CAO COMPLIANCE ADVISOR OMBUDSMAN

The Independent Accountability Mechanism for IFC & MIGA

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ADVISORY NOTE

Insights on Remedy

The Remedy Gap: Lessons from CAO Compliance and Beyond

Advisory Note

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This Advisory Note is part of a series from the Office of the Compliance Advisor Ombudsman (CAO). These short papers seek to inform the approach to remedial actions that the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) are developing to address potential or actual harm that may unintentionally arise in the development process. Drawing from CAO casework, this Note explores the "remedy gap" that occurs when harm to people arising from the adverse impacts of IFC/MIGA projects is not remedied through the actions of IFC/MIGA or their clients. It highlights contributing factors and presents findings and insights to help IFC and MIGA close the remedy gap.

Summary of Findings and Recommendations

IFC's/MIGA's existing Sustainability Frameworks include environmental and social (E&S) commitments that, in principle, provide for remedial action to address adverse impacts on communities. However, a review of CAO casework indicates that, in practice, current E&S risk management approaches have left many people affected by IFC/MIGA financed projects without remedy. The result is a "remedy gap" whereby people lodging a complaint with CAO about environmental and/or social issues often do not see their specific concerns addressed despite attempting dispute resolution or undergoing a lengthy compliance process. Instead, they are left to suffer harm and bear the unintended cost of development projects, even in cases where CAO has found IFC/MIGA non-compliance. These unintended costs can take many forms: the loss of livelihood, poor health, loss of cultural identity, and environmental damage, among others.

A review of CAO cases for this paper provides important insights for IFC/MIGA about factors that can lead to a remedy gap, and actions that can help close it, as they develop their approach to remedy:

- Affected people are often unaware of options for redress, including through CAO. This represents an obstacle to remedy.

  Affected people should be made aware of all grievance redress options, including CAO. When complainants access IFC/MIGA directly, they should be informed of their option to access CAO at any point in the process.

- IFC and its clients often miss critical opportunities for early resolution.

  IFC/MIGA should take complainants' concerns seriously, respond pro-actively, and seek to understand the situation from multiple viewpoints.

Summary of Findings and Recommendations

continued

- IFC/MIGA and client reporting of, and responsiveness to, stakeholder grievances and serious incidents with environmental and social impacts is not sufficiently robust.

  Reporting should be strengthened to enable proactive action where harm may have occurred.

- Gaps in remedial action at the closure of CAO compliance processes often follow project exits. IFC/MIGA and client exits frequently leave project-affected people without remedy.

  IFC/MIGA should address E&S concerns before project exits.

- Using leverage with clients to support E&S performance and enable remedy is a useful tool that is underused in IFC/MIGA contracts with clients. In addition, IFC/MIGA often fail to fully use their leverage with clients to address E&S concerns, and routinely waive agreed E&S actions.

  IFC/MIGA should strengthen the planning and use of all forms of leverage and increase internal accountability for actions that may undermine leverage.

- Timebound and responsive IFC/MIGA Management Action Plans (MAPs) are critical for achieving remedy for complainants through the CAO compliance process. Meaningful engagement with complainants is also critically important.

  IFC and MIGA MAPs should respond to CAO compliance findings and recommendations, and be implemented in a timely fashion. IFC/MIGA should develop guidance on how to engage complainants on remedy.

- Closing the remedy gap will, at times, require IFC/MIGA to assume responsibility for their contribution to project-related harms and contribute to remedy.

  IFC/MIGA should contribute to remedy where they have contributed to harm. IFC and MIGA should establish internal processes and set aside budget to meet this responsibility.

- IFC and MIGA have a responsibility towards communities who have brought their concerns to CAO and are still awaiting remedy.

  IFC and MIGA, in consultation with CAO and complainants, should conduct a review of CAO cases to identify those where a significant remedy gap exists and propose measures to address these.

Box 1. Remedy Analysis from CAO Cases: The Numbers (2013-2022)

- **78 percent** (11 of 14) of closed CAO compliance cases that made project-level findings did not lead to satisfactory project-level actions to address non compliances.
- In **35 percent** (19 of 54) of CAO compliance cases, IFC/MIGA or their clients exited investments while the case was ongoing.[1]
- **56 percent** of CAO dispute resolution cases resulted in agreement or partial agreement.[2]
- **50 percent** of complaints to CAO were for projects that IFC/MIGA had designated "category B" as they were expected to have limited adverse E&S risks or impacts easily addressed through mitigation measures.
- In **70 percent** (9 of 16) CAO compliance cases since 2018, IFC did not exhaust available leverage to address outstanding E&S compliance issues.

1 Over the last ten years, exits occurred in at least 19 CAO cases, while the compliance process was ongoing. Over that time period, CAO compliance worked on 80 complaints that were merged into 54 cases.

2 This number includes agreements (41 percent), and agreements with partial transfer to compliance (15 percent) of outstanding issues that were not addressed through the dispute resolution process.

Dignity factory workers producing shirts for overseas clients, in Accra, Ghana.
Photo Credit: Dominic Chavez / World Bank

About the Remedy Gap

The World Bank Group (WBG), including IFC and MIGA, has made the commitment that development costs should not fall disproportionately on the poor and vulnerable.[3] As a result, WBG E&S risk management approaches place considerable emphasis on avoiding, minimizing, and mitigating adverse E&S impacts.[4] However, despite the best of intentions, IFC/MIGA have acknowledged the reality[5] that some of their investments result in adverse impacts on communities and environments. Since internal systems to remediate such impacts are not well developed, the result is that adverse impacts are often left unremedied.

This situation, which applies to development institutions beyond the WBG, is known as the "remedy gap."[6] In response, development institutions, including IFC and MIGA, as well as businesses, are reevaluating the effectiveness of their approaches to remediation, and developing frameworks to strengthen remedy.

To help inform the development of such approaches and frameworks, CAO has reviewed its case experience. This note first describes CAO's experience with the remedy gap, then briefly explores relevant contributing factors.

3 IFC Performance Standards, para. 12: "*Where individuals or groups are identified as disadvantaged or vulnerable, the client will propose and implement differentiated measures so that adverse impacts do not fall disproportionately on them and they are not disadvantaged in sharing development benefits and opportunities.*"

4 IFC Performance Standards, para. 1: "*The Performance Standards are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities.*"

5 IFC/MIGA Draft Approach to Remedial Access, para. 2: "Notwithstanding the strong foundation provided by the SFs and IFC/MIGA's support for implementation, adverse E&S impacts may occur, including in situations involving significant contextual risks and clients with lower capacity to manage E&S issues."

6 See, for example, the 2020 study by Susan Park, Environmental Recourse at the Multilateral Development Banks. "Using a database of all known submissions to the IAMs [independent accountability mechanisms] (1,052 claims from 1994 to mid-2019), this Element demonstrate(s) how the IAMs enable people to air their grievances, without necessarily solving their problems." Further, a 2019 report published by the Centre for Research on Multilateral Corporations (SOMO) that analyzed the accountability mechanisms of multilateral development banks (MDBs) such as the World Bank noted that outcomes rarely provide adequate remedy for the harm that people and communities affected by development projects have experienced (Glass Half Full? The State of Accountability in Development Finance).

What is Remedy?

The principle that adverse impacts on project-affected people, communities, and workers should be remediated is embedded in many E&S policy frameworks of development finance institutions.[7] Remediation requirements are typically embedded both through mitigation hierarchies and in specific requirements such as responding to the concerns of workers or project-affected people.[8] The access to remedy principle is also a founding objective of independent accountability mechanisms (IAMs) such as CAO. In recent years, institutions have sharpened efforts to understand and address the "remedy gap" that persists despite existing policy requirements for E&S mitigation and complaint response. The challenge of addressing unresolved adverse E&S project impacts is particularly relevant for development finance institutions given their objectives to do no harm and improve people's lives.[9]

Civil society organizations (CSOs) and human rights institutions, including the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), have contributed to thinking on the issue.[10] Remedy is also a core pillar of the UN Guiding Principles on Business and Human Rights (UNGPs).[11] These recognize that not all impacts can be foreseen or avoided, even where businesses have sound E&S risk management systems in place. In such instances, the UNGPs state, grievance mechanisms play an important role and businesses are responsible for providing, or contributing to, remedy when they have caused or contributed to harm.

7 For IFC, for example, the IFC's Policy and Environmental and Social Sustainability sets out that "Central to these requirements [the Performance Standards] is the application of a mitigation hierarchy to anticipate and avoid adverse impacts on workers, communities, and the environment, or where avoidance is not possible, to minimize, and where residual impacts remain, compensate/offset for the risks and impacts, as appropriate" (para. 6).

8 IFC's Policy and Environmental and Social Sustainability, para 12; Performance Standard 1, paras. 3, 23, 35; Performance Standard 2, paras. 3, 20, 27/29; Performance Standard 5.

9 See, for example, "Dutch Banking Sector Agreement Working Group Enabling Remediation," Discussion Paper (Social and Economic Council, The Hague, May 2019); and *Remedy in Development Finance, Guidance and Practice* (UN Office of the High Commissioner for Human Rights 2022).

10 *Remedy in Development Finance, Guidance and Practice* (UN Office of the High Commissioner for Human Rights 2022).

11 The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011. Together with the OECD Guidelines for Multinational Enterprises, the UNGPs are the global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. They inform CAO's interpretation of its Policy and its remedy mandate as a core principle guiding CAO's work and consistent with good practice, including the responsibility of business to respect human rights [para. 10(g) of the Policy]. The OECD Guidelines have been multilaterally agreed and are a comprehensive code of responsible business conduct that governments have committed to promoting; they were last updated in 2011 and include a chapter on human rights that is fully aligned with the UNGPs. IFC's responsibility in this context is addressed in para. 12 of the IFC's Policy on Environmental and Social Sustainability.

CAO and Remedy

The new IFC/MIGA Independent Accountability Mechanism (CAO) Policy was introduced in 2021 in response to the findings of an independent External Review initiated by the IFC and MIGA Boards of Executive Directors.[12] To address identified shortcomings in remedy outcomes,[13] the Policy establishes that, in executing its mandate, "CAO facilitates access to remedy for project-affected people in a manner that is consistent with the international principles related to business and human rights included within the [IFC/MIGA] Sustainability Framework."[14]

In line with learning from the business and human rights context, and in keeping with IFC/MIGA's framing of E&S risk management, CAO defines remedy in this paper as ***the act of effectively remediating adverse project impacts.*** Following the UNGPs, effective remedy involves a number of components:

- It seeks to redress situations that expose people and the environment to potential or actual harm.[15]
- It seeks to "make whole" project-affected people and the environment.
- It helps to prevent future harm.
- It is not only an outcome but is also a process that places agency in the harmed person and acts toward restoring the dignity that was lost in the harm.

The UNGPs state that the provision of remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation, and the prevention of harm through, for example, guarantees of non-repetition.[16]

12 The *External Review of IFC/MIGA's E&S Accountability, including CAO's Role and Effectiveness* was initiated by the IFC and MIGA Boards in 2019 and conducted by a high-level panel of independent experts. The External Review report was released in August 2020.
13 See pp. 69–80 of the External Review of IFC/MIGA E&S Accountability
14 IFC/MIGA Independent Accountability Mechanism (CAO) Policy, para 5.
15 Concerns about future harm that may need remediating now could include, for example, air pollution that leads to adverse health impacts over time. Such harm may not have materialized yet, but still needs to be remediated.
16 See UNGPs Principle 25, p.27. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

Analysis of CAO Casework and IFC/MIGA Record on Remedy

Complaints to CAO often have not resulted in effective remedy.

For almost 25 years, people adversely affected by the E&S impacts of projects supported by IFC and MIGA have sought accountability and redress through CAO. CAO offers complainants and companies the choice between a voluntary collaborative dispute resolution process and a compliance process that focuses on IFC/MIGA compliance with their E&S policies. Over this time, complainants have raised their concerns with mixed results. While dispute resolution and compliance cases have yielded many robust outcomes, many other cases—including a majority of compliance investigations over the past decade—have not led to actual improvements for affected people at the project level.

The 2020 External Review identified a "remedy gap" and provided key recommendations to address this in IFC/MIGA's accountability system, including in the work of CAO (see Box 2).

For this paper, CAO's Advisory function compiled ongoing and specific evidence of the remedy gap by analyzing the Management Action Tracking Record (MATR) ratings. MATR is an annual process during which IFC and CAO report to the Board on institutional responsiveness to, and learning from, CAO cases. An examination of completed and closed CAO compliance cases from 2013-2022 revealed that 11 of 14, or 78 percent, of the CAO investigations that made project-level findings did not lead to satisfactory project-level remedial actions.

CAO Dispute Resolution cases over the same 10 years, where IFC/MIGA client companies and complainants chose to address grievances in a mediated collaborative process, resulted in agreement or partial agreement in 56 percent of cases.[17] Approaches to enhance remedy outcomes from dispute resolution processes are explored in another CAO Advisory Note in this series, Insights on Remedy: The Role of Dispute Resolution in Remedy.

17 https://www.cao-in-numbers.org/dispute-resolution#Dispute-Resolution-Settlement-Rates.

Box 2: External Review Key Recommendations on Remedy

The External Review Report, released in 2020, found that shortcomings with respect to remedy often left project-related harm to communities unaddressed, even after a CAO complaint had run its course.[18] The report concluded that "most CAO non-compliance findings do not lead to effective remedy" (p. 71). To address this gap, the review team made numerous recommendations to align CAO's processes more closely with a mandate to facilitate access to remedy, and to require greater responsiveness by IFC and MIGA to stakeholder grievances.

In the context of CAO's compliance work, the review called for strengthened requirements regarding Management Action Plans (MAP), including:

- Board approval of Management Action Plans (MAP).
- Time-bound operational remedial measures included in MAPs.
- IFC/MIGA measures to avoid recurrence of the stated non-compliances included in MAPs.
- IFC/MIGA consultations with the complainants and CAO on the planned MAP measures.

The review further recommended that IFC/MIGA establish a framework for remedial action in cases where non-compliance contributes to harm, with elements including:

- IFC/MIGA to develop one or more E&S contingent funding requirements, with associated legal covenants, binding on clients during IFC/MIGA involvement and at least two years after.[19]
- The Board to establish the principle that IFC/MIGA contribution to harm triggers an obligation for their contribution to remedy.[20]

18 *External Review of IFC/MIGA E&S Accountability, Including CAO's Role and Effectiveness: Report and Recommendations*, June 2020, pp. 69–79 (https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf).
19 External Review Report, para 59
20 External Review Report, para 60

Affected people suffer real harm when adverse impacts remain unremedied.

Compliance cases only result in remedy when there is a positive institutional response. IFC and MIGA have to work with their clients to develop an action plan, with the meaningful participation of the affected people, which addresses the identified non-compliances and remedies the harm. The External Review's recommendation for IFC/MIGA to establish a remedy framework and to plan for remedy by developing financing options and associated legal covenants (see Box 2) responds to this reality. In discussions about the risks to development finance institutions of adopting remedy approaches or frameworks it is important to note that weak or non-existent remedy frameworks place the burden of the risks on affected people. It is these people that are paying the cost of unaddressed impacts and associated harm on their lives, livelihoods, and surroundings.

Civil society organizations (CSOs) are also increasingly shining a spotlight on the lack of remedy for affected communities,[21] often focusing on specific development projects. CAO's review of the outcomes of complaints going through its compliance process makes clear that weak or non-existent institutional remedy frameworks create a moral hazard that leaves project-affected people dealing with unremedied harms.

For example:

- Tea workers in India, who lodged a complaint with CAO about their living and working conditions in 2013, were still raising concerns about lack of remedy in 2022.[22] This situation persisted despite an IFC Management response to CAO compliance findings in 2016, which acknowledged that IFC and the company "are not satisfied with the status quo nor ongoing non-compliances, and have agreed collectively to work urgently in the next two years, in consultation with workers, to accelerate priority actions". These activities, stated in the company's action plan, included commitments to "build new houses to close the shortfall; repair houses requiring major/capital repair; provide piped water to each household; upgrade (…) hospitals; and (provide) mobile toilets for women in the plantation areas."

- A 2021 CAO compliance investigation found that IFC was aware that its client, a cement factory in the Arab Republic of Egypt, was emitting pollutants with negative health impacts that regularly exceeded WBG and national standards. While IFC implemented an action plan to mitigate this non-compliance, measures were consistently delayed, and excessive pollution incidents, and their associated health risks and impacts, continued for six years after IFC invested until emissions were significantly lowered in 2016. Exposure to dust particles has been documented to lead to higher incidences of respiratory conditions such as lung disease and other abnormal pulmonary reactions, including asthma in children. Some 60,000 people live in neighboring communities, and in 2018, an Egyptian Human Rights Organization reported that medical examination of 10 complainants

21 For an example looking at remedy across functions, see Accountability Counsel's March 2023 article "Data doesn't support IFC/MIGA's remedy proposal," which notes that "available data (…) confirms that remedy for environmental and social harm is exceptionally rare".

22 https://www.brettonwoodsproject.org/2022/07/why-the-ifc-cant-afford-to-squander-this-opportunity-to-get-remedy-right/?utm_source=emailmarketing&utm_medium=email&utm_campaign=new_bretton_woods_observer__summer_2022_out_now&utm_content=2022-07-21. As of 2019, CAO monitoring confirmed that IFC did not have assurance this project was on track to achieve compliance with IFC's Performance Standards. https://www.cao-ombudsman.org/sites/default/files/downloads/CAOComplianceMonitoringReport_APPL2019.pdf

(including children) confirmed that all suffered from respiratory illnesses and allergies. CAO found that the air quality monitoring in place was not sufficient to demonstrate compliance with WBG standards for stack emissions, fugitive dust, or noise pollution. However, IFC's 2021 Management Response argued that the client controls in place to mitigate such risks met WBG guideline values.

- In response to multiple complaints related to a run-of-the-river power plant in Uganda,[23] a 2017 CAO compliance investigation confirmed the concerns raised by former workers about the working conditions and a lack of compensation for injuries suffered during construction. In response, IFC committed to identify possible institutional arrangements as well as assess the need for capacity building to the client and other institutions to address the issue of injured workers effectively. In 2022, the third CAO monitoring report found that actions taken fell short. Compensation for workers that had been seriously injured or dependents of those fatally injured during the construction of the project was inadequate. Similarly, compensation for former workers of subcontractor who sustained workplace injuries were inadequate.

In all three compliance case examples, remedy remained elusive or incomplete for complainants, despite CAO finding IFC out of compliance. If a CAO compliance process does not result in the effective provision of remedy, there is currently no further process step available to complainants seeking redress for harms.

The projects that generate complaints to CAO are frequently not identified as high E&S risk.

Analysis of CAO cases for this paper demonstrates that complaints about unaddressed adverse environmental and social impacts often relate to projects that IFC/MIGA did not view as high E&S risk or monitor for poor E&S performance.

IFC uses an internal index (the Environmental and Social Risk Rating) to evaluate a client's performance in managing E&S risks during implementation of a project investment. This index is based on IFC's assessment of the client's management, performance, and level of reporting.[24] The client's rating is calculated during project appraisal as a baseline and updated after each supervision activity for the lifetime of the investment. For CAO cases since 2018,[25] two-thirds of the underlying projects had "satisfactory" E&S performance ratings at the time CAO received the complaint. Only about one-third of cases had been flagged for closer E&S performance monitoring, and 3 percent rated "unsatisfactory" (Figure 1).

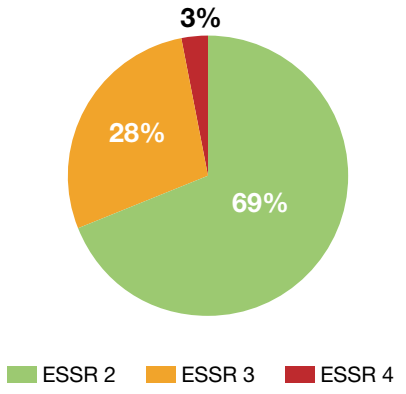
23 See, for example, Uganda: Bujagali Energy-06/Bujagali https://www.cao-ombudsman.org/cases/uganda-bujagali-energy-06bujagali

24 Section 4.41 of the Environmental and Social Review Procedures (ESRP) sets out that "The Environmental and Social Risk Rating (ESRR) is an internal index that provides an indication of the level of E&S risk associated with IFC projects. The ESRR is initially calculated at appraisal (…). During supervision, the ESRR is updated (typically every year). The ESRR is calculated based on three client factors: management, performance, and communication".

25 Relates to CAO cases during 2018–2022. The 49 cases relate to 47 IFC clients (some complaints affect multiple clients). CAO was able to obtain 36 of the 47 ESRR scores applied to clients at the time CAO received the complaint. The missing ESRR scores are due to challenges to accessing certain client information in relevant IFC data recording systems.

Figure 1. Two in three complaints relate to projects considered satisfactory

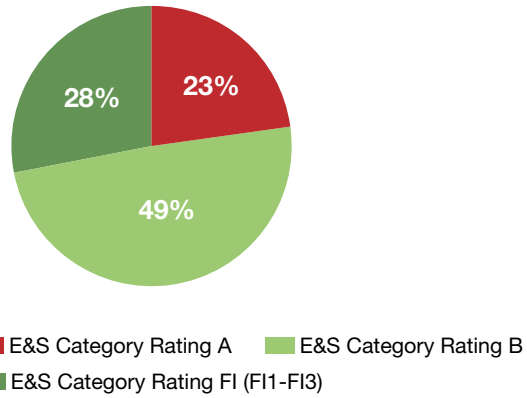
Environmental and Social Risk Ratings (ESSR)
From 2018–22



Source: Internal IFC data systems for CAO sample
Note: The figure covers CAO cases 2018–22.

Figure 2. E&S risk profile of CAO complaint projects

E&S Category Ratings for Projects
with a CAO Complaint (2013–22)



Source: IFC project data for CAO sample
Note: The figure covers 2013–22.

The E&S risk categorization assigned to the underlying project reveals a similar picture (Figure 2).[26] Since 2013, 50 percent of CAO complaints have related to projects that IFC/MIGA expected to carry limited risk of adverse E&S impacts (category B projects). By comparison, 28 percent of CAO complaints relate to IFC/MIGA projects assessed as the highest E&S risk level (category A).[27] In relation to IFC's total portfolio, category A projects are overrepresented in complaints to CAO, while complaints on financial intermediary (FI) projects are underrepresented.[28] Based on this information, remedy frameworks need to be comprehensive in nature and not concentrate on the highest risk, or only low performing projects.

A high E&S risk category, or low E&S client performance rating, are not by themselves adequate predictors of the need for remedy. In CAO's experience, projects with a satisfactory E&S client performance rating are no less likely to result in a situation where non-compliance and harm need to be addressed than those projects being watched for poor performance.

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26 Paragraph 40 of the IFC's Policy on Environmental and Social Sustainability governs the E&S categorization of projects. These categories are:

Category A: Business activities with potential significant adverse environmental or social risks and/or impacts that are diverse, irreversible, or unprecedented.

Category B: Business activities with potential limited adverse environmental or social risks and/or impacts that are few in number, generally site-specific, largely reversible, and readily addressed through mitigation measures.

Category C: Business activities with minimal or no adverse environmental or social risks and/or impacts. FI projects are also categorized on the basis of E&S risk.

27 Receiving a complaint does not automatically mean that a project is out of compliance. Of those projects rated ESRR 2 that were reviewed by CAO compliance, half were deemed to merit a full investigation. This share is in line with – and no lower than - that of CAO overall, indicating that projects with a satisfactory rating are no less likely to result in a situation where non-compliance and harm need to be addressed, and remedy provided. To view historic appraisal outcomes, see https://www.cao-in-numbers.org//compliance

28 According to IFC's Annual Report for 2022 (p. 15), 2.7% of new projects were classified as category A, 41.2% category B, 7% category C, and 48.3% were financial intermediary projects. https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/Annual+Report

Contributing Factors to the Remedy Gap

To narrow and close the remedy gap, development finance institutions, including IFC/MIGA, need to understand the different factors that may contribute to a lack of remedy.

A review of CAO cases revealed several commonly occurring factors, including lack of awareness among affected people of options for grievance redress; missed opportunities by lenders and clients for early resolution; slow, missing, or inadequate responses to concerns raised by communities and/or identified during project supervision; early exits during an active CAO process; and under-use of leverage by IFC/MIGA.

Project-affected people are often unaware of their grievance redress options, presenting a barrier to remedy.

IFC/MIGA need to provide information to affected people about all grievance redress options, including CAO, in an accessible and transparent way. Yet, affected people have frequently told CAO during case assessments and outreach activities that a lack of public awareness of IFC/MIGA's involvement in a project, and of available grievance redress options, represents a real obstacle to accessing remedy. As of 2023, IFC/MIGA project information is available only to people who can access the internet and navigate English language websites. Once aware of IFC/MIGA's involvement, project-affected people can find information about CAO in the project's Environmental and Social Review Summary available via project disclosures on IFC/MIGA's websites. Again, this requires both access to the internet and the ability to navigate the websites in English.

In acknowledgement of this challenge, the 2020 CAO Policy commits IFC/MIGA to work with clients to "disseminate information at the project level about CAO and its availability as a recourse in case other mechanisms for dealing with harmful project impacts are not successful."[29] CAO is unaware of any work plan or actions by IFC or MIGA to implement this commitment.

Providing accessible information about CAO is particularly important in situations where complainants fear threats and reprisals and may not wish to raise concerns directly with the IFC/MIGA client or other financiers. In 2022, complainants raised concerns about threats and reprisals in 33 percent of cases handled by CAO. This is in line with historical trends: 30 percent (49 of 161) of complainants surveyed since 2017 said they experienced repercussions from filing the complaint.[30]

IFC and its clients often miss critical opportunities for early resolution.

CAO cases indicate that IFC and its clients frequently miss opportunities for early resolution, often because concerns raised by affected people are discounted. Sixty percent of complainants surveyed after CAO's assessment phase in 2017–22 stated that they first attempted to address concerns through dialogue directly with the client company before turning to CAO (Figure

29 IFC/MIGA Independent Accountability Mechanism Policy (CAO Policy), para. 168 (https://documents.worldbank.org/en/publication/documents-reports/documentdetail/889191625065397617/ifc-miga-independent-accountability-mechanism-cao-policy).

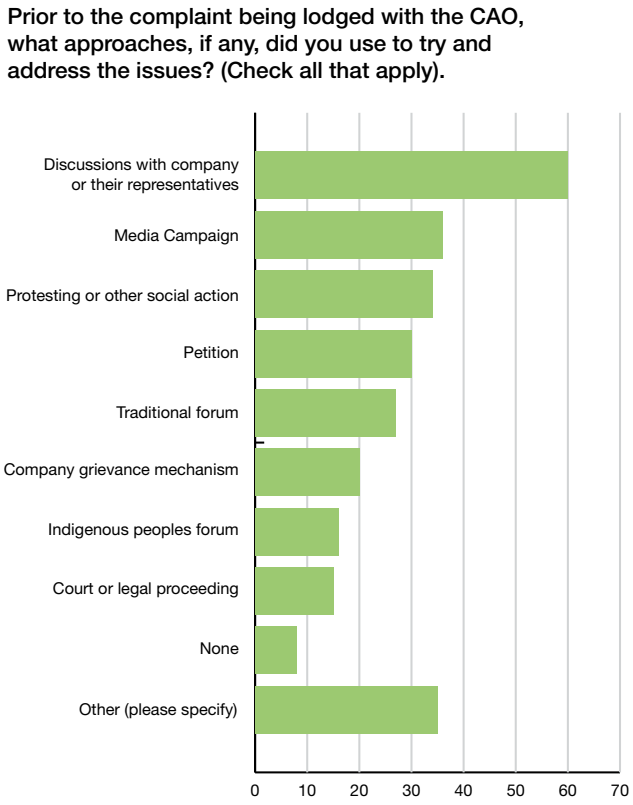
30 Based on complainant answers to CAO Monitoring and Evaluation Assessment Surveys, 2017–22.

3). In addition, dispute resolution and compliance cases include numerous examples where the IFC project team was aware of community concerns before a CAO complaint was lodged but did not act. CAO observes that, in such cases, IFC project teams typically did not reach out to other actors for information about local concerns before determining whether to act, suggesting a heavy reliance on the client's perspective. This approach may also have deprived the client of IFC's perspective on E&S-related issues where the client might have been uninformed.

In addition, IFC missed opportunities for early and decisive action to address stakeholder concerns because client reporting on E&S incidents and stakeholder grievances was late or incomplete. Analysis of 16 CAO compliance investigations processed since 2018[31] found weaknesses in client reporting in 56 percent (9) of them. Client reporting was late, provided low quality data, or included gaps in reporting years for key supervision documentation such as Annual Monitoring Reports (AMR), over the course of IFC's investment.[32] These results suggest that client reporting requirements and follow-up by IFC could be more robust to enable IFC to respond proactively to stakeholder concerns and serious E&S-related incidents.

Finally, lack of reporting on legal challenges to a project is another shortcoming. CAO cases analyzed included projects where IFC was unaware their client faced legal challenges until after CAO received a related complaint. Such knowledge might have given IFC an early opportunity to engage their client and affected communities on the concerns. While legal proceedings are important, and their resolution relevant, they do not typically resolve whether a project adequately applies IFC/MIGA's Performance Standards. They may also take several years to conclude, during which IFC/MIGA can attempt to use their client supervision responsibilities to address complainants' concerns.

Figure 3. Many complainants attempted to address concerns with the IFC/MIGA client before lodging a complaint with CAO



Source: CAO Monitoring and Evaluation Assessment Surveys, 2017–22.

These insights point to some practical approaches IFC and MIGA can take to improve responsiveness on E&S issues and stakeholder concerns, including better reporting, speedier follow up, and talking to different local actors to understand their concerns. CAO's findings also highlight the need for a culture shift at IFC and MIGA toward staff not only valuing the client relationship but also embracing their role to protect the interests and wellbeing of impacted communities and the environment.

31 This data is based on an analysis of a sample of 16 projects financed by IFC from 2008 to present where complaints were made to the CAO office and processed since 2018 by CAO's compliance function.

32 Ibid.

Man fixing railroad tracks. Mexico.
Photo Credit: Curt Carnemark / World Bank

IFC/MIGA often fail to fully use their leverage with clients to address E&S concerns, and routinely waive agreed E&S actions.

An investor's leverage refers to its ability to bring about behavior change by an investee company that may be causing or contributing to E&S harms in the context of a project or investment. The leverage IFC and MIGA wield over clients they finance can take various forms, including contractual and non-contractual leverage, as explained in Box 3. CAO's review of compliance cases processed since 2018 found that, for nearly 70 percent of these projects, IFC did not exhaust the leverage at its disposal to address outstanding E&S concerns.[33] This was the case even though leverage was built into the legal agreements between IFC and the client for each of the reviewed cases.[34] At a minimum, the investment's binding covenants included an Environmental and Social Action Plan (ESAP), and in 69 percent of cases client compliance with the ESAP was also stipulated as a condition of disbursement.

In practice, however, in circumstances when IFC/MIGA considered a client's E&S actions inadequate, they made use of this contractual leverage in only 23 percent of cases. In 54 percent of cases, IFC either granted a waiver for non-compliant ESAP actions or rescheduled the plan's completion dates, allowing the disbursement to go ahead despite unfulfilled commitments. Moving timelines may often be justified given the nature of IFC's investments. However, CAO's review did not find any IFC/MIGA documented analysis of the impacts these waivers and disbursements may have had

33 This data is based on an analysis of a sample of 16 projects financed by IFC from 2008 to present where complaints were made to the CAO office and processed since 2018 by CAO's compliance function.

34 15/16 cases in this sample include compliance with E&S matters within the legal agreements. The legal agreement for one case was not made available to CAO and can therefore not be confirmed as including E&S matters within its legal agreements.

on E&S performance, and of the likelihood of the project achieving E&S compliance over time.

The frequent use of waivers to reschedule ESAP items warrants further analysis and stronger accountability inside IFC. Delaying E&S actions often carries a risk to people and the environment. In addition, every disbursement entails a loss of IFC leverage to ensure a client implements all ESAP items agreed as a condition of the investment.[35]

When waivers are unavoidable, IFC may still be able to exercise leverage. For example, in one case CAO reviewed, IFC demanded increased E&S monitoring of the project in exchange for a waiver of an ESAP item that could not be achieved before a disbursement. This strategic application of leverage enhanced the client's E&S performance without delaying the project by withholding disbursement. In another example, IFC threatened to withhold a disbursement after several years of severe non-compliance. The client agreed to enhanced supervision and a significant number of outstanding tasks were completed. Even then, IFC only released the disbursement with multiple conditions.

CAO's review of case work points to several ways that IFC underutilized sources of leverage in recent years. For a range of projects, IFC approved new investments in a client company, invested in other subsidiaries of the same parent company, approved loan rescheduling or debt restructuring, and waived pre-payment penalties—all without requiring actions to correct or address non-compliances in existing projects. In addition, existing contractual templates used by IFC/MIGA do not provide a strong basis to demand that a client remedy harm that their business activities have caused or contributed to.

35 There are times when a delay does not increase the risk of adverse E&S impacts, such as where risks are associated with a different project phase that is yet to come. Still, leverage decreases with every disbursement.

Box 3: Forms of Leverage*

Investors, including development finance institutions (DFIs), may define leverage in narrow terms, confined to the covenants and other terms and conditions of project financing. However, in addition to standard legal agreements, such as IFC/MIGA covenants with clients, leverage over clients can also stem from:

- An investor's position within a hierarchy or value chain of financers (for example, if the loan is syndicated, or the investor acts as a "signaler" of investment-worthiness).
- An investor's political position within and outside the company (for example, when the investor has a long-term relationship with the client or a seat on its Board).
- A DFI's relationship with the relevant government or with other significant third parties.

In addition, investor expertise in specific sectors or E&S risk management is often valuable to clients. Staff at financial institutions such as IFC are also skilled in areas including relationship-building, negotiation, and consensus-building. These are very real sources of leverage already commonly used by investment officers when identifying investment opportunities and closing transactions. Similarly, investors' strategic resources, such as relationships with other business service providers and governments, add value for clients.

As a result, the degree of leverage an investor has over its clients need not be static or confined to legal agreements. It can also involve relationships, and can be built over time, either individually by the investor or in collaboration with other actors.

* Excerpt from CAO (2023) "Responsible Exit: Discussion and Practice in Development Finance Institutions and Beyond," World Bank Group, Washington D.C.

Primary school students select "big books" in Dadal County, Mongolia.
Photo Credit: Khasar Sandag / World Bank

IFC/MIGA exits from projects subject to a CAO complaint make it difficult to support remedy at the project level.

IFC/MIGA or their clients frequently exit investments in projects subject to a CAO complaint before it is resolved. As IFC regularly notes, this situation results in reduced leverage over the former client, making it difficult to bring about remedy at the project level that addresses identified harms to communities.

These concerns are borne out by the data. Over the past 10 years, IFC/MIGA or their clients have exited investments while a CAO compliance case was ongoing in 35 percent (19 of 54) of cases.[36] Of these 19 exits, 9 compliance processes have concluded and therefore a final assessment of institutional responsiveness can be made. Of these, 7 did not result in satisfactory project level effort to address non compliances identified by CAO.[37] This strongly suggests an association between exit and lack of remedy. This trend highlights the need both for CAO to shorten its timelines and for IFC/MIGA to plan for exiting responsibly. Responsible exit is a growing concern among development finance institutions which CAO has addressed in a separate paper (see Box 4). It involves establishing and employing tools such as leverage and financing options to address any outstanding E&S issues before or at exit, and to provide remedy to communities as appropriate.

Box 4: What is Responsible Exit?

Responsible exit seeks to ensure the sustainability of E&S risk management and/or that the positive impacts of investments endure after exit. It involves DFIs preparing for exit in a way that avoids or mitigates harm to people or the environment. It also requires investors to consider the possible adverse impacts that might arise from the act of exiting as part of their decision making on whether or not to exit and the timing of exit.

A responsible exit involves DFIs taking action to mitigate any harm as well as enabling and providing remedy for any impacts on project-affected people and the environment to which the investment has contributed.

See CAO (2023) "Responsible Exit, Discussion and Practice in Development Finance Institutions and Beyond," World Bank Group, Washington D.C., What is Responsible Exit? Core Elements Identified, p.4"

36 These 19 exits related to 80 complaints that were merged into 54 cases—CAO Compliance practice is to merge multiple, similar, complaints concerning the same project into one compliance process.

37 This figure is based on the CAO's Management Tracking Record (MATR) which annually rates the adequacy of IFC's and MIGA's responsiveness to CAO compliance investigations. Of the nine cases in the sample with MATRs, seven are rated as having either Partly Unsatisfactory or Unsatisfactory project-level responses.

CAO's long case handling timelines have exacerbated the remedy gap due to IFC/MIGA exits

Lengthy CAO processes present an additional challenge to remedy. To start, it takes time for communities to find out about CAO, and for the CAO process to unfold. CAO complaints are lodged, on average, 3 to 4 years after IFC/MIGA project. Access to information about CAO likely plays a role in this delay and should be addressed. Once a complaint has been lodged, the length of CAO's processes represents another challenge. Historical case processing times average about 6 to 8 months in assessment, 24 to 30 months in dispute resolution, and 4 to 4 ½ years in compliance for cases that merit an investigation. As a result, it is common that the commercial relationship between IFC/MIGA and the client ends before the CAO process.

To shorten CAO's processes, and bring redress and remedy to complainants more quickly, the CAO Policy, effective July 2021, mandates timelines for most phases. CAO has committed to achieving these timelines by the end of 2025, which includes assessing complaints in 90 business days, completing compliance appraisals in 45 business days, and drafting investigations for review by complainants, clients and IFC/MIGA within one year of initiation. Almost 2 years into the implementation of the CAO Policy, CAO is meeting its targets for the eligibility and assessment phases. These results have been possible thanks to case-handling improvements such as the reprioritization of resources, the implementation of a case-tracking system and the drafting of protocols to address bottlenecks in case-handling and reporting.

Progress towards achieving compliance-related timelines has been slower, however, partly due to CAO's decision to prioritize working on an existing backlog of cases. There has been significant reduction in CAO's case backlog in the past two years, reducing the share of backlog cases in the CAO caseload from 58 percent (34 cases) in 2021 to 39 percent (19 cases) in 2022. In 2023, the Boards approved a 30 percent budget increase for CAO, recognizing that additional resources and investments are needed for CAO to implement the new Policy and manage its caseload effectively. This includes investments to increase CAO's workforce, including the creation of six new staff. To identify additional measures to improve the efficiency and effectiveness of case-handling, CAO is also implementing several new initiatives, including an independently conducted analysis of timelines and complexity in assessments and dispute resolution processes, and an analysis of the compliance appraisal and investigation.

Project exits during CAO processes are driven by client pre-payments, IFC loan cancellations

Community access to information about CAO and processing timelines are only a part of the picture, however. Many exits that took place during a compliance process over the past decade were actively generated by IFC or its clients. The majority fall into 3 categories: IFC selling its equity in the client company (37 percent); loans that are prepaid by the client (32 percent) and though less common, IFC canceling loans (26 percent).

Given the important role that investment exits play in creating the remedy gap, it is critical that IFC/MIGA plan for exit—including through the purposeful use of leverage—and exercise responsibility during the exit decision and execution. CAO is analyzing its case history experience with exits in more detail and will share insights in a forthcoming Advisory Note on Responsible Exits.

Young women learn computer skills, Hyderabad, Pakistan.
Photo Credit: Visual News Associates / World Bank

Timely and responsive IFC/MIGA Management Action Plans (MAPs) are critical for achieving remedy through the CAO compliance process.

Most of CAO's case experience stems from complaints processed under CAO's prior Operational Guidelines, for which achieving project-level remedy has been challenging. The new CAO policy includes provisions which promise to improve responsiveness including a requirement that IFC/MIGA respond to CAO findings and recommendations, the focus of MAP actions on remediation of impacts and harm, and Board oversight of the process.

CAO's analysis highlights lessons from case experience which are applicable to achieving an effective MAP process under the CAO policy. In the past, IFC/MIGA have not consistently addressed CAO's findings and recommendations in their MAPs. Further, CAO monitoring has found that MAPs are often implemented incompletely and with significant delays. In multiple cases where IFC committed to addressing non-compliances, many months, and sometimes years, went by before actions were implemented. In other cases, actions were not implemented fully. This record highlights the need for stronger MAPs that commit IFC/MIGA and/or their client to timebound and concrete project-level actions that meaningfully address CAO findings and recommendations, as well as effective and timely implementation.

IFC/MIGA contribution to remedy will sometimes be necessary to close the remedy gap

Addressing the various factors contributing to the remedy gap as outlined above should go a long way toward narrowing the remedy gap and providing redress for communities. In terms of who is responsible for providing remedy for a given project, the circumstances of the investment matter as do the roles and responsibilities of different actors, including IFC and MIGA.

Key questions for IFC/MIGA in determining their role and actions should include:

- Did the non-compliance and related harm, as determined by CAO, stem from a client's inability or unwillingness to implement agreed E&S measures?
- Did IFC/MIGA contribute to the situation by overlooking E&S risks during due diligence and/or supervision?
- Did IFC/MIGA respond effectively when they became aware of E&S concerns?
- Will the harm remain unremedied if IFC/MIGA do not act?

The answers to these questions result in different scenarios with different roles and responsibilities for IFC/MIGA and their clients. Deciding who is responsible for redressing harms caused depends both on IFC/MIGA's and their clients' contribution to the harm, and on each player's ability to enable remedy. However, the External Review made clear that IFC/MIGA bear the responsibility to contribute to remedy in a manner commensurate to their contribution to the harm caused by a project investment.[38]

CAO concurs with the External Review recommendation. IFC/MIGA assuming responsibility for remedy in appropriate cases will be critical to closing the remedy gap and ensuring that project-affected people are not burdened with project-related harm without remedy.

Conclusion: Closing the Remedy Gap

In summary, CAO's analysis of 10 years of case experience yields important insights for IFC/MIGA's development of an enhanced approach to remedy.

Under current circumstances, absent or weak remedy frameworks place the risks of development projects on affected communities and the environment as evidenced in the number of complaints to CAO that have not resulted in effective remedy. Instead, local communities are carrying the burden of unaddressed impacts and associated harm created by this gap.

In addition, projects considered by IFC to have satisfactory E&S performance are as likely to result in a situation where remedy is required as projects being monitored for weak performance. A proactive institutional approach to remedy will therefore need to target IFC's portfolio in a broad, comprehensive and holistic manner rather than focusing only on high-risk projects or low performing clients.

Below, CAO summarizes the key findings of its analysis to inform IFC/MIGA's approach to remedial action followed by specific recommendations on addressing remedy.

38 External Review, para 332.

Findings

1. **A significant factor contributing to the remedy gap is a lack of awareness of grievance redress options** and IFC/MIGA's involvement in a project amongst project-affected people.

2. **Early opportunities to address harm come in different forms and are often missed.** IFC tends not to take the concerns of affected people seriously and rely too heavily on the client's perspective without seeking other input. In addition, common weaknesses in client reporting to IFC make it harder to respond early and proactively to E&S concerns.

3. **In many cases, CAO compliance processes conclude when there is no longer an active investment in place, which makes remedy difficult to achieve and leaves non-compliances unaddressed.** Many of these investment exits are the result of an active decision by IFC or the client to exit the project. Lengthy CAO case processing times are also a challenge that CAO is addressing.

4. **Leverage over clients is a useful tool for facilitating more effective risk management and enabling remedy that IFC/MIGA underuse.** Leverage is usually built into a project's legal agreements and therefore provides an opportunity to achieve E&S compliance and remediate harm when it is identified. However, existing contract templates do not provide a strong basis to require a client to remedy harm that their business activities have caused or contributed to.

5. **The quality of IFC/MIGA Management Action Plans (MAP) and their timely and effective implementation plays a critical role in achieving remedy** through the CAO compliance process.

6. **Closing the remedy gap will, at times, require IFC/MIGA to contribute to remedy,** assuming responsibility for their contribution to the creation of project-related harms.

Recommendations

Development finance institutions, including IFC/MIGA, need to develop robust strategies to address the remedy gap and avoid situations where no actor provides remedy for adverse project impacts, leaving affected people to suffer the harm. Below, CAO recommends measures IFC/MIGA can take based on the findings that this paper has identified:

- **IFC/MIGA's remedy framework should apply to all investments that present significant E&S risk in the portfolio:** An effective approach to remedy must be comprehensive and apply remedy tools such as contractual clauses, financing options, and leverage to an investment portfolio broadly. IFC/MIGA should include category B and financial intermediary (FI 1 and 2) projects and projects rated "satisfactory" for client E&S performance in remedy planning, rather than focusing only on high-risk projects or low performing clients.

- **Affected people should be made aware of all grievance redress options, including CAO. When complainants access IFC/MIGA directly, they should be informed of their option to access CAO at any point in the process.** To facilitate access to remedy, at a minimum, people affected by IFC/MIGA projects need to be fully aware of their grievance options, including their right to access CAO. IFC/MIGA should require all new clients to provide information to workers and affected communities about all grievance redress options, and their commitment to zero tolerance on reprisals, in a way that is easily accessible and in local languages. In addition, IFC/MIGA should roll out concrete steps for existing to inform communities of their redress options, including CAO.

- **IFC/MIGA should take complainants' concerns seriously, respond pro-actively, and seek to understand the situation from multiple viewpoints:** IFC/MIGA have opportunities to engage earlier and more proactively in addressing grievances. For this engagement to be effective, IFC/MIGA should not rely solely on their client's perspective on an issue. Complainants' concerns should be taken seriously, and additional local stakeholders' views should be sought.

- **Reporting should be strengthened to enable proactive action where harm may have occurred:** IFC/MIGA client reporting requirements for E&S performance need to be tightened, especially for reporting of significant incidents and of stakeholder concerns. IFC/MIGA should review their internal systems and create processes and incentives to ensure prompt and proactive responses when E&S concerns become known. Client reporting should cover not only what E&S issues arose, but also how they have been addressed, including how adequate remedy was determined and provided.

- **IFC/MIGA should use financial instruments to prepare for the need to provide remedy:** When the need arises to provide remedy, this is much easier for clients to implement if adequate financial resources are available. Such resources, in the form of insurance products, guarantees, performance bonds, contingency funds, and others, are already available in some markets and standard in some industries. IFC and MIGA should also explore financial incentives, such as preferential rates, to reward clients for strong E&S performance, as well as penalties for clients that pre-pay loans during an ongoing CAO process or where there are outstanding non-compliances.

- **IFC/MIGA should provide guidance to clients:** IFC/MIGA should have processes in place to assist clients to carry out an assessment of harms related to any adverse impacts of the project, and to determine adequate remedy, if appropriate, with the participation of affected people.

- **IFC/MIGA should address E&S concerns before project exits:** IFC/MIGA need to plan for project exits under any circumstances with the objective that outstanding E&S concerns are consistently addressed before closure. Pre-paying IFC should not enable clients to walk away without providing remedy for harms caused by their project. Contractual provisions should be designed carefully to give IFC and MIGA tools to help bring about effective remedial actions in exit situations.

- **IFC/MIGA should strengthen the planning and use of all forms of leverage:** IFC/MIGA should plan and use leverage in all its forms with purpose, in order to strengthen E&S performance and enable remedy. The traditional forms of leverage are covenants in loan agreements. IFC/MIGA should ensure that all investment agreements have clear and binding contractual terms that establish the client's responsibility to assess harm when there are credible allegations or other indications that their business activities have adverse E&S impacts, and to provide remedy where harm is confirmed, including by CAO. IFC/MIGA should also review its use of other forms of leverage such as other active investments with the same client or parent company, or membership on the boards of directors of companies in which it holds shares to identify opportunities to maximize its influence.

- **IFC/MIGA should increase internal accountability for actions that may undermine leverage:** To ensure leverage is effectively used, IFC should strengthen internal accountability for decisions that lead to loss of leverage when there are outstanding E&S non-compliances with performance standards. For example, moving forward with disbursements or additional investments when the client has outstanding ESAP actions should be actively discouraged. Such finance should only proceed after an analysis of implications for affected communities and the environment, and the decision should be approved by senior management within a framework of internal checks and balances.

- **IFC and MIGA MAPs should respond to CAO compliance findings and recommendations, and be implemented in a timely fashion. IFC/MIGA should develop guidance on how to engage complainants on remedy:** MAPs need to commit IFC/MIGA and/or their client to timebound and concrete project-level actions that meaningfully address CAO findings and recommendations relating to non-compliance and harm. Board-level oversight of effective MAP implementation is equally important.

- **IFC/MIGA should contribute to remedy where they have contributed to harm:** At a minimum, IFC/MIGA should contribute to remedy where there is a CAO finding that IFC/MIGA have contributed to harm. IFC and MIGA should establish internal processes and set aside budget to meet this responsibility.

- **IFC and MIGA, in consultation with CAO and complainants, should conduct a review of CAO cases to identify those where a significant remedy gap exists and propose measures to address these:** A significant remedy gap exists in relation to CAO cases. IFC and MIGA have a responsibility towards communities who have brought their concerns to CAO and are still awaiting remedy. To address this remedy gap, IFC and MIGA, in consultation with CAO and complainants, should conduct a review of CAO cases to identify those where a significant remedy gap exists and propose measures to address these.

The Independent Accountability Mechanism for IFC & MIGA