

THE INTERNATIONAL FINANCE CORPORATION'S
 COMPLIANCE ADVISOR/OMBUDSMAN (CAO):
 AN EXAMINATION OF ACCOUNTABILITY
 AND EFFECTIVENESS FROM A GLOBAL
 ADMINISTRATIVE LAW PERSPECTIVE

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I. INTRODUCTION

Multilateral development banks (MDBs)¹ such as the World Bank Group play an important role in financing and supporting development projects in the Third World. Their activities have significant impacts on local and national economic development, the environment, and local communities. Due to their ability to select and finance large-scale development projects, usually with conditions attached to the loans, MDBs wield a great amount of power and influence, often more than their client states.² With such power, it is important to hold MDBs accountable for their actions. As international organizations, MDBs historically have been accountable only to their member states and to the client states and private entities that contract with them. Communities and non-state actors that are adversely affected by MDB projects but lack a contractual relationship have been unable to adequately hold MDBs accountable. The recent development of Independent Accountability Mechanisms (IAMs)³ represents the attempt by MDBs to eliminate or reduce the accountability gap between MDBs and affected non-state individuals and groups.⁴

1. In this paper, "multilateral development bank" refers to the World Bank, International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA), Inter-American Development Bank (IDB), European Bank for Reconstruction and Development (EBRD), Asian Development Bank (ADB), and the African Development Bank (AfDB).

2. See 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, 407 (2005) (noting that international financial institutions enjoy superior bargaining power vis-à-vis their client states).

3. The first IAM at a multilateral development bank was the World Bank Inspection Panel, established in 1993. All of the MDBs mentioned *supra* note 1 have since established or begun to establish their own mechanisms. *Id.* at 409.

4. See *id.* at 407–08 (calling IAMs a reaction to the increasing pressure for accountability of MDBs that resulted both from the expanding scope of

This paper focuses on one such IAM, the office of the Compliance Advisor/Ombudsman (hereinafter CAO) of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).⁵ The IFC created the CAO to serve monitoring and accountability functions for IFC-funded and/or MIGA-insured projects.⁶ Private individuals, groups, or their representatives may file complaints with the CAO regarding projects that have adversely affected them or potentially could, and the CAO works to resolve those issues.

In this paper, I argue first that the CAO already has advanced the interests of project-affected people by implementing principles of Global Administrative Law (GAL).⁷ In particular, the CAO has increased IFC/MIGA's responsiveness to a variety of project-affected people by providing for information disclosure, by creating opportunities for participation in problem solving, and by requiring the IFC/MIGA to publicly give reasons for its actions. Second, I suggest that, without major overhaul, the CAO's role could be adjusted and tweaked to increase the responsiveness of IFC and MIGA to historically disregarded, project-affected people by improving trans-

MDBs and from developments in human rights law emphasizing responsibility of non-state entities).

5. The International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) are arms of the World Bank Group that provide loans and political risk insurance, respectively, to private sector actors. For an overview of each, see INTERNATIONAL FINANCE CORPORATION, CORPORATE OVERVIEW (2009), http://www1.ifc.org/wps/wcm/connect/609599804750c442b378bfbae11ad97e/corp_overview.pdf?MOD=AJPERES&attachment=true&id=1308708329684; MULTILATERAL INVESTMENT GUARANTEE ASSOCIATION, ANNUAL REPORT (2011), http://www.miga.org/documents/11ar_english.pdf.

6. The CAO is headed by a single vice-president with a full time staff and the ability to bring in temporary experts and consultants. See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, THE CAO AT 10: ANNUAL REPORT FY2010 AND REVIEW FY 2000-10 (2010) [hereinafter THE CAO AT 10], http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/08/18/000386194_20110818042550/Rendered/PDF/638800AR0201000Box0361531B0PUBLIC0.pdf (providing an overview of the activities of the CAO).

7. See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005) (providing a thorough background to the field of GAL, including the emergence of global institutions adopting principles that have traditionally played central roles in the decision-making of modern administrative states, such as transparency, deliberation, reason-giving, and participation).

parency and by tying substantive IFC/MIGA environmental and social policies to accepted international norms. Finally, I argue that if project-affected communities are to be able to truly hold the IFC/MIGA accountable, then changes beyond the implementation of GAL principles are needed. National courts, a new institution, or the CAO itself must be granted the power to perform binding judicial review of IFC/MIGA actions—including the ability to terminate projects and award reparations.

In the following sections, I provide a background of the CAO and justify this paper's focus on the CAO, rather than on another IAM or IAMs in general. Next, I outline a modern conception of accountability and responsiveness-promoting mechanisms, which will serve as the theoretical framework for my analysis of the CAO. With that background, the remainder of the paper is dedicated to answering two fundamental questions: What are the strengths and weaknesses of the CAO as it currently operates? And, what should a more responsive CAO-of-the-future look like? I answer the latter question in two steps, first discussing the changes that would maximize the CAO's effectiveness within its current model, and second, suggesting proposals for restructuring the CAO or complementing it with an independent institution in order to provide a judicial review function and true accountability to affected communities.

II. CAO BACKGROUND AND THEORETICAL FRAMEWORK

A. *CAO Origins and Historical Context*

In order to address the question of the CAO's effectiveness, it is necessary first to understand the basic history, structure, and procedures of the IFC, MIGA, and the CAO. Background on the structure of the World Bank Group is necessary in order to understand the IFC and, in turn, the CAO's role within it.

1. *Situating the CAO within the IFC and the World Bank*

The World Bank Group of institutions includes the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), IFC, and MIGA. The IBRD and the IDA, collectively referred to as the World Bank, provide loans and grants to the governments of

developing countries, usually in order to fund specific development projects. The IFC and the MIGA provide loans and insurance, respectively, to private-sector clients undertaking projects in developing countries. In connection with these loans, the various World Bank Group institutions impose standards on the government and private-sector borrowers. Despite the similar missions of the public-sector lending World Bank and the private-sector supporting IFC and MIGA, the latter were established as independent institutions, having their own set of operating policies and standards.⁸ The IFC's focus on generating profits from its investments (including not offering grants, as the World Bank does) and the World Bank's fear of IFC operations affecting the creditworthiness of the World Bank are the central reasons why the institutions are separate from one another.⁹

Both the World Bank and the IFC/MIGA can be held responsible by their constituent member states as well as under the contracts they conclude with public—or private—sector borrowers.¹⁰ In contrast, non-state actors and communities di-

8. See *Pages from World Bank History: Origins of the International Finance Corporation (IFC)*, THE WORLD BANK (Mar. 7, 2012, 1:20 PM), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20101830~pagePK:36726~piPK:36092~theSitePK:29506,00.html> (discussing the history of the IFC); *Who We Are: Frequently Asked Questions*, MULTILATERAL INVESTMENT GUARANTEE AGENCY (Mar. 7, 2012, 1:25 PM) [hereinafter *Who We Are*], <http://www.miga.org/whoware/index.cfm?stid=1792#con7> (noting MIGA's legal and financial independence from other parts of the World Bank).

9. See I DEVESH KAPUR ET AL., *THE WORLD BANK: ITS FIRST HALF CENTURY* 813 (1997) (describing the reasons for establishing the IFC as a separate entity); see also THE WORLD BANK, *supra* note 8 (noting that the IFC, with its unique emphasis on making a profit, provides a complement to other World Bank activities). Other multilateral development banks – including the Inter-American Development Bank, the Asian Development Bank, the European Bank of Reconstruction and Development, and the African Development Bank – provide loans to both public and private sector borrowers. See Bradlow, *supra* note 2, at 491 app.

10. For example, the U.S. is the largest contributor to both institutions and thus has considerable power to prevent World Bank or IFC actions that go against U.S. interests. See Susan Park, *Becoming Green: Diffusing Sustainable Development Norms Throughout the World Bank Group*, in *THE WORLD BANK AND GOVERNANCE: A DECADE OF REFORM AND REACTION* 168, 173 (Diane Stone & Christopher Wright eds., 2007) (noting that the U.S. contributes 23.65% of the IFC's share capital, making it the largest donor); Diane Stone & Christopher Wright, *The Currency of Change: World Bank Lending and Learning in the*

rectly affected by the actions of the World Bank and the IFC/MIGA have traditionally been unable to hold those institutions accountable. In fact, this accountability gap—the focus of this paper’s analysis—is present for all MDBs and most international organizations in general.¹¹

The World Bank was the first international organization to attempt to respond to this accountability gap.¹² In 1993, the Executive Directors of the IBRD and the IDA established the World Bank Inspection Panel, a mechanism for certain non-state actors to hold the World Bank responsible for its actions.¹³ The Panel’s jurisdiction, however, is limited to any project funded in whole or in part by the IBRD or the IDA, which, again, provide development loans directly to governments.¹⁴ I will return to the World Bank Inspection Panel as a comparison to the CAO later in this paper.

Wolfensohn Era, in *THE WORLD BANK AND GOVERNANCE 1*, *supra* at 4–5 (noting that as the World Bank’s “principal shareholder,” the U.S. enjoys an “effective veto”).

11. *See generally* INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW (Daniel D. Bradlow & David B. Hunter eds., 2010) (discussing the accountability gaps of international financial institutions).

12. Bradlow, *supra* note 2, at 409; *see also* IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL 121* (1994) (noting that the Inspection Panel addresses the paucity of mechanisms holding international organizations accountable).

13. *THE WORLD BANK INSPECTION PANEL: THE FIRST FOUR YEARS (1994–1998) 1* (Alvaro Umana, ed., 1998). Several factors spurred the World Bank to create the Inspection Panel. The largest factor was international grassroots criticism surrounding the Narmada dam and water projects in India, a group of world bank projects that demonstrated disregard for environmental impacts and lack of adequate resettlement plans. The controversy surrounding the projects led to an independent investigation resulting in a report (“The Morse Report”) which found problems in World Bank policy. Internal concerns at the World Bank that the volume of projects was being prioritized over the quality and positive impact of projects were also a factor leading to the Inspection Panel’s creation. *Id.* at 1–2.

14. International Bank for Reconstruction and Development, *The World Bank Inspection Panel*, IBRD Res. 93-10 (Sept. 22, 1993), *reprinted in* THE WORLD BANK, *THE WORLD BANK OPERATIONS MANUAL: BANK PROCEDURES 17.55, Annex A* (Jan. 1999) [hereinafter *WORLD BANK OPERATIONS MANUAL*], *available at* <http://siteresources.worldbank.org/EXTOPMANUAL/Resources/EntireOpManualExternal.pdf?resourceurlname=EntireOpManualExternal.pdf>; International Development Association, *The World Bank Inspection Panel*, IDA Res. 93-6 (Sept. 22, 1993), *reprinted in* WORLD BANK OPERATIONS MANUAL, *supra*. The two resolutions are identical.

The IFC and MIGA do not work directly with governments. Due to their different mandates, IFC/MIGA policies are independent from those of the World Bank.¹⁵ The IFC and MIGA are governed by their Policy on Social and Environmental Sustainability (2006) (Policy) and by the Performance Standards on Social and Environmental Sustainability (2006) (Performance Standards).¹⁶ The Policy lays out the general sustainability framework of IFC-funded¹⁷ or MIGA-insured¹⁸

15. MIGA and IFC each have their own Policy and Performance Standards documents, but they are practically equivalent. See INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (2012) [hereinafter IFC PERFORMANCE STANDARDS], http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES; INTERNATIONAL FINANCE CORPORATION, POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (2012) [hereinafter IFC POLICY], http://www1.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES; MULTILATERAL INVESTMENT GUARANTEE AGENCY, PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (2007) [hereinafter MIGA PERFORMANCE STANDARDS], http://www.miga.org/documents/performance_standards_social_and_env_sustainability.pdf; MULTILATERAL INVESTMENT GUARANTEE AGENCY, POLICY ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (2007) [hereinafter MIGA POLICY], http://www.miga.org/documents/envirion_social_review_021507.pdf.

16. Sources cited *supra* note 15. The Policy and Performance Standards were created and are revised by the IFC through a process of public input and deliberation, although the institutions themselves have complete control over their final content. See INTERNATIONAL FINANCE CORPORATION, IFC POLICY AND PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY REVIEW AND UPDATE: OVERVIEW OF CONSULTATION AND ENGAGEMENT PROCESS (2009), http://www1.ifc.org/wps/wcm/connect/d9f9008049800946a606f6336b93d75f/PPS%2BOverview%2Bof%2BConsultation%2Band%2BEngagement_English.pdf?MOD=AJPERES (describing the process of stakeholder input into the updated Policy and Performance Standards).

17. For examples of IFC projects, see *Summary of Project Information: Carvajal S.A.*, INTERNATIONAL FINANCE CORPORATION (Apr. 13, 2012, 4:09 PM), <http://www.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/SPI20932> (describing a loan to Carvajal, a Colombian paper conglomerate, to finance the company's 4 year system modernization program); *Summary of Project Information: Zhongda Sanchuan Hydro Development Co., Ltd.*, INTERNATIONAL FINANCE CORPORATION (Apr. 13, 2012, 4:11 PM), <http://www.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/SPI24067> (describing a \$21 million debt financing to Zhongda Yamjin Power Generation Co. Ltd. to build, own and operate three power stations on the White Water River in Yunnan Province, China); *Summary of Project Information: Ahafo*, INTERNATIONAL FINANCE CORPORATION (Apr. 13, 2012, 4:15 PM), <http://www.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/SPI23338> (describing a \$75 million loan to Newmont Mining

projects and establishes the CAO as the independent complaint mechanism for monitoring compliance with the Standards.¹⁹ The Policy also identifies the Performance Standards as the way to ensure compliance with the Policy.²⁰ The Performance Standards, along with the guidance notes of the related IFC issues, are central to the mission of the CAO because those norms form the benchmark from which the CAO measures IFC performance on specific projects.²¹

The Performance Standards establish the procedures that the borrower²² is required to follow throughout the life of a project financed by the IFC or any other relevant financial institution.²³ There are eight standards, the first of which lays out general systematic and procedural requirements that apply to standards 2 through 8. Performance Standard (PS) 1 requires the following of borrowers:

establish and maintain an ESMS [Environmental and Social Management System] appropriate to the nature and scale of the project and commensurate with the level of its environmental and social risks and impacts. The ESMS will incorporate the following elements: (i) policy; (ii) identification of risks and impacts; (iii) management programs; (iv) organizational capacity and competency; (v) emergency

Gold Corporation to construct a greenfield open cast gold mine and associated facilities in the Brong Ahafo Region of Ghana).

18. MIGA provides insurance to companies investing in developing countries. Projects insured by MIGA projects often also receive IFC loans. *See Who We Are*, *supra* note 8. For a list of MIGA-insured projects, see *Projects: Overview*, MULTILATERAL INVESTMENT GUARANTEE AGENCY (Mar. 27, 2012, 11:45 AM), <http://www.miga.org/projects>.

19. IFC POLICY, *supra* note 15, §§ 54–57.

20. *See id.* §§ 1–7 (describing the relationship between the Policy and the Performance Standards).

21. *See* OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, OPERATIONAL GUIDELINES § 3.2 (2007) [hereinafter CAO OPERATIONAL GUIDELINES], <http://www.cao-ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf> (describing the CAO's audit criteria).

22. IFC borrowers are private-sector corporations seeking loans for greenfield or expansion projects in developing countries. *See How to Apply for Financing*, INTERNATIONAL FINANCE CORPORATION (Mar. 27, 2012, 12:09 PM), http://www1.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/aboutifc/about_ifc_financing (describing the criteria potential borrowers must fulfill).

23. IFC PERFORMANCE STANDARDS, *supra* note 15, Overview, ¶1.

preparedness and response; (vi) stakeholder engagement; and (vii) monitoring and review.²⁴

Paragraph 16 of PS1 requires the development of an Action Plan in which the borrower identifies specific mitigation measures and actions necessary for the project to comply with applicable laws, regulations, and the Performance Standards.²⁵ The stakeholder engagement process must include at a minimum: (1) the timely disclosure of the Social and Environmental Assessment, information on the risks and adverse impacts on the communities, the nature and scale of the project, and the duration of proposed activities; (2) an ongoing, fully documented consultation process in which community views are incorporated into the process; and (3) the establishment of a grievance mechanism if the client anticipates risks of adverse impacts to the community.²⁶

Performance Standards (PS) 2 through 8 address specific substantive topics as follows: PS2, Labor and Working Conditions; PS3, Resource Efficiency and Pollution Prevention; PS4, Community Health, Safety, and Security; PS5, Land Acquisition and Involuntary Resettlement; PS6, Biodiversity Conservation and Sustainable Management of Living Natural Resources; PS7, Indigenous Peoples; PS8, Cultural Heritage.²⁷ Each Performance Standard lays out requirements that the

24. *Id.* Performance Standard 1, ¶ 5.

25. *Id.* Performance Standard 1, ¶ 16.

26. *Id.* Performance Standard 1, ¶¶ 25–35. With respect to the grievance mechanism, the Standard states:

Where there are Affected Communities, the client will establish a grievance mechanism to receive and facilitate resolution of Affected Communities' concerns and grievances about the client's environmental and social performance. The grievance mechanism should be scaled to the risks and adverse impacts of the project and have Affected Communities as its primary user. It should seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate and readily accessible, and at no cost and without retribution to the party that originated the issue or concern. The mechanism should not impede access to judicial or administrative remedies. The client will inform the Affected Communities about the mechanism in the course of the stakeholder engagement process.

Id., Performance Standard 1, ¶ 35.

27. *Id.* Overview, ¶ 2.

borrower must meet in handling various issues.²⁸ As mentioned, these Performance Standards are among the benchmark norms by which the CAO evaluates IFC performance.²⁹

2. *Establishment of the CAO*

As mentioned above, the IFC/MIGA Policy establishes the CAO as the independent complaint mechanism for monitoring compliance with the Performance Standards. The CAO is meant to provide a voice to project-affected people, so that the host state, the project company, and the IFC itself are not the only voices in the conversation. Of course, the CAO is a relatively new mechanism within the IFC and MIGA. Looking at its development will help clarify why it is constituted as it is today.

When the CAO was established in 1999, the inspection mechanism of the public sector lending side of the World Bank Group had already been in place for six years. The World Bank's Inspection Panel was created in 1993 in the midst of a broad international campaign by civil society groups concerning the World Bank's failure to adhere to its own policies.³⁰ Because the Inspection Panel did not have jurisdiction

28. As an example of the type of requirements included, the requirements regarding Indigenous Peoples laid out in Performance Standard 7 include the general requirement that the client conducts informed consultation throughout the project on all aspects relevant to the community, including the potential adverse effects of the project, the mitigation strategies, the sharing of development benefits and opportunities, and implementation issues. The Standard also requires that the culture, language, and structure of the community be taken into account throughout the consultation process. The internal complaint mechanism established by the company (as required by PS1) must also be accessible and culturally appropriate. *Id.* Performance Standard 7. Special requirements apply when the project is building or extracting with expected adverse impacts on traditional or customary lands of the indigenous community, when the project will require the displacement of people, or when the project is going to commercially exploit indigenous cultural knowledge. *See id.* Performance Standard 7, ¶¶ 13–17 (describing the special requirements).

29. *See* CAO OPERATIONAL GUIDELINES, *supra* note 21, § 3.2 (listing the CAO's audit criteria).

30. *See* World Bank Inspection Panel, INTERNATIONAL ACCOUNTABILITY PROJECT (Feb. 29, 2012, 1:00 PM), <http://www.accountabilityproject.org/article.php?list=type&type=41> (describing the history of the Inspection Panel). In the 1980s the World Bank began to develop and commit to social and environmental standards and policies including those on involuntary resettlement.

over IFC/MIGA projects, pressure for greater accountability at IFC and MIGA remained.

The World Bank Group was spurred to respond to this pressure by the Pangué Ralco Dam Project on the BíoBío River in Chile.³¹ The effort to build the dam was conducted by ENDESA, a private Chilean utility company, and financed by the IFC.³² Damming the BíoBío River flooded 450 hectares of land, displaced 53 non-indigenous people, and negatively impacted the region's indigenous communities.³³ In 1995, while the dam was being built, a Chilean NGO, Grupo de Acción del BíoBío, filed a complaint with the World Bank Inspection Panel alleging non-compliance with IFC policies and resulting social and environmental harms.³⁴ The Inspection Panel rejected the complaint on a jurisdictional issue, since it did not cover the IFC. However, pressure from local people and local and international NGOs led the World Bank Group president to commission an independent report into the complaints.³⁵ The report, which was only publicly released after

tlement (1980), tribal peoples (1982), and environmental assessment (1988). THE WORLD BANK, THE INSPECTION PANEL AT 15 YEARS 3 (2009), <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>. For a description of the pressures leading to the creation of the World Bank Inspection Panel, see THE WORLD BANK INSPECTION PANEL, *supra* note 13, at 1–2.

31. See INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON 16 (2003), http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf (noting the forces that led to the creation of the CAO).

32. CARL BRUCH, ENVIRONMENTAL LAW INSTITUTE, COMPENDIUM OF RELEVANT PRACTICES FOR IMPROVED DECISION-MAKING, PLANNING AND MANAGEMENT OF DAMS AND THEIR ALTERNATIVES: COMPLIANCE 164 (2007), http://www.unep.org/dams/files/compendium/report_compliance.pdf.

33. *Id.*

34. *Id.*

35. *Pangué Dam – International Finance Corporation (IFC) and the Office of the Compliance Advisor Ombudsman (CAO)*, UNITED NATIONS ENVIRONMENT PROGRAMME DAMS AND DEVELOPMENT PROJECT (Feb. 29, 2012, 1:00 PM), http://www.unep.org/dams/documents/ell.asp?story_id=134. The report was authored by Dr. Jay Hair, the former president of the National Wildlife Federation and the International Union for the Conservation of Nature and Natural Resources (IUCN). *Id.*

being edited, concluded that the IFC had failed to comply with many of its own policies and procedures.³⁶

Along with other pressures, the report ultimately led, in 1999, to the creation of the CAO, whose proposed purpose was to problem solve and advise management on violations of IFC and MIGA policies on information disclosure and social and environmental issues.³⁷ According to Richard Bissell, Executive Director for Policy and Global Affairs of the U.S. National Academy of Sciences, and Suresh Nanwani, a staff member at the Asian Development Bank, “[t]he primary factors for the establishment of this mechanism were the following: civil society pressure for an accountability mechanism at these institutions; the outcome of the independent investigation commissioned by the World Bank’s President over the Pangue project claim; and pressure from IFC’s Board of Directors.”³⁸ Among civil society actors, U.S. environmental groups, including the Center for International Environmental Law, had lobbied the IFC/MIGA for several years for more public accountability.³⁹ The creation of the CAO by the IFC in the midst of a demand for responsiveness from civil society suggests that the IFC intended it to diffuse conflicts and help address the concerns of project-affected people (and civil society advocates) who might feel that they were being ignored.

36. *See id.* (noting that the heavily-redacted public report stated IFC non-compliance with applicable policies and procedures).

37. *See id.* (“[T]he dispute over Pangue Dam and determination that the Inspection Panel would not have jurisdiction over the IFC led the World Bank to establish the CAO in 1999 as a means for promoting and ensuring compliance of IFC and MIGA activities with environmental and social safeguard policies and procedures.”); *see also* Richard E. Bissell & Suresh Nanwani, *Multilateral Development Bank Accountability Mechanisms: Developments and Challenges*, 6 MANCHESTER J. INT’L ECON. L. 2, 9 (2009) (describing the creation of the CAO in response to pressure); THE CAO AT 10, *supra* note 6, at 4 (statement of Meg Taylor, Vice President, CAO) (explaining that dissatisfaction with the resettlement caused by the Pangue Dam project and civil society pressure on the World Bank in Washington led the institution to consider an accountability mechanism for the private sector arms of the World Bank).

38. Bissell & Nanwani, *supra* note 37, at 2 n.*, 15.

39. *See* Press Release, Center for International Environmental Law, CIEL: Environmentists [sic] Welcome New Environmental Watchdog at IFC and MIGA (Apr. 21, 1999), *available at* http://www.ciel.org/Intl_Financial_Inst/ifcmt.html (noting CIEL’s prior advocacy).

The World Bank Group and the IFC chose to create a new mechanism rather than expanding the jurisdiction of the Inspection Panel for several reasons. The first was a desire by private-sector stakeholders to avoid the scrutiny of the Inspection Panel's review function by focusing the new mechanism on problem solving rather than fault finding.⁴⁰ Also it is likely that the experience at the Inspection Panel indicated that a problem-solving-focused mechanism would be better at tempering pressure from civil society than the type of auditing done by the Inspection Panel. Finally, NGOs had emphasized their desire for a problem-solving mechanism at the IFC.⁴¹

B. *Why Focus on the CAO?*

The CAO and the Inspection Panel are two of several IAMs at MDBs—others include: The Independent Consultation and Investigation Mechanism (ICIM) of the Inter-American Development Bank, the Accountability Mechanism (AM) of the Asian Development Bank, the Project Complaint Mechanism (PCM) of the European Bank for Reconstruction and Development, and the Independent Review Mechanism (IRM) of the African Development Bank. Like the CAO, these mechanisms generally lack binding power to initiate or terminate projects and instead utilize principles of GAL such as information generation and fostering participation to increase the responsiveness of the institutions concerned. There are several reasons why the CAO is the focus of this paper rather than another IAM or all IAMs in general. First, the CAO previously has not received much scholarly attention, especially compared to the World Bank Inspection Panel, which, as the first IAM of a multilateral development bank, has been written about extensively.⁴² While studies of the CAO were initially

40. The CAO's compliance role (conducting audits of IFC and MIGA's compliance with their own policies) has become a more prominent part of the CAO and now closely resembles the Inspection Panel. See CAO OPERATIONAL GUIDELINES, *supra* note 21, § 1.2 (describing the CAO's three roles).

41. See Center for International Environmental Law, *supra* note 39 (statement of David Hunter, Executive Director of CIEL) (stating that following the establishment of the CAO, "[t]he mechanism was set up to be practical and solution-driven which is ultimately what local communities harmed by IFC financed projects really want").

42. See, e.g., DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (Dana Clark et al. eds., 2003); SHIHATA,

difficult because of its relative youth, the CAO now has had over a decade's worth of experience on which to view its development and judge its effectiveness. Second, looking at the CAO provides new insights because the CAO deals with private-sector projects where the government is no longer a contractual party to the transaction. Thus, achieving accountability through government intervention is less likely which means the Bank's self-regulation is more central to ensuring desirable outcomes.

The third reason for focusing on the CAO is that the IFC has an established audience of private-sector banks that model their voluntary environmental and social policies on IFC policies and standards.⁴³ The IFC Social and Environmental Policies serve as the model for the Equator Principles, a voluntary set of principles that private-sector international finance institutions adopt to guide their project investment in the developing world.⁴⁴ Therefore, changes in how the IFC operates, including the functions of the CAO, are likely to have an increased impact on project finance globally.⁴⁵

C. Analytical Framework

Before proceeding to the substantive analysis of the strengths and weaknesses of the CAO, I must briefly lay out the analytical framework established by Richard Stewart, Chair of the Hauser Global Law School Program at New York University School of Law, that will guide the discussion. Stewart adopts a critical eye to accountability. He finds that the invocation of accountability and participation gaps in discussions

supra note 12; Daniel D. Bradlow, *International Organizations and Private Complainants: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994); Daniel D. Bradlow & Sabine Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 HEIDELBERG J. INT'L L. 392 (1994).

43. See, e.g., *About the Equator Principles*, EQUATOR PRINCIPLES (Mar. 7, 2012, 1:00 PM), <http://www.equator-principles.com/index.php/about-the-equator-principles> (mentioning that the Equator Principles, "a credit-risk management framework for determining, assessing and managing environmental and social risk in project finance transactions," are based on the IFC Performance Standards).

44. *Id.*

45. Today 75 international financial institutions have adopted the Equator Principles, representing over 70% of project finance debt in emerging markets. *Id.*

of global governance actually represent “diagnoses of the larger problem of *disregard*.”⁴⁶ He defines *disregard* in part as “an exercise of power that unjustifi[ably] harms or unjustly treats some of those affected.”⁴⁷ Stewart uses the term “accountability” to refer only to “institutionalized mechanisms under which an identified account holder has the right to obtain an accounting from an identified accountor for his conduct, evaluate that conduct, and impose a sanction or obtain another appropriate remedy for deficient performance.”⁴⁸ In simpler terms, accountability only exists when someone has the right and ability to obtain an appropriate remedy from someone who has acted improperly.

Stewart points out, though, that accountability mechanisms are not the sole solution to problems of disregard. Two other types of mechanisms can work against situations of disregard: “decisions rules (the rules and procedures that govern decision making by global authorities) and other responsiveness-promoting measures (a residual category of other measures and practices, including transparency, reason giving, and non-decisional participation—to promote greater responsiveness by global decision makers to disregarded interests).”⁴⁹ While measures and mechanisms from all three of these categories can move an institution towards eliminating *disregard*, certain approaches are more effective in particular institutional contexts.

In the following sections, I will discuss the structure and procedures of the CAO with reference to Stewart’s categories as a means of examining the CAO’s strengths and weaknesses. We will see that the CAO fails to provide complete accountability as Stewart defines the term. The IFC/MIGA and the CAO also fail to promote responsiveness by denying project-affected people or their representatives a share of the decision-making power regarding substantive policies and proce-

46. Richard B. Stewart, *Accountability Participation, and the Problem of Disregard in Global Regulatory Governance* 2 (Sept. 2009) (discussion draft), available at <http://iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf>.

47. *Id.* at 9.

48. *Id.* at 3.

49. *Id.* at 2. This group of “other responsiveness-promoting mechanisms” are also often referred to as principles of Global Administrative Law. See, e.g., Kingsbury, Krisch & Stewart, *supra* note 7, at 37–41.

dures. I will examine two possible avenues of solving the problem of *disregard* at the IFC/MIGA: (1) improving the CAO as it currently operates to increase responsiveness without establishing accountability as Stewart defines it; or (2) overhauling the CAO (or creating a separate mechanism) to do judicial review of the IFC/MIGA's social and environmental performance and to hold it accountable.

III. CAO STRUCTURE AND PROCEDURES

A. *General Structure of the CAO and Institutional Independence*

The CAO is guided by its mandate and terms of reference which form the basis for the CAO's Operational Guidelines.⁵⁰ The CAO's mandate is "to assist IFC and MIGA in addressing complaints by people affected by IFC/MIGA projects (or projects in which those organizations play a role) in a manner that is fair, objective, and constructive, and to enhance the social and environmental outcomes of IFC/MIGA projects (or projects in which those organizations play a role)."⁵¹

The CAO is headed by a single person, appointed by the President of the World Bank as a full time employee at the vice presidential level. The CAO vice president serves a term that can be renewed indefinitely by mutual consent. The first and current CAO vice president is Meg Taylor, a national of Papua New Guinea, a lawyer and diplomat, founder of a community-based conservation organization, and board member of several companies.⁵² She was selected through an inclusive interview process that directly involved stakeholders from the private

50. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 1.1.

51. *Id.* Note that the mandate does not directly refer to uncovering violations of IFC or MIGA policies. In contrast the World Bank's Inspection Panel has the mandate of "carry[ing] out independent investigations of Bank-financed projects to determine whether the Bank is in compliance with its operational policies and procedures, and to make related findings of harm." The Bank's Board of Executive Directors then decides how to proceed based on the findings. *Inspection Panel: Panel Resolution and Mandate*, THE WORLD BANK (Mar. 7, 2012, 1:00 PM), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173262~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>; see also IBRD Res. 93-10, *supra* note 14 (establishing the inspection panel and delineating its powers).

52. THE CAO AT 10, *supra* note 6, at 4, 14.

sector and NGOs.⁵³ In an important independence-creating decision, the IFC and the World Bank Group made the CAO report directly to the World Bank president, completely independent from the line management structure of both IFC and MIGA.⁵⁴ The CAO's staff members are recruited directly by the CAO vice president and are also independent of the management structure of IFC and MIGA.⁵⁵ The CAO vice president and her staff are restricted from obtaining employment with IFC or MIGA for a period of two years after they leave the office of the CAO.⁵⁶ This is designed to ensure maximum impartiality and independence from the IFC and MIGA, while the CAO is still internal to the World Bank Group. The CAO's Washington, D.C. office is even physically separate from other World Bank offices and only CAO staff has direct access to it.⁵⁷

Despite a structure that insulates the CAO from direct management by the institutions it reviews, concerns may still exist as to *who reviews* the CAO. As mentioned, the CAO reports directly to the president of the World Bank Group, and the CAO as an oversight mechanism could be terminated at his or her discretion. The World Bank Group president, in turn, reports to the World Bank Group Executive Directors, chosen from among the Board of Governors which represents member countries of the World Bank Group.⁵⁸ Directors are roughly proportional to the ownership of the World Bank Group institutions, with some countries therefore having big-

53. *Id.*

54. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 1.3.

55. *Id.*

56. *Id.*

57. *Id.* Other important details about the CAO's institutional design include: the CAO has a fixed administrative budget (\$3,444,200 in FY2010) and can use funds from a \$1,000,000 contingency fund when necessary, such as when there is an unexpected volume of complaints; it is able to hire partners and experts to aid in any of its functions; and CAO staff and their partners meet with local communities and stakeholders on the site of the projects in both its Ombudsman and Compliance Roles. *See id.* § 1.4 (discussing CAO's interactions with local communities, including meetings and seeking expert advice); THE CAO AT 10, *supra* note 6, at 26, 86 (discussing the CAO Ombudsman's work with local communities and partners, and discussing the budget and the contingency fund).

58. *About Us – Leadership*, THE WORLD BANK (Mar. 24, 2012, 1:00 PM), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040580~menuPK:1696997~pagePK:51123644~piPK:329829~theSitePK:29708,00.html>.

ger stakes than others. The largest contributing member is the United States, which has a de facto veto over structural changes of the World Bank Group institutions and whose president traditionally nominates a U.S. citizen to be the World Bank Group president.⁵⁹ In the end, the CAO must reflect the desire of World Bank Group member states (and especially the influential ones) to enforce certain environmental and social standards. Nevertheless, the structural independence of the office of the CAO helps to avoid ad hoc manipulation by the World Bank Group with its handling of individual projects and issues. Also, because the CAO does not have the power to bind the IFC/MIGA or the entire World Bank Group, there is little incentive for them to meddle in the CAO's administration. Instead, when the IFC/MIGA disagree with the CAO's findings or recommendations, the IFC/MIGA can simply decide to take whatever course of action it pleases.⁶⁰

B. *The CAO's Three Roles*

The CAO office has three distinct roles: (1) Ombudsman (taking a flexible approach to resolve the issues of the affected person or group through dialogue, mediation, and settlement); (2) Compliance (auditing the IFC's and/or MIGA's performance to assess whether they are in line with their own environmental and social policies); and (3) Advisory (advising the president and management of both institutions in dealing with particular issues and reviewing the environmental and social policies, based on the lessons learned from the CAO's experience in its other roles).⁶¹ When the CAO receives an eligible complaint, it first assesses whether the problem can be

59. See *Obama Names Surprise World Bank Candidate Jin Yong Kim*, BBC NEWS, Mar. 23, 2012, <http://m.bbc.co.uk/news/business-17481973> (noting the historical role of the President of the United States in nominating candidates for World Bank President).

60. Of course, as explained in *infra* Section IV, the CAO's practices of broad information disclosure, allowing for project affected people to participate in problem-solving, and pushing for requirements that the IFC/MIGA give reasons for their actions increase the legitimacy and reputational risks that the IFC/MIGA face if they choose to depart from CAO recommendations.

61. See CAO OPERATIONAL GUIDELINES, *supra* note 21, § 1.2 (describing the three roles in general terms).

solved through Ombudsman procedures.⁶² If a resolution is not possible or not achieved, the CAO decides whether to act in its Compliance role and conduct an audit of the IFC/MIGA's social and environmental performance.⁶³ Following an audit, the CAO gives its findings, including areas of non-compliance, to the president and management of the IFC/MIGA.⁶⁴ The CAO can also decide to continue to monitor any agreements made during the Ombudsman phase or problems discovered in the Compliance phase, and report to the IFC and the public on fulfillment of agreements and resolution of issues.⁶⁵ Cases remain open until settlement or compliance is reached or the project ends.⁶⁶

In its Ombudsman and Compliance roles, the CAO only takes action in response to a complaint. It does not take proactive measures to initiate problem solving or to police IFC/MIGA compliance with environmental and social policies. There are two reasons for this approach. First, the staff and financial resources are insufficient to monitor all dimensions of the hundreds of IFC-funded and MIGA-insured projects around the world.⁶⁷ Second, the CAO was created with problem solving as a primary focus.⁶⁸ Thus, if no one has complained about a problem, the CAO does not have a mandate to get involved. In its Advisory role, on the other hand, the CAO can write reports and provide recommendations to the IFC/MIGA on its own initiative.⁶⁹ Based on its experience from project-specific Ombudsman and Compliance work, the CAO Advisor can look into systemic problems and pass its advice on to IFC/MIGA management.⁷⁰ This creates a balance where the CAO's project-specific work is triggered by stakeholder requests, but its systemic work in improving environmental and social policies and procedures of the IFC/MIGA takes place at

62. *Id.* §§ 2.2.6, 3.3.1.

63. *Id.* § 3.3.3.

64. *Id.* § 3.4.

65. *Id.* §§ 2.4.5, 3.4.3.

66. *Id.* § 3.4.3.

67. For a searchable database of the hundreds of IFC projects, see *Search IFC Projects*, INTERNATIONAL FINANCE CORPORATION (Apr. 13, 4:46 PM), <http://www.ifc.org/projects>.

68. THE CAO AT 10, *supra* note 6, at 24.

69. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 4.2.1.

70. *Id.* § 4.1.

the initiative of the CAO itself. In the following sections I describe each of the CAO's three roles in detail.

1. *Ombudsman Role*

The CAO's most important and unique function is the problem-solving work of the CAO Ombudsman. The CAO process for handling complaints begins with an eligibility screening.⁷¹ The complaint must pertain to a project that the IFC/MIGA is participating in or actively considering; the issues raised in the complaint must relate to the environmental or social impacts of IFC/MIGA projects⁷²; and the complaint must demonstrate that the complainant may be affected if the social and/or environmental impacts raised in the complaint occur.⁷³ Any entity or person who has been granted authority by a project-affected person or group can file a complaint on their behalf. Other limitations on the types of complaints the CAO accepts are that malicious or trivial complaints that seek to create a competitive advantage are ineligible and allegations of fraud and/or corruption will be passed along to the World Bank Department of Institutional Integrity.⁷⁴

The CAO differs from the World Bank Inspection Panel in that the CAO does not require that the complainant allege violations of IFC or MIGA operating rules or procedures.⁷⁵ In the same vein, there is no required form or format that a complaint must incorporate.⁷⁶ Thus, it is easy for people to submit complaints in the manner in which they see fit. Since the CAO has been operating, 72 out of 123 complaints received have been found eligible for CAO Ombudsman action.⁷⁷ The

71. *Id.* § 2.3.1.

72. This differs from the Inspection Panel where complaints can allege violations of any World Bank operational policies or procedures, not only those related to environmental or social issues. At other multilateral development banks that support public sector projects, the IAMS also handle complaints related to any of the bank's policies. The limit to social and environmental issues is found only in private sector aimed banks. Bradlow, *supra* note 2, at 455–56.

73. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.3.1.

74. *Id.*

75. *See id.* § 2.2.1 (listing possible grounds for a complaint under the CAO).

76. *Id.* § 2.2.4; Bradlow, *supra* note 2, at 458.

77. *See* THE CAO AT 10, *supra* note 6, app. b at 92–101 (listing all complaints received and whether they were found eligible for resolution).

approach of eschewing strict requirements for the form and substance of complaints is associated with the CAO's overall focus on problem solving for the IFC/MIGA and affected people, and its lack of a real judicial review function.⁷⁸ In the case of judicial review, stricter procedural requirements would be necessary to ensure fairness and consistency in the application of norms, and to create a clear record of the problem at issue.

Once a complaint is deemed eligible, the CAO continues in its Ombudsman role by assessing opportunities for collaborative settlement of the issues raised in the complaint.⁷⁹ At this stage, the CAO Ombudsman gathers information by visiting project sites, holding public meetings, reviewing IFC/MIGA files, and meeting with stakeholders.⁸⁰ As Ombudsman, the CAO is seeking to determine if the stakeholders might be able to resolve the issues, and if so, to identify the best way of proceeding.

The CAO can use flexible methods to address issues from complaints, including facilitation and information sharing, joint fact-finding, dialogue and negotiation, and conciliation and mediation.⁸¹ In each of these processes, the CAO works with the stakeholders and uses its dispute resolution expertise to try to bring the parties to an agreement and resolve the problems. The CAO has the flexibility to work on resolving issues that arise during these processes, even if those issues were not stated in the complaint.⁸² The goal of the process is to walk away with an agreement between the complainant and the IFC/MIGA and/or the project sponsor. Such an agreement may include proposals for future action, including remedial action by the IFC/MIGA or the sponsor, and may entail timelines and/or incentives. Examples of agreements the CAO has facilitated include: an agreement in the Yanacocha Gold Mine case in Peru that the CAO would train community members to conduct joint water monitoring with a mining company; the establishment in the Interagua Case in Ecuador

78. The Inspection Panel, which is focused on reviewing compliance, has slightly more formal requirements for complaints, which fits with its need to treat all stakeholders impartially. See Bradlow, *supra* note 2, at 414 (describing what must be shown in a request for inspection).

79. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.3.2.

80. *Id.* § 2.3.3.

81. *Id.* § 2.4.1.

82. See *id.* § 2.4.2 (listing the issues that may be considered).

of a grievance mechanism within the project company to resolve water service issues; and the commitment of the project company to return land to indigenous communities in the Ambuklao-Binga Hydro project in The Philippines.⁸³

In its Ombudsman role, the CAO does not explicitly refer to general international law, environmental law, or human rights law. As an exercise in flexible problem solving, CAO Ombudsman work is not strictly limited to comparing IFC/MIGA actions to any specific policies, procedures, or norms, as is done in its Compliance role.⁸⁴ Nevertheless, as Adam McBeth, Professor of Law at Monash University in Melbourne, Australia points out, “[t]he ombudsman function of the CAO provides an opportunity for greater consideration of human rights obligations and implementation of practical human rights outcomes due to emphasis on mediation and its more flexible approach compared to the Inspection Panel.”⁸⁵ Thus, while not explicitly considering international norms in its Ombudsman work, the CAO is likely to strive for outcomes that better respect the dignity and welfare of local communities. Indirectly, then, the CAO strives to reach agreements that generally align with human rights law.

Throughout the conciliation and mediation process, the CAO Ombudsman will keep communications from the parties confidential when requested, including withholding confidential information from the CAO Compliance team if the complaint proceeds to that phase. At the same time, however, the CAO Ombudsman discloses its assessment reports, including the opinions of stakeholders and any agreements reached, to all the stakeholders, including the IFC/MIGA, the president of the World Bank Group, and the public.⁸⁶

83. See THE CAO AT 10, *supra* note 6, at 25 (listing the dispute resolution tools used by the Ombudsman).

84. See CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.3.3 (laying out the flexible process of assessment and problem-solving done in the Ombudsman role).

85. Adam McBeth, *A Right by Any Other Name: The Evasive Engagement Of International Financial Institutions with Human Rights*, 40 GEO. WASH. INT’L L. REV. 1101, 1151 (2009). *But see id.* (“On the other hand, that flexibility also can understate the importance of human rights as entitlements that cannot simply be bartered away.”).

86. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.4.3.

If a satisfactory settlement is reached in the Ombudsman phase, the CAO will document the agreements and notify the World Bank president and the public of the outcome.⁸⁷ The CAO Ombudsman also usually goes on to play a monitoring role once an agreement has been reached. The CAO has the option to monitor the fulfillment of the agreements and must disclose to the public and the World Bank president the findings, disclosing when certain stakeholders are not holding up their commitments.⁸⁸

2. *Compliance Role*

When stakeholders are unable to reach an agreement despite the flexible and persistent efforts of the Ombudsman (within an agreed upon time frame), the complaint is then transferred to the CAO Compliance role for appraisal.⁸⁹ A Compliance audit may also be initiated at the request of the World Bank president, senior management of the IFC/MIGA, or at the discretion of the CAO vice president.⁹⁰ CAO Compliance oversees systematic “project-level audits of the social and environmental performance of IFC/MIGA.”⁹¹ The CAO Operational Guidelines describe the norms to be referred to when conducting audits:

Audit criteria include IFC/MIGA policies, performance standards, guidelines, procedures and requirements whose violation might lead to adverse social or environmental consequences. Audit criteria may have their origin, or arise from, the environmental and social assessments or plans, host country legal and regulatory requirements (including interna-

87. *Id.* § 2.4.2.

88. *See id.* § 2.4.5 (describing the ongoing monitoring activities of the CAO). The monitoring function, which the CAO also performs following a compliance audit, contrasts with the Inspection Panel which was created without a monitoring function. *See* Bradlow, *supra* note 2, at 416–17 (describing the final stages of the Inspection Panel process).

89. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 3.3.1.

90. *Id.*

91. *Id.* § 3.1; *see also id.* § 3.3.2 (“The CAO will undertake only project-level compliance audits, not institutional or programmatic-level audits.”). The latter audits might overlap or interfere with the work of environmental, social, and evaluation staff within the IFC/MIGA or the World Bank’s Internal Audit Department.

tional legal obligations), and environmental, social, health, or safety provisions of the World Bank Group, IFC/MIGA, or other conditions for IFC/MIGA involvement.⁹²

Conspicuously absent from the description is the consideration of international treaties and customary law. Essentially, the CAO is only looking at IFC's or MIGA's performance in relation to the IFC/MIGA policies and the contractual agreements into which the IFC/MIGA has entered.

In the IFC Paper Pulp Mill project in Uruguay, the CAO demonstrated its inability to look beyond IFC/MIGA policies and safeguards.⁹³ The Center for Human Rights and Environment (CEDHA, by its Spanish abbreviation) filed a compliance request with the CAO alleging that the project was out of line with IFC policies as well as encouraging the CAO to consider international law obligations and environmental law norms.⁹⁴ The CAO responded by working completely within IFC policies and requested that the IFC clarify the interpretation of IFC Operating Policy 4.01 paragraph 3, which said that environmental impact assessments should take into account "the country's overall policy framework and national legislation . . . and obligations of the country pertaining to project activities, under relevant international environmental treaties and agreements."⁹⁵ This request from the CAO indicates its inability to consider international norms unless explicitly directed to do so by IFC/MIGA policies and standards. This isolation of IFC/MIGA from international law prevents the CAO from holding the IFC/MIGA accountable to widely accepted international law norms, which may be more protective of human rights than IFC/MIGA policies. The CAO's Compliance job of ensuring the environmental and social sustainability of IFC/

92. *Id.* § 3.2.

93. See Vivian Lee, *Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay*, 6 NW. J. INT'L HUM. RTS. 354, 356–57 (2008) (describing the CEDHA's failed efforts to get the CAO to hold the IFC responsible to external international norms).

94. *Id.*

95. OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, PRELIMINARY ASSESSMENT REPORT: COMPLAINT REGARDING IFC'S PROPOSED INVESTMENT IN CELULOSAS DE M'BOPICUÁ AND ORION PROJECTS, URUGUAY 12 (2005), http://www.cao-ombudsman.org/cases/document-links/documents/preliminary_assessmentFINAL.pdf.

MIGA projects could be made easier if IFC/MIGA policies were changed to explicitly incorporate international norms.⁹⁶ For example, if IFC/MIGA policies called for an interpretation consistent with the UN Declaration on the Rights of Indigenous Peoples, the CAO could insist on getting the free, prior, and informed consent of indigenous communities facing displacement by an IFC/MIGA project under Article 10 of that declaration.⁹⁷

Before beginning an audit, the CAO uses a stricter degree of scrutiny to decide whether a Compliance audit should take place than when deciding whether Ombudsman action is appropriate.⁹⁸ The CAO ensures that issues stated in the complaint, or, for cases referred by the CAO Ombudsman, issues related to the complaint, raise substantial concerns regarding social or environmental outcomes.⁹⁹ Conditions under which an audit should take place are not spelled out explicitly, but generally the CAO looks for evidence that potentially significant outcomes have occurred or will occur, and indications that a policy may not have been adhered to or applied properly.¹⁰⁰ As a reflection of that policy, only eight of the twenty-

96. There are indications of support within the CAO for such international norms. See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, ADVISORY NOTE: REVIEW OF IFC'S POLICY AND PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY AND POLICY ON DISCLOSURE OF INFORMATION 16 (2010) [hereinafter CAO ADVISORY NOTE], http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf (noting that IFC clients are attempting to implement local approval processes based on international norms, and stating that the "IFC can play an important role in helping its client companies implement [such] processes"). The Advisory Note goes on to recommend that the IFC should adopt a "transparent, principles-based framework" for local approval. *Id.* at 17. In context, "principles" appears to refer to international norms.

97. See United Nations Declaration on the Rights of Indigenous Peoples art. 10, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007) ("Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.").

98. Compare CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.3 (describing the Ombudsman's eligibility assessment), with *id.* § 3.3.3 (describing the more stringent Compliance appraisal process).

99. *Id.* § 3.3.3.

100. See *id.* (describing the criteria considered during a compliance audit).

two complaints that the CAO considered for audits were deemed eligible through the ten-year history of the CAO.¹⁰¹

The audits generally include a review of documents, interviews, and observations of activities and conditions.¹⁰² When an audit is going to take place, the CAO first creates a Terms of Reference explaining the background and reasons for the audit as well as how the audit will proceed.¹⁰³ A copy is disclosed to IFC/MIGA management and relevant department heads, but not to the public.¹⁰⁴ The CAO staff is responsible for managing audits and can hire specialist experts as necessary.¹⁰⁵ When an audit is completed, CAO will prepare a report including the findings of the audit regarding noncompliance and any undesirable social or environmental outcomes, including the extent to which the findings are verifiable.¹⁰⁶ The report is first submitted to IFC/MIGA management and relevant departments for factual review and comment.¹⁰⁷ The CAO then finalizes the report and sends it to the senior management of the IFC/MIGA for an official response, which is then forwarded with the report to the World Bank Group president.¹⁰⁸ When the president is satisfied with the response from IFC/MIGA management, he or she must provide clearance.¹⁰⁹ Only after clearance is granted does the CAO disclose the report and response to the public.¹¹⁰

In cases where the IFC/MIGA is found to be noncompliant, the CAO will keep the audit open and monitor the situation until the IFC/MIGA moves into compliance.¹¹¹ Although the CAO publicizes the current status of audits, transparency is problematic during the audit phase because of the lengthy process previously described. It can take many months before

101. See THE CAO AT 10, *supra* note 6, app. b at 92–101 (listing the outcomes of all complaints received by the CAO).

102. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 3.2.

103. *Id.* § 3.3.5.

104. See *id.* (“[T]erms of reference (TOR) will be prepared and submitted to the management of IFC/MIGA.”).

105. *Id.* § 3.3.6.

106. *Id.* § 3.4.2.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* § 3.4.3.

the public is aware of the details uncovered.¹¹² Transparency would be improved if the CAO made public all drafts of the report as they were completed, with the disclaimer that they are in draft form.

3. *Advisory Role*

The third function of the CAO is the Advisory function through which the CAO contributes knowledge based on the Ombudsman and Compliance experience to World Bank Group and IFC management. Advice from the CAO may be requested from senior management of the IFC/MIGA or the World Bank Group, or any other department within the IFC/MIGA.¹¹³ The CAO decides whether to accept a request based on consideration of how important and/or helpful the advice would be and the staff and financial resource constraints of the CAO.¹¹⁴ The CAO vice president may also initiate an advisory report to address a systematic concern that arises in the CAO's Compliance and/or Ombudsman work.¹¹⁵ The requests for advice can be either ad hoc or tied to the review of specific IFC/MIGA systems, policies, or procedures.¹¹⁶ Generally, whenever the IFC/MIGA reviews any of its environmental or social policies, which it does periodically, the CAO is asked to provide its views and advice.¹¹⁷ In IFC/MIGA review procedures, the CAO reports often combine with numerous contributions from private sector, academic, and civil society actors in influencing decision-making.

In its Advisory role, the CAO gives only systemic advice. Project-specific advice is not provided because individual projects are handled through the CAO's other roles.¹¹⁸ The Advisory role is focused on providing insights that can improve

112. See The CAO at 10, *supra* note 6, at 42–43 (providing a timeline of the CAO audit process).

113. *Id.* § 4.2.1.

114. *Id.* § 4.2.3.

115. *Id.* § 4.2.1.

116. See *id.* § 4.2.2 (describing the potential scope of advice).

117. See, e.g., CAO ADVISORY NOTE, *supra* note 96 (suggesting ways to improve the sustainability policies of the IFC based on the CAO's experience in its Ombudsman and Compliance roles).

118. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 4.1.2.

IFC/MIGA policies and performance in the future.¹¹⁹ The CAO conducts some Advisory work internally and also hires consultants.¹²⁰ Advice from the CAO always takes the form of an Advisory report or memorandum, and public disclosure is at the discretion of CAO within the limits of IFC/MIGA disclosure policies.¹²¹

In its Advisory role, the CAO has broad leeway to consider international norms such as general international law, human rights law, and environmental law. The purpose of the CAO's Advisory role is to highlight deficiencies and suggest ways the IFC/MIGA can improve its environmental policies, procedures, and outcomes. In doing so, the CAO has made reference to international norms as models for the IFC/MIGA to emulate.¹²² For example, in its 2010 Advisory Note on Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, the CAO recommends that the IFC/MIGA clarify its standard of ensuring "Broad Community Support" for a project by referencing the standard of "free, prior and informed consultation"¹²³ which reflects the International Labour Organization (ILO) 169 norm of "free and informed consent."¹²⁴ The same report also recommends that the IFC/MIGA update its policies and performance standards in accordance with the policy framework of business responsibility for human rights established by John Ruggie as the UN Special Representative

119. *See id.* § 4.1.2 ("The CAO's advice aims to improve performance systematically.").

120. *Id.* § 4.3.1.

121. *Id.* § 4.4.2. The IFC/MIGA disclosure policies provide confidentiality for private information provided by their private-sector clients. *See* INTERNATIONAL FINANCE CORPORATION, POLICY ON DISCLOSURE OF INFORMATION art. 9(a) (2006), <http://www1.ifc.org/wps/wcm/connect/b8faf60046a4ac3ab061f69111d74ae7/ProjectDisclosurePolicyEnglish2006.pdf?MOD=AJPERES> ("Consistent with the practice of commercial banks and of most public sector financial institutions (for their private sector investments), IFC does not disclose to the public financial, business, proprietary or other non-public information provided to IFC by its clients or other third parties.").

122. *See supra* note 96 and accompanying text.

123. *See* CAO ADVISORY NOTE, *supra* note 96, at 16.

124. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 16, ¶ 2, June 27, 1989, 1650 U.N.T.S. 383.

on Business and Human Rights.¹²⁵ These types of references to external norms demonstrate that the CAO, like many civil society human rights and environmental activists, sees a need for IFC/MIGA policies to better reflect international norms and standards.

IV. STRENGTHS OF THE CAO

Regardless of its shortcomings, the creation of the CAO was a positive step for people affected by IFC/MIGA projects. It has increased responsiveness to these populations primarily through implementation of three principles of GAL: (1) information generation and sharing, (2) allowing for non-decisional participation of affected communities, and (3) requiring the IFC/MIGA to give reasons supporting their responses to CAO findings. In this section I explain how each of these approaches of the CAO has helped reduce the problem of *disregard* of people affected by IFC/MIGA projects.

A. *Information and Disclosure*

The information generating and sharing, or transparency function of the CAO is an important contributor to its effectiveness. Under Stewart's framework, transparency does not create accountability on its own because it does not enable project-affected people or members of the public to seek a remedy when the IFC/MIGA fails to provide information or when disclosure reveals noncompliance with environmental and social standards.¹²⁶ But, as Stewart explains, public information disclosure can improve the operation of other responsiveness-promoting practices such as "market competition, general political mechanisms, and peer, public reputational, and social practices and incentives."¹²⁷ Because of the reputational impact of information disclosure, the IFC and MIGA are more likely to correct their own exposed deficiencies, even

125. See CAO ADVISORY NOTE, *supra* note 96, at 8 (noting that Ruggie's work presents an opportunity to update the Policy and Performance Standards).

126. See Stewart, *supra* note 46, at 32 (arguing that the provision of information is insufficient for accountability where the public cannot identify a "specified accountee" and obtain a remedy).

127. *Id.* at 33.

without being forced to do so.¹²⁸ Another benefit of transparency is that it can encourage public discourse by drawing the attention of NGOs or other groups that have greater capability to participate in the debate.¹²⁹ A third benefit of information generation and disclosure is to make settlement between the project company and project-affected people more likely. Having more information on the table helps provide incentives to settlement because project-affected people do not have to worry that there is some important issue, such as the total value of a project, that only the IFC/MIGA and/or the project company knows.

In each of its three roles, the CAO seeks to maximize disclosure of its findings, reports, assessments, and recommendations.¹³⁰ In some instances, the CAO is limited in what it discloses by confidentiality concerns embodied in IFC and MIGA disclosure policies, which require some business information to be held confidential.¹³¹ Despite these limits, the CAO's tendency to strive for maximum transparency¹³² has helped improve situations of *disregard*.

128. See, e.g., David R. Downes et al., *International Environmental Law*, 44 INT'L LAW. 503, 516 (2010) (stating that disclosure of IFC noncompliance in Palm Oil investments led the World Bank President to place a moratorium on investment in the sector).

129. See Stewart, *supra* note 46, at 33 (discussing the way in which "outside affected interests" can mobilize public support).

130. The CAO's Operational Guidelines explain that

[T]he CAO will make available to the stakeholders, including IFC/MIGA, the President and Board of the World Bank Group, and the public its assessment reports. Assessment reports include summaries of key issues and the perspective of the stakeholders on those issues (generally in a non-attribution format) and agreements reached, or decisions to refer to CAO Compliance. Disclosure contributes significantly to the transparency of the ombudsman role and acts as a powerful incentive to comply with the agreements reached.

CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.4.3 (referring to the Ombudsman role); see also *id.* § 3.4.1 (stating a preference for public disclosure in the Compliance role, within confidentiality constraints); *id.* § 4.3.2 (stating that transparency is a goal in all three roles).

131. *Id.* § 3.4.1.

132. *Id.* § 4.3.2 ("As a matter of principle, the Office of the Compliance Advisor/Ombudsman strives for maximum transparency across its three roles. However, this principle must also be balanced against the requirement . . . to avoid project-specific advice.").

In its Ombudsman role, the CAO uses a variety of tools to provide information to disputing parties as a means to move towards a settlement. As Ombudsman, it promotes information-sharing, joint fact-finding, and dialogue between affected people, the IFC/MIGA, and project companies.¹³³ In many instances, the issues raised by complainants relate to confusion about the current or anticipated impacts of an investment.¹³⁴ Community members in project areas may be upset by changes they see going on around them, partly because they have not been informed or included in the process and do not understand what is happening.¹³⁵ The CAO Ombudsman process can go a long way towards reducing the concerns of communities simply by helping them find and understand relevant information about the social and environmental impacts of the project. With more information on the table and available to affected parties, opportunities for settlement of the complaints may become more apparent.

The function of information described above is not unique to the CAO. The same principle applies to dispute resolution in any forum. For example, in the United States' court system, if parties are acting rationally and information is perfect, they will always settle their suits in order to avoid the unnecessary cost of trials.¹³⁶ If information is imperfect (e.g., one of the parties lacks some information needed to estimate the probability of victory), then the settlement window shrinks and parties are more likely to go through an expensive trial.¹³⁷

133. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.4.1.

134. *See, e.g.*, Compliant, *Colectivo Madre Selva – Marlin Mining Project*, ¶ 4, Guatemala/Marlin-01/Sipacapa (Jan. 1, 2005), <http://www.cao-ombudsman.org/cases/document-links/documents/Complaint-English-Translation1.pdf> (“The Guatemalan society in general was not adequately informed about the way in which the mining company would operate, or about the possible implications that said activity would entail The indigenous population was excluded from the design and evaluation of mining . . . plans and were not consulted on their priorities for their development”).

135. *See id.* (describing exactly the above concerns, raised by Colectivo Madre Selva, a civil society organization, in a complaint filed with CAO on behalf of the Indigenous Peoples from Sipacapa, Guatemala).

136. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 402 (2004) (“It is clear that if the plaintiff and the defendant have the same beliefs about the trial outcome, then there should always exist mutually beneficial settlements, because they can each escape trial costs by settling.”).

137. *See id.* at 401–07 (describing the sources and effects of parties' differing beliefs).

Just as information is a major tool that the CAO uses to solve problems raised in complaints, the court system of the United States uses the discovery process to provide both sides with the complete information necessary for inducing settlement.

Beyond simply pushing for company and project information to be released, the CAO helps develop solutions to shed light on new information. Following a complaint filed on behalf of residents of communities in the Leon and Chinandega Departments of Nicaragua regarding the health impacts of an agro-energy complex in the region, the CAO employed joint fact-finding as a means to resolve the conflict.¹³⁸ After establishing that the primary concerns of the communities revolved around the prevalence of kidney failure near the complex, the CAO assisted community members and the company in reaching an agreement to bring in independent credible experts to investigate the incidence of kidney failure and its causes.¹³⁹

In addition to facilitating information sharing and fact-finding, the CAO Ombudsman fosters transparency by disclosing assessment reports including the opinions of stakeholders and any agreements that are reached.¹⁴⁰ Publicizing these reports creates reputational incentives for the IFC/MIGA and project companies to follow the social and environmental policies and creates a forum for public discourse.

The CAO also fosters responsiveness by the project companies and the IFC/MIGA through information disclosure in its Compliance role. The CAO publicizes the current status of Compliance audits and then releases the audits to the public once the president of the World Bank Group has reviewed them.¹⁴¹ This function helps reduce problems of *disregard* by giving the banks reputational incentives to follow their own

138. See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, 2008–9 ANNUAL REPORT 14, 37 (2009) [hereinafter 2008–9 ANNUAL REPORT], http://www.cao-ombudsman.org/publications/documents/CAO2009AnnualReportEnglish_low.pdf (describing the mutually agreed response to the complaint); CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.4.1 (“Joint fact-finding is an approach that encourages the complainant, sponsor, and other stakeholders to jointly agree on the questions to be investigated, the methods and resource people to be used to conduct the investigation, and the way that information generated from the investigation will be used by the stakeholders.”).

139. 2008–9 ANNUAL REPORT, *supra* note 138, at 14.

140. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.4.3.

141. *Id.* § 3.4.2.

policies and by creating an opportunity for public discourse surrounding the disclosed information. This type of disclosure also helps the IFC and MIGA themselves to see problems within their institutions and self-correct.¹⁴²

One example of this CAO-prompted responsiveness is the CAO's involvement in the IFC-financed Wilmar Palm Oil projects in Indonesia.¹⁴³ NGOs, indigenous peoples' organizations, and small landholders in Indonesia filed a complaint alleging that the Wilmar Group's palm oil production activities violated several IFC standards and requirements.¹⁴⁴ In its Ombudsman role, the CAO facilitated agreements, including compensation from the Wilmar Group to two communities, and the Wilmar Group adopting improved operational standards.¹⁴⁵ The allegations that the IFC was not duly diligent in deciding to finance the project were unresolved and thus transferred to CAO Compliance.¹⁴⁶ The CAO appointed a panel of experts to conduct a thorough audit, which took almost a year. The audit found that the IFC failed to apply its own standards, ignored its own internal experts, and that its actions were counterproductive to its mandate of sustainable development.¹⁴⁷ Following an initially weak response from IFC management to the CAO report, which elicited pressure from International NGOs, the president of the World Bank Group placed a moratorium on IFC investments in the palm

142. The Advisory role of the CAO is itself an example of the how CAO findings and disclosures are used to look systematically at how the IFC/MIGA can operate more responsively toward affected communities. For a description of the Advisory role, see *id.* § 4.

143. For a description of the CAO's involvement, see THE CAO AT 10, *supra* note 6, at 39–42 (highlighting “The Wilmar Case in Indonesia and the Oil Palm Sector”).

144. *Id.* at 39.

145. *Id.* at 39–40.

146. *Id.* at 40.

147. See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, *Audit Report: CAO Audit of IFC's Investments in Wilmar Trading (IFC No. 20348), Delta-Wilmar CIS (IFC No. 24644), Wilmar WCap (IFC No. 25532), Delta-Wilmar CIS Expansion (IFC No. 26271)*, §§ 2.1.4–7, 3.2.1, C-I-R6-Y08-F096 (June 19, 2009) [hereinafter *CAO Audit Report*], http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Audit_Report_C_I_R6_Y08_F096_ENG.pdf (listing findings of non-compliance).

oil sector for the whole World Bank Group and initiated a global review of the sector.¹⁴⁸

The Uruguay Pulp Mill case provides a great example of the power of CAO Compliance disclosure to contribute to greater accountability through reputational effects.¹⁴⁹ In that case, the CAO released a Compliance report that found the IFC/MIGA to be out of compliance with its own policies (albeit in minor and correctable ways).¹⁵⁰ As a result, one of the private-sector financiers of the project, the ING Group, decided to pull their funding.¹⁵¹ ING was a member of the Equator Principles, which are modeled after IFC policies, and they were seen as not wanting to risk tainting their reputation by being involved in a project that was getting publicity for being environmentally and socially irresponsible.¹⁵²

In both its Ombudsman and Compliance roles, the CAO increases information benefits by monitoring agreements reached between parties, monitoring that the IFC and MIGA come into compliance following audits, and disclosing the results. This monitoring function, which, as mentioned, was an innovation when the CAO was established, strengthens the reputational incentives to play by the rules, fosters continued public discourse, and provides additional opportunities for the IFC/MIGA to self-correct.

B. *Non-Decisional Participation*

The second major strength of the CAO is its use of non-decisional participation in its Ombudsman role to allow requesters to play an active part in negotiating and solving their own problems. The idea of non-decisional participation simply means that affected communities are given opportunities to participate in the resolution of conflicts surrounding IFC/MIGA projects, but they are not given a right to vote on or veto any final decisions the IFC/MIGA makes. The problem-solv-

148. THE CAO AT 10, *supra* note 6, at 41; *see also* Downes et al., *supra* note 128, at 517 (“Given the systemic implications of the CAO findings [regarding the palm oil sector], the IFC is considering similar moratoriums on its investments in soy and cocoa production.”).

149. *See* Lee, *supra* note 93 (describing a non-profit’s recourse to both public pressure and the CAO to stop the construction of a paper pulp mill).

150. *Id.* at 357.

151. *Id.* at 364.

152. *Id.* at 364.

ing function of the CAO Ombudsman was a significant improvement over existing mechanisms, which only provided for compliance roles.¹⁵³ The CAO's flexible problem-solving function promotes the participation of project-affected people in joint fact-finding, dialogue, negotiation, mediation, and settlement.¹⁵⁴ As a general policy, the handling of any complaint deemed eligible for Ombudsman procedures begins by the CAO reaching out to the complainant and inviting them to discuss their concerns and participate in the problem-solving process.¹⁵⁵

Like the CAO's public information provision, the types of participation fostered through the CAO's Ombudsman role do not constitute an accountability mechanism under Stewart's definition, because they do not include the right for affected parties to hold the IFC/MIGA responsible for their decisions or impose a sanction for bad decisions. Nevertheless, Stewart's framework suggests four benefits of non-decisional participation through the CAO.¹⁵⁶ First, the presentation of evidence and argument by affected people may simply persuade the IFC/MIGA or project company decision makers to make better social and environmental decisions.¹⁵⁷ Second,

153. For example, the World Bank Inspection Panel was originally intended to be only a fact-finding and compliance review mechanism. The creation of the CAO and the Inspection Panel's own experience have led it to incorporate some consultation and problem-solving functions in recent years. See Elena Mitzman, *The Proliferation of Independent Accountability Mechanisms in the Field of Development Finance* 15 (Jean Monnet Working Paper 14/10, 2010), <http://centers.law.nyu.edu/jeanmonnet/papers/10/101401.pdf> (describing the evolution of the Inspection Panel's functions).

154. See CAO OPERATIONAL GUIDELINES, *supra* note 21, §§ 2.4.1–2 (listing the CAO Ombudsman's options for resolving complaints).

155. "The purpose of the assessment is to clarify the issues and concerns raised by the complainant . . ." If the CAO determines through the assessment that a collaborative resolution is possible, the Ombudsman will "[w]ork with stakeholders to produce an explicit agreement on a process for addressing the issues raised in the complaint . . ." *Id.* § 2.3.3.

156. See Stewart, *supra* note 46, at 34–35 (arguing that non-decisional participation "can promote the effectiveness of other responsiveness-enhancing practices" in four ways).

157. *Id.* There are many examples of the CAO's problem-solving role leading to acceptable outcomes for complainants through a non-decisional participation process. See, e.g., 2008-9 ANNUAL REPORT, *supra* note 138, at 29–30 (describing the CAO Ombudsman's involvement in the Interagua/Guayaquil project in Ecuador where the participatory problem-solving pro-

participation and argument can mobilize political influences (like pressure from World Bank member states) based on general public reputation.¹⁵⁸ Third, presentations by complainants to the CAO can provide a benchmark for judging the effectiveness and responsiveness of resulting IFC/MIGA decisions.¹⁵⁹ And fourth, participation itself may have intrinsic value to those communities participating because they at least have an opportunity to have their voices heard.¹⁶⁰ This final benefit is one that the CAO provides even if the responsiveness-promoting effects of CAO intervention are minimal or non-existent. This benefit—the intrinsic psychological value of participation—is a significant step forward from the situation before the CAO role was instituted, in which affected communities had no opportunity to be heard or participate.¹⁶¹

Non-decisional participation at the CAO is not primarily associated with its Compliance role.¹⁶² In the process of creating Compliance audits, the CAO may interview certain affected individuals, but that participation is limited to answering questions relating to the specific issues of the audit.¹⁶³ One way to increase the participation for project-affected people would be to allow complainants to respond to draft and final audit reports. CAO Operational Guidelines currently call for responses from IFC/MIGA management, but do not provide complainants an opportunity to comment (in agreement or disagreement) on the findings of the CAO.¹⁶⁴

I now return to a third procedural mechanism that promotes responsiveness at the CAO and the IFC/MIGA.

cess led to series of agreements between the complainants and the project company).

158. Stewart, *supra* note 46, at 34–35.

159. *Id.* at 35.

160. *Id.* at 35

161. Further research and case studies of CAO Ombudsman processes are necessary in order to gain concrete examples of the benefits of non-decisional participation.

162. See CAO OPERATIONAL GUIDELINES, *supra* note 21, § 3 (describing the compliance audit process, which includes a less participatory role for the complaining party than does the Ombudsman process).

163. *Id.* § 3.3.3.

164. See *id.* § 3.4.2 (describing the review process for audit reports).

C. Reason Giving

'Reason giving' from IFC/MIGA management, a third type of "other responsiveness-promoting" measure under Stewart's framework, increases the responsiveness of the IFC/MIGA to the CAO and project-affected people.¹⁶⁵ However, like transparency and non-decisional participation, Stewart explains that reason giving supports responsiveness without automatically ensuring accountability.¹⁶⁶

Requirements that IFC/MIGA management publicly give reasons in support of their response to CAO assessment reports, audits, and advisory reports have substantial benefits for reducing the *disregard* of adversely-affected people.¹⁶⁷ For one, reason-giving rules allow the affected people and their advocates to criticize the substantive norms used by management to justify decisions. This public criticism puts reputational pressure on the IFC/MIGA to rely on widely accepted norms, such as international treaties, global custom, or United Nations documents, which include stronger protections for human and environmental rights. Second, reason-giving rules encourage the IFC/MIGA to be consistent in which norms it relies on and limits decisions based on the organization's power or ad hoc bargains.¹⁶⁸ The overall reputational effect of the IFC/MIGA having to justify its decisions is to make it more likely that the IFC/MIGA will heed the CAO's recommendations.

Reason-giving requirements are present to some degree in all three CAO roles. The idea of reason giving is naturally present in the CAO's Ombudsman procedures. By bringing affected community members, the project company, and the IFC/MIGA together for dialogue, fact-finding, and negotiation, the CAO provides complainants an opportunity to hear reasons for the actions of the IFC/MIGA and borrowers. The Ombudsman does not make recommendations in its Ombudsman role, but it would be beneficial if IFC/MIGA

165. See Stewart, *supra* note 46, at 35 (arguing that "reason giving" can promote responsiveness).

166. *Id.*

167. See *id.* at 35 ("The giving of reasons for decisions enables those adversely affected to critique and challenge publicly the norms invoked and/or critique the decision as unsupported by the norms invoked.").

168. See *id.* ("Reasons also imply a degree of decisional consistency, which can be an additional check against arbitrary decisions.").

management were required to give reasons for straying from a plan of action agreed to through the process. This would further incentivize the IFC/MIGA to diligently adhere to agreements stemming from the CAO Ombudsman process.¹⁶⁹

Similarly, in its Compliance role, the CAO requires formalized reason giving from the IFC/MIGA. Once the CAO submits a final audit report, the IFC/MIGA has fifteen days to submit to the World Bank Group president a written response to the CAO report including findings of noncompliance and/or adverse social and environmental outcomes.¹⁷⁰ For example, following a CAO audit of the Wilmar Group Indonesian Palm Oil Project which found that the IFC had failed to follow its own policies leading to negative environmental and social outcomes,¹⁷¹ IFC management responded by maintaining that “production of palm oil. . .can provide core support for a strong rural economy, providing employment and improved quality of life for millions.”¹⁷² The reason-giving requirement gave civil society the opportunity to jump on the weak reasoning and response from IFC with demonstrations of the harmful impact on quality of life that the industry in fact had, which led the World Bank president to step in with a moratorium on supporting the palm oil industry.¹⁷³

169. Of course, IFC/MIGA is already incentivized by the CAO Ombudsman’s automatic monitoring of the implementation of Ombudsman agreements. See CAO OPERATIONAL GUIDELINES, *supra* note 21, § 2.4.5 (describing the monitoring process). Reason giving would have supplemental effects.

170. See *id.* § 3.4.2 (providing the timeline for review of an audit report); THE CAO AT 10, *supra* note 6, at 36 (“[T]he CAO has set up a process for IFC/MIGA to respond directly to the CAO’s audit findings with an action plan on how they intend to address any shortcomings identified.”).

171. The CAO’s audit report concluded that among other problems, the IFC applied a *de minimis* approach toward assessing each project’s supply chain, and that the IFC allowed commercial pressures to trump environmental and social concerns leading to inadequate IFC environmental and social due diligence. CAO AUDIT REPORT, *supra* note 147, §§ 2.7, 3.3.

172. Memorandum from Jyrki Koskelo, CFFVP, to Meg Taylor, Compliance Advisor Ombudsman, CCAVP (Aug. 4, 2009), [http://www.ifc.org/ifc/ext/agribusiness.nsf/AttachmentsByTitle/IFC_ManagementResponse_CAO_WilmarAudit.pdf/\\$FILE/IFC_ManagementResponse_CAO_WilmarAudit.pdf](http://www.ifc.org/ifc/ext/agribusiness.nsf/AttachmentsByTitle/IFC_ManagementResponse_CAO_WilmarAudit.pdf/$FILE/IFC_ManagementResponse_CAO_WilmarAudit.pdf).

173. See THE CAO AT 10, *supra* note 6, at 39–42 (explaining the CAO’s role in auditing the IFC response to the palm oil controversy).

In the Advisory role, the CAO had been disappointed that while private-sector actors, including the Equator Banks, were using CAO Advisory Notes for their own projects and investments, the IFC/MIGA itself had failed to take such initiative.¹⁷⁴ In 2009, the CAO pressured the IFC/MIGA to launch a system of formally responding to CAO Advisory Notes.¹⁷⁵ In June 2010, IFC responded to the CAO's Advisory Note on the Review and Update of IFC's Policy and Performance Standards.¹⁷⁶ The IFC Response goes through each of the findings and recommendations of the CAO, states whether the IFC agrees or disagrees, and provides an explanation of what action the IFC is taking and why.¹⁷⁷ For example, in response to the CAO's recommendation that IFC's approach to disclosure needs improvement, the IFC agreed and stated a commitment to creating more opportunities to update project information on the web.¹⁷⁸ This reason-giving procedure will help ensure that the CAO's advice is taken to heart and will increase the power of the CAO's Advisory role.

V. INFORMATION IMPROVEMENTS NEEDED IN THE CAO AND THE IFC/MIGA

While the CAO's information/transparency, non-decisional participation, and reason-giving practices have increased responsiveness of the IFC/MIGA in some cases, there is substantial room for improving the information function. Regarding transparency, two substantial problems exist. The first is that communities affected by IFC/MIGA projects are

174. *See id.* at 45, 54 (describing the use of Advisory Notes by outside actors); *see also* 2008–9 ANNUAL REPORT, *supra* note 138, at 2 (“We think that there should have been greater initiative taken by IFC and MIGA with respect to these Notes.”).

175. 2008–9 ANNUAL REPORT, *supra* note 138, at 2.

176. INTERNATIONAL FINANCE CORPORATION, IFC RESPONSE TO CAO ADVISORY NOTE ON REVIEW OF IFC'S POLICY AND PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY AND POLICY ON DISCLOSURE OF INFORMATION (2010) [hereinafter IFC RESPONSE], *reprinted in* INTERNATIONAL FINANCE CORPORATION, PROGRESS REPORT ON IFC'S POLICY AND PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY, AND ACCESS TO INFORMATION POLICY annex E, at 323 (2010), http://www1.ifc.org/wps/wcm/connect/4cb1bc80498009d7a80dfa336b93d75f/Phase_3_ANNEX_E_CAO.pdf?MOD=AJPERES.

177. *Id.*

178. *Id.* at 325.

often unaware of the IFC/MIGA's involvement and certainly do not know of the CAO as a resource for conflict resolution. This is a major obstacle because no amount of information will promote responsiveness if those affected by IFC/MIGA-funded projects are unaware of IFC/MIGA involvement, and hence do not know where to look for information. This is a problem that the CAO has acknowledged and is trying to improve.¹⁷⁹ Since 2008, the IFC has mentioned the CAO in the mandate letter for borrowers for Category A (most risky) projects, but community awareness is still a major problem.¹⁸⁰ This threshold problem could be alleviated by requiring borrowers supported by the IFC/MIGA to thoroughly publicize the involvement of the IFC/MIGA in their projects and refer people to more information on the institution and resources, including the CAO. Such a policy would increase the costs of borrowing from the IFC or of being insured by MIGA due to language, cultural, and geographical obstacles, but this is nevertheless absolutely necessary in order for the IFC/MIGA to be more responsive to project-affected communities.

The second transparency problem is the lack of timeliness of both the CAO and IFC/MIGA disclosures to the public. The CAO only publishes the results of Compliance audits once the president of the World Bank Group has cleared them.¹⁸¹ The Wilmar Group Palm Oil Project in Indonesia demonstrates the problem with the current practice.¹⁸² The report states: "In September 2008, based on the findings of its appraisal, CAO Compliance decided an audit of IFC was merited to examine whether IFC had indeed complied with its stan-

179. See 2008–9 ANNUAL REPORT, *supra* note 138, at 3 ("We have found through our outreach consultations that there is very little knowledge of the existence of IFC and MIGA, and communities and civil society do not know that the investments in their midst have the World Bank Group's involvement [W]e have persisted in asking IFC and MIGA to enhance efforts to ensure that communities know of their involvement, and are aware of the availability of, and access to, recourse where needed.").

180. See *id.* at 9 (noting the mention of the CAO in the IFC's Mandate letters); see also THE CAO AT 10, *supra* note 6, at 63 (presenting the results of a survey showing a lack of community awareness of IFC/MIGA). Mandate letters are signed between borrowers and IFC explaining the terms and conditions of the loan.

181. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 3.4.2.

182. See THE CAO AT 10, *supra* note 6, at 39–41 (describing the palm oil case).

dards and procedures.”¹⁸³ It was August 2009, eleven months later, when the CAO finally released the audit report (finding the IFC noncompliant with its policies) along with IFC’s response.¹⁸⁴ In the mean time, the IFC had made another loan (its fourth) to the Wilmar Group, allowing more harm to be done to project-affected communities.¹⁸⁵ As suggested in the section on CAO Compliance procedures, transparency would be enhanced and this type of problem would be reduced if the CAO publicly released preliminary drafts of audit reports as they were completed.

The CAO is restricted in its disclosure of information by the disclosure policies of the IFC and the MIGA. Despite claiming to have a “presumption in favor of disclosure,”¹⁸⁶ the IFC has a problematic policy of not disclosing information unless it falls within certain categories rather than having disclosure as the default and enumerating specific exceptions.¹⁸⁷ The World Bank has recently adopted a better approach in its Access to Information Policy, whereby all documents are made available to the public except for those falling within a limited list of exceptions.¹⁸⁸ The IFC should follow suit and implement a real presumption in favor of disclosure.

The IFC also suffers from a lack of timeliness in information disclosure. According to its disclosure policy, project information is to be publically disclosed before a project receives final approval of funding from the IFC Board of Directors, but after the IFC has determined that the client can be expected to conduct the project consistent with the Performance Standards. This implies that the information disclosure is made only after significant preliminary planning work has occurred.¹⁸⁹ Before presenting the project to the relevant inter-

183. *Id.* at 40.

184. *Id.*

185. *Id.*

186. INTERNATIONAL FINANCE CORPORATION, ACCESS TO INFORMATION POLICY ¶ 10 (2012), <http://www1.ifc.org/wps/wcm/connect/98d8ae004997936f9b7bffb2b4b33c15/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES>.

187. *See generally* INTERNATIONAL FINANCE CORPORATION, *supra* note 121 (laying out specific categories of information that should be disclosed rather than creating a general presumption of disclosure and specifying documents not to be disclosed).

188. THE CAO AT 10, *supra* note 6, at 63.

189. *See* INTERNATIONAL FINANCE CORPORATION, *supra* note 121, ¶ 12.

nal authority for final sign-off (usually the Board of Directors), IFC makes the Social and Environmental Information and the Summary of Proposed Investment publicly available on its website and in the relevant communities.¹⁹⁰ It is good that this information is made available before a project actually breaks ground; however, it is clear that the current policy can potentially create obstacles for community members and advocates who do not have complete information about a project until just before the financing is finalized. Project-affected people should be informed as early as the planning stages of a development project.

The Glamis Gold case provides an example of when earlier widespread disclosure of IFC's involvement would have helped prevent a harmful project from occurring. In that case, a public referendum was held after the project had begun in which 98% of community members living near the mine voted to have the mine project terminated.¹⁹¹ According to its principles, the IFC would have had to cancel its involvement based on lack of "broad community support" if such popular discontent with the project had been expressed earlier.¹⁹² Earlier publication (in the appropriate languages and media) would have likely led to earlier and more forceful resistance. Once the IFC has committed funds to a project and work has begun, it becomes very difficult and costly to cancel a project or cause the IFC to withdraw its support. A policy requiring the IFC to first widely publicize its consideration of a project and then wait a period of months before signing off on funding would allow potentially affected communities to mobilize and oppose harmful projects, when there is still a chance that the IFC could cancel its involvement.

Lack of awareness of IFC/MIGA involvement coupled with delayed or non-existent disclosure of documents hinders the CAO's ability to employ its transparency policies to pro-

190. *Id.*

191. Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 628 (2009).

192. *See id.* (noting the World Bank's "commitment stemming from the Extractive Industries Review of 'supporting only projects that have the broad public support of affected communities,' language that seems to mandate some significant level of consent or agreement of those populations to the initiation of the project.") (citation omitted).

mote greater responsiveness. Also, the non-decisional participation and reason-giving requirements that the CAO has implemented cannot fully impact the situation of *disregard* unless the “disregarded” are aware of and have access to the CAO. Increasing the awareness of the IFC/MIGA and the CAO among civil society and project-affected people and publicly disclosing reports and project information in a timely fashion are essential for maximizing the responsiveness of the CAO in its current structure and operation—without institutional overhaul.¹⁹³

With the three responsiveness-promoting mechanisms of transparency, non-decisional participation, and reason giving, the problems of *disregard* are minimized. Stewart explains how the three mechanisms work together:

The three elements are strongly complementary. Transparency permits more effective participation. Participation allows for presentation of evidence and argument that decision makers are under strong if informal incentives to address in the reasons that they give. The reasons given for decisions can be more effectively evaluated with the benefit of the information obtained through transparency and the benchmark provided by the evidence and argument presented by participants.¹⁹⁴

But even with the three procedural responsiveness-generating mechanisms, the CAO still does not qualify as establishing accountability under Stewart’s definition because people who are negatively affected by projects are not able to hold the IFC/MIGA directly responsible in the form of compensation or an injunction.¹⁹⁵ In the remainder of the paper, I focus on the possibility and the potential benefits of adding a judicial review function to the CAO’s existing roles in order to ensure real accountability.

193. See Stewart, *supra* note 46, at 36–37 (explaining that true accountability cannot be achieved by transparency, non-decisional participation, and reason giving requirements alone).

194. *Id.* at 35–36.

195. See *id.* at 36–37 (arguing that these three mechanisms do not “create substantive entitlements on the part of account holders”).

VI. SUGGESTIONS FOR RESPONSIVENESS AND ACCOUNTABILITY AT THE IFC/MIGA

A. *Problems Inherent in the Historical Immunity of the IFC/MIGA*

Part of the difficulty in creating effective accountability and responsiveness through the CAO's office has been that the office and its mandates were afterthoughts that came into existence only after the IFC and MIGA themselves were created and only because the institutions were found to be lacking accountability and responsiveness due to immunity from existing courts. International Financial Institutions (IFIs) such as the IFC are creatures of their member states and, as such, they are granted organizational immunity from suit in national courts.¹⁹⁶ In theory, this immunity is limited to actions that are functionally necessary for IFIs to meet their delegated responsibilities and achieve objectives of the member states; however, it has come to be honored as absolute immunity by national courts.¹⁹⁷ Because of this immunity, people adversely affected by an IFC/MIGA project cannot simply sue the IFC/MIGA in their local court.

As non-state entities, IFIs are also not subject to suit in any international tribunal. Instead, project-affected people have four theoretical options for holding the IFC/MIGA accountable (before considering the CAO and other IAMs): (1) persuade their home state to hold the IFC/MIGA accountable on their behalf; (2) persuade the IFC/MIGA to waive their immunity and agree to suit in one of its member states; (3) persuade a court to set aside the IFI/MIGA's immunity because the organization has acted *ultra vires* or with gross negligence or willful recklessness; or (4) persuade a domestic or international court to "pierce the veil" of the IFC/MIGA and hold member states (such as the largest contributor to the IFC/MIGA, the U.S.) accountable.¹⁹⁸ These options have not succeeded in the past and they are unlikely to be viable in the future as anything more than a one-time solution for some particularly egregious environmental or social failure.

196. Steven Herz, *Rethinking International Financial Institution Immunity*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 137, *supra* note 11, at 137.

197. *Id.*

198. See Bradlow, *supra* note 2, at 406 (outlining the four general procedures by which individuals may hold international institutions accountable).

With none of these options easily accessible to project-affected people, pressure built for IFIs like the IFC/MIGA to create some other means for people to hold the institutions responsible.¹⁹⁹ The creation of the CAO in the midst of a demand for responsiveness from civil society suggests that the IFC intended it to diffuse conflicts and help address concerns among project-affected people (and civil society advocates) that they were being disregarded.

The IFC created the CAO as a mechanism to avoid *disregard* of project-affected people and to resolve conflicts. According to its Operational Guidelines, the CAO's mandate is "to assist IFC and MIGA in addressing complaints by people affected by IFC/MIGA projects . . . in a manner that is fair, objective, and constructive, and [t]o enhance the social and environmental outcomes of IFC/MIGA projects."²⁰⁰ The CAO has gone a long way towards consistently fulfilling that mandate. Since 1999, the CAO has contributed to resolving seventy-six complaints related to forty-eight IFC/MIGA projects in almost thirty countries.²⁰¹ The CAO's Ombudsman role has been successful in responding to affected people and settling

199. See Bissell & Nanwani, *supra* note 37, at 9 ("[T]he purpose of these mechanisms is to address the absence of access to effective remedies by individuals negatively impacted by bank projects due to an MDB's immunity from local jurisdiction."); THE CAO AT 10, *supra* note 6, at 4 (statement of Meg Taylor, Vice President, CAO) (stating that dissatisfaction with the resettlement caused by the Pangue Dam project and civil society pressure on the World Bank in Washington led the institution to consider an accountability mechanism for the private sector arms of the World Bank).

200. CAO OPERATIONAL GUIDELINES, *supra* note 21, § 1.1. Note that the mandate does not directly refer to uncovering violations of IFC or MIGA policies. In contrast, the World Bank Inspection Panel has the mandate of "carry[ing] out independent investigations of Bank-financed projects to determine whether the Bank is in compliance with its operational policies and procedures, and to make related findings of harm." The Bank's Board of Executive Directors then decides how to proceed based on the findings. *The Inspection Panel: Panel Resolution and Mandate*, THE WORLD BANK (Apr. 20, 2012, 3:15 PM), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173262~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>.

201. THE CAO AT 10, *supra* note 6, at 2.

their issues.²⁰² Its innovative, flexible approach has served as a model for other IAMs.²⁰³

As the CAO has gained experience, it has taken steps to improve its effectiveness and come close to fulfilling its mandate. For example, the Compliance and Advisory functions at the CAO recently have become more effective due to the introduction of the requirement that the IFC/MIGA respond, with reasons, to CAO audits and advisory reports.²⁰⁴ As demonstrated by the moratorium on World Bank Group investment in the Palm Oil Sector, the World Bank president supports the Compliance role of the CAO and takes its findings seriously.²⁰⁵ The IFC/MIGA, as well as some independent private-sector banks, now rely on CAO advisory reports and guidelines.²⁰⁶

In the previous section of this paper, I discussed three procedural rights—transparency, non-decisional participation, and reason giving—that could, if fully implemented within the CAO, lead to a nearly adequate level of responsiveness for adversely affected people. These responsiveness-generating mechanisms have been implemented by the CAO, albeit not always completely, and they are helping to reduce the problem of *disregard*. The perfection of these three principles along with the development of a decision rule to link IFC/MIGA policies to a UN body or international law would almost completely eliminate the problem of *disregard* of project-affected people. Project-affected communities and their advocates should continue to focus their efforts on increasing the use of these systems.

202. See *id.* at 2–3 (listing the CAO's accomplishments).

203. See 2008–9 ANNUAL REPORT, *supra* note 138, at 10 (describing the CAO's hosting of the 6th Annual Meeting of the Independent Accountability Mechanisms and the discussion of dispute resolution and mediation techniques used by the CAO).

204. See, e.g., IFC RESPONSE, *supra* note 176 (serving as an example of the IFC giving reasons for its decisions on whether or not to accept CAO recommendations for revising sustainability norms).

205. See THE CAO AT 10, *supra* note 6, at 41 (noting that the President of the World Bank suspended IFC financing in the oil palm sector in response to a CAO investigation).

206. See *id.* at 44–45 (describing the influence of CAO advice on the IFC and external actors).

B. *Options for Solving the Immunity Problem at the IFC/MIGA*

The procedural measures alone, however, without some “hard” force, are insufficient to allow project-affected people to hold the IFC/MIGA accountable, according to Stewart’s theoretical formulation. If the IFC/MIGA has chosen to adhere to a general principle that those with power must be held accountable for the way they use it, then there is need for some further solution to the immunity problem of IFIs (and the IFC/MIGA in particular).²⁰⁷ Some seemingly viable options include re-tooling the CAO to perform a judicial review function, creating a new tribunal/institution to hold the IFC/MIGA accountable, or lobbying the IFC/MIGA and their member states to waive their immunity in national courts.²⁰⁸ In the remainder of this section I describe these proposed approaches that might be utilized to bring full accountability to the IFC/MIGA.

One possibility is that organizational immunity is necessary and desirable for IFIs, and we should therefore rely on national governments to be more effective at allowing project-affected people to seek accountability and remedies from the project companies, rather than from the IFI lenders. Indeed, the CAO has seen increased involvement of governments in enforcing national and international environmental and social norms over the years.²⁰⁹ If national governments had strong social and environmental safeguards and effective court systems, project-affected people could hold project companies accountable in national courts.²¹⁰ This would solve the problem

207. Some people believe that the CAO can be sufficiently responsive without actually giving project-affected people the right to force IFC/MIGA to account for their actions by cancelling projects that violate policies and paying remedies for harms done. See Mitzman, *supra* note 153, at 43 (“The most viable solution . . . might therefore be that of working within the IAM model in order to strengthen it . . .”).

208. See Enrique R. Carrasco & Alison K. Guernsey, *The World Bank’s Inspection Panel: Promoting True Accountability Through Arbitration*, 41 CORNELL INT’L L.J. 577, 618–27 (2008) (suggesting improvements in accountability through MDBs waiving immunity and submitting to arbitration).

209. See 2008-9 ANNUAL REPORT, *supra* note 138, at 2 (noting an increased involvement of governments in complaint resolution).

210. The legal systems of modern developed countries are better able provide remedies to people who are adversely affected by private-sector projects. See, e.g., David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341 (2011) (describing

of *disregard* of affected people because businesses themselves would be held responsible for compensating victims of legal violations. The primary weakness of this approach is that IFC/MIGA projects all take place in developing world countries where institutional capabilities to protect vulnerable populations through domestic laws and courts are often lacking. The mission of the IFC and the MIGA is to increase social and economic development in the Third World so it is incumbent on those institutions to ensure that their activities are not harmful to those goals, even when domestic governments lack the ability to implement and enforce domestic safeguards.²¹¹

Within the hypothetical remedy of remodeling the CAO is the possibility of allowing the CAO in its Compliance role to find fault in IFC/MIGA behavior and issue remedies, including the postponement or cancellation of projects. This would involve the IFC/MIGA granting the CAO power to declare a project noncompliant and to determine whether compensation and/or cancellation of the project would be warranted. Bradlow suggests that this arrangement would be problematic because the CAO as a single office might find its various roles incompatible.²¹² Currently, this arrangement does not pose such a problem because, in its compliance role, the CAO office does not make findings of fault or determine liability; it only indicates when IFC/MIGA action is falling short of their policies.²¹³ Ombudsman functions would not fit well with a fault-finding compliance review function because the IFC and the project company would be unwilling to participate in the problem-solving (Ombudsman) phase if information from that phase were likely to be used to find fault in future Compliance proceedings.²¹⁴ Allowing the single office of the CAO to

the compensation of the many parties harmed by the 2010 BP oil spill in the United States.)

211. The IFC states that its mission is “to promote sustainable private sector investment in developing countries as a way to reduce poverty and improve people’s lives.” See Press Release, International Finance Corporation, Good Business (Apr. 12, 2001), <http://www.ifc.org/ifcext/agribusiness.nsf/Content/SelectedPR?OpenDocument&UNID=BF6B9FE06E06FFCF85256A2D00027842>.

212. Bradlow, *supra* note 2, at 478.

213. See CAO OPERATIONAL GUIDELINES, *supra* note 21, § 3.4.2 (describing the contents of an audit report); see also *id.* § 3.3.3 (describing the substantive scope of compliance audits).

214. Bradlow, *supra* note 2, at 478.

unilaterally assess damages and/or cancel IFC/MIGA projects could discourage participation in the problem-solving Ombudsman phase. As Bradlow proposes, a better solution is one modeled after the African Development Bank's IAM, where a director handles the problem-solving function and later recommends that the board of the Bank appoint experts from a roster to do the compliance review.²¹⁵ The independence of the panel of experts would allow for an effective audit when necessary without chilling the participation of the parties in a preliminary problem-solving phase.

Another possible route toward full accountability would be to create a tribunal to serve an appeals function to the CAO and do judicial review of IFC/MIGA decision making. This could be done in various ways, and I will identify two that have been suggested. The first is the creation of a World Bank review tribunal that would serve to review World Bank public-sector projects as well as the IFC/MIGA's private-sector projects. The Inspection Panel and CAO would remain as problem-solving and advisory mechanisms, and the tribunal would be called upon to review World Bank behavior when the problems are not resolved. This tribunal would require a new founding mandate created by the World Bank Group and could be designed to allow for adoption by other MDBs.²¹⁶

The second route to allowing for judicial review of IFC/MIGA action related to its environmental and social performance is to expand the jurisdiction of the World Bank Administrative Tribunal, which issues final binding decisions on contract complaints filed by World Bank Group employees.²¹⁷ While it would take some effort to expand the Administrative

215. See *id.* at 479–83, 486 (describing the model and stating that it is the “best qualified to satisfy all the elements required for effective inspection mechanisms”).

216. John W. Head has proposed such an international tribunal for all MDBs. See JOHN W. HEAD, *LOSING THE GLOBAL DEVELOPMENT WAR: A CONTEMPORARY CRITIQUE OF THE IMF, THE WORLD BANK, AND THE WTO* 283 (2008) (proposing the creation of a single tribunal to review all MDBs).

217. See Eisuke Suzuki, *Responsibility of International Financial Institutions under International Law*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 63, *supra* note 11, at 96–101 (proposing the expansion of the jurisdiction of the IFIs' internal administrative tribunals to cover claims brought by external parties, and the expansion of the jurisdiction of the World Bank Administrative Tribunal to serve as an appellate body for the IFI tribunals).

Tribunal's jurisdiction to a completely different type of dispute, it may be easier than the creation of an entirely new tribunal because of the structure and procedures of the Administrative Tribunal are already in place.

Of these two options, the creation of a new review tribunal covering all World Bank Group projects and open to expansion to other MDBs seems to have several advantages. The first is that the tribunal would be able gain institutional knowledge from one MDB's projects and apply them to all the others. Because the scope of its subject matter jurisdiction would be limited to social and environmental sustainability it would be able to gain specialized expertise in how to evaluate projects on those dimensions and decide on appropriate remedies. This option also has the advantage of potentially solving the accountability at all the MDBs rather than only at the World Bank. Of course, that advantage is accompanied by the difficulty of setting up a framework that is agreeable to many different MDBs.

The option of expanding the World Bank Administrative Tribunal to environmental and social cases does not share the benefit of having a limited focus on those cases. Nevertheless, this option may be superior for the simple reason that a tribunal is already in place and less institutional change would be required for it to begin hearing cases that the CAO is unable to resolve.

VII. CONCLUSION

The CAO has in the last ten years come a long way towards living up to the principles of GAL. The principles of information, non-decisional participation, and reason giving have been implemented to reduce the problem of disregarding the interests of those individuals and groups that are adversely affected by IFC-funded or MIGA-insured projects. By expanding the application of those GAL principles (especially in the area of transparency) and by instituting a decision rule linking IFC/MIGA environmental and social policies to international norms such as those of the UN Secretary General on Human Rights and Transnational Corporations, the IFC/MIGA and CAO can become highly responsive to the environmental and social concerns of project-affected people.

Nevertheless, with immunity from domestic courts and international tribunals, ongoing pressure for the full accountability of MDBs such as the IFC remains unrelieved by the CAO.²¹⁸ It is a question for stake holders and policy makers to determine whether the solution lies in preparing national governments to hold project companies themselves directly accountable; or lobbying MDBs to waive their immunity in national courts; or arguing for granting IAMs judicial review power; or pushing for institutional reform such as an expanded World Bank Administrative Tribunal with the power to review MDB violations. I believe that expanding the Administrative Tribunal to hear environmental and social cases that the CAO is unable to resolve, is the best place for advocates of full accountability to focus their attention, primarily because it requires the least drastic change of World Bank structure. Nevertheless, while falling short of accountability as I have used the term, the CAO is an example of the potential of GAL principles to greatly decrease problems of *disregard*.

218. See INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW, *supra* note 11 (presenting a collection of essays examining the relationship of international financial institutions, including MDBs, to international law, and addressing concerns about their immunity under both domestic and international law).