

## Advancing Accountability: Establishing a Remedy Fund at the IFC/MIGA

Twenty-five years ago, the World Bank Group catalyzed a crucial advance in development finance by establishing the first independent accountability mechanism (IAM), the Inspection Panel. Created to hear complaints from, and facilitate remedy for,<sup>1</sup> communities harmed or potentially harmed by the World Bank Group's public-sector financing, the Inspection Panel signified a recognition that development actors should be accountable to local communities for unintended environmental and social harm.

By creating the Inspection Panel, the World Bank Group sparked a much-needed proliferation of IAMs across the development finance landscape, including the Compliance Advisor Ombudsman (CAO), the IAM for the World Bank Group's private-sector operations. For 20 years, the CAO has been an important forum in which communities affected by activities financed by the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) can raise their voices and seek remedy for harm.<sup>2</sup>

However, communities have too often found real remedy delayed or unforthcoming. Even when a CAO compliance review investigation confirms local communities' claims of harm and the IFC/MIGA responds by developing a remedial action plan, positive change on the ground for communities is frequently impeded by a lack of follow-through on providing the resources necessary for implementation. In 2016, for instance, the CAO released an investigation report on a complaint regarding [IFC-financed tea plantations in the Indian state of Assam](#). The report found a raft of substandard living and working conditions on the plantations imperiling worker health and safety. While failing to address all of the CAO's findings, the IFC did draft an action plan detailing a number of remedial measures to be taken, with both the IFC and the client to play implementing roles. However, more than three years later, most of those remedial actions remain unimplemented. As a 2019 CAO monitoring report notes, the IFC's client sought financial support from the IFC and other shareholders for implementing remedy, but support has yet to meaningfully materialize.<sup>3</sup>

As the Assam case illustrates, the IFC/MIGA accountability framework lacks a mechanism to ensure predictable and timely implementation of remedy. Other communities have similarly seen their claims of harm substantiated, but unaddressed. The CAO is thus frequently unable to completely fulfill its mandate to provide communities access to redress.<sup>4</sup>

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<sup>1</sup> Inspection Panel Operational Procedures, para. 2(a), p. 6, available at <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/2014%20Updated%20Operating%20Procedures.pdf>.

<sup>2</sup> CAO Operational Guidelines, para. 1.1, p. 4, available at [http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013\\_ENGLISH.pdf](http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf).

<sup>3</sup> Compliance Advisor Ombudsman, COMPLIANCE MONITORING REPORT: IFC INVESTMENTS IN AMALGAMATED PLANTATIONS PRIVATE LIMITED (APPL), INDIA, p. 10, (Jan. 23, 2019), available at [http://www.cao-ombudsman.org/cases/document-links/documents/CAOComplianceMonitoringReport\\_APPL2019.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAOComplianceMonitoringReport_APPL2019.pdf).

<sup>4</sup> CAO Operational Guidelines, *supra* note 2, para. 1.1, p. 4.

The effectiveness of CAO dispute resolution initiatives, which can potentially produce agreements to abate and remedy harm, is also hampered by this problem. The lack of readily available resources can derail a dispute resolution initiative by preventing the parties from achieving a meaningful agreement. And even when agreements are reached through dispute resolution, a lack of resources can delay the implementation of those agreements, leaving community members waiting for additional months or years to receive agreed remedies – as we have seen with commitments made to resolve claims by a [Mongolian community of nomadic herders about an IFC-financed copper mine](#).

The ongoing review of the IFC/MIGA accountability framework presents a crucial opportunity to correct this fundamental gap. The World Bank Group can accomplish this by creating a fund dedicated to resourcing remedy. The fund could be a natural complement to the CAO's processes, provided that certain other reforms to the IFC/MIGA accountability framework – such as procedures to ensure meaningful IFC/MIGA response to CAO findings and, when welcomed by complainants, good-faith engagement in CAO dispute resolution initiatives – are enacted. The CAO's role as an impartial fact-finder in compliance reviews and as a convener of parties in dispute resolution initiatives offers an objective basis for administering a remedy fund.

The time has come for the World Bank Group to once again take the lead in driving accountability in development finance forward and acknowledge that environmental and social risks should not be borne by local communities. With a remedy fund, the World Bank Group can systematically shift these risks away from communities and envisage more environmentally and socially sustainable projects. Remedying environmental and social harm *is* development, and the World Bank Group should address the challenge with zeal.

### **Designing a Principle-Based Remedy Fund**

While a fund can be structured in a variety of ways, it must be geared first and foremost towards delivering effective remedy for communities. No matter how it is structured, the operation of the fund must adhere to the following principles:

- **Remedy-focused:** The fund would bolster the IFC/MIGA accountability framework in a myriad of ways, from enhancing project outcomes to promoting continuous institutional learning and improvement. However, the fund's primary purpose must be to deliver remedy for those communities that have heretofore found harm unaddressed or remedy unimplemented.
- **Community-driven:** The fund must empower affected communities to shape remedy. Local communities are best positioned to know what will constitute truly effective remedy. While the IFC/MIGA and others have important technical expertise to offer, community needs, as voiced by them, should be put front and center. Without this, the fund will fail to mitigate the risk of further unintended harm or ineffective remedy.

Communities must have ample and routine opportunities to participate in the deliberative process of designing and delivering remedy, throughout the CAO's process<sup>5</sup> and remedy implementation. All other parties involved must meaningfully incorporate community input. Other communities not originally affected by an IFC/MIGA-financed activity but potentially affected by remedial measures must also be extended meaningful opportunities for input.

- **Accountability:** Actors that cause or contribute to harm must contribute to remedy.<sup>6</sup> There is a growing recognition that financial institutions can contribute to harm and share responsibility for contributing to remedy.<sup>7</sup> Harm is often not attributable to only the IFC/MIGA or only the client. Rather, it is common that both the IFC/MIGA and the client share the responsibility for harm caused. The operation of the fund should ensure that actors with responsibility for harm contribute to resourcing remedial measures.

There are a number of ways that the IFC/MIGA and clients can – without impeding the delivery of timely remedy to communities – determine an objective allocation of financial responsibility. Such an allocation is not only a matter of fairness but also critical to ensuring accountability for all actors and incentivizing them to be proactive about mitigating and addressing environmental and social risks.

- **Predictability:** The fund should operate according to well-defined procedures that make the fund's operation predictable for affected communities seeking remedy and equally effective from case to case. The fund should also operate according to reliable timelines that should be geared towards delivering timely remedy.
- **Impartiality:** Operation of the fund should entail a process for objectively determining the resources necessary to implement effective remedy, free from commercial considerations or undue influence from the IFC/MIGA or the client.
- **Transparency:** In order to ensure it is effective in executing its mandate to deliver remedy, the fund must operate transparently. Information about the remedial actions identified and the resources allocated for their implementation; the rationales for those

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<sup>5</sup> The establishment of the fund should also be accompanied by additional measures to prevent retaliation against CAO complainants. The CAO should continue to apply its [approach to retaliation](#) and should consider any additional measures that may be needed. The IFC should effectuate its [zero-tolerance position on retaliation](#) with a process for assessing, preventing, and addressing risks of and actual instances of retaliation against all project-affected communities, including potential complainants and all others associated with the complaint process (such as complainants' family members, NGOs, translators, drivers, etc.).

<sup>6</sup> See Office of the High Commissioner for Human Rights, United Nations, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, Principle 13, p. 14; Principle 15(c), p. 16; Commentary to Principle 19, p. 21; Principle 22, p. 24, available at [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>7</sup> See, e.g., OECD, DUE DILIGENCE FOR RESPONSIBLE CORPORATE LENDING AND SECURITIES UNDERWRITING, pp. 41-42, available at <https://mneguidelines.oecd.org/Due-Diligence-for-Responsible-Corporate-Lending-and-Securities-Underwriting.pdf>; Dutch Banking Sector Agreement, DISCUSSION PAPER: WORKING GROUP ENABLING REMEDIATION, pp. 33-35, available at <https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf>.

determinations; assessments by the CAO and communities about the remedial actions' adequacy; monitoring reports of remedy implementation; and more should be disclosed publicly.

### Remedy Fund Options

The World Bank Group should develop a remedy fund framework through a robust, transparent, and public consultation process with a broad range of stakeholders, including affected communities and civil society. Documents detailing the options under consideration should be publicly disclosed, and stakeholders should be afforded meaningful opportunities to provide comments. Structuring a remedy fund entails many complex questions, and proactively incorporating a wide range of perspectives is crucial to answering them properly. These consultations should solicit feedback on a variety of options for structuring a fund, among them: a single, IFC/MIGA-wide fund; individual funds for each project; or a fund that employs a combination of institution-level, project-level, and other mechanisms.

- **Common-fund:** The IFC/MIGA could create a single common-fund for all IFC/MIGA projects. A portion of existing IFC/MIGA capital could be reallocated to set up the fund or the fund could be created by a one-time capital increase from IFC/MIGA shareholders. The fund could be set up to automatically replenish over time, such as by remitting a small percentage of IFC/MIGA revenue, to ensure resources are available to communities harmed by future projects.

Whenever the CAO finds that an IFC/MIGA project results in harm, the fund would disburse a portion of its resources. The amount of resources to be disbursed in any given case would be determined through an impartial and transparent process in which communities meaningfully participate in the process of identifying the necessary remedial measures.

To ensure accountability for all actors, other mechanisms would need to be put in place to facilitate allocation of costs between the IFC/MIGA and the client when both share responsibility for harm. Financing agreements could, for instance, include obligatory indemnification of costs related to remedy or a variable interest rate that increases when a project results in harm. In certain circumstances, the fund could also be used to finance agreements made through dispute resolution processes.

- **Project-specific funds:** The IFC/MIGA could create individual funds for each project as a standard practice. The amount of resources to be set aside in each project's fund could be determined as part of the environmental and social impact assessment phase. Where the project is financed by loans, the fund resources could be "loaned" to the client as an additional percentage of support. Other financial instruments, such as equity, likely could also be structured in a way to set aside fund resources and give the client a financial stake in avoiding harm.

If there is a CAO finding of harm, the client would be obligated to use some or all of the fund, as determined by an impartial process, to resource remedy. Other mechanisms

could be put in place to allocate – after timely disbursement and potentially as part of repayment – financial responsibility between the IFC/MIGA and the client. If the project does not result in harm, the fund resources could be returned to the IFC/MIGA interest-free, so the client suffers no financial consequences, or wholly or partially reallocated, possibly creating a positive incentive for clients to prevent harm. Use of fund resources could also be negotiated through a dispute resolution initiative.

- **Multi-modal:** The fund could employ a combination of mechanisms at the institution and project levels to provide more flexibility in addressing unanticipated circumstances or to streamline allocation of financial responsibility between the IFC/MIGA and the client. Third-party insurance instruments could also be used as a component of a remedy fund, but only where their use would not hamper community participation or the predictable and timely delivery of remedy. The use of insurance instruments also cannot enable any actor to elude its fair share of financial responsibility for remedy with a small upfront payment, which would severely undermine accountability.

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The IFC/MIGA should not leave local communities without recourse for harm arising from their financing activities. The IFC/MIGA accountability framework will ultimately be incomplete without a mechanism in place to systematically facilitate effective delivery of remedy. Though current CAO processes may result in remedial action plans or agreements, experience has shown that the lack of readily available resources can be a major impediment to their implementation. The World Bank Group can close this glaring gap by establishing a remedy fund to ensure resources are available for the predictable and timely implementation of remedy. Now is the time to act. By committing to developing a principle-based remedy fund framework through a transparent and inclusive process, the World Bank Group can ensure that the review of the IFC/MIGA framework truly advances accountability.