



# REPRESENTATION



## PREFACE

The Office of the Compliance Advisor Ombudsman (CAO) is the independent accountability mechanism for the private sector arms of the World Bank Group, the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA). CAO reports directly to the President of the World Bank Group. CAO's mandate is to address complaints from people affected by IFC/MIGA projects in a manner that is fair, objective, and equitable, and to enhance the environmental and social outcomes of those projects. A detailed description of CAO's mandate, functions, and procedures can be found in CAO's Operational Guidelines.

The main objectives of CAO's Dispute Resolution function are to help resolve issues raised about the environmental and/or social impacts of projects supported by IFC/MIGA and to improve outcomes on the ground.

CAO's Dispute Resolution function provides a nonjudicial, non adversarial, impartial, and independent forum through which communities and companies (the "parties") can seek mutually satisfactory solutions to disputes. CAO and the relevant stakeholders may use a number of different approaches in attempting to resolve these disputes, such as confidential meetings, public meetings, joint fact-finding, or shuttle diplomacy. Each approach is chosen in consultation with the parties with the objective of creating a process that promotes self-determination and encourages voluntary decision making. Typically, CAO's role is to convene meetings to facilitate communication, negotiation, and joint problem-solving among the parties. Figure 1 depicts a typical dispute resolution process convened by CAO (see p. 2).

CAO's Reflections from Practice series has two primary goals: to provide guidance for CAO Dispute Resolution staff, mediators, and consultants; and to inform the parties participating in CAO dispute resolution processes about foundational principles.

Each publication in the series is organized along similar lines:

- 1. Introduction**
- 2. Principles**
- 3. Common Challenges**
- 4. Strategies and Tools**

The diversity of cases, issues, and stakeholders engaged with by the CAO makes it difficult and inappropriate to develop guidelines that will apply in every case. This series is intended as a useful resource. The relevance and application of any specific part will depend on the professional judgment of individual staff and mediators, as well as the knowledge of the stakeholders involved. In most cases, the general guidance provided by these publications will need to be tailored to the context and specifics of each particular case.





## INTRODUCTION

CAO's dispute resolution processes often involve dozens, and in some cases even thousands, of stakeholders. It is not feasible to regularly convene such large numbers for meetings. Thus key parties typically select a smaller number of representatives to represent and advocate for their interests. The purpose of establishing clear representation in a CAO dispute resolution process is to identify who will participate in the process and who has power and authority to make decisions in relation to resolving the issues in dispute. Establishing representation can sometimes be quite challenging. Who speaks for the complainants? Who speaks for the broader community? Who speaks for the environment? Who speaks for the public good? Who has the authority to make decisions on behalf of a company or government agency?

Despite these challenges, achieving clarity and consensus on representation is important for many reasons. On a practical level, to negotiate and reach meaningful and binding agreements, everyone needs to know who has the authority to make and implement decisions. Parties are unlikely to engage with individuals whom they do not believe are legitimate representatives. A representative's legitimacy and credibility will also be critical for any agreements reached to be implemented effectively.

Designating representatives with clear roles and responsibilities will enhance the credibility of the process, help clarify expectations, support accountability, and ensure that any agreements reached are meaningful and honored. Furthermore, when discussing representation, parties can work together to help all affected communities have an effective voice and potentially help address power imbalances.



## PRINCIPLES

When making decisions about who should represent each party in a dispute resolution process, the following principles should be considered:

- The “primary” parties and decision makers in a CAO dispute resolution process will typically be the IFC/MIGA client and the project-affected complainants. The dispute resolution process may be expanded to include additional participants, such as governments or nongovernmental organizations (NGOs), if the primary parties agree to do so.
- CAO supports the right to self-determination for all parties. In a CAO dispute resolution process, CAO values direct access to project-affected people, who participate directly, speak for themselves, and retain their own decision-making rights. In circumstances where complainants do not want their identities revealed, special arrangements can be made.
- Each party or stakeholder group decides for itself who represents it.
- Each party in the dispute resolution process needs to feel reasonably assured that the representatives of the other party are credible and legitimate.
- Gender equity in representation structures should be considered and, wherever possible, implemented. Other factors might include age, culture, geography, level of impact, positions and opinions, political views, education, language, or religion.
- A participant and representative’s role should be understood, agreed upon, and clearly defined. The degree of formality regarding how this is captured will vary from case to case, depending on the parties’ needs. Some formats that have been used in CAO cases include Memorandums of Understanding, Agreements to Mediate, Framework Agreements, and Ground Rules.<sup>1</sup> Affected communities will sometimes have legal and/or technical experts, NGOs, or other advisers and supporters assisting them; the exact roles of these advisors will be specific to each case.

<sup>1</sup> See also Reflections from Practice 1: Getting Started with Dispute Resolution, CAO (2018).

- Representatives should keep their constituents informed throughout the dispute resolution process. Constituents need to be able to follow the developing negotiations and the grounds on which decisions are being made. They should also understand how their inputs are weighed and acted upon.
- Representation, like the dispute resolution process overall, is dynamic and changes over time. People often learn and change their minds during the process. Parties should be prepared to be flexible and adaptable (see box 1).



#### ESTABLISHING CREDIBLE AND WORKABLE REPRESENTATION IN A FLUID ENVIRONMENT

In a mediation involving dozens of nomadic and semi-nomadic herder households that lived and worked throughout an area covering hundreds of square kilometers, establishing credible and workable representation was a challenge. The complainant households organized village-level public meetings to explain the CAO complaint and mediation process. At the village meetings, they also discussed the roles and responsibilities that would be expected of their representatives in negotiations with the company, and asked for individual volunteers and nominations. Each village was able to elect individuals to represent their respective geographic areas and herder households. Over time, there was some turnover in representation, and the complainants continued to convene local public meetings to confirm and/or elect replacement representatives. The representatives

also solicited feedback and ideas from their constituents and worked hard to keep them informed throughout the mediation process.

The representatives faced significant challenges in their work. Most of them had to climb a learning curve. They made mistakes, and then learned from those mistakes and from feedback from their fellow herders. Most of the herders were nomadic, geographically dispersed over large areas, and did not have access to the internet, making communications difficult and time-consuming. All the representatives were volunteers and had to try to sustain their normal livelihoods and jobs while putting in many, many days of additional work for the mediation process. In the end, they were successful in reaching agreements that had broad support among their constituents.



## COMMON CHALLENGES

While each dispute resolution case is unique, cases may share a number of common challenges related to decisions about representation, including:

- Disseminating information to keep constituents informed, and collecting information and inputs from constituents.
- Determining CAO's role in relation to the selection of community/complainant representatives.
- Helping stakeholders define and agree on roles for other participants, such as advocates, lawyers, technical experts, advisors, and observers.
- Addressing limitations in a representative's capacity (in resources, organization and coordination, information, and technical knowledge) and related power imbalances.
- Ensuring gender equity–inclusion and fair treatment of both males and females without any discrimination on the basis of gender–in representation while being appropriately mindful of the local context.
- Handling disagreements and conflict within communities, companies, or governments.
- Establishing the legitimacy and authority of representatives.
- Dealing with changes in representation.
- Involving a large number of affected people and/or complainants who are dispersed over a large geographic area.



## STRATEGIES AND TOOLS

There are a variety of strategies and tools that can help facilitate the selection of representatives for a dispute resolution process. Some of them are:

### *Beginning the Conversation About Representation Early*

It may not always be possible or preferable to begin addressing representation as early as the assessment stage (please see CAO Operational Guidelines for an overview of the complaint process),<sup>2</sup> but where appropriate, CAO can begin to discuss what representation would look like if the case proceeds to dispute resolution. For example, it may be beneficial during assessment to think about issues such as whether parties can be properly represented during a dispute resolution process, what type of advice or guidance they might need, how organized and empowered they are, how much and what sort of community organizing might be required to determine representation, and who else should be involved in the process.

Deciding when and how deeply to address representation during assessment may be informed by:

- Which CAO role the complainants seek to initiate. More attention to representation may be warranted in cases where complainants are seriously considering dispute resolution than in cases where there is a clear preference for a compliance process.
- Whether the complaint is submitted by an organized community group<sup>3</sup> or by separate individuals who are not organized in a more formal structure. While organized community groups may already know who they want to represent them, it may be impossible to validate the legitimacy of the representatives or representative group within the wider community. If the complaint is submitted by individuals who are not formally organized, it may be important to discuss with the wider community the role of complaint signatories who may not be considered as “representative” of the whole community.
- Whether CAO can verify all signatories to a complaint. Where possible, it may be preferable to check with complaint signatories to make sure they understand the nature of the complaint and CAO’s process and what it means for them. This may not be possible, however, in cases where there are many signatories or signatories are spread out geographically.

<sup>2</sup> The CAO Operational Guidelines can be found at [http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines2013\\_ENGLISH.pdf](http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines2013_ENGLISH.pdf).

<sup>3</sup> In the context of CAO dispute resolution, an “organized community group” means a group of people who coordinate and organize themselves to pursue shared interests through cooperative efforts. Examples include community-based organizations and village associations, environmental groups, women’s rights groups, farmers’ associations, faith-based organizations, labor unions, cooperatives, and professional associations.



- The size and culture of the IFC/MIGA client. When the private sector client is relatively small, and the key decision-makers are clear and unified, representation on the company side may be very straightforward. However, in large corporations, or cases that involve multiple internal departments, parent companies, subsidiaries, contractors, or sub-clients, representation may be more complicated and require more in-depth discussion during the assessment. As noted in the Introduction above, it is critical for all participants to know who has the authority to make and implement decisions.

### *Offering Capacity Building and Training*

CAO dispute resolution processes may include training in general conflict resolution, communication, and negotiation skills to build the capacity of parties to the complaint (both the client and the complainants). This training can also include modules on how to be an effective representative. Some parties may want or need this training before selecting their representatives. If NGOs or other advisors and advocates are involved, they typically should be invited to participate in the training. Topics specific to representation might include:

- What are the duties and responsibilities of an effective representative?
- How do complainants/representatives communicate with the wider group of affected people?
- How do the respective constituents wish to be communicated with?
- Who will represent each of the groups, and what decision-making power will he/she have? How will he/she be selected?
- How will representatives reconcile advocating for their own personal interests versus representing a group's collective interests? How can internal differences be managed so that collective decisions can be made as a representative group?
- How will internal disagreements be handled?
- If there are stakeholders who are not currently participating in the process but are influential, who will keep them informed of the process?
- How can opportunities be provided, where possible and appropriate, for a wider group of affected people to directly participate in the dispute resolution process?

### *Discussing the Possibility of CAO/Mediator Intervention When Internal Conflict Arises Within the Community or Company*

Internal disagreements and conflict among complainants and project-affected communities can be a barrier to reaching consensus on decisions related to representation. When internal community conflicts arise, CAO will typically try to understand and identify the source of the conflict, the reasons why a community group may oppose a project or community members may be in conflict with one another over a project, and any common concerns or openings for negotiation. If the case is in assessment, it is important to listen to all sides and show respect for all opinions. If the case is in the dispute resolution phase, CAO may be able to help mediate within the community to resolve differences.

Factors to consider when deciding how much to mediate/intervene in internal conflicts within community groups include:

- Can CAO credibly demonstrate its good faith effort to help resolve the internal conflict?
- Are there cases of “bad faith” on the part of one or more parties?
- To what extent are external factors influencing the primary parties in dispute?
- How deeply rooted is the dispute?
- How much trust does CAO enjoy from community members to enable it to play a role as a third-party intervener effectively?
- How great an effort will be required to resolve the dispute, and what are the odds of being successful?
- Can CAO reasonably assure itself that it is not putting anyone in a more vulnerable position or exposing people to additional risks? How might the “intent to do no harm” principle apply in the situation?
- Are there threats of violence?
- Is confidentiality important, and can it be maintained?
- Are there external players that have an influence on all parties who can help create a safer space and dilute or diffuse threat scenarios? These third parties might include government officials or agencies, cultural leaders, and religious leaders.

Similarly, when there are differences of opinion or internal disagreements within the IFC/MIGA client, CAO, as a neutral party, can assist in helping to build consensus among the key internal company stakeholders. This can be done confidentially and helps to ensure that company representatives are empowered and have the support of their peers, teams and/or superiors.

### *Identifying and Being Mindful of Local Power Structures and/or Leadership Structures*

Where possible, and in line with guidance from the relevant parties participating in the dispute resolution process, it is best to work with traditional leaders and to keep any local leaders who are not participating directly in the process informed (while respecting the confidentiality of the dispute resolution process). It is important to seek to understand the views of complainants and other stakeholders regarding the role of local leadership. CAO will not prescribe who should represent the parties in dispute. Given this, and despite local government structures, CAO will enable a community to determine who will represent it for purposes of the CAO dispute resolution process.

### *Helping Local Parties Consider and Define Representative Roles and Responsibilities*

When engaging with those identified as community representatives, it is generally a good idea to discuss what their responsibility is in terms of reporting back to the wider community. Company representatives may also have responsibilities for reporting back to other internal constituencies within their organization. CAO may need to assist representatives and/or periodically check on the quality of such reporting by meeting with community and/or company constituents, and by soliciting feedback. This is especially important because representatives’ roles, interests, credibility, and skills may change over time as the dispute resolution process unfolds.

<sup>4</sup> See Reflections from Practice 1: Getting Started with Dispute Resolution, CAO (2018).

If complaint signatories are not seen as “representatives” of the whole community, their role in the dispute resolution process should be discussed with the community. As a general principle, if a complainant is the sole representative of a community interest at the table, it may be difficult to establish legitimate representation in a dispute resolution process. In such cases, CAO can explore whether additional community members affected by the IFC/MIGA project wish to take part in the process. It may be possible for the dispute resolution process to proceed, even if some of the original complainant signatories opt out of taking on the role of representing broader community interests. Parties may also consider roles other than formal representative, such as observer, advisor, or note taker, that may allow for more inclusive participation in the process.

If new or replacement representatives are necessary, it is important to discuss within the group how they will be incorporated and brought up to speed. In fact, it is usually helpful to have a discussion with parties in advance about how they will manage replacements or back-ups, in case any representatives drop out during the process.<sup>4</sup>

### *Determining Whether the Process Can Start Without Absolute Clarity*

Representation issues and questions may not be able to be fully resolved before the dispute resolution process begins. In such cases, CAO may have to use its judgment and pursue a “good enough” approach to proceed to dispute resolution in situations in which the parties want to proceed.

### *Holding A Broader Conversation About Who Will Participate in the Dispute Resolution Process*

In some cases, it can be helpful to include other participants in addition to the designated representatives of the primary stakeholders, such as observers, technical advisors, government regulators, or elected officials. As noted in the Principles section above, the roles of all participants should be clearly understood and agreed upon. In many cases, it will be useful to discuss the differences between the various roles and their contributions and impact on the overall process and objectives. Parties should also consider whether to document agreements about the various roles in process ground rules<sup>5</sup> or a more formal Memorandum of Understanding or Agreement to Mediate.



#### AN INABILITY TO AGREE ON A REPRESENTATIVE STRUCTURE

In one CAO case, an individual filed a complaint on behalf of a group of hundreds of former contract workers alleging unpaid wages and benefits. The parties initially agreed to try to resolve the complaint through CAO’s Dispute Resolution function. The former workers were not organized and did not have any organizations assisting them with their claims. In addition, the claims covered a period of several years, and many of the workers had moved and were

geographically dispersed. CAO attempted to help the complainant group resolve their internal conflicts by holding extensive discussions with the complainants about who would represent the larger group of worker complainants and what the mandate of those representatives would be. Ultimately, they were unable to agree on a workable representative structure, and the dispute resolution process could not proceed.

<sup>5</sup> Ibid.

Selection of additional participants should be based on the purpose of the process, the role of the group, and the issues to be addressed. A participant's individual qualities and accountability to constituencies are also important. As a general rule, the process should in some way include all groups affected by the issue whose support is needed for whatever decision the group is trying to make (those who can "make or break" an agreement), as well as those who have the information, knowledge, or expertise needed to resolve the complaint issues.

The degree of inclusiveness will often determine whether the process is perceived as fair and credible. Depending on the nature of the issues, a participant group that is seen as broadly representative will have legitimacy that a group that is perceived as excluding interests will not have, and thus any agreements they reach will be less likely to be challenged (see box 2). Diversity of representation (in terms of gender, age, culture, geography, level of impact, positions and opinions, and political views, for instance) can broaden the base of knowledge and experience and attract new ideas and innovation. The ability to confer with, and report the concerns of, a variety of organizations and constituencies may be especially important when it comes time to implement decisions and agreements.

Erring on the side of inclusiveness is usually best, although the extent of inclusiveness may vary in the different stages of a dispute resolution process and given the context. Early on, when the primary parties are still establishing trust, trying to determine how they will work together, defining issues, setting the agenda, and so forth, including additional stakeholders may be counterproductive. They can always be invited to participate later, if needed (although before final decisions/agreements are made).

### *Tailoring Approaches to Representation to the Specific Context*

Potential tensions and contradictions may arise in applying some of the principles, strategies, and tools described in this document. For example, difficulties may emerge when striving for both gender equity and respect for local traditions and culture in a society that is patriarchal, or when trying to work with local power and/or leadership structures and respect self-determination where a project-affected community includes a religious or ethnic minority that may be disadvantaged and disenfranchised. It is not possible to provide detailed guidance for what to do in every possible scenario. In some cases there may not be a perfect or clear "right" answer. In such situations, the importance of consulting directly with people directly affected by the IFC/MIGA project and seeking guidance from experienced mediators and conflict-resolution specialists who have worked in relevant difficult contexts is paramount.

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