dispute resolution process, and CAO's reluctance to determine the applicability of human rights norms to cases it investigates has undermined this commitment. In some of the cases examined, CAO failed to address potential human rights violations and focused instead on issues that were amenable to consensus by the parties involved, interviews with those involved indicate. CAO should act proactively

and diligently to identify concerns that implicate human rights violations by conducting an analysis of project impacts, applicable international and domestic laws, and local practices. Such investigations of human rights issues should be part of CAO's initial assessment of a complaint.

**3. Address power imbalances between the parties.**

Companies receiving World Bank financing include some of the world's largest and most influential companies while the affected communities often have little access to political, economic, or social resources. This study found that stark differences in access to power or resources—such as money, information, technical expertise, and time—between the parties may influence CAO's procedure, outcomes, and community perceptions of its fairness. Although CAO met with parties, offered trainings, and contracted with local mediators in an effort to “level the playing field,” these measures did not adequately address the communities' lack of information, expertise, or power relative to a company. The World Bank, IFC/MIGA, and CAO should redouble efforts to ensure that communities can meaningfully participate in CAO's process. This could be done in the following ways:

**a. Improve community access to information.**

Access to information provides local communities the opportunity to identify and voice concerns, which is key to accountability. While the IFC's Policy on Disclosure of Information establishes a presumption of disclosure, it also establishes far-reaching exceptions to the rule. This study found that complainants often lacked access to key information about a company's project, which undermines their ability to seek accountability before CAO. The IFC/MIGA should expand its disclosure policy to require dissemination of investment and project information, especially information related to the potential environmental and social impacts, to affected communities in relevant languages; create a public registry for project information that is routinely updated; and

contractually obligate companies receiving IFC/MIGA financing to disclose project information to communities. If the IFC/MIGA decides not to disclose information, the reasons for this decision should be made public.

**b. Ensure that ground rules for negotiation and mediation do not exacerbate power imbalances.** The ground rules CAO used during the problem solving process exacerbated power differences with the company, a number of complainants interviewed reported. The voluntary nature of the problem-solving process limits CAO's ability to prevent companies from dominating the process to force concessions from complainants. CAO should reconsider ground rules for negotiation and mediation that may exacerbate power imbalances, such as rules that require strict confidentiality, limit the role of communities' representatives, prohibit communities' contact with the media, and inhibit access to other forms of accountability, such as litigation. CAO also should raise security risks, particularly the risk of harassment or violence against opponents to the project, with the parties and identify an action plan to address actual or threatened reprisals against complainants before initiating a problem-solving process.

**c. Respect the autonomy of complainants to select their representatives.** This study found that CAO's decision to limit the participation of civil society organizations and legal representatives during negotiation and mediation engendered distrust among complainants and in some cases prompted their decision to withdraw from the dispute resolution process. Several complainants believed that CAO's approach to representation also exacerbated power imbalances. Although direct contact with affected communities is critical to CAO's work, CAO should respect complainants' autonomy to engage legal representation or to enjoy the support of organizations. CAO

should reform its operational guidelines to allow organizations standing to file complaints, to recognize complainants' autonomy in the selection of their representatives, and to allow for the participation of representatives selected by complainants in mediation and negotiation.

**d. Ensure adequate access by complainants to technical expertise.** Many of the projects entail complex technical issues, but complainants and affected communities often do not have the resources to bring in technical experts or gain access to proprietary information. CAO should ensure complainants have access to technical expertise by using a mediator who has the requisite technical expertise or experience and/or making funds available for complainants to hire experts in order to equalize access to technical information and expertise.

**4. Expand scope of CAO's compliance review.** During its compliance review, CAO determines whether the bank complied with its own policies and protections. The focus of CAO's audit is the IFC/MIGA and not the company. During the appraisal process, however, CAO should determine whether the project "raise[s] substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to the IFC/MIGA." In practice, according to our case studies, CAO had a

much narrower view of the purpose of its appraisal. Its decision to conduct an audit turned on whether the IFC/MIGA took steps to assure itself of compliance with bank operational policies, regardless of whether the bank's approach led to the intended outcome on the ground. CAO should clarify that the performance of the company is a focus of compliance audits in addition to auditing due diligence by the IFC/MIGA. CAO should also independently verify whether the company effectively implemented bank policies and whether those policies prevented or mitigated social and environmental impacts.

**5. Clarify the role of complainants.** CAO's rules of procedure and practices do not offer complainants—the signatories of the complaint—opportunities for meaningful participation in the process. This study found that CAO determined who mediated discussions, who was at the negotiation table, and what issues were discussed. Additionally, CAO's rules of procedure do not require staff to consult with the complainants or to visit the project site to determine whether or not a complaint merits an audit. CAO's operational guidelines should specify the positive role of complainants during the problem-solving process, should require staff to consult with complainants during compliance appraisal and audit, and should allow complainants the same opportunity as the IFC/MIGA management to respond to draft and final audit reports.

## APPENDIX A

# LIST OF ELIGIBLE CASES, 2000–2011

<i>Case ID</i>	<i>Country</i>	<i>Region</i>	<i>Case Name</i>	<i>Date Complaint Filed</i>
1	Chile	Latin America and the Caribbean	Empresa Electrica Pangué S.A.-01/ Upper Bio-Bio Watershed	08/2000
2	Peru	Latin America and the Caribbean	Yanacocha-01/Cajamarca	12/2000
3	Jordan	Middle East and North Africa	Jordan Gateway Project Co.-02/Bet Shean Valley	01/2001
4	Peru	Latin America and the Caribbean	Yanacocha-02/Cajamarca	03/2001
5	Nigeria	Sub-Saharan Africa	Niger Delta Contractor Revolving Credit Facility-01/ Niger Delta	06/2001
6	Uganda	Sub-Saharan Africa	Bujagali-02/Bujagali Falls	06/2001
7	Uganda	Sub-Saharan Africa	Bujagali-03/Canada	07/2001
8	Tanzania	Sub-Saharan Africa	Bulyanhulu Project-01/Kankola	01/2002
9	India	South Asia	Chemplast-01/Cuddalore District	06/2002
10	Chile	Latin America and the Caribbean	Empresa Electrica Pangué S.A.-02/ Upper Bio-Bio Watershed	07/2002
11	Bolivia	Latin America and the Caribbean	Comsur V-01/Bosque Chiquitano	06/2003
12	Zambia	Sub-Saharan Africa	Konkola Copper Mines Plc (KCM)-01/ Mingomba and Kawama	07/2003
13	Georgia	Europe and Central Asia	BTC Pipeline-02/Rustavi	03/2004



APPENDIX A LIST OF ELIGIBLE CASES, 2000–2011

14	Georgia	Europe and Central Asia	BTC Pipeline-06/Bashkovi	05/2004
15	Georgia	Europe and Central Asia	BTC Pipeline-07/Dgvari	05/2004
16	Georgia	Europe and Central Asia	BTC Pipeline-08/Sagrasheni	05/2004
17	Georgia	Europe and Central Asia	BTC Pipeline-09/TetriTskaro	05/2004
18	Georgia	Europe and Central Asia	BTC Pipeline-10/TetriTskaro	05/2004
19	Georgia	Europe and Central Asia	BTC Pipeline-11/Tsikhisjvari	05/2004
20	Georgia	Europe and Central Asia	BTC Pipeline-12/Tba, Tsemi, Sadgeri	05/2004
21	Georgia	Europe and Central Asia	BTC Pipeline-13/Tsalka	07/2004
22	Georgia	Europe and Central Asia	BTC Pipeline-14/Vale	08/2004
23	Kazakhstan	Europe and Central Asia	Lukoil Overseas-01/Berezovka	09/2004
24	India	South Asia	AD Hydro Power Limited-01/Himachal Pradesh	10/2004
25	Botswana	Sub-Saharan Africa	Kalahari Diamond-01/Kalahari	11/2004
26	Georgia	Europe and Central Asia	BTC Pipeline-15/TetriTsakro	12/2004
27	Georgia	Europe and Central Asia	BTC Pipeline-16/TetriTskaro	12/2004
28	Georgia	Europe and Central Asia	BTC Pipeline-17/Tadzrisi	12/2004
29	Georgia	Europe and Central Asia	BTC Pipeline-18/TetriTsakro	12/2004
30	Guatemala	Latin America and the Caribbean	Marlin-01/Sipacapa	01/2005
31	Georgia	Europe and Central Asia	BTC Pipeline-19/Atskuri Temple	04/2005
32	Georgia	Europe and Central Asia	BTC Pipeline-20/Atskuri	04/2005
33	Turkey	Europe and Central Asia	BTC Pipeline-21/Posof	05/2005
34	Georgia	Europe and Central Asia	BTC Pipeline-22/Tsemi	06/2005
35	Georgia	Europe and Central Asia	BTC Pipeline-23/Tsemi	06/2005
36	Peru	Latin America and the Caribbean	Compania Minera Antamina S.A.-02/Huarmey	06/2005
37	Uruguay	Latin America and the Caribbean	Celulosas de M'Bopigua (CMB) & Orion-01/Argentina & Uruguay	09/2005
38	Georgia	Europe and Central Asia	BTC Pipeline-26/Krstanisi	12/2005
39	Peru	Latin America and the Caribbean	Yanacocha-03/Cajamarca	03/2006
40	Georgia	Europe and Central Asia	BTC Pipeline-27/Tbilisi	06/2006
41	Turkey	Europe and Central Asia	BTC Pipeline-28/Adana & Ceyhan	06/2006
42	India	South Asia	Atul Ltd.-01/Gujarat	06/2006
43	Georgia	Europe and Central Asia	BTC Pipeline-29/Tsalka	08/2006
44	India	South Asia	Mahindra Farm Services-01,02,03,04/Confidential	10/2006
45	Russia	Europe and Central Asia	Russkiy Mir II-01/Taman	01/2007
46	Kazakhstan	Europe and Central Asia	Lukoil Overseas-02/Berezovka	04/2007
47	Indonesia	East Asia and the Pacific	Wilmar Group-01/West Kalimantan	07/2007
48	Georgia	Europe and Central Asia	BTC Pipeline-30/Vale	08/2007
49	India	South Asia	Ramky-03/Gummidipoondi	10/2007
50	Ecuador	Latin America and the Caribbean	Interagua-01/Guayaquil	01/2008

51	Georgia	Europe and Central Asia	BTC Pipeline-31/Naokhrebi	02/2008
52	Russia	Europe and Central Asia	Russkiy Mir II-02/Taman	02/2008
53	Kenya	Sub-Saharan Africa	Pan African Paper-01/Webuye »	02/2008
54	Nicaragua	Latin America and the Caribbean	Nicaragua Sugar Estates Limited-01/ León and Chinandega	03/2008
55	Kazakhstan	Europe and Central Asia	Lukoil Overseas-03/Berezovka	05/2008
56	Philippines	East Asia and the Pacific	Ambuklao-Binga Hydroelectric Power-01/Binga	06/2008
57	Georgia	Europe and Central Asia	BTC Pipeline-32/Vale	09/2008
58	Turkey	Europe and Central Asia	Assan Aluminyum-01/Dilovasi	09/2008
59	Turkey	Europe and Central Asia	Standard Profil-01/Duzce	09/2008
60	Indonesia	East Asia and the Pacific	Wilmar Group-02/Sumatra	12/2008
61	Russia	Europe and Central Asia	Russkiy Mir II-03/Taman	03/2009
62	Peru	Latin America and the Caribbean	Agrokasa-01/Ica	06/2009
63	Uruguay	Latin America and the Caribbean	Orion-02/Gualeguaychú-Argentina	08/2009
64	Sri Lanka	South Asia	Rainforest Ecolodge Linkages-01/Deniyaya	08/2009
65	Chile	Latin America and the Caribbean	Aconcagua-01/Santa Barbara	11/2009
66	Cambodia	East Asia and the Pacific	Cambodia Airport II-01/Preah Sihanouk	12/2009
67	Colombia	Latin America and the Caribbean	TCBuen-01/Buenaventura	12/2009
68	Panama	Latin America and the Caribbean	Pando Montelirio-01/Chiriquí	01/2010
69	Peru	Latin America and the Caribbean	Maple Energy-01/Nuevo Sucre and Canaán	04/2010
70	Indonesia	East Asia and the Pacific	PT Weda Bay Nickel-01/Weda Bay	07/2010
71	Ecuador	Latin America and the Caribbean	Pronaca Expansion-01/Santo Domingo de los Tsachilas	12/2010
72	Georgia	Europe and Central Asia	BTC Pipeline-33/Vale	05/2011

# ENDNOTES

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- 5 Philip Shabecoff, *World Bank Offers Environmental Projects*, N.Y. TIMES (May 6, 1987), <http://www.nytimes.com/1987/05/06/world/world-bank-offers-environmental-projects.html>.
- 6 See BRADFORD MORSE & THOMAS BERGER, SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW (1992); CAO, A REVIEW OF IFC’S SAFEGUARD POLICIES 21 (2003), <http://www.cao-ombudsman.org/howwework/advisor/documents/ReviewofIFCSPsfinalreportenglish04-03-03.pdf> (finding that the World Bank did not have the necessary systems in place to guide implementation of safeguard policies); INDEP. EVALUATION GRP., SAFEGUARDS AND SUSTAINABILITY POLICIES IN A CHANGING WORLD: AN INDEPENDENT EVALUATION OF WORLD BANK GROUP EXPERIENCE 61 (2010) (finding that the World Bank routinely failed to independently assess or mitigate negative project impacts), [http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards\\_eval.pdf](http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards_eval.pdf); Int’l Consortium of Investigative Journalists, *Evicted and Abandoned: The World Bank’s Broken Promise to the Poor*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 16, 2015), <https://www.icij.org/project/world-bank/124-countries-969-projects-34m-displaced-key-numbers> (finding that World Bank projects physically or economically displaced approximately 3.4 million people in the last decade). In several reports, CAO has attributed the IFC/MIGA’s failure to comply with bank social and economic policy to a flawed incentive structure: “accountability for results defined primarily in financial terms may incentivize [World Bank] staff to overlook, fail to articulate, or even conceal potential environmental, social and conflict related risks.” CAO, CAO AUDIT OF IFC INVESTMENT IN

- CORPORACIÓN DINANT S.A. DE C.V., HONDURAS 10 (2013) [hereinafter CORPORACIÓN DINANT S.A. DE C.V. (HONDURAS) INVESTMENT AUDIT], [http://www.cao-ombudsman.org/cases/document-links/documents/DinantAuditCAORefC-I-R9-Y12-F161\\_ENG.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf); see also CAO, REVIEW OF IFC'S POLICY AND PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY AND POLICY ON DISCLOSURE OF INFORMATION 21 (2010), [http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview\\_May2010.pdf](http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf) ("[The] IFC does not appear to incentivize its [] clients for [environmental and social] performance. There are no positive incentives for clients [] that enhance their E&S management systems.").
- 7 BRUCE RICH, *FORECLOSING THE FUTURE* 10 (2013).
- 8 Steven Holmes, *India Cancels Dam Loan from World Bank*, N.Y. TIMES (Mar. 31, 1993), <http://www.nytimes.com/1993/03/31/world/india-cancels-dam-loan-from-world-bank.html>.
- 9 MORSE & BERGER, *supra* note 6, at 8.
- 10 Holmes, *supra* note 8.
- 11 David B. Hunter, *International Law and Public Participation in Policy-Making at the International Financial Institutions*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 199, 231–32 (Daniel D. Bradlow & David B. Hunter eds., 2010).
- 12 Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 450 (2007).
- 13 Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 555 (1994); Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 177–78, 182 (2005).
- 14 For example, the World Bank has immunities and privileges in the territories of all of their member States. See e.g., Articles of Agreement of the International Finance Corporation, art. III, § 3(i), May 25, 1955, T.I.A.S. No. 3620, amended June 27, 2012. The World Bank is also immune from liability in U.S. courts under the International Organizations Immunities Act of 1945 (IOIA). International Organizations Immunities Act of 1945, 22 U.S.C. §§ 288–288l (2012). Efforts to hold the World Bank accountable for development harms in developing countries through litigation in the United States, where the World Bank is headquartered, have been unsuccessful. *Jam v. Int'l Fin. Corp.*, No. CV 15–612 (JDB), 2016 WL 1170936 (D.D.C. Mar. 24, 2016).
- 15 Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403 (2005); Suzuki & Nanwani, *supra* note 13, at 190.
- 16 Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, 9 GERMAN L.J. 1987 (2008).
- 17 Bradlow, *supra* note 15, at 408.
- 18 *Id.* at 409.
- 19 *Id.* at 410. See also Suzuki & Nanwani, *supra* note 13, at 225. The remedial and normative significance of these mechanisms has drawn the attention of scholars who have examined how these mechanisms promote accountability. Several scholars have developed a taxonomy of IFI accountability mechanisms and assessed their strengths and weakness to formulate recommendations to improve their effectiveness. Bradlow, *supra* note 15; Suzuki & Nanwani, *supra* note 13, at 181; Benjamin M. Saper, *The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from A Global Administrative Law Perspective*, 44 N.Y.U. J. INT'L L. & POL. 1279 (2012).
- 20 ANDRIA NAUDÉ FOURIE, 59 THE WORLD BANK INSPECTION PANEL'S NORMATIVE POTENTIAL: A CRITICAL ASSESSMENT, AND A RESTATEMENT, NETHERLANDS INTERNATIONAL LAW REVIEW 221–226 (2012).
- 21 David D. Bradlow & David B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* *supra* note 11, at 199, 231–32.
- 22 Saper, *supra* note 19, at 1329; de Wet, *supra* note 16, at 2000.
- 23 Bradlow, *supra* note 15, at 486.
- 24 *Id.* at 484.
- 25 See BEN DYSART, TIM MURPHY & ANTONIA CHAYES, *BEYOND COMPLIANCE? AN EXTERNAL REVIEW TEAM REPORT ON THE COMPLIANCE ADVISOR/OMBUDSMAN OFFICE OF IFC AND MIGA 2* (2003) [hereinafter 2003 EXTERNAL COMPLIANCE REVIEW], <http://www.cao-ombudsman.org/publications/archive/documents/CAOEvaluationReport7-26-03.pdf>; WARREN VAN WICKLIN, JILL SHANKLEMAN & ROGER BATSTONE, *A RETROSPECTIVE ANALYSIS OF CAO INTERVENTIONS: TRENDS, OUTCOMES AND EFFECTIVENESS* 15 (2006) [hereinafter 2006 EXTERNAL EFFECTIVENESS REVIEW], <http://www.cao-ombudsman.org/publications/archive/>

- documents/RetrospectiveAnalysisonCAOEfectiveness\_final\_9May06.pdf; DAVID FAIRMAN, GRAHAM JOSCELYNE & LORI UDALL, INTERNAL REVIEW OF CAO TERMS OF REFERENCE, OPERATIONAL GUIDANCE AND OPERATIONAL PRACTICES 2 (2010), [http://www.cao-ombudsman.org/publications/archive/documents/final\\_CAO\\_IRT\\_Report\\_10.62.pdf](http://www.cao-ombudsman.org/publications/archive/documents/final_CAO_IRT_Report_10.62.pdf).
- 26 See 2006 EXTERNAL EFFECTIVENESS REVIEW, *supra* note 25.
- 27 IFC, IFC ANNUAL REPORT 2016, 4 (2016) [hereinafter 2016 IFC ANNUAL REPORT], [http://www.ifc.org/wps/wcm/connect/bf1bfbbob-216b-4cde-941b-dd55febe9d3a/IFC\\_AR16\\_Full\\_Volume1.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/bf1bfbbob-216b-4cde-941b-dd55febe9d3a/IFC_AR16_Full_Volume1.pdf?MOD=AJPERES).
- 28 Many private financial institutions have committed to the Equator Principles, which are based on IFC Performance Standards. Signed by 82 financial institutions, the Equator Principles are voluntary guidelines that address the management of environmental and social risks when financing large infrastructure projects. *Equator Principles Financial Institutions*, IFC, [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/IFC+Sustainability/Partnerships/Equator+Principles+Financial+Institutions/](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Partnerships/Equator+Principles+Financial+Institutions/) (last visited July 26, 2016).
- 29 MIGA, MIGA ANNUAL REPORT 2016 (2016), [https://www.miga.org/Documents/Annual\\_Report\\_2016.pdf](https://www.miga.org/Documents/Annual_Report_2016.pdf).
- 30 Although CAO has in the past requested at least two external reviews, neither focuses on the perspective of community members or complainants who have sought to use the mechanism to address their social and environmental concerns. See 2003 EXTERNAL COMPLIANCE REVIEW, *supra* note 25; 2006 EXTERNAL EFFECTIVENESS REVIEW, *supra* note 25.
- 31 We created an index variable to serve as a proxy for “strength of CAO intervention.” This variable was created by combining: (a) the complaint duration (0–60 months), (b) total number of harms alleged (0–11), and (c) diversity of complainants (0–6). A z-score was created for each of these three components that indicated the number of standard deviations a given complaint’s score was from the mean (across all complaints). These three separate z-scores were first combined, and then re-scaled to create a “strength of CAO intervention” index:  $z\text{-score} = (x - \mu) / \sigma$  where  $x$  = value,  $\mu$  = mean,  $\sigma$  = standard deviation.
- 32 From FY 2000–2011, CAO received 144 complaints from affected individuals or their representatives and deemed 85 eligible for assessment. Of these 85 cases, 6 were referred to CAO by World Bank officials, including: 1) Peru: Compañía Minera Antamina S.A.–01/Huarmey (transferred to Compliance Review by the CAO Vice-President); 2) Brazil: Amaggi Expansion–01/ IFC Executive Vice President request; 3) Democratic Republic of Congo: Anvil Mining Congo, SARL–01/World Bank President Request; 4) World: SN Power–01/CAO Vice President Request; 5) Ghana: Tullow Oil, Kosmos Energy & Jubilee FPSO–01/ CAO Vice President Request; and 6) World: Financial Intermediaries–01/CAO Vice President Request. These six cases were excluded from our analysis because this study focuses on the community perspective and these cases where not initiated by a complaint submitted by a community member.
- 33 The IFC and MIGA each have social and environmental policies, including performance standards, which are very similar. See *IFC Sustainability Framework*, IFC, [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_site/Sustainability+and+Disclosure/Environmental-Social-Governance/Sustainability+Framework](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_site/Sustainability+and+Disclosure/Environmental-Social-Governance/Sustainability+Framework) (last visited Oct. 17, 2016); see MIGA Environmental and Social Sustainability, MIGA, <https://www.miga.org/projects/environmental-and-social-sustainability> (last visited Oct. 17, 2016).
- 34 See IFC, PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY I (2012), [http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffdia5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffdia5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES).
- 35 See *id.*
- 36 CAO, TERMS OF REFERENCE I [hereinafter CAO TERMS OF REFERENCE], [http://www.cao-ombudsman.org/about/whowere/documents/TOR\\_CAO.pdf](http://www.cao-ombudsman.org/about/whowere/documents/TOR_CAO.pdf) (last visited Feb. 10, 2016).
- 37 CAO, OPERATIONAL GUIDELINES 21 (2007) [hereinafter 2007 CAO OPERATIONAL GUIDELINES], <http://www.cao-ombudsman.org/about/whowere/documents/EnglishCAOGuidelines06.08.07Web.pdf>.
- 38 *Id.*
- 39 CAO TERMS OF REFERENCE, *supra* note 36, at 10 (“It will be at the discretion of the President to terminate the employment of the Ombudsman if the President determines that the Ombudsman can no longer exercise the function with the required level of independence and authority.”).
- 40 CAO, ANNUAL REPORT 2011, at 10 (2011), [http://www.cao-ombudsman.org/publications/documents/CAOAnnualReport\\_ENG\\_2011.pdf](http://www.cao-ombudsman.org/publications/documents/CAOAnnualReport_ENG_2011.pdf).
- 41 *Id.* at 78.



- 42 In 2011, CAO's 12-person staff consisted of several ombudsman specialists, one compliance specialist, research support, and administrative assistance. *Id.* at 80–82.
- 43 CAO, THE CAO AT 10: ANNUAL REPORT FY2010 AND REVIEW FY 2000–10, 153 (2010) [hereinafter 2010 CAO ANNUAL REPORT & REVIEW], [http://www.cao-ombudsman.org/languages/french/documents/CAO\\_10Year\\_AR\\_web.pdf](http://www.cao-ombudsman.org/languages/french/documents/CAO_10Year_AR_web.pdf).
- 44 *Id.* at 147.
- 45 CAO TERMS OF REFERENCE, *supra* note 36, at 1.
- 46 CAO, COMPLIANCE ADVISOR OMBUDSMAN 2014 ANNUAL REPORT 2–3 (2014), <http://www.cao-ombudsman.org/publications/documents/CAOANNUALREPORT2014.pdf>.
- 47 CAO Operational Guidelines, CAO, <http://www.cao-ombudsman.org/howwework/2012OperationalGuidelinesUpdate.htm> (last visited Oct. 17, 2016).
- 48 CAO TERMS OF REFERENCE, *supra* note 36, at 1.
- 49 2010 CAO ANNUAL REPORT & REVIEW, *supra* note 43, at 24.
- 50 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 12 (2.2.2: Who can make a complaint?). Complaints should be submitted in writing and may be presented in any language. *Id.* (2.2.3: Lodging a complaint). Complaints “may relate to any aspect of the planning, implementation, or impact of IFC/MIGA projects,” including the adequacy of measures for the mitigation of social and environmental impacts of the project and arrangements for involvement of affected communities, minorities, and vulnerable groups in the project. *Id.* at 11 (2.2.1: Grounds for complaint). The complaint should include a statement of the way in which the complainant believes it has been, or is likely to be, affected by social or environmental impacts of the project. *Id.* at 12 (2.2.4: What to include in a complaint). In addition, it is helpful to include what the complainant or affected parties have done to attempt to resolve the problem, including any contact with IFC/MIGA personnel, the sponsor, or host government. *Id.*
- 51 See e.g., 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 12 (2.2.2: Who can make a complaint?). “[T]he representative should clearly identify the people on whose behalf the complaint is made and provide explicit evidence of authority to represent them.” *Id.* The CAO requires “proof that the organization(s) or individual(s) representing the affected people has/have the authority to do so.” *Id.*
- 52 *Id.* at 11.
- 53 2006 EXTERNAL EFFECTIVENESS REVIEW, *supra* note 25, at 13.
- 54 2010 CAO ANNUAL REPORT & REVIEW, *supra* note 43, at 9.
- 55 CAO, CAO OPERATIONAL GUIDELINES 8 (2013) [hereinafter 2013 CAO OPERATIONAL GUIDELINES], [http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013\\_ENGLISH.pdf](http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf).
- 56 CAO, ANNUAL REPORT: FIFTEEN YEARS OF IMPACT 7 (2015), [http://www.cao-ombudsman.org/publications/documents/CAO\\_Annual\\_Report\\_2015.pdf](http://www.cao-ombudsman.org/publications/documents/CAO_Annual_Report_2015.pdf).
- 57 See e.g., 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 15. A copy will also be provided to the President and Board of the World Bank Group and the public. *Id.*
- 58 2010 CAO ANNUAL REPORT & REVIEW, *supra* note 43, at 8.
- 59 2016 IFC ANNUAL REPORT, *supra* note 27, at 7.
- 60 Sustainability: Environmental and Social Categorization, International Financing Corporation, IFC, [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability+and+disclosure/environmental+and+social+categorization](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability+and+disclosure/environmental+and+social+categorization) (last visited July 26, 2016).
- 61 See e.g., 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 11 (2.2.1: Grounds for complaint).
- 62 See e.g., *id.* at 17 (2.3.3: Assessment); 2013 CAO Operational Guidelines, *supra* note 55, at 14 (2.3: Assessment).
- 63 See e.g., 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 18 (2.4.4: Action in the event that stakeholders do not reach an agreement).
- 64 See e.g., *id.* at 11 (2.2.1: Grounds for complaint).
- 65 See e.g., *id.* at 17 (2.3.3: Assessment). Under the 2013 guidelines, complaints will be referred to compliance if a party no longer wishes to pursue dispute resolution.
- 66 2013 CAO Operational Guidelines, *supra* note 55, at 18 (2.3.3: Assessment).
- 67 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 11, 16 (2.1: A Problem-solving orientation, 2.3.3: Assessment).
- 68 *Id.* at 11 (2.1: A Problem-solving orientation).
- 69 *Id.* at 17 (2.4.1: Approaches to complaint resolution).
- 70 *Id.* at (2.4.2: Reaching and documenting agreements). The agreements should be specific regarding the objective, nature, and requirements, and may include incentives or disincentives. *Id.*
- 71 *Id.* at 18 (2.4.2: Reaching and documenting agreements). The CAO Ombudsman will not support “agreements that would be coercive to one or more parties, are contrary to IFC/MIGA policies, or that would violate domestic laws of the parties or international law.” *Id.*
- 72 *Id.* (2.4.5: Monitoring and follow-up).

- 73 *Id.* at 21 (3.1: The purpose and emphasis of compliance auditing); CAO TERMS OF REFERENCE, *supra* note 36, at 1.
- 74 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 22 (3.3.3: Appraising audit requests).
- 75 *Id.* at 23 (3.3.3: Appraising audit requests).
- 76 *Id.* at 24 (3.3.7: Procedure for compliance auditing).
- 77 *Id.* at 25 (3.4.2: Report preparation).
- 78 *Id.* (3.4.2: Report preparation).
- 79 *Id.* at 22 (3.3.3: Appraising audit requests).
- 80 *Id.* at 26 (3.4.3: Monitoring and closure of audits). Where IFC, MIGA, and/or project sponsors are in compliance, CAO Compliance will close the audit. *Id.* (3.4.3: Monitoring and closure of audits). However, in cases where the IFC/MIGA is/are found to be out of compliance, CAO Compliance will monitor the situation until actions taken by IFC/MIGA assure the CAO that IFC/MIGA will move back in to compliance, at which time CAO will close the audit. *Id.* (3.4.3: Monitoring and closure of audits). In practice, the CAO cannot force compliance by the IFC/MIGA. For example, in the Karachaganak compliance audit, one NGO reported that six months after the CAO's April 2008 audit report, the IFC remained out of compliance. CAO closed the case in April 2009 because "noncompliances related to project performance had been addressed by the project sponsor and IFC's client had ended its contractual relationship." *Kazakhstan/Kukoil Overseas-01/Berezovka*, CAO, [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=104](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=104) (last visited Feb. 11, 2016). However, "[i]ssues related to IFC's assurance process remained unaddressed." *Id.*
- 81 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 26 (3.4.3: Monitoring and closure of audits).
- 82 Prior to 2013, cases were generally transferred for compliance review by a bank official or CAO's Ombudsman if the dispute resolution was unsuccessful. Under current operational guidelines, complainants can request a compliance review before first exhausting the dispute resolution process. THE CAO AT 10 ANNUAL REPORT FY2010 AND REVIEW FY 2000–10, COMPLIANCE ADVISOR OMBUDSMAN [CAO] 34 (2010), [http://www.cao-ombudsman.org/languages/french/documents/CAO\\_10Year\\_AR\\_web.pdf](http://www.cao-ombudsman.org/languages/french/documents/CAO_10Year_AR_web.pdf).
- 83 Results of the chi-square test were statistically significant at the .01 significance level (p-value .0004).
- 84 Results of the chi-square test were significant at the .01 level (p-value .0001).
- 85 The 11 types of harms included: IFC/MIGA due diligence & supervision; pollution; water; land; biodiversity; consultation & disclosure; socio-economic impacts; labor; community health & safety; Indigenous Peoples; and cultural heritage.
- 86 Results of the chi-square test were significant at the .05 level (p-value .0204).
- 87 Results of the chi-square test were also significant at the .05 level (p-value .0452).
- 88 Results of the chi-square test were statistically significant (p-value: .0171).
- 89 These results were statistically significant at the .05 level of significance (p-value .0249).
- 90 A chi-square test of association revealed the association is statistically significant (p-value .0039).
- 91 A chi-square test of association revealed the association is statistically significant (p-value .0273).
- 92 Based on a chi-square test of association, the result is statistically significant (p-value .0038).
- 93 Based on a chi-square test of association, the result is statistically significant (p-value .0467).
- 94 The chi-square test of association showed a statistically significant relationship (p-value .0099).
- 95 This chi-square test of association showed a statistically significant association (p-value .0155).
- 96 The chi-square test of association showed a statistically significant relationship (p-value .0266).
- 97 The result of the chi-square test of association was statistically significant (p-value .0199).
- 98 These results were statistically significant (p-value .0544), but only at the .10 level.
- 99 Case duration was first log-transformed to smooth the shape of the data. To ease interpretation, all graphs show results converted back to months of case duration.
- 100 The results were statistically significant at the .05 level (p-value .046).
- 101 This was found to be statistically significant from cases in which there was no organization listed as signatory. These results were significant at the .05 level (p-value .021).
- 102 The regression results found no significant differences in duration between cases where the IFC loan category amount was either 0 (9 cases), 1–99 (22 cases), or 100–199 (in USD millions) (12 cases). However, there was a statistically significant difference between cases where the loan commitment was zero relative to 200 million or more. These results were found to be statistically significant (p-value: .001).
- 103 Results were statistically significant at the .05 level of significance.
- 104 P-value (.000).

- 105 Results were found to be statistically significant (p-value: .009).
- 106 GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 96 (1986). Numerous studies have examined complainants' perceptions of the process, outcomes, and relationships to assess the effectiveness of different approaches to environmental conflicts and other public policy issues. TAMRA PEARSON D'ESTRÉE & BONNIE G. COLBY, *GUIDEBOOK FOR ANALYZING SUCCESS IN ENVIRONMENTAL CONFLICT RESOLUTION CASES* (2000). See also TAMRA PEARSON D'ESTRÉE & BONNIE G. COLBY, *BRAVING THE CURRENTS: EVALUATING ENVIRONMENTAL CONFLICT RESOLUTION IN THE RIVER BASINS OF THE AMERICAN WEST* (2004). This study follows a similar approach to explore the effectiveness of CAO accountability procedures.
- 107 CAO, *ASSESSMENT REPORT: COMPLAINT REGARDING THE LUKOIL OVERSEAS PROJECT (KARACHAGANAK OIL AND GAS FIELD)* 5–6 (2005) [hereinafter *LUKOIL ASSESSMENT REPORT*], [http://www.cao-ombudsman.org/cases/document-links/documents/Karachaganak\\_Assessment\\_Report04-14-05.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/Karachaganak_Assessment_Report04-14-05.pdf).
- 108 LUKOIL, *FACT BOOK* 2012, 2–3 (2012) [hereinafter *LUKOIL FACT BOOK*], [http://www.lukoil.com/materials/doc/FactBook/2013/Lukoil\\_FB\\_eng.pdf](http://www.lukoil.com/materials/doc/FactBook/2013/Lukoil_FB_eng.pdf).
- 109 LUKOIL *ASSESSMENT REPORT*, *supra* note 107, at 15 app. 1.
- 110 *Id.* at 4.
- 111 SHAMIL MIDKHATOVICH YENIKEYEFF, *KAZAKHSTAN'S GAS SECTOR: EXPORT MARKETS AND EXPORT ROUTES* 20, 23 (2008), <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/NG25-KazakhstansgasExportMarketsandExportRoutes-ShamilYenikeyeff-2008.pdf>.
- 112 LUKOIL *ASSESSMENT REPORT*, *supra* note 107, at 5.
- 113 KARACHAGANAK PETROLEUM ORG., *PUBLIC CONSULTATION AND DISCLOSURE PLAN* 7–8 (2002) [hereinafter *KPO PUBLIC CONSULTATION & DISCLOSURE PLAN*], [http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/o/6ef3ba3e9615e319852576c10080cb40/\\$FILE/PCDPFinal.pdf](http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/o/6ef3ba3e9615e319852576c10080cb40/$FILE/PCDPFinal.pdf).
- 114 *Id.* at 41. Local government sets the priorities of KPO's social investment fund in accordance with procedures established by the PSA. *Id.* at 39.
- 115 By 2013, KPO claimed to have invested \$17 billion in developing the field and made direct payments of \$9.4 billion to the Kazakhstan budget. *Kazakhstan Oil and Gas: Karachaganak Half Year Performance Results*, TIMES CENT. ASIA (Sept. 3, 2013), <http://www.timesca.com/index.php/news/9713-kazakhstan-oil-and-gas-karachaganak-half-year-performance-results>.
- 116 The IFC has provided loans to at least two other subsidiaries of OAO Lukoil, JSC for oil and gas development projects: \$100 million for the Caspian Sea Early Oil Development Project in 1998 and \$82 million for an oil refinery in Romania in 2005.
- 117 LUKOIL *FACT BOOK*, *supra* note 108, at 2–3.
- 118 OAO LUKOIL, *OAO LUKOIL 2012 CONSOLIDATED FINANCIAL STATEMENTS* 5 (2013).
- 119 LUKOIL, *ANNUAL REPORT* 2014, at 66 (2014), [http://www.lukoil.com/materials/doc/AGSM\\_2015/LUKOIL\\_AR\\_eng\\_2014.pdf](http://www.lukoil.com/materials/doc/AGSM_2015/LUKOIL_AR_eng_2014.pdf).
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- 121 *IFC Summary of Lukoil Kazakhstan Project*, *supra* note 120.
- 122 *Id.*
- 123 *Id.*
- 124 KPO *PUBLIC CONSULTATION & DISCLOSURE PLAN*, *supra* note 113, at 15.
- 125 *Id.* at 15.
- 126 Kate Watters, *The Fight for Community Justice against Big Oil in the Caspian Region: The Case of Berezovka, Kazakhstan*, in *ENVIRONMENTAL JUSTICE AND SUSTAINABILITY IN THE FORMER SOVIET UNION* 157 (2009).
- 127 YURIY SHOKAMANOV ET AL., *STATISTICS AGENCY OF KAZAKHSTAN & EXPENDED UN THEME GROUP ON POVERTY ALLEVIATION, EMPLOYMENT AND SOCIAL SAFETY, LIVING STANDARDS AND POVERTY IN KAZAKHSTAN (STATISTICAL MONITORING)* 24–25 (2004), [http://www.undp.kz/library\\_of\\_publications/files/3819-30400.pdf](http://www.undp.kz/library_of_publications/files/3819-30400.pdf).
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- 129 *Id.* at 159.
- 130 *Id.* at 159–160.
- 131 KPO *PUBLIC CONSULTATION & DISCLOSURE PLAN*, *supra* note 113, at 14.

- 132 *Who's Involved*, CRUDE ACCOUNTABILITY, <http://crudeaccountability.org/campaigns/karachaganak/352-2/> (last visited Aug. 28, 2013).
- 133 *Id.* The group later registered as a public organization named Zhasil Dala.
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- 136 *Crude's Congressional Testimony May 13, 2004* (May 13, 2004), <http://crudeaccountability.org/campaigns/karachaganak/crudes-congressional-testimony-may-13-2004/>.
- 137 In 2004, Crude Accountability sent 60 villagers' blood for analysis at a health clinic in Aksaim, Kazakhstan and Astrakhan, Russia. The report from this analysis concluded that high levels of anemia, low white blood cell counts, and other factors, were consistent with toxic exposure to hydrogen sulfide associated with petroleum production. Watters, *supra* note 126, at 164.
- 138 *KPO Fined \$52 Mln for Pollution, Consortium to Dispute Decision*, INTERFAX (Apr. 4, 2012), <http://www.interfax.com/newsinf.asp?id=321606>.
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- 140 Complaint Against Lukoil (2004) (on file with authors). The complainants allege that they “and other residents of the village of Berëzovka have experienced adverse health effects from the field: 1) disorders of the upper respiratory tract, the cardiovascular system, allergies, etc.; 2) a deterioration in the quality of drinking water from underground sources; 3) the issue of resettlement of Berëzovka was dropped from the agenda, despite previous decisions by the Government of Kazakhstan to include Berëzovka in the SPZ.” *Id.*
- 141 LUKOIL ASSESSMENT REPORT, *supra* note 107, at 15 app. 1. The 2004 complaint was one of three complaints accepted by CAO regarding the social and environmental impact of the Lukoil Overseas Project and one of thirty-one complaints accepted by the CAO involving oil and gas sector projects in the former Soviet Union.
- 142 *Who's Involved*, *supra* note 132.
- 143 SUMMARY OF LAWSUITS IN 2008, ECOLOGICAL SOC'Y GREEN SALVATION, <http://www.greensalvation.org/en/index.php?page=Lawsuits2008> (last visited Sept. 23, 2013).
- 144 *Id.*
- 145 LUKOIL ASSESSMENT REPORT, *supra* note 107, at 4.
- 146 *Id.* at 9.
- 147 *Id.* at 11.
- 148 Letter from Rashad Kaldany, Director, COCDR, IFC, to Meg Taylor, Vice President, CAO 1 (June 1, 2005), <http://www.cao-ombudsman.org/cases/document-links/documents/IFCsResponsetoCAOAssessmentReportre-KarachaganakComplaint.pdf>.
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- 150 *Id.* at 3.
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- 152 *Id.* See also SARAH BEDY, CRUDE ACCOUNTABILITY, SUFFICIENT RECOURSE? CONTROVERSIAL OIL AND GAS PROJECTS IN THE FORMER SOVIET UNION AND RECOMMENDATIONS TO IMPROVE THE COMPLIANCE ADVISOR/OMBUDSMAN FUNCTION OF THE WORLD BANK GROUP 15 (2011), <http://crudeaccountability.org/wp-content/uploads/2012/10/201109-SufficientRecourse.pdf> (stating that “[t]he [CAO] report said that Berëzovka received more privileges than the other eight villages surrounding the Karachaganak oil field, and that many people in the village were hired by the company. This was not true; some people were hired by subcontractors, but few by the actual company. The report also highlighted social projects funded by KPO, claiming that the central street in the village had been repaved. The central street had been paved in the Soviet period, and remained the same. The report also mentioned the remodeling of a school and equipment donated to the medical center. KPO did remodel the school, but it still has outdoor toilets. The report's conclusion was that according to medical reports, villagers were healthier than those in other villages surrounding the fields. The only recommendation was that the company needed to engage more with the local community.”).
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- ombudsman.org/cases/document-links/documents/KPO\_Progress\_Report\_English\_June06.pdf.
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- 155 *Kazakhstan/Kukoil Overseas-01/Berezovka*, *supra* note 80.
- 156 *The Campaign: 2003–Today*, *supra* note 139.
- 157 *Id.*
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- 159 *Id.*
- 160 *Id.* at 10.
- 161 CAO, AUDIT REPORT: CAO AUDIT OF IFC CAO COMPLIANCE C-I-R7-Y06-F079, 10 (Mar. 14, 2008) [hereinafter AUDIT REPORT], [http://www.cao-ombudsman.org/cases/document-links/documents/CAO\\_Audit\\_Report\\_C\\_I\\_R7\\_Y06\\_F079\\_ENGLISH.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Audit_Report_C_I_R7_Y06_F079_ENGLISH.pdf).
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- 163 *Id.* at 15.
- 164 *Id.* at 1.
- 165 CAO, AUDIT MONITORING REPORT: CAO AUDIT OF IFC CAO COMPLIANCE C-I-R7-Y06-F079, 3 (Apr. 20, 2009) [hereinafter AUDIT MONITORING REPORT], [http://www.cao-ombudsman.org/cases/document-links/documents/CAO\\_Monitoring\\_of\\_Audit\\_CLOSURE\\_C\\_I\\_R7\\_Y06\\_F079\\_ENGLISH.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Monitoring_of_Audit_CLOSURE_C_I_R7_Y06_F079_ENGLISH.pdf) (stating that CAO “supplementary data on stack emissions, documented and verified actions in relation to the ambient air quality monitoring programs, and commitments to verify the adequacy of the selection of the ambient air quality monitoring sites.”).
- 166 *Id.*
- 167 *Children Poisoned by Unknown Toxins in Berezovka, Kazakhstan, Close to the Karachaganak Oil and Gas Condensate Field*, CRUDE ACCOUNTABILITY (Dec. 1, 2014), <http://crudeaccountability.org/children-poisoned-by-unknown-toxins-in-berezovka-kazakhstan-close-to-the-karachaganak-oil-and-gas-condensate-field/>.
- 168 Başkut Tuncak (Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes), Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes on His Mission to Kazakhstan (26 March to 8 April 2015), ¶¶ 59, 61, U.N. Doc. A/HRC/30/40/Add.1 (Sept. 15, 2015) [hereinafter S.R. Tuncak’s Report on His Mission to Kazakhstan].
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- 170 LUKOIL ASSESSMENT REPORT, *supra* note 107, at 8–9.
- 171 *Id.* at 9.
- 172 CAO, APPRAISAL REPORT: CAO APPRAISAL FOR AUDIT OF IFC CAO COMPLIANCE C-I-R7-Y06-F086, at 7 (2008), [http://www.cao-ombudsman.org/cases/document-links/documents/CAO\\_Appraisal\\_Report\\_O\\_I\\_R7\\_Y06\\_F086\\_ENGLISH.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Appraisal_Report_O_I_R7_Y06_F086_ENGLISH.pdf).
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- 180 CAO, ASSESSMENT REPORT: COMPLAINT REGARDING THE MARLIN MINING PROJECT IN GUATEMALA 6 (Sept. 7, 2005) [hereinafter MARLIN ASSESSMENT REPORT], <http://www.cao-ombudsman.org/cases/document-links/documents/CAO-Marlin-assessment-English-7Sep05.pdf>. The project was not the first development project in Guatemala to receive significant financial backing from the World Bank. In the early 1980s, the World Bank and Inter-



- American Bank financed the construction of the Chixoy Dam. In 1982, the government and its paramilitary allies slaughtered 400 Mayan villagers and displaced thousands to make way for the dam and quash protests. Both the World Bank and Inter-American Bank approved additional loans for the Chixoy Dam in 1986 despite the violence directly associated with the project. Nick Dearden, *Guatemala's Chixoy Dam: Where Development and Terror Intersect*, GUARDIAN (Dec. 10, 2012), <https://www.theguardian.com/global-development/poverty-matters/2012/dec/10/guatemala-chixoy-dam-development-terror>.
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- 188 *Id.* (“Potential environmental, health and safety issues associated with this project include: associated facilities; longer-term cumulative impacts; natural habitats; international waterways; safety of tailings dam; solid and liquid waste management; hazardous materials management; water resources management; reclamation and closure; management of occupational health and safety issues, as well as emergency preparedness and response. Social issues include: management of impacts on indigenous communities; resettlement, compensation and sustainable economic rehabilitation/development; direct and induced impacts of associated facilities; induced migration to the project area; and management of work camps and residential areas.”).
- 189 *Id.*
- 190 MONTANA EXPLORADORA DE GUATEMALA, ENVIRONMENTAL AND SOCIAL PERFORMANCE ANNUAL MONITORING REPORT 4 (2007).
- 191 DAVID STILLER, WOUNDING THE WEST: MONTANA MINING AND THE ENVIRONMENT 92 (2006).
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- 194 *Id.* at 32.
- 195 Holden & Jacobson, *supra* note 179, at 328.
- 196 ROBERT GOODLAND, GUATEMALA'S MARLIN GOLD MINE: SUGGESTIONS TO RECTIFY ITS MOST SERIOUS ERRORS 8 (2012) [hereinafter SUGGESTIONS], <http://www.business-humanrights.org/media/documents/guatemala-marlin-sept-17-2012.doc>.
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- 203 Fulmer, Snodgrass & Neff, *supra* note 185, at 93.
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- 206 Fulmer, Snodgrass & Neff, *supra* note 185, at 92.
- 207 Quiénes somos?, MADRE SELVA, [http://madreselva.org.gt/?page\\_id=93](http://madreselva.org.gt/?page_id=93) (last visited Feb. 17, 2016).
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- 209 *Id.*
- 210 *Id.*
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- 212 ILO Convention No. 169, *supra* note 178. Likewise, Article 7 of the same convention provides that indigenous people have the right to decide their own priorities for the process of development and to “participate in the formulation, implementation, and evaluation of plans and programmes for

- national and regional development which may affect them directly.” *Id.*
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- 223 *Id.*
- 224 *Id.*
- 225 MARLIN ASSESSMENT REPORT, *supra* note 180, at 1.
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- 406 *Id.* (follow “Community/Engagements” hyperlink).
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- 409 Maple Complaint, *supra* note 385, at 7.
- 410 *Id.*
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- 412 *Id.* at 2.
- 413 *Id.*
- 414 *Id.* at 20, 27, 35.
- 415 CAO, STAKEHOLDER ASSESSMENT REPORT: REGARDING COMMUNITY AND CIVIL SOCIETY CONCERNS IN RELATION TO THE ACTIVITIES OF MAPLE ENERGY, PERU (2011), [http://www.cao-ombudsman.org/cases/document-links/documents/FinalAssessmentReportMapleJan2011\\_ENGLISH.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/FinalAssessmentReportMapleJan2011_ENGLISH.pdf).
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- 418 *Id.* at 2–3.
- 419 *Id.* at 5.
- 420 The company refused, claiming it could not make such a commitment without knowing how much the study would cost. *Id.* at 6.
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- 427 Minutes of the Meeting Between the Multi-Sectoral Technical Commission and the Representatives of the Indigenous Communities of Canaan de Cachiyacu and Nuevo Sucre (Sept. 8, 2011), <http://www.accountabilitycounsel.org/wp-content/uploads/2013/03/9.8.11-Agreement-English.pdf>.
- 428 CAO, CAO APPRAISAL FOR AUDIT OF IFC CAO COMPLIANCE C-I-R9-Y12-F155, at 8–9 (2012), [http://www.cao-ombudsman.org/cases/document-links/documents/CAOAppraisalReport\\_C\\_I\\_R9\\_Y12\\_F155\\_ENG.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAOAppraisalReport_C_I_R9_Y12_F155_ENG.pdf).
- 429 *Id.* at 9.
- 430 *Id.*
- 431 *Id.* at 13.
- 432 *Id.*
- 433 Open Letter, *supra* note 423.
- 434 Maple Complaint, *supra* note 385, at 3, 11; WEEMAELS, *supra* note 398, at 9, 12.
- 435 Maple Complaint, *supra* note 385, at 4.
- 436 *Id.*
- 437 *Id.* at 4–6.
- 438 *Id.* at 6.
- 439 *Peru Indigenous Group Takes Over Maple Energy Wells*, REUTERS (Sept. 11, 2012), <http://www.reuters.com/article/2012/09/11/us-peru-oil-maple-idUSBRE88A1H220120911>.
- 440 *See e.g.*, 2007 CAO OPERATIONAL GUIDELINES, *supra* note 37, at 14.
- 441 To determine if an agreement was reached, we reviewed CAO’s case registry and other CAO reports to see whether CAO reported a “substantive” agreement had been reached; procedural agreements (e.g., an agreement simply to enter into negotiations) were not counted as “substantive.”
- 442 A review conducted by CAO in 2006 yielded similar findings: when complainants involved in 15 projects were asked whether CAO’s intervention had an impact on underlying issues, complainants involved in 12 of the projects responded that CAO had a low impact (5 projects), no impact (4 projects), or a negative impact (3 projects). Complainants in

- three projects responded that CAO had a high impact. 2006 EXTERNAL EFFECTIVENESS REVIEW, *supra* note 25, at 25.
- 443 According to CAO, many complainants articulate their concerns in human rights language and most, if not all, of the complaints implicate human rights, particularly the rights to adequate standards of living and health. 2010 CAO ANNUAL REPORT & REVIEW, *supra* note 43, at 58–59 (referring to the University of Washington study that concluded 100% of CAO's cases concerned protections enshrined in the International Covenant on Economic, Social and Cultural Rights). CAO has expressed an interest in conducting a more comprehensive analysis of the applicability of the human rights regime to its work. *Id.* at 59.
- 444 Peter Woicke, *Putting Human Rights Principles into Development Practice Through Finance: The Experience of the International Finance Corporation*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 327 (Philip Alston & Mary Robinson eds., 2005).
- 445 *Id.* at 328.
- 446 John Ruggie, *Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises*, OHCHR, <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx> (last visited Feb. 26, 2016); OHCHR, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT, AND REMEDY" FRAMEWORK (2011).
- 447 *Id.* at iii. The Guiding Principles are not legally binding but elucidate existing state obligations to identify foundational and operational principles for corporate accountability.
- 448 See *id.* at 27, 29 (Commentary to Principles).
- 449 Laurel B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 499 (1993).
- 450 Robert Mnookin, *Alternative Dispute Resolution 1* (Harvard Law Sch. John M. Olin Ctr. for Law, Bus. & Econ. Discussion Paper Series, Paper 232, 1998), [http://lsr.nellco.org/harvard\\_olin/232/](http://lsr.nellco.org/harvard_olin/232/).
- 451 Edelman, Erlanger & Lande, *supra* note 449, at 503.
- 452 *Id.* at 503.
- 453 Mnookin, *supra* note 450, at 8.
- 454 *Id.* at 9, 18, 21, 23–24, 27, 29, 31, 37, 45.
- 455 CAO closed complaints where the company revenue was between \$5 to 50 billion after 31.8 months on average. CAO closed complaints where the first-parent company revenue was greater than \$50 billion after 11.4 months on average.
- 456 Oren Gazal-Ayal & Ronen Perry, *Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes*, 39 LAW & SOC. INQUIRY 791, 818 (2014), <http://onlinelibrary.wiley.com/doi/10.1111/lsi.12063/pdf>.
- 457 Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 405–410 (2010). See also Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 367 (2004) (describing how "[l]awyers may be particularly well suited to the design, management, and facilitation of consensus building processes, especially those which implicate law . . .").
- 458 Sternlight, *supra* note 457, at 409–410.
- 459 The remaining complaints were lodged by confidential complainants.
- 460 IFC Memorandum on Marlin Mining Project Complaint, *supra* note 242, at 2.
- 461 JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS vii (1975); Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 13 (1978); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 541 (1978).
- 462 See generally, Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).
- 463 Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).
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## AUTHORS AND ACKNOWLEDGMENTS

**Authors**    Roxanna Altholz  
Acting Clinical Professor of Law  
Associate Director, International Human Rights Law Clinic  
University of California, Berkeley, School of Law

Chris Sullivan  
Assistant Professor  
Department of Sociology  
Fresno State

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International Human Rights Law Clinic  
University of California, Berkeley  
School of Law  
353 Boalt Hall  
Berkeley, CA 94720  
(510) 643-4800  
[humanrightsclinic.org](http://humanrightsclinic.org)

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