

# Grievance Mechanisms in the Dutch Hard Coal Supply Chain

An assessment of the effectiveness of three grievance mechanisms against the UN Guiding Principles on Business and Human Rights

5 November 2014



## About this Report

This report was written by consultants Roberta Pinamonti and Peter Nestor with support from Peder Michael Pruzan-Jorgensen.

## Methodology

The report is an assessment of the effectiveness of three grievance mechanisms to provide access to remedy for stakeholders in the Dutch hard coal supply chain. The three grievance mechanisms, the Dutch OECD National Contact Point (NCP), the FMO Independent Complaints Mechanism (ICM), and the IFC's Compliance Advisor Ombudsman (CAO), have been assessed against the effectiveness criteria established by the United Nations Guiding Principles on Business and Human Rights. The assessment is based on BSR's own analysis as well as the analysis provided by a number Dutch civil society stakeholders consulted for the purposes of this assessment. The recommendations are based on a composite assessment from both of these sources and they have been vetted with the civil society stakeholders.

Sections One and Two of this provides an introduction to the report as well as an overview of the research methodology. Section Three provides a summary of BSR's assessment that is followed, in Section Four, by a summary of civil society stakeholders' assessment. Section Five summarizes detailed findings and presents key recommendations.

In addition to the body report, there are two important appendices. Appendix 1 comprises BSR's detailed assessment of each of the three grievance mechanisms whereas Appendix 2 provides detail on stakeholders' expectations to effective grievance mechanisms in general and their assessment of each of the three grievance mechanisms in particular.

Any errors that remain are those of the authors. Please direct comments or questions to Brooke Avory at [bavory@bsr.org](mailto:bavory@bsr.org).

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## Introduction

Following the finalization of the Dutch Coal Dialogue in the summer 2013, the participating Dutch utilities, E.ON, Essent, GDF Suez, Nuon and EPZ published a vision document on transparency and corporate responsibility in the hard coal supply chain. This document committed them to develop a plan on the establishment for a pilot grievance mechanism in the hard coal supply chain supplying hard coal to the Dutch market for energy generation. The grievance mechanism should be in accordance with the UN Guiding Principles of Business and Human Rights (UNGPs), and meet the standards of due diligence established in the UNGP framework.



In early 2014, the Dutch utilities commissioned BSR to lead a research project to assess the usefulness and relevance of existing grievance mechanisms as well as their alignment with the UNGPs with a view to determine how the Dutch utilities can provide effective access to remedies for stakeholders. Thus, in response to the commitment made as an outcome of the Dutch Coal Dialogue, the utilities set out to understand whether existing mechanisms could be applied to the scope of the Dutch hard coal supply chain, and if so, what

changes would possibly be required. In the event that no such suitable mechanism existed, the utilities wanted to understand what a new mechanism should look like.

This report provides a detailed assessment of three existing grievance mechanisms – the Dutch OECD National Contact Point (NCP), the FMO Independent Complaints Mechanism (ICM), and the IFC’s Compliance Advisor Ombudsman (CAO). The assessment uses the UNGP “Effectiveness Criteria” as the analytical framework to assess whether each mechanism complies with human rights standards.

The assessment is based on two distinct inputs: BSR’s analysis of each mechanism, and stakeholder consultation on each mechanism. The findings and recommendations are based on a composite assessment from both of these inputs.

The analysis presented in this report is organized in the following sections:

- » Research Methodology
- » Summary of BSR Independent Assessment
- » Summary of Stakeholders’ Expectations and Assessment
- » Detailed Findings and Recommendations
- » Appendix I: BSR’s Full Independent Assessment
- » Appendix II: Stakeholders’ Full Assessment





## Research Methodology

The project was scoped and implemented by BSR in consultation with Essent who has acted as representative for the Dutch utilities. Neither Essent – nor any other party – unduly influenced the conclusions contained in this report.

The project addressed three objectives:

1. Identify and analyze the scope, strengths and weaknesses of three existing grievance mechanisms relevant to the Dutch coal supply chain.
2. Identify and analyze the expectations of all interested stakeholders on the scope, criteria, and design of the pilot grievance mechanism, including requirements stipulated in the UN Guiding Principles for Business and Human Rights.
3. Identify the gaps between existing grievance mechanisms and stakeholder expectations, and provide recommendations according to the findings.

In consultation with Essent, the following three grievance mechanisms were selected for assessment:

1. The Dutch OECD National Contact Point (NCP)
2. Dutch Development Bank (FMO) Independent Complaints Mechanism (ICM)
3. The IFC Office of Compliance Advisor Ombudsman (CAO)

The project was completed in two phases: (1) an independent assessment by BSR of the three grievance mechanisms, and (2) external stakeholder engagement seeking to understand (a) stakeholders' expectations for each of the eight Effectiveness Criteria, and (b) their assessment of each grievance mechanism's ability to meet their expectations. While the assessment makes a clear distinction between the assessment of BSR and that of stakeholders, the resulting conclusions and recommendations are those of BSR.

BSR offered stakeholders the opportunity to make their responses public, and to comment on the final draft of the report prior to publication.

The three grievance mechanisms were assessed against the UNGP's Effectiveness Criteria, with two widely accepted additional criteria added, "Proportionality" and "Independence"<sup>1</sup>. Table 1 provides a description of each of the criteria. Each grievance mechanism is assessed against the Effectiveness Criteria with a score of (1) "Well-Aligned," (2) "Minor Gaps," (3) "Some Gaps," and (4) "Major Gaps."

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<sup>1</sup> "Proportionality" considers whether the remedies available to aggrieved parties are proportional to the harm suffered. "Independence" considers whether the grievance mechanism is sufficiently independent from the host institution. These two criteria are not included in the UNGPs but are widely considered important to a complete assessment of the effectiveness of grievance mechanisms.

**TABLE 2: THE UN GUIDING PRINCIPLES “EFFECTIVENESS CRITERIA”**

Effectiveness Criteria	Description (from Guiding Principle 31)
31(a): Legitimate	Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.
31(b): Accessible	Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.
31(c): Predictable	Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.
31(d): Equitable	Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.
31(e): Transparent	Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.
31(f): Rights-Compatible	Ensuring that outcomes and remedies accord with internationally recognized human rights.
31(g): Source of Continuous Learning	Drawing on relevant measure to identify lessons for improving the mechanism and preventing future grievances and harm.
31(h): Based on Engagement and Dialogue	Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.
Proportionality* (added by BSR)	The remedy is proportional to the harm suffered.
Independence* (added by BSR)	The Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest.

## BSR's Assessment Methodology

In April and May 2014, BSR researched all aspects of each grievance mechanism, including a review of representative complaints. Desktop research was supplemented by interviews with representatives from each of the grievance mechanisms.

While the OECD NCP and the IFC CAO mechanisms have been established since 1999 and 2007, respectively, the FMO grievance mechanism was only recently established in 2014 and it is shared with the German Investment and Development Corporation (DEG). Hence, there is much less data to consider when reviewing the actual effectiveness of the FMO-DEG ICM.

Appendix I provides BSR's full assessment for each grievance mechanism. Each section contains: (1) a chart summarizing the assessment of each criterion, and (2) narrative description of the ranking analysis. Research sources are provided in footnotes throughout the document.

## Stakeholder consultation methodology

Five out of seven invited stakeholders engaged in the consultation. Stakeholders were invited based on their participation in the Dutch Coal Dialogue or because they otherwise were seen as important to the engagement. The five engaged stakeholders are (in alphabetical order): ActionAid, Cordaid, FNV Mondiaal Labor Union, PAX and SOMO. Flora and Fauna international and CNV Labor Union declined the invitation.

BSR consulted the five stakeholders to understand their expectations for effective grievance mechanisms in general as well as their assessment of the effectiveness of the three grievance mechanisms for this project. Stakeholders were consulted through an on-line questionnaire as well as telephonic interviews.

Three of the five stakeholders did not agree to make their responses publicly available; hence all stakeholder responses in this report are presented anonymously.

Stakeholders were contacted through an email questionnaire. BSR then interviewed respondents in order to analyze their answers and clarify particular aspects that emerged through their answers to the questionnaire. At the end of the process, BSR submitted the draft report to the involved stakeholders and the Dutch NCP in order to finalize the report with their final feedback based on the review of the draft and recommendations included. A conference call was conducted as the final step of the stakeholder consultation.

Section 1 of the questionnaire asked stakeholders to identify and describe the three to five most important operational characteristics for each of the effectiveness criteria for a grievance mechanism in the coal supply chain. Four out of five stakeholders responded to this section, and these responses are provided below in Appendix II.

Section 2 asked stakeholders to assess the alignment of the three grievance mechanisms against their expectations of the UNGP effectiveness criteria, as well as to provide an overall judgment of strength and weaknesses of those mechanisms. Some stakeholders acknowledged having limited knowledge and experience working with the three grievance mechanisms and only one of the five stakeholders provided a complete assessment of all the three mechanisms. These responses are provided below in Table 4.

Appendix II provides a complete assessment of the expected operational characteristics of the grievance mechanisms expressed by stakeholders.



## Summary of BSR’s Assessment

BSR’s assessment did not reveal any of the mechanisms to be entirely lacking in the criteria required under the “Effectiveness Criteria.” However, none are fully aligned with the Guiding Principles and therefore were assessed as having “Some Gaps” or “Minor Gaps.” The ranking rationale is explained in detail for each of the grievance mechanisms in Appendix I.

**TABLE 3: BSR ASSESSMENT OVERVIEW**

Guiding Principles: Effectiveness Criteria	Dutch NCP	FMO-DEG ICM	IFC CAO
31(a): Legitimate	Well Aligned	Well Aligned	Well Aligned
31(b): Accessible	Minor Gaps	Minor Gaps	Well Aligned
31(c): Predictable	Minor Gaps	Minor Gaps	Well Aligned
31(d): Equitable	Well Aligned	Minor Gaps	Well Aligned
31(e): Transparent	Well Aligned	Well Aligned	Well Aligned
31(f): Rights-Compatible	Some Gaps	Some Gaps	Some Gaps
31(g): Source of Continuous Learning	Well Aligned	Well Aligned	Well Aligned
31(h): Based on Engagement and Dialogue (For Operational-Level GMs only)	N/A	N/A	N/A
Proportionality* (added by BSR)	Some Gaps	Some Gaps	Some Gaps
Independence* (added by BSR)	Well Aligned	Minor Gaps	Well Aligned

The following points summarize the key takeaways from BSR’s assessment:

The Dutch NCP provides the broadest access to remedy, allowing for alleged victims to file a complaint against a Dutch company (operating anywhere in the world) or violations committed on Dutch soil (by any company based anywhere in the world). The FMO-DEG ICM and IFC CAO are limited in their scope and are available only to victims where the alleged abuses occurred at a project site funded by the FMO (and DEG) or IFC, respectively. All of the grievance mechanisms reviewed met five of the Effectiveness Criteria: “Legitimate,” “Accessible,” “Equitable,” “Transparent,” “Source of Continuous Learning.”

Each of the grievance mechanisms have “Some Gaps” for the “Rights-Compatible” and “Proportional” criteria. “Rights-Compatible” tests whether the mechanism’s process and outcomes accord with internationally accepted human rights. “Proportionality” tests whether the remedies are proportional to the alleged harm suffered by the victim.

The rationale for ranking these criteria as having “Some Gaps” is that these grievance mechanisms are dispute resolution forums where parties voluntarily reach agreement on remediation of past harm, or agree on processes to avoid future harm. However, these grievance mechanisms do not have the capacity to develop or provide mandatory remedies, or even to enforce their own remedies through a court of law or other mandatory enforcement mechanism.

That being said, each of the grievance mechanisms provide a highly capable forum for developing remedies that have been fully compatible with human rights in past cases, and could be fully proportional to the harm suffered. The forums provide an *opportunity* to facilitate outcomes that are both “Rights-Compatible” and “Proportional” – but since these are not required outcomes or necessarily enforced outcomes – the score of “Some Gaps” has been given for these two criteria.

The FMO-DEG ICM had “Some Gaps” for the “Predictable” and “Independent” criteria, due to weaker structural protections for the independence of panelists facilitating cases, and less public guidance around which types of cases may be heard, weakening the predictability of the mechanisms. However, the FMO-DEG ICM was newly created in January, 2014, and may have an opportunity to strengthen these measures once more cases are filed.

One of the eight Effectiveness Criteria, “Based on Engagement and Dialogue”, only applies to operational level grievance mechanisms, and thus does not apply to the three grievance mechanisms reviewed here.

## Summary of Stakeholder Expectations and Assessment

### Stakeholders Expectations

The following key takeaways emerged from the identification of the expected operational characteristics for a grievance mechanism in the coal supply chain.

Public awareness of the Grievance Mechanism is a key driver for the “Accessibility” criterion.

- It is the general opinion of stakeholders that operational level grievance mechanisms can be more accessible for the affected stakeholders from coal operations, because they are physically closer to them.
- Special attention should be given to highly vulnerable parties, and the grievance mechanism should regularly conduct an independent assessment to ensure that no one is excluded, especially most vulnerable and target groups.
- The grievance mechanism should employ best efforts to raise awareness through multiple and multi-language channels to reach affected stakeholders and enable them to access the complaints process.

Grievance mechanism processes should be well-defined and well-structured, and provide public information about potential outcomes to help build trust and confidence in the mechanism.

- Procedures must be clear, consistent and well publicized, with a clearly defined time frame and reasonable time periods to resolve the case.
- Adequate staffing and dedicated resources are needed, especially to support the most vulnerable parties.
- The grievance mechanism shouldn't reject complaints too quickly in the initial phase, or require an excessive burden of proof.
- The grievance mechanism should guarantee a safe environment for all the parties involved by guaranteeing confidentiality and a neutral space for discussion.
- Grievance mechanisms have limited options to provide and enforce remedies. However, within its boundaries, the grievance mechanism needs to be authoritative and clearly define available outcomes from the process. Authoritativeness is essential to enforce and guarantee remedies.

- A “Complaint Determination” phase should be included in mechanisms, especially when mediation is not possible, because investigating and clarifying facts can be a remedy in itself.
- If no mediation or determination is possible, there should be space for handing over the process to a third party for mediation or arbitration.
- The grievance mechanism should monitor whether the agreements are respected by parties and analyze whether the grievance mechanism has enabled progress on the ground.

Transparency and stakeholder engagement increase the legitimacy to the grievance mechanism.

- Engaging with local stakeholders should be part of the grievance process.
- Stakeholders should be part of the governance structure (stakeholders explicitly mentioned the French and British NCP as good practice examples).
- The grievance mechanism should ensure that parties are regularly informed about the steps in the grievance resolution process.
- Although confidentiality must be respected, some level of transparency should be guaranteed to external interested stakeholders while the process is ongoing and before the final conclusion is reached, because other interested stakeholders might need to be informed about the status of the process.

Utilities should strengthen their grievance mechanisms as well as influencing suppliers to establish well-functioning grievance mechanisms

- Utilities should commit to actively upholding the OECD Guidelines – including throughout the supply chain – and commit to engaging constructively in any case filed through grievance mechanisms and related to their own activities or those of their business partners.
- As recommended by the OECD Guidelines and the UN Guiding principles, utilities should strengthen their own UNGP-compliant company-level grievance/complaints mechanisms that can be engaged by any interested party to address violations/impacts in the supply chain.
- Utilities should influence suppliers to establish well-functioning grievance mechanisms noting that this is already a requirement for members of Bettercoal.

A complete description of stakeholders’ expectations against each effectiveness criteria is outlined in Appendix II.

## Stakeholder assessment

The questionnaire provided stakeholders with the opportunity to assess the three grievance mechanisms on the basis of the expected operational characteristics and their alignment with the eight Effectiveness Criteria (plus the two criteria added by BSR). Each of the grievance mechanisms were assessed as “Well aligned”, “Minor Gaps”, “Some Gaps” or “Major Gaps” according to this alignment (see Table 3 below).

Although almost all of the stakeholders provided expectations for operational characteristics, only one stakeholder completely assessed the three grievance mechanisms. Another stakeholder assessed the Dutch NCP only. The other stakeholders decided not to provide an assessment in absence of experience working with the three mechanisms.

Notwithstanding this limitation, the stakeholders’ assessment did not reveal any of the mechanisms to be entirely lacking in the eight Effectiveness Criteria.

**TABLE 4: STAKEHOLDERS ASSESSMENT OVERVIEW**

Guiding Principles: Effectiveness Criteria	Dutch NCP	FMO-DEG ICM	IFC CAO
31(a): Legitimate	Well Aligned	Minor gaps	Well Aligned
31(b): Accessible	Some Gaps	Some Gaps	Some Gaps
31(c): Predictable	Well Aligned	Minor Gaps	Well Aligned
31(d): Equitable	Well Aligned	N/A	Minor Gaps
31(e): Transparent	Well Aligned	Minor Gaps	Well Aligned
31(f): Rights-Compatible	Well Aligned	Minor Gaps	Some Gaps
31(g): Source of Continuous Learning	Minor Gaps	N/A	Major Gaps
31(h): Based on Engagement and Dialogue (For Operational-Level GMs only)	N/A	N/A	N/A
Proportionality* (added by BSR)	Well Aligned	N/A	N/A
Independence* (added by BSR)	Well Aligned	Minor Gaps	Minor Gaps

The following points summarize the key takeaways from the stakeholders’ assessment and gap analysis against their expectations:

Of the three existing mechanisms examined, the Dutch NCP is the grievance mechanism that aligns closest to the Effectiveness Criteria. In particular, it is recognized that the Dutch NCP:

- Provides an institutional arrangement that enables trust from the parties.
- Has a broader scope of eligible grievances, including supply chain grievances, whereas the FMO-DEG ICM and IFC CAO are limited to FMO- and CAO-funded projects.
- Enables access for a wider global range of stakeholders.

The three Effectiveness Criteria most aligned to stakeholder expectations are “Legitimate”, “Transparent” and “Predictable”, but not for all the three grievance mechanism, since the FMO-DEG ICM is rated with ‘Minor gaps’ in each of three criteria. Stakeholders believe that the FMO-DEG ICM would need to have a more transparent process, an independent secretariat supporting the panel of experts, and engagement with relevant stakeholders.

All of the grievance mechanisms received “Some Gaps” for the “Accessible” effectiveness criteria. Accessibility is a major concern for consulted stakeholders, who believe that:

- The Dutch NCP has rejected past cases unjustifiably. While in theory it is accessible for a wide range of parties, in practice it is difficult for victims to access the NCP directly.
- Both the FMO-DEG ICM and the IFC CAO do not require funded projects to raise awareness of the mechanisms among communities.

The IFC CAO has several pros and cons. The IFC CAO is considered a good example for “Transparency” because it keeps parties informed about the progress of the case. The IFC CAO website provides a lot of information and the staff is always available and open to speak to stakeholders.

Nevertheless, the IFC CAO seems to perform poorly in “Rights compatibility” (“Some gaps”) and “Source of Continuous Learning” (“Major Gaps”) mainly because stakeholders believe that:

- The IFC Performance Standards do not require human rights due diligence and therefore, the IFC CAO cannot directly investigate whether the IFC-funded projects respect human rights.
- While the IFC CAO engages in regular assessments and integrates key findings into its processes, the IFC itself tends not to learn lessons from the IFC CAO grievances to prevent similar cases from happening in the future.

One of the Effectiveness Criteria, “Based on Engagement and Dialogue”, only applies to operational level grievance mechanisms, and thus does not apply to the three grievance mechanisms reviewed here.

The FMO-DEG ICM was rated as “Not Applicable N/A” for “Equitable”, “Source of continuous learning” and “Proportional”, because this mechanism is still at an early stage and the stakeholders believe that it is too early to assess the FMO-DEG ICM on these three criteria, which generally require time and experience.

Like the FMO-DEG ICM, the IFC CAO has not been rated on “Proportional” since stakeholders believe that neither the FMO-DEG ICM nor the IFC CAO have the direct mandate to provide a response and/or remedy. It is the FMO or the IFC instead that, according to the findings, provide a response and/or remedy.



## Detailed Findings and Recommendations

Under the UNGPs, the Dutch Utilities in the coal supply chain have a responsibility to provide or to cooperate in providing access to remedy when they contribute to harm through their business relationships. This can be done through their own grievance mechanism, when it is appropriate to the size and circumstances, or through incentivizing the use of an existing (or new) grievance mechanism that is effective in this context.

This research project aimed at analyzing existing grievance mechanisms that could be applied in the Dutch marketplace within the framework of the UNGPs, while identifying strengths and weaknesses from BSR's perspective and from the perspective of relevant Dutch stakeholders. It is relevant to recognize that only a limited number of stakeholders have assessed the three grievance mechanisms.

Overall, the assessment suggests that the three grievance mechanisms broadly align with the UNGP Effectiveness Criteria. Notably the FMO-DEG ICM and the IFC CAO have certain shortcomings that make them less relevant as effective grievance mechanisms for the Dutch hard coal supply chain. While not disregarding other shortcomings, the major limitation of the IFC and FMO grievance mechanisms are their applicability only to alleged grievances associated with projects funded by the IFC or the FMO.

Conversely, Dutch NCP broadly exhibits the key characteristics that stakeholders expect from an effective grievance mechanism. It is the assessment of both BSR and stakeholders that the NCP aligns well with the UNGP effectiveness criteria and that there are no material weaknesses. Nonetheless, the assessment suggests certain weaknesses such as ineffective access for vulnerable populations in mining communities, although stakeholders recognize efforts made by the NCP to make itself more known and accessible to such groups. Other minor weaknesses are highlighted in the extensive assessments provided for in Appendix I and II.

It is noteworthy that no stakeholders called for the establishment of a separate grievance mechanism to enable stakeholders in the Dutch hard coal supply chain additional access to remedy. As a means to reinforce accessibility, stakeholders called instead for the need of strengthening respectively the Dutch utilities' own grievance mechanisms and mining companies' own operational level grievance mechanism supported by full transparency of commercial relationships between Dutch utilities and mining companies. Consulted stakeholders consider that both are needed in order to provide further and more effective options for impacted stakeholder allowing them to choose the preferred mechanism to use. It should also be noted that most stakeholders consulted were not in a position to make a comprehensive assessment of the effectiveness of the three grievance mechanisms due to limited knowledge of and experience with the individual mechanisms.

## Recommendations

BSR believes that the Dutch NCP provides a strong basis for effective access to remedy to stakeholders in the Dutch hard coal supply chain. We are unconvinced that piloting a new grievance mechanism specifically focused on hard coal will yield additional benefits to relevant stakeholders including vulnerable groups in hard coal mining countries. On the contrary, there is a risk that investing in a new grievance mechanism will detract needed policy attention, financial resources, awareness and commitment from the Dutch NCP. We believe one would have to answer the question "Why would it be more effective from a stakeholder perspective to invest in a new grievance mechanism than investing in improving the existing Dutch NCP"?

While this assessment suggests that the Dutch NCP would be a strong basis for effective access to remedy to stakeholders in the Dutch hard coal supply chain, it also suggests



several areas of improvement. Although further research may be required to develop a more complete understanding of the exact improvement needs, the assessment suggests improvement in the following areas:

- » Improve access for local stakeholders in mining countries. While the Dutch NCP is recognized for being responsive to local stakeholder queries as well as proactively seeking to make the mechanism more widely-known locally, the assessment suggests that more structural measures should be made to enable and facilitate access including communication in local languages, and wider engagement with stakeholders to raise awareness and knowledge. Further, it could be considered to explore how the Dutch NCP can strengthen collaboration with local operational level grievance mechanisms and with Dutch utilities own grievance mechanisms.
- » In order to improve accessibility, consulted stakeholders stressed the importance of transparency on the commercial relationship between the mining company and the Dutch based utilities. In absence of this information, the Dutch NCP cannot be identified as a possible solution by local affected stakeholders. Additionally, in order to reinforce the local awareness of the Dutch NCP, it was suggested that the Dutch embassies in source countries could play an important role in promoting the mechanism.
- » Review admissibility criteria including historic caseload to determine whether such criteria place a too large burden of proof on complainants and thus effectively reducing their access to a fair assessment of their case.
- » Stakeholders are concerned about the rejection of complaints during the phase of the initial assessment, undermining access to the dispute resolution process. One reason is that the NCP requires evidentiary proof that stakeholders often do not have the capacity to bring. The Dutch NCP should consider reviewing guidelines for admitting complaints and eventually lightening the admissibility criteria especially for the evidence requirements of the initial assessment phase.
- » From our assessment potential concerns of unequal or potentially harming sharing of information could arise. This relates in particular with the confidentiality rule of “Communication between parties” on whether information is shared with the other party by default and the parties must request not to share it. Although this provision is clearly stated in the procedures, it may inadvertently place complainants in a risky situation if their identity or knowledge of the complaint is known by the company. A potential solution could be reviewing such procedure and consider changing this default rule to ensure safeguarding of identity.
- » The NCP’s focus on mediation as a means for resolving disputes has advantages in providing a government-backed but non-adversarial space for dispute resolution. However, experience has shown that disputes related to serious human rights abuses are often not suited to resolution through mediation. -. In cases in which mediation is not possible (the parties do not agree) or its result is not successful for both parties, the NCP should explore how to make use of all of the tools at its disposal and within its mandate to help resolve the dispute. For example, in such cases, and to broaden the range of potential outcomes it is suggested to consider pursuing a “Complaint determination” phase, when through research and fact finding the Dutch NCP can issue a statement of determination and clarification of facts.
- » The fact that the Dutch NCP cannot force parties to follow its remedy-related recommendations limits the scope of the remedy it can actually provide. However, the Dutch NCP should make full use of the tools at its disposal and within its mandate to ensure that its statements and recommendations do have consequences for those seeking and providing remedy. This includes actively following up on recommendations (holding follow-up meetings and requiring follow-up reports from parties) and actively communicating NCP statements and recommendations directly to other relevant government bodies/agencies such as Atradius DSB (export credit agency) and the Dutch Good Growth Fund (DGGF).

**TABLE 1: COMBINED ASSESSMENT OF THREE GRIEVANCE MECHANISMS**

Guiding Principles: Effectiveness Criteria	Dutch NCP		FMO-DEG ICM		IFC CAO	
	BSR	SH	BSR	SH	BSR	SH
31(a): Legitimate	Well Aligned	Well Aligned	Well Aligned	Minor gaps	Well Aligned	Well Aligned
31(b): Accessible	Minor Gaps	Some Gaps	Minor Gaps	Some Gaps	Well Aligned	Some Gaps
31(c): Predictable	Minor Gaps	Well Aligned	Minor Gaps	Minor Gaps	Well Aligned	Well Aligned
31(d): Equitable	Well Aligned	Well Aligned	Minor Gaps	N/A	Well Aligned	Minor Gaps
31(e): Transparent	Well Aligned	Well Aligned	Well Aligned	Minor Gaps	Well Aligned	Well Aligned
31(f): Rights- Compatible	Some Gaps	Well Aligned	Some Gaps	Minor Gaps	Some Gaps	Some Gaps
31(g): Source of Continuous Learning	Well Aligned	Minor Gaps	Well Aligned	N/A	Well Aligned	Major Gaps
31(h): Based on Engagement and Dialogue	N/A	N/A	N/A	N/A	N/A	N/A
Proportionality* <i>(added by BSR)</i>	Some Gaps	Well Aligned	Some Gaps	N/A	Some Gaps	N/A
Independence* <i>(added by BSR)</i>	Well Aligned	Well Aligned	Minor Gaps	Minor Gaps	Well Aligned	Minor Gaps

## Appendix I | BSR Independent Assessment

### 1. The Netherlands OECD National Contact Point (NCP)

#### Overview of Grievance Mechanism

As part of its commitment to the OECD system, the Netherlands established a National Contact Point (NCP) in 2001 under its Ministry of Foreign Affairs. The Dutch NCP consists of four independent members, supported by four advisors from relevant Dutch ministries.

The Dutch NCP reviews complaints (known as “special instances”) filed against:

- » any company from the Netherlands (operating anywhere in the world) in instances where the company is alleged to have violated the OECD guidelines; or
- » Any other company from other countries having violated the OECD guidelines on Dutch soil.

Any “interested party” may file a complaint, which usually includes individuals or communities adversely affected by enterprise operations. Representatives filing a specific instance on behalf of an individual or community must demonstrate that they have obtained proper consent from affected individuals to file a specific instance on their behalf.<sup>2</sup>

After determining the validity of the complaint, the NCP provides mediation and facilitated meetings to encourage the parties to resolve the disputed issues through dialogue. The NCP may conduct fact-finding investigations to support claims on either side and when helpful to fostering constructive dialogue, but the NCP is not a judicial body or judicial mechanism.

Once the mediation is complete, the NCP issues a “final statement” describing the mediation process and outcomes. Parties are encouraged to reach resolution and agreement on ways to resolve the dispute; however, agreement is not required for the NCP to issue a final statement. The Dutch NCP does not have enforcement authority over the final statement or its outcomes, although the parties may request the assistance of the NCP to oversee enforcement.

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<sup>2</sup> See Overview of the Dutch NCP process (<http://www.oesorichtlijnen.nl/en/notifications>) and Calling for Corporate Accountability: A Guide to the 2011 OECD Guidelines for Multinational Enterprises, available at [http://oecdwatch.org/publications-en/Publication\\_3962/](http://oecdwatch.org/publications-en/Publication_3962/).

## DUTCH NCP ASSESSMENT SUMMARY

Effectiveness Criteria	Description (from Guiding Principle 31)	Dutch NCP Grievance Mechanism
31(a): Legitimate	Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.	Well-Aligned
31(b): Accessible	Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.	Minor Gaps
31(c): Predictable	Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.	Minor Gaps
31(d): Equitable	Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.	Well Aligned
31(e): Transparent	Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.	Well Aligned
31(f): Rights- Compatible	Ensuring that outcomes and remedies accord with internationally recognized human rights.	Some Gaps
31(g): Source of Continuous Learning	Drawing on relevant measure to identify lessons for improving the mechanism and preventing future grievances and harm.	Well Aligned
31(h): Based on Engagement and Dialogue (Operational GMs)	Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.	<i>Not Applicable</i>
Proportionality* ( <i>added by BSR</i> )	The remedy is proportional to the harm suffered.	Some Gaps
Independence* ( <i>added by BSR</i> )	The Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest.	Well Aligned

## Effectiveness Criteria Analysis

### 31(a): *Legitimate*

Definition: “Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.”

#### Relevant Provisions in the Dutch NCP

- The NCP is structured around an Independent Expert body, consisting of four independent members, four advisory members from the most relevant Dutch government ministries (Economic Affairs, Foreign Affairs, Infrastructure & Environment, Social Affairs & Employment), and a secretariat located within the Ministry of Foreign Affairs.
- The NCP has facilitated dialogues between adverse parties and reached agreement and resolution in over 15 cases since its beginning.<sup>3</sup>
- As part of the initial assessment, the NCP will have separate, confidential meetings with both the party raising the issue and the business involved concerning the specific instance.<sup>4</sup>
- Starting in the summer of 2012, the NCP began conducting meetings with its key stakeholders to review challenges and discuss potential new developments and changes to the procedures.<sup>5</sup>
- The NCP has explicitly committed to guiding principle of “impartiality” stating: “Impartiality means that at all times the NCP will be neutral and will avoid any appearance of partiality in its contacts with stakeholders, the consideration of specific instances and its promotional activities. If one of the independent members of the NCP has a stake in one of the parties involved with a specific instance, the member NCP will notify the NCP of this and he/she will not be involved in this specific instance.”<sup>6</sup> Commitment to this principle supports the independence and legitimacy of the grievance mechanism.

#### Potential Shortcomings

- One aspect of the NCP that may undermine its legitimacy from a human rights perspective is the limited nature of the remedies available to injured parties. The NCP is structured as a dispute resolution and conflict mediation mechanism, and is not equipped to provide or enforce any other form of remedy to an injured party, unless mutually agreed to by each party through mediation. This means that the remedies available may not be able to restore the victim to an equivalent condition before the adverse consequence occurred, which is one of the key principles of proportionality, and thus may undermine the legitimacy of the mechanism.

#### Assessment

- **Well-Aligned.** The Dutch NCP has been one of the most active NCPs in the OECD system, which supports its legitimacy from the perspective stakeholders who consistently use the NCP to resolve disputes. The legitimacy is further strengthened by the independence of the NCP members, the NCP’s commitment to transparency and confidentiality, and the accessibility of the mechanism. While the structure of the NCP is limited to dispute resolution and mediation, and is not able to provide or enforce a full spectrum of remedies for victims of human rights abuses, it is possible that the parties could mediate a resolution that would be proportional to the harm suffered by the victims. By providing a forum for neutral dialogue to occur, the NCP provides the opportunity for parties to reach agreement on a remedy that is proportional from a human rights perspective.

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<sup>3</sup> NCP website, <http://www.oesorichtlijnen.nl/en/notifications/overview-notifications>

<sup>4</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>5</sup> Netherlands NCP Report to the OECD, 2013, available on the NCP website.

<sup>6</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

### 31(b): Accessible

Definition: “Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.”

#### Relevant Provisions in the Dutch NCP

- Anyone who is a stakeholder (an individual, NGO, trade union or other company) to an alleged breach of the OECD Guidelines by a multinational enterprise can submit a notification of this alleged breach at the NCP as a specific instance.<sup>7</sup>
- A specific instance should be submitted to the NCP in the country where the alleged breach of the OECD Guidelines has occurred. If there is no NCP located in that country, the specific instance can be submitted in the country of the headquarters of the multinational enterprise involved.<sup>8</sup>
- A notification of a specific instance can be submitted to the Secretariat of the NCP by mail or e-mail.<sup>9</sup>
- Detailed procedures for all NCPs, including the Dutch NCP, with examples of good and bad practice, guidance for filing a complaint, and templates for filing a complaint are included in detail in *Calling for Corporate Accountability: A Guide to the 2011 OECD Guidelines for Multinational Enterprises* (2011).<sup>10</sup>
- Through an in-person interview with the NCP, it was confirmed that the Dutch NCP will work with NCP’s in other countries to ensure that the right resources are directed to the right NCP to resolve disputes. For example, if aggrieved parties in Colombia filed a specific instance in Colombia against a Dutch company, the Dutch NCP will work with the Colombian NCP to ensure that the specific instance is handled correctly.<sup>11</sup>
- All of the NCP specific instances to date have been conducted in English. In the case where translation services are needed, the NCP would ensure that translation services are provided.<sup>12</sup>
- The NCP takes affirmative steps to raise awareness of the NCP and to provide guidance on how it works. The NCP will often travel to countries to explain how the NCP system works, and regularly meets with official stakeholder groups in the Netherlands.<sup>13</sup>
- The NCP has formally committed to the principle of “accessibility” stating: “Accessibility means that the NCP can be contacted easily and is open to discussion with all parties and stakeholders.”<sup>14</sup>

#### Potential Shortcomings

- One potential shortcoming is whether stakeholders are aware of the NCP has a dispute resolution grievance mechanism and have the means to take advantage of it. For example, is it feasible to believe that coal miners in Colombia are aware of the NCP and know how to file a specific instance? Even in Colombia, Colombian miners could file a case with the Colombian NCP, yet miners or other affected rights holders in, for example, Russia and South Africa are at a further disadvantage because these are not OECD-member countries and do not have a local NCP.

<sup>7</sup> Dutch NCP, “Submitting a Specific Instance,” <http://www.oesorichtlijnen.nl/en/notifications/submitted-specific-instance>

<sup>8</sup> Dutch NCP, “Submitting a Specific Instance,” <http://www.oesorichtlijnen.nl/en/notifications/submitted-specific-instance>. *BSR Note:* For the three countries of highest concern to the Dutch Utilities (Colombia, Russia, and South Africa), only Colombia has a National Contact Point (as of March, 2014). See OECD, <http://www.oecd.org/daf/inv/mne/NCPContactDetails.pdf>

<sup>9</sup> Dutch NCP, “Submitting a Specific Instance,” <http://www.oesorichtlijnen.nl/en/notifications/submitted-specific-instance>

<sup>10</sup> *Calling for Corporate Accountability: A Guide to the 2011 OECD Guidelines for Multinational Enterprises*, available at [http://oecdwatch.org/publications-en/Publication\\_3962/](http://oecdwatch.org/publications-en/Publication_3962/).

<sup>11</sup> BSR Interview with Mr. Frans Evers, Chairman of the Dutch NCP, May 26, 2014.

<sup>12</sup> BSR Interview with Mr. Frans Evers, Chairman of the Dutch NCP, May 26, 2014.

<sup>13</sup> BSR Interview with Mr. Frans Evers, Chairman of the Dutch NCP, May 26, 2014.

<sup>14</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.



### Assessment

- **Minor Gaps.** The NCP provides relatively user-friendly methods to file a complaint, e.g. e-mail, and allows for stakeholder groups to file specific instances on behalf of affected communities with proper representation. Although the awareness issue is a challenge, the NCP takes affirmative efforts to raise awareness of the tool, and will provide information to particular communities when requested by stakeholders.

### 31(c): Predictable

Definition: “Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.”

### Relevant Provisions in the Dutch NCP

- The key steps for each stage of the grievance mechanism are provided on the website and in the “Netherlands National Contact Point OECD Guidelines for Multinational Enterprises” PDF document, available directly from the Dutch NCP website.<sup>15</sup>
- The NCP website and the PDF document make clear the items that need to be included in the complaint, and the procedures and timeframe for the proceedings to occur.<sup>16</sup>
- The NCP formally commits to the principle of “predictability,” stating: “Predictability means that the NCP will act in accordance with the Procedural Guidelines and will provide clear information on the NCP procedures and will act accordingly in handling specific instances. It also means that the NCP will provide substantiated arguments on decisions made whether to take a specific instance into further consideration and on reaching a final statement.”<sup>17</sup>

### Potential Shortcomings

- One potential shortcoming is that the procedures and guidelines are only available in English and Dutch through the website. While translation services are provided once specific instances are filed, the lack of procedural guidelines in other common languages may present an initial barrier to communities considering the filing of a complaint.

### Assessment

- **Minor Gaps.** The description of the NCP is available documents on the website is clear, as well as the timeframe for dispute resolution to occur. The NCP’s commitment to specific operating principles (e.g. Visibility, Accessibility, Transparency, etc.) helps provide guidance to complainants where specific terms may not be specifically defined. While the guidelines are not currently available in languages besides Dutch or English, the NCP is willing to work closely with communities at particular sites to provide guidance on how to file a complaint, which can be conducted in the local language.

### 31(d): Equitable

Definition: “Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.”

### Relevant Provisions in the Dutch NCP

- “Ahead of submitting a notification of the alleged breach, any stakeholder can contact the NCP for advice. This can be a way of gaining a better understanding of how to proceed with the notification and what the potential notifier should do to

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<sup>15</sup> NCP, Specific Instance Procedure, link to PDF, <http://www.oesorichtlijnen.nl/en/notifications/specific-instance-procedure>

<sup>16</sup> Dutch NCP, “Submitting a Specific Instance,” <http://www.oesorichtlijnen.nl/en/notifications/submitting-specific-instance>; and Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>17</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

prepare for the process. At this stage it may also be possible for the NCP to already facilitate contact between the parties involved to avoid a formal notification.”<sup>18</sup>

- The NCP also states that it has proactively offered its assistance to stakeholders in advance of receiving formal notifications (in the pre-mediation phase).<sup>19</sup> This was confirmed through interviews with the NCP where specific examples of fact-finding missions and investigations have been undertaken to ensure that all relevant facts are brought to light, particularly on behalf of alleged victims or communities.
- The NCP formally commits to the principle of “equitability”, stating: “Equitability means that parties will be treated on fair and equitable terms and have access to the same procedures. It also means that the NCP will use the concept of proportionality in the handling of specific instances.”<sup>20</sup>

#### Potential Shortcomings

- Depending on the project location and context, impacted individuals and communities may not have the same cultural understanding of the dispute resolution process, and in many cases will not have access to the same resources to effectively present their case.

#### Assessment

- **Well-Aligned.** There is clear evidence that the NCP provides proactive assistance to stakeholders during the process, and is responsive to requests for assistance from impacted individuals and communities. While impacted individuals may not have the same access to information and resources as companies, the NCP is proactively working to overcome this barrier. The root cause of the problem is not a design flaw with the grievance mechanism, rather a pre-existing structural problem in many operating contexts. Given the NCP’s awareness and proactive efforts to overcome this barrier, the criterion is met.



<sup>18</sup> Dutch NCP, “Submitting a Specific Instance,” <http://www.oesorichtlijnen.nl/en/notifications/submitting-specific-instance>

<sup>19</sup> Netherlands NCP Report to the OECD, 2013, available on the NCP website.

<sup>20</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

### 31(e): *Transparent*

Definition: “Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.”

#### Relevant Provisions in the Dutch NCP

- “Communication between parties: To ensure the proceedings’ transparency, parties are encouraged to share all communication with one another. If one of the parties communicates directly with the NCP, the NCP will inform the other party, unless explicitly requested not to do so by the communicating party.”<sup>21</sup>
- At the conclusion of the proceedings between the parties, the NCP issues interim and final public statements on the results of the procedure, excluding confidential information from the parties.<sup>22</sup> These statements are available on the NCP website.
- The NCP provides strict guidelines and regarding confidentiality and transparency of the proceedings to the public that balance fairness and the public interest with the need to protect confidential information of the parties.<sup>23</sup>
- The NCP formally commits to the principle of “transparency”: “Transparency means that the NCP strives to be transparent about its procedures and that it encourages mediation. However, this can mean that the NCP is not transparent about the content of the mediation, as confidentiality may contribute to the success of the procedure.”<sup>24</sup>
- The NCP formally commits to the principle of “visibility”, stating: “Visibility means that the NCP highly values its task of providing information to increase awareness of the Guidelines and to increase their effective implementation.”<sup>25</sup>

#### Potential Shortcomings

- None identified through our research.

#### Assessment

- **Well-Aligned.** The procedures, parties, and outcomes from disputes are publicly available and accessible, while important precautionary measures are taken to protect confidential information provided by the parties.

### 31(f): *Rights Compatible*

Definition: “Ensuring that outcomes and remedies accord with internationally recognized human rights.”

#### Relevant Provisions in the Dutch NCP

- “Communication between parties: To ensure the proceedings’ transparency, parties are encouraged to share all communication with one another. If one of the parties communicates directly with the NCP, the NCP will inform the other party, unless explicitly requested not to do so by the communicating party.”<sup>26</sup>
- Follow-up to track effectiveness and progress of the dialogue: “Following the completion of a procedure for a specific instance, the NCP requests all parties to provide the NCP with information on any progress regarding implementation of the agreements and/or recommendations. As standard practice, the NCP will publish a brief evaluation of the implementation of the agreements and/or recommendations on the website one year after the publication of the final statement.”<sup>27</sup>

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<sup>21</sup> Dutch NCP, “Confidentiality,” <http://www.oesorichtlijnen.nl/en/notifications/confidentiality>

<sup>22</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>23</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>24</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>25</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>26</sup> Dutch NCP, “Confidentiality,” <http://www.oesorichtlijnen.nl/en/notifications/confidentiality>

<sup>27</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

### Potential Shortcomings

- The limited nature of remedies available through the NCP (i.e. dispute resolution) may fail to adequately remedy negative human rights impacts suffered by affected individuals or communities.
- There is some concern from the rights-holder perspective about whether information is shared with the other party by default and the parties must request not to share it with other parties. Although this provision is clearly stated in the procedures, it may inadvertently place complainants in a risky situation if their identity or knowledge of the complaint is known by the company.

### Assessment

- **Some Gaps.** A fully rights-compatible grievance mechanism would allow for a broader range of remedies available to a Complainant under relevant human rights standards including forms of financial or non-financial compensation, remedies that may attempt to offer redress to the victims that could return them to the same or similar prior to the negative impact. This type of remedy could be negotiated between the parties and hence the “partial” score, but given that a “rights-compatible” remedy is not required and that the enforcement of any agreements or remedies between the parties is not required by the NCP, this criterion cannot be fully satisfied. To be clear, this is not a criticism of the design or implementation of the NCP, rather it is recognition of the limited nature of mediation-based grievance mechanisms to provide the full range of remedies.

### **31(g): Source of Continuous Learning**

Definition: “Drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harm.”

### Relevant Provisions in the Dutch NCP

- The NCP publishes self-assessments each year available publicly on the website.<sup>28</sup> The 2013 assessment indicates that the NCP has undertaken changes to improve, for example, operational effectiveness of the NCP and accounting for the changing political environment and the impact of a “CSR Supervisor” in the country.
- The NCP conducted a peer review in 2007, which is publicly available on its website.
- Starting in the summer of 2012, the NCP began conducting meetings of its key stakeholders to review challenges and discuss potential new developments and changes to the procedures.<sup>29</sup>

### Potential Shortcomings

- None identified through our research.

### Assessment

- **Well-Aligned.**

### **31(h): Based on Engagement and Dialogue (Operational Grievance Mechanisms)**

Definition: Consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances.

**Note:** This criterion does not apply to the NCP because it is not an operational level grievance mechanism.

### **Proportionality (Added by BSR):**

Definition: The remedy is proportional to the harm suffered.

**Note:** This criterion focuses on the remedy that is provided to the alleged victim, and not solely on the process or design of the grievance mechanism. However, it is

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<sup>28</sup> See, e.g., Netherlands NCP Report to the OECD, 2013.

<sup>29</sup> Netherlands NCP Report to the OECD, 2013, available on the NCP website.

*considered here and given some weight due to the extent that the final remedy will likely be impacted by the design and structure of the grievance mechanism.*

#### **Relevant Provisions in the Dutch NCP**

- The NCP commits to “use the concept of proportionality in the handling of specific instances,” but this concept is not further elaborated or explained.<sup>30</sup>
- Through interviews with the NCP, the members of the NCP will work with the parties to attempt to reach proportional outcomes during their facilitation of the dispute resolution.

#### **Potential Shortcomings**

- It is not entirely clear what is meant by the “concept of proportionality” in the NCP’s commitment to this principle.
- The limited nature of the remedies provided by the NCP may limit its ability to provide a truly proportional remedy to an individual or community who has suffered significant harm due to an adverse human rights impact. While bringing the parties together in dialogue is absolutely critical, this outcome alone, or other outcomes that may be voluntarily agreed to by the parties, may not be considered “proportional” to the harm suffered by the victim.

#### **Assessment**

- **Some Gaps.** While the NCP commits to the principle of proportionality, the structure of the NCP system and remedies available may not allow it to truly provide a proportional remedy to victims in many cases. Similar to the discussion above in the “rights-compatible” analysis, it is possible that parties could negotiate a proportional remedy, but given that the process does not require the parties to resolve the dispute with a proportional remedy, then this criterion is only partially

#### **Independence (Added by BSR)**

Definition: The Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest.

#### **Relevant Provisions in the Dutch NCP**

- The structure of the NCP is an Independent Expert body, consisting of four independent members, four advisory members from the most relevant Dutch government ministries (Economic Affairs, Foreign Affairs, Infrastructure & Environment, Social Affairs & Employment), and a secretariat located within the Ministry of Foreign Affairs.
- Members of the NCP are appointed by the Minister of Foreign Trade and Development Cooperation. They come from a diverse backgrounds in Dutch society including academics, financial sector, labor sector, and NGOs.<sup>31</sup>
- The advisory members of the NCP serve an important role as well to ensure the commitment of the Dutch government in the work of the NCP and to contribute expertise when needed.<sup>32</sup>
- Through interviews with the NCP, the members will remove themselves from a specific instance should a conflict of interest arise.<sup>33</sup>
- As noted above, the NCP has formally committed to the principle of impartiality: “Impartiality means that at all times the NCP will be neutral and will avoid any appearance of partiality in its contacts with stakeholders, the consideration of specific instances and its promotional activities. If one of the independent

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<sup>30</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>31</sup> Dutch NCP Annual Report (2013), available at [http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/ncp\\_nl\\_annual\\_report\\_2013.pdf](http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/ncp_nl_annual_report_2013.pdf).

<sup>32</sup> Dutch NCP Annual Report (2013), available at [http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/ncp\\_nl\\_annual\\_report\\_2013.pdf](http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/ncp_nl_annual_report_2013.pdf).

<sup>33</sup> BSR Interview with Mr. Frans Evers, Chairman of the Dutch NCP, May 26, 2014.

members of the NCP has a stake in one of the parties involved with a specific instance, the member NCP will notify the NCP of this and he/she will not be involved in this specific instance.”<sup>34</sup>

#### Potential Shortcomings

- It could be viewed as a potential issue that the NCP sits within the Dutch government, where Dutch or other companies may have significant influence or long-lasting relationships with various government agencies and branches.
- The NCP could also be seen as making decision based on governmental affairs, such as foreign policy considerations, that may not be relevant to the narrow dispute in the specific instance.

#### Assessment

- **Well Aligned.** Although the NCP sits in the Dutch Ministry of Foreign Affairs, the members of the NCP are independent dispute resolution experts from a range of backgrounds and vetted by many other members of civil society. In prior cases, some members have recused themselves from a specific instance where there was an actual or perceived conflict of interest. The members are each committed to impartiality through all of their proceedings.

## 2. FMO Development Bank: Independent Complaints Mechanism

### Overview of Grievance Mechanism

The FMO Dutch Development Bank established an Independent Complaints Mechanism (“ICM”) in January, 2014. This independent mechanism is shared with the German Investment and Development Corporation (DEG). The ICM is a dispute resolution mechanism intended to provide parties with an opportunity to resolve complaints through mediated dialogue by an independent panel. The creation of the ICM was informed through consultation with stakeholders, including Amnesty International, Bank Track, Both ENDS, and SOMO.

The ICM is available only to complaints from individuals or communities who are adversely impacted by the two financial institutions, respectively the FMO-supported projects and the DEG-supported projects. The ICM is not available for non-FMO or non-DEG-invested projects. Eligible complaints may be filed by any individual, including representatives of impacted individuals with legitimate authorization of representation.<sup>35</sup>

Complaints eligibility is determined by an independent external panel (not connected with the FMO) which determines whether the complaint is admissible, based on the pre-defined admissibility criteria. If the complaint is admissible, the independent external panel will communicate an indicative timeline for its preliminary assessment. Based on the information gathered, and the views of the complainant and other relevant stakeholders, panelists will decide on which of the following is the best approach to take the complaint forward: mediation and compliance review<sup>36</sup>. Once the investigation and mediation are complete, the independent panel will prepare a “Conclusions Report” of the proceedings for the FMO’s Management Board and Supervisory Board. The Conclusions Report may contain recommendations to correct operational level policies or procedures, and must include a detailed implementation plan. Implementation of any corrective actions will be monitored by the Complaints Office.<sup>37</sup>

As of May 14, 2014, one complaint has been filed with the ICM.

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<sup>34</sup> Netherlands National Contact Point OECD Guidelines, PDF, available at NCP website.

<sup>35</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>.

<sup>36</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>.

<sup>37</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>.



### FMO-DEG ICM ASSESSMENT SUMMARY

Effectiveness Criteria	Description (from Guiding Principle 31)	FMO-DEG ICM Grievance Mechanism
31(a): Legitimate	Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.	Well Aligned
31(b): Accessible	Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.	Minor Gaps
31(c): Predictable	Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.	Minor Gaps
31(d): Equitable	Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.	Minor Gaps
31(e): Transparent	Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.	Well Aligned
31(f): Rights-Compatible	Ensuring that outcomes and remedies accord with internationally recognized human rights.	Some Gaps
31(g): Source of Continuous Learning	Drawing on relevant measure to identify lessons for improving the mechanism and preventing future grievances and harm.	Well Aligned
31(h): Based on Engagement and Dialogue (Operational GMs)	Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.	<i>Not Applicable</i>
Proportionality* ( <i>added by BSR</i> )	The remedy is proportional to the harm suffered.	Some Gaps
Independence* ( <i>added by BSR</i> )	The Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest.	Minor Gaps

## Effectiveness Criteria Analysis

### 31(a): Legitimate

Definition: “Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.”

#### Relevant Provisions in the FMO-DEG ICM

- The ICM clearly explains the procedural aspects of the grievance mechanism, with a clear explanation of the timeframe for communicating with the Complainant.<sup>38</sup>
- The standard for reviewing FMO’s activities and allegations in Complaints is against FMO’s policies, which include FMO’S human rights policy referencing the UN Guiding Principles on Business and Human Rights, in addition to explicit alignment in the ICM itself to the UN Guiding Principles.<sup>39</sup> FMO’s human rights policy and the UN Guiding Principles incorporate by reference the full spectrum of international human rights standards (including the “International Bill of Human Rights”).
- The ICM states that “adequate budgetary support” will be provided to the Mechanism so that it can be effective and timely.<sup>40</sup>
- The ICM consulted with international stakeholder groups on the design of the program, including Amnesty International, Bank Track, Both ENDS, and SOMO.<sup>41</sup>

#### Potential Shortcomings

- The fact that the Complaints Office is operated wholly within the FMO – despite legitimate safeguards to ensure its independence (discussed more below) – may lead to the perception that the process is not legitimate and complaint assessments may be biased.
- The ICM states that complaints must be filed “within one year” from the date upon which the complainant could have reasonably learned about the events underlying the allegations.<sup>42</sup> Stakeholder groups have questioned the need for the “one year” limitation in light of the potential barriers to knowing about the existence of the FMO ICM, and the time required for Complainants to understand that the FMO is a funder of the project and provides a grievance mechanism.<sup>43</sup> Given the nature and severity of the potential grievances, combined with the inherent difficulty of understanding the process and resources needed to collect evidence to file a complaint, this limitation may unnecessarily prevent legitimate complaints from being filed.
- While international stakeholder groups were consulted, it does not appear that members from local communities where FMO funded projects are located were consulted.

#### Assessment

- **Well-Aligned.** Extensive stakeholder engagement during the design process is an important procedural aspect to create a legitimate grievance mechanism. While not all of the suggestions provided by stakeholders were accepted, a group of stakeholders consulted in the process recognized that “To their credit, FMO has accepted a large number of our suggestions, thereby considerably strengthening the final structure and

<sup>38</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.2.

<sup>39</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 2.4.2.

<sup>40</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.4.1.

<sup>41</sup> Confirmed through telephone interview with Mr. Steven Priem, Director of FMO for Internal Auditing, May 14, 2014.

<sup>42</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section, 3.1.7.

<sup>43</sup> NGO Briefing on Independent Complaints Mechanism of FMO and DEG, February 2014, available at: [http://www.bothends.org/uploaded\\_files/inlineitem/1140213\\_FMO\\_compliance\\_mechanism\\_briefing\\_FINAL.pdf](http://www.bothends.org/uploaded_files/inlineitem/1140213_FMO_compliance_mechanism_briefing_FINAL.pdf)

function of the mechanism as compared to the first two drafts we reviewed.”<sup>44</sup> While the Complaints Office sits within the FMO’s internal audit group, the actual complaint assessment, mediation, and final reports are drafted by independent experts external to the FMO. The fact that rights-holders filed a legitimate complaint within the first six months of the establishment of the ICM lends further credence to its legitimacy in the eyes of stakeholders.

### **31(b): Accessible**

Definition: “Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.”

#### **Relevant Provisions in the FMO-DEG ICM**

- The ICM is open to “any” external party to submit a complaint, including representatives of affected parties with a proper showing of legitimate representation.<sup>45</sup>
- The ICM provides for an online Complaint submission process, which increases accessibility to Complainants. Stakeholders have noted that the online complaint form is “user-friendly.”<sup>46</sup>
- Acceptance of complaints in English or the national language of the complaining party.
- The ICM confirmed during an interview that it would work with local populations to translate documents connected to a legitimate complaint from a local language into either the national language or to English.<sup>47</sup>

#### **Potential Shortcomings**

- It is not clear in publicly available documents that a complaint would be accepted in a language other than the national language of the country where the project is located. While this may be the native language for many people in that country, several indigenous groups or communities may speak only a local dialect or indigenous language.
- It is not clear whether rights-holders are aware of the FMO grievance mechanism, or whether the FMO is taking steps to raise awareness at its project sites.

#### **Assessment**

- **Minor Gaps.** Despite the lack of clarity around whether the grievance mechanism can accept Complaints from local languages, the ability of any person affected to file a grievance (at least in the official native language of the project site) and for legitimate representatives to file grievances on behalf of Complainants ensures that claimants will have access to the grievance process. Moreover, the ICM will work with parties on a case-by-case basis to ensure that relevant documents are properly translated. The fact that grievances may be filed online increases the accessibility of the mechanism.

### **31(c): Predictable**

Definition: “Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.”

#### **Relevant Provisions in the FMO-DEG ICM**

- The grievance mechanism provides a clear description of the process and timeframe for filing a complaint; the determination of the validity of the Complaint;

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<sup>44</sup> NGO Briefing on Independent Complaints Mechanism of FMO and DEG, February 2014, available at:

[http://www.bothends.org/uploaded\\_files/inlineitem/1140213\\_FMO\\_compliance\\_mechanism\\_briefing\\_FINAL.pdf](http://www.bothends.org/uploaded_files/inlineitem/1140213_FMO_compliance_mechanism_briefing_FINAL.pdf)

<sup>45</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 2.1.1.

<sup>46</sup> NGO Briefing on Independent Complaints Mechanism of FMO and DEG, February 2014, available at:

[http://www.bothends.org/uploaded\\_files/inlineitem/1140213\\_FMO\\_compliance\\_mechanism\\_briefing\\_FINAL.pdf](http://www.bothends.org/uploaded_files/inlineitem/1140213_FMO_compliance_mechanism_briefing_FINAL.pdf)

<sup>47</sup> Confirmed through telephone interview with Mr. Steven Priem, Director of FMO for Internal Auditing, May 14, 2014.

Complaint investigation procedures; and, the dispute resolution process and outcomes.<sup>48</sup>

- The Complaint clearly sets forth what is required of each party at each stage of the process, and the documents that will be exchanged between the ICM and the parties.

### Potential Shortcomings

- Lack of clarity in terms creates uncertainty from the perspective of the Complainant. For example:
  - Section 3.1.1. Complaints may be filed in English or in the national language of the country where the project is located, but does not specify whether this includes local indigenous languages or dialects that complaining parties may speak.
  - Section 3.1.4. The ICM states that complaints will only be heard where they contain allegations that have an “indication of a relationship” with the project, and have “substantial (in) direct and adverse impacts or risks.” The key words “relationship” to the project and “substantial” impacts or risks is not clarified in the document. This makes it less clear to potential complainants whether their complaint would qualify as a “substantial” impact or whether their claim has a close enough “relationship” to the project. On the other hand, FMO may consider providing further guidance once complaints are filed to provide a spectrum of cases that have a close enough “relationship” and “substantial” impact to be considered. This concern has also been raised publicly by stakeholders.<sup>49</sup>
  - Section 3.1.4. Stakeholders have raised concerns publicly around the requirement that Complainants must to consult with “relevant responsible parties” before filing the complaint “if applicable.” The requirement is vague and unclear, and may not capture the difficulty of engaging with the responsible parties at the project level.
  - Section 3.1.5. The ICM states that complaints cannot be heard where there is a determination that they are “clearly frivolous or malicious in nature.” The ICM does not provide standards or clarifying language around these terms, and they could be based on a misunderstanding or subjective view of certain beliefs held by claimants that would be foreign non-local reviewers.

### Assessment

- **Minor Gaps.** Although the ICM provides clarity around the entire process, timeframe, and requirements of the parties, the lack of clarity around key terms in the process undermines the predictability of the process. Of chief concern are that the alleged facts must have a “substantial” relationship to the project, although no guidance is provided on the meaning of “substantial.” It is also unclear whether Complainants will need to have consulted with other “relevant parties” before filing the complaint. Through an interview with the ICM, these considerations were considered in the design of the mechanism, but the decision was made to leave the terms somewhat vague in order to give the reviewing panel more flexibility in how to apply them.<sup>50</sup> In some cases, this may work in favor of harmed individuals, and in other cases it may work against them; however, in either case the predictability of the mechanism is weakened although not rendered completely “unpredictable.” The consequence may be to deter legitimate Complainants from filing a Complaint, or unduly burden Claimants with undertaking unnecessary actions to engage with other parties or collect evidence that may (or may not) be needed to satisfy the “substantial” impact requirement.

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<sup>48</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.2

<sup>49</sup> NGO Briefing on Independent Complaints Mechanism of FMO and DEG, February 2014, available at: [http://www.bothends.org/uploaded\\_files/inlineitem/1140213\\_FMO\\_compliance\\_mechanism\\_briefing\\_FINAL.pdf](http://www.bothends.org/uploaded_files/inlineitem/1140213_FMO_compliance_mechanism_briefing_FINAL.pdf)

<sup>50</sup> Confirmed through telephone interview with Mr. Steven Priem, Director of FMO for Internal Auditing, May 14, 2014.

**31(d): Equitable**

Definition: "Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms."

**Relevant Provisions in the FMO-DEG ICM**

- The ICM allows for Complaints to be filed in the native language of the Complainant, increasing the likelihood the Complainants will feel more comfortable seeking help and assistance from those who are able to communicate with them.<sup>51</sup>
- The ICM allows for legitimate representatives to file a complaint on their behalf, increasing the likelihood that Complainants will seek support where necessary.
- The Independent Expert Panel relies heavily on consultation with the Complainant during their investigatory phase, including consultations with the Complainant, visits to the project site, requested written or oral submissions on specific issues from the Complainant, and hiring independent experts to facilitate or research specific issues related to the complaint.<sup>52</sup>
- The ICM provides an opportunity for the Complainant and relevant FMO personnel to comment on the Independent External Panel's report.

**Potential Shortcomings**

- The ICM does not explicitly offer services or support to Complainants to collect facts or data relating to the allegations of their Complaint. Given the relative imbalance of the parties, it may not be feasible for some Complainants to gather the necessary amount of evidence or understand the most persuasive ways to present it for a European based audience.
- Through an interview with the ICM, it was confirmed that while the ICM may help complainants with formatting or filing specifics to ensure that the complaint meets the basic criteria, it is not the province of the grievance mechanism to provide extensive resources for complainants.<sup>53</sup>

**Assessment**

- **Minor Gaps.** Despite the lack of specific offer of services to Complainants, the mechanism provides enough procedural checks and guidance to Complainants to ensure that they have the resources necessary to engage in the grievance process. Process-based commitments at the local level include consultation with Complainants to ensure that the full nature of their story can be heard.

**31(e): Transparent**

Definition: "Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake."

**Relevant Provisions in the FMO-DEG ICM**

- The description and procedures for the ICM are available on the FMO's website.<sup>54</sup>
- The ICM will indicate publicly when it must keep some information confidential due to a party's request.<sup>55</sup>
- The ICM will publish an online register of complaints without status updates and outcomes of cases, including follow-up actions and remediation, taking into account privacy and confidentiality concerns of the parties.<sup>56</sup>

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<sup>51</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.1.3.

<sup>52</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.3.1.

<sup>53</sup> Confirmed through telephone interview with Mr. Steven Priem, Director of FMO for Internal Auditing, May 14, 2014.

<sup>54</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.5.1.

<sup>55</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.1.6.

- Reports from the Independent External Panel's annual report to the FMO Supervisory Board will be published on FMO's website.

#### Potential Shortcomings

- None identified through this research.

#### Assessment

- **Well Aligned.** The ICM contains appropriate processes to ensure that information about the Complaints and the process are made publicly available. Moreover, extensive stakeholder engagement during the design of the grievance mechanism bolstered the transparency of the entire mechanism.

#### 31(f): Rights Compatible

Definition: "Ensuring that outcomes and remedies accord with internationally recognized human rights."

#### Relevant Provisions in the FMO-DEG ICM

- As discussed above, the standards used to review FMO's conduct include FMO's human rights policy and the UN Guiding Principles of Human Rights.

#### Potential Shortcomings

- The limited nature of remedies available under the ICM may fail to adequately remedy negative human rights impacts suffered by Complainants.

#### Assessment

- **Some Gaps.** A fully rights-compatible grievance mechanism would allow for a broader range of remedies available to a Complainant under relevant human rights standards including forms of financial or non-financial compensation, remedies that may attempt to offer redress to the victims to attempt to make them whole again. However, by providing the opportunity for parties to engage in dialogue that may lead to a rights-compatible outcome – although not required under this framework – the criterion is partially satisfied.

#### 31(g): Source of Continuous Learning

Definition: "Drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harm."

#### Relevant Provisions in the FMO-DEG ICM

- The ICM states that the Complaints Mechanism will be reviewed at least every four years and specifically when new laws or regulations arise.

#### Potential Shortcomings

- None identified through this research.

#### Assessment

- **Well Aligned.** Given the explicit statement to review and update the grievance mechanism in accordance with laws and regulations, or immediately in certain situations, the ICM meets the requirement to continuously improve the mechanism.

#### 31(h): Based on Engagement and Dialogue (Operational Grievance Mechanisms)

Definition: Consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances.

**Note:** This criterion does not apply to the NCP because it is not an operational level grievance mechanism.

<sup>56</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.5.2.



**Proportionality (Added by BSR)**

Definition: The remedy is proportional to the harm suffered.

**Note:** *This criterion focuses on the remedy that is provided to the alleged victim, and not solely on the process or design of the grievance mechanism. However, it is considered here and given some weight due to the extent that the final remedy will likely be impacted by the design and structure of the grievance mechanism.*

**Relevant Provisions in the FMO-DEG ICM**

- The remedies available under the ICM include “mediation” and “compliance review”, resulting in the issuance of a report that may contain recommendations to improve existing policies and procedures at the FMO or at the project level. The report must also include an “implementation plan as well as a detailed timeframe.”<sup>57</sup> The report may contain feedback from the FMO and the Complainant, but the final text will be drafted and approved by the Independent Panel.
- The remedy framework is flexible because it allows for a wide range of remedies and corrective action to result from the process in order to account for the variety of complaints and complex operating environments where FMO-funded projects exist.

**Potential Shortcomings**

- The ICM clearly states that it is not a legal enforcement mechanism and does not (and cannot confer rights or enforce rights for complainants. The system is also not designed to make a Complainant whole again or necessarily provide financial or other compensation to the victim for abuses. The ICM is thus limited in the full range of remedies that it can provide to Complainants. Depending on the allegations of the Complaint, the remedies available may not be proportional to the harm suffered by the victim.

**Assessment**

- **Some Gaps.** Although the grievance mechanism may not be able to provide remedies that could make a Complainant whole again, the range of remedies available under the mechanism could lead to a proportional remedy for the victim, but this is not a required outcome. The Independent External Panel can make recommendations to change business processes or systems, and oversee implementation of the recommendations, which can encompass a wide variety of potential remedies that would be proportional to the harm suffered even if not fully able to make the Complainant whole again.

**Independence (Added by BSR)**

Definition: The Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest.

**Relevant Provisions in the FMO-DEG ICM**

- The review of the validity of the Complaint and the substantive merits of the Complaint are undertaken by the Independent Expert Panel, which provides actual and perceived independence from FMO.<sup>58</sup>
- Stakeholder groups noted that “sufficient independence” is given to the expert panel.<sup>59</sup>

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<sup>57</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.2.9.

<sup>58</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 2.1.6 and 3.2 generally.

<sup>59</sup> NGO Briefing on Independent Complaints Mechanism of FMO and DEG, February 2014, available at: [http://www.bothends.org/uploaded\\_files/inlinetext/1140213\\_FMO\\_compliance\\_mechanism\\_briefing\\_FINAL.pdf](http://www.bothends.org/uploaded_files/inlinetext/1140213_FMO_compliance_mechanism_briefing_FINAL.pdf)

- The Independent Expert Panel is appointed by the CEO with approval by FMO's Supervisory Board. The panelists should not have any involvement in FMO project related activities for at least two years.<sup>60</sup>
- The ICM has taken additional steps to ensure that the grievance process is not connected to FMO's business or project-related funding, further supporting the independence and legitimacy of the process. The Complaint Office will be independent of any operation activities arising from the allegations in the Complaint.<sup>61</sup> FMO's Internal Audit will "host" the Complaints Office, but provides only administrative and practical support and will not be involved in determining the substantive merits of the Complaints.

#### Potential Shortcomings

- The independent panelists are compensated by the FMO during their time working as a panelist.<sup>62</sup>
- It is not clear whether panelists can seek employment with the FMO after their two-year tenure on the panel, which could lead to the bias or the perception of bias in their decisions.<sup>63</sup>
- Candidates for panelists are selected through a network of qualified applicants, with input from the NGO community, but panelists are not subject to an open application process.<sup>64</sup>
- Panelists are vetted for conflicts of interest in particular cases, and will recuse themselves if they have a conflict of interest. However, these procedures are not formalized or publicly available.

#### Assessment

- **Minor Gaps.** While it is critical that the panelists are independent of the FMO, the fact that panelists are not subject to an open application process and are not prohibited from working at the FMO after their tenure, may create a perception of taint or bias, even though they may in fact be independent. The lack of these provisions undermine, although by no means eliminate, the independence of the ICM.

### 3. IFC Office of Compliance Advisor Ombudsman (CAO)

#### Overview of Grievance Mechanism

The Office of the Compliance Advisor Ombudsman (CAO) was created in 1999 and is the grievance and accountability mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). The CAO has three roles:

- » **Dispute Resolution:** The CAO provides dispute resolution for complaints by individuals or communities negatively affected by IFC/MIGA projects
- » **Compliance Role:** The CAO oversees compliance investigations into the environmental and social performance of the IFC and MIGA.
- » **Advisory Role:** The CAO provides advice and guidance to the IFC and MIGA based on insights gathered from dispute resolution and compliance case work.

Most cases filed by individuals or communities negatively affected go into the Dispute Resolution phase for facilitated dialogue and mediation. The "Compliance Role" can be initiated

<sup>60</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 3.4.2.

<sup>61</sup> FMO Independent Complaints Mechanism, available for download at <https://www.fmo.nl/page/1115>, Section 2.2.2.

<sup>62</sup> Confirmed through telephone interview with Mr. Steven Priem, Director of FMO for Internal Auditing, May 14, 2014.

<sup>63</sup> Confirmed through telephone interview with Mr. Steven Priem, Director of FMO for Internal Auditing, May 14, 2014.

<sup>64</sup> Confirmed through telephone interview with Mr. Steven Priem, Director of FMO for Internal Auditing, May 14, 2014.

by individuals, but focuses on investigating internal processes and policies to ensure compliance with IFC standards. The CAO is only available to individuals and communities affected by IFC-funded projects.

#### IFC CAO ASSESSMENT SUMMARY

Effectiveness Criteria	Description (from Guiding Principle 31)	IFC CAO Grievance Mechanism
31(a): Legitimate	Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.	Well Aligned
31(b): Accessible	Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.	Well Aligned
31(c): Predictable	Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.	Well Aligned
31(d): Equitable	Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.	Well Aligned
31(e): Transparent	Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.	Well Aligned
31(f): Rights- Compatible	Ensuring that outcomes and remedies accord with internationally recognized human rights.	Some Gaps
31(g): Source of Continuous Learning	Drawing on relevant measure to identify lessons for improving the mechanism and preventing future grievances and harm.	Well Aligned
31(h): Based on Engagement and Dialogue (Operational GMs)	Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.	<i>Not Applicable</i>
Proportionality* ( <i>added by BSR</i> )	The remedy is proportional to the harm suffered.	Some Gaps
Independence* ( <i>added by BSR</i> )	The Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest.	Well Aligned

## Effectiveness Criteria Analysis

### 31(a): Legitimate

Definition: “Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes.”

#### Relevant Provisions in the IFC CAO

- The CAO has implemented robust measures to ensure the CAO’s independence from the IFC, strengthening its legitimacy in the eyes of stakeholders.<sup>65</sup> Independent third parties and NGOs have noted that the recent decisions from the CAO demonstrate the institutional capability of the CAO to make “highly critical” findings regarding the IFC’s performance, supporting the legitimacy of the CAO in the stakeholder community.<sup>66</sup>
- The IFC has resolved hundreds of disputes since its founding, and is consistently used by individuals and stakeholders for dispute resolution. This fact does not mean that it is perfect or leads to the correct outcome in every case, but rather that it is at least viewed as a legitimate mechanism to raise a dispute.

#### Potential Shortcomings

- The CAO is the internal “watchdog” of the IFC, sits within the IFC, and is funded by the IFC.<sup>67</sup> While there are adequate measures in place to ensure its independence (discussed below), this fact could raise some concern around its legitimacy.

#### Assessment

- **Well Aligned.** Despite the CAO being financially dependent on the IFC, the mechanism is viewed by stakeholders as legitimate as evidenced by its continued use and increase in use since its inception. Moreover, the fact that CAO sits within the IFC has not limited the CAO’s ability to deliver positive outcomes to adversely affected individuals, thus strengthening the legitimacy of the institution.

### 31(b): Accessible

Definition: “Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access.”

#### Relevant Provisions in the IFC CAO

- The CAO states that it takes a “proactive approach to raising awareness about the CAO among stakeholders to ensure that they know about CAO’s existence, understand its mission and mandate, and are familiar with how CAO works to address complaints.”<sup>68</sup>
- Proactive outreach measures include:<sup>69</sup>
  - Publishing CAO documents in multiple languages and making materials available online, in hard copy, and other “culturally appropriate means.”
  - Meeting with potentially affected people and their representatives upon request
  - Disseminating information about the CAO in the markets where IFC/MIGA does business through civil society organizations, World

<sup>65</sup> See analysis under the “Independence” criterion below.

<sup>66</sup> “CSO Response to the CAO Investigation Into IFC Investment in Corporacion Dinant Honduras,” Grain.org., January 10, 2014, available <http://www.grain.org/article/entries/4854-cso-response-to-the-cao-investigation-into-ifc-investment-in-corporacion-dinant-honduras> (noting that the CAO’s opinion is one of the most “damning investigations” ever conducted into the IFC).

<sup>67</sup> See further analysis under the “Independence” criterion below.

<sup>68</sup> IFC, CAO Operational Guidelines, pg. 7, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>69</sup> IFC, CAO Operational Guidelines, pg. 7, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

- Bank Group offices, partner independent accountability mechanisms, the business community, academia, and other organizations.
  - Conducting outreach to national and local civil society groups
  - Seeking advice from experts on ways to improve CAO's communications with stakeholders and potentially affected people and communities
  - Understanding and being responsive to local constraints that may impede peoples' ability to access CAO's services and/or participate in a CAO process.
- Although the working language is English, the CAO "works to facilitate communications with its stakeholders in any language, including the submission of complaints and publication of CAO reports and materials. All publically disclosed CAO reports relating to complaints... are translated into the local language of the relevant complainants," and where necessary "CAO will translate these materials into additional local languages and present them in a culturally appropriate manner."<sup>70</sup>
- The CAO has relatively loose criteria for filing a complaint, making it easier for individuals, communities, and stakeholders to access the grievance mechanism. The Operational Guidelines state that "any individual or group of individuals that believes it is affected or potentially affected by the environmental and/or social impacts of an IFC/MIGA project may lodge a complaint with the CAO."<sup>71</sup>

#### Potential Shortcomings

- The CAO does not currently provide an online filing system (beyond an email address), although we confirmed through an interview that the CAO is working to build a system with this capability.<sup>72</sup>
- All complaints must be mailed or delivered to the Office of the CAO in Washington, DC. This may provide some challenges for communities in remote areas that are not able to physically send in the complaint to an international address.

#### Assessment

- **Well Aligned.** The CAO is accessible to directly affected individuals or communities. Representatives of those communities may also file a grievance with a requisite showing of legitimate representation." It is also evident that there is significant interaction with the complainants during the complaint assessment phase to ensure that the mediators understand the details of the alleged dispute.<sup>73</sup> While an online filing system would be welcome, it is our understanding that the CAO is working to build one, which will likely increase the accessibility of the CAO.

#### 31(c): Predictable

Definition: "Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation."

#### Relevant Provisions in the IFC CAO

- The CAO Operational guidelines clearly state the requirements for filing a complaint and the timeframe for review, investigation, and assessment of the complaint.<sup>74</sup>

<sup>70</sup> IFC, CAO Operational Guidelines, pg. 7, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>71</sup> IFC, CAO Operational Guidelines, pg. 10, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>72</sup> Confirmed through in-person interview with Gina Lea Barbierri, Senior Specialist, Dispute Resolution, CAO, on May 22, 2014.

<sup>73</sup> Confirmed through in-person interview with Gina Lea Barbierri, Senior Specialist, Dispute Resolution, CAO, on May 22, 2014.

<sup>74</sup> IFC, CAO Operational Guidelines, pg. 10, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

- The terms are relatively clear and easy to understand.
- Complaints are limited to IFC/MIGA projects, and this is clearly stated in the Operational Guidelines.<sup>75</sup>
- The CAO Operational Guidelines provide a visualization of the complaints process and the various steps at each stage of the process.<sup>76</sup>

#### Potential Shortcomings

- None identified during this research.

#### Assessment

- **Well Aligned.** The Operational Guidelines provide a clear and predictable guidance on how to file a complaint and the timeframe and process for resolution.

#### 31(d): Equitable

Definition: "Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms."

#### Relevant Provisions in the IFC CAO

- Although the working language is English, the CAO "works to facilitate communications with its stakeholders in any language, including the submission of complaints and publication of CAO reports and materials. All publically disclosed CAO reports relating to complaints... are translated into the local language of the relevant complainants," and where necessary "CAO will translate these materials into additional local languages and present them in a culturally appropriate manner."<sup>77</sup>
- The Operational Guidelines state that "On request, the CAO will provide guidance on how to lodge a complaint, without providing advice regarding the substance of the complaint." Moreover, if the "initial submission is not clear, CAO will seek additional information or clarification from the complainant."<sup>78</sup>
- If the parties choose to engage in Dispute Resolution, the CAO will "assist parties in the monitoring implementation of the agreements" reached during this process. The CAO will publicly disclose the outcomes of implementation efforts on its website.<sup>79</sup>
- The CAO's annual report documents extensive engagement with individuals and communities that file grievance, which was confirmed through several examples presented during an in-person interview with representatives from the CAO.<sup>80</sup>

#### Potential Shortcomings

- The CAO does not explicitly provide resources or expertise to all parties beyond advice and support on the initial complaint.

#### Assessment

- **Well Aligned.** The CAO works closely with the allegedly harmed individuals or communities to educate on the dispute resolution process, benefits and limitations of mediation, and to ensure that the relevant facts are brought to light

<sup>75</sup> IFC, CAO Operational Guidelines, pg. 10, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>76</sup> IFC, CAO Operational Guidelines, pg. 11, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>77</sup> IFC, CAO Operational Guidelines, pg. 7, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>78</sup> IFC, CAO Operational Guidelines, pg. 12, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>79</sup> IFC, CAO Operational Guidelines, pg. 19, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>80</sup> Confirmed through in-person interview with Gina Lea Barbierrri, Senior Specialist, Dispute Resolution, CAO, on May 22, 2014.



during the mediation. Several of examples of this are contained in case studies in the IFC Annual Report.<sup>81</sup>

### 31(e): *Transparent*

Definition: “Keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.”

#### Relevant Provisions in the IFC CAO

- The CAO states that it “makes every effort to ensure transparency and maximum disclosure of its reports, findings, and outcomes,” including publicly posting the reports and findings from its dispute resolution process, compliance investigations, and advisory work as well as annual and interim CAO reports.<sup>82</sup>
- Once a complaint is deemed eligible under the IFC’s eligibility criteria, relevant parties in the complaint will be notified of the complaint.<sup>83</sup>
- Although the working language is English, the CAO “works to facilitate communications with its stakeholders in any language, including the submission of complaints and publication of CAO reports and materials. All publically disclosed CAO reports relating to complaints... are translated into the local language of the relevant complainants,” and where necessary “CAO will translate these materials into additional local languages and present them in a culturally appropriate manner.”<sup>84</sup>
- A summary of each case from the CAO is included in its Annual Report, which is available to the public.

#### Potential Shortcomings

- None identified through this research.

#### Assessment

- **Well Aligned.** The CAO is transparent about its process and the outcomes of dispute resolutions, while protecting the identity of parties where necessary.

### 31(f): *Rights Compatible*

Definition: “Ensuring that outcomes and remedies accord with internationally recognized human rights.”

#### Relevant Provisions in the IFC CAO

- The CAO states that it “recognizes and protects” a party’s right to confidentiality, and disclosure of information “with respect a party’s request for confidentiality.”<sup>85</sup>
- The CAO states that in cases “where a CAO Dispute Resolution case is transferred to CAO Compliance, confidential information received during the dispute resolution process will not be shared with CAO Compliance, unless explicit permission to do so is provided by the relevant parties.” This is to ensure that parties engage in “open and frank” discussion during the dispute resolution process.<sup>86</sup>

<sup>81</sup> The CAO annual reports can be found on the IFC CAO website. The process of working with individuals was further confirmed through in-person interview with Gina Lea Barbiéri, Senior Specialist, Dispute Resolution, CAO, on May 22, 2014.

<sup>82</sup> IFC, CAO Operational Guidelines, pg. 6, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>83</sup> IFC, CAO Operational Guidelines, pg. 6, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>84</sup> IFC, CAO Operational Guidelines, pg. 7, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>85</sup> IFC, CAO Operational Guidelines, pg. 6, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>86</sup> IFC, CAO Operational Guidelines, pg. 6, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

- During the filing of the complaint, the complainant may indicate whether they would like their identity or any other information contained in the complaint to be kept confidential.
- Human rights standards, e.g. the International Bill of Human Rights, is integrated into IFC (and thus CAO) review standards through the IFC Sustainability Policy and through IFC Performance Standard One.<sup>87</sup>

#### Potential Shortcomings

- The limited nature of remedies available under the ICM may fail to adequately remedy negative human rights impacts suffered by Complainants.

#### Assessment

- **Some Gaps.** Similar to the NCP and ICM, a fully rights-compatible grievance mechanism would allow for a broader range of remedies available to a victim under relevant human rights standards including forms of financial or non-financial compensation, remedies that may attempt to offer redress to the victims to attempt to make them whole again. However, by providing the opportunity for parties to engage in dialogue that may lead to a rights-compatible outcome – although not required under this framework – the criterion is partially satisfied.

#### 31(g): Source of Continuous Learning

Definition: “Drawing on relevant measure to identify lessons for improving the mechanism and preventing future grievances and harm.”

#### Relevant Provisions in the IFC CAO

- The CAO reports on its learnings to the President of the IFC quarterly and provides briefings upon request. The CAO also provides Annual Reports to the World Bank Group Board to provide an overview of the CAO’s activities and monitor the implementation of recommendations.<sup>88</sup>
- The CAO provides an annual update to the Board’s Committee on Development Effectiveness, including a Management Action Tracking Record, which annually records actions taken by IFC/MIGA in response to CAO’s recommendations and findings.<sup>89</sup>
- Through the “Advisory” component, the CAO advises the IFC “on broader environmental and social issues related to policies, standards, guidelines, procedures, resources, and systems established to improve the performance of IFC/MIGA projects.”<sup>90</sup> Specific objectives may include:
  - Brining about systemic improvements in environmental and/or social performance of IFC/MIGA addressing deficiencies in systems, policies, guidelines, or procedures;
  - Helping IFC/MIGA understand how their environmental and/or social obligations may be met more effectively; and
  - Advancing the boundaries of environmentally and/or socially responsible behavior on the part of IFC/MIGA by advising on emerging strategic or systemic issues, trends, or processes.<sup>91</sup>

<sup>87</sup> *The International Bill of Human Rights and IFC Sustainability Framework*, available at [http://www.ifc.org/wps/wcm/connect/dc3e948049800ad7ac6afe336b93d75f/IBHR\\_and\\_IFC\\_Policies%2BPS-DRAFT.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/dc3e948049800ad7ac6afe336b93d75f/IBHR_and_IFC_Policies%2BPS-DRAFT.pdf?MOD=AJPERES) (providing assessment and analysis of incorporation of human rights into the IFC Sustainability Framework and Performance Standards).

<sup>88</sup> IFC, CAO Operational Guidelines, pg. 6, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>89</sup> IFC, CAO Operational Guidelines, pg. 6, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>90</sup> IFC, CAO Operational Guidelines, pg. 28, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>91</sup> IFC, CAO Operational Guidelines, pg. 29, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

- The CAO Guidelines were recently updated in response to recommendations from external reviews of CAO's effectiveness by the World Bank Group Board and an independent review team. The revised Operational Guidelines were released in March 2013.<sup>92</sup>

#### Potential Shortcomings

- None identified through this research.

#### Assessment

- **Well Aligned.** The CAO process is designed to reflect upon the process and incorporate improvements at each stage.

#### 31(h): *Based on Engagement and Dialogue*

Definition: Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances

*Note: This criterion does not apply to the CAO because it is not an operational level grievance mechanism.*

#### Proportionality (Added by BSR)

Definition: The remedy is proportional to the harm suffered.

*Note: This criterion focuses on the remedy that is provided to the alleged victim, and not solely on the process or design of the grievance mechanism. However, it is considered here and given some weight due to the extent that the final remedy will likely be impacted by the design and structure of the grievance mechanism.*

#### Relevant Provisions in the IFC CAO

- The Dispute Resolution component of the CAO is the most relevant for negatively impacted individuals or communities. The Dispute Resolution mechanism is a “nonjudicial, nonadversarial, neutral forum” that provides a process “through which parties may find mutually satisfactory solutions.” The Operational Guidance further states that engaging in the dispute resolution process is “voluntary decision, and requires agreement between the complainant and the client, at a minimum.”

#### Potential Shortcomings

- The CAO clearly states that it is not a legal enforcement mechanism and does not (and cannot) confer rights or enforce rights for complainants. The CAO is not designed to necessarily offer remedies that will, in every case, make the alleged victim whole again, or in every case provide adequate financial or other compensation to the victim for abuses. The CAO is thus limited in the full range of remedies that it can provide to Complainants. Depending on the allegations of the Complaint, the remedies available may not be proportional to the harm suffered by the victim.

#### Assessment

- **Some Gaps.** Similar to the NCP and ICM, the CAO grievance mechanism provides an opportunity to lead to a proportional remedy, but it is not mandated or a necessary outcome of the mechanism. Similar as well to the other two, the CAO can make recommendations to change business processes or systems through Compliance or Advisory role, which can encompass a wide variety of potential remedies that would be proportional to the harm suffered even if not fully able to make the victim whole again.

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<sup>92</sup> Source: <http://www.cao-ombudsman.org/about/whoweare/>

### **Independence (Added by BSR)**

Definition: The Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest.

### **Relevant Provisions in the IFC CAO**

- The CAO states that it “strives to be an independent.... process,” and that it is “not identified with or beholden to any sector or interest.” The CAO is independent from the line management of the IFC and MIGA.<sup>93</sup>
- The CAO takes the following measures to reinforced its independence:<sup>94</sup>
  - CAO staff are recruited by the CAO Vice President
  - CAO staff specialists and above are restricted from obtaining employment with the IFC for a period of two years after they end their engagement with the CAO.
  - The CAO Vice President is restricted for life from obtaining employment with the IFC.
  - The CAO office is physically located in a secure area and only CAO staff has access to the office.
  - The CAO does not give project-specific advice to the IFC/MIGA.
  - If CAO staff or consultants have a conflict of interest in a particular case, that person will withdraw from the case.
  - In some cases, contractual arrangements with CAO consultants may impose time-bound restrictions on their future involvement with IFC or MIGA.

### **Potential Shortcomings**

- Although the CAO has implemented relatively robust measures to ensure its independence from the IFC, the CAO still sits within the IFC and is funded by the IFC.<sup>95</sup>

### **Assessment**

- **Well Aligned.** The IFC has implemented robust controls to ensure the CAO’s independence, including “lockout” periods for CAO staff obtaining employment at the IFC, and a lifetime restriction on the Vice President. The CAO has also instituted measures to address potential conflicts of interest when investigating complaints. While the CAO sits within the IFC, the Guiding Principles do not require grievance mechanisms that are completely external to a funding institution.

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<sup>93</sup> IFC, CAO Operational Guidelines, pg. 5, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>94</sup> IFC, CAO Operational Guidelines, pg. 5, available <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>95</sup> See “About the CAO: Funding”, available at <http://www.cao-ombudsman.org/about/funding/>.

## Appendix II | Stakeholders Expectations and Assessment

The questionnaire requested to stakeholders to identify and describe the three to five most important operational characteristics for each of the effectiveness criteria for a grievance mechanism (GM in the table below) relevant to the coal supply chain. The official description provided by the UNGPs and the two additional BSR criteria were provide in order to guide the response for each one of them.

By operational characteristics we mean the way the grievance mechanisms could be designed in order to meet the effectiveness criteria, in terms of processes and systems in place (e.g. ongoing revision of the mechanism, stakeholder participation, ways to address barriers to the access to the mechanism, etc.).

In the following table a description of the expected operational characteristics described by the stakeholders is presented for each one of the criterion.

Guiding Principles: Effectiveness Criteria	Operational characteristics expected by stakeholders
31(a): Legitimate	<ol style="list-style-type: none"> <li>1. The final outcome of the process needs to be enforced and make parties bounded to the result – also under Proportionality</li> <li>2. To be credible there must be a normative framework against which stakeholders can make reference, like a code of conduct or a standard</li> <li>3. The GM needs to be adequately staffed for each stage of the process and must be headed by a qualified person</li> <li>4. There should be an oversight independent body to guarantee the integrity of the instrument</li> <li>5. The GM should provide continuous information and consultation to stakeholders who should be able to understand the process and its potential outcomes</li> </ol>
31(b): Accessible	<ol style="list-style-type: none"> <li>1. The operational level grievance mechanisms are preferable, because they are closer to affected stakeholders: the GM must be able to create a real relation with affected stakeholders and access in situ</li> <li>2. GM should do an outreach effort in order to be known by stakeholders</li> <li>3. A telephone number is not enough: multiple entry points should be guaranteed and in consideration of language and cultural differences</li> <li>4. The GM should be open and comply with the due diligence framework: 'identify, prevent and mitigate actual or potential impacts': In particular: <ul style="list-style-type: none"> <li>• It shouldn't be too restrictive in admitting a complaint (sometimes GM requests unreasonable burden of proof and the complaints are not considered if those proofs are not provided at the earliest stage.</li> <li>• At the same time the GM should consider complaints even if the impact has not materialized yet.</li> </ul> </li> </ol>

<p>31(c): Predictable</p>	<p>1. The GM process should comprise the following phases:</p> <ul style="list-style-type: none"> <li>• Complaint is assessed for its acceptability, but GM shouldn't request a too heavy proof of evidence</li> <li>• GM should a mediation phase which should be done by a professional mediator</li> <li>• If the mediation phase is not possible or its result is not successful for both parties, there should be at least a determination phase where GM should do research and fact finding and issue a statement of determination/recommendation</li> <li>• The final result should be left open to a potential binding arbitration process, supported by the GM and managed by an independent credible third party</li> </ul> <p>2. GM should ensure that parties are regularly informed about the upcoming steps of the procedure</p> <p>3. GM should monitor the implementation of the agreement and should consider issuing an addendum to the final statement if the agreement is not respected – also under 31(f) Rights Compatible</p> <p>4. Procedures must be clear, consistent and well publicized, with a clear defined time frame and reasonable time to close the case. Cases pending for an undue period of time should be closed with a clear statement</p>
<p>31(d): Equitable</p>	<p>1. The procedure should have established terms of references, including binding rules on how to treat the contentious points and how to monitor their elimination.</p> <p>2. A more definite outcome, whether it is a determination phase or a binding arbitration process handed over to a third party could help solving the imbalance of forces between the parties with a clear outcome that mediation cannot always guarantee.</p> <p>3. Impartiality needs to be guaranteed on a case by case basis - also under Independency</p> <p>4. Providing a relevant, easy to find, in multiple languages and meaningful information to the people is part of the solution.</p> <p>5. Adequate staffing and dedicated resources are needed to support the most vulnerable parties. The GM needs to communicate to parties that these resources are available.</p> <p>6. Providing a safe environment for discussion is crucial: anonymity and confidentiality need to be guaranteed in order to safeguard the most vulnerable parties.</p> <p>7. In the mediation phase the external mediator should be endorsed by both parties, who should have the possibility to reject a mediator in justified cases.</p>



<p>31(e): Transparent</p>	<ol style="list-style-type: none"> <li>1. The GM should publish an annual review analyzing progress and trends</li> <li>2. As a minimum initial and final statement for each complaint must be published.</li> <li>3. Information must be guaranteed sufficiently and timely to both parties on a continuous basis as the process advance and must clarify how the complaint will be handled and what the next steps are.</li> <li>4. The decision reached during the initial and final statement phases must be based on information that was shared with both parties.</li> <li>5. Complainants should be able to communicate externally to their stakeholders about how the process is going, with due respect to confidentiality and good faith.</li> <li>6. Nevertheless, content of mediation should be kept confidential when parties agree to do so</li> </ol>
<p>31(f): Rights-Compatible</p>	<ol style="list-style-type: none"> <li>1. GM should have a clear frame of reference aligned with the Human rights framework (UN, ILO, OECD, etc.).</li> <li>2. GM should regularly conduct an independent assessment to ensure that no one is excluded, especially considering the most vulnerable and target groups - also under 31(g) Source of Continuous learning.</li> <li>3. Remedy must not allow a violation of rights.</li> <li>4. GM should monitor the implementation of the agreements by the parties and there should be the possibility to take action if the agreement is not followed, like issuing an addendum to the final statement – also under 31(c) Predictable</li> </ol>
<p>31(g): Source of Continuous Learning</p>	<ol style="list-style-type: none"> <li>1. GM should carry a periodic independent review, assessment, benchmarking and trend analysis of complaints and of the functioning of the GM to seek advice. Stakeholders and involved parties should be part of this process.</li> <li>2. GM should commit to an action plan and should provide response times to cover gaps that have been found through the review.</li> <li>3. GM should monitor the implementation of agreements after the final statement has been issued and do a context analysis to see if the GM has enabled progress</li> </ol>
<p>31(h): Based on Engagement and Dialogue <i>(For Operational-Level GMs only)</i></p>	<ol style="list-style-type: none"> <li>1. GM should engage stakeholders operating on the ground for the specific (this can be applicable for non-operational level GM as well).</li> <li>2. GM should organize focus groups with stakeholders that could advice during the grievance/mediation process.</li> <li>3. The participation of local authorities is important and they should be educated to be involved in the grievance process.</li> </ol>

<p>Proportionality* <i>(added by BSR)</i></p>	<ol style="list-style-type: none"> <li>1. To be proportionate the outcome must be enforceable - also under 31(a) Legitimate</li> <li>2. Adequate compensation should be available (e.g. job loss should be compensated by money or in other cases extra education and training).</li> <li>3. GM should assess regularly the outcome of the grievance process against the harm suffered.</li> </ol>
<p>Independence* <i>(added by BSR)</i></p>	<ol style="list-style-type: none"> <li>1. GM should be structured to ensure impartiality, though the involvement of stakeholders in both the governance (respondents referred to the French NCP model) and at proceeding level, having an independent secretariat.</li> <li>2. GM should screen and conduct record checks to avoid conflict of interests.</li> </ol>