Shift Submission to the International Finance Corporation/Multilateral Investment Guarantee Agency (IFC/MIGA) Consultation on the proposed "Approach to Remedial Action"

At Shift, we have worked for several years with a wide range of financial institutions and their stakeholders seeking to embed the UN Guiding Principles on Business and Human Rights (UNGPs)[1] into their practice, as well as supporting the integration of the UNGPs into the work and tools of various financial industry associations and initiatives. One of our areas of focus has been defining and operationalizing the concept of the 'remedy ecosystem' and the important role financial institutions can play in enabling remedy, including in the context of the innovative Dutch Banking Sector Agreement.

From March through April 2022, Shift supported the initial conversations of the IFC/MIGA interdepartmental Working Group on IFC/MIGA's approach to remedial action by providing initial scoping and research on remedy as reflected in the UNGPs. IFC/MIGA subsequently carried out further analysis and then developed and published a proposed "Approach to Remedial Action" for public consultation. Shift is pleased to make a submission to that consultation.

Shift recognizes that this is an extremely important topic for IFC/MIGA to be tackling in terms of its potential to deliver meaningful outcomes for people in connection with IFC/MIGA's own investments and also in the signals that such an approach can send to other financial institutions, particularly national and regional development finance institutions.

IFC/MIGA's proposed "Approach to Remedial Action" (the Approach) references extensively the concepts of the *remedy ecosystem* and *enabling remedy.* On the positive side, we note with appreciation that the Approach considers "prospective and anticipatory measures" throughout the project cycle that could lessen the need for and/or increase preparedness for remedy. However, the Approach is grounded in an assumption that IFC/MIGA's involvement in remedy will typically take, absent "exceptional circumstances", the primary form of "facilitating or supporting" its clients' provision of remedy.

[1] The UN Guiding Principles on Business and Human Rights are the global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity and are available at: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

Shift therefore seeks in this submission to provide some background on the development of these concepts, grounded in the international standards on human rights due diligence (HRDD), and to highlight examples of the application of these concepts by financial institutions that we would encourage the IFC/MIGA to consider further. Our comments are grounded in the UNGPs and the OECD Guidelines for Multinational Enterprises[2] (hereafter collectively the International Standards). Both the Approach and the External Review[3] reference these authoritative frameworks; moreover, a growing number of bilateral development finance institutions (DFIs) have made commitments and advancements in practice with reference to these standards over the last decade.[4] They are increasingly being incorporated, in whole or in part, into existing or emerging regulations and legislation governing responsible business conduct. Most pertinently, the concepts of the *remedy ecosystem* and *enabling remedy* emerged from processes that took these standards as a core reference point.[5]

1. The Centrality of the Connection to Harm Analysis to Concepts of Enabling Remedy

The Approach focuses exclusively on the role that IFC/MIGA can play in “facilitating and supporting remedial actions” by clients. This is an extremely important role for a financial institution to play, and this aspect of the Approach substantially aligns with the developments in understanding financial institutions’ roles in “enabling remedy” advanced in contexts such as the Dutch Banking Sector Agreement’s Enabling Remediation Working Group[6] and the Equator Principles Association’s work on remedy.[7] However, a critical element of the enabling remedy framework as established in the International Standards, and as applied in these and other financial institution contexts, is that it is grounded the responsibility of businesses to **first ascertain the form of their actual or potential connection to a harm**.

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[2] Available at: http://mneguidelines.oecd.org/guidelines/

[3] See Review Team (2020) *External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness Report and Recommendations* (e.g. para. 7) at https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf

[4] See: OHCHR (2023) *Benchmarking Study of Development Finance Institutions’ Safeguard Policies* (e.g. page 36) at https://www.ohchr.org/sites/default/files/documents/issues/development/dfi/OHCHR_Benchmarking_Study_HRDD.pdf; *External Review* (as above) (para. 7 and para. 30); CAO (2023) *Responsible Exit: Discussion and Practice in Development Finance Institutions and Beyond* (p. 13). https://www.cao-ombudsman.org/sites/default/files/2023-02/03c_Rpt-WBG-3518-CAO%20ResponsibleExit_External%20R2%20v1%20FIN.pdf

[5] See: Dutch Banking Sector Agreement Working Group on Enabling Remediation (2019) *Discussion Paper* at: https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf

[6] Dutch Banking Sector Agreement Working Group on Enabling Remediation (2019) *Discussion Paper* at: https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf

[7] Equator Principles Association (2023) *Tools to Enhance Access to Effective Grievance Mechanisms and Enable Effective Remedy* at https://equator-principles.com/app/uploads/Tools-Access-to-remedy_FINAL.pdf

In cases where a business may cause or contribute to harms, business enterprises (including financial institutions) "should provide for or cooperate in their remediation through legitimate processes." Where the business enterprise's operations, products or services are **linked** to harms through a business relationship, it is not responsible for providing remedy itself but should use its leverage to seek to prevent or mitigate the impact, which can include **considering using its leverage to enable remedy**. We summarize these expectations – often called "the involvement framework" – in the graphic below.

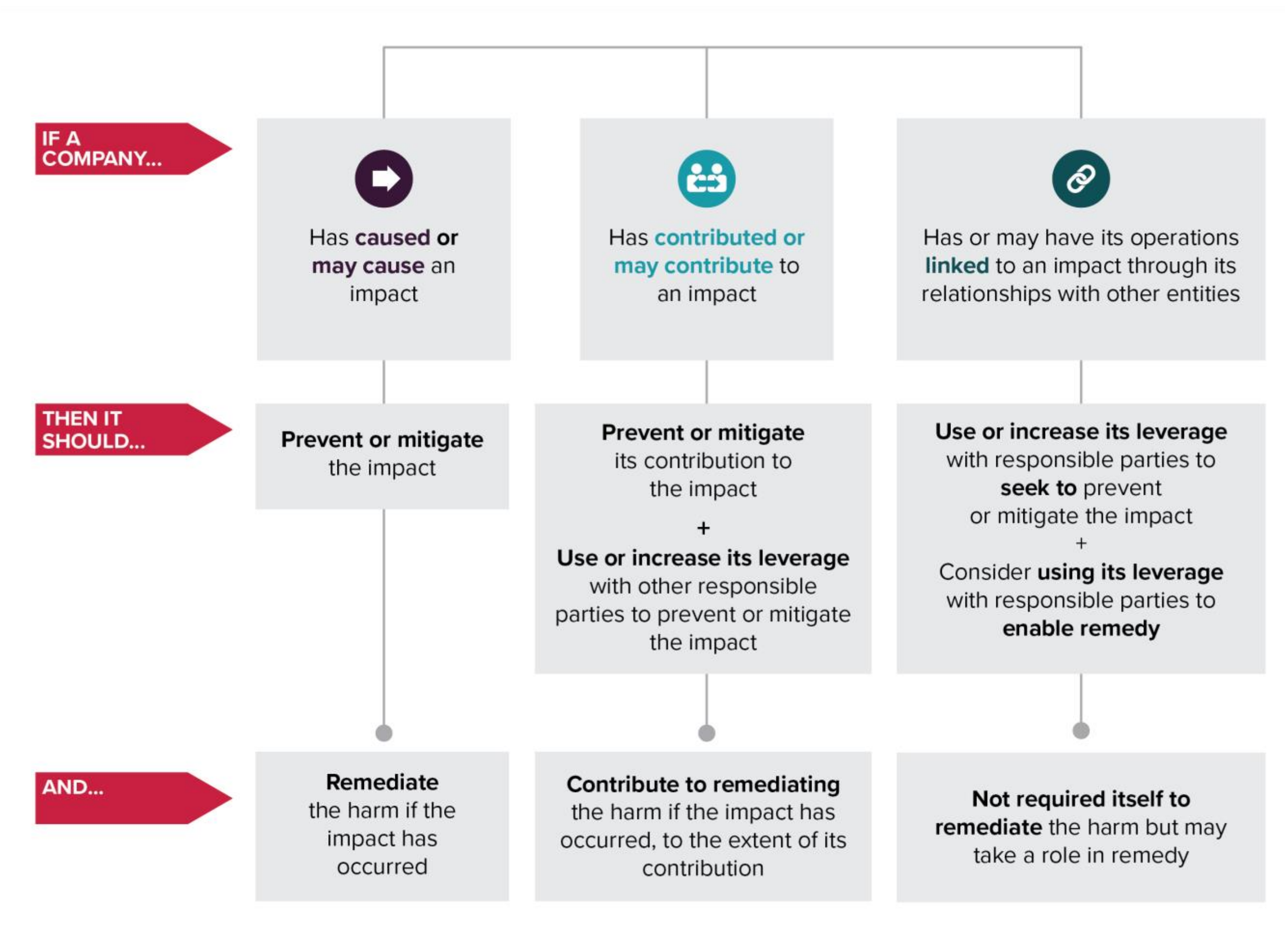

Figure 1: Involvement Framework and Implications for Action (© Shift)

A persistent myth that financial institutions can never contribute to impacts in their portfolio, whether through their actions or omissions, has been rebutted by the Office of the UN High

Commissioner for Human Rights[8] and the OECD[9] (which have a mandate to interpret the UN Guiding Principles and the OECD Guidelines respectively) looking at both commercial banking as well as development finance contexts. So, while it is fair to say that a financial institution's relationship to impacts with which it is involved through its portfolio companies will *often* constitute a situation of linkage, this is by no means always the case.

The OHCHR[10] and the OECD[11] have recognized that a factor-based approach is needed in determining where an institution sits on the continuum between contribution and leverage, based on the quality of its due diligence processes. The Dutch Banking Sector Agreement also incorporated this analysis. More recently, the Equator Principles Association, in its *Tools To Enhance Access To Effective Grievance Mechanisms And Enable Effective Remedy*, expressly recognizes that there may be situations where financial institutions **contribute to harm** and that they will then have a **direct role to play in providing remedy**.[12]

The CAO's recent "Responsible Exit" report noted emerging practice amongst DFIs and other investors involving ascertaining connection to harm to inform subsequent action.[13] A number of leading financial institutions are developing specific **diagnostic tools to determine their potential connection to impacts**, including Export Credit Agencies (ECAs), DFIs, private commercial banks, and industry groups. These tools, which structure the analysis around the quality of HRDD that was undertaken by the financial institution, are being embedded into grievance mechanisms and/or process steps that are triggered once the financial institution becomes or is otherwise made aware of an impact associated with its portfolio. One publicly available example is the guidance for ESAPs in the conservation sector produced by Legacy

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[8] See OHCHR (2017) *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 Sector* at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf

[9] See OECD (2019) *Due Diligence Guidance for Responsible Corporate Lending and Securities Underwriting* (section 2.1.2) at https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf

[10] See: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf

[11] See *OECD Due Diligence Guidance for Responsible Business Conduct* on relationship to impact, available at https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf (page 70) and OECD (2019) *DD Guidance for Responsible Corporate Lending and Securities Underwriting*, available at: https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf (page 42).

[12] Equator Principles Association (2023) *Tools to Enhance Access to Effective Grievance Mechanisms and Enable Effective Remedy* (p. 7 "Note") at https://equator-principles.com/app/uploads/Tools-Access-to-remedy_FINAL.pdf

[13] CAO (2023) *Responsible Exit: Discussion and Practice in Development Finance Institutions and Beyond* (p. 29). https://www.cao-ombudsman.org/sites/default/files/2023-02/03c_Rpt-WBG-3518-CAO%20ResponsibleExit_External%20R2%20v1%20FIN.pdf

Landscapes Fund (LLF) and KfW[14] in collaboration with Shift (see Figure 2 below). It provides requirements for risk-based Environmental and Social Due Diligence and uses the UNGPs' "involvement framework" to inform an understanding of the responsibility of LLF and its grantees for impacts on people and subsequent action, including remedy.

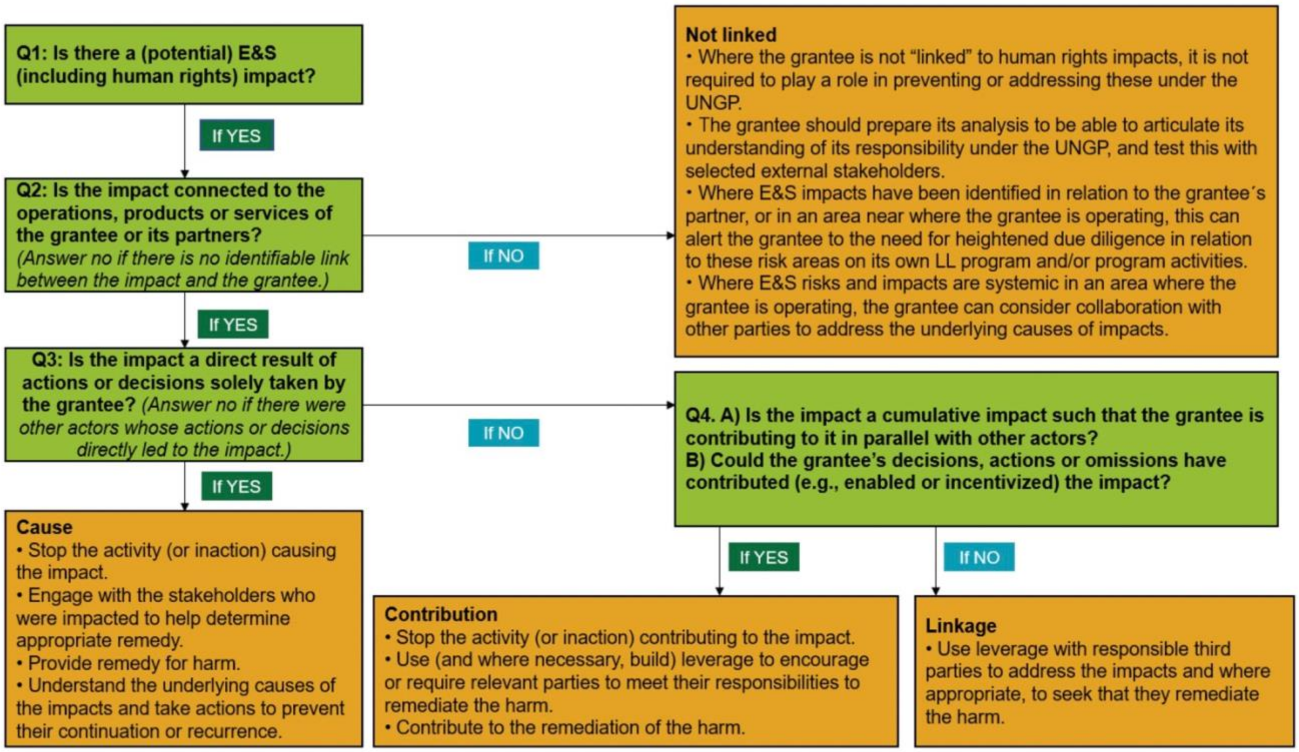

Figure 5-2 Decision Tree Flowchart for Establishing Responsibility under the UNGP

Figure 2: Legacy Landscapes (KfW) Decision Tree Flowchart Establishing Responsibility under the UNGPs

IFC/MIGA recognizes in the Approach that "nothing in the Approach would preclude IFC/MIGA from considering the provision of direct financing for remedial action in exceptional circumstances." We would strongly urge IFC/MIGA to avoid this framing and rather **provide for explicit consideration of a factor-based analysis. This would involve consideration of potential connection to harm as the essential first step in informing any decisions about its appropriate role in either providing or enabling remedy in the circumstances of a particular case**. Moreover, we note that the provision of remedy in "exceptional

[14] Available at: https://legacylandscapes.org/wp-content/uploads/2023/03/230310_Annex-C-ESAP-Development-incl.-UNGP-implementation_final.pdf

circumstances" is expressed as being "subject to existing policies and procedures," the effect of which is unclear.

2. The Remedy Ecosystem and Enabling Remedy

The Approach helpfully reflects that the remedy ecosystem framing brings a focus to preparedness for remedy; this includes strengthening the broader grievance system architecture before impacts occur. As Shift has previously discussed in this Shift Viewpoint, a remedy ecosystem approach is an integral part of meeting a financial institution's responsibility in a situation of linkage to impacts, by thinking about how it might use its leverage differently to enable remedy in practice, including after those impacts occur.

In the Approach, IFC/MIGA express the concern that "[f]inancing direct contribution to remedial actions gives rise to risks, the most significant of which include: the possibility of shifting how clients and other stakeholders understand their roles and responsibilities and act on them." It is precisely in order to avoid concerns about inappropriate shifting of responsibility for impacts that the remedy eco-system approach recognizes that getting to remedy in many cases will require a range of actors to play different but complementary roles, based on the nature of their involvement in the impact(s).[15] However, the precise role, and specific actions that can be expected, will be shaped by the nature of the financial institution's involvement with the impact (i.e., cause, contribution or linkage). We have seen in practice that being clear about the basis for a business or financial institution taking a particular role in enabling remedy can directly help manage any such concerns about perceptions or assumptions that could otherwise be created.[16]

3. The Relevance of Proximity to Harm?

There are references in the Approach to a distinction between the role of IFC and MIGA in remedy; where this distinction is framed in terms of MIGA's "role in the project" it appears to suggest that proximity to harm is a factor that is determinative of responsibility. While MIGA may be less proximate to harm as compared to the IFC as equity holder or lender, proximity to harm is *not* itself determinative of responsibility. As noted above, MIGA's connection to a harm

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[15] See further: Shift (2019) *Rethinking Remedy and Responsibility in the Financial Sector* at https://shiftproject.org/rethinking-remedy-and-responsibility-in-the-financial-sector/

[16] For more on financial institution practice in this regard, see Shift's papers on *Using Leverage with Clients to Drive Better Outcomes for Peoples* and *Financial Institutions and Remedy: Myths and Misconceptions* arising from our Financial Institutions Practitioners Circle. (Available at https://shiftproject.org/wp-content/uploads/2021/07/FIs-Circle_Summer-2021_Using-Leverage-to-Drive-Better-Outcomes-for-People.pdf and at https://shiftproject.org/wp-content/uploads/2021/07/FIs-Circle_Summer-2021_Using-Leverage-to-Drive-Better-Outcomes-for-People.pdf respectively.)

is determined, under the International Standards, by reference to a number of factors, including omissions in due diligence. Proximity will become relevant when one considers the types of leverage it would be reasonable to expect MIGA to exert and how feasible they may be in practice. Here the Approach appears to suggest a limited scope for influence by MIGA. IFC/MIGA may wish to explore, for example, developments in leverage identification and use by Export Credit Agencies with similar or analogous products and relationships.[17]

4. Conclusion

Shift respectfully urges IFC/MIGA to align its proposed Approach to enabling remedy more fully with that in the International Standards – including recognizing the relevance of the involvement framework in any analysis of responsibility and respective roles in remedy. We support the view expressed in the Joint CSO Statement that "IFC and MIGA have an opportunity to demonstrate leadership among development finance institutions and the wider financial sector by bringing this proposal in line with prevailing international human rights norms." We also echo the concerns about the length of the four-year pilot period proposed in the context of creating new de facto expectations and potentially limiting IFC/MIGA's ability to change course thereafter. We hope that the IFC/MIGA will draw on the feedback it receives to reorient these core elements of the Approach towards greater alignment with existing International Standards and developing practice among other financial institutions.

[17] For example, Export Development Canada has been exploring "actions that it might take to influence customers or other responsible parties to prevent and address risks or impacts in response to concerns [raised] about environmental, social or human rights issues that EDC is connected to through its financial products or services". See: https://www.edc.ca/content/dam/edc/en/corporate/corporate-social-responsibility/environment-people/principles-leverage-remedy.pdf