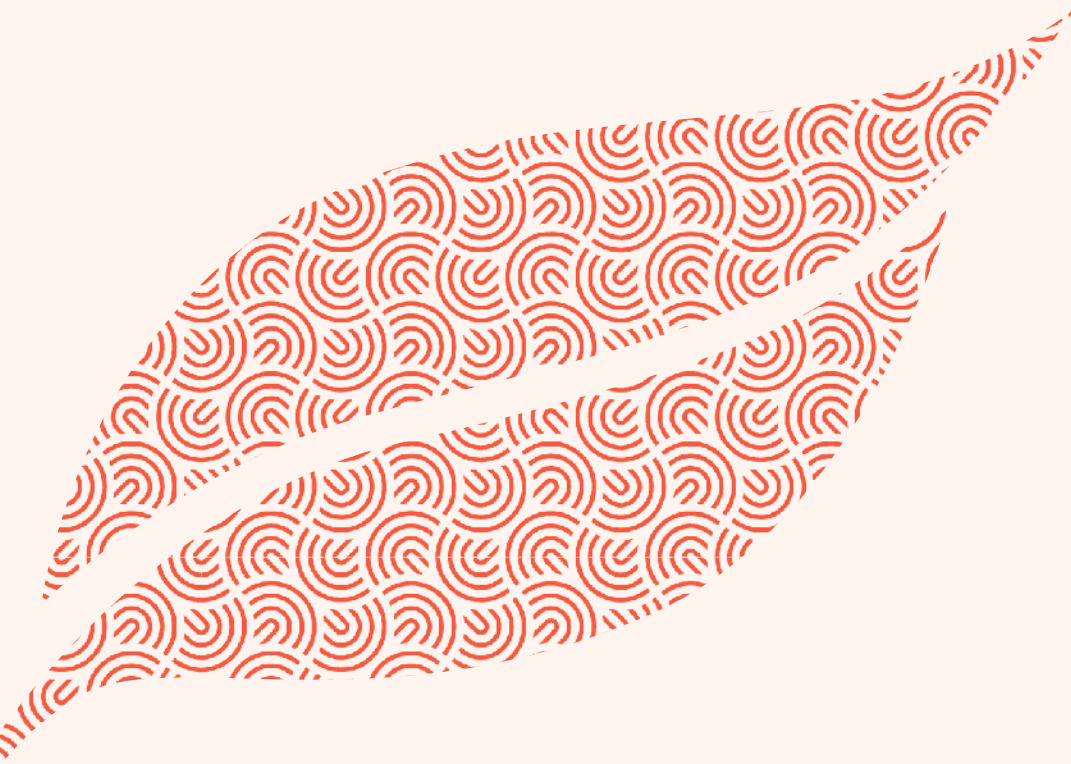


JANUARY 2023

ADVISORY NOTE

Insights on Remedy

The Role of Dispute Resolution in Remedy



Advisory Paper

© 2023 Compliance Advisor Ombudsman (CAO)

All rights reserved.

The Office of the Compliance Advisor Ombudsman (CAO)

2121 Pennsylvania Avenue, NW
Washington, DC 20433
USA

Telephone: + 1 202 458 1973

Website: www.cao-ombudsman.org

e-mail: cao@worldbankgroup.org

Acknowledgments

This note was written by Julia Gallu with research and data support from Danielle Falcon, Erica Bach, Nadia Asgaraly and Victoria Vasalo. Input was provided by Laure-Anne Courdesse, Janine Ferretti, Sadaf Lakhani, Silvia de Rosa, Kelly Ann Maharaj, and Nokukhanya Ntuli. Feedback on a report draft was provided by Reinett Erkan, Piotr Mazurkiewicz, and Philipp Koenig. We are grateful for the support provided by Emily Horgan and Andres Pulgar Perich and editing by Amy Sweeting and Nancy Morrison.

This advisory note is part of a series of short notes CAO is preparing to inform the development of IFC/MIGA's approach to remedial action. These notes share insights from CAO cases on facilitating remedial action to address potential or actual harm that may unintentionally arise in the development process. Drawing from CAO experience, this note identifies opportunities for IFC and MIGA to do more to support remedial outcomes for project-affected people via CAO dispute resolution processes.

Summary

CAO dispute resolution processes play a meaningful role in remedy, both through their concrete outcomes and through elements of the process that help to restore the dignity of complainants and increase levels of trust between the project-affected people and the concerned companies. In addition, the involvement of government authorities, where appropriate, has been associated with higher rates of settlement in dispute resolution processes. Further, dispute resolution processes often help prevent future harm, and participants in the process express high levels of satisfaction.

There have also been challenges to achieving remedial outcomes via dispute resolution. These are related to company reluctance to engage in the process, lack of resources for external expertise, and the need for ongoing support for the sustainability of agreements reached, among others. Engagement by other stakeholders, when relevant, has proven to improve processes and outcomes.

This note is aimed at exploring the potential role of IFC and MIGA in the dispute resolution process as a means of facilitating access to remedy.

About CAO dispute resolution processes:

CAO's Dispute Resolution function convenes companies and project-affected people (the "parties") in voluntary mediation processes. These processes focus on helping the parties find

practical and mutually acceptable solutions to the environmental and social (E&S) concerns raised in a complaint.¹ Depending on the circumstances, other stakeholders, including governments,² civil society organizations (CSOs), shareholders, and financiers may be involved. In dispute resolution processes, CAO plays a neutral role as convener.

1 CAO becomes active in a case after receiving an eligible complaint from affected people. During an assessment, complainants and IFC/MIGA clients are informed of their options – whether to engage in a dispute resolution process through CAO's Dispute Resolution function or a compliance process through CAO's Compliance function – as detailed in the [CAO Policy](#). Dispute resolution always requires the positive choice by both the complainants and the company to engage.

2 Government agents can include representatives of relevant ministries or specific relevant agencies at the national, regional, and local level.

What is remedy?

The principle that adverse impacts on project-affected people, communities, and workers should be remediated is embedded in E&S sustainability frameworks,³ both through mitigation hierarchies and in specific requirements such as responding to concerns of workers or affected people.⁴ This principle is also a founding objective of independent accountability mechanisms like CAO. The focus on remedy in the financial sector, particularly in development finance, has been sharpened by efforts to understand and address the “remedy gap,” which refers to the challenge of unresolved adverse environmental and social impacts in projects, particularly those supported by development finance institutions (DFIs).⁵

The new CAO Policy, in response to an External Review Panel identifying shortcomings in remedy outcomes,⁶ 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 Sustainability Framework.”⁷

Remedy is one of the core pillars of the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs).⁸ The UNGPs recognize that not all impacts can be foreseen or avoided,

even where businesses have sound E&S risk management systems in place. Here, grievance mechanisms play an important role when unanticipated impacts occur, and the UNGPs outline a responsibility for businesses to provide, or contribute to, remedy when they have caused or contributed to harm.

In line with learning from the business and human rights context, and in keeping with IFC/MIGA’s framing of E&S risk management, for the insights presented in this note, CAO refers to providing remedy 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.⁹
- It seeks to “make whole” project-affected people and the environment.
- It helps to prevent future harm.
- It is not only an outcome, but also a process that places agency in the harmed person and acts toward restoring the dignity that was lost in the harm.

3 For IFC, for example, the [International Finance Corporation \(IFC\)’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.).

4 [International Finance Corporation \(IFC\)’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](#).

5 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 United Nations High Commissioner for Human Rights (OHCHR), 2022.

6 See pp. 69--80 of the [External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness, Report and Recommendations](#).

7 [IFC/MIGA Independent Accountability Mechanism \(CAO\) Policy](#), para 5.

8 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 insofar as a core principle guiding CAO’s work is consistency 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 [International Finance Corporation \(IFC\)’s Policy and Environmental and Social Sustainability](#).

9 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.



Dispute resolution processes can make a meaningful contribution to remedy

Outcomes from dispute resolution processes relevant to remedy include concrete remedial actions, prevention of future harm, and restoration of dignity through respectful processes.

CAO dispute resolution processes have resulted in concrete positive outcomes¹⁰. Agreements reached by companies and communities have involved, for example, return or replacement of land from land-take,¹¹ training and skills development,¹² health and community development programs,¹³ payment of unpaid wages,¹⁴ and payment for land at a reassessed value.¹⁵ They have also helped to prevent future recurrence of harm by catalyzing systemic

changes to company policies and procedures, including improved company grievance mechanisms.¹⁶

Frequently, agreements that are reached in dispute resolution processes set up structures for company-community engagement that continue after CAO's involvement concludes. These structures equally serve to prevent future harm. This has included dialogue tables and other ongoing forms of engagement, which contribute to the implementation of agreements reached between the parties and also address any new concerns that may arise.¹⁷ Perhaps as importantly, relationships are built and trust between the parties increases demonstrably (see figure 1).¹⁸ These relational outcomes contribute to restoring the dignity that was lost in the harm—another important part of remedy.

10 <https://www.cao-in-numbers.org/dispute-resolution#Outcomes-of-Dispute-Resolution-Processes>.

11 See, for example, Indonesia: [Wilmar-01/West Kalimantan](#); Cambodia: [Cambodia Airports-01/Preah Sihanoukville](#); Uganda: [Bidco Bev. & Det-03/Kalangala](#).

12 See, for example, [Albania: Bankers Petroleum-01/Patos](#); [Chad-Cameroon Pipeline-02/Cameroon](#).

13 See, for example, Nicaragua: [Nicaragua Sugar Estate Limited-01/León and Chinandega](#); Uganda: [Agri-Vie-02/Mubende](#).

14 See, for example, [Egypt: Egyptian Indian Polyester Company Sokhna-01/Hyderabad](#).

15 See, for example, Chad: [Chad-Cameroon Pipeline-03/Doba](#); Indonesia: [Rajamandala HEPP-01/West Java](#).

16 See, for example, [Mexico: Harmon Hall-01](#).

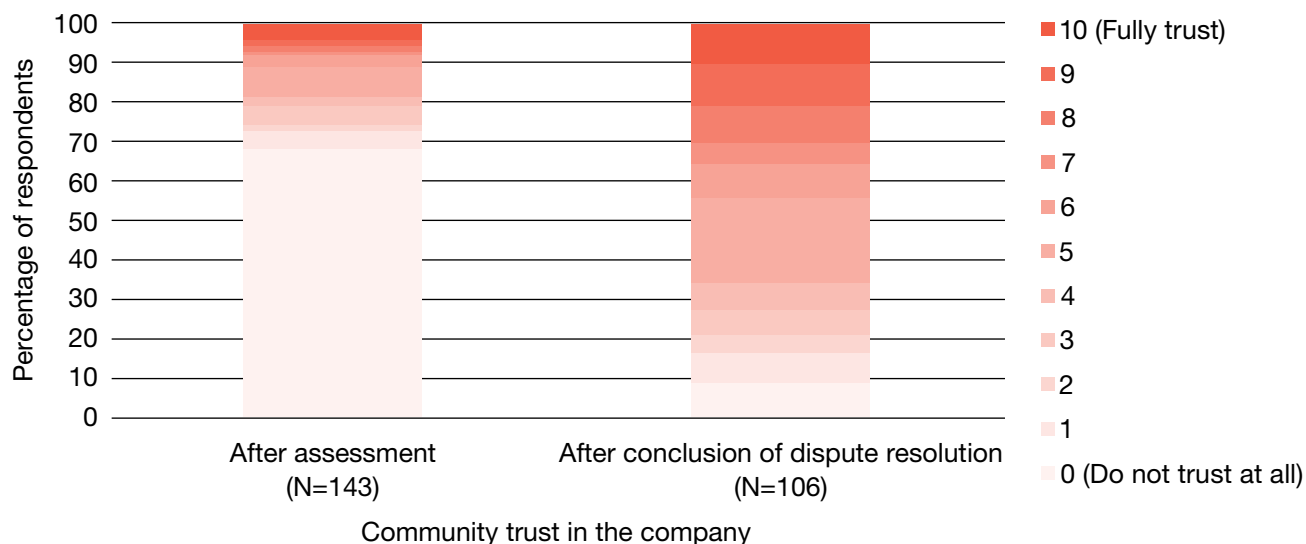
17 See, for example, Mongolia: [Oyu Tolgoi-01](#) and [02/Khanbogd](#).

18 <https://www.cao-in-numbers.org/dispute-resolution#Trust-Building-through-Dispute-Resolution>.

Many company representatives have expressed that they have also found these processes advantageous, for a number of reasons. Key benefits of participation in the process identified by company representatives include the

establishment of robust mechanisms to address any issues in the future, becoming a trusted partner over the long term with local communities, and the opportunity to manage reputational and operational risk for the business.¹⁹

Figure 1. Levels of community trust in the company increase significantly during a dispute resolution process.



Source: CAO post-assessment and post-dispute resolution stakeholder feedback surveys.

Note: This figure captures complainants' survey responses to the question of how much they trust the company (on a scale from 1 to 10). The percentage of respondents in the relevant category are based on 143 complainant responses following CAO assessment of a complaint and 106 complainant responses following dispute resolution. Data combine individual responses from both post-assessment and post-dispute resolution stakeholder feedback surveys conducted from FY2017 – FY2022.

Dispute resolution supports the provision of remedy through respectful and responsive processes.

There are various ways in which the nature of dispute resolution processes supports the provision of remedy. These processes allow grievances to be settled on mutually acceptable terms and involve both the affected people and the company in designing the process.

They are voluntary processes in which the parties are free to exit at any stage; any agreement is final only when both the affected people and the company agree. They give affected people agency and can restore dignity. They also humanize company staff in the eyes of communities and resolve conflict, which serves the interests of both companies and communities. Affected people and company representatives who have gone through CAO's dispute resolution process have reported high levels of satisfaction.²⁰

19 These findings are from comments made by company representatives in monitoring and evaluation M&E surveys at the conclusion of dispute resolution processes.

20 Eighty-five percent of complainants and 80 percent of company representatives who responded to the relevant question in CAO's M&E survey at the conclusion of a dispute resolution process agreed that they were very satisfied with the results achieved in the dispute resolution process. This positive picture is confirmed by a more neutral question also asked in the survey: 95 percent of complainants and 80 percent of company representatives noted they would recommend a dispute resolution process to others in a similar situation. A total of 161 complainants and 35 company representatives responded to the survey. Source: Monitoring and Evaluation CAO Assessment Surveys, FY18 to FY22.

Challenges to enabling remedy through dispute resolution

Companies are not always willing to participate in dispute resolution processes.

It is the voluntary participation of the parties in the mediation process in good faith that enables them to explore interests and creative solutions to issues, which may ultimately resolve concerns in a manner that benefits all involved and thus leads to sustainable solutions and improved relationships. At the same time, the voluntary nature of dispute resolution processes yields challenges for achieving remedy. Because the process is voluntary, clients that do not wish to participate will not, closing one possible door to identifying remedial solutions to address project impacts. Historically, two in five cases that were referred to CAO's Compliance function after assessment did so because the company chose not to participate in dispute resolution.²¹

While it would be counterproductive for IFC/MIGA to use leverage to “force” the participation, or continued participation, of an unwilling client in the process, there may still be opportunity for IFC and MIGA to engage with their clients and lay out the potential benefits of resolving the concerns of project-affected people. The mediation path may seem more attractive where IFC or MIGA consistently and clearly communicate to clients from the early stages of a project that engaging proactively with concerns raised by project-affected people, and preventing and remediating impacts,²² are integral and required parts of implementing sound E&S risk management systems.

CAO dispute resolution would then be one path open to the client to achieve this, and more clients might choose to give this path a try.

Access to trusted expertise and related funding can be a challenge to achieving remedy through dispute resolution.

CAO cases point to many examples where reaching agreements with the potential to remediate impacts has been limited by the resources that companies are able and willing to commit. Disputes of fact—for example about the environmental or health impacts of company operations—are common in CAO dispute resolution processes. These can be addressed in various ways, such as through involvement of mutually acceptable and trusted external technical experts. Involving such experts requires resources. The need for technical studies or expertise ranges from verifying contested factual information to designing appropriate solutions.

Difficulties in funding technical studies or expertise can also prevent mutually agreed initiatives from being implemented. Typically, participating companies carry the cost of technical studies or external expertise. In one case, CAO was able to engage a foundation to pay for these costs.²³

21 <https://www.cao-in-numbers.org/how-we-handle-complaints#Who-Chooses-Compliance-versus-Dispute-Resolution>.

22 Dispute resolution processes also often address concerns about potential impacts, and an agreeable solution can prevent impacts.

23 See [Uzbekistan: Indorama Kokand/, Hamkor Bank-01](#). In two other cases, a foundation paid for community-capacity building ([Cameroon: Chad-Cameroon Pipeline-02/Cameroon](#) and [Mongolia: Oyu Tolgoi-02/Khanbogd](#)). These case examples are among a total of 93 dispute resolution processes CAO has handled since 2000 (figures at the time of writing).

However, relying on the generosity of foundations is not a viable long-term solution. Foundations have their own funding priorities that do not always match the geographic or sectoral characteristics of the case. Furthermore, the parties' needs often do not match the specific processes, or timelines of the foundation.

The lack of a predictable and reliable system to support the financing of technical expertise is an impediment that needs to be addressed in order to facilitate greater success in dispute resolution.

Support by, and participation of, relevant government entities in the dispute resolution process is often associated with higher success rates for resolving complaints.

In the dispute resolution process, the involvement of third parties may be critical to the successful resolution of a case. For example, for many infrastructure projects involving resettlement, the responsibility for resettlement rests not with the private sector client but with the local or national government. The engagement of third parties such as government authorities is voluntary. In most cases in which the government played an important role in the process, they were invited by the parties, who identified government participation as a need. This does not necessarily mean that government agents participate in or attend the dialogue meetings.

There are also circumstances in which the federal or local government plays an important role in assisting parties with the implementation of agreements that have been reached.

When government involvement is sought by the parties, the most frequent issues at stake are those addressed by Performance Standard 5 relating to land, including both physical and economic displacement issues, followed by concerns about pollution issues (addressed in Performance Standard 3), and community health and safety (Performance Standard 4). For example, when land ownership is under dispute, relevant government authorities typically play an important role in the implementation of agreements reached by the parties. The parties convened by CAO in dispute resolution have greatly benefited from the introductions World Bank and IFC staff have made to responsible government agents.

In CAO cases, the involvement of government agents has been associated with successful process outcomes in many dispute resolution cases. In fact, of dispute resolution cases that concluded in the past ten years,²⁴ two in three that settled or partially settled benefited from some form of government engagement or presence. Of the cases that were transferred to CAO's Compliance function, only one in four had government engagement or presence.

The question of government involvement in dispute resolution is complex and requires further analysis to determine what type of case benefits more from government involvement and what type of involvement is most beneficial. It is also important to figure

²⁴ In the past 10 years, 30 dispute resolution cases have concluded. Of the 14 cases that were settled or partially settled, 9 had some kind of government engagement/presence (64 percent). Of the 16 cases that were transferred to Compliance, only 4 had government engagement/presence (25 percent).

out when government involvement may not be beneficial: for example by leading to delays. One challenging factor can be real or perceived threats from government actors. There have been situations where complainants initially reported behavior by government officials that they experienced as threatening, and where this behavior stopped after government agents became better informed of, or involved in, the process. However, despite these positive examples, there will be circumstances where seeking to involve government agents could undermine the complainants' ability to engage in dispute resolution freely. These situations need to be discussed and agreed carefully case by case. CAO is guided by its Approach to Threats and Reprisals.²⁵

Dispute resolution processes where affected people are supported by civil society organizations or a trade union have higher rates of settlement.

Dispute resolution processes are twice as likely to lead to agreement where complainants—whether community members, or workers—are supported by a civil society organization (CSO) or a trade union. Conversely, cases where complainants had no CSO or trade union support were approximately three times more likely to be transferred to Compliance when no agreement, or only partial agreement, could be reached.

IFC's work with the client during the dispute resolution process can make a positive difference.

Several of the challenges to achieving remedy through dispute resolution that were identified above could be positively influenced by the constructive engagement with or concrete support of IFC/MIGA or World Bank colleagues. IFC has played various roles in CAO dispute resolution processes. These include acting as an observer, engaging on issues concerning the risk of reprisal, providing general information to stakeholders about implementation of Performance Standards and IFC's supervision role, and holding workshops with parties. IFC staff and their World Bank country office colleagues have also facilitated introductions to government authorities. Sometimes, IFC provided information to the CAO team informally that could be helpful during the process, or exerted leverage on their client to address grievances substantively. And IFC and MIGA commonly advise their clients and build their clients' capacity to engage with CAO.²⁶ While CAO's new policy provides for this option, IFC/MIGA have yet not yet tried out participating in a process as a party alongside their client and the complainants.²⁷

There are circumstances when IFC's role can be challenging for the dispute resolution process. When IFC project teams are reluctant counterparts to CAO—for example, by not being forthcoming when CAO requests meeting or information—this can lead to delays in case-processing. In these situations, IFC's hesitancy is often mirrored in a less-cooperative IFC client. Other IFC teams have been highly cooperative, and this has helped the CAO team as they

25 CAO Approach in Responding to Concerns of Threats and Instances of Reprisals in CAO Operations, <https://www.cao-ombudsman.org/about-us/approach-reprisals>

26 Based on working arrangements of IFC's Stakeholder Grievance Response team (MIGA is in the process of establishing a similar function).

27 At the Inter-American Development Bank's Independent Consultation and Investigation Mechanism (MICI), management participates as a party alongside the client and complainants in all dispute resolution processes. <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-525549286-333>. Rules and procedures of the African Development Bank's Independent Review Mechanism (IRM) also allow for management participation in the dispute resolution process, either as an advisor or as a separate party, when appropriate and with parties' agreement.



Herder in Oyu Tolgoi, Mongolia. Photo Credit: Stephan Bachenheimer / CAO

navigate complex conflict situations and build trust with the client and affected people. These IFC teams have proactively communicated with CAO, for example, ahead of and after supervision visits, or by providing technical briefings for CAO staff on the issues at hand.

In the last two to three years, CAO has observed that IFC's engagement with CAO assessments and dispute resolution cases has increased markedly. This increased engagement coincides with the creation of IFC's Stakeholder Grievance Response team, as well as the introduction of the new CAO Policy. Efforts have been bolstered by a round of discussions on remedy that took place among IFC, MIGA, and CAO. This included a discussion on facilitating access to remedy in the context of the dispute resolution process.

Dispute resolution outcomes may need initial support to be sustainable.

CAO's Dispute Resolution function monitors the implementation of agreements reached through dispute resolution processes. In this monitoring role, it supports parties, should they encounter challenges such as overcoming different interpretations of what was agreed.

CAO plays a monitoring role until all agreed actions have been implemented, or until the parties decide that CAO's involvement is no longer necessary. In a subset of cases that involved agreed actions to address threatened community livelihoods, CAO has observed that the sustainability of the agreed outcomes may require ongoing support after CAO monitoring of agreement implementation has concluded. This kind of support includes, among others, technical expertise (such as supporting the implementation of jointly designed development projects) and resources or convening power (such as facilitating the continuity of livelihood activities).

In one example, complainant farmers formed cooperatives to support their livelihoods on the new land they obtained as one result of the process.²⁸ These cooperatives required additional support during their first years of existence for the achieved gains to become sustainable. In other relevant examples, livelihood projects needed early support to be sustainable.²⁹ Mechanisms to support the implementation of agreements with technical expertise and/or financial assistance is an important area to be explored.

28 [Uganda: Agri-Vie-02/Mubende \(Namwasa\).](#)

29 [Nicaragua: Ingenio Montelimar-01/Montelimar Environs; Nicaragua: Nicaragua Sugar Estate Limited-01/León and Chinandega.](#)

What can IFC/MIGA do to support remedial outcomes from dispute resolution processes?

CAO's case experience clearly demonstrates that dispute resolution processes can lead to remedial project-level outcomes and help prevent future harm. They can serve to restore the dignity of affected people, and they enjoy high participant satisfaction, all of which plays a role in their making a meaningful contribution to remedy. Yet, there have also been challenges to achieving remedial outcomes via dispute resolution. IFC and MIGA could play a role in addressing these challenges.

The development and implementation of IFC/MIGA's approach to remedial action represents a great opportunity to explore the most constructive roles IFC and MIGA can play in the dispute resolution process. Under what conditions is their involvement in the process helpful? How can good practice and guidance be established for the benefit of complainants as well as companies?

IFC/MIGA roles could include:

- **Clearly communicating the client's responsibility for remedy.**
IFC/MIGA could set clear expectations with client companies that grievances need to be proactively and constructively engaged with, and that adverse impacts and related harm be addressed and remediated. Once this expectation is clearly established, clients may choose dispute resolution more frequently as an attractive option to meet this expectation.
- **Encouraging clients to share project information to build trust.**
IFC/MIGA could encourage clients to share relevant information with complainants, such as environmental and/or social studies or monitoring reports that are not otherwise publicly available.

- **Supporting provision of technical expertise within the structure of a robust CAO-led process.**

This might include sharing in-house specialist expertise, supporting the development of relevant Terms of Reference, supporting the search for technical experts, or, where appropriate, procuring external expertise.

- **IFC/MIGA participation in the dispute resolution process as a party alongside their client.**

The question of IFC/MIGA participation is bound to come up in future when CAO co-manages a process alongside another independent accountability mechanism whose management participates as a party.

- **Helping bring other actors to the table if needed to catalyze solutions.**

Where the presence of third parties is required to address the issues, IFC/MIGA can play a role in bringing such actors to the table. This includes encouraging clients, when they are reluctant, to embrace the presence of CSOs in the dispute resolution process.

- **Supporting sustainable dispute resolution outcomes as part of ongoing supervision.**

When CAO closes a successful dispute resolution case, IFC/MIGA could support the sustainability of the outcomes of dialogue by including agreements reached by the parties in legally binding commitments (such as the Environmental and Social Action Plan) that IFC/MIGA can monitor and support during regular client supervision.

Conclusion

In summary, CAO's case experience yields the following insights:

1. Dispute resolution contributes to remedy by catalyzing concrete remedial actions to address harm, prevent future harm, and restore people's dignity through a respectful process that builds trust.
2. IFC/MIGA clients are not always willing to participate in dispute resolution. IFC and MIGA can do more to clearly communicate the responsibility to provide remedy and help their clients understand the business case and benefits of dispute resolution in this context.
3. Lack of access to trusted expertise and funding can impede the achievement of remedy through dispute resolution. This is an area where IFC and MIGA could provide support.
4. In some instances, government may be part of the solution, and their involvement, where appropriate, can contribute to the successful resolution of complaints. The World Bank and IFC/MIGA can play a key role in helping to bring government actors to the table.
5. Participation of civil society organizations and trade unions also contributes to higher success rates in dispute resolution, so their involvement is an opportunity for achieving positive outcomes.
6. IFC/MIGA's work with their client can make a positive difference through the dispute resolution process, as can IFC and MIGA's own involvement in the process as a party, where appropriate.
7. Dispute resolution outcomes often need support to be sustainable. IFC and MIGA can add value to their client and the community by supporting them to sustain the positive outcomes they achieved after CAO exits.

CAO looks forward to continuing to explore these possibilities with IFC and MIGA.

CAO  **COMPLIANCE
ADVISOR
OMBUDSMAN**

The Independent Accountability Mechanism for IFC & MIGA

