



## **IFC/MIGA APPROACH TO REMEDIAL ACTION**

October 31, 2022

**This IFC/MIGA Approach to Remedial Action (Approach) was prepared for public consultation purposes only. The Approach is a proposal by IFC/MIGA that has not been endorsed by and remains subject in all respects to further review and comment by the IFC and MIGA Boards of Directors, including the Committee on Development Effectiveness (CODE). Accordingly, the Approach remains subject to change following these consultations and further review and comments from CODE and the IFC/MIGA Boards of Directors.**

## Contents

Acronyms and Abbreviations .....	i
Executive Summary .....	ii
I. Introduction .....	1
II. The Approach to Remedial Action .....	2
A. <i>Scope of Approach to remedial action</i> .....	2
B. <i>IFC/MIGA Sustainability Frameworks</i> .....	4
C. <i>CAO Policy</i> .....	5
D. <i>The Remedy Ecosystem: Roles and Responsibilities</i> .....	5
E. <i>Enhancements</i> .....	6
F. <i>Internal capacity and financing</i> .....	9
G. <i>Processes</i> .....	10
III. Key Considerations for IFC/MIGA’s Contribution to Remedial Actions .....	11
IV. Potential Impact on Other DFIs .....	12
V. Pilot Period .....	12
VI. Stakeholder Engagement Plan .....	13
Appendix A. External Review .....	14
Appendix B. Stakeholder Engagement Plan .....	15
Appendix C. Proposed Approach to remedial action: Pilot Period .....	18

**Acronyms and Abbreviations**

CAO	Compliance Advisor Ombudsman
CAPs	Corrective Action Plans
CODE	Committee on Development Effectiveness
CSOs	Civil Society Organizations
DFI	Development Finance Institution
E&S	Environmental and Social
ESAPs	E&S Action Plans
FIs	Financial Intermediaries
IFC	International Finance Corporation
MAP	Management Action Plan
MDBs	Multilateral Development Banks
MIGA	Multilateral Investment Guarantee Agency
NGO	Non-Governmental Organization
NHFO-SOE	Non-Honoring of Financial Obligations by a State-Owned Enterprise
NHSFO	Non-Honoring of Sovereign Financial Obligation
OECD	Organization for Economic Co-operation and Development
PRI	Political Risk Insurance
SFs	IFC/MIGA Sustainability Frameworks
SGR	Stakeholder Grievance Response

## **Executive Summary**

### **Introduction**

The International Financial Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) are articulating a holistic approach to remedial action (the Approach) embedded in the Sustainability Frameworks (SFs) and the IFC/MIGA Independent Accountability Mechanism Compliance Advisor Ombudsman (CAO) Policy (the CAO Policy), which contain the mitigation hierarchy of environmental and social (E&S) risks and provide access to remedy through the CAO and project-level grievance mechanisms. The Approach also provides more clarity on activities to prepare for remedy, including building and exercising influence, improving access to remedy and systemizing IFC/MIGA's facilitation and support of remedial actions.

IFC/MIGA recognize that, to build on their leadership in the field of sustainability through robust SFs and continued efforts to strengthen their implementation, IFC/MIGA can do more to facilitate and support remedial actions to address adverse E&S impacts that may occur in the projects they support. IFC/MIGA are committed to strengthening implementation of their SFs and, in line with the "do no harm" intent of their SFs and their development mandate, endeavoring to avoid or minimize the occurrence of harm in the projects they support. If harm occurs, they are committed to facilitating and supporting clients' and stakeholders' remedial action to address the harm. These commitments, including accompanying concepts and definitions, are more fully outlined in the main section of this paper.

The process of articulating and enhancing the existing approach reflects IFC/MIGA's commitment to explore the recommendations of the "External Review of IFC/MIGA's E&S Accountability, including the CAO's Role and Effectiveness Report and Recommendations" (External Review), that was presented to the IFC/MIGA Boards in June 2020. The Boards endorsed the IFC/MIGA and CAO roadmap package for implementing the External Review recommendations, including IFC/MIGA's proposal to further analyze and discuss the External Review recommendation related to remedial action.

Since January 2021, an IFC/MIGA interdepartmental working group chaired by two senior directors and supported by a joint IFC/MIGA technical team has reviewed relevant theory, guidance, and practice. This included analysis of various external documents relevant to remedial actions to better understand the existing literature and external practices. To further examine issues and options, the working group engaged with the CAO, the World Bank, select civil society organizations, multilateral organizations, commercial financial institutions, think tanks, and the Committee on Development Effectiveness (CODE) of the IFC/MIGA Boards.

IFC/MIGA has previously presented to CODE (i) the outcome of the research phase (June 2021) and (ii) the key considerations for an approach to remedial action (February 2022). This paper presents the culmination of work to date, namely the key elements of the Approach, plans for a 45-day public consultation Q3FY23, and a four-year pilot period. Following the consultations, IFC/MIGA will submit a final decision document for CODE's consideration which will encompass the proposed IFC/MIGA Approach and the proposed pilot period.

### **The Approach to Remedial Action**

A. Scope of the Approach to Remedial Action: IFC/MIGA have articulated a consolidated, structured, and systematic approach for IFC/MIGA to facilitate and support remedial actions by clients and other stakeholders to address adverse E&S impacts in IFC/MIGA projects. The Approach has its foundation in the existing SFs, which provide the framework for determining compliance by IFC/MIGA and their clients and for assessing whether any related E&S harm has occurred as a result of non-compliance with IFC/MIGA's E&S requirements. The Approach is holistic. It encompasses (1) prospective and anticipatory measures taken at the earliest stages of considering, analyzing and processing a project in order to avoid or mitigate harm, (2) implementing measures taken during

implementation to further support avoidance and mitigation, and (3) retrospective measures taken after harm has occurred in order to support and facilitate the clients' efforts to address that harm. The Approach embodies four key elements: application of the mitigation hierarchy, preparedness, access to remedy, and the response continuum. This holistic Approach reflects the view that addressing adverse E&S impacts in projects supported by IFC/MIGA requires actions throughout the project cycle to avoid or minimize such impacts and engage early in the resolution of any complaints, prepare for remedial actions, strengthening various options available to access systems that allow those negatively impacted as a result of non-compliance with IFC/MIGA's E&S requirements to seek redress (access to remedy), and facilitate and support remedial actions when needed. Through application of the mitigation hierarchy and early resolution of complaints and concerns the overall Approach aims to reduce the possibility of adverse E&S impacts occurring in the first place, and to equip IFC/MIGA clients with the means to provide remedial actions as and when needed. IFC/MIGA recognize that they have a role, within a broader remedy ecosystem, to facilitate and support remedial actions by their clients or other stakeholders. The nature and manner of any such facilitation and support is determined by IFC/MIGA depending on the specific circumstances. This response continuum may range from applying IFC/MIGA influence with clients and third parties to facilitate implementation of E&S requirements to supporting enabling activities, such as technical assistance or capacity building, in cooperation with other actors in the remedy ecosystem, e.g., clients, government entities including municipalities, other financiers/investors, civil society organizations (CSOs), or nongovernmental organizations (NGOs). Most of elements of the proposed Approach are already being implemented to varying degrees within the SFs, while others would be enhancements to existing practices, as detailed below.

B. IFC/MIGA Sustainability Frameworks: The application of a mitigation hierarchy aims to anticipate and avoid adverse impacts on workers, communities, and the environment; where avoidance is not possible, it aims to minimize, and where residual impacts remain, it requires clients to compensate for, or offset the risks and impacts, as appropriate. In accordance with the SFs, IFC/MIGA work with their clients to determine remediation measures when there are significant environmental or social impacts associated with a particular business activity. The SFs provide that (i) the client set up project-level grievance mechanisms through which affected communities can seek access to remedy, and (ii) enable individuals and communities affected by IFC/MIGA-supported business activities to raise their concerns to the CAO. IFC/MIGA have also continued to strengthen their respective systems, processes, capacity, training, and tools underpinning efficient E&S risk management. Progress in this space was presented to CODE on July 12, 2022, as part of the update on implementation of the non-Policy actions recommended by the External Panel Review.

C. CAO Policy: The recently adopted CAO Policy now includes several elements that further strengthen IFC/MIGA's Approach to remedial action. It reflects an emphasis on the early and proactive resolution of complaints by IFC/MIGA and their clients. There are many opportunities embedded in the CAO Policy that facilitate access to remedy, such as referral, engagement in the Dispute Resolution process, deferral during compliance appraisal, and the development of Management Action Plans (MAPs) in response to compliance investigations. These mechanisms are now explicitly embedded in the Approach and are aimed at facilitating and supporting remedy earlier, more quickly, more efficiently, and more effectively.

D. Remedy ecosystem: According to the SFs, various actors, including IFC/MIGA and their clients, have differentiated but complementary roles to play that are relevant for remedial actions. IFC/MIGA clients/sub-clients have the primary responsibility for managing E&S risks and impacts in a manner consistent with the Performance Standards. IFC/MIGA conduct due diligence and monitoring and supervision efforts to determine whether the business activities they support are implemented in accordance with their E&S requirements. IFC/MIGA cooperate with various actors in the remedy ecosystem, such as government entities, including municipalities; other financiers/investors; and CSOs and NGOs.

E. Enhancements: In addition to already existing elements being implemented within the SFs, the Approach would include the following enhancements:

- *Preparing for remedial actions*: IFC/MIGA would continue to explore additional actions early in the project cycle to better position the institutions to facilitate and support their clients' preparedness for remedial actions, and to build and enhance IFC/MIGA's ability to exit responsibly, when relevant and as appropriate for each institution's business model. These efforts, which go beyond the explicit requirements of the SFs, would be focused on assessing, building, and deploying IFC/MIGA influence with clients and third parties to facilitate implementation of E&S requirements by IFC/MIGA clients. Actions would include: (i) strengthening assessment of influence and of client preparedness for remedial actions; (ii) expanding possibilities for financing by clients, including through costing E&S Action Plans (ESAPs) where appropriate; (iii) exploring additional contractual provisions; and (iv) considering other actions to support low-capacity clients. Some of the foregoing enhancements would be innovations that are not consistent with current market practice, and IFC/MIGA may face resistance from clients to their introduction.
- *Access to remedy*: IFC/MIGA are working towards enhancing *access to remedy* through strengthening various options available to affected communities, namely project-level grievance mechanisms,<sup>1</sup> the IFC Stakeholder Grievance Response (SGR) function, MIGA's SGR function (which is currently being established), and CAO (with the recently approved CAO Policy constituting a cornerstone of the Approach).
- *Facilitation and support*: IFC/MIGA would pursue a range of possible ways to facilitate and support remedial actions depending on the circumstances of each individual case, in response to adverse E&S impacts that result from non-compliance with IFC/MIGA E&S requirements. IFC/MIGA would utilize influence to prompt clients and/or other actors in the remedy ecosystem – i.e., government entities including municipalities, other financiers/investors, and civil society organizations – to provide remedial actions; and, if needed, facilitate and support remedial actions by the client or other stakeholders. This could entail support for activities such as technical assistance, capacity building, fact-finding, or dialogue facilitation, which could be provided in the context of CAO cases or otherwise.

F. Internal capacity and financing: The costs of implementation of the SFs by IFC and MIGA and ongoing improvements are already significant. The resources IFC dedicates to its E&S risk management and accountability function are significant relative to the size of its operations and compares favorably to all other MDBs operating in the private sector space. From a total resources' viewpoint, the budget has more than doubled over the past 10 years to \$73 million in FY22, including a \$10.5 million per year allocation to the E&S Risk and Policy Department since 2019. IFC currently has 129 E&S staff, or 11 E&S staff per \$1 billion of commitment, compared to 2-4 for other MDBs. MIGA also continues to increase resources available for E&S risk management. In FY22, a second Sector Manager position was created in the MIGA Economics and Sustainability Department (MIGES) as well as four new E&S positions bringing the total team to 15 E&S staff. IFC/MIGA actions to facilitate and support remedial actions are financed by, in the case of IFC, the underlying project's funding structure and, in the case of MIGA, funds for the current application of its Performance Standards and Sustainability Policy. IFC/MIGA plan to continue financing facilitation and support activities for clients' remedial actions from these sources. In light of IFC/MIGA's increased exposure to FCS/IDA countries, the appropriate allocation of resources for E&S due diligence and supervision will need continued attention through the normal budgetary process. Also, the cost of implementation of IFC/MIGA E&S requirements by clients, especially those operating in FCS/IDA countries, should not be underestimated and will depend on a number of factors such as the gap between existing E&S laws and regulations

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<sup>1</sup> Performance Standard 1, paragraph 2.

and IFC/MIGA Performance Standards, the complexity and risk profile of projects, sectors of operations, etc. IFC is considering other available options including using donor funds for additional financing of technical assistance. Per its Sustainability Policy, MIGA may also provide limited advisory/technical assistance services to clients either through budgetary resources or leveraging funds from donor-funded facilities.

### **Key Considerations for IFC/MIGA Contribution to Remedial Action**

The SFs clearly establish the delineation of roles between IFC/MIGA and their clients and defines the facilitating and supporting roles that IFC/MIGA can play in the remedy ecosystem. Consistent with the purpose and mission of IFC/MIGA and the fundamental purposes and objectives of the SFs, IFC/MIGA are not guarantors of clients' performance or compliance with Performance Standards or other E&S requirements, nor are they insurers of E&S risks. IFC/MIGA conduct due diligence and monitoring and supervision efforts to determine whether the business activities they support are implemented in accordance with their E&S requirements. If harm occurs as a result of non-compliance with IFC/MIGA's E&S requirements, IFC/MIGA are committed to facilitating and supporting clients' and stakeholders' remedial action to address the harm within the scope of the existing SFs and the holistic Approach.

Financing direct contribution to remedial actions gives rise to risks, the most significant of which include: the possibility of shifting how clients and other stakeholders understand their roles and responsibilities and act on them; increased litigation risk (under a range of possible legal theories) and increased costs and decreased competitiveness. Given opportunities envisioned for facilitation and support of remedial actions and the anticipated risks associated with financing direct contribution to remedial actions, the Approach does not contemplate a systemic process for the financing of direct contribution to remedial action (see paragraph 30).

### **Potential Impact on Other DFIs**

The Approach addresses specific issues arising in the context of IFC/MIGA's respective business models and mandates, which are distinct from those of other development finance institutions (DFIs) focused on financing sovereign clients. In sovereign operations, where the client is an agency or affiliate of the member country, the relationships that are required to discuss, design, and implement appropriate remedial actions remain in place, separate from the DFI's loan, and an Approach to remedial action like the one described in this paper is not necessary or applicable. For the same reason, during the pilot period, the Approach will only apply to projects guaranteed through MIGA's Political Risk Insurance (PRI) product. It will not apply to Non-Honoring of Sovereign Financial Obligation (NHSFO) and Non-Honoring of Financial Obligations by a State-Owned Enterprise (NHFO-SOE) instruments, which guarantee financing to sovereign, sub-sovereign, or state-owned enterprise clients, as applicable.

Since many DFIs endeavor to follow a largely harmonized approach to E&S risk management in their E&S policies, it would be appropriate that those DFIs focused on private sector financing also share and coordinate their respective approaches to remedial actions to the extent possible.

### **Pilot Period**

IFC/MIGA intend to apply the Approach for an initial four-year pilot period during which it would be rolled out, tested, and refined, in particular taking into account the experience from the implementation of the CAO Policy and enhanced grievance response arrangements. It is anticipated that an IFC Management Directive would govern the pilot period for IFC, and a similar document would govern the MIGA pilot. It is expected that these would be issued in Q1FY24. IFC/MIGA are currently assessing and developing relevant tools that would be rolled out during the preparatory phase and would run from July 2023 through December 2023. During this period, IFC/MIGA would proceed with the implementation arrangements; build necessary capacity; finalize systems, procedures, guidance and reporting requirements; refine relevant tools and conduct training and outreach in order to prepare for the pilot

period. During the subsequent pilot period, starting January 2024, IFC/MIGA would implement the Approach, including all proposed enhancements, for all new IFC direct investment projects and all new MIGA PRI projects. Relevant elements of the Approach, particularly those related to client preparedness, will also be applied to new IFC Financial Intermediary (FI) transactions and new MIGA FI transactions to be supported by its PRI product. For the avoidance of doubt, IFC/MIGA will not require FI clients to establish their own equivalents of the Approach. The review of the pilot period would coincide with the review of the CAO Policy. The proposal for a pilot period would allow IFC/MIGA to draw lessons learned, including those related to the design and implementation of MAPs and handling non-CAO complaints, that would inform the formalization of the Approach.

### **Stakeholder Engagement**

IFC/MIGA look forward to conducting an inclusive public consultation on the proposed Approach in Q3FY23, involving a 45-day consultation period. Feedback from the consultation will inform the refinement of the Approach before it is finalized for submission to CODE.



## I. Introduction

1. **The International Finance Corporation and the Multilateral Investment Guarantee Agency (IFC/MIGA) have been leaders and standard setters in the field of sustainability for over two decades.** IFC/MIGA have developed robust Sustainability Frameworks (SFs)<sup>2</sup>—providing a model that has since been widely adopted by other development finance institutions (DFIs), commercial financial institutions, and corporations—and work continuously to support their implementation through ongoing supervision, IFC’s dedicated advisory services, and MIGA’s use of trust funds or budgetary resources to support clients with technical assistance. A basic principle is that clients have the responsibility for environmental and social (E&S) management, including identification of adverse E&S impacts and addressing them through corrective action plans. The E&S standards contained in the SFs constitute a critical aspect of IFC/MIGA’s value proposition for clients to avoid or minimize adverse E&S impacts, including in fragile and conflict-affected countries. The SFs also provide for access to remedy through the Compliance Advisor Ombudsman (CAO) as well as through project-level grievance mechanisms. This holistic approach allows for avoidance or minimization of adverse E&S impacts and channels to access remedy if necessary. In essence, the SFs and the CAO Policy provide the foundations of an IFC/MIGA approach to remedial action.

2. **Adverse E&S impacts can occur despite best implementation efforts.** 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. This may lead to CAO complaints (see Figure 1) about projects with adverse E&S impacts which may require remedial action. How DFIs should approach these situations is an ongoing topic of discussion among global development and commercial financial institutions and presents an important opportunity for IFC/MIGA to take steps to articulate IFC/MIGA’s approach to remedial action. IFC/MIGA are committed to strengthening implementation of their SFs. In line with the “do no harm” intent of IFC/MIGA’s SFs and their development mandate, IFC/MIGA are also committed to avoiding or minimizing the occurrence of harm in IFC/MIGA projects and, if harm occurs, are committed to facilitating and supporting<sup>3</sup> remedial action by the client and others to address the harm.

Figure 1. IFC/MIGA Projects, Complaints, and Cases, 2012–2021



3. **The External Review.** A further impetus for articulating an approach to remedial actions comes from the “External Review of the E&S Accountability of the IFC and MIGA, including the CAO’s Role and Effectiveness Report and Recommendations” (the External Review), initiated in 2018 by the Committee on Development Effectiveness (CODE) on behalf of the Boards of the IFC and MIGA (the Boards). The External Review presented

<sup>2</sup> IFC/MIGA Sustainability Frameworks are comprised of the Sustainability Policies (IFC 2012, MIGA 2013); Performance Standards on Environmental and Social Sustainability (IFC 2012, MIGA 2013) and Access to Information Policies (IFC 2012, MIGA 2013).

<sup>3</sup> Support for remedial action refers to enabling activities such as advisory services, technical assistance, and capacity building.

its report to the Boards in June 2020. At the meeting on June 24, 2020, CODE Committee on Governance and Executive Directors' Administrative Matters (COGAM) tasked IFC, MIGA, and CAO with preparing a roadmap for implementing the External Review recommendations and a timeline for continuing deliberations on recommendations needing further discussion. On October 26, 2020, CODE/COGAM endorsed the Final Roadmap Package on IFC & MIGA E&S Accountability, which involved several recommendations relating to remedial actions, including that “an IFC/MIGA framework needs to be established for remedial action in cases in which noncompliance contributes to harm,”<sup>4</sup> which IFC/MIGA proposed to further analyze and discuss (see Appendix A for additional information on the recommendations of the External Review explicitly related to remedial action).

4. **Process.** In January 2021, IFC/MIGA established an interdepartmental working group chaired by two senior directors and supported by a joint IFC/MIGA technical team to explore an approach to remedial action. From January to June 2021, IFC/MIGA reviewed theory, guidance, and practice related to remedial actions, analyzing various documents relevant to remedial actions to better understand the existing literature – namely, the 2011 UN Guiding Principles on Business and Human Rights, the 2011 Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, and several thematic papers developed specifically for the financial sector, including those prepared by the Dutch banking sector. They also studied implementation practices related to these publications, which are currently limited and ad hoc. Relevant aspects of IFC/MIGA's own SFs were also considered and shared in a progress report to CODE in June 2021. From June 2021 to date, IFC/MIGA have been considering relevant issues and options and consolidating them into a workable approach for the two institutions. As part of this process, IFC/MIGA have engaged with CAO including through dedicated brainstorming sessions and technical working group meetings in March, April, and May 2022. This engagement has generated valuable insights from CAO's practical experience of handling complaints related to IFC/MIGA projects, including CAO's perspectives on various shortcomings in the implementation of IFC/MIGA SFs that may have been associated with E&S harms. IFC/MIGA have also engaged with and received feedback from the World Bank. More broadly, IFC/MIGA have benefited from numerous discussions with select civil society organization (CSOs), multilateral organizations (including multilateral financial institutions), private sector financial institutions, and think tanks. Based on these inputs, IFC/MIGA presented key considerations for an approach to remedial action to CODE in February 2022, receiving general support for the proposed direction and overall approach. As a result of further analysis and discussions within IFC/MIGA and the World Bank, the approach has evolved with this paper a product of the work to date. It outlines key elements of the proposed Approach to Remedial Action (the Approach), as well as plans for a 45-day public consultation in Q3FY23, and a pilot period, proposed to run until the end of 2027. Following the consultations, IFC/MIGA will submit for CODE's consideration a final decision document. It will encompass the proposed IFC/MIGA Approach and its implementation over a proposed pilot period.

## II. The Approach to Remedial Action

### A. *Scope of Approach to Remedial Action*

5. IFC/MIGA have articulated a consolidated, structured, and systematic approach to facilitate and support remedial actions addressing E&S harm resulting from non-compliance with IFC/MIGA E&S requirements in projects supported by IFC or by MIGA's Political Risk Insurance (PRI) instrument. The Approach has as its foundation the existing SFs, which provide the framework for determining compliance by IFC/MIGA and their clients and for assessing whether any related E&S harm has occurred due to non-compliance with IFC/MIGA E&S requirements. The Approach is holistic and encompasses (1) prospective and anticipatory measures taken at the earliest stages of considering, analyzing and processing a project in order to avoid or mitigate harm, (2) implementing measures taken during implementation to further support avoidance and mitigation, and (3)

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<sup>4</sup> “External Review of the Environmental and Social (E&S) Accountability of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), including the Compliance Advisor Ombudsman (CAO)'s Role and Effectiveness Report and Recommendations” (June 24, 2020), p. xvii.

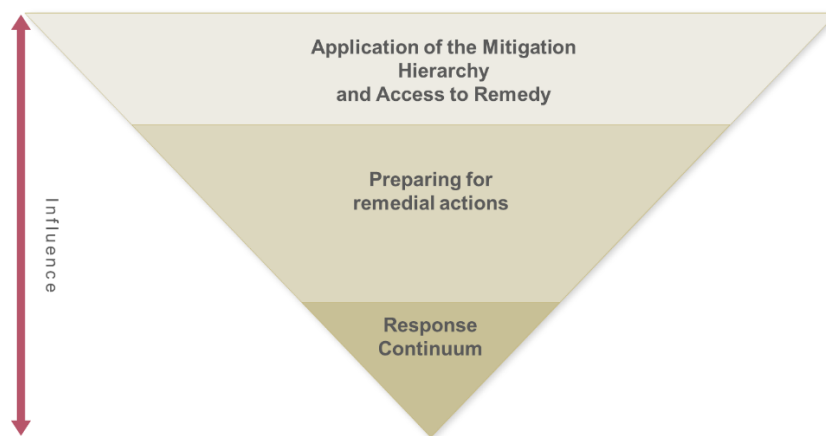
retrospective measures taken after harm has occurred in order to support and facilitate the clients' efforts to address that harm. The Approach embodies four key elements: application of the mitigation hierarchy, preparedness, access to remedy, and response.

6. It places the issue of remedial actions<sup>5</sup> in a wider context, including measures to avoid or minimize E&S impacts, prepare for remedial actions and early resolution of complaints, provide access to remedy (through or outside of CAO processes), and facilitate and support remedial actions (through or outside of the CAO processes) when needed.

7. Through application of the mitigation hierarchy and early resolution of complaints and concerns, this holistic Approach aims to reduce the possibility of adverse E&S impacts occurring in the first place, while equipping IFC/MIGA clients with the means to provide remedial actions as and when needed, and for IFC/MIGA to facilitate and support remedial actions as appropriate. Where adverse E&S impacts still occur, IFC/MIGA's early engagement with clients on preparedness for remedial actions paves the way for proactive and effective early response and resolution of grievances. Even if proactive engagement does not lead to an early resolution of E&S issues, such engagement still provides a crucial foundation for equipping IFC/MIGA with tools to facilitate and support their clients in providing remedial actions as needed.

8. IFC/MIGA recognize that they have a role, within a broader remedy ecosystem, to facilitate and support remedial actions by the client or others, with the nature and manner of any such facilitation and support being determined by IFC/MIGA depending on the specific circumstances. IFC/MIGA facilitation and support constitute a continuum. This response continuum may range from applying IFC/MIGA influence with clients and third parties to facilitate implementation of E&S requirements to supporting enabling activities such as technical assistance or capacity building, in cooperation with other actors in the remedy ecosystem, such as clients, government entities including municipalities,<sup>6</sup> other financiers/investors, civil society organizations (CSOs), or nongovernmental organizations (NGOs).

Figure 2. Key Elements of the Approach to Remedial Action



<sup>5</sup> Remedial actions by clients and other stakeholders within the remedy ecosystem aim to address adverse E&S impacts, in line with the Performance Standards, and related E&S harm due to non-compliance with IFC/MIGA E&S requirements, and such actions can take many forms. These forms may include restitution, compensation, rehabilitation, satisfaction, and guarantees/promise of non-repetition. The appropriate action in a particular case depends on the unique circumstances of that case and could include a combination of these forms. Determining the form(s) of remedial action to be used in a particular case should include meaningful consultation with project-affected communities/complainants.

<sup>6</sup> Efforts to strengthen national systems based on legal, regulatory and country frameworks are pursued by other programs.

## ***B. IFC/MIGA Sustainability Frameworks***

9. The IFC/MIGA SFs provide a sound foundation for the Approach. In line with IFC/MIGA’s intent to do no harm,<sup>7</sup> the SFs present a robust framework, including the application of the mitigation hierarchy for the clients to anticipate, prepare for, and avoid adverse impacts on workers, communities, and the environment, or where avoidance is not possible, to minimize, and where residual impacts remain, compensate for, or offset the risks and impacts, as appropriate.<sup>8</sup> IFC/MIGA conduct due diligence of E&S risks at appraisal and regular monitoring throughout implementation. As part of these efforts, and as applicable, IFC/MIGA agree with their clients at appraisal on the implementation of E&S Action Plans (ESAPs), through which clients are contractually obligated to undertake specific actions to bring the client or the project into compliance with the applicable requirements of the Performance Standards. Actions to facilitate ongoing compliance with Performance Standards may be captured in amendments to ESAPs or additional Corrective Action Plans (CAPs),<sup>9</sup> which are instruments solely financed and implemented by clients that provide additional avenues to address changing project circumstances and emerging risks not anticipated at the appraisal stage; thus, they constitute a cornerstone of client remedial actions and IFC/MIGA influence. IFC and MIGA are also required to “work with its client to determine remediation measures where there are significant environmental or social impacts associated with the business activity,” “including past or present adverse impacts caused by others.”<sup>10</sup> The SFs provide the relevant benchmark for determining whether E&S harm has occurred in IFC/MIGA-supported projects.

10. The SFs also provide channels for *access to remedy* to affected communities and those impacted as a result of non-compliance with IFC/MIGA’s E&S requirements, specifically through project-level grievance mechanisms, and the CAO for both IFC and MIGA:

- In accordance with the IFC and MIGA Sustainability Policies, clients are required to provide “access to an effective grievance mechanism that can facilitate early indication of, and prompt remediation of various project-related grievances.”<sup>11</sup>
- The CAO, as IFC’s and MIGA’s independent accountability mechanism, receives complaints from people or communities who believe they may have been affected by an IFC or MIGA project, and, in executing its mandate, “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.”<sup>12</sup>

11. At IFC implementation of the SFs has been supported by dedicated E&S specialists in the Sustainability and Gender Solutions Department (CEG). In addition, in 2019 the E&S Policy and Risk Department (CES) reporting to the Managing Director and Executive Vice President of IFC was created to serve an E&S policy, regulatory and E&S risk oversight function (including classification of all projects, clearances of E&S Review Summaries as well as commitments and disbursement of high-risk projects), as well as to house a Stakeholder Grievance Response (SGR) function to facilitate pro-active response to CAO and non-CAO complaints. MIGA supports implementation of the SF through its Economics and Sustainability Department, which reports to the Vice President and Chief Risk, Legal and Sustainability Officer and Partnerships. Within the Economics and Sustainability Department, the E&S

<sup>7</sup> IFC Sustainability Policy, paragraph 9 and MIGA Sustainability Policy, paragraph 9.

<sup>8</sup> IFC Sustainability Policy, paragraph 6 and MIGA Sustainability Policy, paragraph 5.

<sup>9</sup> CAPs reflect findings from IFC/MIGA supervision processes. They are developed in cases when originally developed ESAPs are not sufficient and additional actions are needed to meet the Performance Standards. Clients are responsible for implementation of CAPs, and IFC/MIGA monitor their implementation.

<sup>10</sup> IFC Sustainability Policy, paragraph 26 and MIGA Sustainability Policy, paragraph 24.

<sup>11</sup> IFC Sustainability Policy, para. 12.

<sup>12</sup> CAO Policy, paragraph 5.

team is responsible for E&S policy, E&S risk oversight (including E&S due diligence and monitoring), and the SGR function. IFC/MIGA have also continued to strengthen their respective systems, processes, capacity, training, and tools underpinning efficient E&S risk management. Progress in this space was most recently presented in a paper to CODE on July 12, 2022, as part of the update on implementation of the non-Policy actions recommended by the External Panel Review.

### ***C. CAO Policy***

12. The recently adopted CAO Policy now includes several elements that further strengthen IFC/MIGA’s Approach to remedial action. It reflects an emphasis on the early and proactive resolution of complaints by IFC/MIGA and their clients, including an option to refer complaints to IFC/MIGA (with the consent of the complainant) for early resolution prior to starting a CAO process,<sup>13</sup> and an option to defer a compliance investigation if a credible plan is put forward to address E&S concerns, with CAO specifically considering “whether Management has provided a statement of specific remedial actions.”<sup>14</sup> The CAO Policy also provides for CAO to make recommendations for IFC/MIGA to consider when developing a MAP after a compliance investigation “related to the remediation of Project or Sub-Project-level non-compliance and related harm, and/or steps needed to prevent future non-compliance, as relevant.”<sup>15</sup> IFC/MIGA are working with CAO on establishing effective engagement processes supporting remedial action through the entry points provided by the IFC/MIGA CAO Policy.

### ***D. The Remedy Ecosystem: Roles and Responsibilities***

13. IFC/MIGA SFs and the CAO Policy clearly distinguish among the respective roles of IFC/MIGA, clients, and the CAO:

- IFC/MIGA clients/sub-clients<sup>16</sup> have the primary responsibility for managing E&S risks and impacts in a manner consistent with the Performance Standards, including through the implementation of ESAPs agreed with IFC/MIGA (or, in the case of Financial Intermediaries (FIs), between the FI and its clients).
- IFC/MIGA are responsible for undertaking E&S due diligence during appraisal and supervision efforts during an investment’s lifetime to identify key E&S risks and impacts and assist clients to implement IFC/MIGA-supported projects in accordance with the requirements of the Performance Standards.
- CAO, as part of its purpose (and without excluding involvement of other stakeholders), facilitates access to remedy for people affected by IFC/MIGA projects, and recommends remedial actions to address noncompliance and harm, where appropriate. IFC/MIGA engages with CAO throughout its Dispute Resolution and Compliance processes as provided in the CAO Policy.

14. MIGA provides PRI or credit enhancement instruments to equity providers, lenders, or other investors, as appropriate to the instrument, who invest in eligible projects. Unlike IFC and other investors who extend direct equity or debt financing to projects, MIGA does not have a direct contractual relationship with the project company responsible for implementing the project. Therefore, MIGA seeks to enforce its requirements, including E&S requirements, through its contractual counterparty, i.e., the guarantee holder, making MIGA one step further removed from the projects compared with IFC and other direct investors. This structural difference results in MIGA's role in the project and influence on a project company being different than that of an equity holder or lender (e.g., MIGA exercises its contractual rights against its guarantee holder, who is then expected to use its contractual

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<sup>13</sup> CAO Policy (June 28, 2021), paragraph 39.

<sup>14</sup> CAO Policy (June 28, 2021), paragraph 92.

<sup>15</sup> CAO Policy (June 28, 2021), paragraph 120.

<sup>16</sup> Throughout this paper, the term “client” is typically used to refer to the project company. MIGA does not have any contractual relationship with the project company. Instead, MIGA’s contractual relationship is with the guarantee holder (e.g., equity investor or lender). See para. 14.

influence on the project company).<sup>17</sup> For this reason, the roles and responsibilities of MIGA within the proposed Approach reflect the differing role of MIGA and MIGA's guarantee holder in project structures.<sup>18</sup>

15. In accordance with this delineation of roles and responsibilities between IFC/MIGA and IFC/MIGA clients under the SFs, IFC/MIGA embrace the concept of a remedy ecosystem in which various actors have differentiated but complementary roles to play in relation to remedy. Remedial action should be provided by clients whose projects cause adverse E&S impacts. IFC/MIGA proactively work with clients to support them in meeting their contractual E&S obligations. When there is insufficient action by clients, IFC/MIGA may facilitate remedial actions through exercising their influence with clients and, as appropriate, with other actors. IFC/MIGA may also support enabling activities such as offering technical assistance or capacity building. IFC/MIGA facilitate and support remedial actions in cooperation with other actors in the remedy ecosystem, such as government entities including municipalities; other financiers/investors; and CSOs and NGOs (see paragraph 20, below).

### ***E. Enhancements***

16. The Approach builds on the existing SFs and the CAO Policy. It would introduce a number of enhancements to the already existing core elements, several of which are already being implemented in the context of the IFC/MIGA response to the External Review recommendations<sup>19</sup> and through other ongoing activities to improve E&S management.

17. **Preparation for remedial action.**<sup>20</sup> Preparation needs to occur early in the project cycle in order to better position IFC/MIGA to facilitate and support their client's preparedness for remedial actions when necessary, and to exit responsibly when relevant. These efforts would focus on assessing, increasing, and deploying IFC/MIGA's influence with clients and third parties. IFC/MIGA will also monitor client preparedness and assess the effectiveness of grievance mechanisms as part of IFC/MIGA supervision efforts. The proposed enhancements would include: (i) strengthening assessment processes; (ii) expanding possibilities for financing by clients, including through costing ESAPs where relevant; (iii) exploring additional contractual provisions; and (iv) considering other actions to support low-capacity clients operating in the private sector.

**a. Preparation through strengthening the assessment process.** IFC/MIGA are planning to introduce new tools during appraisal and supervision to better set IFC/MIGA client expectations and assess client preparedness for (including understanding of) remedial actions. Assessments would be informed by discussions with the client (alongside or as part of more general appraisal discussions), together with a review of the client's track record on E&S, including with respect to past remedial actions, as applicable. IFC/MIGA are planning to develop and test the following:

- Guidance material and staff training to assess the potential sources and extent of influence that IFC/MIGA may have with a client or relevant third party, specifically with respect to influencing actions on E&S issues and ability to exit responsibly. IFC/MIGA would identify additional ways to build influence, especially for higher E&S risk transactions, as needed. This would include ways to (i) use influence with clients—including commercial influence and legal influence; and (ii) use influence with others—including influence

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<sup>17</sup> For example, when MIGA provides non-commercial risk mitigation products to lenders or swap providers, MIGA's direct contractual client is the lender or swap provider that makes a financial investment in the project, in which case MIGA's influence on the project will also be limited to the rights these clients have under their respective finance documents.

<sup>18</sup> See paragraph 33 regarding application of the Approach pilot only to MIGA's PRI instrument.

<sup>19</sup> The External Review recommendations also included a large number of non-CAO Policy actions for IFC/MIGA to implement. These actions include improvements in E&S risk management, new tools, procedures, and guidance in a number of areas. IFC/MIGA reported on implementation progress in updates to their Boards on March 24, 2021, June 15, 2021, and July 12, 2022.

<sup>20</sup> IFC/MIGA is taking a holistic view to upfront actions, which will support preparing for remedial actions and responsible exit, and more generally avoiding or minimizing E&S issues and increasing IFC/MIGA's influence to better address E&S issues.

through innovation and convening. IFC/MIGA would explore ways up-front to build influence and use influence throughout the full project cycle.

- Guidance material and staff training to strengthen IFC/MIGA assessment of client preparedness for ESAP implementation, as well as specifically for remedial actions. This would include determining whether clients understand IFC/MIGA expectations with respect to providing remedial action, demonstrate commitment to meeting these expectations, and have the capacity (both financial and technical) to provide for remedial action, if necessary. Key aspects of the client’s due diligence systems, its track record, including assessing existing or legacy conflict or harms, evidence of grievance mechanism effectiveness, and the quality of stakeholder mapping, would also be considered. IFC/MIGA would also advise clients on how to provide stakeholders with information to access remedy, including project- and operational-level grievance mechanisms, as well as other parts of the grievance infrastructure, including the CAO. IFC/MIGA would also assess the capacity and commitment of any relevant third parties.

- b. *Preparation through the review of client resources for remedial actions.*** IFC/MIGA would better review, confirm, and in some cases, require clients to mobilize resources for remedial actions, in line with the assessments undertaken (see paragraph 17(a)) and with the nature (including risk level) of the transaction, where relevant, for example, if there is a risk that funds for implementation may not be sufficient, costing ESAPs so that clients fully understand the financial resources required and confirming the client’s available resources. For select projects— for example, those that require additional approaches to build influence throughout the project cycle— IFC/MIGA would explore suitable financial instruments to provide greater assurances of the client’s ability to address impacts (e.g., insurance, bonds, etc.) if reasonable in the context considered. The use of such instruments is highly contextual and cannot be a uniform requirement. IFC/MIGA may consider, on a case-by-case basis, certain instruments, provided they are relevant and available for the particular project structure, effective in the given circumstances, and not excessive in their cost or unreasonably burdensome in their oversight/implementation (see further explanation of the rationale for case-by-case considerations in box 1). Where relevant, IFC/MIGA would conduct a review of available instruments and determine their potential application to inform decision-making on this matter.

*Box 1. Client Contingency Funding Considerations*

IFC/MIGA would continue to pursue a fit-for-purpose approach and selectively consider contingency funding by clients on a case-by-case basis, when needed and appropriate. The rationale for the case-by-case approach includes:

- *There are existing funding approaches already in place:* The implementation of the SFs already employs modalities that contribute to mitigation measures having the requisite funding possibilities. These include insurance assessments (which entail reviewing the project’s E&S risks and exposures, guiding the client on insurance management, and monitoring insurance coverage through the life of the investment); cash waterfall account structures (for project finance) whereby all project revenue is to be deposited into project accounts that are pledged to IFC as part of its security package and directed to fund the client’s capital expenditures and/or operating expenses to comply with the client’s contractual obligations relating to compliance with the Performance Standards; and bankable feasibility studies and contingency cost lines (in the context of high-risk infrastructure and natural resource projects). Instead of introducing new contingency funding requirements, these existing approaches could be further enhanced, where required, by the costing of ESAPs, and then by pursuing selective additional requirements.
- *Minimize unnecessary costs for clients:* Blanket contingency funding requirements indiscriminately raise project costs, decrease IFC’s and MIGA’s competitiveness, and could unnecessarily undermine development impact by reducing the likelihood of the project reaching financial close (given higher capital requirements).
- *Strategically tailor requirements:* IFC/MIGA will use influence and remedial actions assessments to focus IFC and MIGA efforts where they are most needed and then design products tailored to the specific client, without

causing delays in resolving E&S issues in cases where the client could move forward without such requirements. This will take into account the fact that, in many markets and project contexts, suitable instruments are simply not available, and a case-by-case approach is necessary in order to explore and develop suitable instruments. Engaging with the client during this process is also a key tool to build IFC's and MIGA's influence and client commitment.

- c. *Preparation through use of revised contractual provisions.*** IFC/MIGA would review existing contractual provisions and consider whether it would be feasible and useful to introduce additional ones to better signal up front the importance of addressing E&S impacts, increase preparedness for providing remedial actions if necessary, and possibly position IFC/MIGA to exercise increased influence throughout the project cycle. Examples of potential contractual provisions that IFC/MIGA would explore further include those related to financial incentives to encourage compliance with the Performance Standards; client commitments to remediate/develop remedial plans for certain potential adverse impacts (including IFC/MIGA's expectations that clients provide remedy for harms caused due to non-compliance with E&S requirements); participation in alternative dispute resolution (e.g., IFC/MIGA would observe developments related to arbitration and consider testing relevant provisions related to arbitration between the client and affected communities or individuals); strengthening the existing provisions on responsibilities to report on and assess allegations and adverse impacts emerging from serious incidents; responsibilities for remedy or compliance with other E&S-related requirements post exit (e.g., for a fixed period of time); specific contractual remedies, including for non-compliance with E&S requirements; strengthening provisions to participate in the CAO process, including Management Action Plan (MAP)<sup>21</sup> preparation; and considering how support for remedial actions extend to relevant third parties (e.g., associated facilities, sub-contractors). Actions related to client resources (see paragraph 17(b)) would also be addressed as relevant in financial agreements. Many of the foregoing changes would be innovations that are not consistent with current market practice, and IFC/MIGA may face resistance from clients to their introduction. As mentioned in paragraph 12, as an insurance provider, MIGA, unlike IFC, does not have a direct contractual relationship with the project company responsible for the implementation of the guaranteed project. Therefore, MIGA will evaluate the applicability of the additional and revised contractual provisions outlined in this section, taking into account the nature of its business model, including its indirect relationship with the project company.
- d. *Additional action for capacity development.*** IFC/MIGA would particularly focus on capacity building for low-capacity clients operating in the private sector. For such clients, where appropriate and depending on IFC/MIGA assessment of client's preparedness for remedial actions, IFC/MIGA would consider conducting additional capacity building activities meant to build both clients' risk mitigation capacity, as well as preparedness and understanding of their responsibility for providing remedial actions if harm occurs as a result of non-compliance with E&S requirements.

**18. Access to remedy.** IFC/MIGA would continue to work towards enhancing *access to remedy* for communities and those impacted as a result of non-compliance with IFC/MIGA's E&S requirements through the following:

- (i) New guidance materials and training for clients and IFC/MIGA staff on how to make project-level grievance mechanisms more effective in addressing stakeholder concerns and complaints, based on a holistic portfolio wide review (currently underway) of client-supported grievance mechanisms.
- (ii) The Stakeholder Grievance Response (SGR) function—which has been established in the E&S Policy and Risk Department—provides another pathway for responding to E&S issues raised in IFC projects. SGR actively manages IFC's responses to both CAO and non-CAO complaints. IFC is currently developing new

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<sup>21</sup> The MAP is a vehicle to formalize IFC/MIGA commitments to client and management remedial actions to respond to findings of noncompliance and related harm. The MAP is consulted on with clients and complainants and approved by the Boards (CAO Policy, paragraphs 130-138).



guidance and has increased staffing capacity and resources to strengthen SGR's work. MIGA is in the process of developing a similar grievance response function, modified for MIGA's size, portfolio, and business model.

- (iii) The recently adopted CAO Policy includes several elements that further strengthen IFC/MIGA's ability to anticipate, minimize, prepare for, and facilitate access to remedy. IFC/MIGA proactively encourage their clients to share information with stakeholders regarding grievance mechanism channels, including the CAO.

**19. Facilitating and supporting remedial actions by clients and others.** IFC/MIGA would pursue a continuum of possible responses including a range of ways to facilitate and support remedial actions, to be deployed in accordance with the unique circumstances of each individual case:

- a. Exercising influence.** IFC/MIGA would assess their practices and seek to improve the effectiveness of their existing influence within the current frameworks (e.g., linking key E&S actions with disbursement, adequately managing waivers, amendments, extensions, etc.). In addition, they would seek to increase influence through proposed preparedness steps (see paragraph 17) to prompt remedial action by the client. The type of influence IFC/MIGA may have, and the roles being played by other relevant actors, would help determine how influence may be exercised. Applying influence could entail, for example, considering whether to exercise applicable rights or remedies under the relevant agreements, or working closely with other lenders, governments, or parent companies.
- b. Enabling activities for remedial action.** In situations where the client lacks capacity to resolve complaints, IFC/MIGA may additionally support the client or relevant third parties throughout the project cycle, including during a CAO dispute resolution process, at the end of a CAO compliance investigation, or during a non-CAO complaint process. This could entail support for enabling activities such as technical assistance, capacity building, fact-finding, dialogue facilitation, or community development which could be provided in the context of CAO cases or otherwise. Where possible, IFC/MIGA would also work within the broader remedy ecosystem to mobilize other stakeholders.

20. IFC/MIGA are often only one of many financiers/guarantors and would need to always act in the context of the broader remedy ecosystem. Even in cases where IFC/MIGA takes all actions contemplated under the Approach, this may alleviate but not fully address the E&S harm.

21. The approach to facilitate and support remedial action described above should not be construed as creating a duty, responsibility, or liability to any person, nor should any involvement by IFC/MIGA in any remedial action be construed as an admission of duty, responsibility, liability, or obligation. Any steps taken by IFC/MIGA, would be considered *ex gratia*.

#### ***F. Internal capacity and financing***

22. The current costs of implementation of the SFs by IFC and MIGA are noteworthy. The staff resources IFC dedicates to its E&S risk management and accountability function are significant relative to the size of its operations and compare favorably to all other MDBs operating in the private sector space. From a total resources' viewpoint, CEG's budget has more than doubled over the past 10 years from \$29.6 million in 2011 to \$63.1 million in 2022. Since 2019 IFC has also allocated on average \$10.5 million per year to the E&S Policy and Risk Department. The total number of E&S specialist positions has grown from less than 60 in 2011 to 129 (combined for CEG and CES) in 2022. IFC currently has about 11 E&S staff per \$1 billion of commitment, compared to 2-4 for other MDBs. MIGA also continues to increase resources available for E&S risk management. In FY22, a second Sector manager position was created in the MIGA Economics and Sustainability Department (MIGES) as well as four new E&S positions, bringing the total team to 15 E&S staff, more than doubling the 2011 number of 6 E&S specialists. The

CAO budget has also grown significantly over the past 10 years, from \$4.95 million to \$9 million, indicating the caseload and complexity of issues. IFC’s contribution to CAO’s FY23 budget was at the level of \$8.64 million and MIGA’s contribution \$0.36 million. In light of IFC/MIGA’s increased exposure to FCS/IDA countries, the appropriate allocation of resources for E&S due diligence and supervision will need continued attention through the normal budgetary process. Also, the cost of implementation of IFC/MIGA E&S requirements by clients, especially those operating in FCS/IDA countries, should not be underestimated and will depend on a number of factors such as the gap between existing E&S laws and regulations and IFC/MIGA Performance Standards, the complexity and risk profile of projects, sectors of operations, etc..

23. IFC/MIGA facilitation and support for clients’ remedial actions are currently financed by, in the case of IFC, the underlying project’s existing funding structure and in the case of MIGA, the current application of its Performance Standards and Sustainability Policy. The framework is in place to request a budget increase if such resources are needed from their regular budgets and are drawn from funds used, for example, for appraisal, supervision, and advisory services. IFC plans to continue financing facilitation and support activities for clients’ and third parties’ remedial actions through various available sources. IFC is considering other available options including using donor funds for additional financing of technical assistance. Per its Sustainability Policy, MIGA may provide additional limited advisory/technical assistance services to clients either through budgetary resources or through leveraging funds from donor-funded facilities.

### *G. Processes*

24. Pursuing facilitation and support for remedial action of client and others would be built into existing processes, where relevant, and otherwise structured to be as effective and efficient as possible, without creating duplicative or separate processes. In a CAO compliance investigation, the proposed actions, including client remedial actions and/or IFC/MIGA facilitation and support of remedial actions, would be reflected in MAPs.<sup>22</sup> In all other cases—other CAO processes (referral, dispute resolution, and deferral) and non-CAO complaints and incidents that may arise during normal supervision—client actions would be documented in the CAP<sup>23</sup> to be agreed with the client, and/or the IFC/MIGA Management Response as part of a deferral request.

*Table 1. Process depending on the trigger*

<b>Trigger/context</b>	<b>Facilitation and support process</b>
CAO compliance investigation	MAP
CAO compliance appraisal	CAP and Management Response
CAO referral, CAO dispute resolution, non-CAO complaints, other incidents	CAP

25. **Meaningful engagement.** Throughout these processes, IFC/MIGA would consider how to engage meaningfully with affected stakeholders. Engagement should aim at understanding what stakeholders desire with respect to remedial actions, including the form of remedial actions (as per Footnote 5). Engagement should be timely, inclusive, and highly sensitive to any project-specific concerns, including any fears of reprisal.

26. **Approach to responsible exit.** The Approach is aligned with and complemented by IFC’s approach to responsible exit, as follows:

- **Preparing for exit.** The approach to responsible exit affirms the importance of taking actions early in the project cycle to avoid or minimize adverse impacts and strengthen IFC’s influence and client preparedness

<sup>22</sup> See Footnote 21 for MAP.

<sup>23</sup> See Footnote 9 for CAP.

for addressing E&S issues. This encompasses the same actions being considered under Preparation for remedial actions, which include analyzing influence to exit responsibly (see paragraph 17). These actions would constitute a consistent, integrated effort to both prepare for remedial action and to prepare for exit.

- **Responsible exit.** The Approach is also aligned with responsible exit later in the project cycle through the application of the responsible exit principles. The set of responsible exit principles include among them addressing E&S issues and using the practicable leverage at IFC's disposal to implement the ESAP and other CAPs and to attempt to address and/or mitigate any other adverse E&S risks and impacts that are both likely and severe post-exit, which is consistent with the SFs and the proposed Approach. The principles also explicitly establish that a responsible exit may trigger the need for remedial actions, which would then be implemented in accordance with any relevant aspects of the Approach. In other words, the responsible exit principles should be understood as another entry point for IFC to pursue facilitation and support as needed, while they also include broader actions and considerations (such as development impact).
- **Pilot period.** Finally, the approach to responsible exit is currently being piloted. Since the responsible exit pilot is expected to run through FY23, any lessons learned, specifically if facilitation and support of remedial actions are pursued in the context of exit, will be used to inform the proposed Approach.

27. MIGA is currently exploring how a “responsible exit” could apply in the context of MIGA guarantees, recognizing that MIGA is an *insurance* provider (not an investor) and its contractual rights to exit a project are explicitly defined under the MIGA contracts of guarantee. As a result, exits driven by MIGA are very rare.

### III. Key Considerations for IFC/MIGA's Contribution to Remedial Actions

28. The SFs clearly establish the delineation of roles between IFC/MIGA and their clients and the facilitating and supporting roles that IFC/MIGA can play in the remedy ecosystem. Consistent with the purpose and mission of IFC/MIGA and the fundamental purposes and objectives of the SFs, IFC/MIGA are not guarantors of clients' performance or compliance with Performance Standards or other E&S requirements, nor are they insurers of E&S risks. IFC/MIGA conduct due diligence and monitoring and supervision efforts to determine whether the business activities they support are implemented in accordance with their E&S requirements. If harm occurs as a result of non-compliance with E&S requirements, IFC/MIGA are committed to facilitating and supporting clients' and stakeholders' remedial action to address the harm within the scope of the existing SFs and the proposed holistic Approach.

29. The Approach presents IFC/MIGA with a range of possible ways to facilitate and support remedial actions by clients and other stakeholders, which may range from exercising IFC/MIGA influence with clients and third parties to facilitate implementation of E&S requirements to supporting enabling activities in cooperation with other actors in the remedy ecosystem.

30. **Roles and responsibilities.** The Approach is based on a clear division of roles and responsibilities, without IFC/MIGA assuming (expressly or implicitly) any of the responsibilities that rest with the project company, client, or sponsor. Under the SFs, the primary responsibility for identifying, avoiding, mitigating, and remediating any risks and harms rests with the project company, client, or sponsor, as appropriate. The Approach is not intended to modify or blur the lines between the responsibilities of the client and those of IFC/MIGA under the SFs. It seeks to preserve how different actors understand and fulfill their roles and responsibilities and facilitate contribution of direct financing of remedial action, as appropriate, and to avoid disincentivizing a client from fulfilling its responsibilities or create expectations that IFC/MIGA would fulfill those responsibilities instead. Accordingly, IFC/MIGA would not expect to provide direct financing of remedial action but nothing in the Approach would preclude IFC/MIGA from considering the provision of direct financing for remedial action in exceptional

circumstances, subject to existing policies and procedures. Moreover, the Approach is intended to complement, not limit, existing policies and procedures.

**31. Mitigating litigation risk.** A focus on facilitating and supporting remedial actions by the client or other stakeholders seeks to accomplish the ultimate goal of remediating harms without exposing IFC/MIGA to the increased litigation risks (and corresponding significant costs) that could result from providing for a new systemic process to financing of direct contribution to remedial actions by IFC/MIGA. However, the proposed Approach does not guarantee the elimination of litigation risks and associated costs. Currently IFC allocates the amount of \$15 million annually to cover legal costs associated with litigation cases

**32. Financing of facilitation and support for remedial action.** IFC/MIGA would finance facilitation and support activities for clients and other stakeholders' remedial actions through various available sources. This should be managed so as not to be viewed as an uncapped/open ended financial liability for IFC/MIGA's balance sheets, which would have negative impacts on IFC/MIGA's financial sustainability and/or IFC's credit rating.

#### **IV. Potential Impact on Other DFIs**

**33. Private Sector Focus.** The Approach addresses specific issues arising in the context of IFC/MIGA's business model and mandate, which are distinct from those of other DFIs focused on financing sovereign clients. In private sector financing, relationships between IFIs and clients are one-off (except in the case of repeat financing), with the relationship ending once the loan is paid or equity sold. In sovereign operations, where the client is an agency or affiliate of the member country, the relationships that are required to discuss, design, and implement appropriate remedial actions remain in place, separate from the DFI's loan, and an approach like the one contemplated by the Approach is not necessary or applicable. For the same reason, the Approach will not apply to MIGA's Non-Honoring of Sovereign Financial Obligations (NHSFO) and Non-Honoring of Financial Obligations by a State-Owned Enterprise (NHFO-SOE) instruments, which provide credit enhancement guarantees for public sector projects of sovereign, sub-sovereign, or state-owned enterprises, as applicable. IFC/MIGA have not analyzed sovereign DFI borrowers, including sovereign borrowers benefiting from MIGA's NHSFO and NHFO-SOE instruments; their ownership of, and/or responsibility for, projects financed by DFIs or MIGA NHSFO and NHFO-SOE guarantee holders; nor the role of DFIs and MIGA's guarantee holders in these contexts. For other DFIs and MIGA's NHSFO and NHFO-SOE instruments, additional analysis would have to be conducted before evaluating any of the proposals contained herein.

**34. DFI Coordination.** Since many DFIs endeavor to follow a largely harmonized approach to E&S risk management in their E&S policies, it would be appropriate that those DFIs focused on private sector financing to also share and coordinate their respective approaches to remedial actions to the extent possible.

#### **V. Pilot Period**

**35. Overview.** The Approach would be implemented for an initial pilot period (guided by IFC/MIGA's respective Management Directives) of four years, from January 2024 to December 2027 (Q3FY24-Q2FY28), to provide sufficient time and to align with the review and reflect lessons learned from implementation of the CAO Policy, including implementation of MAPs and experience with the SGR function. This would allow IFC/MIGA to further test the Approach, draw lessons learned, and refine it, rather than locking into an approach at the outset that may not be as effective or as efficient as intended. It is anticipated that an IFC Management Directive would govern the pilot period for IFC, and a similar document would govern the MIGA pilot. These would be issued in Q1FY24, . IFC/MIGA are currently assessing and developing relevant tools, which would be rolled out during the Approach preparation phase that would run from July 2023 through December 2023. During the preparation phase, IFC/MIGA would proceed with the implementation arrangements; build necessary capacity; finalize systems, procedures, guidance and reporting requirements, as well as refine relevant tools and conduct training and outreach in order to

prepare for implementation. During the subsequent pilot period, IFC would implement the Approach, including all proposed enhancements, for all new direct investment projects. Relevant elements of the proposed Approach, particularly those related to client's preparedness, will also be applied to the new FI transactions. MIGA would implement the Approach, including all proposed enhancements, for all new political risk insurance guarantee operations. For the avoidance of doubt IFC/MIGA will not require FI clients to establish their own Approach equivalents. The review of the pilot period would coincide with the review of the CAO Policy. The proposal for a pilot period reflects the novelty and scale of this undertaking, allowing IFC/MIGA to draw lessons learned that would inform the formalization of the Approach.

**36. Risk considerations.** Although framed in the context of a pilot period, any enhancements made by IFC/MIGA during this period may also be perceived as creating new *de facto* expectations on the part of independent accountability mechanisms, courts, or the public more widely, limiting IFC/MIGA's ability to change course following the pilot period. That said, a pilot period is proposed to have the time to assess the likelihood of risks materializing in practice and to evaluate their impact. The likelihood and magnitude of these risks and whether IFC/MIGA have effectively mitigated them will become more evident during the pilot period. In addition, the pilot period will provide some flexibility by allowing IFC/MIGA to adapt the Approach if and as necessary, by drawing lessons learned from preparation as well as from cases where IFC/MIGA facilitates and supports remedial action through clients and others.

**37. Implementation.** Throughout the pilot period a dedicated core team would track implementation of the proposed enhancements, including key metrics related to outputs and outcomes; risks materialized/corresponding mitigation measures; incremental resources used; capacity needs; other lessons learned; and possible suggested refinements. Additional details on the proposed pilot period are presented in Appendix C.

**38. Reporting.** IFC/MIGA would keep the Board informed of progress through briefings and reports throughout the pilot period, including annual reports. The final assessment would be undertaken at the end of the pilot period, in consultation with the CAO and coinciding with the review of the CAO Policy. IFC/MIGA would then submit a proposal to the Boards, including a refined Approach and the steps to formalize it in appropriate policies or procedures.

## **VI. Stakeholder Engagement Plan**

**39.** IFC/MIGA intend to conduct a 45-day public consultation (see Appendix B) on the proposed Approach as presented in this paper. It would have the following characteristics:

- At the start of the consultation period, all materials as well as questions for feedback would be made available through a dedicated website hosted by IFC/MIGA. The website would also allow for written feedback.
- Sessions would be run by professional facilitators. The consultation would include both open sessions and sessions targeting select groups, to support participation by all relevant stakeholder groups (e.g., CSOs, clients, private sector financial institutions, affected communities, and other development finance institutions and their independent accountability mechanisms).
- Sessions would be held in multiple time zones and multiple languages (Arabic, English, French, Portuguese, and Spanish).
- A summary of the outcomes of the stakeholder engagement process, including comments and questions received (without attribution), would be compiled and disclosed on the dedicated website.

## Appendix A. External Review

1. The “External Review of the Environmental and Social (E&S) Accountability of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), including the Compliance Advisor Ombudsman (CAO)’s Role and Effectiveness” (the External Review) was initiated in 2018 by the Committee on Development Effectiveness (CODE) on behalf of the Boards of IFC/MIGA. Chaired by former IFC Executive Vice President, Mr. Peter Woicke, a team of independent experts presented a report with 136 recommendations to CODE and the Committee on Governance and Executive Directors’ Administrative Matters (COGAM) for discussion on June 24, 2020. The report included this recommendation: “An IFC/MIGA framework needs to be established for remedial action in cases in which non-compliance contributes to harm.”<sup>24</sup>

2. With respect to remedy, the External Review made the following detailed recommendations on establishing a framework and on what it should entail:

- “Two mechanisms should be established to fund remedial actions: (1) contingent liability funds from the client that can be tapped in the event that E&S harm materializes and is linked to the client’s failure to meet the Performance Standards; and (2) funds that IFC/MIGA can contribute, in the event that either has contributed to E&S harm.
- IFC and MIGA should define a framework for remedial action, and the Board should review and approve that framework, building in part on the Dutch Banking Sector Agreement.
- IFC and MIGA should develop contingent liability funding requirements and mechanisms for all investments that present significant E&S risk (at a minimum, all Category A, B, FI 1, and FI 2 investments);
- IFC and MIGA should develop, in collaboration with CAO, and present to the Board a draft policy on the use of IFC/MIGA resources to contribute to remedy, clarifying the criteria, potential uses, and limitations of such resources to contribute to remedy.”<sup>25</sup>

3. At the June 2020 meeting, CODE/COGAM tasked IFC, MIGA, and the CAO to prepare a roadmap and timeline for implementing the External Review recommendations. They did so, and on October 26, 2020, CODE/COGAM endorsed the Final Roadmap Package on IFC & MIGA E&S Accountability, including CAO’s Role and Effectiveness, proposed by IFC/MIGA. In order to respond to the External Review recommendations, IFC/MIGA’s actions have been clustered into the following three areas: (1) the IFC/MIGA Independent Accountability Mechanism (CAO) Policy (approved by the Board on June 28, 2021); (2) non-policy actions for IFC/MIGA to implement; and (3) the review by IFC/MIGA of the recommendations on remedy, which is the focus of this paper.

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<sup>24</sup> External Review, p. xvii.

<sup>25</sup> External Review, pp. 98-99.

## Appendix B. Stakeholder Engagement Plan

The following outlines the plan for stakeholder consultation for the Approach to Remedial Action and the Approach to Responsible Exit. It is subject to change.

### Roles and Responsibilities

The consultation will be led by IFC Communications with support from MIGA Communications, as needed. A select group of IFC and MIGA staff who have been involved in articulating the approaches (the “Core Team”) is meeting regularly with IFC Communications to advise on approach, coordinate planning, and review documents.

### Duration and Timing

The consultation period will last 45 days, commencing within a month of the CODE meeting.

### Key Elements of the Consultation Approach

#### 1. *Online Consultation Platform*

- **Survey to collect written feedback:** Will use SurveyMonkey—translated into the official World Bank Group (WBG) languages: Arabic, Chinese, French, Japanese, Portuguese, Russian, and Spanish.
- **Direct feedback:** Stakeholders will be able to submit feedback directly to a dedicated email address.
- **Consultation webpage:** The consultation webpage hosted on ifc.org developed for the IFC/MIGA Accountability Policy (CAO Policy) will be repurposed for expediency given existing IFC IT support and stakeholder familiarity with and positive feedback on the webpage. The MIGA website will have a landing page that also links to the consultation page. The webpage promoting the stakeholder consultation for the Approach to remedial action and the Approach to Responsible Exit will launch soon after the CODE meeting and will detail (i) background and context for the Approach to remedial action and the Approach to Responsible Exit, including an overview of work to date; and (ii) consultation details (dates, time-zones, languages, etc.) with links to the survey, RSVPs, and direct feedback options. Consultation content will be added to the webpage at the beginning of the consultation period and will be made available at least 10 days prior to the first consultation session.
- **Format:** While most sessions will be held online, IFC/MIGA will look for opportunities to hold in-person or hybrid sessions as well.

#### 2. *Supporting Materials*

- **Document(s) outlining the key aspects of the Approach to remedial action and Approach to Responsible Exit:** Will be translated into the official WBG languages and be made available on the webpage at the beginning of the consultation period.
- **FAQ document:** Will be provided to address likely questions and include ways to provide feedback.

#### 3. *Promotion of Stakeholder Consultation*

The events will be promoted via various IFC and MIGA newsletters, IFC/MIGA and WBG communication channels, direct stakeholder outreach as needed, and the consultation webpage.

#### 4. *Series of Meetings*

- **Forums by stakeholder group:** Most of the consultations will consist of smaller-sized forums to ensure stakeholders feel comfortable discussing opinions and providing feedback. Forums will be composed of specific stakeholder groups (CSOs and communities, private sector, DFIs), with several timeslots available for each group, so stakeholders can self-select based on time zone and language. Each meeting will be limited to 25-30 participants. A second meeting in the relevant language and time zone will be considered if more participants than can be accommodated in one meeting express interest.
- **Language:** Meetings will be organized and facilitated in English, Spanish, French, and Arabic (the “Meeting Languages”). Portuguese interpretation will be made available during meetings held in Spanish. Live interpretation in English will be offered in all sessions as well, with support from interpreters who are familiar with the relevant terminology.
- **Duration and management:** Each meeting will consist of a 2- to 3-hour facilitated session, with support of at least one notetaker and one member of the Core Team.
- **Registration and outreach:** Sessions for private sector clients and DFIs will be organized by invitation only. Registration for CSOs and community sessions will be open to everyone interested via the consultation webpage (via SurveyMonkey). Participation will be encouraged through targeted outreach to core stakeholder groups (including through various IFC/MIGA and WBG networks, and through community mappings). A minimum of 5 registered participants will be required for any session to be held. Should that minimum not be reached 2 days before the session, stakeholders who have signed up will be informed that the session will not take place and will be encouraged to join another meeting or the final multi-stakeholder session.
- **Multi-stakeholder session:** After all stakeholder forums have been completed, a multi-stakeholder session will be held in English, with interpretation available in the Meeting Languages. The session will provide a space to listen to those participants who were not able to join the stakeholder forums, allow for some cross-fertilization between groups, and enable deeper discussion of specific issues, including issues raised during previous sessions.
- **Other specific meetings:** Additional meetings may be scheduled with community individuals or groups, or other external stakeholders affected by IFC/MIGA projects as relevant, and who are not used to participating in consultation meetings, are not aware of the process, or have concerns about providing input in a public meeting. These could include meetings with community groups and CSOs together, if so requested. Similarly, specific meetings may be actively scheduled with clients who have a longstanding relationship with IFC/MIGA and would rather engage in one-on-one conversations with the Core Team.

#### 5. *Disclosure of summary of feedback by stakeholder group on the Consultation Platform:*

Summaries of meetings and of feedback by stakeholder group will be prepared by the facilitators, with support from notetakers. Different versions may be prepared for the Core Team, Board, and public disclosure, respectively, with the public summaries to be provided along with any publicly disclosed final recommendations.

#### 6. *Timeline:*

- Webpage will launch soon after the CODE meeting.
- Consultation material will be available at the start of the 45-day consultation period.



- A report of the consultation process and updated Approach will be submitted to CODE in late 2023 and a version will be made available for public disclosure thereafter.

### 7. Proposed meetings

<b>Stakeholders</b>	<b>Language</b>	<b>Type of Session</b>	<b>Time Zones covered</b>
DFIs	English	Closed Consultation (Hybrid)	Washington DC & Caribbean Countries (AM) - African Countries (PM) - Eastern Europe (PM) - West and Central Asia (PM)
Clients	English (Spanish/French)	Closed Consultation Online	Washington DC & Caribbean Countries (AM) - African Countries (PM) - Eastern Europe (PM)
		Closed Consultation Online	West and Central Asia (PM) - East Asia Pacific (AM)
Communities & CSOs	English (Spanish/French)	Open Consultation (Hybrid/Online)	Washington DC & Caribbean Countries (AM) - African Countries (PM) - Eastern Europe (PM) - West and Central Asia (PM)
		Open Consultation Online	West and Central Asia (PM) - East Asia Pacific (AM)
	French (English)	Open Consultation Online	Haiti (AM) - Francophone Africa (PM)
	Arabic (English)	Open Consultation Online	Northern Africa (AM) - Arab Peninsula (PM)
	Spanish/Portuguese (English)	Open Consultation Online	Central America & South America (AM)
Multi-stakeholder	English (with interpretation available)	Open Consultation (Hybrid)	Global

**Appendix C. Proposed Approach to remedial action: Pilot Period**

<b>Preparing for the Implementation of the Approach to remedial action</b>	
<b>Overview</b>	It is anticipated that an IFC/MIGA Management Directive will govern the pilot period. This would be issued in July 2023, . IFC/MIGA are currently assessing and developing relevant tools, which will be finetuned during the Approach preparation phase that will run from July 2023 through December 2023. During the six-month preparation phase, IFC/MIGA will build the necessary capacity, finalize systems, finetune procedures, and develop guidance and reporting requirements. Additional training and outreach will be led by a dedicated core team implementing the pilot.
<b>Timeframe</b>	July 2023 – December 2023
<b>Preparation Required for Each Aspect of the Approach</b>	
<b>Preparedness for Remedial Action</b>	<p><i>Influence Assessment and Client Preparedness Assessment</i></p> <ul style="list-style-type: none"> <li>• Build tools to conduct influence assessment and client preparedness assessment.</li> <li>• Develop methodology for applying to projects (and integrate into relevant processes).</li> </ul> <p><i>ESAP costing</i></p> <ul style="list-style-type: none"> <li>• Develop ESAP costing guidance and template.</li> <li>• Develop methodology for applying to select projects (and integrate into relevant processes).</li> </ul> <p><i>Contractual provisions</i></p> <ul style="list-style-type: none"> <li>• Review the existing legal templates and reflect revised/new contractual provisions regarding client responsibility for remedial actions in the legal templates.</li> <li>• Develop appropriate guidance determining when each provision may be relevant (i.e., subset of project circumstances) and how (if necessary) it may be tailored.</li> <li>• Develop methodology for applying to select projects (and integrate into relevant processes).</li> </ul>
<b>Facilitation and Support</b>	Develop decision-making methodology and process guidance on assessing and implementing how best to facilitate and support remedial actions.
<b>General</b>	<ul style="list-style-type: none"> <li>• Develop tracking systems, including key metrics to track for all “Outputs” and “Outcomes” below, and methodologies to support recalibration of key tools as required.</li> <li>• Develop processes for pilot implementation.</li> </ul>

<b>Implementation of the Approach in the Pilot Period</b>			
<b>Overview</b>	During the pilot period, IFC/MIGA will implement the Approach, including all proposed enhancements. Throughout the pilot period, a dedicated core team will track implementation of proposed enhancements in a centralized database. Key issues to be tracked: key metrics for all “outputs” and “outcomes”; risks materialized/corresponding mitigation measures; incremental resources used; capacity needs, other lessons learned; and possible suggested refinements. IFC/MIGA will engage on the implementation of the proposed Approach with CAO throughout the pilot period.		
<b>Timeframe</b>	January 2024 – December 2027		
<b>Pilot Activity</b>	<b>Objectives</b>	<b>Outputs</b>	<b>Outcomes</b>
<b>I. Preparedness for Remedial Action</b>			
<b>A. Assessments</b>			
Implement assessments, drawing lessons learned and iterating over time.	Strengthen client preparedness to provide remedial actions when needed Increase IFC/MIGA influence to address adverse E&S impacts	Assessments implemented in projects	Increased/ improved client awareness of IFC/MIGA expectations regarding remedial actions and preparedness to provide remedial action, if required  Improved utilization of IFC/MIGA influence to act when required within the remedy ecosystem
<b>B. Contractual Provisions</b>			
Implement in all projects (to which applicable), drawing lessons learned and iterating over time.	Use revised/new contractual provisions to increase client preparedness and IFC/MIGA influence for when remedial action is needed	Provisions incorporated in contract templates	
<b>II. Facilitation and Support</b>			
Implement in all relevant projects, as provided for in the Approach Board document, drawing lessons learned and iterating over time.	<b>Influence</b> – More effectively utilize IFC/MIGA influence to address adverse E&S impacts  <b>Support enabling activities for:</b> remedial actions by the client or third parties to address adverse E&S impacts	<i>Case-by-case application</i> Influence utilized with client, and other actors such co-lenders/co-investors, governments etc.  Technical assistance, capacity building, advisory services and dialogue facilitation and others provided to support/facilitate remedial action	Fewer un-remediated adverse E&S impacts
<b>II. Access to Remedy</b>			
1. Project level Grievance Mechanisms (GM): Follow on activities to the IFC/MIGA GM portfolio review	<ul style="list-style-type: none"> <li>Enhance understanding of client performance and the efficacy of IFC’s appraisal and monitoring of stakeholder engagement and GMs</li> </ul>	<ul style="list-style-type: none"> <li>Results from the review will inform training programs for specialists, client capacity-building initiatives, and the</li> </ul>	<ul style="list-style-type: none"> <li>Improved access to remedy through project level GMs</li> </ul>

<b>Implementation of the Approach in the Pilot Period</b>			
2. Encourage clients to inform stakeholders of all grievance mechanism channels, including the CAO	<ul style="list-style-type: none"> <li>Increase stakeholder’s knowledge and access to all grievance mechanism channels, including CAO</li> </ul>	<p>development of knowledge products and advisory services programs.</p> <ul style="list-style-type: none"> <li>Lessons from CAO case examples, developed in consultation with the CAO, will be included to enhance the training material.</li> </ul>	<ul style="list-style-type: none"> <li>Improved knowledge of all grievance mechanism channels, including the CAO</li> </ul>
3. SGR Enhancements to facilitate access to remedy	Strengthen institutional level grievance response mechanism, facilitating access to remedy	<ul style="list-style-type: none"> <li>Developing new guidance</li> <li>Increasing staffing capacity and resources to strengthen its work.</li> <li>Developing additional tools to proactively engage with stakeholders</li> </ul>	Improved responsiveness and resolution of complaints at institutional level
Implement in all relevant projects, drawing lessons learned and iterating over time.			
<b>III. Lessons Learned: Reporting and Assessment</b>			
Assessment of pilot period (based on key metrics to be finalized in June 2023) in order to draw lessons learned.	Evaluate implementation outputs, analyzing trends and drawing conclusions on the key aspects of the Approach.	Annual Assessment Reports	CODE kept informed and Approach strengthened.