

Briefing for European Executive Directors
Planning for and Contributing to Remedy at the International Finance Corporation
26 April 2022

As recommended by the 2019 *External Review of IFC's and MIGA's Environmental and Social Accountability*, IFC/MIGA is now developing a [remedial framework](#) for its operations. This is an opportunity for IFC/MIGA to improve the sustainability of its financing, honor its development mandate, and retain its place as a leader among DFIs. However, there is also a risk that the IFC/MIGA's framework will fail to go far enough to truly enable remedy.

Questions for Executive Directors

- How will the Board ensure that IFC/MIGA incorporate the findings and recommendations in the UN's [Report on Remedy in Development Finance](#) as it develops its remedial framework?
- How will the Board ensure that existing verified harms are addressed by the IFC/MIGA's proposed remedial framework so that the framework is not only forward-looking?
- In addition to prioritizing harm prevention, how will the Board ensure that IFC/MIGA and its clients have funds available to respond to harm when it occurs? What is your position on the IFC/MIGA establishing a reserve fund to be utilized in the event a client does not contribute to remedy and an IFC/MIGA project causes environmental or social harm?
- What metrics will you use to determine whether IFC/MIGA's remedial framework is successful?

Civil Society Recommendations

- The scope of the remedy framework cannot just be forward-looking. IFC/MIGA must remediate harms that persist from its current and recently closed projects.
- IFC must focus on prevention, but not exclusively. Funding for responding to harm is required.
- Responsible exit must be addressed in the remedial framework.
- The remedial framework must apply to financial intermediaries.

Why Remedy Matters

A Remedy Gap Exists: The new UN report *Remedy in Development Finance* confirms that DFIs are falling short of their “do no harm” mandates, as they rarely provide effective remedy to communities harmed by their investments.¹ In developing its new remedial framework, IFC/MIGA should be guided by the report's recommendations for enabling remedy in a manner consistent with the UN Guiding Principles on Business and Human Rights.

- 1. Remedy must be built into the planning process for every project, including those in fragile and conflict-affected settings.**
 - “If commitments to remedy (including but not limited to financial compensation) are part of contingency planning from the beginning of the project cycle, this would promote more timely and granular inquiries into: (a) the likelihood and severity (scale, scope and remediability) of potential impacts; (b) the scope and effectiveness of available remedial mechanisms (including national GRMs, insurance arrangements and ring-fenced funds; (c) what remedy gaps may be foreseen; and (d) the roles that the client and bank, as appropriate, may play in filling those gaps.” (p. 4)

¹ From the UN report: “[A]ccording to CAO, of the 16 cases since the year 2008 for which data are available, only 13 per cent of monitored projects demonstrated satisfactory remedial actions, 37 per cent of projects were partly unsatisfactory and 50 per cent of projects were unsatisfactory. Moreover, as at 2019, 50 per cent of all projects for which the CAO monitoring process had been closed remained in ‘substantial non-compliance.’” (p. 61)

2. **The IFC/MIGA and its clients should implement financing mechanisms for remedy.**
 - ”The corollary of ‘enabling’ remedy is ‘contributing’ to remedy. According to ordinary principles of justice, and under international human rights standards, any contribution to harm should entail a proportionate contribution to remedy.” (p. xix).
 - “Ring-fenced funds are more likely to provide accessible, rapid and reliable reparations and therefore deserve priority consideration in the remedial toolkit of DFIs.” (p. 82)
 - The Report lists the following other potential funding mechanisms: (1) escrow; (2) trust fund; (3) contingency funds; (4) insurance; (5) and guarantees and letters of credit. (pp. 88-89)

3. **The IFC/MIGA does not have to reinvent the wheel; it can rely on its existing tools and expertise, in particular from CAO cases.**
 - “DFIs leading on the issue of remedy may feel that they face a ‘first mover’ dilemma: how can innovation and a forward-leaning approach to remedy be incentivized and commercially viable, in an environment in which competitors’ and clients’ standards and practices on remedy are often weak? But this may be a false dilemma, particularly for multilateral development banks, which have consistently and appropriately set new standards and shaped new global norms, public expectations and national legal and policy frameworks on environmental and social risk management and accountability issues. Innovation and leadership are part of the DNA of DFIs and essential to their reputations, comparative advantages and continuing influence.” (p. xxi)
 - Annex III of the Report lists the different mechanisms within DFIs that can contribute to remedy, including Board members, evaluation and audit departments, integrity departments, grievance redress services, administrative tribunals, and access to information mechanisms.

4. **As part of responsible exit, IFC must plan for remedy when it divests from a project.**
 - The Report recommends that DFIs “[d]evelop a responsible exit framework applicable across the full project cycle” and “[d]o not leave behind unremediated harms, including those arising from the exit.” (p. 108)

Common Misconceptions about Remedy

Hesitations about providing remedy are often founded on misconceptions. Below are clarifications to some of the most common misconceptions we hear.

Common Misconception	Clarifications
Committing to remedy will expose IFC/MIGA to financial risk in every project.	<ul style="list-style-type: none"> ● The UN’s framework of “protect, respect, and remedy” sets out a model for when and who pays to remedy harm; DFIs should contribute to remedy only if they have contributed to the harm. ● CAO cases only represent 1.2% of IFC’s portfolio. ● On the contrary, a strong remedial environment can decrease costs and incentivize prevention. ● If the cost of remedying harm from a DFI’s projects is truly so high that it risks bankrupting IFC/MIGA, this would call into question its own ability to adhere to its environmental and social obligations. The alternative is that it would be acceptable to require project-affected communities to bear the cost.

<p>Remedy means providing cash to project-affected people.</p>	<p>Remedy designed in consultation with communities often looks like practical measures tailored to the harm experienced. Case examples:</p> <ul style="list-style-type: none"> ● Haiti (IDB’s MICI): A dispute resolution agreement contained commitments to provide the community with (1) land transfers, (2) motorized pumps and wells for collecting water, (3) jobs trainings, (4) school supplies, (5) employment at the industrial park, and (6) promises to manage the environmental risks of the industrial park. ● Mongolia (CAO): Community negotiated an agreement asking for, <i>inter alia</i>, (1) design of a new grazing system to accommodate lost pasture, (2) measures to increase water access, (3) support for an animal husbandry development program, and (4) university scholarships for herder children. ● Remedy also includes non-compensatory measures such as restitution, rehabilitation, satisfaction, and guarantees of non-repetition. This briefing from the CIEL explains the remedy typology: Remedying Harm: Lessons from International Law for Development Finance.
<p>If the IFC/MIGA pays money to provide remedy, it will result in more lawsuits.</p>	<ul style="list-style-type: none"> ● IFC/MIGA has contributed to remedy before, on a case-by-case basis. This has not resulted in lawsuits. ● IFC/MIGA remains partially immune from suit, even after <i>Jam v. IFC</i>. ● The <i>Jam</i> litigation arose because IFC did not respond to and address CAO findings of noncompliance and related harm. This illustrates that prioritizing remedy at the IAM level can <i>prevent</i> potential liability. ● UN Report: “[L]egal hurdles that a successful plaintiff may need to clear in such cases include the substantive complexity of tort law claims in the context of financing relationships, <i>forum non conveniens</i> doctrines, political question doctrines, territorial nexus requirements, proof that harms complained of relate to ‘commercial activity,’ and overcoming the restrictive scope of lender liability laws in many jurisdictions, among other issues.”(p. 20) ● ANZ paid compensation for harms resulting from due diligence failures and set up an accountability mechanism, and it has not been sued.
<p>If the IFC/MIGA commits to providing remedy, it will create a “moral hazard” where clients will be disincentivized to uphold their E&S commitments.</p>	<ul style="list-style-type: none"> ● Clients would still be required to contribute to remedy in proportion to their contribution to the harm. ● This has not proven to be true outside of the development finance sphere. For example, there have been funds for large-scale disasters (<i>i.e.</i> Rana Plaza collapse in Bangladesh), funds for oil & gas industry (<i>i.e.</i> Association of International Petroleum Negotiators’ Model Joint Operating Agreement provides for the establishment of a decommissioning trust fund), and even at DFIs (<i>i.e.</i> World Bank’s rapid social response trust fund). ● Notably, insurance for environmental risks is widely used in

	<p>project finance despite risks of perverse incentives. Insurance is regularly paid out from project budgets to compensate third parties for environmental harms - there is no reason in principle why social harms can't be treated similarly.</p> <ul style="list-style-type: none"> ● This overlooks the moral hazard that already exists, wherein the poorest and most marginalized people bear the costs of human rights impacts while financiers and project implementers are all too often insulated from responsibility.
<p>Providing remedy would result in an increased number of CAO complaints alleging harm.</p>	<ul style="list-style-type: none"> ● The CAO's policies impose eligibility requirements that guard against frivolous claims. ● In our experience partnering with communities who consider filing complaints to IAMS, the decision to do so is incredibly difficult. The process is time-consuming and resource-intensive, and at times communities face risks of retaliation. ● In any event, IFC/MIGA should welcome legitimate complaints to the CAO, as it creates an opportunity to understand and address issues that risk the sustainability of their investments. If there is concern about a particularly high number of <i>legitimate</i> complaints, then this calls into question IFC/MIGA's own practices regarding "do no harm."

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