Comment on IFC and MIGA's proposed Approach to Remedial Action

By Multiple Civil Society Organizations

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Civil society organizations from across the globe have condemned the IFC and MIGA's proposed Approach to Remedial Action. From the moment the proposed Approach to Remedial Action and Responsible Exit Principles were published by IFC and MIGA, organizations from around the world pored over their content. The immediate response from civil society and community groups was resounding condemnation. This results from the fact that we have all been witness to the mistakes that have led the IFC and World Bank in its entirety to make piecemeal improvements that have not resulted in preventing or remedying the harms that project affected communities have suffered. Groups worldwide had high expectations for a proposal that would set out the actions needed to actually provide a viable path to guaranteeing the remedy that communities required. Initial hope for an adequate remedial framework stemmed from the 2020 *External Review* and its keen observations and recommendations. To our dismay, IFC and MIGA's proposed remedial Approach did not set out how they and their clients would guarantee that remedy is delivered.

And yet, a growing number of organizations from civil society and community groups with knowledge of and first-hand experience with environmental and social harms caused by international finance continue to engage with and advocate for change at the World Bank Group. We remain committed because communities who have been harmed deserve remedy. Our comments below include the following:

We recommend that IFC and MIGA write and consult publicly on a second draft proposal that sets out how IFC, MIGA, and their clients will prepare for and implement necessary remedial actions.

I. The right to remedy is indisputable.

The right to effective remedy for harm is a core tenet of international human rights law, with substantive and procedural dimensions. Despite the principle's wide recognition, there is no one-size-fits-all approach to remedy, and every situation is predicated on a wide array of factors, demanding tailored approaches that depend on the nature of the harm, the affected communities' needs, and more. Human rights law affirms that states have a duty to respect, protect, and fulfill this right, while business enterprises[1] have a responsibility to ensure that individuals and communities who have experienced human rights violations have access to remedy by providing for or cooperating in remedial action. Institutional investors — including development finance institutions (DFIs) — share this same responsibility to provide remedy.[2]

We recognize that in recent decades, development finance institutions have attempted to strengthen environmental and social frameworks and internal structures with the goal of avoiding harm to communities they are meant to benefit. Yet the environmental and social impacts to project-affected communities have not only continued, they have sometimes gone completely unnoticed due to systemic and long-standing failures in project design, proper stakeholder engagement, as well as project implementation, management, and monitoring. Consequently, project-affected communities continue to suffer from harms caused by development projects.

As understood and established under ordinary principles of justice, and the standards of international human rights law, any contribution to harm should entail a proportionate contribution to remedy. As noted by the Office of the United Nations High Commissioner for Human Rights (OHCHR), "[w]hen determining the possible contributions of DFIs to remedy… it would also be relevant to take into account their development mandates, any significant barriers to accessing remedy in the given context, the complexity of the investment structure and operating context, and any legacy issues."[3]

As a group of civil society organizations who have collectively worked to improve and strengthen the policies and practices of DFIs and their respective Independent Accountability Mechanisms worldwide for more than three decades, we value this opportunity to convey our comments and recommendations. We preface our comments by recognizing the steep burden put on project-affected communities, who, while still experiencing the harm and damage inflicted by development projects, must then engage in long, complex, and demanding processes to seek justice. This says nothing of the reprisal risks they may face in carrying out these efforts within dangerous and unsafe environments.

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[1] UN Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy', Framework," RES 17/4 (June 16, 2011) at Principle 22.

[2] Center for International Environmental Law, "Remedying Harm: Lessons from International Law for Development Finance," March 2022; UN Working Group on Business and Human Rights, *Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights*, A/HRC/47/39/Add.2, 8 (June 2021); Guiding Principle 19, Commentary.

[3] Supra note 1, at page 5.

We should never forget that the ultimate reason why a Remedial Framework and Responsible Exit Principles at the IFC and MIGA must be adequate is that communities faced with environmental and human rights harms deserve remedy to restore their rights and ways of life.

II. IFC's draft Approach fails to respond to the External Review's Recommendations and fails to guarantee remedy for environmental and social harm.

A. IFC/MIGA did not respond to the recommendations in the *External Review*.

The 2020 *External Review of IFC's and MIGA's Environmental and Social Accountability* made multiple recommendations for how IFC and MIGA can improve their remedial environment. The Board charged IFC and MIGA with preparing a roadmap and timeline for implementing the *External Review* recommendations. And yet, IFC and MIGA's proposed Approach ignores the Board's charge. The proposed Approach only commits to "explore" the recommendations of the External Review and states that "[m]ost of [the] elements of the proposed Approach are already being implemented to varying degrees within the [Sustainability Frameworks]"[4] and that "the Approach does not contemplate a systemic process for the financing of direct contribution to remedial action."[5]

The *External Review* recommended that "[a]n IFC/MIGA framework needs to be established for remedial action in cases in which non-compliance contributes to harm." To design an adequate framework, the *External Review* further recommended that:

1. "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 the IFC/MIGA can contribute in the event that IFC/MIGA has/have contributed to E&S harm."
2. "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."
3. "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)."
4. "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,

[4] IFC/MIGA Approach to Remedial Action, p. iii (""Most of [sic] 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.").
[5] IFC/MIGA Approach to Remedial Action, p. v.

clarifying the criteria, potential uses, and limitations of such resources to contribute to remedy."[6]

Here is how IFC and MIGA chose to respond to each recommendation in the *External Review*:

1. *Recommendation:* "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 the IFC/MIGA can contribute in the event that IFC/MIGA has/have contributed to E&S harm."
   IFC/MIGA Response:

   Regarding contingent liability funds from the client: The draft policy does not take a systematic approach to establishing contingency funds from clients. Rather, it promotes an *ad hoc* approach where it may "consider contingency funding by clients on a case-by-case basis when needed and appropriate." The Approach explicitly rejects the idea of taking a more systematic path, claiming that "existing funding mechanisms already in place" are sufficient. However, it fails to support this claim with any examples of how existing funding mechanisms have enabled clients to provide remedy for past project-related harms.

   Regarding funds that IFC/MIGA can contribute: The Approach does not establish funds for IFC/MIGA to contribute and instead states that "IFC/MIGA would not expect to provide direct financing of remedial action." The Approach does not even commit to directly remedying the cases in which its own accountability mechanism, the Compliance Advisor Ombudsman (CAO), finds that projects did not comply with the IFC's own Sustainability Policy and, as a result, contributed to harm.

   The proposed Approach does carve out a small and unclear caveat, stating that "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." The Approach never defines "exceptional circumstances," however, and it undercuts any potential "exceptional circumstances" by requiring direct financing to be subject to existing policies and procedures, which at present do not establish a process for direct contribution. If this was IFC/MIGA's attempt at admitting that it might contribute financially to

[6] IFC/MIGA Approach to Remedial Action, pp. 98-99.

remedy, it's an inadequate and insincere attempt. Further, IFC and MIGA claim that they are not in fact obligated to remediate harm and that any action they take is only if they decide they want to: "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*."[7]

2. *Recommendation:* "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/MIGA Response: IFC and MIGA state that they "reviewed theory, guidance, and practice related to remedial actions" including "several thematic papers developed specifically for the financial sector, including those prepared by the Dutch banking sector." They do not, however, adopt critical language from the Dutch Banking Sector Agreement, which notably states that "when enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact they should provide for or cooperate in their remediation."

3. *Recommendation:* "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/MIGA Response: The Approach does not address this recommendation. Instead, the Approach states that existing funding is mostly sufficient and that there could be vague "additional requirements" to pursue: "[t]here are existing funding approaches already in place ... 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."

4. *Recommendation:* "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."

   IFC/MIGA Response: While we understand that the CAO did contribute to aspects of the development of the proposed Approach, the proposed Approach is not a joint product from the CAO. This is clear from the fact that CAO issued its own separate statement on the Approach in which it called for several improvements, including that IFC/MIGA should

[7] IFC/MIGA Approach to Remedial Action, para. 21.

contribute to remedy when they contribute to harm.[8] Furthermore, the Approach was missing key information that the CAO could have helped to supply, such as examples of whether IFC/MIGA's current policies and practices have led to effective remedy for project-affected communities in the past. (Indeed, the existing draft contains no examples at all of what remedy for harm related to IFC projects has looked like, casting severe doubt on the idea that current practices are effective.) As IFC/MIGA's primary mechanism with expertise in addressing complaints of environmental and social harm, the CAO should have played a much more central role in the development of the Approach.

In conclusion, IFC and MIGA have presented a draft to the Board that flouted the Board's assignment. This rejection of clear instructions from the Board is not only concerning as a matter of governance, but also because it fails to guarantee remedy for harm suffered by project-impacted communities and the environment.

B. IFC/MIGA only committed to applying the Remedial Approach to new projects, failing communities who are currently experiencing harm.

The remedial Approach, which is being developed in response to past and ongoing harms to communities, cannot ignore those very communities who are still waiting for remedy. Shockingly, the Approach states that it will only apply to "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."[9]

Any serious commitment to remedy must remediate current harms. At minimum, IFC/MIGA should begin by reviewing the following to determine where remedy is still needed: (1) CAO cases where non-compliance has been found, including the cases of: Tata Mundra Ultra Mega Power Project, Alto Maipo Hydroelectric Project, and Titan; (2) CAO dispute resolution cases where agreements have not been implemented fully, including the Oyu Tolgoi Project in South Gobi Province, Mongolia (first complaint here and second complaint here); and (3) complaints that have been raised to the SGR mechanism.

[8] "[E]mbedded in the ecosystem approach is the expectation that financiers do at times contribute to remedy where they have contributed to harm or where they are able to, as it is the only means of achieving remedy for people impacted by their investment. The consultation draft lacks clarity about IFC's and MIGA's role and responsibility to contribute to remedy." (CAO Statement, IFC/MIGA Consultation Draft Approach to Remedial Action (March 2, 2023) p. 3)

[9] IFC/MIGA Approach to Remedial Action, para. 35.

C. The few "enhancements" that IFC and MIGA promise to undertake are either too vague or are actions already required under the Sustainability Frameworks.

The Approach admits that it is not offering much that is new, claiming that "[m]ost of [the] elements of the proposed Approach are already being implemented to varying degrees within the [Sustainability Frameworks], while others would be enhancements to existing practices." The "enhancements" in the Approach pertain to three categories: (1) Preparation for remedial action; (2) Access to remedy; and (3) Facilitating and supporting remedial actions by clients and others. Many of the proposed "enhancements" are either things that IFC and MIGA should already be doing or are so vague that it would be impossible to assess whether IFC and MIGA are in fact undertaking them. For example, one enhancement requires IFC and MIGA to "(i) use influence with clients— including commercial influence and legal influence; and (ii) use influence with others—including influence through innovation and convening."[10] Another enhancement promises to "assess the capacity and commitment of any relevant third parties."[11] And yet another enhancement is that IFC and MIGA "would review existing contractual provisions and consider whether it would be feasible and useful to introduce additional ones," which is merely a promise to consider something new. IFC and MIGA should be more concrete about how they will actually enhance their leverage over clients to guarantee remedy.

D. IFC and MIGA make claims about impediments to remedy without proof.

Although the proposed Approach is supposed to explain how IFC and MIGA will guarantee remedial actions when needed, the Approach instead sets out reasons why IFC and MIGA will *not* guarantee remedy. We have heard many of these arguments before and over the years have developed responses to them.[12]

To our surprise, IFC and MIGA do not explain or justify their excuses for not proposing a framework that provides remedy for environmental and social harm. Given IFC and MIGA's extremely inadequate track record of remedying harm from their projects, their assumptions should not be accepted without proof. IFC and MIGA should have shown their work.

Examples of assumptions without proof in the proposed Approach:

1. The draft Approach claims that direct contribution to remedy could lead to "increased litigation risk (under a range of possible legal theories)." Given that the only example of IFC being successfully sued by a project-affected

[10] Proposed Remedial Approach, pp. 6-7.
[11] Proposed Remedial Approach, p. 7.
[12] In **Annex II**, we include some of the so-called challenges to remedy that financial institutions have shared with us, and we offer solutions.

community resulted from IFC *failing* to provide remedy for a noncompliant project, the burden is on IFC to demonstrate that providing remedy is likely to increase its litigation risk.

2. The Approach states that "[c]urrently IFC allocates the amount of $15 million annually to cover legal costs associated with litigation cases." It does not explain whether this is related to potential remedy-related litigation or all potential litigation.
3. The draft Approach states that "[f]inancing direct contribution to remedial actions gives rise to risks, the most significant of which include: [...] increased costs and decreased competitiveness." However, nowhere in the draft Approach does IFC/MIGA attempt to estimate the potential costs of directly financing remedy. This is another example where collaboration with CAO would have been extremely useful, as CAO has insight into past remedial actions financed by IFC/MIGA clients.
4. The Approach describes at length the "resources IFC dedicates to its E&S risk management and accountability" without providing any evidence that this use of resources is leading to the effective remediation of harm to communities.
5. The Approach states that direct contributions by IFC/MIGA to remedy would risk "disincentivizing a client from fulfilling its responsibilities or creat[ing] expectations that IFC/MIGA would fulfill those responsibilities instead." This claim rests on the questionable assumption that the current arrangement – where the client in theory bears full responsibility for providing remedy–is in fact incentivizing clients to uphold the Performance Standards. Through our collective experience working with project-affected communities, we know that this is not true. The existence of the remedy gap demonstrates that clients are rarely compelled to provide remedy as a consequence of breaching project standards.

Multiple civil society organizations requested IFC and MIGA to share more information behind their assumptions as a part of the consultations so that we could more meaningfully engage.[13] IFC and MIGA responded that "[n]o additional documentation will be posted at this time as part of the Consultation." We again request that IFC and MIGA publish the analysis they did that resulted in the proposed Approach. The Board should also request to see that work given that the proposed Approach did not measure up to the Board's charge.

[13] That request is attached as **Annex II**.

III. IFC's Approach to Remedial Action should have included the following key elements.[14]

A. IFC and MIGA must commit to contributing financially to remedy when they contribute to harm. They must also contribute to remedy when they cannot exercise leverage over clients and a remedy gap persists.

International human rights principles are clear that if an investor contributes to harm, it must contribute to remedy.[15] The UN Guiding Principles on Business and Human Rights (UNGPs) "embody the existing principles and requirements of international human rights law and the responsibilities of private sector financial institutions and DFIs."[16] Since the inception of the UNGPs, the private sector has responded with the creation of internal policies and guidance to acknowledge and respond to their known responsibility to respect human rights. In light of the UNGPs, DFIs' involvement in harm should logically determine their involvement in remedy.[17]

Other banks have already adopted this principle in their policies. Below are examples. At minimum, IFC should meet the standard set by these other institutions.

1. Belgium Investment Company for Developing Countries (BIO) Grievance Mechanism Policy:
    - Section 7: "BIO's Grievance Mechanism aims to support victims in accessing effective remedy. Remedy is understood in the sense of the United Nations' Guiding Principles on Business and Human Rights (UNGPs) and may include apologies, restitution, rehabilitation, financial or non-financial compensation, as well as the prevention of harm through, for example, guarantees of non-repetition. In situations where BIO contributed (or may contribute) to an adverse impact, usually through an investment (or potential investment) in a portfolio company causing the harm, BIO shall use its leverage on the portfolio company to mitigate any remaining impact to the greatest extent possible. If necessary, BIO may also decide to cease (or prevent) its contribution to the harm, for instance by suspending or terminating the business relationship. In situations where BIO has caused the harm, for instance by failing to comply with its own policies and procedures such as the environmental and social due diligence or monitoring, BIO's Grievance Mechanism shall take the necessary steps, appropriate to the company's size and circumstances, to ensure the provision of remedy."

[14] In addition to the key elements discussed below, we set out more detailed components that we expect IFC and MIGA to consider and address in their second draft. See **Annex III**.
[15] Office of the UN High Commissioner on Human Rights, *Remedy in Development Finance: Guidance and Practice* Section IV: "Contributing to Remedy."
[16] Id at Section IV. page 83.
[17] Id at Section IV. p. 83.

2. ANZ's Grievance Mechanism Framework:
    - One function of ANZ's Grievance Mechanism is to assist the bank in assessing its connection to human rights impacts, and recommend remedy as appropriate.
    - Para 5: "The Mechanism will: [...] Consider ANZ's involvement, if any, in relation to the impact and use leverage where appropriate to encourage Customer action in response to the complaint; Consider any improvements to ANZ policy and process; and Consider and provide any ANZ remedy in consultation with the Affected People where possible."
    - Para 20-22: "Consideration of any bank involvement may include [*inter alia*]: Consideration of whether ANZ contributed, caused or was directly linked to the impact in the complaint; Consideration of any remedy options defined by the UNGPs; and Consideration of any recommended improvements to ANZ policy and process." … "The framework in the UNGPs and OECD guidelines will guide ANZ to assess any bank connection to impact including any contribution."
    - Paras 23.2-24: "If ANZ has not made any Contribution to an impact, but the impact is directly linked to ANZ's lending: ANZ will not be responsible for providing remedy, and that responsibility will rest with the Customer; ANZ will, acting reasonably, seek to use leverage to encourage the Customer to prevent or mitigate the impact, and where relevant remedy the impact appropriate to the Customer's own conduct and Contribution; and ANZ will seek to identify and recommend any improvements to its policy and process including due diligence. If ANZ accepts that it has made any Contribution to an impact: **ANZ will provide for, or cooperate in, the remediation of the impact in a manner proportionate to its involvement and in a manner it considers appropriate in consultation with the Affected People; and ANZ will, acting reasonably, seek to use leverage to encourage the Customer to prevent or mitigate the impact, and where relevant, remedy the impact appropriate to the Customer's own conduct and Contribution**. Where there is disagreement about whether ANZ has made any Contribution to an impact, ANZ may suggest other options for reaching a resolution, including engaging an independent mediator to facilitate further discussions or engaging an expert to make a determination on remedy" (emphasis added).

3. Standard Chartered's Human Rights Position Statement:
    - "Where Standard Chartered identifies that we have caused or contributed to adverse impacts, we endeavor to address these by providing remedy or cooperating in the remediation process."

4. African Development Bank's Independent Recourse Mechanism Policy:
    - Para 67(iii): "If the Compliance Review Report concludes that any Bank Group action, or failure to act, in respect of a Bank Group Financed

Operation has resulted in any material non compliance in accordance with Paragraph 9, it may recommend: (a) Any remedial changes to policies, systems or procedures of the Bank Group to avoid current and future situations of non-compliance; (b) Any operation specific actions to bring the Bank back into compliance with respect to the operation subject of the Complaint, and address harm and potential harm associated with the findings of non-compliance; (c) **That redress be provided to those harmed, which may include financial and/or non-financial considerations, as the case may be**; (d) Promoting institutional learning and relevant capacity building; (e) Any steps to be taken to monitor the implementation of the changes referred to in (a) and (b) above."

- Para 69: "If IRM finds the Bank to be non-compliant, Management shall: [...] Include in the Management Action Plan clear time-bound actions for returning the Bank to compliance **and achieving remedy for affected populations**."

5. Inter-American Development Bank's Independent Consultation and Investigation Mechanism (MICI) policies for public and private financing contain the same language MICI-IDB Invest Policy and MICI-IDB Policy:
   - Para. 25: "The Consultation Phase process is intended to be flexible, consensus-based, and tailored to the specific issues raised in the Request related to policy noncompliance. The methods to be used will depend on factors such as urgency, type of Harm involved, remedies sought, and the likelihood that the exercise will have a positive outcome."
   - Para. 49: "MONITORING. When applicable, the ICIM Office will monitor implementation of any action plans or remedial or corrective actions agreed upon as a result of a Compliance Review. To do so, it will prepare a monitoring plan and timeline in accordance with the needs of the case and in consultation with the Requesters, Management, and other interested Parties, as applicable."

6. Dutch Banking Sector Agreement:
   - Section 7, para. 1: "Adhering banks confirm, in conformity with the responsibility set out in the OECD Guidelines, the UNGPs and ILO, that when enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact they should provide for or cooperate in their remediation through legitimate processes (UNGPs 22 and 29, OECD GL art. 6 of chapter IV) and act upon the findings as described in these guidelines (see appendix 1 for the different ways in which businesses, including the financial sector, can be connected to adverse human rights impacts)."

B. IFC and MIGA's remedial approach must address existing environmental and social harm. It cannot be forward-looking only.

The remedial Approach, which is being developed in response to past and ongoing harms to communities, cannot ignore those very communities who are already waiting for remedy. Any serious commitment to remedy must include a plan to remediate current harms. At minimum, IFC/MIGA should begin by reviewing: (1) CAO cases where non-compliance has been found, (2) CAO dispute resolution cases where agreements have not been implemented fully, and (3) complaints that have been raised to the SGR mechanism, to determine where remedy still needs to be provided.

C. IFC and MIGA's remedial approach must actually establish how they will exercise leverage over clients to provide remedy.

There are many ways for IFC and MIGA to exercise leverage over clients to guarantee that clients provide adequate remedy. One option included in the proposed Approach is the use of existing and an exploration of additional contractual provisions as part of its plan for preparedness for remedial action. However, we have reason to be skeptical of this proposal's effectiveness, because IFC has failed to use existing contractual provisions to prevent harm or remedy harm. IFC's loan agreements already give IFC valuable legal powers over their clients, granting numerous options for IFC to enforce affirmative and negative covenants in line with IFC's Performance Standards, along with other environmental and social measures.[18] Most notably, existing loan agreements offer ways for IFC to enforce these provisions to compel the borrower to take remedial action, including after loan repayments.[19]

IFC/MIGA can and should be using existing contractual provisions to prevent harm and ensure that remedy is provided to communities. Introducing new contractual provisions would be pointless if IFC/MIGA continue to not exercise them. An effective remedial approach should therefore (1) acknowledge the considerable leverage that IFC/MIGA have over their clients and (2) include a commitment to exercise that leverage, rather than a vague promise to "explore" doing so.

D. IFC and MIGA should increase the effectiveness of project-level accountability channels without decreasing their own responsibility.

IFC and MIGA must provide more information on the plans to "enhanc[e] access to remedy through strengthening various options available to affected communities including project-level grievance mechanisms," including on the Approach's "holistic"

[18] See e.g. Loan Agreement between Coastal Gujarat Power Limited and International Finance (Apr. 24, 2008), available at: https://earthrights.org/wp-content/uploads/IFC-Loan-Agreement.pdf. Sections 4.1-4.2, 5.1-5.2.
[19] Id. Sections 8.4-8.5.

review of these mechanisms. These should not be used as a way to deflect IFC/MIGA's own responsibility to provide remedy.

The Approach includes only minimal and vague reference to how it will "enhanc[e] access to remedy through strengthening various options available to affected communities including project-level grievance mechanisms." The Approach provides almost no information about its "holistic portfolio wide review (currently underway) of client-supported grievance mechanisms" that will inform new guidance and training materials, including how the results will be used to ensure that these mechanisms operate properly, and what IFC/MIGA will do when the clients fail or refuse to provide adequate remedy through them.

It is critical that the review focus on consulting with users of project-level grievance mechanisms to learn from their experiences and incorporate those learnings into the subsequent materials. It must also extend beyond client-supported projects both to flag all relevant barriers and to identify better practices such as the recommendations by the OHCHR and the International Commission of Jurists and earlier CAO guidance that these mechanisms should be at the very least co-designed with the impacted communities, and community designed if possible.

The Approach must also provide more detail on how it will "monitor client preparedness and assess the effectiveness of grievance mechanisms as part of IFC/MIGA supervision efforts" Project-level grievance mechanisms have historically failed to provide remedy, when they are in place at all. They must not be used as a way to divert responsibility from IFC/MIGA.

IV. The proposed Remedial Approach included a few discrete commitments worth retaining and expanding upon in a second draft.

The proposed Remedial Approach correctly acknowledges that the CAO can provide access to remedy if IFC and MIGA engage adequately in the case process. The CAO is a critical accountability channel that has the potential to provide communities access to remedy. The CAO's policy states that it can "recommend[] remedial actions to address non-compliance and Harm where appropriate."[20] Its case process also requires IFC and MIGA to develop plans to respond to findings of non-compliance and related harm by proposing and publishing "time-bound remedial actions."[21] The proposed Remedial Approach correctly acknowledges that "[t]he recently adopted CAO Policy now includes several elements that further strengthen IFC/MIGA's Approach to remedial action."[22]

[20] CAO Policy, paras. 8(b), 76.
[21] CAO Policy, para. 131.
[22] Remedial Approach, p. 5.

The proposed Remedial Approach also includes a vague, but important, promise to engage more effectively in the CAO process. It states that "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." The Approach further states that IFC and MIGA's facilitation of and support for remedial actions "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."[23] IFC and MIGA's financial support for processes that feed into the CAO case process is critical, and communities have regularly requested for IFC in particular to pay for technical assistance, capacity-building, fact-finding, and dialogue facilitation as a part of the CAO process. Rarely, however, has the IFC responded favorably to these requests.[24] These good commitments should be expanded upon and made more concrete so that CAO's value to IFC/MIGA and communities is fully realized.

V. A strong remedial environment is good for IFC and MIGA as well as impacted communities.

In addition to remedy being owed to communities negatively impacted by IFC and MIGA investments, IFC and MIGA should embrace strong remedial commitments because they help the institutions deliver their mission.

A. Guaranteeing and providing remedy increases the sustainability of IFC and MIGA investments.

Providing remedy for unintended negative environmental and social impacts–and ensuring that clients provide the same–is critical to IFC and MIGA successfully fulfilling their mandate. IFC's mission is to "advance[] economic development and improve[] the lives of people by encouraging the growth of the private sector in developing countries," and it states that it "create[s] jobs and raise[s] living standards, especially for the poor and vulnerable" all in support of "the World Bank Group's twin goals of ending extreme poverty and boosting shared prosperity."[25] MIGA's mandate is "to promote foreign direct investment into developing countries to support economic growth, reduce poverty and improve people's lives" while affirming that MIGA "only supports investments that are developmentally sound and meet high social and environmental standards".[26]

[23] Remedial Approach, p. iv.
[24] As an example, in the Ukraine: MHP-01/Vinnytsia Oblast case, both the IFC and EBRD refused to pay for a technical study of environmental impacts. In part because the parties then could not agree on the factual record, the dialogue process broke down and now the IFC and EBRD are facing compliance investigations by their accountability mechanisms.
[25] https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new.
[26] https://inquiries.worldbank.org/knowledgebase/articles/931722-miga.

Remediating unintended negative impacts of investments makes the investments more sustainable and supports economic growth, poverty reduction, and the raising of living standards. By the same token, *failing* to remedy negative impacts means that communities affected by IFC/MIGA investments are left worse off than they were before. Not only does this negative outcome breach the development mandate to "do no harm," it also tarnishes IFC/MIGA's reputation and undermines their sustainability.

B. A rights-based commitment to remedy reduces legal exposure.

IFC/MIGA's contention that direct contribution to remedy will increase its legal liability is unfounded, and likely based on a flawed interpretation of *Jam v. IFC* (2019), where IFC lost its absolute immunity from lawsuits. IFC's heightened fear of liability overlooks the critical fact that *Jam* was only filed because IFC failed to respond to CAO recommendations for restoring compliance in the disastrous Tata Mundra power plant project that devastated the livelihoods of the local fishing community.

For that community (and countless others like it), litigation was not the first resort for achieving remedy. Filing a lawsuit against an international financial institution is expensive, time-consuming, and involves numerous procedural hurdles, making it an option that is out of reach for most project-affected communities. The community at the center of *Jam* first tried to get remedy through IFC's CAO process. It was only after IFC failed to act on CAO's recommendations that the community, after years of waiting in vain, sued IFC.

The lesson IFC should have taken from *Jam* was that if it had provided remedy in response to the CAO complaint, it never would have been sued. Providing remedy is protective against legal liability, not the other way around.

C. A rights-based commitment to remedy would support the Evolution Roadmap.

With the draft of an "Evolution Roadmap," the World Bank management exposes its own analytical blind spots in all three reform areas (Vision & Mission, Operational Model, Financial Model). The draft emphasizes that "The fight against poverty is affected by a series of structural trends that will make good development outcomes much harder to achieve over the coming decades" (p.2). In doing so, the World Bank fails to acknowledge that its own activities also repeatedly lead to negative impacts for the people who are supposed to benefit from its activities.

The draft highlights that "The WBG has adapted to change in its scale and mandate and is well positioned to do so again." (p.5). 75 years after the Universal Declaration of Human Rights and 30 years after the establishment of the first complaints mechanism of multilateral development banks, it is time for the shareholders to recognize the

necessary contribution to remedy in their mission as well as to institutionalize it in their financing model.

This is the only way to ensure that the intended expansion and clarification of the mandate, the adjustments in the operational model, and the increasing financing capacities do not lead to further unintended negative effects that repeatedly call into question the legitimacy of the institution.

"Given the impact of growing global challenges on the achievement of poverty reduction, shared prosperity, and the SDGs" (p.5), the starting point of any effort must be **to do no harm** and contribute to remedy without exception in case of failure.

While the draft raises the question of how to ensure that the mission serves all clients (p.6), it seems more urgent than ever to prioritize citizen-driven accountability over all other stakeholders.

VI. Next Steps

IFC and MIGA must write a proposal for remedial action that: (1) actually addresses and implements the recommendations of the External Review; (2) commits to contributing financially to remedy when its financing has contributed to harm or when IFC/MIGA cannot exercise leverage over a client and a remedy gap persists; (3) commits to remedying existing environmental and social harm. IFC and MIGA should engage in public consultations on this second draft. Those consultations should improve upon and correct the limitations of the consultations on the first draft, including adding more languages.

In the meantime, IFC/MIGA should be applying a remedial approach immediately. IFC/MIGA must remediate existing harms that persist from its projects. The first projects to start with are: (1) CAO cases where non-compliance has been found, (2) CAO dispute resolution cases where agreements have not been implemented fully, and (3) complaints that have been raised to the SGR mechanism.

VII. Endorsements

This submission is endorsed by the following organizations and individuals:

1. Center for International Environmental Law (CIEL)
2. Urgewald e.V.
3. NGO Forum on ADB
4. Just Ground
5. Jamaa Resource Initiatives, Kenya
6. Accountability Counsel

7. Centre for Financial Accountability
8. Arab Watch Coalition
9. Oxfam
10. Both ENDS
11. Interamerican Association for Environmental Defense (AIDA)
12. Gender Action
13. CEE Bankwatch Network
14. Bank Information Center
15. Green Development Advocates (GDA) - Cameroon
16. Recourse
17. David Hunter, Director of the Program on International and Comparative Environmental Law
18. Green Advocates International – Liberia
19. Global Labor Justice-International Labor Rights Forum
20. Oyu Tolgoi Watch
21. Rivers without Boundaries Coalition
22. International Accountability Project
23. Public Interest Law Center (PILC)
24. Lumière Synergie pour le Développement (LSD, Sénégal)
25. Inclusive Development International
26. Peace Point Development Foundation-PPDF, Nigeria
27. Bretton Woods Project (BWP)

Annex I: Examples of Remedy Provided and Remedy Outstanding

Because DFIs are part of the value chain of development projects, they share responsibility for the harms resulting from the projects they finance. Two obligations flow from this responsibility: first, the obligation maintaining a standard of due diligence in its supervision of the projects it finances; second, to ensure the project does not violate the human rights of impacted communities. If the bank fails in either of these duties, and thus contributes to any community harm during any phase of the project, the bank must remedy that harm before exiting the project.

As a result of the fact that people harmed by projects have raised issues to accountability mechanisms as a means of advocating and fighting for their rights, at times, financial institutions and clients have undertaken–and paid for–remedial actions. The problem is that remedy remains rare, and the onus is still on impacted communities to fight for it. The following examples show instances in which a degree of remedy has been provided to demonstrate what remedy can look like and to show that it is not unprecedented.

IFC should contribute to remedy when it has contributed to harm. We will again use existing case examples of remedial actions and reparation cases to bolster the argument for creating a robust remedy policy, therefore we bring the following:

1. Case examples of remedial actions and reparation in older/closed cases from several Independent Accountability Mechanisms

    a. Dispute Resolution
        i. CAO Case: **Nicaragua Sugar Estate Limited-01/León and Chinandega**. The case culminated with major outcomes after a four-year dialogue process which began in 2009 between Nicaragua Sugar Estates Limited (NSEL), and ASOCHIVIDA, an association of 2,000 former sugarcane workers and their families affected by Chronic Kidney Disease (CKD) in Chichigalpa, Nicaragua. The dispute resolution process was centered around three topics, an independent scientific study, improving medical attention in Chichigalpa and providing alternative livelihoods for the families of ex-employees suffering from the disease. One of the major benefits to come out of this process was the creation of a fund to provide microcredits in the amount of $165,000. This money was donated by NSEL to ASOCHIVIDA, and has benefited more than 300 community members.
        ii. CAO case: Mongolia: Oyu Tolgoi-02/Khanbogd. Communities filed a complaint regarding harm to local nomadic pastoralist community's pastures and water access in the Gobi Desert caused by a gold and copper mine. After five years of long negotiations and three assessments by independent experts, a Complaint Resolution Agreement was signed in May 2017. The agreement included many

remedial commitments aimed at restoring sustainable access to water and pastures were not implemented to date. A local governance body, the Tripartite Council, was established to monitor and manage implementation of the agreement. Unfortunately, not all of the remedial commitments have been implemented, and the local decision-making mechanism no longer represents the interests of the affected community. This is an example of a case that is ready for a new complaint while still awaiting resolution of past harm.

iii. MICI Case: Haiti Caracol Industrial Park **Productive Infrastructure Program - Request II**. This dialogue between representatives of 400 farming families displaced from their land with no consultation and the UTE agency of the Haitian government resulted in a 2018 agreement with commitments from the UTE to provide project-affected people with a choice of (1) replacement land (limited to the 100 families most in need, as prioritized by the community); (2) motorized irrigation pumps; (3) small business support (training, health insurance, and start-up assets); and (4) vocational scholarships. Affected families were also allowed to nominate one member to receive training and be considered for employment at the Caracol Industrial Park. Each family was also given 2 backpacks with school supplies. The agreement also promised improvements to managing environmental risks around the project, including the treatment of solid waste. Notably, the affected community initially asked for a single tractor to be shared within the community, but this request was refused.

b. Compliance

i. Inspection Panel case: Republic of Uganda: Transport Sector Development Project - Additional Financing (P121097).

In 2015, the Bigodi community in Uganda sent a request to the World Bank's Inspection Panel to address cases of sexual exploitation of teenage girls by construction workers employed by a Bank-funded project, the Uganda Transport Sector Development Project (TSDP). The TSDP case demonstrates the horrifying impacts that can be visited on local communities when MDBs fail to supervise and monitor adequately the large infrastructure projects they finance. At the same time, this case demonstrates the positive influence that MDBs, particularly the World Bank, can have in supporting and protecting communities from the worst harms of such projects. The World Bank's independent accountability mechanism, the Inspection Panel, provides an opportunity for those who suffer as a result of Bank investments to obtain redress. The accountability mechanisms can recommend not only direct support for those who were harmed by the project but also project-related changes to prevent future harm, as well as system-wide Bank reform aimed at improving Bank projects generally.

This case is significant not only because World Bank funding for the project was canceled, affected community members received needed support services, and a corrupt government agency was purged, but because the institutional changes made may prevent similar harms across future World Bank projects. As this case demonstrates, when management responds constructively to Panel investigations, genuine reform can take place.

ii. Japan International Cooperation Agency (JICA) Objection Procedures - Thilawa Special Economic Zone (TSEZ)

The Thilawa SEZ was the first special economic zone developed in Myanmar. It proceeded in two development stages: a smaller phase one (Zone A) and a larger phase two (Zone B). As documented in EarthRights' 2014 report on the Thilawa SEZ, residents first found out about the Myanmar government's plans for the Thilawa SEZ after it signed a Memorandum of Cooperation (MoC) with Japan in December 2012. On January 31, 2013, the Thanlyin and Kyauk Tan Township Administrators sent eviction notices to residents in both Zone A and Zone B ordering residents to abandon their homes within 14 days, or face imprisonment for 30 days.

In November 2013, the majority of residents living in the Zone A area of the SEZ were relocated to Myaing Thar Yar relocation site, where conditions were far below the living standard residents had in their former homes. Although JICA's 2010 Guidelines included requirements for EIAs and involuntary resettlement, these were not followed in relation to the TSEZ. In addition, JICA failed to ensure access to remedy and impeded community-led efforts to put in place an effective operational-level mechanism. Initial engagement efforts with JICA were unwelcome, as were efforts to engage with other project proponents. As a result, community members filed a complaint through JICA's Objections Procedure that proved wholly ineffective, with the JICA examiner failing to acknowledge the harms or non-compliance and providing no remedy.

One outcome of the complaint, however, was that a multi-stakeholder dialogue (MSAG) group was established. At the same time, impacted community members were also advocating for community-driven and designed OGM (CD-OGM) to meet their needs and ensure access to remedy in Thilawa. A draft of the proposed CD-OGM was shared with JICA and the other project proponents in late 2016, and throughout 2017 community leaders sought feedback from JICA and others, with the hopes of coming to an agreement on a final version. The

CD-OGM was also discussed in the MSAG, and an Interim Joint Problem-Solving Mechanism was negotiated. Once community members sought to use the Mechanism, however, the MSAG did not meet again and the Mechanism was never fully operationalized.

In 2017 the project proponents commissioned the design of the Thilawa Complaints Management Procedure (TCMP) instead of engaging with the community designed CD-OGM. The affected community members who were involved in the CD-OGM advocacy were excluded from this process. As outlined in the critique by EarthRights International and the letter written by the community leaders who led the design of the CD-OGM, the TCMP is ineffective in terms of process and outcomes. Community members sought to better align it with the proposed CD-OGM. However, the project proponents continued to exclude the community leaders, despite their continued engagement efforts.

iii. CAO case Alto Maipo Hydroelectric Project, Chile: Alto Maipo-01/Cajon del Maipo.

The Alto Maipo project is a large-scale run-of-the-river hydroelectric project located 50 km southeast of Santiago, Chile. The project diverted water from the three main tributaries of the Maipo River and rerouted this water through some 70 km of tunnels bored through the Andes mountains, using underground turbines to produce electricity. Communities and organizations from the Maipo region filed two complaints with the CAO and MICI in January of 2017 raising concerns about numerous environmental and social harms caused by the Alto Maipo project including: inadequate Environmental Impact Assessments; lack of meaningful community engagement, consultation and access to information; shortage of drinking and irrigation water affecting the population of Santiago and the surrounding Metropolitan Region; acceleration of desertification processes while exacerbating climate change and causing damages to: glaciers, biodiversity and natural resources; archaeological and paleontological resources within protected areas; economic, agricultural and tourist activities; health effects due to air and water pollution; and displacement and resettlement of communities.

In 2021, the CAO's Compliance Investigation Report included a review of the ESIA process, the project's compliance with national law, determination of Broad Community Support, as well as investigations into the IFC's Performance Standards (PS) regarding the project's approach to climate change impacts, infiltration of groundwater during tunneling, sediment transport, air quality,

tourism and recreational activities and a complaint regarding the sexual harassment of a worker.

The CAO's Report found that the pre-investment review was generally consistent with the requirements of the Sustainability Policy, yet it found many instances where the IFC had not ensured project compliance with PS requirements. Some of those findings included: the IFC had not required adequate geological studies and modeling of potential impacts of tunneling activities on groundwater, which led to tunnels flooding and increased risk of glacier melt, infiltration and groundwater discharge and increased risks on downstream river ecosystems; the IFC had failed to monitor air quality around the construction site adequately, which gave risk to undetected air pollution and associated impacts on human health; the IFC had not ensured the project was taking adequate actions to meet the requirements of PS3 in relation to the mitigation and monitoring of noise impacts, particularly on the El Alfalfal community.

The CAO also found that IFC's overreliance on adaptive management techniques led to oversights in several issues and that the adaptive management approach should not be used to substitute environmental and social impact assessments. The IFC management's response failed to acknowledge responsibility for CAO's findings of non-compliance or to take action in regard to the harms that the Alto Maipo project caused to communities and the environment in the Maipo region. The Management Action Plan was neither timely nor relevant to the complainants' concerns providing only for institutional improvements in future projects. IFC exited the project in May 2018, while IFC FI client Itau Corpbanca remains a project financier. Additionally, the IFC has ongoing business relationships with AES Corp, the parent company to Alto Maipo.

The community complainants from the Alto Maipo have expressed that for them remedy would not entail compensation but rather an acknowledgement of the harm that the project has caused to their lives and the environment and a public apology from the financial institutions that funded them.

2. Examples of proposals for remedy provided by affected communities in existing cases.

MICI case: **Generadora San Mateo S.A. y Generadora San Andrés S.A.** MICI-CII-GU-2018-0136 Guatemala Yichk'isis (Ixquisis)
The microregion of Yichk'isis (Ixquisis in Spanish), located north of the San Mateo Ixtatán municipality in northwest Guatemala is home to Mayan Indigenous peoples from nations of Chuj, Q'anjob'al, Akateko and Mam who have inhabited the area since time immemorial. Their

ways of life are based on a respect for nature and stewardship of water and the environment. The communities depend on the rivers as a source of livelihood, culture and community life through agriculture, foraging, and fishing.

In 2009, with the goal of preserving the integrity of the rivers and natural environment, the indigenous communities, and subsistence farmers of Yichk'isis organized and participated in a good faith consultation, resulting in a majority vote deciding that there would not be extractive projects, including hydroelectric projects in their territory. Despite the results of the community consultation, Promoción y Desarrollo Hídricos, S.A. (now Energía y Renovación S.A.) began constructing two hydroelectric projects in the region co-financed by the IDB and the San Mateo and San Andrés municipalities in 2010.

Impacts and harms caused by construction

Once construction began on the hydroelectric projects, the project generated negative impacts on various segments of the community and aspects of community life including the destruction of sacred and ceremonial indigenous Mayan sites and archeological artifacts; attacks on human rights and environmental defenders by private and public security forces causing physical injury, criminalization, and death; fragmentation of local communities and increased social conflict among those who oppose and support the hydroelectric projects; river pollution due to poor management of construction waste and residue, causing loss of biodiversity and adversely impacting traditional sources of sustenance such as fishing; water pollution resulted construction placed a greater burden on women's caretaking duties in the communities. Additionally, the projects negatively impacted food security and the familial economies, which increased local conflict, principally impacting women.

IDB's contribution to harm and the community's proposal for remedy

In August 2018, communities impacted by the San Mateo y San Andrés Hydroelectric projects filed a complaint at the MICI arguing the IDB had failed to comply with its own operating policies, recommending that the IDB withdraw its investment from the hydroelectric projects given their socio-environmental damages on indigenous communities and women.

In 2021, the MICI's compliance investigation report concluded that IDB Invest had failed to comply with its own operational policies and safeguards for at least five reasons: 1) validating an inadequate characterization of the affected population, which denied the existence of indigenous peoples; 2) failure to verify gender-differentiated impacts on women; 3) failure to ensure client's assessment and management of environmental impacts; 4) failure to ensure proper disclosure of information and consultation with communities; and 5) failure to carry out adequate assessment of risk for local conflict resulting from the projects.

Of the 29 recommendations issued in the MICI's report: ten proposed institutional reforms to avoid non-compliance in future IDB Invest operations; eighteen were recommendations for corrective actions aimed to bring the projects into compliance with policies; and number 29, created, for the first time, the possibility for IDB Invest to withdraw its investment from the projects by taking measures to ensure a responsible exit: "[i]n case of exit from the Projects, IDB Invest should make the necessary provisions to ensure a responsible exit from the Operations, taking into account the findings, conclusions, and recommendations of this report. For this, a transition plan should be prepared, in consultation with the communities, guided by the principles to do no harm, transparency and responsibility."[27]

The Community's proposal for responsible exit and remedying the harms caused by the IDB's hydroelectric projects in Guatemala was submitted to the MICI and to IDB management:

The affected communities, through the accompanying organizations (International Platform against Impunity, AIDA and The Gobierno plurinacional de las Naciones Originarias Akateko, Chuj, Q'anjob'al y Popti´) proposed the following proposal to ensure responsible exit and remedy:

Regarding the social damages caused and the increase of social conflict in the territory:

- Restore living conditions to the families of the people killed, and to the people tortured, stigmatized, and criminalized because of their complaints regarding the San Andres and San Mateo projects.
- Compensate for the economic damages identified in the MICI investigation as a consequence of the implementation of the San Mateo and San Andres Projects due to non-compliance with their operational policies.
- Guarantee that, during the process of divestment and responsible exit of the hydroelectric projects, no practices of discrimination, exclusion, and racism against indigenous peoples and indigenous women of the Yich K'isis micro-region will occur.
- Recommend to IDB Invest to avoid financing any support to the Mesa de Diálogo de San Mateo Ixtatán as it is a space from which local indigenous communities have been excluded, discriminated against, and stigmatized in opposition to the San Mateo and San Andrés hydroelectric projects, thus increasing their risk and vulnerability.

Regarding damages to indigenous peoples:

- Carry out an act of public forgiveness by IDB Invest and the client to the members of the GAP Gobierno Ancestral Plurinacional and the Chuj, Q'anjob'al, and Akateko nations, affected by the breaches and damages caused in the framework of the projects.

[27] MICI, MICI-CII-GU-2018-0136, Compliance Review Report Revised Version, Generadora San Mateo S.A. and Generadora San Andres S.A. Projects. Recommendation 29 at Page 93. Available at: https://www.iadb.org/document.cfm?id=EZSHARE-1567711961-1773

- Restore living conditions to compensate for the damages that both projects have caused to the indigenous peoples. Measures aimed at restoring living conditions should address the territorial, spiritual, and cultural impacts generated by project implementation.
- Ensure that during the process of divestment and responsible exit of IDB Invest from the projects, the collective dimension of local indigenous peoples' culture is respected concerning their collective rights over lands, territories, and natural resources, through respect for indigenous peoples' decisions regarding the use and management of natural resources in their territory.
- Ensure that due process is followed and that the right to self-determination of the indigenous peoples of the Yich K'isis micro-region is respected concerning the San Mateo and San Andres projects.
- Guarantee that, during the process of divestment and responsible exit of the hydroelectric projects, there are no practices of discrimination, exclusion, and racism against the indigenous peoples of the Yich K'isis micro-region

Regarding cultural heritage:

- Finance and facilitate a study and/or inventory by the ancestral authorities and Plurinational Government of the lost/modified heritage so that they can recover the memory of the grandfathers and grandmothers of the sacred and ceremonial sites, legends, and related stories, as well as a rescue and care plan.
- Fund a plan for the recovery, care, and protection of the affected ceremonial sites.
- Finance actions and/or projects aimed at restoring the relationship of the population with the sacred site, guaranteeing free circulation to and from the sacred sites.
- Return the archaeological objects and goods extracted and looted in the archaeological site "Yich K'isis".
- Restore the Yich K'isis archaeological site destroyed by the client's activities.
- Create an archaeological museum to house the objects and goods removed from the site

Regarding differentiated damage to women:

- Restore living conditions to adversely affected women. Measures aimed at restoring living conditions should address the loss of their livelihood, the increased burden of care, the health damage caused to the population, and the psychosocial impacts due to stigmatization, harassment, and threats. Such measures must guarantee the effective participation and monitoring of women belonging to the affected communities.

Regarding environmental damages.

- Urgently carry out an updated risk analysis to establish a management plan to address the imminent risk generated by the construction of infrastructure projects without risk analysis, given the increased vulnerability of the population to natural and climatic phenomena.
- Execute an independent and updated study on the environmental impacts generated by the San Mateo and San Andres projects throughout the basin.
- Ecological restoration of the watershed in the municipality of San Mateo Ixtatán aimed at recovering the quality and flow of the affected water sources.

- Restoration and environmental remediation of the affected areas.
- Establish a plan for prevention, mitigation, and management of environmental and climatic phenomena that may occur in the short and medium-term.
- Establish adaptability measures for the occurrence of climatic phenomena that may worsen due to increased vulnerability in the area.
- Establish a wastewater treatment system.
- Reforestation and restoration of the rivers.
- Reforestation and restoration of the affected areas.
- Undertake actions to guarantee access to quality water to families who were left without it due to water contamination.
- Ensure that the actions to be implemented must be duly consulted with the claimants.

More than a year after the MICI's report was published and the IDB's Management Action Plan was approved, the methodology and scope of recommendation 29 have not been agreed upon, which means that to this day there is no responsible exit plan or remedial measures to address the damages caused by the construction of IDB Invest co-financed projects.

This case represents an opportunity for IDB Invest, and offers important lessons for DFIs in general, regarding the minimum required elements and standards for responsible exit and access to remedy, when DFI project financing has contributed to the harm to communities.

a. Tata Mundra, India

CAO case: India: Tata Ultra Mega-02/Tragadi Village

The Tata Mundra Ultra Mega Power Project is a 4000 megawatt (MW) power station, comprising five 800 MW units, in the coastal region of Mundra in Gujarat, India. The IFC financed the project at US$ 450 million. Since its inception the project has been marred with environmental and social problems resulting in substantial harm to the local community, including physical and economic displacement, loss of livelihood, destruction of marine environment, impacts to water quality and fish populations, and harm to community health due to air emissions, among others.

In 2011 the fishworkers affected by the project filed a complaint with the CAO drawing attention to numerous ways in which the project was out of compliance with IFC standards and policies and threatened substantial harm to the local community. After a failed dispute resolution process, the CAO conducted a CAO compliance audit. That report, released by the CAO in 2013, validated the concerns of the community, finding that IFC had failed to ensure the project met the applicable Environmental and Social Standards necessary for IFC projects. This included a failure to conduct adequate due diligence, a failure to ensure proper consultation and accounting for impacts to the local community, a failure to ensure baseline studies and data were collected, specific failures relating to thermal pollution and air pollution standards, shortcomings in supervision, among others. Yet IFC management largely

rejected the findings of the reports, putting out only an empty action plan promising to do baseline studies that were not even possible to do anymore with no remedial action. Management's response was rejected by the communities.[28] The local organization Machimar Adhikar Sangharsh Sangathan (local fishworkers union) called it *"empty and a non-starter." It further stated:*

> *"By issuing this, IFC is trying to confuse the public, making a mockery of communities' concerns and yet again, undermine CAO and its findings. While some of the action plan stated are listing of actions taken pre-CAO time, some other are just suggestions, resulting in nothing particular. Eg: household level socio-economic survey, health survey and testing of ash residue for radioactivity and heavy metals. The action plan fails to say what happens after these surveys and testing. There are no timelines, no specific targets or indicators. Significantly, the statement says that it will bank on the expertise of the company, whose violations are in question."*

More than a decade later, even these woefully inadequate steps have not been implemented. The project continues to be in the monitoring phase more than a decade after the complaint was filed with CAO.

Left with no other options, in April 2015 the community filed a lawsuit, *Jam v. International Finance Corporation*, against IFC in federal court in Washington D.C.[29] Again, IFC sought to deny the communities relief, arguing they should not be able to have their claims heard in court at all. IFC even argued that they did not need to be able to access the court because it was sufficient that they could go to the CAO - despite the fact they had already done that, and nothing had changed. IFC argued it was protected by "absolute immunity" and could not be sued. In February 2019, the U.S. Supreme Court rejected that claim, deciding that international organizations do not enjoy absolute immunity, giving hope to the community to go ahead in their fight to hold IFC responsible for the damage caused to them. IFC could have acted then to remedy the harm the communities were continuing to suffer, but instead it moved to dismiss, again claiming immunity. Unfortunately, the claims were dismissed on the basis that the relevant conduct occurred in India, and immunity applies unless the lawsuit is based upon commercial activity in the United States. The fishworkers filed their appeal with the D.C. Circuit Court of Appeals in September 2020. The appeals were subsequently dismissed. IFC still could have done right by these communities at that point, but it decided not to.

After the External Review, IFC began this process during which it again had an opportunity to provide remedy to these communities. Instead, it put out a draft approach that would deny them anything and exclude them from any future action.

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[28] *IFC Hide behind Tata's False Claims: No Actions Taken on CAO Findings yet President Dr.Kim's claims about Accountability Goes for a Toss!!,* May 21, 2014. Available here: http://masskutch.blogspot.com/

[29] EarthRights International, *Jam v. IFC*, available at https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/.

The need for remedy remains as acute as ever and IFC's obligation to provide remedy remains.[30] Entire communities have had their way of life destroyed, and face mounting threats to their health. The Tata Mundra Project has proven to be a complete failure. From the violation of IFC's standards and the environmental and social conditions on which IFC got involved in the first place, to the harm to the local community, to the financial disaster of the project itself, to IFC's effort over more than a decade to avoid accountability of any kind (and in the process undermining its own judicial immunity and substantially damaging its reputation), to a failed accountability mechanism process, this project is a case study of what ought not to be done. IFC and the CAO have failed to provide the community either justice or remedy even after a decade of people's engagement with IFC. Rather, in this decade of engagement, the affected community has been pushed into poverty and economic and social disempowerment. There are important lessons for IFC here and, if these lessons are not taken seriously and if drastic reforms and changes in these processes are not implemented and people not provided remedy, this will serve as a searing establishment of IFC's lack of intent regarding its own commitment to people.

The community members created the following **proposal for effective mitigation and management of impacts and remedy** for harm in collaboration with an expert committee:

Compensation for economic loss, restoration and rehabilitation:

- IFC needs to provide compensation for economic losses and loss of livelihood to the fishing communities, farmers and pastoralists due to damage to the land and marine environment caused by the construction and operation of The Tata Mundra Power Project.
- IFC must provide for setting up of a Community Development Fund and provide compensation through this fund. The compensation is for restoration of environmental damage, rehabilitation of the affected communities and needs to be paid for by IFC. The Community Development Fund would be governed by, fishing community, farmers group, elected *panchayat*(local governance body at village level) members, representatives of civil society organization and specially women members from the fishworkers community. An advisory group with experts on each sector like ground water, fisheries, agriculture etc. nominated by the community governing body to advise on the activities to be taken up by the trust for the restoration, rehabilitation and mitigation measures.

Restoration of the Marine Environment:

- A study needs to be commissioned for a species-specific study to assess the marine ecosystem and how it has been damaged as a tool for planning for effective remediation efforts. This study must be done by an agency agreeable to the community.

[30] Michelle Harrison & Lindsay Bailey, Ending "absolute immunity" for the International Finance Corporation: The legacy of Jam v. IFC, Bretton Woods Project (July 21, 2022), https://www.brettonwoodsproject.org/2022/07/ending-absolute-immunity-for-the-international-finance-corporation-the-legacy-of-jam-v-ifc/.

- Building a better screening of water intake channel and/or a diversion system to prevent entrainment of fish, including at further points of the intake channel of the Power project. Before taking the water into the power plant from the intake channel, there should be a closed water filtration device or system to prevent the fish eggs and fish larvae from entering the plant. The fish eggs and the larvae that are trapped in the filtration system should be collected carefully and released back into the open sea.
- The plant must be retrofitted with a closed-cycle cooling system to minimize the thermal discharge temperature contrast into the local marine environment. The system utilized is inappropriate for the plant's size; IFC should have required this system from the beginning. The system had not yet been chosen when IFC approved the loan and it specifically identified the choice of an inappropriate cooling system as an issue that could lead to substantial harm.
- Restoration of mangrove and seagrass beds and deployment of artificial reefs to help with the restoration of species.

Restoration of land environment:

- Access to clean water for drinking and agriculture is essential for survival of people and agriculture**.** Saltwater intrusion is already a problem in the area and with plants' intake channels this has become worse. Community level (at villages and fishing harbors) Reverse Osmosis(RO) plants need to be provided. Provisions need to be made for RO discharge to be scientifically managed.
- Fresh water supply water connection lines through pipelines should be provided to households.
- Purchase land for grazing from Tata (they have acquired excess land for the project keeping in mind the expansion of the project as well) to be managed by the panchayat*(local governance body)* as grazing land for pastoralists to continue with their livelihood.
- An assessment study is needed into the extent of harm to groundwater to determine ways to mitigate impacts.
- Infrastructure needs to be built for restoration and storage of rainwater.

Addressing Air Quality/Health

- Fully cover the Conveyor belt for coal transportation to the plant site from the Mundra port must be entirely covered and storage of coal on site.
- Installation of technology that reduces particulate matter pollution from the plant e.g. replacing the Electrostatic Precipitators (ESP) with fabric filters (to reduce the particulate matter (PM) emissions), installing the flue gas desulfurization unit (to reduce SO_2 emissions), installation of ammonia injection (to reduce NOx emissions), selective catalytic reduction [SCR] or selective non-catalytic reduction [SNCR]), installing a system for activated carbon injection upstream of a fabric filter (to reduce Mercury emissions)etc.
- Regular and reliable monitoring of air quality with information publicly available at all times, as monitoring has been inconsistent, incorrect, and frequently not working at all.

- Establish health facilities for those affected by pollution and provide treatment.

Mitigating the social loss and rehabilitation:

- Establish Vocational Training centers for those who have been pushed out of fishing and want to now explore opportunities to establish new sources of livelihood.
- Provide for Quality primary and secondary level education at panchayat (administrative unit) level as poverty from the loss of livelihood for fishing families has substantially reduced access to education
- Provide for covered infrastructure for fishworkers to store and dry fish now that this can no longer be done outside without contamination from ash.
- Provide for access to housing for those who have lost livelihoods.

Annex II: Purported Challenges to Remedy and Civil Society Responses

In our work, DFIs have shared with us various challenges they perceive to ensuring and providing remedy. In the chart below, we list some of the challenges we have heard and propose responses based on our case experience and research.

Purported Challenge	Civil Society Response & Recommendation
The monetary cost of providing remedy is perceived as too high for the DFI.	● To the contrary, a strong remedial environment can decrease costs and incentivize prevention. Per the UN Report on Remedy, "If commitments to remedy (including but not limited to financial compensation) are part of contingency planning from the beginning of the project cycle, this would promote more timely and granular inquiries into: (a) the likelihood and severity (scale, scope and remediability) of potential impacts; (b) the scope and effectiveness of available remedial mechanisms (including national GRMs, insurance arrangements and ring-fenced funds); (c) what remedy gaps may be foreseen; and (d) the roles that the client and bank, as appropriate, may play in filling those gaps." ● If DFIs are meeting their E&S obligations, financing remedy should only be required in a limited number of projects. ● Further, DFIs should build in measures to ensure that clients appropriately bear E&S risk and have resources to address harm and provide remedy. ● Some types of remedy may not require financial compensation for communities such as measures of *satisfaction* under international law which might include: an official declaration to restore dignity, a public apology or acknowledgment of wrongdoing, and sanctions to clients or borrowers, among others. ● Finally, if the cost of remedying harm from a DFI's projects is truly so high that it risks bankrupting a DFI, then it should call into question the DFI's own ability to adhere to its E&S obligations.
DFIs are concerned that ensuring and providing remedy will increase the DFI's legal liability and result in an increase of court cases.	● Examples of financial institutions providing remedy demonstrate that it did not result in increased litigation. ○ ANZ: After acknowledging its due diligence failures, a commercial bank paid compensation to communities in Cambodia who were harmed by its former client. This

	was done to settle a complaint to the Australian National Contact for the OECD Guidelines. ○ WB re Uganda Transport: WB admitted fault and began providing remedy to affected community, and carrying out institutional reforms, prior to the completion of the Inspection panel process. No litigation was considered or threatened. ○ IDB re Caracol Plant: Dispute resolution process resulted in an agreement that affected communities would be provided with replacement land, vocational training, employment opportunities, and equipment, among other remedies. ○ ADB Cambodia Railways: A major remedial compensation, debt relief and enhanced livelihood improvement program was provided. This was partially financed out of the ADB loan, but AusAid contributed an additional $2m grant for livelihood restoration and ADB provided a TA grant. ● DFIs remain largely immune from suit, and lender liability laws and jurisdictional limitations further limit the fora available for lawsuits. ○ The UN Report on Remedy agreed: "[L]egal hurdles that a successful plaintiff may need to clear in such cases include the substantive complexity of tort law claims in the context of financing relationships, forum non conveniens doctrines, political question doctrines, territorial nexus requirements, proof that harms complained of relate to 'commercial activity,' and overcoming the restrictive scope of lender liability laws in many jurisdictions, among other issues." ● Further, even if suits were filed, DFIs would be able to participate in the legal process and defend against any unsubstantiated claims. ● In addition to the legal hurdles to filing a lawsuit against a DFI, other practical barriers to litigation for project-affected peoples exist. They include resources required and risk of reprisals. ● Some of the concern stems from a misunderstanding of the *Jam v. IFC* case.

	○ The *Jam* litigation arose because IFC did not respond to and address CAO findings of noncompliance and related harm. ○ *Jam* illustrates that prioritizing remedy at the IAM level can prevent potential liability. Even if complainants potentially have a limited option to litigate in light of *Jam*, using IAMs is a much more cost-effective and pragmatic first resort. DFIs can help ensure that this is also the last resort by providing meaningful remedy. ○ *Jam* shows that if there is no remedy through DFI processes, then complainants might seek effective remedy elsewhere (i.e. through courts).
Related to the above, DFIs are concerned that ensuring and providing remedy will result in an increase of complaints to the DFIs' accountability mechanisms.	● Evidence thus far does not support this concern. The number of cases IAMs receive is a small fraction of the total projects financed. Per the 2020 External Review of ICF/MIGA, the CAO's portfolio represents 1.2% of IFC projects. ● IAM policies have eligibility requirements to filter out frivolous claims. ● In our collective experience partnering with communities who consider filing complaints to IAMs, the decision to do so is an incredibly difficult one. The process is time-consuming and resource-intensive; at times, communities face risk of retaliation. ● In any event, DFIs should welcome legitimate complaints to their IAMS, as it creates an opportunity to understand and address issues that risk the sustainability of their investments. If DFIs are worried that there will be a particularly high number of *legitimate* claims, they should examine their own practices re: "do no harm." ● Good faith engagement efforts between DFIs and IAMs have provided comprehensive solutions to issues of accountability in the past. Creation of effective remedial actions will only benefit from collaborations between IAM and DFI staff that can define roles for both clients and bank.
DFIs have expressed uncertainty about how to	● Remedy should be built into the planning process for every project.

structure remedy.	● Mechanisms to finance remedy can include: ○ Standing Fund / Reserve Fund ○ Escrow ○ Trust Fund ○ Contingency Funds ○ Insurance ○ Guarantees and Letters of Credit ● At minimum, IFC needs a Standing Fund / Reserve Fund for situations where IFC contributed to harm. As the UN Report on Remedy noted, "Ring-fenced funds are more likely to provide accessible, rapid and reliable reparations and therefore deserve priority consideration in the remedial toolkits of DFIs." ● Most management action plans stemming from Compliance Reviews include forward looking reviews and changes to E&S processes, guidance and/or policies for improvements in internal practices by adopting lessons learned. The remedy framework should contain internal guidance that collects examples from previous cases for continuous improvement. ● When first implementing the newly designed remedy framework to address harms it will be crucial to take from existing examples in international fora and be open to adapt and receive input from affected communities who must be involved in designing remedial measures crafted to their circumstances.
DFIs are concerned that if they ensure remedy, then their clients will be disincentivized to fulfill E&S obligations, creating a so-called "moral hazard."	● This has not proven to be true outside of the development finance sphere. For example, there have been funds for large-scale disasters (*i.e.* Rana Plaza collapse in Bangladesh), funds for oil & gas industry (*i.e.* Association of International Petroleum Negotiators' Model Joint Operating Agreement provides for the establishment of a decommissioning trust fund), and even at DFIs (*i.e.* World Bank's rapid social response trust fund). ● Notably, insurance for environmental risks is widely used in project finance despite risks of perverse incentives. Insurance is regularly paid out from project budgets to compensate third parties for environmental harms - there is no reason in principle why social harms can't be treated similarly. ● The current "moral hazard" is that communities, often people who are marginalized, bear the most

	risk when projects result in negative environmental and social impacts. ● Further, DFIs can build in measures to ensure that clients appropriately bear E&S risk and have resources to address harm and provide remedy. ● Finally, if DFIs are truly concerned that certain clients will not make a good faith attempt to adhere to E&S obligations, they shouldn't lend to them.
DFIs expressed concern that for certain existing projects, there will be insufficient funds available to remedy harm if it arises because remedy was not adequately considered in project planning.	● Forward looking, the DFI should include remedy as part of the normal planning process for every project. ● For projects already facing a perceived lack of funds for remedy, IFC should create and use a Standing Fund / Reserve Fund. ● Further, DFIs should create an Environmental and Social Legacy Fund to ensure remedy is provided for past harm from DFI projects.
DFIs expressed concern about their obligation and ability to ensure or provide remedy in projects from which they have divested or plan to divest from.	● Having a robust remedy framework with appropriate parameters for responsible exit can allow DFIs to be able to exit investments where clients do not meet their E&S obligations or when planning to divest given a loss of leverage over the client. ● A prerequisite for responsible exit would be the creation of escrow funds or insurance that clients are obliged to keep throughout the lifecycle of the project plus a supplemental Remedy Fund for the DFI to contribute to remedy as appropriate. ● DFIs must not divest from a project without consulting the project-affected community. ● DFIs must disclose intentions to exit or divest from projects subject to IAM cases with the IAM so as to incorporate and implement responsible exit plans within dispute resolution or compliance review processes. Failure to do so leaves both IAM and DFI ill-equipped to address ongoing situations of harm that will likely leave affected communities seeking a response for years to come.
DFIs view an obligation to ensure or provide remedy as punitive.	● Instead, remedy should be understood as a normal cost of doing business in the same way that remedial costs and risk management are streamlined into many commercial activities. ● DFIs should reorient themselves around the development and sustainability rationale for (1) better incentivizing prevention and (2) contributing

	to remedy when some projects inevitably do go wrong. ● As part of that reorientation, DFIs should change internal incentive structures so that better prevention and providing remedy are incentivized and are not, in practice, punitive. Instead of being rewarded for deal volume, for example, staff should be rewarded for sustainable projects that do not cause E&S harm or that remedy harm when it arises.
Determining remedy is perceived as difficult and time-consuming. It can raise issues of fairness in distribution and require tailoring remedy to what people want and need. Conflict within communities can complicate the remedy process.	● Communities should be central in designing remedial measures; when they are, they often propose concrete, durable, and meaningful actions to remedy harm. Examples of dispute resolution processes where communities have been involved in negotiating remedies in profound ways include: OT-Mongolia CAO case (Agreements including construction of animal laboratory; university scholarships; wells furnished with solar-powered pumps; and compensation packages for households that were physically or economically displaced by the mine); Caracol-Haiti MICI case (Agreement included provisions of land, jobs trainings, and equipment); Dragon Capital-HAGL; Nedbank-AngloGold Ashanti; and Nicaragua Sugar Estate Limited (NSEL) CAO case (Agreement between NSEL and civil society group included provisions relating to improvements in direct medical care and medical facilities for those suffering from Chronic Kidney Disease; the development of income-generation projects for households impacted by the disease; and continued support for independent research). ● DFIs should support efforts of affected people to use remedial processes, including IAMs. This should include providing financial and technical support (such as paying for technical experts to assess E&S problems and recommend remediation/prevention measures), exercising leverage over clients to participate in dispute resolution processes in good faith, and DFI observer status in dispute resolution.
Committing to remedy will require addressing harm that	● DFIs should create an Environmental and Social Legacy Fund to ensure remedy is provided for past

has already occurred. Financing to remedy that harm has not been adequately considered.	harm from DFI projects. ● DFIs should begin by applying a remedy framework to their IAM and management grievance mechanism cases, working with the mechanisms to determine where remedy still needs to be provided.

Annex III: Email to IFC and MIGA Requesting More Information

Gmail

Request for Disclosure of Information related to the Proposed IFC/MIGA Approach to Remedial Action and the Draft Responsible Exit Principles

Margaux Day [redacted] Fri, Mar 17, 2023 at 6:44 PM
To: Accountability Consultation <accountabilityconsultation@worldbankgroup.org>
Cc: [redacted]

Dear IFC and MIGA colleagues,

Following up on our requests during the consultation meetings on February 28 and March 3, I am writing on behalf of a number of civil society representatives to request disclosure of information on the consultation website so that we can more effectively engage in the consultation process on the proposed Approach to Remedial Action and Draft Responsible Exit Principles.

Proposed IFC/MIGA Approach to Remedial Action

1. Please publish the white paper(s) that helped inform the Proposed IFC/MIGA Approach to Remedial Action.
2. If not covered in the white paper(s), please publish what was done to "explore" each of the remedy-related recommendations of the "External Review of IFC/MIGA's E&S Accountability, including the CAO's Role and Effectiveness Report and Recommendations."
3. Please describe what remedy has occurred for IFC/MIGA projects in the past. Questions we are seeking to answer include: When you looked back at how much remedial actions have cost in the past and how IFC paid for them, what did you find? What is an example of IFC contributing to remedy in the past and how did it do so? And what was the reaction to that remedy when you contributed it?
4. The draft Approach referred to "increased litigation risk (under a range of possible legal theories)." What are the legal theories? Please publish those theories on the consultation website.
5. The draft Approach states that "[f]inancing direct contribution to remedial actions gives rise to risks, the most significant of which include: [...] increased costs and decreased competitiveness." Please explain what is meant by "increased costs" and "decreased competitiveness."
6. The Approach sets out "resources IFC dedicates to its E&S risk management and accountability." Please publish an analysis of the effectiveness of the expenditures thus far in preventing, mitigating, and remedying E&S harm.
7. The Approach states that "[c]urrently IFC allocates the amount of $15 million annually to cover legal costs associated with litigation cases." What type of litigation cases is this related to?
8. The Approach refers to a "holistic portfolio wide review (currently underway) of client-supported grievance mechanisms." When will that be made public? Can a summary of the findings thus far be disclosed in the meantime?

Draft Responsible Exit Principles

1. Please share the full draft responsible exit proposal, as the eight slides of the Responsible Exit Principles are not sufficiently specific nor extensive for civil society to provide substantive comments.
2. Regarding the Draft Responsible Exit Principles, please disclose which projects are included in the pilot phase. If the IFC has already exited any of those projects, please report on how the IFC followed the principles.
3. In principle two, the Draft Principles require that projects "[t]ake into account the risk of reprisals against civil society organizations (CSOs) and project-affected communities following exit" but on slide four, IFC states that "[a]fter IFC exits an investment, meaningful monitoring and enforcement of ongoing covenants may not be

available due to the nature of legal remedies for contracts." What are the elements of the contracts that limit IFC's ability to enforce covenants post-exit and how does IFC plan to minimize risks of reprisal with its contractual limitations?

4. Please clarify what is required by "preparing for exit" procedures and which projects will have to comply with preparing for exit.
5. Please clarify the planned involvement of project-affected communities, particularly indigenous and other traditional or ethnic minority communities, in the Responsible Exit procedures and which decisions require consultation or free, prior, and informed consent of project-affected communities.

Disclosure of the above information will greatly assist us in providing the best feedback we can on the Proposed Approach for Remedial Action and the Draft Responsible Exit Principles and would be an important step in making the consultation process more of a dialogue. Thank you sincerely for your consideration.

Margaux Day, Accountability Counsel
Umo Isua-Ikoh, Peace Point Development Foundation (PPDF), Nigeria
Kate Geary, Recourse
Shauna Curphey, Just Ground
Carla García Zendejas, Center for International Environmental Law
David Pred, Inclusive Development International
Amy Ekdawi, Arab Watch Coalition
Christian Donaldson, Oxfam
Rosa Peña, Interamerican Association for Environmental Defense
John Nimly Brownell, Green Advocates International
Katelyn Gallagher, Bank Information Center
Anuradha Munshi, Centre for Financial Accountability

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Request for Disclosure of Information related to the Proposed IFC/MIGA Approach to Remedial Action and the Draft Responsible Exit Principles

Accountability Consultation <accountabilityconsultation@worldbankgroup.org> Tue, Apr 11, 2023 at 2:39 PM

To: Margaux Day [redacted], Accountability Consultation <accountabilityconsultation@worldbankgroup.org>

Cc [redacted]

Thank you for your message and participation in the Consultation on the Proposed IFC/MIGA Approach to Remedial Action.

No additional documentation will be posted at this time as part of the Consultation, aside from the forthcoming summary reports of each Consultation meeting and the final comprehensive report of the entire Consultation. We take note of your request for further information, which we will address in the revision of the Approach paper that will be presented to the Committee on Development Effectiveness (CODE).

Thank you again for your participation.

Annex IV: Practical Solutions that Should be Considered

As we noted above, IFC and MIGA must write a proposal for remedial action that: (1) actually addresses and implements the recommendations of the External Review; (2) commits to contributing financially to remedy when its financing has contributed to harm or when IFC/MIGA cannot exercise leverage over a client and a remedy gap persists; (3) commits to remedying existing environmental and social harm.

Below is a series of practical recommendations that we believe should form an integral part of the revised proposal to prevent harms and ensure remedy where they occur in IFC/MIGA projects. We wish to emphasize that none of these solutions can be used in isolation to achieve effective remedy for communities harmed by development projects. As explained by the External Review and in numerous comments by civil society, an effective system should not only strive to avoid harm, it must also take proactive measures throughout the project cycle to mitigate and resolve issues as they arise, and provide effective remedy when harms nonetheless occur. Such a comprehensive approach requires concerted collaborative efforts inside the institution, including between IFC/MIGA staff and management and CAO when appropriate, with knowledge and support from the Board.

We have organized these recommendations by stage: (1) prevention of harm before it occurs; (2) preparation in high-risk projects to be well-placed to learn about harm early and respond quickly; and (3) response in the form of effective remedy for harm that has occurred. Within each stage, we have identified various barriers and operational challenges that need to be addressed and listed concrete solutions that should be considered in IFC/MIGA's revised proposal.

	Stage	Operational Challenge	Solutions that Should be Considered
1.	Prevention	Various barriers (including client willingness and community capacity) frequently prevent robust community engagement, leading to an inability to appropriately assess broad community support and a failure to incorporate community perspectives into project design and/or E&S plans	● Take steps to ensure complete and consistent implementation of policy requirements regarding broad community support for projects, including not supporting projects unless and until affected communities are genuinely satisfied with proposed E&S measures, including measures to ensure they will derive development benefits. ● Internal incentive and accountability structures at IFC/MIGA revised to reward robust community engagement and outcomes, as well as environmental and social due diligence and supervision throughout the project. ● Technical/legal assistance fund to support community engagement throughout the project, beginning with ESIA and ESMP development until project closure.

	Stage	Operational Challenge	Solutions that Should be Considered
2.	Prevention	Current structure makes some projects with potentially broad/national development benefits attractive, regardless of significant E&S impacts on local communities.	● As part of project due diligence, include an explicit, separate assessment of the benefits and costs to directly affected communities. Do not support projects that place disproportionate burdens on or externalize costs onto affected communities. Must also recognize that human rights impacts cannot be "offset." ● Ensure that internal incentive structures do not penalize managers and staff for not proceeding with investments that have unacceptably high E&S costs. In fact, staff should be rewarded, and IFC/MIGA should establish internal feedback mechanisms to learn from these experiences and share that knowledge among staff.
3.	Prevention	Some projects have already caused significant E&S impacts prior to IFC/MIGA involvement.	● Address pre-existing adverse impacts as part of the development opportunity and the rationale of IFC/MIGA involvement. ● Pre-existing harms should be assessed and remedied as part of the E&S plan and tied to the first disbursement. ● Do not get involved if there is an inability or unwillingness to address serious pre-existing impacts.

	Stage	Operational Challenge	Solutions that Should be Considered
4.	Prevention	Client unwillingness and/or lack of capacity to fully implement E&S plans in a timely and effective manner.	● Require E&S plans to include cost estimates, allocated budgets and realistic timelines. ● Add compliance with Performance Standards and E&S plans, as well as remedy when harm occurs, as covenants in legal agreements. ● Ensure loan disbursements are tied to E&S performance and compliance, including timely and effective implementation of E&S plans and provision of remedy if necessary. ● Provide technical assistance to address client capacity issues, Pair the technical assistance with benchmarks for clients to implement reforms, tying those to disbursements. ● Contractually require FI clients to include compliance with Performance Standards, E&S plans and remedy requirements in their loan covenants, where applicable, for all higher risk sub-projects.

	Stage	Operational Challenge	Solutions that Should be Considered
5.	Prevention	Certain types of projects and/or clients repeatedly and predictably result in the same sorts of adverse E&S impacts.	● Create internal guidance for collecting examples from compliance reviews and making necessary changes to E&S processes, policies and/or internal practices. ● Ensure appropriate risk categorization of projects to require proper due diligence processes and risk assessments. ● Enforce the implementation of IFC/MIGA's exclusion list. ● Require IFC/MIGA management to respond to CAO Advisory Notes that include recommendations to address systemic issues. ● To the extent that repeat problems are not being, or cannot be, effectively redressed and prevented going forward, prohibit financing of those types of projects. ● Review clients' E&S compliance records (including the record of closely related entities, for example, a parent company that will be carrying out project activities) and require provision of remedy as a condition of new support. Require clients to address outstanding grievances before they are eligible for repeat funding. ● Require additional safeguard measures for projects that have already resulted in complaints. ● Create a sanctions regime that would exclude clients involved in severe violations of E&S standards.

	Stage	Operational Challenge	Solutions that Should be Considered
6.	Preparation	IFC/MIGA may not get complete information about adverse E&S impacts in a timely manner	● Expand notification requirements in legal agreements to ensure that clients immediately notify IFC/MIGA about specific types of adverse E&S impacts or incidents. Notification requirements could also include a requirement that the client subsequently, but promptly, disclose a plan for enabling or providing remedy and consult on that plan with affected communities. ● Create stronger reporting requirements for clients' grievance mechanisms, including documentation to demonstrate the satisfaction of the stakeholder/aggrieved party. ● Strengthen requirements for independent auditors to talk to directly affected communities and report back/follow up on community concerns. ● Enforce proper supervision of client's progress against the E&S plans, which should necessarily include engagement with affected communities on an ongoing basis.

	Stage	Operational Challenge	Solutions that Should be Considered
7.	Preparation	Determining what to do when adverse E&S impacts arise can be time consuming, resulting in delays and further harm.	● Require clients to document foreseeable adverse E&S impacts (including likelihood, scale, scope and remediability of potential impacts) and engage external experts to assess the scope and effectiveness of available remedial mechanisms (including insurance and/or any remedial funds in place), and identify and plan for filling any foreseeable remedy gaps. This should occur as part of the normal planning process for every project and should include input from affected communities, as part of the project's stakeholder engagement process. IFC/MIGA should independently assess the adequacy of a project's remedial plans as part of its standard due diligence. ● For specific, severe E&S risks, require clients to identify and be prepared for specific remedial measures in advance through consultation with affected communities.

	Stage	Operational Challenge	Solutions that Should be Considered
8.	Preparation/ Response	Client unwillingness to address adverse E&S impacts.	● Create standard clauses in legal agreements requiring clients to take specific prevention and mitigation measures to address specific severe E&S risks identified through due diligence, should they occur, including agreed processes for enabling or providing remedy. ● Take appropriate steps to ensure enforcement of these contractual requirements. ● Recognize affected communities as third-party beneficiaries able to enforce E&S plans and policy compliance, with an associated right to bring clients (and IFC/MIGA) to binding arbitration where attempts at mediation fail. ● Create appropriate guidelines for responsible exit to ensure that when IFC/MIGA exits projects, clients will meet their E&S obligations and/or there is not a complete loss of leverage over the client: ○ As a prerequisite, steps would already need to be in place to ensure clients have the obligation/resources to address E&S harm. ○ IFC/MIGA should also have a supplemental remedy fund in place to contribute to remedy as appropriate.

	Stage	Operational Challenge	Solutions that Should be Considered
9.	Preparation/ Response	IFC lacks leverage over FI sub-clients, limiting its ability to ensure sub-clients address adverse E&S impacts.	● Apply the remedy framework to financial intermediaries and their sub-projects. ● Require cascading contractual obligations that ensure FI sub-clients adhere to the same standards and have the same remedy obligations as other IFC clients. ● Improve transparency generally around FI lending including greater detail on FI clients' E&S frameworks and detailed capacity building plans.

	Stage	Operational Challenge	Solutions that Should be Considered
10.	Preparation/ Response	Client may lack resources to address adverse E&S impacts	● Prohibit financing undercapitalized subsidiaries/projects in which a parent company uses a subsidiary to insulate itself from E&S risk. Require parent company guarantees or other contingency arrangement. ● Consider some combination of the following to ensure that resources are available to address adverse E&S impacts: ○ Required insurance policies for E&S harm and compliance, issued and payable to the company. ○ Required insurance policies for E&S harm with affected communities as the direct beneficiary. Payout would not go to the client and should not be dependent on showing legal liability. Could be administered by the CAO and/or triggered through arbitration. ○ Escrow funds held by IFC/MIGA (5% for Category C projects, at least 10% for Category A & B, with the ability to require more if warranted by the risk profile of the project). ○ Other types of funds (standing fund, reserve fund, trust fund, contingency fund). ○ Guarantees and/or letters of credit.
11.	Preparation/ Response	Some adverse E&S impacts may not become apparent until after project closure.	● Ensure that contractual requirements related to E&S performance extend for a reasonable period of time beyond project closure. ● Ensure that funding mechanisms are similarly available beyond project closure.

	Stage	Operational Challenge	Solutions that Should be Considered
12.	Response	Client unwillingness or lack of funds to address adverse E&S harm may cause substantial delay of remedy for affected communities, thereby causing additional harm.	● IFC/MIGA should use its remedy fund to ensure timely redress for communities in these circumstances. ● IFC/MIGA should reserve reimbursement rights in its contracts with clients, so that it can seek reimbursement for contributions to remedy made by them on their clients' behalf.
13.	Response	IFC/MIGA lack dedicated funds to contribute to remedy, even when they have contributed to harm.	● Create a remedy fund financed with a set percentage of net revenue (the percentage can be adjusted as needed after the fund has operated for a few years).
14.	Response	Need to identify under what circumstances remedial funds would be accessible.	● Make all funding mechanisms mentioned here accessible through the CAO process and/or through binding arbitration.

	Stage	Operational Challenge	Solutions that Should be Considered
15.	Response	Affected communities may struggle to effectively use the opportunity presented by CAO-facilitated dispute resolution for a variety of reasons, including power imbalances, lack of good faith by IFC/MIGA clients, and ability to "prove" harm or fully engage on technical questions.	● IFC/MIGA should increase involvement in and support of CAO-facilitated dispute resolution, including by: ○ Requiring good faith participation or, at minimum, using maximum leverage to get clients to agree to and engage in good faith in mediation ○ Being observers in the mediation as a default ○ Escalating supervision of issues raised by communities, taking community perspectives and positions into account ○ Providing or paying for technical experts to assess adverse E&S impacts (particularly those about which there are factual disputes) and recommend prevention and remediation measures ○ Providing technical advisors to communities.

	Stage	Operational Challenge	Solutions that Should be Considered
16.	Response	CAO's findings of noncompliance might go unresolved by both clients and IFC/MIGA.	● IFC/MIGA should include remedial actions in Management Action Plans. ○ Remedial actions should be specific, time-bound, and include corresponding budgets and funding. ● Contracts with clients should include requirements to engage with compliance reviews in good faith. Further, contracts with clients should include a requirement to remedy E&S harm and set aside funding in the case of noncompliance by the client. ● If CAO monitoring finds continued noncompliance, IFC/MIGA should escalate prioritization of remedy in that case and utilize a remedy fund to avoid undue delay.

	Stage	Operational Challenge	Solutions that Should be Considered
17.	Response	IFC/MIGA need to address harm already caused by projects.	● Apply the remedy framework to past and ongoing harm. ○ IFC/MIGA, in collaboration with CAO, should apply its remedy framework to all existing CAO cases that have resulted in outcomes to determine which still require remedy (as of March 2022, that # was 84 cases). IFC/MIGA should particularly focus on cases in monitoring (22 cases as of March 2022) and cases closed within 5 years (16 cases related to 13 projects as of March 2022). ○ Further, the remedy framework should apply to all cases pending outcomes (as of December 2021, at most 36 cases, related to 29 projects). ● Create an E&S Legacy Fund to ensure remedy is provided for past harm.