EARTHRIGHTS INTERNATIONAL

Submission of EarthRights International on the Draft
IFC /MIGA Approach to Remedial Action

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 IFC-financed projects, including in *Jam v. International Finance Corporation* and *Doe v. International Finance Corporation*. We submit this comment on IFC/MIGA's Draft Approach to Remedial Action ("Draft Approach") based on that experience and our broader expertise on remedy, legal liability, human rights, and sovereign immunity. While our focus is on the Draft Approach, we note that much of this submission is highly relevant to the "Draft IFC Responsible Exit Principles" as well.

I. Introduction

IFC/MIGA's Draft Approach does not address the accountability crisis that led to this effort in the first place and rejects most of the recommendations that could have resulted in meaningful change. It proposes nothing new, commits to nothing, and will have no impact on access to remedy. That is obviously by design. The strategy behind the Draft Approach is a mistake. If adopted, it would harm IFC/MIGA's institutional interests, undermine its mandate, and damage its reputation. It should be reconsidered.

The process leading to the Draft Approach was spurred by a recognition that IFC/MIGA lack accountability and that communities that host IFC/MIGA projects are too often left worse off, and without any remedy when they are harmed. Instead of attempting to seriously address these problems, however, IFC/MIGA largely restate existing policies and suggest (but do not commit) to minor "enhancements." There is virtually nothing in the Draft Approach that would ensure that injured communities have access to remedy and thus that positive development outcomes extend to the communities that host their projects. IFC/MIGA suggest a multiyear "Pilot Period," in which they will "explore" and "assess" various things they should already know. This is a transparent ploy to build in years of delay, kicking the accountability can down the road. Again.

IFC/MIGA justify inaction in the name of minimizing litigation risk and legal exposure, but the Draft Approach would just further entrench the practices that expose the institution to legal risk. Indeed, the Draft Approach shows that IFC Management has learned the wrong lessons from the *Jam v. International Finance Corp*. litigation, in which the U.S. Supreme Court held that IFC is not absolutely immune from suit. The *Jam* case exposed the scale of the accountability problem at IFC. IFC had numerous opportunities to prevent, mitigate, and remedy harm, which would have eliminated any reason for it to be sued. The lesson IFC should have learned from the *Jam* case is that robust, meaningful, and effective mechanisms to prevent and mitigate harm and trusted, legitimate mechanisms to access remedy - from both the borrower and IFC – is the best way to both prevent future litigation and to enhance positive development outcomes. By ignoring *why* IFC was sued, the Draft Approach would guarantee that IFC will face future lawsuits.

Worse, the Draft Approach reflects a pervasive, entrenched culture problem at both institutions, but especially IFC, confirming that management simply does not view its development mandate as central to its work, and considers itself accountable to no one.

IFC/MIGA do not even acknowledge past cases of harm let alone propose any means of addressing such harm. For development institutions like IFC/MIGA, "remedy is the functional corollary of the 'do no harm' mandate[ ]," "going to the heart of their mission[ ]," and "[t]he requirement to 'do no harm' does not stop at prevention, but also logically requires remedying any harms done."[1] Getting an "approach" to remedy right has to start with addressing the legacy harms that got IFC/MIGA here in the first place. For all of these reasons, the Draft Approach would significantly undermine IFC's mission, increase it litigation risks, and worsen the damage IFC has already done to its reputation and credibility as a development institution.

II. The Tata Mundra Project, *Jam v. IFC*, and the context in which IFC/MIGA are approaching the question of remedy.

The impetus for IFC/MIGA drafting an "Approach to Remedial Action" was, in large part, IFC's mishandling of the Tata Mundra Project. As a result of the *Jam v. IFC* litigation, the crisis of accountability at IFC gained additional international attention and broader scrutiny, as did the clash between IFC's assertions of immunity on the one hand, and on the other, its role in harming communities like those near the Tata Mundra Project and the need for remedy.[2] That prompted the Boards of IFC and MIGA to request an "External Review of IFC's/MIGA's Environmental and Social Accountability including the CAO's Effectiveness" in 2019. The Review Team issued its report in 2020 with numerous important recommendations for IFC/MIGA to address its accountability problem, including to create and implement a framework for remedial action.

The Tata Mundra Project is thus a significant reason why this process is happening at all. IFC cannot chart a new path forward without remedying the harm that led to this process, that is, by providing some redress to the communities living in the shadow of the Tata Mundra Plant. These communities' experience is emblematic of the central accountability problems plaguing IFC and no one will take IFC's claim to be addressing remedial action seriously until it does right by the Tata Mundra Project's neighbors.

The Tata Mundra case also shows why the Draft Approach would fail to result in meaningful change. It is critical to get straight what led to that lawsuit and what it reveals to be the root problems that act as barriers to remedy, as the Draft Approach fails to engage with this issue in a genuine way.

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[1] OHCHR, Remedy in Development Finance: Guidance and Practice 14 (2022), https://www.ohchr.org/sites/default/files/2022-03/Remedy-in-Development.pdf.

[2] *See, e.g.* External Review of IFC's/MIGA's Environmental and Social Accountability including the CAO's Effectiveness Review Report ¶ 14 (2020) (explaining the "context" for the External Review includes "questions about the E&S performance of IFC/MIGA and its clients and concerns about CAO Compliance cases and insufficient IFC follow-up actions" and that "The recent controversy over IFC's investment in the Tata Mundra power plant in India, which triggered both a CAO compliance investigation and the *Jam v. IFC* litigation in the US courts, has intensified these concerns."); *id.* ¶ 312 ("The lack of IFC responsiveness to support remedial actions was also prominently highlighted in the *Jam v. IFC* case, on which the US Supreme Court made a ruling.").

A. IFC had numerous opportunities to prevent, mitigate, and remedy harm but it refused.

IFC knew the Tata Mundra Project would substantially harm the environment and local communities if sufficient steps were not taken to address critical issues, which it specified in great detail. IFC also identified "improper mitigation or insufficient community engagement" as having the potential to trigger "unacceptable environmental impacts."[3] The specific issues IFC flagged at the outset were precisely those that then devastated the lives and livelihoods of local communities and their health. The harms were not only foreseeable, they were accurately predicted by IFC.

Among other things, the project is a stark example of how a failure to effectively consult with and account for host communities from the beginning - and an unwillingness to course correct - led to cascading failures to identify, prevent, and mitigate impacts. These early failures compounded later shortcomings in the project, particularly with respect to supervision and monitoring. IFC continued to maintain that the communities were not being harmed, because they were not identified by the borrower in initial studies as project-affected – even when the design of the project changed, without additional studies – and because it lacked baseline information against which to compare the mounting impacts on the local community. This in turn was made worse by its ignoring these communities when they repeatedly sounded the alarm.

IFC had numerous legal and other tools available to compel compliance with the environmental and social conditions of the loan agreement and to protect local people, to prevent and mitigate further harm, and to remedy harm that had already occurred. The loan agreement gave IFC substantial power and authority over the project and its construction and operation at every stage. As is addressed further below (see infra Section V.C.3), this included substantial control over design and construction, the power to withhold disbursements based on noncompliance with environmental and social conditions, the power to audit environmental and social compliance, and the power to compel the borrower to remedy harm, among others. These obligations survive repayment of the loan. Despite worsening conditions, IFC continued to make disbursements without enforcing the conditions and without steps to prevent further harm.

The communities filed a complaint with the CAO in 2011 raising in detail the impacts they were already experiencing and concerns about future injuries.[4] At that point, IFC could have addressed harm before construction was complete and the plant was operating. It did not. After a failed dispute resolution process, the complaint was transferred to compliance. Again, IFC had a clear opportunity to take meaningful action before construction was complete, but again it did not.

In 2013, the CAO's Audit Report found that IFC had failed to abide by it own policies at virtually every stage in the project, including, but not limited to, failing to adequately assess risk, weaknesses

[3] CAO, CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India 15 (Aug. 22, 2013) (citing IFC, PDS Approval (Mar. 2008)).

[4] Like many communities that find themselves hosting IFC projects, these communities did not know about IFC's involvement until years after it committed to the project and started disbursing money. *See* CAO, Advisory Note: Insights on Remedy, The Remedy Gap: Lessons from CAO Compliance and Beyond at 14 (Apr. 2023) (noting that affected people frequently did not know of IFC investment or grievance redress options available to them).

in review of impacts and risk, and failing to address environmental and social compliance during project supervision. The communities hoped this would finally spur IFC to act. But it did not. IFC merely noted the borrower had said it would undertake certain studies and potential corporate social responsibility measures. IFC's response included no remedial action.[5] Indeed, IFC spent most of its response outlining its "different view [from] the CAO" on nearly every finding.[6] IFC did not agree to address non-compliance, it did not agree to provide any kind of remedy, and it did not commit to holding the borrower accountable; it did not commit to doing anything at all.[7]

In its 2015 monitoring report, the CAO found IFC had taken no meaningful action to address non-compliance and again emphasized the need for a "rapid, participatory and expressly remedial approach" to addressing project impacts.[8] IFC again had a clear opportunity and call to take action. And again it failed to act.

Left with no other options, the communities sued IFC in 2015. Instead of finally addressing the communities' suffering, IFC opted to fight accountability at all costs. In addition to its bold claims of "absolute immunity" from suit, IFC advanced numerous other arguments in the litigation that revealed its public commitments to "do no harm" to people and the environment are meaningless. Despite publicly touting its environmental and social standards and commitments as central to the institution and its mandate, IFC told the court that these safeguards and commitments are neither binding nor "essential to IFC's chartered objectives."[9]And although the environmental and social standards purport to protect people living near such projects, IFC expressly disavowed any intent to protect or benefit such persons; IFC called project-affected communities "tenuously related parties" with whom it has "no relationship" and thus owes no duty.[10]

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[5] Notably, the Compliance Review Panel (CRP) of the Asian Development Bank (ADB), which also provided financing for the Tata Mundra project, issued a report in the Tata Mundra case in April 2015 that found similar failings. Unlike IFC, the ADB responded by taking action even before the CRP's investigation had concluded. *See* ADB, Lessons Learned from Compliance Reviews of the Asian Development Bank (2004-2020): Mundra Ultra Mega Power Project in India §§ 3, 4.7 (2021), https://www.adb.org/sites/default/files/publication/747376/ocrp-lessons-india-mundra-ultra-mega-power-project.pdf. This did not provide remedy to communities, and it did not substantially improve compliance since the CRP was required under its rules to close the case after three years, before the borrower had actually implemented action that could bring the project back into compliance. But the contrast between ADB's affirmative steps and IFC's complete rejection of any responsibility is stark. As the External Review Report noted, ADB took "more effective remedial actions… in the Jam case (as opposed to IFC) as a result of the firm stance on the Management Action Plan taken by the ADB Board Compliance Review Committee, and subsequent attention to implementation on the ADB investigation report on the Tata Mundra Power Plan Project." External Review Report ¶ 319.

[6] Anita Marangoly George and William Blumer, IFC, Letter to Meg Taylor, CAO ¶ 7 (Sept. 12, 2013).

[7] Even the studies that were ultimately done have been sharply criticized by both the CAO and the CRP as being unreliable and problematic. *See, e.g.* CRP Third Annual Monitoring Report to the Board of Directors on the Implementation of Remedial Actions for the Mundra Ultra Mega Power Project in India (Asian Development Bank Loan 2419) ¶ 18 (Sept. 4, 2018) (noting "serious reservations about the methodology and the results of the [NIO marine impact] study."); *id.* ¶ 36 (criticizing the air quality study conducted in 2016, noting concerns "about the poor quality of the data on which the assessments are based" and "very high instrument downtime" and concluding the results are unreliable). *See also* CAO, Monitoring of IFC's Response to: CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India ¶ 56 (Jan. 14, 2015) ["First Monitoring Report of CGPL"].

[8] CAO, First Monitoring Report of CGPL ¶¶ 31, 75.

[9] 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.

[10] 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-cv00612), https://earthrights.org/wp-content/uploads/ifc_motion_to_dismiss-1.pdf.

IFC even argued that the communities had another alternative available: the CAO, *i.e.* the mechanism these communities had *already used*, that had already expressly called for IFC to take remedial action, and that IFC had ignored. IFC told the court that the CAO's adequacy was irrelevant; its mere existence, no matter how "fundamentally flawed," was enough of an "alternative" for communities to justify barring them from accessing courts.[11]

IFC also argued that having to follow the laws in each of the countries in which it operated would "chill" IFC's "willingness to lend money to business entities in developing countries, which frequently struggle to conduct industrial activity in accordance with sound environmental practices."[12]

B. Both IFC/MIGA's and the External Review Report's portrayal of the *Jam* case ignores this critical context, and therefore both learn the wrong lessons.

The treatment of the *Jam* litigation by both the External Review Team and by the IFC/MIGA Draft Approach (in its reference to litigation risk) must be considered against the backdrop of the communities' decade-long struggle for justice, and the countless opportunities IFC had to prevent the harm from occurring and to do right by these communities after the fact. As we address below, IFC/MIGA appear to use the fact of recent litigation against IFC as the basis for refusing to address the accountability and remedy crisis that made that litigation necessary in the first place. This fundamentally misunderstands the context in which these cases were filed, and it learns precisely the wrong lessons.

But this problem is evident in some aspects of the External Review Report as well. While we agree with many of the External Review Report's recommendations, and highlight them throughout this submission, the External Review Report's portrayal of the *Jam* and *Doe v. IFC* litigation, and specifically how it relates to the role of the CAO, is deeply troubling.

First, the External Review Report suggested that by filing suit, the plaintiffs in both lawsuits against IFC "hijacked" CAO efforts in order "to advance agendas that are beyond CAO's remit."[13] This completely misunderstands the litigation that was filed against IFC, falsely suggesting the plaintiffs in both cases sought to use the CAO Audit Report "as 'evidence' of IFC's duty to affected people and liability for consequential harm."[14] But in neither case was the CAO Audit Report the basis of the lawsuit that was filed or of IFC's legal liability. Both lawsuits were based on the law and the facts. Both could have been filed with precisely the same claims in the absence of the CAO investigation and report, and neither relied on the fact of the CAO Audit Report to establish that the IFC owed them a duty. As explained below (see infra Section III.C.), IFC/MIGA, like everyone else, have a *legal* duty to take reasonable care to avoid foreseeable harm to host communities. That duty is unaffected by the CAO process.

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[11] 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).
[12] Defendant's Motion to Dismiss at 11, *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv00612).
[13] External Review Report ¶ 144.
[14] *Id.* ¶ 139. *See also id.* (CAO is not "intended to create legal duties").

It is true that both sets of plaintiffs filed their lawsuit after a CAO Audit Report validated their concerns. But that merely shows that they tried to use the only process IFC provides, not that they tried to manipulate the CAO process. The CAO process came first because redress without litigation, through the CAO, is preferable for all parties, including the plaintiffs. No doubt if the plaintiffs had filed suit without first resorting to the CAO, IFC would have argued plaintiffs should not be allowed to sue until first using the CAO. It is only once the CAO process had failed to result in any meaningful change that they sought relief elsewhere. The clear lesson is that if the CAO had been effective, if it actually resulted in IFC taking remedial action, IFC likely would never have been sued. That is a reason to strengthen the CAO.

To the extent the External Review Report implicitly blames communities for "the lengthy, costly, and otherwise inefficient process for all" of filing suit,[15] this is obviously unfair. The length and cost of litigation falls far more heavily on the plaintiffs, who can ill-afford a delayed remedy. That's why the plaintiffs did not resort to litigation until IFC slammed every other door available to them in their faces. That is another reason to strengthen the CAO, not to blame the victims, who had no other avenue for recourse.

Second, the External Review Report even suggests that the CAO should pull its punches: that it should exercise caution in how it "fram[es] its findings," be "mindful of 'unintended consequences' of its compliance processes" and be "attentive in its use of language to the possibility that non-compliance findings and assertions of factual conclusions could be used for collateral purposes (including to support litigation against IFC/MIGA), and exercise restraint accordingly."[16] The notion that the CAO should censor itself sends a troubling message to the CAO that conflicts with the External Review Report's broader recommendations for enhancing the effectiveness and independence of its compliance mechanism and better ensuring meaningful access to remedy.

IFC's accountability crisis exists in part because CAO is powerless, not because it tells the truth. Suggesting the CAO exercise "restraint" conflicts directly with CAO's independence and ability to act impartially, and would fundamentally eliminate any trust in and legitimacy of the process. It could only make things worse.

Any attempt by IFC/MIGA or the External Review team to shift the blame for the IFC/MIGA accountability crisis to the CAO, the only mechanism that has even tried to do anything for impacted communities, is obviously focusing on the wrong problem and would substantially weaken CAO's ability to carry out a meaningful compliance function. Such a result would be a catastrophic failure of this process to address the root problems, and a giant step backwards that will harm communities, as well as harm IFC/MIGA.

C. The Draft Approach would yet again deny these communities remedies. But getting this case right is key to the credibility and legitimacy of any "Approach to Remedial Action" that IFC/MIGA ultimately adopt.

The Draft Approach fights against accountability at all costs, but that benefits no one. It has left the communities to suffer, and it has done considerable damage to IFC's reputation and credibility as a

[15] *Id.*
[16] *Id.* ¶¶ 144, 152.

development institution. It has sent the message to communities around the world that IFC cannot be trusted. IFC says it will ensure its projects do no harm, but its position is that it can go back on its word at any point and there is nothing that communities can do about it, and nowhere that they can go to hold IFC to its promises.

IFC has yet again failed to do right by these communities. The Draft Approach completely ignores the need for remedy in cases like *Jam* where harm has already occurred. Failure to address the harm that led IFC (and MIGA) to draft this document in the first place undermines the entire legitimacy of this process. A serious approach to remedy must start with remedying the harm IFC has already caused.

III. IFC/MIGA's description of their "Role and Responsibilities" ignores their own role in causing or contributing to harm, is contrary to law and best practice, and is inconsistent with IFC/MIGA's mission and position as supposed leaders in the field.

The External Review Report called for IFC/MIGA to craft a remedy framework that had as a central pillar their direct provision of remedy where IFC/MIGA non-compliance has contributed to harm. Yet the Draft Approach does not even acknowledge *the possibility* of instances where IFC's/MIGA's own actions and/or omissions contribute to harm, let alone grapple with their responsibilities to provide remedy for any instances of harm, past or future.

Delineating a "division of roles and responsibilities" that omits IFC/MIGA's own relationship to harm and its corresponding remedy obligations is legally untenable, as well as an abdication of IFC/MIGA's mission and supposed role as leaders in sustainability and development finance. Far from minimizing legal exposure, this approach would further cement the institutional practices and norms that have led to litigation against IFC in the past, thus exacerbating IFC's legal risk moving forward.

A. Ignoring IFC/MIGA's relationship to harm fundamentally undermines the legitimacy of this effort.

The right to an effective remedy is a basic human right, recognized as customary international law and binding on IFC/MIGA.[17] Those harmed by development projects have a right to remedy.[18] Providing remedy where one has caused or contributed to harm is not optional or "*ex gratia*." The External Review Report recognized this, emphasizing that IFC/MIGA "have responsibilities to contribute to remedy in situations where their non-compliance has contributed to harm."[19] It called for IFC/MIGA to adopt the well-recognized principle that their "contribution to harm triggers an

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[17] *See, e.g.* Brief of Amicus Curiae Professor Daniel Bradlow in Support of Plaintiffs-Appellants at 12-14*, Jam v. Int'l Fin. Corp.,* 860 F.3d 703 (D.C. Cir. 2017), available at https://earthrights.org/wp-content/uploads/2016-08-17_amicus_for_appellant_dckt_.pdf (explaining that the right to an effective remedy is enshrined in all major international human rights treaties, international humanitarian law, and all major regional human rights convention, and has reached status of customary international law, thereby binding all subjects of international law, including IFC); DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 238 (3rd ed. 2015)("[t]he right to a remedy is well established" and "a norm of customary international law").

[18] 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).

[19] External Review Report ¶ 328.

obligation for their contribution to remedy,"[20] and recommended IFC/MIGA adopt a framework with their own contribution to remedy as a central component.[21] The Draft Approach rejects that recommendation entirely, without discussion, by wholly disclaiming any responsibility for remedy and at no point acknowledging their own relationship to harm.

IFC is not a passive bystander in its projects; it plays a critical role, through its affirmative acts and its omissions, that can determine whether a project harms its neighbors. This includes, but is not limited to, IFC's provision of the critical financing that enables major development projects in the first place; its affirmative actions– at numerous steps – to further those projects, with substantial information about what adverse impacts those projects can have, are having, and have had; and its substantial ability to alter course and prevent harm.

IFC/MIGA's failure to engage with the fact that *their own* activities have, in some cases, caused harm to the very people they were supposed to help is a striking omission. The *Jam* litigation, a precipitating factor of the External Review process, challenged *IFC's own* wrongful conduct, its role in causing and contributing to harm, and its *own responsibility* to remedy that harm. Ignoring IFC's own relationship to harm and corresponding remedial obligations all but guarantees that there will be more communities like the *Jam* communities that are harmed by IFC and that sue IFC for redress.

A serious attempt to grapple with accountability and remedy must begin with IFC/MIGA acknowledging the fact that there are cases in which their own conduct causes or contributes to harm. They gain nothing by failing to do so. It does not eliminate IFC's outstanding obligations to provide remedy to communities, such as the one harmed by the Tata Mundra Project, it does not prevent future litigation, and it will not alter any court's legal analysis of IFC/MIGA's liability.

B. By failing to address situations where IFC/MIGA cause or contribute to harm, the Draft Approach deviates dramatically from the evolving legal and normative landscape and the External Review Report's recommendations.

There is international consensus that financial institutions must contribute to remedy where they have contributed to harm. In recent decades, instruments such as the UN Guiding Principles on Business and Human Rights (UNGPs)[22] and OECD Guidelines for Multinational Enterprises (OECD Guidelines)[23] have clearly articulated the existing legal duties of businesses, including

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[20] *Id.* ¶ 60.
[21] *Id.* (a critical element of a remedial action framework "is IFC/MIGA accountability to contribute to remedy where there is a CAO (or IFC/MIGA Management) finding of IFC/MIGA non-compliance that contributed to harm by enabling or failing to prevent harmful action or inaction by the client."); *id.* ¶ 62 (noting there should be "circumstances in which IFC/MIGA acknowledge a contribution to harm and *See*k to contribute to remedy").
[22] Unanimously endorsed by the Human Rights Council in 2011, the UN Guiding Principles on Business and Human Rights clearly articulate business' pre-existing obligations under international law. John G. Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/Res/17/4 (June 16, 2011) [hereinafter UNGPs].
[23] The OECD Guidelines for Multinational Enterprises are recommendations directed by OECD member states to companies regarding how best to align their conduct with applicable laws and internationally recognized standards. Organisation for Economic Cooperation and Development (OECD), Guidelines on Multinational Enterprises (2011), https://www.oecd.org/daf/inv/mne/48004323.pdf [hereinafter OECD Guidelines].

financial institutions, to prevent and mitigate harm in their operations and business relationships, and to contribute to remedy where they have caused or contributed (directly or indirectly) to harm.[24]

The External Review Report acknowledged this international consensus and noted the continually evolving legal and normative landscape and increased scrutiny on financial institutions.[25] It emphasized the Dutch Banking Sector Agreement Working Group on Enabling Remediation in particular as "highly relevant to the assessment of IFC/MIGA responsibility for remedy."[26]

The Dutch Banking Sector Agreement – in conformance with the OECD Guidelines and UNGPs, and the legal duties on which those are based – lays out a well-regarded and comprehensive framework for understanding the remedy obligations of financial institutions.[27] Those obligations differ depending on the institution's relationship to harm, which it breaks into three possible categories: (1) directly causing harm, (2) directly or indirectly contributing to harm, and (3) where the institution may not have contributed to the harm but it is nonetheless "linked" to that harm.[28]

Where the institution has caused or contributed (directly or indirectly) to harm, the institution must provide for remedy.[29] While financial institutions contributing to harm may occur more frequently than directly causing harm, both come with direct remedy obligations. Contribution to harm includes facilitating[30] or incentivizing[31] another party's harmful actions or inactions.[32] A bank that funds a project that entails clear risks of harm has facilitated – and thus contributed to – such harms that ultimately occur.[33] Failure to undertake effective due diligence efforts, and the failure to act to prevent or mitigate a harm it knew or should have known would result, also constitutes contribution to harm.[34] That the borrower or another actor has also contributed to harm does not absolve IFC/MIGA of their own responsibility to directly contribute to remedy.

Financial institutions also have obligations where they are "linked" to harm – even where they may

24 OECD Guidelines, Chapter IV; UNGPs, Principle 22.
25 *See, e.g.* External Review Report ¶¶ 7-8, ¶¶ 145-50, ¶¶ 324-328.
26 *Id.* ¶ 324; *see also id.* ¶ 328.
27 Social and Economic Council of the Netherlands, Dutch Banking Sector Agreement on international responsible business conduct regarding human rights § 7.1 (Oct. 2016), https://www.ser.nl/-/media/ser/downloads/overige-publicaties/2016/dutch-banking-sector-agreement.pdf [hereinafter Dutch Banking Sector Agreement].
28 Social and Economic Council of the Netherlands, Dutch Banking Sector Agreement, Discussion paper: Working Group enabling remediation, § 2.1 (May 2019), https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf?la=en&hash=4FB229CEBC0E8FCA85E5363240C11687 [hereinafter Dutch Banking Sector Remedy Discussion Paper].
29 Dutch Banking Sector Agreement § 7.1; UNGPs, Principle 22 and commentary.
30 Dutch Banking Sector Remedy Discussion Paper §5.2 ("Facilitating implies a situation in which the other party was already likely to take the action that led to the impact, and the bank's actions (or inaction) made it more likely that the other party would do so.").
31 *Id.* ("Incentivizing an impact generally involves a positive action or decision by a bank that has made it more likely that another party took an action or decision that caused an impact.").
32 *Id.*; OECD Guidelines ¶ 14.
33 OHCHR, Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking, at 5-6 (June 12, 2017) https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf [hereinafter OHCHR Response to BankTrack].
34 *Id.* at 8.

not have caused or contributed to the harm themselves.[35] In these circumstances, the institution must use its leverage, and build additional leverage where necessary, to ensure that the borrower prevents or mitigates the harm and provides remedy.[36] Even where a financial institution takes reasonable steps to prevent and mitigate risk, it is still linked to any resulting harm, and the obligation to build and use its leverage to influence the borrower to provide remedy still applies.[37]

To the extent the Draft Approach addresses IFC/MIGA's relationship to harm *at all*, it is solely in this last respect. But even here, the Draft Approach falls short. As addressed further below (infra Section V.C), the problem is that IFC rarely, if ever, uses its leverage to this end, and nothing in the Draft Approach suggests this will change.

In light of the fact that around half of IFC's total investment commitments are in financial intermediaries,[38] the External Review Report also recommended that IFC clarify its policies around financial intermediary accountability,[39] by looking to the Dutch Banking Sector's "clear framework for financial intermediaries."[40] IFC/MIGA ignore this entirely – only vaguely noting that during the "Pilot Period," "relevant elements" like "client preparedness" would be applied to new financial intermediary transactions, but "IFC/MIGA will not require FI clients to establish their own equivalents of the Approach."[41]

The External Review Report expressly called for IFC/MIGA to "build" on the Dutch Banking Sector framework in creating their own approach to remedy.[42] Yet these basic principles are nowhere to be found in the Draft Approach. IFC/MIGA acknowledge the External Review Report's recommendation to build on the Dutch Banking Sector framework,[43] and they indicate that they read it,[44] but otherwise the Draft Approach makes no reference to it or the broader legal and normative landscape at all.

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[35] *See, e.g.* UNGPs, Principle 19 and commentary; *see also* OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, HR/PUB/12/02 at 48-52 (2012), https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf [hereinafter UNGP Interpretive Guide]; International Labour Organisation, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy para. 65 (5th ed., March 2017) ("Multinational enterprises should use their leverage to encourage their business partners to provide effective means of enabling remediation for abuses of internationally recognized human rights.").
[36] Dutch Banking Sector Agreement § 7.3.
[37] *See* OHCHR Response to Request from BankTrack at 8.
[38] External Review Report ¶ 219.
[39] *Id.* ¶¶ 26, 339.
[40] *Id.* ¶ 7.
[41] Draft Approach at vi. IFC's differentiation in its approach to financial intermediaries versus other investments lacks a legal basis and diverges from the evolving normative landscape. The responsibility to respect human rights applies fully and equally to "the entire spectrum of FIs." OHCHR Response to Request from BankTrack. Under both the Guiding Principles and the OECD Guidelines, there is a business relationship between a financial institution and an investee company, and thus the same remedial obligations apply whether IFC is financing a project or holding and trading shares in an investee. *Id.*
[42] External Review Report ¶ 60.
[43] Draft Approach, Appendix A, ¶ 2.
[44] Draft Approach ¶ 4.

The Draft Approach would move IFC/MIGA squarely in the opposite direction of international consensus and the practice of other institutions. The External Review Report identified the "need for IFC to regain leadership in shaping E&S policies and practices,"[45] but its failure to acknowledge even basic obligations will set it far behind other institutions. Indeed, it might threaten to undermine the consensus that has developed with respect to the role of financial institutions and progress on remedy. IFC should be advancing standards that protect those who host its projects, the very people IFC is chartered to help. It certainly should not lead other institutions to ignore the harms they cause. Indeed, should that occur, the international community will rightly blame IFC.

C. Expressly omitting the fact that IFC/MIGA's own conduct causes or contributes to harm will do nothing to insulate IFC/MIGA from legal liability.

IFC/MIGA seem to have concluded that the damage that the Draft Approach, if adopted, would do to their reputation, as well as existing norms, is worth the cost, since it will insulate IFC/MIGA from legal liability where harm results. But IFC/MIGA's attempt to articulate "roles and responsibilities" in a way that would place the obligation to provide a remedy solely on the borrower will do nothing to minimize their legal risk. IFC/MIGA mischaracterize their own legal obligations, and their disclaimer of any remedial obligations has no legal import. Under international law and domestic law around the world, IFC/MIGA can be held liable for harms to project-affected communities. How they articulate their role in the Draft Approach does not alter the established law under which they can be held liable for their activities that cause or contribute to harm.

1. IFC/MIGA can be held liable for their own tortious conduct and for aiding and abetting the borrower's conduct.

As a general matter, IFC/MIGA may be liable for their own negligence and for aiding and abetting a borrower's tortious conduct. Both common law and civil law jurisdictions impose duties of reasonable care on all actors – including financial institutions. IFC/MIGA's own tortious conduct, such as negligence in financing projects that cause foreseeable harm or negligent supervision and oversight, constitutes an actionable breach of legal duty to project-affected communities that IFC/MIGA cannot contract themselves out of through disclaimers in their policies or loan agreements.[46]

Under general negligence principles, financial institutions – like any other party – have a duty to avoid causing or contributing to foreseeable harm;[47] that is, to exercise reasonable care to protect

[45] External Review Report ¶ 8. Among other indications that IFC is no longer a leader on E&S protections, "in 2020, for the first time, the Equator Principles were updated independently of the IFC Performance Standards, due in part to the need to reflect emerging norms." OHCHR, Remedy in Development: Guidance and Practice 18 (2022), https://www.ohchr.org/sites/default/files/2022-03/Remedy-in-Development.pdf.

[46] *See generally* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 424-26 (2015); Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873).

[47] *See, e.g.* Restatement (Second) of Torts, § 302(a) ("A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force stared or continued by the act or omission, or (b) the foreseeable action of … a third person….").

others against an unreasonable risk of harm.[48] Where the injury that results was reasonably foreseeable to the defendant, courts typically conclude that the defendant owed the plaintiff a duty to avoid causing that injury.[49]

Financial institutions' duty, like any other party's, includes a duty to avoid harms created by third parties, and both actions and omissions can constitute a breach of this duty.[50] This means a lender can be liable for ignoring the foreseeable harms of the projects it finances,[51] even where it does not control the borrower's conduct or operations.[52] Further, where an actor sets a force in motion (through their act or omission) that causes an unreasonable risk of harm to another party, that actor is liable for the harm that results.[53] For example, IFC providing critical financing for a borrower's project sets that project in motion. Where such a project results in foreseeable harm, the financial institution itself is liable for negligent failure to exercise reasonable care to prevent harm.[54]

IFC/MIGA may also be liable for aiding and abetting the unlawful conduct of the borrower. Aiding and abetting liability is a longstanding and well-established principle of law across most jurisdictions

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[48] *See, e.g.* Restatement (Second) of Torts § 302, comment a. ("anyone who does an affirmative act is under a duty" to exercise reasonable care "to protect [others] against an unreasonable risk of harm."); Restatement (Third) of Torts: Physical & Emotional Harm § 7(a) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.").

[49] *See, e.g. Hedgepeth v. Whitman Walker Clinic,* 22 A.3d 789, 793 (D.C. 2011) ("If the injury that befell the plaintiff was 'reasonably foreseeable' to the defendant, then courts will usually conclude that the defendant owed the plaintiff a duty to avoid causing that injury …."); *Doe v. Roman Catholic Diocese of Greensburg*, 581 F. Supp. 3d 176, 198 (D.D.C. 2022) ("it is sufficient if the negligent [party] might reasonably have foreseen that injury might occur."); *Towe v. Sacagawea, Inc.*, 357 Ore. 74 (Ore. 2015) ("when asserting an ordinary negligence claim, a plaintiff does not need to prove that the defendant owed the plaintiff a duty, because—as a general proposition—everyone owes each other the duty to act reasonably in light of foreseeable risks of harm").

[50] *See, e.g.* Restatement (Second) of Torts § 449 ("If the likelihood that a third person may act in a particular manner is the hazard … which makes the actor negligent, such an act … does not prevent the actor from being liable for harm caused thereby"); Restatement (Third) of Torts: Phys. & Emot. Harm § 19 (2010) (defendant's conduct can lack reasonable care insofar as it foreseeably permits the improper conduct of a third party); *Kesner v. Superior Court,* 1 Cal. 5th 1132, 1148 (Cal. 2016) ("It is well established … that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person."). *See also, e.g. Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004, 1030 (Lord Reid) (UK); *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (Can.).

[51] *See, e.g. Connor v. Great W. Sav. & Loan Ass'n,* 69 Cal. 2d 850, 865 (Cal. 1968) (finding that the lender should have known that the borrower would deviate from accepted standards as a cost-saving measure because the borrower was operating with little capital).

[52] *See e.g. In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 121 (2d Cir. 2013) (holding a manufacturer liable for pollution from gas stations it did not control). For example, in the *Jam* litigation, IFC's "lender liability" arguments mistakenly conflated instrumentality liability with ordinary tort liability. The instrumentality theory of liability asks whether a lender is vicariously liable to other creditors for the borrower's debts because it so dominates the borrower that they are really one entity. *See, e.g. Famm Steel, Inc. v. Sovereign Bank*, 571 F.3d 93, 104 (1st Cir. 2009) ("The instrumentality theory is akin to the piercing of the corporate veil doctrine"). The plaintiffs in *Jam* sought to hold the IFC accountable for its *own* tortious conduct, not to hold IFC vicariously liable for the borrower's conduct. Future litigation will likely allege the same.

[53] *See* Restatement (Second) of Torts § 302, comment c ("The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it.").

[54] *See, e.g. Doe v. Deutsche Bank Aktiengesellschaft,* No. 22-cv-10019, 2023 U.S. Dist. LEXIS 47059 at *4 (Mar. 20, 2023) (permitting claims against J.P. Morgan for setting in motion forces that led to an individual's intentional tortious conduct).

globally,[55] and under international law.[56] It requires only that the defendant substantially assist the primary tortfeasor, knowing that they are assisting the tort.[57] Funding a party that causes harm to others can constitute substantial assistance,[58] and the defendant need not be the "but-for" cause of the harm the plaintiffs allege.[59]

Emphasizing the borrower's role in causing harm does not alter IFC/MIGA's own duties and their liability for breaching that duty and contributing to harm. Joint and several liability[60] of multiple parties that have contributed directly or indirectly to harm is well-established in both common and civil law systems,[61] as well as under international law.[62] The relevant inquiry is whether they have

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[55] At common law, aiders and abettors were principals in the second degree in the criminal context. 4 William Blackstone, Commentaries on the Laws of England 34-35 (1769). *See also*, e.g., An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 113-114 (1790) (U.S) (criminalizing aiding, counseling, advising, or commending someone in the commission of murder, piracy, and crimes committed on the high seas or against the law of nations); s. 830(2) BGB (Ger.)("instigators and accessories are equivalent to joint tortfeasors").

[56] *See generally* Brief of International Law Scholars, Former Diplomats, and Practitioners as *Amici Curiae* in Support of Respondents, *Nestle USA, Inc. v. Doe*, 141 S.Ct. 1931 (2021) (describing the recognition of secondary liability, including aiding and abetting, under customary international law); *see also* Int'l Law Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 16, Rep. of the Int'l Law Comm'n on the Work of its Fifty-Third Session, U.N. GAOR, 53rd Sess., U.N. Doc. A/56/10 (2001).

[57] Restatement (Second) of Torts § 876(b); *see also Halberstam v. Welch,* 705 F.2d 472, 477-78 (D.C. Cir. 1983); *Rochez Bros., Inc. v. Rhoades,* 527 F.2d 880, 886 (3d Cir. 1975); *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 608 (11th Cir. 2015); *Stutts v. De Dietrich Group,* No. 03-CV-4058, 2006 U.S. Dist. LEXIS 47638, at *47 (E.D.N.Y. June 30, 2006). *See also, e.g.*, *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-A, Appeals Judgement, ¶¶ 162-72 (Mar. 24, 2000); *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-T, Judgement, ¶ 776 (June 20, 2007); *Prosecutor v. Kalimanzira,* Case No. ICTR-05-88-T, Judgement, ¶ 161 (June 22, 2009); *Prosecutor v. Eav,* Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 533 (July 26, 2010).

[58] *See, e.g. Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432-34 (E.D.N.Y. 2013) (finding jury could conclude that funds bank sent terrorist group were a "substantial reason" group could perpetrate terrorist acts).

[59] *Linde v. Arab Bank, PLC,* 384 F. Supp. 2d 571, 584-85 (E.D.N.Y. 2005) (citing *Halberstam*, 705 F.2d at 477); *Aetna Cas. & Sur. Co. v. Leahey Const. Co.,* 219 F.3d 519, 537 (6th Cir. 2000) (assistance need only be substantial, not necessary to the tort).

[60] Joint and several liability for multiple parties is a general principle of international law, and is a feature of both common law and civil jurisdictions globally. *See, e.g.* Restatement (Third) of Torts, Apportionment of Liability § 15; s. 830(2) BGB (Germany); Oil Platforms (Iran v. U.S.), Judgment 2003 I.C.J. 161, 354-58 (Nov. 6) (separate opinion by Simma, J.); Andre Nollkaemper et al, *Guiding Principles on Shared Responsibility in International Law*, 31 EURO. J. INT'L L. 1, 15 (Feb. 2020).

[61] For example, a party is liable for nuisance not only when it carries out the activity but when it participates to a substantial extent in carrying on the activity. Restatement (Second) of Torts § 834. This substantial factor test also applies to general negligence and trespass claims. Restatement (Second) of Torts § 431. *See* Restatement (Second) of Torts § 876, Cmt. (if the assistance is a substantial factor in the tort, the one giving it is a tortfeasor, including where tort is merely a negligent act); *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) ("a secondary defendant could substantially aid a negligent action"). *See also* French Civil Code arts 1240-42; 0 S.T.J.-T2, REsp 650728, Relator: Min.Benjamin Herman, 23.10.2007, Revista Do Superior Tribunal De Justiqa [R.S.T.J.], 02.12.2009 (Braz.) ("For the purpose of determination of the proximate cause in environmental damage cases, one who commits [the act] shall be equated with one who does nothing when he or she should act, who allows it to happen, who does not care what is being done, who is financing so that it can be done, and who benefits when others act.").

[62] *See generally* Andre Nollkaemper et al, *Guiding Principles on Shared Responsibility in International Law*, 31 EURO. J. INT'L L. 1, 15 (Feb. 2020); *see also* Oil Platforms (Iran v. U.S.), Judgment 2003 I.C.J. 161, 354-58 (Nov. 6) (separate opinion by Simma, J.).

contributed to the harm, even if another party was a more direct cause of the harm.[63] Abettors are also jointly and severally liable for harmful conduct.[64]

2. There are no special rules insulating lenders from liability.

The law treats financial institutions like any other party. No special rules exempt them from liability or treat them differently from any other party simply on the basis of their status as a lender. Courts around the world apply a similar duty of care to financial institutions that cause or contribute to foreseeable harm to third parties as they would for any other person or entity.[65] And as the External Review Report noted, judicial precedent imposing duties on lenders is rapidly growing and increasing exposure for financial institutions.[66] Global legislative and judicial developments show a clear trend of increased scrutiny of financial institutions' contributions to harm to third parties.[67]

Where lenders have escaped liability, it has been in cases involving arms-length transactions where the lender was substantially removed from and uninvolved in the conduct of the borrower. To the

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[63] *See, e.g. Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 584-85 (E.D.N.Y. 2005) (citing *Halberstam*, 705 F.2d at 477); *Aetna Cas. & Sur. Co. v. Leahey Const. Co.*, 219 F.3d 519, 537 (6th Cir. 2000) (assistance need only be substantial, not necessary to the tort); *Athey v. Leonati* 1996, 2 SCR 458 (Canada); *March v. E & MH Stramere Pty Ltd*. 1991 171 CLR 506 (Australia).

[64] *See, e.g.* Restatement (Third) of Torts, Apportionment of Liability § 15; *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit."); *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 30 n. 30 (D.D.C. 2005); s. 830(2) BGB (Germany).

[65] *See, e.g. Doe v. Deutsche Bank Aktiengesellschaft,* No. 22-cv-10019, 2023 U.S. Dist. LEXIS 47059 at *4 (Mar. 20, 2023); *Kashef v. BNP Paribas SA*, No. 16-cv-3228, 2021 U.S. Dist. LEXIS 28436 at *33-34 (S.D.N.Y. Feb. 16, 2021) (finding that "plaintiffs plausibly alleged that BNPP consciously cooperated with the Sudanese regime, either knew or should have known that its assistance was contributing to the Regime's human rights abuses" and "have therefore stated a claim for relief under the Article 50.1 of the Swiss Code of obligations"). *See also, e.g. Anns v. Merton Borough Council,* [1978] A.C. 728 (Can.); French Civil Code arts 1240-42; *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 865 (Cal. 1968).

[66] External Review Report ¶ 146.

[67] For example, in addition to the ongoing litigation in the United States, *Kashef*, 2021 U.S. Dist. LEXIS 28436, a judicial investigation has been opened in France against BNP Paribas alleging that the financial institution knew or should have known that it was fueling and profiting from genocide. International Federation for Human Rights, *Victims provide testimony on BNP Paribas' alleged role in mass atrocities in Sudan* (Mar. 18, 2022), https://www.fidh.org/en/region/Africa/sudan/sudanese-victims-provide-testimony-to-french-war-crimes-unit-on-bnp. Other European countries have also introduced or passed human rights legislation imposing obligations on financial institutions to identify, prevent, mitigate, or remedy human rights violations, and more are expected to follow suit. Marti Flacks & Madeleine Songy, *European Union Releases Draft Mandatory Human Right Due Diligence Directive* (Mar. 11, 2022), https://www.csis.org/analysis/european-union-releases-draft-mandatory-human-rights-and-environmental-due-diligence. There has also been a proliferation of lawsuits against financial institutions for their contributions to the climate crisis, including suits against BNP Paribas and UK Export Finance for financing high emissions projects. Notre Affaire à Tous, Les Amis de la Terre & Oxfam France v. BNP Paribas (filed Feb. 2023), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230223_18777_summons-1.pdf; Friends of the Earth v. UK Export Finance [2022] EWHC 568 (Admin) (UK). Project-affected communities and civil society organizations are also turning to non-judicial mechanisms, such as OECD National Contact Points, to seek redress against financial institutions for human rights abuses and climate harm. *See, e.g.* Dutch National Contact Point, Initial Assessment: Notification Oxfam Novib, Greenpeace, BankTrack, Friends of the Earth Netherlands (Milieudensie) v. ING (Nov. 14, 2017), http://mneguidelines.oecd.org/database/instances/nl0029.htm; UBS, and Complaint Against Mizuho Financial Group, Inc., Sumitomo Mitsui Banking Corporation and Mitsubishi UFJ Financial Group, Inc., Japanese National Contact Point for the OECD Guidelines for Multinational Enterprises, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180918_11361_complaint-3.pdf.

extent IFC seeks to distance itself from the borrower's conduct, this effort is unavailing. In particular, IFC simply isn't an ordinary lender, nor can it be.[68] Trying to establish more distance between IFC and the projects it finances would be counterproductive. IFC's active role in the projects it finances is usually a good thing and something IFC should embrace. The reverse would simply deprive IFC (and MIGA) of its best tools to prevent and remedy harm that could otherwise give rise to litigation and limit its ability to produce positive development outcomes.

IV. By justifying a categorical prohibition on directly financing remedy on the basis of limiting exposure to litigation, IFC/MIGA fundamentally misunderstand the litigation risks they face, as this will have precisely the opposite result.

IFC/MIGA justify their refusal to commit to ever "financing direct contribution" to remedy on the basis of not "exposing IFC/MIGA to the increased litigation risks (and corresponding significant costs) that could result," under "a range of possible legal theories,"[69] which they nowhere specify. IFC has learned precisely the wrong lessons from the *Jam* litigation, and adopting this approach would virtually guarantee that IFC will be sued again. That in turn will create substantial litigation costs, but also broader risks to IFC's reputation and credibility and the possible further erosion of immunities.[70]

A. Relying on litigation risk to disclaim any responsibility for providing remedy and justify inaction is contrary to IFC/MIGA's mission and entirely ineffective.

The External Review Report correctly emphasized that IFC/MIGA should "treat litigation risk as a secondary consideration, to be addressed through legal means only when litigation actually arises, rather than as an ex ante constraint on proactive efforts to avoid, mitigate, and compensate for E&S impacts"; litigation risk should not "serve[ ] as an excuse for inaction."[71] Yet that is precisely how IFC/MIGA use it. That is extremely disappointing – IFC/MIGA should be more interested in achieving positive outcomes consistent with their mission and obligations than protecting themselves from what they view as increased costs. Regardless, their approach to minimizing litigation risk will not remotely achieve its desired result.

First, IFC has been sued by communities who were harmed and left without any remedy. The *Jam* lawsuit, for example, would not have been filed if IFC had taken the meaningful action the CAO recommended to address the harm to the project's neighbors. IFC could have compelled the borrower to mitigate and remedy harm when it first occurred, and/or it could have provided remedy

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[68] For example, IFC is required to engage in extensive and ongoing due diligence and monitoring, and its loan agreements allow IFC to exercise significant control over the borrower. Such control over a borrower certainly gives rise to increased liability when a project causes harm, but it is not possible in light of its mission, mandate, and status as an international organization and development finance institution for IFC to distance itself from borrowers to the extent necessary to actually mitigate liability for the control it exerts over borrowers. Any attempts to do this would undermine IFC's legitimacy and defeat its purpose.

[69] Draft Approach ¶ 31. *See also id.* at v. ("direct contribution to remedial actions gives rise to… increased litigation risk.").

[70] We primarily focus on IFC, as it has been the subject of recent litigation, but much of it would apply to MIGA, too.

[71] External Review Report ¶ 152. *See also id.* (As institutions, IFC/MIGA/CAO should not let the litigation tail wag the dog of effective E&S risk management.").

directly itself. IFC's failure to do *anything,* including its failure to take seriously the recommendations of the CAO for remedial action, left the communities with no other option but to sue.

That lawsuit would not have been any less likely if IFC had had an official "no direct financial contribution to remedy" policy as it now proposes. It would not have eliminated the need for remedy, disincentivized the communities from seeking redress via the only avenue they saw possible, nor provided IFC with a stronger argument for immunity or any defense to legal liability. Staking out such a position now certainly will not make it *less* likely that communities who have been harmed and left with no other options will seek relief via litigation.

Lost in IFC's discussion of the risk to IFC of providing remedy is any acknowledgement that under the current status quo, it is the communities that host IFC's projects that are currently forced to bear *all* of the risk, without any remedy, despite having had virtually no say in the project. And if IFC truly fears that any acknowledgement that it will provide remedy in some cases will lead to a flood of lawsuits from communities who have been harmed and left without a remedy, IFC's remedy and accountability crisis is far worse than currently realized.

Ultimately, the Draft Approach tells impacted communities that their *only* option to engage with IFC remains the CAO while simultaneously emphasizing that IFC will never contribute to remedy directly – even if CAO finds noncompliance and harm and recommends remedy. IFC could have used this opportunity to strengthen the CAO, and commit to seeing its recommendations through, something that would have both assured better access to remedy and meaningfully protected IFC from litigation risk. IFC did the opposite. Far from minimizing the chance of litigation, the Draft Approach makes it clear that litigation is the only *real* option for obtaining remedy from IFC.

B. The additional litigation that results from IFC's refusal to remedy harm will substantially increase the likelihood of litigation that may further erode jurisdictional immunities.

In *Jam*, the first time IFC was sued by a community in need of remedy, the U.S. Supreme Court rejected the absolute immunity IFC had for decades assumed it enjoyed. IFC's failure to establish an alternative mechanism to provide or otherwise ensure remedy will leave other desperate communities without redress and all but guarantee IFC will be sued again. With this increased litigation risk comes the possibility of the further erosion of privileges and immunities that IFC may prefer not to have further tested.

1. Future suits against IFC in U.S. courts may reach different outcomes.

When the *Jam* communities filed suit in 2015, IFC argued that it was entitled to "absolute immunity" from all suits under U.S. law. After nearly four years of litigation, and millions of dollars in legal fees, the U.S. Supreme Court ruled that IFC was *not* entitled to such sweeping immunity.[72] Instead, the same exceptions codified in the Foreign Sovereign Immunities Act that permit suits against foreign governments also apply to IFC. In particular, the "commercial activity exception" to immunity permits suits against states (and now international organizations) based on conduct in the United

[72] *Jam v. Int'l Fin. Corp.,* 139 S. Ct. 759 (2019).

States that is "commercial" as opposed to uniquely governmental, like loaning money to private businesses.

The statutory requirement that a suit be "based upon" the defendant's commercial activity in the U.S. requires courts to determine the "gravamen" of the plaintiff's claims. This test has always focused on the conduct of the defendant in the suit.[73] But in a later stage of the *Jam* case, IFC advanced a novel argument for why it should be applied differently to IFC, including that its own immunity should turn on the actions of an entirely different party. Surprisingly, the U.S. Court of Appeals for the D.C. Circuit agreed, holding that the claims were "based upon" third party conduct that happened in India, and not the actions of IFC in the United States for which IFC was sued.[74]

But *Jam* is an outlier, not the rule. This decision marked a significant deviation from prior precedent. And it was highly fact specific, so a different case alleging different facts could be analyzed differently. Perhaps most importantly, the holding in *Jam* no longer appears to be controlling. The D.C. Circuit has subsequently reached a very different holding in a different case against an international organization, *Rodriguez v. Pan American Health Organization*, which the facts of *Jam* would have satisfied.[75] In both *Jam* and *Rodriguez*, the defendant organization aided and/or facilitated a third party that more directly injured the plaintiffs. While *Jam* held that the claims' gravamen was the third party's acts because those acts "actually injured" plaintiffs,[76] *Rodriguez* held the gravamen was the defendant organization's conduct, and that the organization's conduct need not be the conduct that "actually injured" plaintiffs.[77] In *Rodriguez,* PAHO facilitated the third-party conduct (Cuba and Brazil's forced labor) that "actually injured" the plaintiffs, and the court rejected the argument that IFC won with in *Jam*, holding that Supreme Court precedent "does not require defining the 'gravamen' by looking to the acts that 'actually injured' [Plaintiffs]."[78]

At best, there is significant uncertainty about how immunity would be resolved in a future suit against IFC in the U.S. If IFC/MIGA adopt this Draft Approach, leaving communities with nowhere else to turn and no alternatives for remedy, they will likely be forced to turn to litigation that under *Rodriguez* may well further erode IFC's immunity from suit.

2. **Immunity law is substantially different in other jurisdictions and courts in other countries are far less likely to find IFC entitled to immunity from suit.**

The *Jam* decisions turned on how U.S. courts interpreted U.S. statutes; it said nothing about how other jurisdictions would evaluate immunity under their laws or under any relevant treaty. Other

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[73] *See, e.g. Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174 (2d Cir. 2010) (looking to "the act of the foreign sovereign that serves as the basis for the plaintiff's claim" in assessing whether the sovereign was immune); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) ("immunity depends on the nature of those acts of the defendant that form the basis of the suit"); *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015) (holding that the proper analysis required first determining which acts where attributable to the sovereign, as only this could be the gravamen); *Southway Constr. Co. v. Cent. Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) (holding the sovereign immunities were not immune from suit where those with a direct contractual relationship with the plaintiff more directly caused its injuries).
[74] *Jam v. Int'l Fin. Corp.,* 3 F.4th 405, 409 (D.C. Cir. 2021).
[75] *Rodriguez v. Pan Am. Health Org.*, 29 F.4th 706 (D.C. Cir. 2022).
[76] *Jam*, 3 F.4th at 409.
[77] *Rodriguez,* 29 F.4th at 715.
[78] *Id.* (citing *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 n.2 (2015)).

countries have different approaches to immunity; some assess immunity under the terms of a generally applicable statute, while others incorporate the Articles of Agreement of institutions like IFC/MIGA into their laws (either as self-executing treaties, or via statute with verbatim language). The breadth of such immunity varies, but we briefly note a few of the reasons why courts in other countries may be more open to claims by communities in future cases, and less inclined to find IFC entitled to immunity, especially if it adopts a policy (as presently proposed) that would effectively foreclose the possibility of access to meaningful remedy through any other means.

a. IFC's Articles of Agreement specify immunity only from suits by member states.

In many legal systems, the immunity of international organizations is determined based on the provisions of the founding treaty establishing the organization (or the identical provisions, as incorporated verbatim into domestic law), by the terms of a Headquarters Agreement, or by another treaty, such as the United Nations Convention on Privileges and Immunities of the Specialized Agencies.

The founding treaties and headquarters agreements of many international organizations provide for seemingly unqualified immunity, or broad immunity with only narrowly defined exceptions, using language such as the organization "shall enjoy immunity from all forms of judicial process, except to the extent that it expressly waives its immunity."[79] The IFC, however, is not one of them; it has no such provision in its Articles of Agreement and no headquarters agreements.[80] To the contrary, Article VI, Section 3 of IFC's Articles states that:

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.[81]

This provision clearly envisions IFC can and will be subject to suit of various kinds in many different jurisdictions and contains only one exception: suits may not be brought by member states.[82]

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[79] *See, e.g.* International Monetary Fund Articles of Agreement, art. IX § 3, Dec. 27, 1945, 60 Stat. 1401 ("The Fund . . . shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity."); Convention on the Privileges and Immunities of the United Nations art. II, § 2, Feb. 13, 1946, 21.2 U.S.T. 1418, 1 U.N.T.S. 15.

[80] Nor does the Convention on Privileges and Immunities of the Specialized Agencies help IFC, since it explicitly exempted itself from the Convention's broad immunity, providing that the language in Section 3 of IFC's Articles of Agreement "shall be substituted" for the Convention's broader immunity provision. *See* Convention on the Privileges and Immunities of the Specialized Agencies Annex XIII §1, Nov. 21, 1947, 33 U.N.T.S. 261.

[81] MIGA's Convention is similar, however it also expressly bars personnel suits. *See* World Bank: Convention Establishing the Multilateral Investment Guarantee Agency, 24 I.L.M. 1598 art. 44 (1985).

[82] *See, e.g. Jam v. Int'l Fin. Corp.,* 139 S. Ct. 759, 771-72 (2019) (noting that "the charters of many international organizations" reserve immunity beyond what the IOIA provides, noting the United Nations and the IMF, but "IFC's own charter does not"); International Law Commission, Fourth report on relations between States and international organizations (Second Part of the Topic), A/CN.4/424 and Corr.1 ¶ 71 (1989) https://legal.un.org/ilc/documentation/english/a_cn4_424.pdf ("IBRD, IDA and IFC do not enjoy general immunity from suit. Their immunity is limited to actions brought by member States or persons acting for or deriving claims from such States.").

IFC may thus be found to only have immunity from suits by member states in many places.[83] Indeed, IFC itself made this very point in the *Jam* litigation, asserting that the plain language of its Articles would render the IFC "subject to suit" in courts outside the United States.[84] This will no doubt prove useful to litigants in non-U.S. cases.

b. Courts regularly condition international organization immunity on the existence and adequacy of an alternative avenue of dispute resolution capable of providing meaningful remedies.

Even where a court finds that the relevant treaty, headquarters agreement, or the statute of the country in question would otherwise provide immunity from judicial process, which is *not* the case for IFC, the existence of a fair, impartial alternative avenue for meaningful remedy has increasingly become a precondition to recognizing the immunity of international organizations from suit in courts outside the United States.

For example, more than twenty years ago, the European Court of Human Rights held that a "material factor" in determining whether granting an international organization immunity from jurisdiction is appropriate is whether the claimant had "available to them reasonable alternative means to protect effectively their rights" of access to courts.[85] While many domestic courts have applied this precedent directly, others have established the same principle on an independent basis.[86]

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[83] That this language did not help the plaintiffs in *Jam* is based on a particularities in the D.C. Circuit that have not been adopted elsewhere. The D.C. Circuit has treated this language as a "waiver" of immunity that the organization would otherwise have enjoyed under the U.S. statute setting out the immunities for international organizations. But it created a test to narrow the waiver to waive immunity only where the court finds that there would be a "corresponding benefit" to the organization of allowing the particular suit. *Mendaro v. World Bank,* 230 U.S. App. D.C. 333, 717 F.2d 610, 617 (1983); *Atkinson v. Inter-American Dev. Bank,* 156 F.3d 1335, 1338 (1998*) rev'd other grounds Jam v. Int'l Fin. Corp*., 139 S. Ct. 759 (2019). This test lacks any basis in the language of the provision or policy and it has been roundly criticized by numerous judges on the D.C. Circuit and many legal scholars. *See, e.g. Jam,* 860 F.3d at 708, 710, 713 (Pillard J. concurring) (the waiver doctrine "lacks a sound legal foundation," "is awkward to apply," and has contributed to a "doctrinal tangle" and should be "revisit[ed]."); *Vila v. Inter-Am. Inv. Corp.,* 583 F.3d 869, 870-71 (2009) (Williams, J., statement) (noting the test should be re-visited). *See also, e.g.* Steve Herz, *International Organizations In U.S. Courts: Reconsidering The Anachronism Of Absolute Immunity,* 31 SUFFOLK TRANSNAT'L L. REV. 471, 518 (2008) ("The D.C. Circuit's treatment of the waiver issue… is not persuasive."); Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 84 (1995) ("It would be hard for the court to have confused functional necessity doctrine, voluntary waiver and constitutive waiver more thoroughly."). Accordingly, even if other courts viewed it as a waiver - and some may not, where there is no other source of baseline immunity outside the Articles to be waived in the first place - they are likely to give the provision the broad meaning its words provide, and not narrow waiver's application the way the D.C. Circuit has.

[84] *See* Defendant IFC Reply in Support of Motion to Dismiss at 16, *Jam v. Int'l Fin. Corp*., 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612); *see also* Plaintiffs' Response To New Arguments The Defendant Impermissibly Raised For The First Time On Reply at 5-6 (Nov. 13, 2015), available at https://earthrights.org/wp-content/uploads/Plfs-Surreply-DDC.pdf (explaining this means IFC has conceded it waived immunity).

[85] *Waite and Kennedy v. Germany,* Application No. 26083/94, ¶ 68. (ECtHR 1999*); Beer & Regan v. Germany,* Application No. 28934/95 (ECtHR 1999).

[86] *See, e.g.* Paola Pistelli v. *European University Institute,* Italian Court of Cassation, all civil sections, 28 October 2005, no. 20995, Guida al diritto 40 (3/2006), ILDC 297 (IT 2005) (evaluating whether immunity would violate the Italian constitution and finding it did not where organization had established an adequate alternative judicial remedy); *Hetzel v. EUROCONTROL*, Germany, Federal Constitutional Court, 2 BvR 1058/79, BVerfG 59, 63 (1982) (evaluating whether organization's dispute tribunal was sufficient such that immunity did not violate the German Constitution); *Banque africaine de développement v. Degboe,* Cour de Cassation, Chambre sociale, 25 janvier 2005, 04-41012, 132 Journal du droit international (2005) 1142 (immunity absent alternative recourse would be contrary to "public international order.").

Where no alternative tribunal exists, domestic courts have frequently refused to recognize immunity of international organizations.[87] But mere existence of an alternative is not enough; courts upholding immunity on the basis of an alternative typically do so only after meaningful scrutiny of the details of the alternative mechanism, including its procedures, the qualifications and impartiality of the arbiters and judges, whether it was fair and meaningful, and the actual possibility of obtaining a remedy, among other considerations.[88] Courts have refused to recognize immunity where the alternative mechanism that existed lacked sufficient indications of impartiality and fairness, including the inability to issue binding decisions and execute judgments.[89]

Although this trend is most prominent in European courts, where more suits have been brought against international organizations, courts in other jurisdictions have likewise found that an alternative avenue to access remedy is critical to recognizing immunity from domestic jurisdiction.[90]

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[87] *See, e.g. Banque africaine de développement v. M.A. Degboe*, Cour de Cassation [Cass.] soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (rejecting African Development Bank's immunity where there was no tribunal established that could issue binding decisions if the plaintiff was denied access to court); Neumann and Peters, "Switzerland" at 252 in The Privileges and Immunities of International Organizations in Domestic Courts (August Reinisch, ed. 2013) ("the Swiss Federal Supreme Court has repeatedly linked the dispensation of international organizations from domestic jurisprudence to the establishment and operation of an alternative means of dispute settlement."); Rosanne von Alebeek and Andre Nollkaemper, "The Netherlands" at 197 in The Privileges and Immunities of International Organizations in Domestic Courts (August Reinisch, ed. 2013) (observing that Dutch courts proceed from the "assumption that international organizations' immunity will not be applied when no alternative remedy is available.").

[88] *See, e.g. X v Organisation for Economic Co-operation and Development*, France, Court of Cassation, Appeal judgment of 29 September 2010, no 09–41030, ILDC 1749 (FR 2010), paras. 4–5 (upholding the OECD's immunity after reviewing its Administrative Tribunal's makeup, competence, independence, and impartiality, as well as various procedural aspects, such as whether its hearings were public). *See also, e.g.* Riccardo Pavoni, "Italy," at 160-61, in The Privileges and Immunities of International Organizations in Domestic Courts (August Reinisch, ed. 2013) (discussing *FAO v Colagrossi* (1992) 75 RDI 407, 101 ILR 386 (Court of Cassation, 18 May 1992 No 5942) and *Carretti v FAO* (2004) Archivio civile 1328 (Court of Cassation, 23 January 2004 No 1237)); Thore Neumann and Anne Peters, "Switzerland" at 256-57 (discussing the Swiss Federal Supreme Court's decision in *ZM v Arab League* and noting the court took effort to "verify both the adequacy of the alternative mechanism and effective access to it.").

[89] *See Siedler v. Western European Union,* Brussels Labour Court of Appeal (4th chamber), J. TRIBUNAUX 617 (2004), ILDC 53 (BE 2003) (denying immunity to the Western European Union and finding that the commission des recours was an inadequate alternative based on its lack of provisions providing for execution of decisions, for public hearings, or publication of judgments, and insufficient independence of commissioners, among other things). *See also Western European Union v. Siedler*, Belgium, Court of Cassation, 21 December 2009, Cass No S 04 0129 F, ILDC 1625 (BE 2009) (upholding prior decision denying immunity*); Lutchmaya v. ACP Secretariat,* Cour d'Appel [CA] Bruxelles, Mar. 4, 2003, J.T. 2003, 684, ILDC 1363 (BE 2003) (upholding denial of organization's immunity from suit to execute judgment of Belgian Labor Court that had ruled for plaintiff where organization had refused to pay, as there was no alternative mechanism to compel the organization to execute the decision); *Drago v. International Plant Genetic Resources Institute (IPGRI),* Cass., 19 febbraio 2007, No. 3718, ILDC 827 (It.)) (refusing to recognize an international organization's immunity where the alternative dispute mechanism was insufficiently independent and impartial).

[90] *See, e.g.* Raúl E. Vinuesa, "Argentina." The Privileges and Immunities of International Organizations in Domestic Courts (August Reinisch, ed. 2013) at 19-22 (discussing *Cabrera, Washington J. E. c. Comisión Técnica Mixta de Salto Grande*, Fallos 305:2150, de 5/12/1983) (explaining that the supreme court found that immunity would be incompatible with the right to have access to a court if there was not an alternative avenue to entertain claims against the organization, citing both the National Constitution and arguing that the right of access to court is now a norm of jus cogens under international law); Raposo with UNESCO Sentencia Ilustrísima Corte de Apelaciones de Santiago. Causa ROL 90-2009 (finding constitutional protections outweighed immunity of UNESCO); *SN Ryabov v Eurasian Development Bank*, Russian Federation, Supreme Court, judgment of 9 July 2010, N 5-B10-49, ILDC 1559 (RU 2010) (holding that the Eurasian Development Bank could not claim immunity in the absence of an alternative means of redress available for employees or contractors).

And while much of the case law to date has focused on employment-related disputes, legal scholars have long noted that "it is clear that the obligation to provide for alternative dispute settlement mechanisms is not limited to staff disputes but also extends to private law disputes between organizations and third parties."[91]

IFC/MIGA have no such mechanism available to communities that comes close to having the kind of impartiality, independence, and effectiveness required under this inquiry. Indeed, the CAO is intentionally set up differently than the mechanisms that were found to be sufficient in such cases, (see infra V.B.1). It is entirely internal to IFC, has no judges or arbiters of any kind let alone with the kind of impartiality and independence that have been required. And it lacks any power whatsoever to issue a binding decision or enforce any action.[92] A mechanism that can only "recommend remedial action" does not come close to constituting an effective alternative to accessing courts.

In *Jam,* IFC argued that under U.S. case law, "the presence of such a mechanism" was all that mattered, courts "did not consider how effective (or ineffective) those mechanisms were," thus it told the court that the plaintiffs' "contention that the CAO is 'fundamentally flawed' is not relevant to this Court's consideration of IFC's immunity."[93] That's not an accurate statement of U.S. law, but even if it were, it most definitely isn't true for courts in other countries.

C. Strengthening accountability mechanisms and preventive measures is not only more consistent with IFC's mandate and mission – it's more effective at minimizing legal risk.

IFC can limit the number of test cases that could erode its immunity, but that will not be accomplished by staking out the position that it will never provide remedy. The best way for IFC (and MIGA) to mitigate legal risk and to minimize damage to its reputation is to strengthen its ability to promptly and meaningfully address project-related harm, to take meaningful action to alter its organizational culture to actually incentivize both IFC staff and borrowers to do so, and to ensure management, staff, and borrowers are held to account for the failure to do so. As the External Review Report correctly noted, a key "way to mitigate litigation risk is to be able to demonstrate the integrity and efficacy of its governance and accountability mechanisms with respect to E&S principles and sustainability outcomes."[94] This includes strengthening the ability of CAO to actually

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[91] August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy*, 1 INT'L ORG. L. REV. 59, 72 (2004). *See also* August Reinisch, Ch. 49 "Privileges and Immunities" at 1068, in Oxford Handbook of International Organizations (ed. Cogan 2016) ("it appears that many national courts, in particular in Europe, have 'internalized' the demands of effective alternative remedies to be available against international organizations to such an extent that they may be willing to curtail their immunity from suit in future cases.").

[92] By contrast, IFC has established a mechanism for hearing employment disputes that is made up of independent judges with fixed terms who are not (and cannot later be) employed by the World Bank Group, and have the power to issue final binding decisions with which the IFC must comply, including payment of compensation and restitution. Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation, Art. IV, Art. XII (1980).

[93] Defendant IFC Reply in Support of Motion to Dismiss at 10-11, *Jam v. Int'l Fin. Corp.*, 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612).

[94] External Review Report ¶ 143. *See also Id.* ¶ 138 ("The *Jam* case (and others) have altered litigation risk for IFC (and other international financial institutions) and placed a sharper focus on the substantive effectiveness and procedural legitimacy of IFC's commitment to its Sustainability Framework, including the manner in which CAO administers (and IFC engages in) its complaint resolution processes.").

make findings and compel remedies and enhancing its independence (see infra V.B.1). It also means taking a more proactive role in due diligence and monitoring, remedying instances where harm has already occurred, and seriously committing to remedy in future cases, and taking remedial action proactively, including directly financing remedy where IFC has caused or contributed to harm. Doing so is not only morally right, it would also substantially decrease the possibility that those injured would resort to litigation.[95]

V. The Draft Approach proposes no meaningful components that would alter the status quo in any way.

The Draft Approach proposes almost nothing new; it mostly summarizes existing policies that have failed to prevent harm, failed to address accountability, and failed to result in remedy for those harmed by IFC/MIGA projects. Indeed, it notes "[m]ost of [the] elements of the proposed Approach are already being implemented […] while others would be enhancements to existing practices."[96] We address briefly here the main components that the Draft Approach suggests will enhance access to remedy, as well as some of the External Review Report recommendations that the Draft Approach wholly or partially ignores.

A. The Draft Approach does not establish any mechanism or other means of ensuring that either IFC/MIGA or the borrower would make any financial contribution to remedy.

The External Review Report emphasized the need for a remedy framework with two key funding mechanisms: (1) contingent funds from the client that would be available should harm result, and (2) funds from IFC/MIGA that would be available where IFC/MIGA contribute to harm.[97] IFC's Draft Approach commits to neither, and expressly disavows the latter.

1. The Draft Approach expressly rejects the idea of IFC/MIGA providing financial contribution to remedy at all.

The External Review Panel expressly recommended that "where IFC/MIGA action or inaction (in addition to client action or inaction) contributed to harm… that IFC/MIGA should also contribute to remedial action."[98] It recommended more specifically that, at a minimum, "a CAO finding of IFC/MIGA noncompliance… should in principle establish the need for IFC/MIGA to contribute to remedy along with the client."[99] The Draft Approach expressly rejects this, stating that "IFC/MIGA would not expect to provide direct financing of remedial action," noting only that it would not exclude consideration in "exceptional circumstances" which are not defined.[100]

Aside from a desire to minimize exposure to litigation risk, the only reason given for this conclusion is to avoid "disincentivising a client from fulfilling its responsibility" or creating "expectations" that

[95] *See Id.* ¶ 143 ("such leadership" by IFC "should mitigate a variety of risks, including the proliferation of 'home country' litigation.").
[96] Draft Approach at iii.
[97] External Review Report ¶¶ 333, 339.
[98] *Id.* ¶ 337.
[99] *Id.* ¶ 337.
[100] Draft Approach ¶ 30.

IFC/MIGA would provide remedy.[101] But IFC simultaneously refuses to do anything to *incentivize* the borrower to fulfill any of its responsibilities either. And its existing practice, as evidenced in the Tata Mundra case, has been that, despite substantial power and authority to compel the borrower to fulfill its remedial obligations, IFC management simply doesn't. Refusing to take any action that might meaningfully incentivize (or compel) the client to take remedial action, while also refusing categorically to play a role in filling that remedy gap where it does not, will only solidify and exacerbate the current remedy gap and accountability crisis.

2. IFC expressly rejects the External Review Report's recommendation to ensure borrowers provide for contingent liability funding for every project.

The second mechanism was focused on financial resources from the borrower, ensuring "a source of contingent liability funding … would be established for every project."[102] The Expert Review team expressly recommended that IFC/MIGA "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)."[103] The External Review Report provided numerous examples of forms this could take and detailed the ways it could be practically implemented, including having IFC/MIGA "co-authorized to draw on the contingent funds to contribute to remedy,"[104] and the Report addressed how this would minimize the risk of "creating moral hazard for the client because the client would be liable for repayment."[105]

The Draft Approach explicitly rejects this recommendation too, stating that "the use of such instruments is highly contextual and cannot be a uniform requirement."[106] It commits only to "explore," for unspecified "select projects," "suitable financial instruments to provide greater assurances of the client's ability to address impacts (e.g. insurance bonds, etc.) if reasonable in the context considered,"[107] and "not excessive in their cost or unreasonably burdensome in their oversight/implementation."[108]

This highly qualified language obviously commits to nothing. And IFC/MIGA's stated "rationale" for only "selectively consider[ing] contingency funding by clients on a case-by-case basis,"[109] strongly suggests IFC/MIGA have no intention of ever actually implementing any such measures.

First, IFC/MIGA assert there are "existing funding approaches already in place," such as insurance assessments and cash waterfall account structures, which could simply be "enhanced."[110] This is

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101 *Id.*
102 External Review Report ¶ 334; *See* generally *Id.* ¶ ¶ 333-339.
103 *Id.* ¶ 339. Notably, half of the CAO complaints filed between 2013-2022 were related to Category B projects, meaning that Category B projects are overrepresented in CAO processes (41.2% of projects and 50% of CAO complaints). Category A projects are also overrepresented in complaints to CAO (comprising 2.7% of projects and 28% of CAO complaints). CAO, The Remedy Gap: Lessons from CAO Compliance and Beyond 5, 13 (April 2023) [hereinafter Remedy Gap].
104 External Review Report ¶ 334-336.
105 *Id.* ¶ 336.
106 Draft Approach ¶ 17b.
107 *Id.*
108 *Id.*
109 Draft Approach at 7, Box 1.
110 *Id.*

difficult to take seriously when there is no evidence that IFC/MIGA have ever used any of these mechanisms for this purpose, and they do not actually indicate that they have any intent to use them in the future beyond noting their existence.

Second, IFC/MIGA express concern about "raising project costs" and "decreas[ing] IFC's and MIGA's competitiveness" as outweighing the need for action to prevent and remedy harm.[111] The idea that IFC must keep the burden on borrowers low in order to be competitive in winning their business directly contradicts IFC's Articles of Agreement. It states explicitly that "the Corporation shall not undertake any financing for which in its opinion sufficient private capital could be obtained on reasonable terms."[112] A desire to finance projects it shouldn't be financing in the first place is a poor excuse for refusing to place meaningful conditions on its loans.

More broadly, the main thrust of the Draft Approach is that only the client, not IFC/MIGA, has remedy obligations. But if IFC/MIGA were serious about real remedies from borrowers/clients, they would ensure such remedies exist. Suggesting that IFC/MIGA will not provide remedies themselves and that borrowers/clients should – but IFC/MIGA are not going to do anything to actually *make* them do so – reveals this entire approach to be worthless.

B. IFC/MIGA's Draft Approach does not provide for any mechanisms for responding to community complaints and concerns that could actually result in remedy.

IFC/MIGA identify three avenues through which they would "continue to work towards enhancing access to remedy for communities:"[113] the CAO, client grievance mechanisms, and IFC's Stakeholder Grievance Response. None of these are actually new and none have any actual ability to result in remedies for those who have been harmed unless the borrower/client, or IFC/MIGA, chooses to act.

1. The CAO remains powerless to provide a remedy from either the client or IFC/MIGA if harm occurs, and it cannot even induce IFC/MIGA management to address non-compliance.

The CAO is an important mechanism in many ways for both communities and IFC/MIGA. But it is simply not capable of ensuring access to remedy and closing the remedy gap in IFC/MIGA projects as currently constituted; it cannot compel any action at all, let alone compel a remedy of any kind by either IFC/MIGA or the borrower/client.

While the dispute resolution function can occasionally facilitate access that would otherwise not exist and may even lead to some kind of remedial action by the borrower in rare cases, neither that process, nor the compliance function, has ever, to our knowledge, resulted in *IFC or MIGA* providing remedy of any kind to any community, and they rarely result in any action to correct non-compliance. The CAO itself reports that the majority of compliance investigations over the past decade "have not led to actual improvements" for project-affected people;[114] it notes that 78% of

[111] *Id.*
[112] IFC Articles of Agreement, Art III § 3.
[113] Draft Approach ¶ 18.
[114] CAO, Remedy Gap at 9.

completed and closed CAO investigations that made project-level findings did not lead to satisfactory remedial actions.[115]

The External Review Report likewise concluded that "[t]he majority of CAO findings of non-compliance and related harm are not remedied,"[116] emphasizing the "highly unsatisfactory response by IFC/MIGA in implementing corrective actions."[117] It found that IFC brought a project into compliance in only *two* cases.[118]

To the extent that CAO dispute resolution or compliance processes lead to any commitments at all, these are made by the borrower only and rarely carried out.[119] Only 15% of publicly disclosed commitments from compliance reviews and 37% of commitments from dispute resolution agreements were actually carried out, according to CAO reports, and less than half of those were actually aimed at addressing the needs of project-affected communities.[120] This poor performance record is in part a reflection of the institutional constraints that prevent CAO from ensuring the provision of remedy.

The Draft Approach vaguely references "several elements" in the new CAO Policy, but nothing about that changes this fundamental problem, because it is a feature, not a bug. IFC/MIGA specifically designed the CAO to be powerless to provide or compel remedy, or even to require action to correct non-compliance. As IFC reiterated throughout the *Jam* litigation, CAO "is not a claims tribunal" and has "no authority to … grant restitution."[121] The CAO is only able to make findings and recommendations, which IFC regularly ignores.[122]

IFC/MIGA state that they "proactively encourage their clients to share information with stakeholders regarding grievance mechanism channels, including the CAO."[123] But a recent report by CAO notes this is not happening.[124] Worse, there is evidence of IFC Management acting to impede CAO investigations. Most troubling, *during* a CAO investigation into child sexual abuse, "IFC and the client entered into a wide-ranging confidential agreement that purports to cover CAO's work."[125] The agreement, "reached without CAO's agreement or participation … includes commitments from IFC that CAO will not disclose information that the client asserts to be confidential."[126] That investigative report has yet to be released. It is unclear if this is a reason why, but this action by IFC has already substantially undermined its own credibility and is a serious threat to CAO's ability to be

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115 *Id.*
116 External Review Report ¶ 190.
117 *Id.* ¶ 191.
118 *Id.* ¶ 111.
119 Megan Pearson, Data Doesn't Support IFC/MIGA's Remedy Proposal, Accountability Console (Mar. 6, 2023) https://accountabilityconsole.com/newsletter/articles/data-doesnt-support-ifcmigas-remedy-proposal/.
120 *Id.*
121 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).
122 *See, e.g.* External Review Report ¶ 12 ("IFC has frequently disagreed with CAO investigation findings; when it disagrees, IFC has not pursued remedial actions to correct CAO non-compliance findings.").
123 Draft Approach ¶ 18(iii)
124 CAO, The Remedy Gap at 14 (despite IFC/MIGA's commitment to "disseminate information at the project level about the CAO and its availability," "CAO is unaware of any work plan or actions by IFC or MIGA to implement this commitment").
125 CAO, Compliance Appraisal: Summary of Results: Bridge International Academies-04, at 7 (Dec. 23, 2020).
126 *Id.* at 7-8.

an impartial, independent, and trusted actor. It certainly gives little reason to expect management to act in good faith in any future investigations. Nothing in the new CAO Policy or the Draft Approach gives CAO sufficient power, or otherwise puts in sufficient safeguards, to prevent such action by IFC/MIGA management in future cases.

While some of the changes in the new CAO Policy are welcome, these are tweaks around the edges. Some may lead to more efficient CAO processes, but they do not change the structure, power, or function of the CAO to enable it to ensure provision of remedy and thus will not result in better outcomes for those who have been injured.

The requirement of Board-approved Management Action Plans (MAPs), with time-bound actions on the part of IFC/MIGA to remedy harm and bring projects into compliance, was sorely overdue, as virtually every other IAM has such a requirement in place.[127] But even with the best intent by IFC/MIGA, which, given its history, there is no reason to expect, its impact will remain limited when the quality of such plans and any actual implementation remain entirely in IFC/MIGA's hands. Except for providing initial recommendations, CAO can be excluded from the process of preparing the MAP entirely; CAO submits comments on the MAP to the Board *after* it is written.[128] CAO has no power to ensure that the MAP actually tracks CAO recommendations or will result in positive outcomes for project-affected people, or even compliance. In light of IFC's record, merely requiring a response and action plan by management does little to guarantee the quality of that response or its actual implementation.

CAO's inability to ensure the sufficiency of what ends up in a MAP is made worse by the language in the new policy on case closure. While the previous policy tied closure to CAO's determination of compliance with IFC/MIGA policy,[129] the new policy suggests cases be closed when the "commitments *as set out in the MAP* have been effectively fulfilled."[130] That could incentivize IFC/MIGA to draft narrow MAPs that do not solve the underlying problem, in order to silence the CAO. Given the broad language on CAO's more expansive role elsewhere, CAO should *not* consider the scope of its work limited to a MAP it considered inadequate. But even the suggestion that an inadequate MAP could constrain CAO's monitoring in this way shows the new policy has not addressed the structural and power constraints that prevent CAO from actually being able to get IFC/MIGA to take any action.

The External Review Report found that while "all IAMs have difficulties in achieving implementation of effective remediation measures," "the challenges seem to be particularly pronounced" for IFC/MIGA.[131] Other development finance institutions are far ahead of IFC/MIGA in authorizing and empowering their grievance mechanisms to expressly recommend the institution provide, or even directly provide itself, remedy to impacted communities and to

[127] As the External Review Team observed, other IFIs already require Management to present such plans, and it is an "established practice of other IAMs" to develop such plans "in consultation with complainants." External Review Report ¶¶ 48, 49. "[T]he absence of a Management Action Plan and the lack of Board approval of such a Plan" is "a significant shortcoming in the current CAO compliance process." *Id.* ¶ 49.
[128] IFC/MIGA IAM (CAO) Policy ¶ 135 (2021).
[129] CAO Operational Guidelines § 4.4.6 (2013).
[130] IFC/MIGA IAM (CAO) Policy ¶ 145 (2021) (emphasis added).
[131] External Review Report ¶ 333.

monitor implementation of that remedial action.[132] The addition of language in the new CAO Policy expressly recognizing the CAO role in recommending remedial action to address non-compliance in harm is thus welcome and overdue.

But words in a policy document do nothing to address the organizational culture and attitude among IFC/MIGA staff and management, one of the most significant factors in perpetuating the remedy gap. The External Review Report found that many IFC staff and managers believe that "the CAO compliance process should not lead to remedial actions" *at all*; "instead, [it] should remain restricted to institutional learning to prevent a recurrence of such non-compliance."[133] This problematic perspective is "unique" to the CAO and IFC/MIGA; the question at other institutions is "*not* whether there is a remedial action requirement, but rather *how, by whom, and at whose expense* remedial action should be carried out."[134] In other words, there is "common understanding" at other institutions that the role of the accountability mechanism is "to help assure (through action by the IFI and the borrower) that non-compliance and related harm are remedied."[135] IFC is the outlier.

It is hardly surprising, therefore, "that in the vast majority of cases, IFC responses to address project-level compliance findings are insufficient and/or ineffective."[136] Concerted, meaningful action has to be taken to fundamentally change the attitude of IFC management and staff who do not consider themselves required to abide by the recommendations of the CAO or act in response to its findings. Because changes to the wording of the CAO Policy cannot do that, it cannot change implementation outcomes.

A serious approach to remedy must include substantial measures to strengthen the power, authority, and independence of CAO to make findings of both borrower and IFC/MIGA non-compliance and actually compel implementation of remedial action, including requiring provision of compensation or other remedy by IFC/MIGA Management and Staff. IFC has mechanisms in place that can make binding decisions when it comes to employment disputes and violations of sanctions policy; there is no reason why compliance with environmental and social standards and contractual conditions meant to protect the most vulnerable, those who host IFC/MIGA projects, should not be treated with similar seriousness.

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132 *See, e.g.* ANZ, ANZ Human Rights Grievance Mechanism Framework § 5.4 (2021) ("The Mechanism will… Consider and provide any ANZ remedy in consultation with the Affected People"); African Development Bank ¶¶ 67(iii) (power to recommend remedy, "[t]hat redress be provided to those harmed" including financial compensation); *id.* at ¶ 69 (if it "finds the Bank to be non-compliant, Management *shall* include in the MAP clear time-bound actions for… achieving *remedy* for affected populations) (emphasis added); Belgian Investment Company for Developing Countries, BIO's Grievance Mechanism Policy § 7 (March 2022) ("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…to ensure the provision of remedy." And, "where BIO contributed (or may contribute) to an adverse impact… BIO shall use its leverage on the portfolio company to mitigate any remaining impact to the greatest extent possible" and "[i]f necessary, BIO may also decide to cease (or prevent) its contribution to the harm, for instance by suspending or terminating the business relationship.").

133 External Review Report ¶ 307.

134 *Id.* ¶ 308.

135 *Id.*

136 *Id.* ¶ 311.

2. IFC/MIGA have no idea whether project-level grievance mechanisms even exist, let alone whether they ever provide access to remedy of any kind, but they certainly do not address *IFC/MIGA* accountability at all.

The Draft Approach also says that IFC/MIGA will create "guidance materials and trainings" for clients and staff "on how to make project-level grievance mechanisms more effective in addressing stakeholder concerns and complaints."[137] Do any such mechanisms exist? Do individuals or communities ever use them? How effective are they? Have any such mechanisms ever resulted in a meaningful "remedy" to anyone? These are basic threshold questions that IFC/MIGA evidently have zero idea how to answer at this point. Yet they center these mechanisms as being a key means of "access to remedy" in their Draft Approach.

IFC's Performance Standards have required project-level grievance mechanisms for many projects for more than a decade, and IFC's Environmental and Social Review Procedures Manual has long required IFC to review the effectiveness of client grievance mechanisms.[138] We have found no evidence that IFC does this at all, and apparently the External Review team could not either, citing a lack of any such information.[139] Only now do IFC/MIGA suggest they have started a portfolio review (although they provide no details as to what this entails).

Centering borrowers' hypothetical grievance mechanisms as a feature of "access to remedy," without having done any assessment or analysis whatsoever, reveals how unserious and illegitimate this effort is. Is IFC going to make this review publicly available? If IFC finds in its ongoing "survey" that its clients typically do not have such mechanisms, that they are not used, or they are not effective, does it intend to revise its entire approach to remedy? Or will it keep this as a central feature and hope its trainings will eventually lead to something better many more years down the road? The Draft Approach manufactures years of further delay to conduct a "review" and develop trainings without any commitment to actually take any action at any point down the road when that process might finally end.

The experience of the communities in the Tata Mundra case is common: repeated attempts to bring concerns to the company directly are simply ignored. More generally, existing evidence strongly indicates that company grievance mechanisms are largely ineffective, and often a strategy companies use to distract and obfuscate stakeholders and delay and divert affected communities' complaints.[140]

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137 Draft Approach ¶ 18(i).

138 IFC, Environmental and Social Review Procedures Manual, ESRP §§ 2.3, 3.4.3 (2014), https://www.ifc.org/wps/wcm/connect/6f3c3893-c196-43b4-aa16-f0b4c82c326e/ESRP_Oct2016.pdf?MOD=AJPERES&CVID=lRwoQFr.

139 *See, e.g.* External Review Report ¶ 359 ("there is a lack of information about how IFC checks whether clients have adequately informed people about the existence of the grievance mechanism"); *id.* ¶361 ("there is a lack of systemic data available on the effectiveness of client GMs or on the support and supervision provided by IFC/MIGA").

140 Mind the Gap, Distracting and Obfuscating Stakeholders (July 7, 2020), https://www.mindthegap.ngo/harmful-strategies/distracting-obfuscating-stakeholders/. *See also* International Commission of Jurists, Effective Operational-level Grievance Mechanisms 116 (Geneva: International Commission of Jurists, 2019), https://www.icj.org/companies-around-the-world-must-do-more-to-ensure-effective-operational-grievance-mechanism-practices-and-provide-clear-and-transparent-information/.

Such mechanisms are neither effective nor appropriate for many kinds of harm, especially large-scale harm or gross human rights abuses.[141]

Where such mechanisms exist, they are designed and dictated by the company without community involvement.[142] Most grievance mechanisms enable companies to exploit power imbalances,[143] often lead to intimidation, harassment, and reprisals against complainants,[144] and lack any avenue for enforcement of anything at all, leaving the company free to ignore the complaints or abandon promises it makes as part of the process.[145] EarthRights' work with communities using such mechanisms confirms many of these problems.[146]

Even if such mechanisms were able to satisfy borrower remedial obligations, that does nothing to address IFC/MIGA's *own* remedial obligations where they cause or contribute to harm. Ultimately, IFC/MIGA again commit to nothing that might actually improve the ability of communities to obtain remedies from either the borrower or IFC/MIGA.

3. The Stakeholder Grievance Response function is obviously not an avenue for remedy.

The last avenue for "access to remedy" listed, IFC's "Stakeholder Grievance Response (SGR) function," is disingenuous and entirely misleading. The SGR is a management tool, a means of coordinating IFC management positions and responses to grievances that come from different places. It says nothing about what those responses will be and whether it would ever mean actual remedies for people who are harmed. That IFC previously "had no systematic way for receiving, tracking, or responding to complaints," is obviously problematic.[147] But this basic update to improve IFC's internal functions (and MIGA's, if it establishes the same) plainly is not about community access to remedy. Suggesting otherwise further undermines the credibility of this whole effort.

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[141] International Commission of Jurists, Effective Operational-level Grievance Mechanisms 10 (Geneva: International Commission of Jurists, 2019), https://www.icj.org/companies-around-the-world-must-do-more-to-ensure-effective-operational-grievance-mechanism-practices-and-provide-clear-and-transparent-information/.

[142] *See, e.g.* EarthRights International & SOMO, Community-Driven Operational Grievance Mechanisms: Discussion Paper for a New Model 2 (Apr. 2015), https://media.business-humanrights.org/media/documents/files/documents/OGM_Discussion_Paper_-_ERI_SOMO_-_Mar_2015.pdf.

[143] Maximilian J. L. Schormair & Lara M. Gerlach, Corporate Remediation of Human Rights Violations – A Restorative Justice Framework, Journal of Business Ethics 10 (2019). *See also* Dutch Banking Sector Agreement, Discussion paper: Working Group enabling remediation at 3.2.1 (May 2019), https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf?la=en&hash=4FB229CEBC0E8FCA85E5363240C11687 (a project or site-level company mechanism "may place disproportionate decision-making power in the hands of the company, to investigate and adjudicate complaints about its own actions, and may therefore be dependent on the company's willingness to accept responsibility and determine appropriate outcomes").

[144] OHCHR, Remedy in Development Finance: Guidance and Practice 30 (2022), https://www.ohchr.org/sites/default/files/2022-03/Remedy-in-Development.pdf.

[145] Mariette van Huijstee & Joseph Wilde-Ramsing, The relationship between non-judicial grievance mechanisms and access to remedy for business-related human rights abuses in Research handbook on human rights and business 488 (Surya Deva, ed. 2020).

[146] *See, e.g.* EarthRights International, Factsheet: Abuse by Barrick Gold Corporation, https://earthrights.org/wp-content/uploads/barrick_fact_sheet_-_earthrights_international_1.pdf.

[147] External Review Report ¶ 183.

C. IFC/MIGA make no commitments to use contractual or other leverage and influence, and do not propose any changes that would address the fundamental problem that management and staff simply choose not to act.

IFC/MIGA have a legal, a moral, a mission-driven, and a business responsibility to use their leverage to prevent harm and to ensure remedy where harm results. But although IFC/MIGA acknowledge they have a role to play with respect to leverage and influence, they make no attempt to assess the extent of their existing leverage and commit to nothing that could change the status quo. As a result, IFC/MIGA fail to get at the root problem: using such leverage is left to IFC/MIGA's discretion and experience shows they will not use their power (or their money) to remedy harm to communities.

1. IFC/MIGA's complete failure to assess existing contractual terms, and their influence and leverage, undermines the seriousness of this whole component.

IFC/MIGA agree to spend time assessing their leverage and influence: they say they will "review existing contractual provisions and consider whether it would be feasible and useful to introduce additional ones to … possibly position IFC/MIGA to exercise increased influence throughout the project cycle."[148] Likewise, IFC/MIGA suggest they "would explore ways up-front to build influence and use influence throughout the full project-cycle,"[149] and "use influence with clients - including commercial influence and legal influence."

IFC/MIGA's suggestion that they have not yet bothered to consider their standard contract terms or assessed their existing commercial, legal, and other leverage and influence is inexplicable. Existing terms are commonly known within the building, and this is not a difficult task. IFC/MIGA likewise suggest they have not yet looked at their "practices" in using existing terms.[150] It is impossible to evaluate anything IFC/MIGA propose (to the extent they actually propose anything at all) without some ability to understand whether these are even actually changes, let alone changes that get at the root problems – including that the use of such leverage is currently left to management discretion.

What have IFC/MIGA been doing for the last three years? The fact that they now propose a "pilot period" to "consider" existing and potential provisions they should have been evaluating for years, without any promise of concrete action that might change the status quo, reveals this process to be more about delay than substantive change.

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[148] Draft Approach ¶ 17c.
[149] *Id.* ¶ 17a. *See also id.* ("IFC/MIGA would explore ways up-front to build influence and use influence").
[150] *Id.* ¶ 19a (IFC "would assess their practices and Seek to improve the effectiveness of their existing influence within current frameworks (e.g. linking key E&S actions with disbursements, adequately managing waivers, amendments, extensions)").

2. IFC/MIGA list vague examples of "potential contractual provisions," but make no commitments as to when, or even if, they would use them or what such provisions would achieve as compared to existing terms.

IFC/MIGA state that "[w]hen there is insufficient action by clients, IFC/MIGA may facilitate remedial actions through exercising their influence with clients."[151] But the only "enhancements" they propose amount to "exploring additional contractual provisions."[152]

IFC/MIGA list "examples of potential contractual provisions" that they "would explore further."[153] But there is virtually no analysis here of how this could change outcomes, nor consideration of the pros and cons of various approaches, let alone whether IFC/MIGA would ever actually use any of these and how they would make the decision to do so.

For example, IFC/MIGA mention "financial incentives to encourage compliance," without discussing why that may or may not be better or worse than using existing leverage to *compel* compliance. It discusses moral hazards elsewhere, but does not discuss that possibility here. IFC/MIGA also reference "alternative dispute resolution," but provide no specifics or discussion, noting only that it "would observe developments related to arbitration and consider testing relevant provisions," over an unspecified period of time.[154]

A number of the other vague examples IFC/MIGA cite actually sound like provisions in the 2008 Tata Mundra Loan Agreement, such as "client commitments to remediate/develop remedial plans for certain potential adverse impacts," and "specific contractual remedies for noncompliance with E&S requirements," provisions on responsibilities for reporting on allegations and adverse impacts, and responsibilities for remedy or compliance post-exit.[155] IFC/MIGA provide no discussion or analysis of whether they are suggesting the same terms used in the Tata Mundra Loan Agreement, a stronger version of those terms, or something else altogether. And they do not suggest any basis to be able to evaluate why it might result in a different outcome in a future project when such provisions did nothing for these communities.

IFC/MIGA's suggestion that many of these provisions "would be innovations that are not consistent with current market practice," is hard to take seriously when many of these provisions were in fact in the Tata Mundra loan agreement (signed 15 years ago) in some form, and when IFC/MIGA admit that they have not even analyzed their own contracts yet - let alone done some sort of broader market analysis.

But innovation is precisely what IFC/MIGA should be doing. It is disappointing that IFC/MIGA did not use this opportunity to think creatively and strategically about how to structure contracts to produce the best development outcomes. Some of these contract provisions could have been good ideas. But IFC/MIGA do not meaningfully engage with any of them, and ultimately commit to doing nothing that could meaningfully alter the status quo.

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151 Draft Approach ¶ 15.
152 *Id.* ¶ 17.
153 *Id.* ¶17c.
154 *Id.*
155 *Id. See* infra Section V.C.3.

3. IFC had substantial contractual power and leverage in the Tata Mundra project, and still does. It simply chose not to use it.

Because IFC does not discuss its existing leverage and influence, it avoids the root problem: it does not matter how much leverage or influence IFC has if IFC management can simply choose not to use it and face no consequences from doing so. While strengthening contractual provisions to enhance IFC leverage can be an important step, it is meaningless without a commitment by IFC to *use* the leverage it has, a culture and incentive structure that actually *makes* IFC management use it, and some ability of outside parties to *hold IFC to that*. IFC proposes none of that.

The *Jam* communities' experience is again illustrative of the broader problem and how IFC fails to address it at all. The Tata Mundra Loan Agreement afforded IFC substantial control and authority at every stage of that project, including after repayment. The problem was not an absence of contractual leverage. It was a failure by IFC to use it.

For example, the agreement conditioned each loan disbursement on compliance with the Environmental and Social Action Plan (ESAP), IFC's Performance Standards, environmental laws and regulations, Environmental and Social Management Plans, and other environmental and social measures specified in the agreement.[156] Failure to comply with such standards was grounds for default.[157]

The first disbursement under the loan agreement was contingent upon numerous conditions having been met, including the following:

- The Borrower was in compliance with the environmental and social requirements;[158]
- IFC approval of Borrower's Environmental Management Plan and Social Management Plan;[159]
- The Borrower having employed "qualified" personnel in charge of compliance;[160]
- IFC approval of the resettlement plan;[161]
- IFC's approval of the Project's construction plan, schedule, and budget;[162]
- The Borrower had secured required insurance, including liability insurance, and specifically coverage that names IFC as an additional insured on all liability policies;[163]

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156 *See* Loan Agreement between Coastal Gujarat Power Ltd. and IFC §§ 5.02, 4.2q (Apr. 24, 2008) available at https://earthrights.org/wp-content/uploads/IFC-Loan-Agreement.pdf [hereinafter Loan Agreement].
157 *See, e.g.* Common Terms Schedule, Loan Agreement between Coastal Gujarat Power Ltd. and IFC, § 6.1(x) (Apr. 24, 2008) [hereinafter Common Terms Schedule]. *See also id.* § 6.1(d) (incorrect or misleading warranties, such as warranties made regarding E&S compliance, are grounds for default); *id.* § 6.1(o) (failure to obtain or maintain proper authorizations is grounds for default); § 6.1(aa) (failure to comply with consultants' observations is grounds for default).
158 Loan Agreement § 4.2 (q).
159 Common Terms Schedule § 4.1(i).
160 Common Terms Schedule § 4.1(i).
161 Common Terms Schedule §§ 4.1(i), 4.1(iii).
162 Common Terms Schedule § 4.1(b), 4.1(u).
163 Common Terms Schedule § 4.1(h). *See also* Common Terms Schedule Exhibit 5.3.

- The Borrower had provided proof of proper title and land use rights and water supply[164]
- IFC approval of contractors and "competency and capability;"[165]
- IFC approval of a "Project Management Committee" constituted by the Borrower, to which IFC has the power to appoint a "permanent member;"[166]
- The Borrower had amended its constitutional documents and its board or shareholders have passed relevant resolutions in order to be able to carry out its obligations under the Loan Agreement.[167]

All disbursements were subject to compliance by the Borrower, the Project Subsidiary, and their employees, agents, contractors, and subcontractors with the Environmental and Social Requirements, the Environmental Management Plan, and the Social Management Plan.[168] In addition, all representations and warranties made in signing the agreement were considered repeated with each disbursement, and if any representation or warranty was found to be misleading or incorrect, that constituted an event of default.[169] These include various specific environmental and social compliance warranties.[170]

All of these conditions could, however, be waived by IFC for any particular disbursement.[171]

Significantly, IFC had the right to perform an independent audit of environmental and social compliance "to identify any adverse impacts, risks or liabilities with respect to Environmental and Social Matters that have not been adequately mitigated or compensated," at the Borrower's expense, and the power to compel the Borrower to implement "a corrective action plan," with failure to comply constituting grounds for default.[172]

The Loan Agreement gave IFC the power to compel the Borrower to pay all costs and expenses arising out of any failure of the project or the Borrower to comply with "any Environmental Social Requirements."[173] This obligation specifically "survive[d] repayment of loan obligations to the maximum extent permissible by law."[174] This means IFC has the power to compel the Borrower to remediate harm even after the loan has been repaid.

In addition, the Loan Agreement provided IFC with substantial authority over management of the Borrower; it had authority to change the Borrower's board of directors and senior management to IFC's "satisfaction," and the top-level technical, financial, and executive personnel, project

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164 Common Terms Schedule §§ 4.1(q), 4.1(t).
165 Loan Agreement § 4.1(w).
166 Loan Agreement § 4.1(x).
167 Common Terms Schedule §§ 4.1(j), 4.1(k).
168 Common Terms Schedule § 4.2(q).
169 Common Terms Schedule § 6.1(d).
170 Loan Agreement § 3.1(s)(i)).
171 Loan Agreement § 5.04. Even if IFC waives compliance with any condition for a particular disbursement, IFC preserves the ability to require compliance for any subsequent disbursement. Common Terms Schedule § 8.1(c).
172 Loan Agreement § 5.1(i)(ii)); *see also* Common Terms Schedule § 8.1(c)(IFC has a right "to require compliance with any condition under the Senior Loan Agreement").
173 Common Terms Schedule § 8.4(a)(ii)(5) ("The Borrower shall pay to the Senior Lender *or as the Senior Lender may direct*, all costs and expenses (including Consultants' fees and expenses) arising out of or in connection with: (5) any failure by the Project or the Borrower to comply with any Environmental or Social Requirements.") (emphasis added).
174 Common Terms Schedule §§ 8.4(d), 8.5.

management committee, and contractors and auditors all needed to meet IFC's satisfaction.[175] IFC also has the right to have a permanent representative on the project management committee.[176]

Other examples of relevant requirements and IFC authority included requirements that the Borrower submit quarterly environmental and social monitoring reports,[177] an Annual Performance Audit,[178] and reports on any environmental and social claims.[179] IFC also had the power to appoint consultants and advisors for the project,[180] and IFC, CAO, and IFC consultants have the right to visit and inspect the project site and facilities and access to the Borrower's books and records.[181] The Borrower pays for all reasonable expenses incurred by IFC, CAO, and IFC consultants in exercising this right.[182]

Voluntary prepayment by the Borrower was not to be permitted until after the Project Physical Completion Date,[183] which is not deemed reached until the project passes certain tests,[184] and numerous other environmental and social requirements have been satisfied.[185] This includes the

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175 Common Terms Schedule §§ 4.1 (x), 5.1(w)(i)-(iii)(The Borrower's board of directors, top-level technical, financial and executive personnel, and project management committee must all meet IFC's satisfaction).). *See also* Common Terms Schedule §4.1(w)(contractors must meet IFC's satisfaction).

176 Common Terms Schedule § 4.1(x).

177 Common Terms Schedule § 5.5(c)(v). The Borrower is required to file Quarterly Environmental and Social Monitoring Reports, as well as an Annual Environmental and Social Performance Report, which must include an overview of the project and its progress against schedule; details of any alignment, routing or design changes; details of "any material adverse impact relating to any environmental or social matter," "any material written communication with any Authority relating to any environmental or social matter," and "Any Environmental or Social Claim." Common Terms Schedule § I.1.1. These reports must also include a description of the corrective or remedial actions taken or proposed, and an action plan subject to IFC approval. *Id.* Environmental and Social Matters is a very broad term, and includes emissions, deposits, discharges, waste, nuisance, noise, and other traditional environmental matters, as well as impacts of resettlement and land acquisition, impacts on indigenous peoples and other vulnerable groups, public consultation and disclosure. *Id.*

178 Common Terms Schedule § 5.5(c)(v)(B).

179 Common Terms Schedule §5.5(c)(vi)(The Borrower must report any material incident that has had or could reasonably be expected to have an adverse effect on the environment, health or safety at the Project or of employees or consultants working on site, as well as the anticipated on-site and off-site impacts, as soon as possible but within three days).

180 Common Terms Schedule § 8.15. "Consultants" incudes, among others, "the Environmental and Social Consultant and any other advisor or consultant of the Senior Lenders appointed or replaced from time to time." Common Terms Schedule I.1.1.

181 Loan Agreement § 5.1(f)(i).

182 Loan Agreement § 5.1(f)(ii).

183 Common Terms Schedule § 2.5(a).

184 This includes the successful completion of tests, with all units operating simultaneously, demonstrating that noise and emissions levels are in compliance with the E&S requirements and applicable law in all respects. Common Terms Schedule § I.1.1, "Project Physical Completion Date" § (i).

185 The Borrower must submit, among other things, a report from the Environmental and Social Consultant stating whether there are any past or existing adverse risks or impacts relating to the E&S Requirements that have not been adequately mitigated or compensated, known or threatened E&S claims, or past or existing material complaints relating to E&S requirements; a certificate stating that the Project was constructed in compliance with all E&S Requirements and Applicable Law in all respects and the Project and Borrower are in compliance with all E&S Requirements; a certificate that implementation of the Social Management Plan has been completed in full. Common Terms Schedule § I.1.1, "Project Physical Completion Date" §§ (k)-(l). The Borrower must also be current on submissions of required quarterly and annual reports. *Id.* § (m). The Borrower must also submit, in satisfactory form and substance, the Project's Environmental and Social Management Plans for the Project's operational phase. *Id.* § (n).

absence of any continuing Event of Default or Potential Event of Default, such as noncompliance with environmental and social conditions.[186]

The loan agreement required the Borrower "to carry liability insurance to cover legal liability" of IFC, including for "injury to third parties or loss or damage to their property arising out of the ownership, operation, use or maintenance of the Project" and it "must include coverage for sudden and accidental seepage, pollution and contamination, and the costs incurred of cleaning up."[187] IFC could also require the borrower "to procure additional or amended insurance coverage as necessary to cover any material change in the identified risk exposure."[188]

The Loan Agreement provided IFC with numerous different legal mechanisms through which it could enforce the contract provisions,[189] and the Loan Agreement also had robust indemnification provisions. The Borrower "shall pay to the Senior Lender or as the Senior Lender may direct, all costs and expenses (including Consultants" fees and expenses) arising out of or in connection with … any failure by the Project or the Borrower to comply with any Environmental and Social Requirements."[190] The borrower also must pay IFC for consultants that IFC appoints.[191] And the Borrower also indemnifies IFC for any loss, claim, damage, or liability to which IFC itself may become subject in connection with or arising from their activities.[192] Each of these indemnification provisions expressly survived repayment of the loan.[193]

In other words, under that contract, IFC not only has substantial legal authority to compel compliance, it can expressly require payment of compensation for harm, and IFC can even take the remedial action and pay compensation to these communities itself and seek full reimbursement from the Borrower for those costs long after the loan agreement has been repaid.

Despite these terms, IFC took no action to use any of this authority. Indeed, in the *Jam* litigation, IFC made clear that "[a]ny violation of the IFC E&S Standards by [the borrower] provides IFC with various contractual enforcement options, but does not *require* IFC to do anything in response."[194] And it told the court the communities had no rights under the contract to enforce provisions meant to protect them. The *Jam* communities' experience shows that contractual terms to protect communities and the environment and ensure access to remedy are meaningless if left to IFC discretion, because IFC cares more about the Borrower than the community, and will do nothing.

A credible approach to remedy, accordingly, must involve firm, express commitments to implement such leverage, internal performance and other management structures that incentivize use of such

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186 Common Terms Schedule § I.1.1, "Project Physical Completion Date" § (a).
187 Common Terms Schedule § 4.1(h); Common Terms Schedule § 5.3; Common Terms Schedule Exhibit 5.3.
188 Common Terms Schedule § 4.1(h); Common Terms Schedule § 5.3; Common Terms Schedule Exhibit 5.3.
189 *See, e.g.* Common Terms Schedule § 6.3. These include, acceleration, payment on demand, suspension of the borrower's right to further disbursements, termination of disbursements or cancellation of the loan, enforcement of security, or further terms that IFC deems fit. These options are in addition to all other options provided by law. Loan Agreement § 7.02.
190 Common Terms Schedule, Section 8.4(a)(ii)(5).
191 Common Terms Schedule, Section 8.4(a)(iii).
192 Common Terms Schedule § 8.4(b).
193 Common Terms Schedule §§ 8.4(d), 8.5.
194 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).

leverage and enforcement of contractual provisions, as well as punishment for a failure to do so. And it must have mechanisms built in that give affected parties express rights to hold IFC and the Borrower to account for failure to comply with the terms that are meant to protect them and their environment. If IFC wants anyone to actually believe it would ever use its leverage in the future – it should start by using the rights it has under the Tata Mundra Loan Agreement.

4. The Draft Approach leaves the use of any contractual power or other leverage entirely up to IFC/MIGA, thus making it clear they have no intent of using it to protect people or remedy harm.

The failure by IFC/MIGA management to exercise their leverage is not unique to the Tata Mundra case. Analysis by the CAO has found "under-use of leverage by IFC/MIGA" to be a common factor contributing to a lack of remedy.[195] It noted that IFC/MIGA made use of the contractual leverage provided by contract provisions conditioning disbursements on compliance with Environmental and Social Action Plans (ESAPs), in only 23% of cases where it "considered a client's E&S actions inadequate." In 54% of cases, it allowed disbursement to go ahead despite unfulfilled commitments, either through waiver, or amending or extending the E&S compliance deadlines, and in *no case* did IFC/MIGA analyze the impacts that waiver and disbursement had on E&S performance.[196] Far from using their leverage, IFC/MIGA freely give it up for nothing in return.

This is another reason why IFC/MIGA's complete failure to assess or discuss their existing contractual terms and practice undermines this entire endeavor. Even if IFC/MIGA were to add more robust conditions to protect people and the environment, what good would it do if IFC/MIGA staff and management retain the seemingly unfettered discretion to simply waive those requirements? IFC/MIGA do not engage at all with these contractual terms that may exacerbate the remedy problem, nor do they suggest they would take any action to reform such provisions.

The Draft Approach notes only that IFC/MIGA "would assess their practices and seek to improve the effectiveness of their existing influence within the current frameworks (e.g., linking key E&S actions with disbursement, adequately managing waivers, amendments, extensions, etc.)."[197] There is no serious recognition of the institutional culture that leads IFC/MIGA to throw away their leverage rather than exercising it and little indication they intend to do anything about it.

Freely forfeiting contractual leverage is also highly relevant to early repayment. This type of "exit" frequently results in a failure to remedy harm, but yet is not addressed in either the Draft Approach or the Draft IFC Responsible Exit Principles. IFC Management often acts as though it loses all leverage in the prepayment scenario and its responsibilities end, but that is not true. As discussed above, even after repayment, IFC/MIGA have power and leverage that survive repayment – including prepayment. But IFC/MIGA also have substantial power in that prepayment process to enforce remedial obligations before allowing repayment, they simply choose not to use it. Despite

[195] CAO, Remedy Gap at 13.
[196] *Id.* at 16-17.
[197] Draft Approach ¶19a.

this, IFC/MIGA can and do give away significant leverage by allowing or facilitating prepayment without addressing non-compliance and remedial action, and even waiving pre-payment penalties.[198]

This is particularly concerning given IFC/MIGA or its clients "exit investments in projects subject to a CAO complaint" before it is resolved in *more than a third* of CAO cases.[199] Failure to use this leverage with a case subject to a CAO complaint is inexcusable.

In in the rare instances where IFC is canceling a loan or exiting based on a company's failure to meet loan conditions, this leverage is even greater. But IFC has typically done this quietly without explanation. This is a huge missed opportunity and a huge failing. Companies use the fact of current or past IFC lending as a stamp of approval to attract other investors by assuaging concerns about their risk. Where IFC stays silent about compliance problems, it is failing to exercise its substantial leverage to ensure remedies to those who have been harmed and letting the borrower continue to use IFC's name.

IFC does not commit to use its leverage or influence in anyway at all, it simply notes "[a]pplying influence could entail, for example, considering whether to exercise applicable rights or remedies under the relevant agreements, or working closely with other lenders, governments, or parent companies."[200] It could. But IFC gives no reason to think it will.

This failure to speak honestly about contractual terms, leverage, and actual practice in this process substantially undermines IFC/MIGA's credibility and destroys trust, particularly given their track record of failing to use any such leverage and/or waiving environmental and social requirements. Seriously tackling this problem requires substantially greater transparency from IFC/MIGA about past and existing contract terms and practice, as well as a commitment to contract transparency going forward to ensure that, at a minimum, project neighbors are fully aware of the terms on which the project will proceed from the outset and can better monitor whether the borrower and IFC/MIGA are actually abiding by such promises and commitments.

D. Support and enabling activities are important, but even here IFC/MIGA commit to virtually nothing.

IFC/MIGA indicate that where "the client lacks capacity to resolve complaints, IFC/MIGA may additionally support the client or relevant third parties throughout the project cycle, including during a CAO dispute resolution process, at the end of a CAO compliance investigation, or during a non-CAO complaint process. This could entail support for enabling activities such as technical assistance, capacity building, fact-finding, dialogue facilitation, or community development which could be provided in the context of CAO cases or otherwise."[201] There is an obvious need for this kind of support and one we agree IFC/MIGA should fill. But even here IFC/MIGA commit to nothing at all. Indeed, IFC/MIGA go out of their way to emphasize that any such support would be provided "*ex gratia*," essentially, as a favor, if and only if IFC/MIGA decide they care enough to

198 CAO Remedy Gap at 17 (noting that a review of CAO cases revealed instances in which IFC approved loan rescheduling or debt restructuring, or waived pre-payment penalties, all without requiring actions to correct or address non-compliance in existing projects).
199 *Id.* at 19.
200 Draft Approach ¶ 19a.
201 *Id.* ¶ 19b.

bother.[202] How can anyone expect IFC/MIGA to actually do anything based on this, and given experience to date? This is an area where IFC/MIGA could add significant value not just in terms of the remedy gap but in terms of building up company capacity and making themselves more competitive, effective institutions, and yet they pass on the opportunity almost entirely.

Moreover, this capacity and support should not be limited to providing resources to the client. IFC/MIGA should establish a means of making resources available to support communities hosting its projects, particularly in using mechanisms for redress.

VI. IFC/MIGA's elevation of concerns about competitive advantage above the development outcomes of their projects reveals institutions who have lost both purpose and relevance.

Ultimately, IFC/MIGA's thorough discussion of the costs and negative impacts *on IFC/MIGA, and the borrower,* of having to provide remedy, without any acknowledgement of how the failure to provide remedy hurts communities that host their projects, forcing them to bear all the risk, is revealing of just how enormous the accountability problem really is within the institutions. It strongly suggests that IFC/MIGA have lost their way.

IFC/MIGA's position is that competitiveness and cost concerns outweigh the importance of compliance with environmental and social obligations and ensuring communities are not left in poverty as a result of IFC/MIGA's investments. That is incompatible with their stated mission of ending poverty and promoting sustainable development while doing "no harm." IFC's mandate is not to provide loans irrespective of the environmental and human toll. The interests of its "clients" are not supposed to be the only – nor the primary – consideration**.**

There is an obvious and deep-seated culture problem in IFC/MIGA. IFC in particular has long been criticized for having a "deals over development" mentality that comes at the expense of communities that host its projects.[203] The Independent Evaluation Group of the World Bank, for example, has repeatedly noted IFC and MIGA hostility to evaluating development impact, noting their staff instead measure success "primarily through monetary returns and financial sustainability," and emphasizing that it is "essential to IFC and MIGA's development mandates" that this "culture … be changed."[204] The External Review team likewise emphasized the need for "major cultural change in IFC" away "from an investment banking culture,"[205] and recommended that the Policy and Risk Department actually track the reasoning and results of staff judgements in order to better

[202] *Id.* ¶ 21.
[203] *See, e.g.* Charles Kenny, Vijaya Ramachandran and Scott Morris, Center for Global Development, *An Agenda for Makhtar Diop at the IFC*, (Feb 18, 2021), https://www.cgdev.org/blog/agenda-makhtar-diop-ifc; CAO Audit of Investment in Corporacion Dinant S.A. de C.V., Honduras (Dec. 20, 2013) at 10 ("accountability for results defined primarily in financial terms may incentivize staff to overlook, fail to articulate, or even conceal potential environmental, social and conflict related risks. The result, however, as seen in this audit is that the institution may underestimate these categories of risk."); *id.* at 57 ("investment staff are minimally accountable for either the E&S performance of their projects or the quality of their relationships with E&S staff."); *id.* at 58 ("the development of an organizational structure and culture in which E&S concerns are appropriately voiced at key decision points requires ongoing attention").
[204] Independent Evaluation Group, Annual Report 2022 at 94, 14.
[205] External Review Report ¶ 23.

address the problem.[206] And the CAO similarly observed in its recent Remedy Gap report "the need for a culture shift at IFC and MIGA toward staff not only valuing the client relationship but also embracing their role to protect the interests and wellbeing of impacted communities and the environment."[207] The Draft Approach makes clear IFC/MIGA have no intention of addressing this problem.

Given IFC's "deals over development" mentality and the unwillingness to address the problem on display in the Draft Approach, it is difficult to see what IFC's relevance is going forward. A key IFC value-add is supposed to be assuring better social and environmental standards and enhanced development impact. If IFC is not actually willing to ensure projects are up to those standards – through serious proactive capacity building as well as holding borrowers accountable to meet those standards – then it is neither aiding in the performance of the project nor de-risking the project, since it's not minimizing negative impacts. Indeed, IFC's involvement may make matters worse, since borrowers are able to use the fact of IFC investment to greenwash their projects without having to meet any of the standards that are supposed to come with IFC involvement.

As the External Review Report recommended: "IFC/MIGA should be leading with the most ambitious E&S principles and commitments; experimenting with innovative practices and instruments; and delivering world-class economic, environmental, and social results."[208] IFC/MIGA propose the opposite. But refusing to enforce, and in some cases even weakening, IFC/MIGA's standards and declining to provide remedy won't make IFC/MIGA more competitive and it won't advance their mission.

Denying remedy to communities means leaving the intended beneficiaries of their operations worse off. That is fundamentally inconsistent with IFC/MIGA's mission and mandate. But it is not clear that IFC/MIGA in any way meaningfully evaluate development outcomes so as to take into account negative impacts on communities, and thus they fail to assess the damage they are doing to their mission and mandate. Indeed, a review of the AIMM documentation suggests that IFC *only* evaluates positive impacts but does not consider unintended or expected negative impacts on project hosts. This selective accounting undermines IFC's ability to assure it is producing positive development outcomes. A requirement to assess the actual development outcomes over every IFC/MIGA project, and a fundamental overhaul of what that evaluation looks like, is absolutely essential.

Development projects that leave host communities worse off are simply not successful development projects. The External Review panel recognized this, emphasizing that " even investments/projects/guarantees that appear to have overall highly developmental outcomes will be regarded as failures when local communities do not benefit from them, or, even worse, suffer harm

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206 External Review Report ¶ 25 ("the Policy and Risk Department should ensure that the reasoning behind staff judgments about investment risks and risk mitigation measures is consistently and adequately documented; and that the results of significant judgments (that is, where risks and mitigation measures were judged accurately and where they were not) are tracked to contribute to institutional learning over time.").
207 CAO, Remedy Gap at 15.
208 External Review Report ¶ 22.

from them."[209] IFC/MIGA's failure to reckon with this basic fact undermines this entire effort and substantially limits their ability to successfully carry out their mission.

VII. IFC/MIGA should embrace this opportunity to develop a bold, innovative approach to remedy and accountability.

IFC/MIGA have legal, moral, and mission-directed obligations to ensure those who are harmed by their activities have access to true, meaningful remedies. A serious commitment to ending the remedy gap should be embraced more broadly as a central goal and a critical component of IFC/MIGA's affirmative approach to development. IFC/MIGA have a monumental opportunity with this process to chart a new path that will re-establish their leadership role and enable them to help transform markets and produce substantially greater positive development outcomes.

Likewise, an affirmative acknowledgment of their obligation to provide and ensure remedy where harm results and the strengthening of their accountability mechanisms can substantially repair IFC/MIGA's credibility and legitimacy with communities.

A strong, meaningful commitment to ending the remedy gap with respect to all projects – through concrete funding mechanisms, as well as dedicated commitment of resources for technical expertise and other capacity support at all stages – would simultaneously position IFC to add far more value than any of its "competitors." A strong commitment to remedying harm not only ensures that no one is left worse off, it would also significantly better incentivize effective due diligence and responsible conduct from the beginning by both IFC and the borrower to substantially reduce the risk of harm in the first place. This would enhance development outcomes and minimize risk for all actors involved, including IFC. This requires serious commitments, but as the External Review Report emphasized, "Relative to the scale of IFC and MIGA portfolios and annual commitments, the resources required are modest. Relative to the scale of avoided E&S impacts, reputational risk, and potential for development impact through enhanced E&S benefits, the return on investment could be substantial."[210]

As the World Bank Group transitions to new leadership, considers a significant capital increase,[211] and continues to develop its Evolution Roadmap "to better address the scale of development challenges such as poverty, shared prosperity, inequality, and cross-border challenges including climate change, pandemics, and fragility, conflict and violence,"[212] getting remedy right has the ability to make IFC/MIGA powerful engines of transformative change. Showing donor countries and their Boards that IFC/MIGA are willing and able to address their current failures with respect to remedy will instill confidence that IFC/MIGA are actually ready to take on the challenges laid out in the

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209 External Review Report ¶ 163.
210 External Review Report ¶ 68.
211 Shabtai Gold, World Bank mulls capital increase, climate focus in new reform plan (Jan.3, 2023), https://www.devex.com/news/world-bank-mulls-capital-increase-climate-focus-in-new-reform-plan-104713.
212 World Bank Group Statement on Evolution Roadmap (Jan. 13, 2023), https://www.worldbank.org/en/news/statement/2023/01/13/world-bank-group-statement-on-evolution-roadmap.

Evolution Roadmap and capable of properly utilizing a massive capital increase in a manner that leaves communities better off.

VIII. Necessary components of a meaningful approach to remedy

For this effort to have value, IFC/MIGA must:

1. Expressly acknowledge their remedial responsibilities and commit to ensuring the remedy gap is closed in all IFC/MIGA projects through a combination of borrower funds and IFC/MIGA funds and other support. This includes financial intermediaries.
2. Remedy past cases of harm. At a minimum, all cases where CAO found non-compliance. This must include a commitment to provide remedy, including compensation, to the *Jam* communities.
3. Commit to ensuring there are funding mechanisms in place for all projects in the event of harm. This should include building in contingent liability funding for all projects that can be easily tapped into in the event of harm and a process for ensuring such funds are actually provided that minimizes, or removes, IFC staff/management discretion to decline to access such funds. This should also include a means of ensuring IFC/MIGA funds are made available where IFC/MIGA cause or contribute to harm, and where there is no means of ensuring the borrower will provide compensation. This could be a set aside fund administered by CAO or some other independent means but it should be set up in a way that removes barriers to accessing such funds, including IFC staff and management discretion to refuse or simply fail to ac.
4. Disclose existing contractual terms and explain existing practice. Commit to full contract transparency going forward.
5. Write and fully publish a model contract(s) for all future projects with meaningful, innovative contractual terms to enhance IFC leverage to ensure social and environmental compliance. There should be an emphasis on provisions that remove discretion from IFC management and staff and give oversight and enforcement to the people and communities that the provisions are meant to protect, including express third party beneficiary rights for project-affected communities. This should also include limiting existing provisions, such as the ability to waive compliance, that undermine environmental and social performance.
6. Expressly commit to using all available leverage and describe in detail what this will look like so prospective clients, communities, and the public are fully aware of this commitment and what is expected.
7. Establish – and make publicly available – detailed policies and procedures that lay out the requirements for documenting use of any staff or management discretion with respect to compliance with environmental and social conditions, including written justification and explanation for any waiver decision and after the fact evaluation of that decision.
8. Require the evaluation of development outcomes for every IFC/MIGA project and overhaul the way development outcomes, and more generally "success" is evaluated to require assessment of the impact on the local community and the environment. The AIMM

evaluation model is inadequate and problematic. The new approach must include an evaluation of initial assumptions and justifications against actual implementation and include a detailed assessment of environmental and social impacts, including negative impacts, to assess the net development outcomes.

9. Substantially overhaul internal structures and incentives, with particular emphasis on how staff and management performance is evaluated and reshape other incentive structures necessary to shift the institutional culture away from emphasizing money out the door, and instead toward positive development outcomes and the prevention of harm to third parties and the environment.
10. Strengthen the CAO, including by giving it greater access to information, more independence and authority, more resources, and the power to compel action by IFC/MIGA, including remedies, and especially compensation.
11. Substantially enhance information disclosure and access to host communities. For every project, provide materials in the local language and distribute locally regarding IFC/MIGA potential involvement before project approval. Include information on the CAO as part of this.
12. Substantially enhance commitment to enabling and supporting remedy to clients, but also expand this to make resources available to communities to support them in accessing mechanisms for redress and in balancing the asymmetry of power, resources and information.
13. Commit to ensuring every exit – including early borrower prepayment – will ensure remedial action before the borrower's obligations are considered complete under the agreement.
14. Develop an approach to providing for affirmative local development outcomes separate from the question of remedy, to be designed by and for the communities who host IFC projects.

IX. Conclusion

Put simply, IFC/MIGA did not do the task that they were assigned. The Draft Approach is not an approach to remedial action at all, but rather, a concerted effort to dodge any measure of accountability. IFC/MIGA must use this opportunity to course correct before it is too late.

We would be happy to discuss any of the above further.

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