



## **Submission to the Business and Human Rights Working Group for its report on development finance institutions and human rights**

**March 2023**

We appreciate the Working Group's invitation to provide input on Development Finance Institutions (DFIs) and human rights.

EarthRights International is a non-governmental organization with offices in the United States, the Amazon region, and Southeast Asia, that holds corporations and governments accountable for human rights violations and environmental harms, through litigation and legal advocacy. As part of this work, EarthRights has represented communities harmed by DFI-financed projects in seeking remedies, including in *Jam v. International Finance Corporation*, one of the first ever lawsuits by communities against such an entity.<sup>1</sup>

Our experience confirms what others will undoubtedly articulate: that most DFIs view themselves as above the law and they act like it. They too often do not take the steps they can and should to avoid foreseeable harm that their financing causes or contributes to, and when the very harms they knew were likely to result come to pass, they deny communities remedies at virtually every turn and at seemingly any cost. This glaring remedy gap is inconsistent with international law and contrary to DFIs' development mission. It therefore undermines their effectiveness, their credibility, and their legitimacy.

We note the Working Group's primary focus here is not on multilateral development banks. While we focus primarily on our experience, and the experience of our clients, specifically with the International Finance Corporation (IFC), the private lending arm of the World Bank Group, we do so because it illustrates problems and lessons that are broadly applicable to a wide range of DFIs. Particular attention to the IFC is also warranted given that national, regional, and sub-regional DFIs, as well as private banks, often adopt the IFC's policies and standards, and entities like OHCHR use IFC policies as a benchmark in evaluating other DFIs' policies.<sup>2</sup> IFC's approach to accountability and remedy and treatment of its own standards have far-reaching impacts on the conduct of other DFIs and industry norms.

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<sup>1</sup> Jam, et. al., v. Int'l Fin. Corp., <https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/>). See also Doe et. al v. Int'l Fin. Corp., <https://earthrights.org/case/juana-doe-et-al-v-ifc/>.

<sup>2</sup> See e.g. OHCHR, Comments on the IFC/MIGA Independent Accountability Mechanism Policy for the Office of the Compliance Advisor Ombudsman (CAO) (1 April consultation draft) (May 16, 2021) (recognizing IFC as "a global standard-setter" and "the leading role of CAO in the field of accountability"); OHCHR, Update of the African Development Bank's Integrated Safeguard System: Comments and recommendations of the UN Human Rights Office (May 17, 2022) (making frequent reference to IFC standards and policies to evaluate the relative strength of proposed AfDB policies); IFC, Equator Principles Financial Institutions [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions) ("IFC's Performance Standards ...have become globally recognized good practice in dealing with environmental and social risk management. . . . More than

**Southeast Asia Office**  
PO Box 123  
Chiang Mai University  
Chiang Mai 50202 Thailand  
+66-81-672-3095  
[infoasia@earthrights.org](mailto:infoasia@earthrights.org)

**Amazon Office**  
Av. Jorge Basadre No. 489  
Departamento 401  
San Isidro, Lima, Peru  
+51-1-359-9721  
[infoperu@earthrights.org](mailto:infoperu@earthrights.org)

**US Office**  
1612 K Street, NW, Suite 800  
Washington, DC 20006  
Tel: +1 (202) 466-5188  
Fax: +1 (202) 466-5189  
[infousa@earthrights.org](mailto:infousa@earthrights.org)

## I. The Tata Mundra Project and the long struggle for remedy

The experience of Indian communities living in the shadow of the disastrous IFC-funded Tata Mundra coal-fired power plant in Gujarat, India is illustrative of how the costs of “development” too often fall hardest on the poorest and most vulnerable. It also highlights the remedy gap; after more than a decade fighting for remedies, the communities are still waiting.

IFC’s stated goals, like those of many DFIs, are to end poverty and boost shared prosperity, to “carry out investment and advisory activities with the intent to ‘do no harm’ to people and the environment . . . and to achieve positive development outcomes.” But the Tata Mundra project has left the fishing and farming communities living near the plant far worse off; it has destroyed the local environment on which fishing and farming families rely and threatens human health.<sup>3</sup>

The IFC knew from the outset that the project would have “irreversible or unprecedented” environmental and social impacts if sufficient precautions were not taken to address critical issues, including the selection of an appropriate cooling system, impacts on the marine environment and fish, air quality impacts, and pollution control measures, among others. Yet IFC approved the keystone financing enabling construction without taking steps to prevent such harms. When the very harms IFC predicted in fact occurred, IFC refused to take any responsibility, let alone any remedial action.

The affected communities sought relief from the Compliance Advisor Ombudsman (CAO). In 2013, the CAO issued a scathing report finding that IFC had failed to comply with its own standards and policies at virtually every stage of the project, from consultations and due diligence through supervision of the project.<sup>4</sup> The CAO noted that these failures were at odds with IFC’s stated justification for involvement in the project and it called for IFC to take remedial action. IFC refused. And because the CAO has no power to compel IFC action of any kind, it could do nothing except note in its subsequent monitoring reports that IFC remained out of compliance, and the project-affected communities remained without a remedy.

With no other options, in 2015 the communities sued the IFC in federal court in Washington D.C., where IFC is headquartered. Instead of defending itself on the merits, IFC advanced numerous different arguments as to why the plaintiffs should be barred from accessing the court at all, and why IFC could not be held accountable in any circumstances, no matter how much harm it may cause.

First, IFC asserted radical claims of “absolute” immunity from suit in U.S. courts. The case went all the way up to the U.S. Supreme Court, which in 2019, expressly rejected such sweeping immunity, holding instead that IFC could be sued under the same rules that applied to suits against foreign governments. The IFC then advanced another new and expansive interpretation of how *those* rules should apply to IFC so as

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130 banks and financial institutions have voluntarily adopted the Equator Principles, which are based on IFC’s Performance Standards” and “32 export credit agencies of the OECD countries benchmark private sector projects” against them”).

<sup>3</sup> An extensive overview of the harms caused by the project, and the extent to which IFC specifically predicted such harm, is provided in the complaint, available at: <https://earthrights.org/wp-content/uploads/District-Court-Proposed-Amended-Complaint-March-2020.pdf>

<sup>4</sup> CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India (Aug. 22, 2013), <https://www.cao-ombudsman.org/sites/default/files/downloads/CAOAuditReportC-I-R6-Y12-F160.pdf>. The Asian Development Bank’s Compliance Review Panel issued similar noncompliance findings. Asian Development Bank, Lessons Learned from Compliance Reviews of the Asian Development Bank (2004-2020): Mundra Ultra Mega Power Project in India (2021), <https://www.adb.org/sites/default/files/publication/747376/ocrp-lessons-india-mundra-ultra-mega-power-project.pdf>.

to bar communities any access to courts. Throughout the litigation, IFC also repeatedly asserted that it is in no way bound by its environmental and social commitments, that communities have no right to hold IFC accountable for breaking its promises or causing harm, and even that remedying the suffering of communities caused by IFC conduct was simply not in its interest. Again, the communities were denied any remedy - nor even access to a forum to seek one.

Last week, the IFC again advanced extreme positions as to why it would not provide remedies. It released its draft “Approach to Remedial Action,” which not only disclaims *any* obligation to provide remedies whatsoever, but would expressly exclude the *Jam* communities - and other communities that have *already* been harmed by IFC-projects - from any remedial action.

## **II. DFIs’ Responsibility to Respect and Protect Human Rights**

DFIs are not above the law: they have a duty to prevent harm, and where their actions—or omissions—cause or contribute to harm, they must provide a remedy.<sup>5</sup> Where a DFI knows, or should have known, that harm would result from its conduct—as with the Tata Mundra project, where IFC specifically predicted how the communities would be harmed if it provided the necessary financing for the project to go forward—and it does not take action to prevent it, they have a legal responsibility to provide remedies. Indeed, DFIs are not a typical arms-length lender. They often have substantially more legal authority over and involvement in projects from the outset, and if anything, a heightened responsibility to prevent harm and where harm occurs, to remedy such harm.

IFC, like many other DFIs, often frames compliance and remedy as solely the responsibility of the borrower,<sup>6</sup> but that fundamentally misunderstands well established legal principles at both the international and domestic level. That borrowers *also* have a legal duty to respect human rights and to prevent and to remedy harm caused by their conduct, in no way diminishes the lender’s own obligations where it causes or contributes to harm through its own acts or omission.

### **A. DFIs act as though they are above the law**

The IFC’s sweeping assertions of immunity in the *Jam* litigation made clear that it views itself as above the law—that it cannot be held responsible no matter how much harm it causes. That is wrong as a matter of both international and domestic law, but it is also revealing as to how the IFC conducts itself and how it makes decisions. Persons and entities who believe that they are above the law, act like it. There is little incentive to do robust, thorough due diligence when there is no concern about the consequences of failing to do so. Nor does an institution feel compelled to live up to any of its promises or commitments if it knows those harmed will have no way of holding it responsible.

Like many DFIs, before IFC can go forward with a “high risk” project, such as the Tata Mundra project, it must ensure the project has “broad community support.” This inevitably requires promises to communities as to how the project will benefit them and measures that will be taken to ensure they are not harmed. Indeed, IFC regularly touts its commitment to “do no harm” to people and the environment. It emphasizes how essential its environmental and social safeguards and commitments are to the institution and fulfillment

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<sup>5</sup> 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. DFIs have the same human rights responsibilities as businesses, and the UN Guiding Principles on Business and Human Rights apply equally to DFIs as to any other business entity.

<sup>6</sup> See e.g. IFC, IFC/MIGA Approach to Remedial Action at 5 (Oct. 31, 2022); OHCHR, Update of the African Development Bank’s Integrated Safeguard System: Comments and recommendations of the UN Human Rights Office ¶¶ 60-61 (May 17, 2022).

of its mandate. But IFC made clear in the *Jam* litigation that it does not actually see these commitments as part of its mission. IFC can go back on its word, break its commitments, and communities—the people those safeguards and commitments are meant to protect—have no recourse.

Indeed, contrary to what it says publicly and to its Board, the IFC told the court that its Performance Standards and policies are neither binding nor “essential to IFC’s chartered objectives.”<sup>7</sup>

The environmental and social standards that DFIs put in place and incorporate into loan agreements purport to protect people living near such projects. But in the *Jam* litigation, IFC expressly disavowed any intent to protect or benefit such persons; IFC referred to project-affected communities as “tenuously related parties” with whom it has “no relationship” and thus owes no duty.<sup>8</sup> Project-affected communities are the most vulnerable stakeholders with respect to DFI-funded projects, yet they are the only group that lacks recourse against DFIs when projects cause harm.<sup>9</sup>

These standards that IFC so vehemently disavowed during litigation are the same standards that DFIs around the world adopt and claim to follow. When the very entity setting these standards makes clear that they are meaningless, how can communities have faith that other DFIs will treat these standards any differently? IFC’s brazen rejection of any accountability, including to its own policies and standards, sends a clear and dangerous message to all DFIs: they should promulgate environmental and social standards in order to secure the trust of communities and donors, but they should not fear that they will ever be held accountable to the standards they set because they are above the law.

**B. DFIs have significant legal authority and leverage over borrowers to prevent harm, and remedy harm, they simply choose not to use it.**

DFIs dictate the terms and conditions on which they will provide financing for development projects. This typically gives them significant authority over the project—and the borrower—throughout the full life-cycle of the loan. For example, IFC loan agreements give IFC the authority to change the borrower’s board of directors and senior management, the right to perform an independent audit of environmental and social compliance at the borrower’s expense, and the power to compel corrective action, with failure to comply constituting grounds for default.<sup>10</sup> The standard terms condition each loan disbursement on compliance with IFC’s Performance Standards and other specific environmental and social environmental and social measures,<sup>11</sup> and include both affirmative and negative covenants regarding environmental and social protections.<sup>12</sup> The loan agreements provide IFC with numerous different legal mechanisms through which it can enforce those provisions, and even compel the borrower to take remedial action, including after repayment.<sup>13</sup> But IFC made clear in the *Jam* litigation that a borrower’s non-compliance, including when it

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<sup>7</sup> Defendant’s Reply in Support of Motion to Dismiss at 9, *Jam v. Int’l Fin. Corp.*, 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612) <https://earthrights.org/wp-content/uploads/Doc.-23-IFC-MTD-Reply-Memo-of-Law.pdf>

<sup>8</sup> Defendant’s Motion to Dismiss at 14, *Jam v. Int’l Fin. Corp.*, 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612) [https://earthrights.org/wp-content/uploads/ifc\\_motion\\_to\\_dismiss-1.pdf](https://earthrights.org/wp-content/uploads/ifc_motion_to_dismiss-1.pdf)

<sup>9</sup> Other constituencies, creditors, suppliers, employees, have legal rights guaranteed through their contracts.

<sup>10</sup> 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>.

<sup>11</sup> Id. §§ 4.1-4.2.

<sup>12</sup> Id. §§ 5.1-5.2

<sup>13</sup> The contracts also include provisions requiring the borrower to indemnify IFC for costs arising from the borrower’s failure to comply with environmental and social requirements that survive repayment. Id. §§ 8.4-8.5.

results in harm to third-parties, gives IFC “various contractual enforcement options, but does not require IFC to do anything in response.”<sup>14</sup>

If project-affected communities lack any means of enforcing the environmental and social commitments meant to protect them, all they can hope is that a borrower will not cause harm, or the DFI will elect to use its leverage. But a search for examples of times that DFIs have exercised such power for the benefit of communities comes up empty. DFIs have the responsibility to act to prevent harm and to ensure remedies where harm occurs, and they have the power to do so, they simply choose not to. If DFIs are willing to harm the poorest, those they are supposed to help, without providing any remedy, exactly what purpose do DFIs serve?

### **III. Access to Remedy**

The right to an effective remedy is a principle of customary international law and is a legally binding obligation on all subjects of international law, including international financial institutions.<sup>15</sup> Remedy is a common thread running through all three pillars of the Guiding Principles, and those harmed by DFI-funded projects have a right to a remedy.<sup>16</sup>

#### **A. DFIs actively seek to bar access to courts.**

Substantial barriers exist to communities obtaining remedies in courts, and some DFIs actively seek to increase such barriers, as IFC has done in advancing sweeping claims to jurisdictional immunity to insulate itself entirely from scrutiny.<sup>17</sup>

In the *Jam* case, it took four years before the United States Supreme Court finally rejected the IFC’s argument that it was “absolutely immune” from suit, and held that international organizations are subject to suit for the same categories of legal actions as foreign sovereigns, including for their commercial activities.<sup>18</sup> But the lower courts ultimately found the *Jam* case did not fit within the commercial activity exception, after more than seven years of litigation. It took seven years for the courts to decide the plaintiffs could not even start their case.

That decision in *Jam* was based on a problematic reading of both the law and the facts of that case, but it does not mean a different case would suffer the same fate. Indeed, subsequent U.S. cases indicate that cases against international organizations like IFC with similar facts could come out differently.<sup>19</sup> It is also worth

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<sup>14</sup> Defendant’s Renewed Motion to Dismiss at 17, *Jam v. Int’l Fin. Corp.*, 442 F.Supp. 3d 162 (D.D.C. 2020) (No.1:15-cv-00612) <https://earthrights.org/wp-content/uploads/District-Court-IFCs-Renewed-Motion-to-Dismiss-June-2019.pdf>

<sup>15</sup> See, e.g. Brief of Amicus Curiae Professor Daniel Bradlow in Support of Plaintiffs-Appellants at 19, *Jam v. Int’l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017), [https://earthrights.org/wp-content/uploads/2016-08-17\\_amicus\\_for\\_appellant\\_dckt\\_.pdf](https://earthrights.org/wp-content/uploads/2016-08-17_amicus_for_appellant_dckt_.pdf).

<sup>16</sup> UN General Assembly, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/72/162, at 17 (July 18, 2017).

<sup>17</sup> See, e.g. Brief of Amicus Curiae Professor Daniel Bradlow in Support of Plaintiffs-Appellants at 19, *Jam v. Int’l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017), [https://earthrights.org/wp-content/uploads/2016-08-17\\_amicus\\_for\\_appellant\\_dckt\\_.pdf](https://earthrights.org/wp-content/uploads/2016-08-17_amicus_for_appellant_dckt_.pdf).

(International organizations have sought to “convert[ ] the immunity that was primarily intended to shield them from interference by member states into a sword with which they can ward off attempts by non-state actors to hold them accountable for their actions.”)

<sup>18</sup> *Jam v. Int’l Fin. Corp.*, 139 S.Ct. 759, 765 (2019).

<sup>19</sup> See, e.g. *Rodriguez v. Pan Am. Health Org.*, 502 F. Supp. 3d 200 (D.D.C. 2020), aff’d, 29 F.4th 706 (D.C. Cir. 2022) (holding that the Pan American Health Organization was not immune from claims that it had facilitated a program that trafficked Cuban physicians to Brazil). See also Michelle Harrison and Lindsay Bailey, Ending

noting that courts outside the United States have different legal regimes and standards for immunity. In particular, a number of jurisdictions have recognized that granting immunity is inappropriate in certain instances, such as where there is no sufficient alternative dispute settlement mechanism in place.<sup>20</sup> It is likely DFIs like IFC will see lawsuits in such countries, and it is likely that at least some suits will overcome immunity, particularly if DFIs like the IFC refuse to actually remedy the harm they cause. But there is no question that countering these sweeping immunity arguments in court against these powerful institutions and their expensive law firms remains an enormous barrier.

DFIs point to communities' ability to sue the borrower as a defense of DFI immunity, but suits against borrowers are often ineffective or impossible due to inadequate legal standards, host government support for the project, or retaliation concerns.<sup>21</sup> Regardless, such a suit does not address the DFI's conduct. Financing a project when rights violations are foreseeable contributes to adverse human rights impacts, and is a separately actionable offense from the borrower's misconduct.<sup>22</sup> Further, many jurisdictions recognize liability of multiple parties as joint tortfeasors, and joint liability is also recognized under international law,<sup>23</sup> so where both the DFI and the borrower are jointly responsible, they should be held jointly liable.

These immunity claims are not limited to traditional MDBs, such as the IFC. Regional DFIs advance such claims as well,<sup>24</sup> and suits against national DFIs in their home country face issues of sovereign immunity. Even where jurisdictional immunity does not bar access to courts, communities still face numerous, often insurmountable, barriers to obtaining remedies from powerful companies and institutions in courts. OHCHR has previously noted persistent problems, common to many jurisdictions, which inhibit communities from effectively obtaining remedial action through judicial systems.<sup>25</sup> All of this has the effect of insulating DFIs from judicial scrutiny while denying communities remedies for the harm they have suffered.

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"absolute immunity" for the International Finance Corporation: The legacy of *Jam v. IFC* (July 21, 2022) <https://www.brettonwoodsproject.org/2022/07/ending-absolute-immunity-for-the-international-finance-corporation-the-legacy-of-jam-v-ifc/>

<sup>20</sup> See, e.g. *CSJN, Cabrera, Washington J. E. c. Comisión Técnica Mixta de Salto Grande*, Fallos 305:2150, de 5/12/1983 (Argentina); *Western European Union v. Siedler*, Appeal judgment, Cass No S 04 0129 F; ILDC 1625 (BE 2009), 21 Dec. 2009 (Belgium); Tribunal fédéral, IIe Cour de droit civil, Sept. 20, 2012, Ruling no. 5A 106/2012 (Switzerland). See also *African Development Bank v. TN* [2018] 3 All SA 646 (GP); 2019 (s) SA 437 (GP (15 June 2018) (South Africa). See also *Beer and Regan v. Germany*, App. No. 28934/94, 33 E.H.R.R. 3 (2001); *Waite and Kennedy v. Germany*, App. No. 26083/94, 30 E.H.R.R. 261 (2000).

<sup>21</sup> For example, communities impacted by the Tata Mundra project sought relief through available mechanisms in India, but these mechanisms failed to address the harm or provide a remedy. It came as no surprise that the *Jam* plaintiffs were unlikely to receive a fair shake in India against Tata, one of the country's most powerful and politically connected conglomerates.

<sup>22</sup> See e.g. OECD, Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises 46 (2019).

<sup>23</sup> See e.g. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Judgment, 1992 I.C.J. Rep. 240, ¶ 48 (June 26); *Corfu Channel (U.K. of Gr. Brit. & N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, at 22-23, 36 (Apr. 9).

<sup>24</sup> See e.g. *African Development Bank v. TN* [2018] 3 All SA 646 (GP); 2019 (s) SA 437 (GP (15 June 2018) (South Africa); *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation [Cass.], soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (France).

<sup>25</sup> See Human Rights Council, Report of the United Nations High Commissioner for Human Rights: Improving accountability and access to remedy for victims of business-related human rights abuse, A/HRC/32/19 ¶ 4 (May 10, 2016); see also Office of the United Nations High Commissioner for Human Rights, Remedy in Development Finance: Guidance and Practice at 20 (2022) (noting the numerous hurdles, in addition to immunity, that litigants in cases against DFIs face prior to obtaining relief).

### **B. Communities harmed by DFIs have no alternative avenue for seeking remedies.**

Without access to courts, there is no mechanism for project-affected communities to turn to for a remedy that is consistent with international law.<sup>26</sup> While some DFIs have independent accountability mechanisms (IAMs), none have been given any enforcement authority or the ability to compel the DFI to provide remedial action.<sup>27</sup>

In the *Jam* litigation, IFC argued that there was no need for the communities to have access to court because the CAO was an adequate alternative. This argument was absurd. The CAO—by design—lacks any authority whatsoever to provide a remedy or compel IFC to provide a remedy of any kind.<sup>28</sup> Moreover, the communities had already gone to the CAO, the CAO had sided with them and expressly called for IFC to take remedial action, and IFC had simply refused. But IFC told the court that the CAO’s mere existence, no matter how “fundamentally flawed” it was, was enough of an “alternative” to justify complete immunity.<sup>29</sup>

As noted above, some jurisdictions have made clear that immunity will be denied where there is no alternative means of obtaining a meaningful remedy. Neither the CAO nor any other IAM currently comes close. Indeed the inadequacy of the CAO and other IAMs is particularly obvious when compared to the mechanisms that DFIs have established for other stakeholders. In particular, it is worth comparing the CAO to the World Bank Group Administrative Tribunal, an independent entity (as opposed to an office within the institution) available to WBG employees, which has independent judges who issue decisions that are final, binding upon the parties, and can include ordering compensation.<sup>30</sup> By contrast, in IFC’s own words, the CAO, the only forum it has made available to communities, “has no authority with respect to judicial processes,” “is neither a court nor a legal enforcement mechanism,” “has no authority to disperse awards or grant restitution,” and is “not a claims tribunal.”<sup>31</sup>

It is unsurprising that a mechanism IFC can entirely ignore has, according to the IFC’s external review, resulted in action in response to CAO noncompliance findings that brought the project into compliance with IFC policies in only 13% of cases.<sup>32</sup> If CAO is largely unsuccessful in getting IFC to comply with its own policies, there is clearly no hope that CAO will ever secure a remedy for project-affected communities. In fact, we are not aware of any instances in which the IFC has provided a remedy to the communities it has harmed.

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<sup>26</sup> They cannot turn to the ICJ or international treaty bodies, and their own governments are unlikely to take up their cases because the government is often supporting the project that caused harm. Brief of Amicus Curiae Professor Daniel Bradlow in Support of Plaintiffs-Appellants at 19, *Jam v. Int’l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017), [https://earthrights.org/wp-content/uploads/2016-08-17\\_amicus\\_for\\_appellant\\_dckt\\_.pdf](https://earthrights.org/wp-content/uploads/2016-08-17_amicus_for_appellant_dckt_.pdf).

<sup>27</sup> World Bank, External Review of IFC/ MIGA Environmental & Social (E&S) Accountability, Including CAO’s Role and Effectiveness, (June 9, 2020).

<sup>28</sup> Defendant’s Motion to Dismiss at 14, *Jam v. Int’l Fin. Corp.*, 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612); Defendant’s Renewed Motion to Dismiss at 8, *Jam v. Int’l Fin. Corp.*, 442 F.Supp. 3d 162 (D.D.C. 2020) (No.1:15-cv-00612).

<sup>29</sup> Reply in Support of Defendant’s Motion to Dismiss at 6, *Jam v. Int’l Fin. Corp.*, 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612) <https://earthrights.org/wp-content/uploads/Doc.-23-IFC-MTD-Reply-Memo-of-Law.pdf>

<sup>30</sup> The World Bank Administrative Tribunal Statute and Rules arts. 11-12 (April 2020), <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/documents/WBAT-Statute-Rules.pdf>.

<sup>31</sup> Defendant’s Renewed Motion to Dismiss at 8, *Jam v. Int’l Fin. Corp.*, 442 F.Supp. 3d 162 (D.D.C. 2020) (No.1:15-cv-00612).

<sup>32</sup> External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness Report and Recommendations, June 2020, ¶ 58.

### **C. Lack of accountability breeds bad decision making and undermines effective development outcomes.**

DFIs have tried to create a situation of complete immunity from any scrutiny—by either courts or their own IAMs—and this accountability vacuum breeds poor decision making and bad behavior. Entities that think they are above the law act like it. The Working Group notes the “sustained attention” that multilateral DFIs have received in recent years, but that attention has not resulted in any tangible improvement in terms of access to remedy.

It was only in response to increased scrutiny that IOs established tribunals to hear employee claims,<sup>33</sup> and more recently, it was “concern about increasing litigation risks faced by IFC” that was the impetus for IFC’s commission of an external review and subsequent reforms.<sup>34</sup> The gross inadequacy of these recent IFC reforms,<sup>35</sup> and their anticipated influence on accountability and access to remedy across all DFIs,<sup>36</sup> underscores the need for more extensive scrutiny of DFIs.

The current incentive structure at DFIs like IFC encourages staff to push money out the door quickly and in large volumes, rather than achieve positive development outcomes. With little emphasis placed on the actual development outcome of a project—including seemingly any consideration of adverse impacts resulting from the project—there is little incentive for DFIs to conduct proper due diligence, respect and protect human rights, improve IAMs, or otherwise ensure access to remedy. IFC, for example, is failing to learn from CAO findings and recommendations. This, along with its failure to provide remedy to project-affected communities, is undermining IFC’s legitimacy and credibility, and it is leading to poor development outcomes.

## **IV. State Responsibility to Ensure Access to Remedy**

States have a duty to ensure access to effective remedies for persons injured by DFIs’ conduct, and that includes access to effective judicial mechanisms.<sup>37</sup> Ensuring the availability of fair, independent judicial mechanisms for claims against the borrower is important, but that alone is insufficient for a state to meet its legal obligations. In permitting DFIs’ sweeping immunity claims, whether through legislative, executive or judicial acts, states are failing in their duty, especially in the absence of any meaningful alternative avenue to seek remedy.

States also have duties based on their involvement in DFIs, whether it is as a member state or as the government of a national DFI. This includes the responsibility to use its role to hold the DFI accountable and compel remedial action. In many instances, it is clear that management of DFIs are no longer remaining true to the mission of the entity. States in their role on Boards of DFIs and as national governments with

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<sup>33</sup> The World Bank Administrative Tribunal Statute and Rules arts. 1-2 (April 2020), <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/documents/WBAT-Statute-Rules.pdf>.

<sup>34</sup> External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness Report and Recommendations ¶ 15 (June 2020).

<sup>35</sup> EarthRights International, IFC Draft “Remedial Approach” Evades Accountability, Fails to Address Legacy Harms (Feb. 22, 2023), [https://earthrights.org/media\\_release/ifc-draft-remedial-approach-evades-accountability-fails-to-address-legacy-harms/](https://earthrights.org/media_release/ifc-draft-remedial-approach-evades-accountability-fails-to-address-legacy-harms/); Joint CSO Statement Calls on IFC and MIGA to Strengthen its New Approach to Remedial Action Policy (Feb. 22, 2023), <https://www.ciel.org/news/joint-cso-statement-calls-on-ifc-and-miga-to-strengthen-its-new-approach-to-remedial-action-policy/>.

<sup>36</sup> IFC will be meeting with other DFIs as part of their consultation process, and other DFIs will undoubtedly follow IFC’s lead in approaching human rights compliance and remedy.

<sup>37</sup> UN Guiding Principles on Business and Human Rights, Guiding Principle 26, *Commentary*.

oversight of national DFIs must take action to hold such entities accountable and course correct. With respect to multilateral development banks, this should include waiving immunity on behalf of the entity where harm has occurred to ensure management does not abuse the law on immunity to avoid remedial action.

Through their actions and omissions, states have allowed DFIs to operate as if they are above the law. As such, meaningful DFI accountability and access to remedy requires states to live up to their own obligations, to enforce legal standards, scrutinize DFI conduct more closely, and provide affected communities access to judicial mechanisms.

We would be happy to be a resource as your work continues.

Respectfully,

Michelle C. Harrison  
*Deputy General Counsel*  
EarthRights International

Shannon Marcoux  
*Bertha Justice Fellow*  
EarthRights International