



CAO ASSESSMENT REPORT

Regarding Concerns in Relation to IFC's PL IV Advisory Project (# 602084) in Panama

April 2019

Office of the Compliance Advisor Ombudsman
for the International Finance Corporation and the
Multilateral Investment Guarantee Agency
www.cao-ombudsman.org

About CAO

The Office of the Compliance Advisor Ombudsman (CAO) is the independent accountability mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), the private sector arms of the World Bank Group. CAO reports directly to the President of the World Bank Group, and its mandate is to assist in addressing complaints from people affected by IFC/MIGA-supported projects in a manner that is fair, objective, and constructive, and to enhance the social and environmental outcomes of those projects.

For more information, go to www.cao-ombudsman.org.

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LIST OF ACRONYMS

ETESA	Electrical Transmission Company - <i>Empresa de Transmisión Eléctrica, Sociedad Anónima</i>
IFC	International Finance Corporation
MODETEAB	Movement for the defense of the territories and ecosystems in Bocas del Toro - <i>Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro</i>
CIEL	Center for International Environmental Law
ACD	Alliance for Conservation and Development - <i>Alianza para la Conservación y el Desarrollo</i>
FPIC	Free, Prior and Informed Consent

1. OVERVIEW

In June 2018, CAO received a complaint from two local organizations, with the support of a national and an international NGO, on behalf of indigenous communities in Panama (the Complainants) who feel that they will be affected by a transmission line being developed by Empresa de Transmisión Eléctrica S.A (ETESA or the Company), the national transmission company. IFC is providing Advisory Services to support ETESA to structure a public-private partnership (PPP) for the financing, construction, and operation of a 330-kilometer transmission line across the Atlantic coastal region. The complaint raises concerns that indigenous communities who live outside the Ngäbe-Buglé Comarca (the Comarca)¹, have not been consulted about the transmission line and its potential impacts. The Complainants also raise concerns regarding the process of Free, Prior and Informed Consent (FPIC) that ETESA is pursuing in the Comarca, environmental and social impacts of the transmission line, and IFC's compliance with its Performance Standards. CAO found the complaint eligible in July 2018.

During the assessment phase, the Complainants expressed their interest in engaging with ETESA through a CAO-facilitated dispute resolution process. In response, ETESA indicated a preference to address the Complainants' concerns within the consultation frameworks that are already under way, or provided for by the law, and has not expressed an interest in a CAO-facilitated dispute resolution process. Pursuant to CAO's Operational Guidelines, the complaint will be referred to CAO Compliance for appraisal of IFC's performance.

2. BACKGROUND

2.1 The Project

According to IFC disclosures, the Project consists of Advisory Services to ETESA to structure a PPP for a fourth transmission line, called Panama Line IV (the Fourth Electrical Transmission Line). This involves the construction, operation, and maintenance of a double-circuit 500 kilovolt (KV) (AC) transmission line over 330 kilometers (km) crossing the Atlantic coast from Chiriquí Grande to Panama III substations, connecting the west side of Panama, where the power generation takes place, to the national grid. With an estimated cost of US\$500 million, with operations expected to begin in 2023, it will be part of the Interconnected National System (INS).

The Project operation will be divided in two stages:

a) Stage 1: Solving redundancy issues - a transmission line from Chiriquí Grande substation of 230KV and the extension of substation Panama III 230KV will be operational in 2020.

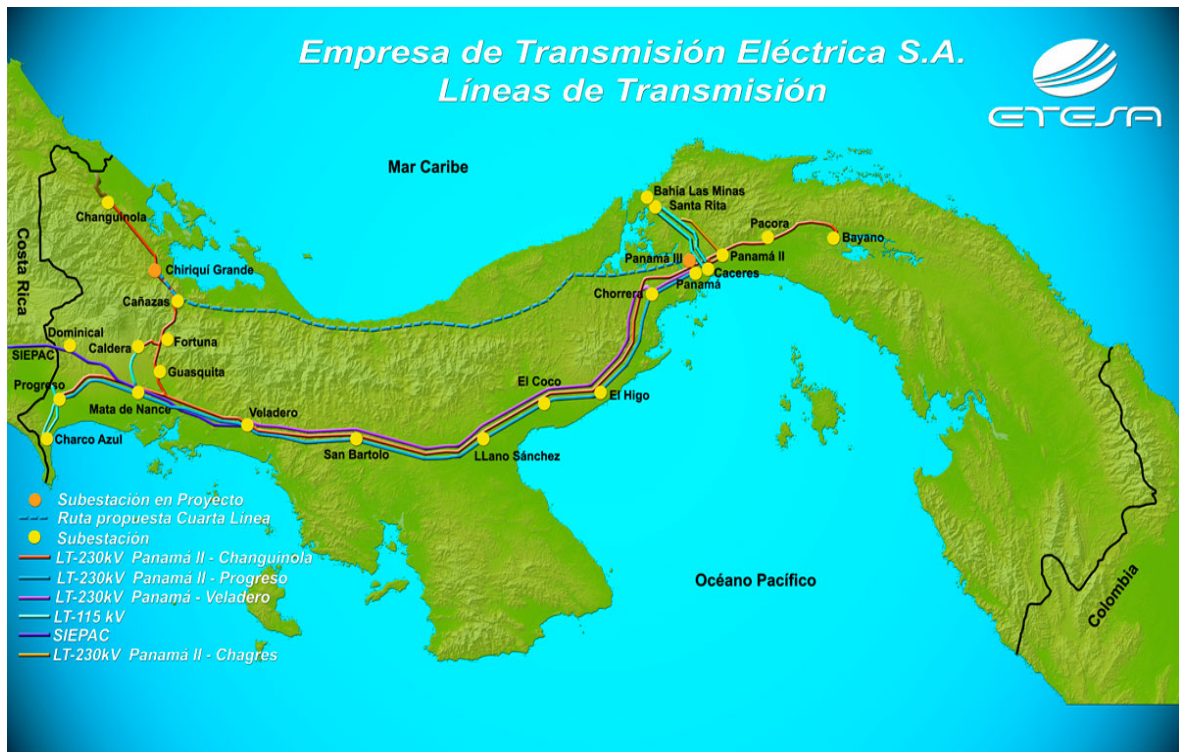
b) Stage 2: Energization to increase capacity of both substations to 500 KV. New equipment will be added to the Panama III substation to receive the new energy.

According to IFC, its Advisory Services will be delivered through a phased approach that will comprise:

¹ The Ngäbe-Buglé Comarca is a territory created and demarcated by Law No 10 dated March 7, 1997, which is ruled in a traditional way and where traditional standards of indigenous people are applied. The Ngäbe-Buglé Comarca encompasses three regions: Ño Kribo, Kadridri, and Nidriini.

Phase 1: Technical, legal, and financial due diligence, underpinning the development of a Transaction Structure that will incorporate feedback from market sounding, and also a cost benefit analysis. Phase 1 will be considered a success once the Transaction Structure is approved by the client and the Project moves to Phase 2.

Phase 2: Project promotion, elaboration of the bidding documents, including the concession contract; and support throughout the bidding process until commercial closing. Phase 2 will be considered a success once the Project is awarded to a private investor and the Project documents have been signed.



- Substation under construction
- Proposed route for Line IV
- Substation
- Transmission line-230kV Panama II-Changuinola
- Transmission line-230kV Panama II-Progreso
- Transmission line-230kV Panama II-Veladero
- Transmission line-115kV
- SIEPAC
- Transmission line-230kV Panama II-Chagres

Source: ETESA

2.2 The Complaint

The complaint was filed by the Ngäbe, Buglé, and Campesina Territorial Organization of the Northern Region of Santa Fe de Veraguas² (*Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe de Veraguas*) and the Movement for the Defense of the Territories and Ecosystems of Bocas del Toro (MODETEAB³ - *Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro*), on behalf of the indigenous communities in the areas of Chiriquí Grande (who live inside the Ngäbe-Buglé Comarca) and Northern Santa Fe (who live outside the Ngäbe-Buglé Comarca and who demand that the State of Panama recognize their territories as indigenous territory). The Complainants received the support of the Alliance for Conservation and Development (ACD⁴ - *Alianza para la Conservación y el Desarrollo*), located in Panama City, and the Center for International Environmental Law (CIEL), with headquarters in Washington, DC, USA.

The complaint indicates that the indigenous people who are demanding that the Government of Panama recognize their territories have not been consulted on the Fourth Electrical Transmission Line and its potential impacts. It also raises a series of concerns regarding the process of Free, Prior and Informed Consent (FPIC) that ETESA is pursuing with the leaders of the Ño Kribo region of the Ngäbe-Buglé Comarca, direct and indirect environmental and social impacts of the Fourth Electrical Transmission Line and the IFC's lack of compliance with its Performance Standards.

The issues raised by the Complainants during the assessment are described in greater detail below.

3. ASSESSMENT SUMMARY

3.1 Methodology

The aim of the CAO assessment is to clarify the issues and concerns raised by the Complainants, gather information on the views of different stakeholders, and determine whether the Complainants and the IFC client would like to pursue a dispute resolution process facilitated by CAO, or whether the complaint should be referred to CAO's Compliance function for appraisal of IFC's performance (see Annex A for CAO's complaint-handling process).

In this case, CAO's assessment of the complaint included:

- a review of the project documentation of IFC, which provides advisory services to ETESA;
- a meeting in Playita Guabal with representatives of the Ngäbe, Buglé, and Campesina Territorial Organization of the Northern Region of Santa Fe de Veraguas and approximately 120 members of the different communities present in the region;
- a meeting with representatives of MODETEAB and ACD;
- a meeting in Pueblo Mesa with approximately 70 members of the communities living in the Ngäbe-Buglé Comarca;
- consultations with CIEL;
- meetings with the ETESA team in charge of the project;

² The Ngäbe, Buglé, and Campesina Territorial Organization of the Northern Region of Santa Fe de Veraguas is made up of indigenous communities located in Northern Santa Fe that do not have formal territorial recognition and are not included within the boundaries of the Comarca.

³ MODETEAB stated that its purpose as an NGO is to protect the environment and fight for the rights of indigenous people in Bocas del Toro Province, and in Panama in general.

⁴ ACD stated that it is an NGO founded in May of 2002 by a group of Panamanian scientists and activists concerned about knowledge management for conservation purposes and promoting alternative development models that benefit the country's vulnerable communities.

- meetings with the IFC project team (a meeting in Washington, DC at the beginning of the assessment period; a meeting in Panama City during the assessment trip, and a follow-up meeting in Washington, DC in March 2019);
- a meeting in Panama City with representatives of national NGOs working to protect the environment;
- a meeting with the National Secretary of Energy; and
- a drive from Santa Fe de Veraguas to Calovébora.

This document summarizes the views heard by the CAO team, and describes next steps based on the parties' decision. This report does not make any judgment on the merits of the complaint.

3.2 Summary of Views

3.2.1 Complainants' perspective

The members of communities living outside of the Comarca in the Northern Region of Santa Fe gathered to meet CAO in Playita Guabal and the members of communities living inside the Ngäbe-Buglé Comarca gathered in Pueblo Mesa. They raised a number of concerns, some held in common, and others as individuals.

Common concerns

The Complainants claim that ETESA did not provide them with information on the project, its impacts and benefits for the communities. They believe that the impacts will be significant, in particular because they think that the Fourth Transmission Line is part of a larger project known as the Conquest of the Atlantic (*Conquista del Atlántico*), which will include the construction of a highway, real estate speculation, and new mining or hydroelectric projects to feed the transmission line, placing their territories at risk. As for benefits, they consider it unfair that there is no budget for addressing the communities' basic needs in terms of health, education, and infrastructure, but that there are resources for building a transmission line that will not bring them any benefits, not even electricity. In this regard, during the assessment, they voiced their concern about the reasons the World Bank might have for financing this project. They added that they lack information regarding the route of the Fourth Electrical Transmission Line, and do not know who will be affected by it and how.

They indicated that in the past they have not received truthful information regarding the construction of hydroelectric projects, the opening of highways, or the creation of national parks, among other things. They stated that, in all cases, they have received promises of development benefits that have never been fulfilled. They fear that this project will be no exception.

They also expressed concern about the fact that ETESA has not conducted an assessment of the social and environmental impacts of the Fourth Electrical Transmission Line project.

Specific concerns

A. Specific concerns of the Complainants living outside of the Comarca in Northern Santa Fe

The members of communities living outside of the Comarca in the Northern Santa Fe Region stated that the fact that ETESA has neither approached nor started a dialogue with them is a lack of respect for their rights as indigenous people. They argued that, although they are not within the Comarca, they are indigenous people with a traditional organization that seeks to

protect and defend their territory, which encompasses the areas of Calovébora, Río Luis and El Cuay, and that they are entitled to an FPIC process for any project that traverses their territory. They explain that they repudiate the attitudes of ETESA and other companies because they ignore the existence of indigenous people in this zone and promote and execute their projects arbitrarily without measuring the consequences for future generations.

They indicated that the Government has not been willing to proceed with the recognition of their territory and the existence of the traditional structure of their communities. They also emphasized that there is a pattern of the Government imposing projects illegitimately in their native territory, and that they have felt deceived, in particular with the construction of the road that goes to Calovébora and the creation of the Santa Fe National Park. In these cases, they indicated that they were told about the potential benefits, but were not informed about the negative impacts, which only became apparent once the projects had already been completed. They mentioned by way of example that the construction of the road resulted in the destruction of nature in the zone (mostly trees being cut), as well as pollution of the nearby rivers, and that it unleashed real estate speculation and hoarding of land.

The Complainants of the Northern Santa Fe area expressed an interest in engaging in a CAO-facilitated dispute resolution process with ETESA.

B. Specific concerns of Complainants living inside the Ngäbe-Buglé Comarca

Members of communities belonging to the Comarca claim that the construction of the Fourth Electrical Transmission Line contravenes the provisions of Law No. 10 of 1997, which created the Comarca and its Executive Decree No. 194, and of Law No. 11 of March 26, 2012, which established a special regime for the protection of mineral, water and environmental resources in the Comarca. They also state that the FPIC process which ETESA is conducting is not valid nor in compliance with Law No. 37 of August 2, 2016, which established free, prior and informed consent, because, as they allege, the leaders recognized by the Government, with whom ETESA is conducting the process, do not represent their communities. They further allege that these leaders are taking advantage of the benefits that ETESA is giving them to participate in the process (free trips to Panama City, including hotels and per diem expenses), and are making decisions without considering the voice of their people. During the assessment, they indicated that a large part of the people in the Comarca rejected the project in very large meetings organized by the traditional congresses in Coclesito, Caña Sucia, and Kankintú in August 2018.

In addition, they claim that the meetings organized by ETESA in the communities have a restricted scope, with information presented in Powerpoint format in which the ETESA representatives only present the project as a *fait accompli*, and do not engage in any consultation with the communities. They also claim that everything is done in Spanish and not in their local languages, and that for some people it is hard to understand. Furthermore, they stated that neither ETESA nor the indigenous leaders with whom ETESA is conducting the process has handed them documents about the project, and that all information is only provided verbally, which they consider a lack of respect. As for the benefits, they mentioned that they have heard talk of a promise of US\$17 million in compensation for the Comarca but maintain that the Comarca leaders will not administer it appropriately. They also expressed that, with the construction of the third transmission line, ETESA did not fulfill its commitments to the communities, and the benefits that it promised arrived late or did not arrive at all.

The Complainants living inside the Ngäbe-Buglé Comarca indicated that they wish to engage in a dispute resolution process with ETESA facilitated by the CAO, and that they would also like the complaint to be referred to CAO's Compliance function.

3.2.2 ETESA's perspective

ETESA noted that it is a company entirely owned by the state. Its focus is on the transport of high voltage electricity from the point of energy generation to the point of reception by the distribution company.

A. Information about the Fourth Electrical Transmission Line

According to ETESA, the Fourth Electrical Transmission Line project arose in response to the need to provide the system with redundancy. ETESA indicated that most of the energy generating projects are in the western part of the country, whereas electricity needs are in the east, in Panama City. The three existing electrical transmission lines go along the country's Pacific coast, and consequently, the system is vulnerable to operating risks. To endow the system with greater reliability and stability, and to ensure good quality service for electricity consumers, it is necessary to build a new electrical line. The Fourth Electrical Transmission Line will transport energy produced by the existing projects (hydroelectric projects, among others) in the Bocas del Toro and Chiriquí regions to the main substations in the cities of Panama and Colon, as well as the country's main grid. With an estimated cost of \$500 million, the Fourth Electrical Transmission Line will be part of the Interconnected National System.

The Fourth Electrical Transmission Line will go through the Ño Kribo Region of the Ngäbe-Buglé Comarca, which is a territory officially recognized by the Government of Panama as indigenous territory, with its own laws and a structure of traditional representation. The Comarca encompasses three regions: Ño Kribo, Kadridri, and Nidriini.

ETESA indicated that the purpose of the Fourth Electrical Transmission Line is to increase transmission capacity in order to guarantee that companies responsible for electricity distribution will have enough energy so that it can be distributed throughout the country.

B. The FPIC process conducted by ETESA with delegates of the Special Commission and the communities of the Ño Kribo Region of the Ngäbe-Buglé Comarca

ETESA stated that, since December of 2017, it has been conducting a careful and thorough FPIC process pursuant to what was established in Law No. 37 of August 2, 2016, with the delegates of the Special Commission ratified in the Congress of the Ño Kribo Region through Resolution 0004-06-2018 CRÑ and the communities of the Ño Kribo Region of the Ngäbe-Buglé Comarca. The goal of such process is to make the Fourth Electrical Transmission Line project known, as well as to jointly consider, consult, assess, and work towards consensus to determine where the transmission line should go, and how the indigenous communities affected by the project should be compensated.

ETESA expressed they began consultations on this project with the support of the Government's Vice Ministry for Indigenous Affairs and the Ministry of Environment, who put them in touch with the authorities of the Ño Kribo Regional Congress, specifically its Board of Directors.

According to ETESA, the Congress of the Ño Kribo Region convened an Extraordinary Congress on April 12 and 13, 2018, in Samboa, district of Jirunday, during which it appointed a commission (the "Outreach Commission") to discuss with ETESA technicians the routing⁵,

⁵ ETESA indicated that the Presidential Decree establishing the project's area of influence specifically exempts the Comarca to enable this Outreach Commission to be the body that determines where the transmission line will go inside the Comarca. The Outreach Commission has plotted GPS points on the ground to mark the route of the transmission line and demarcate sacred areas to be avoided.

benefits and environmental aspects of the Fourth Electrical Transmission Line and issued Resolution No. 0002-03-2018CRÑ.

Subsequent to this, on June 15, 2018, the Board of Directors of the Ño Kribo Regional Congress met in Cañaverel, district of Kusapín, to elect a commission (the “Special Commission”) to discuss the collective social benefits, and Resolution No. 0004-06-2018 CRÑ was issued.

In this regard, ETESA noted that the winner of the tender for the PPP will have to comply with any agreements that ETESA may have reached with the Special Commission that represents the plenary of the Ño Kribo Regional Congress of the Ngäbe-Buglé Comarca.

According to ETESA, members of the commissions (the Outreach Commission and the Special Commission) have managed to achieve good handling of the project’s technical, environmental and social aspects. ETESA added that the Special Commission is maintaining radio spaces to disseminate information about the project and announce informational meetings in the communities that live within the project’s area of influence. According to ETESA, members of various communities in the Ño Kribo region have attended these informational meetings, where they were given the opportunity to voice their concerns, which have then been relayed to ETESA by the Special Commission.

In ETESA’s opinion, the Complainants who live inside the Ngäbe-Buglé Comarca are part of the FPIC process, given that their delegates are members of the Ño Kribo Regional Congress, who reported their concerns to ETESA via the members of the Special Commission.

According to ETESA, the FPIC process is expected to conclude before May of 2019.

ETESA indicates that it has made available all information concerning the Fourth Electrical Transmission Line so that it can be disseminated within the Ño Kribo Region of the Ngäbe-Buglé Comarca and people can find out about progress of the process. It is being done in such a way that the delegates of the Special Commission can be the ones to inform the communities of the Ño Kribo Region. Accordingly, ETESA recommends to the Complainants who live inside the Comarca to share their concerns with the Special Commission of the Ño Kribo Regional Congress.

C. Engaging with affected communities outside the Ngäbe-Buglé Comarca

With respect to the people living outside the Comarca (in the North of Santa Fe), ETESA stated that the question of territorial recognition falls outside of its mandate and its activities, established in Law No. 6 of February 3, 1997, which relate to the concessions that the National Authority of Public Services (ASEP – *Autoridad Nacional de los Servicios Públicos*) has granted to ETESA. It noted, however, that pursuant to applicable law, any person within the area of influence of the Fourth Electrical Transmission Line will be informed, including any civil society organization or organization of any other kind, as requested.⁶ Such information will be provided as part of the activities related to the Environmental and Social Impact Assessment (ESIA). ETESA indicated that the Fourth Electrical Transmission Line’s area of influence has been defined through Executive Decree No. 561 of August 10, 2018 and has a width of two kilometers. In addition, ETESA indicated that once the ESIA has been assessed and approved, the process of indemnification will commence for any property over

⁶ ETESA cites the Executive Decree No. 123, Law of Assessment of Environmental Impact Studies, which is regulated by Chapter II of Title IV of Law No. 41 of July 1, 1998, General Law of the Environment of the Republic of Panama, which in its Title IV frames citizen participation in environmental impact studies, and which, in particular in its Chapter II, describes such citizen participation.

which the Fourth Electrical Transmission Line will run, based on what is established by Title VI of Law No. 6 of February 3, 1997.

ETESA added that, in response to the request submitted by NGOs concerned with environmental issues (flora and fauna), it organized a meeting where the NGOs had an opportunity to express their concerns about the Fourth Electrical Transmission Line. Those concerns were then registered and addressed by ETESA. Furthermore, it provided them with information about the project.

3.3 Next Steps

During the assessment phase, the Complainants expressed their interest in engaging with ETESA through a CAO-facilitated dispute resolution process. In response, the Company indicated their preference for the Complainants living inside of the Comarca to consult with their representatives involved in the FPIC process and stated that Complainants living outside of the Comarca will receive information about the transmission line at a later stage, during the ESIA process. Considering that ETESA prefers to address the Complainants' concerns within the consultation frameworks that are already in place, or provided for by the law, and has not expressed an interest in a CAO-facilitated dispute resolution process, the complaint will be referred to CAO Compliance for appraisal of IFC's performance as per CAO's Operational Guidelines.

ANNEX A. CAO COMPLAINT HANDLING PROCESS

Once CAO declares a complaint eligible, CAO conducts an initial assessment. The purpose of CAO's assessment is to: (1) clarify the issues and concerns raised by the complainant(s); (2) gather information on how other stakeholders see the situation; and (3) help stakeholders understand the recourse options available to them and determine whether they would like to pursue a collaborative solution through CAO's Dispute Resolution function, or whether the case should be reviewed by CAO's Compliance function. As per CAO's Operational Guidelines,⁷ the following steps are typically followed in response to a complaint that is received:

Step 1: **Acknowledgement** of receipt of the complaint.

Step 2: **Eligibility**: Determination of the complaint's eligibility for assessment under the mandate of the CAO (no more than 15 working days).

Step 3: **CAO assessment**: Assessing the issues and providing support to stakeholders in understanding and determining whether they would like to pursue a consensual solution through a collaborative process convened by CAO's Dispute Resolution function, or whether the case should be handled by CAO's Compliance function to review IFC's/MIGA's environmental and social due diligence. The assessment time can take up to a maximum of 120 working days.

Step 4: **Facilitating settlement**: If the parties choose to pursue a collaborative process, CAO's dispute-resolution function is initiated. The dispute-resolution process is typically based on or initiated by a Memorandum of Understanding and/or mutually agreed-upon ground rules between the parties. It may involve facilitation/mediation, joint fact finding, or other agreed resolution approaches leading to a settlement agreement or other mutually agreed and appropriate goals. The major objective of these types of problem-solving approaches will be to address the issues raised in the complaint, and any other significant issues relevant to the complaint that were identified during the assessment or the dispute-resolution process, in a way that is acceptable to the parties affected.⁸

OR

Compliance Appraisal/Investigation: If the parties opt for a Compliance process, CAO's Compliance function will initiate an appraisal of IFC's/MIGA's environmental and social due diligence of the project in question to determine whether a compliance investigation of IFC's/MIGA's performance related to the project is merited. The appraisal time can take up to a maximum of 45 working days. If an investigation is found to be merited, CAO Compliance will conduct an in-depth investigation into IFC's/MIGA's performance. An investigation report with any identified non-compliances will be made public, along with IFC's/MIGA's response.

Step 5: **Monitoring and Follow-up**

Step 6: **Conclusion/Case Closure**

⁷ For more information on the role and work of CAO, please refer to the full Operational Guidelines: http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf

⁸ Where stakeholders are unable to resolve the issues through a collaborative process within an agreed time frame, CAO Dispute Resolution will first seek to assist the stakeholders in breaking through impasse(s). If this is not possible, the Dispute Resolution team will inform the stakeholders, including IFC/MIGA staff, the President and Board of the World Bank Group, and the public, that CAO Dispute Resolution has closed the complaint and transferred it to CAO Compliance for their appraisal.