Inclusive Development International
Comments on IFC/MIGA's proposed Approach to Remedial Action
April 19, 2023

Introduction

> "It must be understood that even investments […] 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 from them." (External Review of IFC/MIGA E&S Accountability[1])

Inclusive Development International welcomes the opportunity to provide comments and recommendations on the proposed IFC/ MIGA Approach to Remedial Action. As an organization that has supported communities in countries including Guinea, Uganda, Cambodia, Indonesia, and the Philippines to claim their rights through complaints to the Compliance Advisor Ombudsman (CAO) and advocated for policy reform to ensure respect for human rights at the World Bank Group, we are well placed to comment on the proposal. Our comments also draw on our extensive experience supporting communities to secure remedy from other financial institutions as well as corporations and government agencies.

In our experience engaging with commercial sector lenders and major corporations, there is great and immediate demand from the private sector for IFC to play an active and effective role in addressing environmental and social (E&S) risks of projects, including the remediation of harms when they arise. The proliferation of mandatory human rights due diligence laws coupled with the increased interest in ESG investing is placing an unprecedented degree of pressure on the market to ensure respect for human rights throughout investment and supply chains. In many cases, the IFC E&S Performance Standards are used to set expectations of suppliers and clients. **For investments in high-risk countries and regions in particular, the market looks to IFC for assurance that projects can meet acceptable E&S standards in undertaking their own due diligence to inform investment and procurement decisions. This presents a critical opportunity IFC/MIGA to advance responsible and sustainable investment for the good of communities, the environment, and the market.** But unfortunately, IFC/MIGA is currently failing to meet this market demand. In line with their development mandate and "value-add" mission, IFC/MIGA must respond to this market opportunity by stepping up their systems, tools, and resources devoted to the effective prevention, mitigation, and remediation of adverse impacts in projects and sectors they support. The development of the IFC/MIGA Approach to Remedial Action is a key opportunity to meet this challenge.

Overall, we agree with IFC/MIGA that the primary aim of their approach to remedy should be to reduce the possibility of adverse impacts occurring in the first place. We also agree that it is essential that IFC/MIGA equip clients to provide remedy when needed and for IFC/MIGA to facilitate and support remedial actions as appropriate. Unfortunately, we do not believe IFC/MIGA has presented a convincing approach to achieve these objectives. The proposal claims to articulate a "structured and systematic approach to facilitate and support remedial

[1] External Review of IFC/MIGA E&S Accountability, paragraph 163.

actions," but the approach presented is instead vague, noncommittal and offers only piecemeal "enhancements" to its current inadequate approach. The proposed Approach is at pains to avoid any affirmative commitments on any aspect of remedy, whether it be the addition of contractual clauses requiring clients to remediate harm due to non-compliance with the Performance Standards (PSs); how and when IFC/MIGA will support and facilitate remedial action; when and through what sort of instrument IFC/MIGA will require contingency funds to be established; and in what circumstances and by which standard IFC/MIGA will contribute to remedy themselves. Instead, the draft Approach explicitly vests in IFC/MIGA full and unfettered discretion to decide whether or not to implement or require each of its proposed remedy tools on a case-by-case basis, without providing any systems or criteria for exercising that discretion.

While we recognize that a degree of flexibility is essential for effective approaches to remedy, we believe that the Approach adopted should contain affirmative policy commitments to, inter alia: adopt new contractual requirements to enable and compel remedy from clients and effectively exercise that contractual leverage; provide support to clients whenever their capacity is not commensurate to risks; provide technical support to affected communities so they can participate effectively in the development of environmental and social (E&S) measures and, where necessary, remedial measures; provide technical support to CAO-facilitated dispute resolution processes upon request by the CAO or the parties; and establish remedial funding mechanisms for all higher risk projects, with a clear menu of available and effective instruments for different circumstances.

Moreover, in line with international human rights norms, when IFC/MIGA contributes to harm through failures in their due diligence and supervision, they must commit to contributing to remedy. **We believe that if IFC/MIGA commit to the principle that they will contribute to remedy when they contribute to harm, the institutions and their staff will be much more motivated to exercise robust due diligence and ensure effective E&S management systems that will prevent significant harms in the first place. We also believe that as a premier development institution, IFC should actively look for ways to contribute to the development aspirations of project affected communities, who should share in the benefits of investment projects on their land and in their vicinities.**

Many of these measures must also apply to IFC's vast financial intermediary portfolio, which makes up more than half of IFC's overall business and exposes IFC to the greatest risk of contributing to harm.

Importantly, IFC/MIGA must begin implementing this new approach to remedy through measures that enable or provide remedy for communities who have already suffered harm from IFC and MIGA supported projects. This includes communities that have undergone CAO compliance or dispute resolution processes and have still not received a full and effective remedy.

Below we set out our recommendations for a more effective IFC/MIGA Approach to Remedy, through: (1) building an exercising influence, including contractual leverage; (2) capacity building, including training of IFC staff and technical support to both clients and affected communities, including during CAO dispute resolution processes; (3) establishing contingency

funds; and (4) contributing to remedy. We also make recommendations for (5) how these approaches to remedy should apply to IFC's financial intermediary portfolio.

(1) Building and Exercising Influence

In their draft Approach to Remedial Action, IFC/MIGA propose identifying "additional ways to build influence, especially for higher E&S risk transactions, as needed. This would include ways to (i) use influence with clients— including commercial influence and legal influence; and (ii) use influence with others—including influence through innovation and convening. IFC/MIGA would explore ways up-front to build influence and use influence throughout the full project cycle."[2]

We strongly support the notion of IFC/MIGA doing more to build commercial, legal (and relational) influence upfront, including influence with both clients and other relevant entities. We also appreciate the need to maintain a degree of flexibility in the approach to ensure that it is responsive to the particularities of the project and the context.

However, we believe that there are a number of principles and measures that IFC should apply to every project with significant E&S and human rights risk. The approach should include an affirmative commitment to applying certain measures, especially contractual requirements (see below). Even where flexibility is needed, the Approach should do more to elaborate on specific ways IFC/MIGA could build and exercise commercial, legal, and relational influence and which type of measures would be best suited in a variety of contexts. We provide an example in the box below.

IFC has several projects and sub-projects in Guinea's high-risk mining sector, including a loan to Compagnie des Bauxites de Guinee (CBG), a loan to Guinea Alumina Corporation (GAC)[3] and an investment in Nedbank,[4] which went on to approve a loan to AngloGold Ashanti used to expand its Siguiri gold mine in Guinea. An investment in Diamond Cement Guinea is currently under appraisal.[5] Two of these projects are the subject of CAO complaints, brought with the support of Inclusive Development International, and which set out failures by IFC to meet the Sustainability Policy and a failure on the part of clients and sub-clients to meet the PSs. Noncompliance has resulted in serious harm to local communities and their environment, including land acquisition and economic displacement without restoration of livelihoods, serious impacts on natural water sources relied upon by local population, and health and safety impacts caused by dangerous mining techniques and infrastructure.[6]

In such a context, characterized by high-risk extractives projects, weak justice systems and governance gaps, and a dearth of E&S expertise, there are several measures IFC could take to increase its leverage at both the project and sector level. IFC could require additional contractual provisions (see below), and coordinate with co-lenders, including other

[2] Approach to Remedial Action, paragraph 17(a).
[3] https://disclosures.ifc.org/project-detail/SII/24374/guinea-alumina-corporation
[4] http://ifcext.ifc.org/ifcext/pressroom/ifcpressroom.nsf/1f70cd9a07d692d685256ee1001cdd37/ab073109ea552bde8525730c006c3afa?OpenDocument
[5] https://disclosures.ifc.org/project-detail/ESRS/43862/diamond-cement-guinea-sa
[6] See the complaint regarding CBG here: https://www.cao-ombudsman.org/cases/guinea-cbg-01-sangaredi and the complaint regarding la Société AngloGold Ashanti de Guinée S.A. here: https://www.cao-ombudsman.org/cases/guinea-nedbank-tier-ii-01kintinian

development finance institutions and Equator Principles banks, in the use of leverage with clients. It could use its leverage to urge clients and sub-clients to participate in good faith in CAO dispute resolution processes and it could insist on holding observer status throughout mediation.

It could increase its relational influence by providing ongoing hands-on capacity support to clients, including through the CAO dispute resolution processes underway and provide or fund technical expertise to fill gaps and support neutral fact finding. Furthermore, given IFC's multiple investments in Guinea's mining sector and its relationships with business and government there, it could convene and support sector-wide E&S standard setting and capacity building initiatives. It could also support agricultural and other livelihoods projects (including in partnership with the IDA or IBRD) that directly benefit mining affected communities, among other initiatives.

We recommend that in a new draft of the Approach paper or in accompanying materials, IFC/MIGA describe in much more detail the specific types of measures it could employ to build and exercise its leverage and the kinds of contexts in which these measures would be suitable. This analysis should support an overarching principle and affirmative commitment to building its leverage to better ensure it is equipped to motivate its client to prevent, mitigate and remedy adverse impacts.

Building and exercising contractual leverage

On the issue of contractual leverage, the proposed Approach states that IFC/MIGA "would review existing contractual provisions and consider whether it would be feasible and useful to introduce additional ones to better signal up front the importance of addressing E&S impacts, increase preparedness for providing remedial actions if necessary, and possibly position IFC/MIGA to exercise increased influence throughout the project cycle."[7]

We are concerned that IFC/MIGA presented an Approach to the Board and the public without having already reviewed their contractual provisions and considered whether new ones should be introduced to build leverage and whether they have historically effectively exercised the contractual leverage they have. Apart from a few exceptions, we do not have access to IFC/MIGA loan and investment agreements; however, we have observed that there are many projects for which IFC either does not have sufficient contractual leverage or is failing to exercise that leverage effectively to prevent and remediate harm.

The proposed Approach provides several additional provisions that IFC/MIGA *may* consider, though it does not provide any detail on these provisions, their frequency of use in current agreements, or analysis of their likely effectiveness in increasing leverage to bring about remedy, as one would expect in an Approach paper. Nonetheless, in general, we support the proposals and believe that they would boost IFC/MIGA's leverage, which if exercised effectively, would have important implications for the prevention and remediation of harm. However, we believe that IFC/MIGA's proposals alone are insufficient. Much more is needed.

[7] Approach to Remedial Action, paragraph 17(c).

Below we make recommendations to the IFC to enhance its contractual leverage to prevent and remedy harm, which draw on our extensive case experience. We do not have equivalent experience with respect to MIGA-supported projects, and we understand that MIGA, unlike IFC, does not have a direct contractual relationship with the project company responsible for the implementation of the projects it guarantees. Therefore, our recommendations are directed toward IFC, but we urge MIGA to adopt similar appropriate measures in order to achieve the same ends.

We submit that the IFC should make an affirmative commitment to including the following contractual provisions in every loan/ investment agreement for Category A and B ("high risk") projects --and enforcing those provisions wherever necessary-- unless there are exceptional reasons *not* to include them:

a. **Tie approval of financing and/ or initial disbursements to condition precedents, including: (i) remediating any pre-existing (or legacy) harm; (ii) a high quality Environmental and Social Action Plan (ESAP) that effectively addresses risks and impacts, including contingencies to address unforeseen impacts; (iii) sufficient budgets and staffing to execute the ESAP (and contingencies); and (iv) evidence of broad community support for the project and the ESAP, including local development benefits.**

   A primary condition should be remediation of pre-existing harms, especially those that constitute human rights violations. For example, where a project, including an earlier phase of the operation, has caused physical or economic displacement prior to IFC's involvement, IFC should require specific remedial action, agreed to by affected communities, to improve or at least restore pre-displacement living conditions and livelihoods. If the event causing displacement (or other harm) occurred many years prior, and some affected households have migrated away from the area and cannot be easily consulted on a plan or provided remedy, an accessible claims process should be initiated to reach as many affected people as possible. If the client is unwilling or unable to remediate these impacts, it should not be eligible for IFC investment because it should not be trusted to implement the PSs in good faith moving forward.

   Project specific E&S measures, including ESAPs, underpin the E&S contractual requirements and therefore IFC must be assured of their quality and effectiveness in addressing risks and impacts. Relevant aspects should be developed with the participation of affected communities, whose support for the project will depend on their understanding of the risks, how they will be avoided and mitigated, and the development benefits they will gain. (This should be a key component of the IFC assuring itself that there is Broad Community Support for the project as required by the Sustainability Policy.)

   Clients should also be required to set aside sufficient resources to fund the implementation of ESAPs and contingencies, including remedial action (see (3) below), and recruit sufficient E&S staff and technical experts.

b. **Tie disbursements of the loan to the fulfilment of key E&S actions and outcomes.** Disbursements should not only be tied to process actions, such as development of E&S plans, but E&S outcomes and results in a manner that satisfies PS objectives and affected

communities. This is critical to building leverage. We have seen in our own cases, including the CBG case, how once disbursements are made, leverage is diluted, to the detriment of affected communities.

In the case of co-financed projects, IFC should encourage other lenders to link disbursements to E&S actions out outcomes in order to further build leverage.

c. **Expand reporting obligations to ensure that clients immediately notify IFC about adverse E&S impacts or incidents that arise, regardless of their financial materiality, and whether or not affected communities lodge a complaint.** Notification requirements should also include a requirement that the client subsequently, but promptly, disclose a plan for remedying harm caused. While IFC should not rely solely on client notifications for its monitoring and supervision, immediate notification should be a standard requirement, triggering IFC to increase its oversight, and where necessary, E&S support to the client.

d. **Give IFC and its consultants the right to perform assessments of compliance and any adverse impacts and, where necessary, prepare a corrective action plan**. IFC should include provisions that entitle it to access and investigate project sites, facilities, and business premises; documents and records; and employees, agents, and consultants (similar to provisions that allow the CAO such access).

   Corrective action plans, including technical measures to rehabilitate, restore or redress adverse impacts, should be developed with the participation of affected communities. Corrective actions may also be developed in response to CAO processes, as part of Management Action Plans. In practice, where clients are committed to remediation, IFC should encourage their full participation in the development of corrective action plans.

e. **Prohibit any threats, retaliation or reprisals against affected communities or workers** for meeting with and freely expressing their views with IFC, their consultants, or any other third party.

f. **Require clients to remediate harm caused due to noncompliance with E&S requirements, including the Performance Standards, as determined by the IFC, CAO or through arbitration.** Where, in the context of an IFC assessment or a CAO process, a corrective action plan has been developed by IFC, based on community consultations, it should form the required actions to be taken by the client. (Where, at the project approval stage, IFC approved an inadequate ESAP that would foreseeably fail to address project impacts, IFC should contribute to remedy. Its contribution may be based on gaps in the approved ESAP that foreseeably risked harm. (See (4) below.)

   Where clients are committed to remedial action but have E&S capacity constraints, IFC should be prepared to support the client in the provision of technical support, at the expense of the client. (However, IFC should also be prepared to provide independent experts at their own expense in certain circumstances, including in the context of independent fact finding in CAO dispute resolution processes.) On arbitration, see (g) below.

g. **Recognize project affected people and communities as third-party beneficiaries able to enforce E&S covenants, including through arbitration**. Project affected people and

communities, who are the beneficiaries of the protections and entitlements of the PSs and project specific E&S requirements should be recognized in loan agreements as third-party beneficiaries with enforcement rights. Affected people and communities should be empowered in the agreement to enforce relevant parts of the contract against the IFC client in court or through arbitration (in addition to CAO processes). This additional option for recourse would enhance access to remedy for affected communities.

The right to activate arbitration to enforce E&S covenants should extend to legal agreements reached between IFC clients and affected communities that give effect to requirements in the ESAP and the PSs (eg. negotiated land use or benefit sharing agreements) or agreements reached in the context of CAO dispute resolution processes. The PSs and the relevant clauses in the IFC loan agreement and any client-community agreement should form the applicable law, as long as they are not inconsistent with the UN Guiding Principles on Business and Human Rights and UN human rights conventions.

Loan agreements should establish arbitration rules suited to community-company conflicts to ensure fairness, accessibility, and affordability, including a presumption of transparency of proceedings and awards, permitting entire affected communities to aggregate or make collective claims (ie. “class actions”), and streamlined efficient proceedings, including allowing remote testimony. (See model arbitration clauses in the Hague Rules on Business and Human Rights Arbitration and, in the context of labor rights in supply chains, Model Arbitration Clauses for Enforceable Brand Agreements.)

IFC should establish a reserve fund or enter into partnership directly with an arbitral tribunal, such as the Permanent Court of Arbitration, to cover arbitrators’ fees and expenses and other common costs of arbitration (for which IFC may seek reimbursement from clients subject to arbitral awards by reserving reimbursement rights in contracts). IFC should also establish an independent technical assistance fund for project affected communities, who could apply to the fund to support access to remedy in the context of both CAO dispute resolution processes and arbitral proceedings.

An award in favor of affected communities should be one trigger for the release of IFC held and administered contingency funds, where necessary to cover the costs of monetary compensation or non-monetary forms of relief (see (3) below on contingency funds).

Currently, affected communities have few, if any, options to enforce their rights, including their protections and entitlements under the PSs, against IFC clients that cause them harm. Complaints to the CAO may lead to mediation between the parties, but the process is voluntary and plagued by enormous power asymmetries that badly hamper the chances of significant positive outcomes for communities (in large part because of the absence of any strong alternatives available to them to seek redress from the client). Meanwhile, currently the IFC, not its clients, is the subject of CAO investigations and there is no obligation on clients to act in response to CAO noncompliance findings and recommendations (though, as stated above, we recommend explicitly requiring clients to remedy harm in this and other contexts as part of the new Approach). We believe that if project affected communities could pursue arbitration against the client, it would incentivize better E&S performance by IFC clients to begin with, and, where communities do face harm and file complaints to the CAO, a higher rate of successful mediated agreements in order to avoid arbitral proceedings.

We recognize that there are several operational questions regarding the recommendation to give project affected communities third party rights to activate arbitration to enforce E&S covenants and pursue remedy. We propose a working group to address these questions and challenges with the IFC; legal advisors to affected communities, including Inclusive Development International; and arbitration experts, including authors of the Hague Rules on Business and Human Rights Arbitration and Model Arbitration Clauses for Enforceable Brand Agreements.

h. **Extend responsibilities for remedy beyond project closure**. IFC should ensure that contractual requirements related to E&S performance and the remediation of harm extend for a reasonable period of time beyond project closure, commensurate to post-project risks.

We note that the draft Approach recommends financial incentives to encourage compliance with PS. While we support the idea of motivating strong E&S performance, it is imperative that this does not signal to clients that PSs are voluntary but encouraged through financial incentives, leading clients to factor this incentive into a financial cost-benefit calculation, which may not come out in favor of meeting with PSs.

(2) Capacity Building

Training IFC staff on ESAP effectiveness and Broad Community Support:

One enhancement the Approach proposes is developing guidance material and staff training to strengthen assessment of client preparedness for ESAP implementation. While we welcome this enhancement, in our view, more emphasis also needs to be placed on assessing the quality of the ESAPs themselves, including staff training for assessing whether impact assessments have effectively identified risks and whether the ESAP will effectively address those risks. An integral part of this training and assessment should be how to ascertain whether there is Broad Community Support for the project, as required by the Sustainability Policy. Community support for a project is unlikely to be secured unless the community participates in the development and approval of the E&S measures laid out in the ESAP. The proposed Approach appears to underappreciate the importance of effective ESAPs --that are approved by affected communities-- in preventing harm and conflict. As noted below, we also recommend that IFC/MIGA provide access to technical support for affected communities so that they can effectively engage in ESAP development in an informed manner.

The Approach also proposes strengthening IFC staff capacity to determine whether clients demonstrate commitment to meet IFC expectations with respect to providing remedial actions and have the financial and technical capacity to provide it, if necessary. Again, we welcome this initiative, but the proposed Approach fails to elaborate on what IFC will require as evidence of this client commitment and capacity, *differently than it does now*, and how IFC will demonstrate to the Board and public that it is conducting these assessments effectively. Will these assessments and determinations, for example, constitute new project documents that will be presented to the Board and accessible on the project portal?

Support to clients throughout the project cycle:

According to the External Review "a repeated message was that clients found IFC/MIGA support to enable them to meet the E&S requirements insufficient, particularly during the planning stages of projects, with IFC/MIGA expertise often coming in only after problems had arisen." The Review emphasized the need for IFC/MIGA to step up E&S assessment and capacity building work with clients from the earliest stages of a potential investment/guarantee relationship.[8]

Our own experience engaging with IFC clients, especially in the context of CAO dispute resolution processes is that even *after* problems arise, leading to conflict with communities, IFC is not providing the crucial technical support that is needed to solve those problems. Even where clients are motivated to address the issues and resolve conflict but are unable to find the technical expertise needed, IFC is neglecting to help.

We agree with the External Review's recommendation that "to support clients in IDA-eligible and fragile countries, IFC and MIGA will have to spend considerably more resources at the front end during project design, preparation, and implementation to help their clients mitigate adverse impacts and achieve positive E&S outcomes."[9] And that "when things go wrong, IFC/MIGA should support the client with high-quality E&S advice."[10]

We welcome IFC/MIGA's proposal to develop capacity for low-capacity clients on risk mitigation and remedial action. We note that in some countries and regions there is limited availability of high-capacity specialists, especially social specialists, and that IFC should also play a proactive role in addressing these gaps.

Technical support to affected communities throughout the project cycle:

We recommend that IFC/MIGA provide support to project affected communities throughout the project cycle so they can effectively engage in the development and monitoring of E&S measures themselves, and if harms occur, the development of remedial action. IFC could do this by providing the community with relevant E&S specialists and by establishing a technical assistance fund for affected communities to hire their own technical experts. The technical assistance fund should also be accessible to affected communities during remedial processes, including CAO-facilitated mediation and arbitral proceedings.

We believe that giving affected communities the information and tools they need to understand the project and its risks, and actively participate in the development and monitoring of measures to prevent harm and maximize local development benefits, would go a long way in addressing current E&S failures in IFC projects. We have observed how relationships between IFC clients and affected communities can improve through CAO-facilitated mediation when communities are empowered by having an informed seat at the table. But the empowerment of communities to shape the E&S measures that affect them should occur from the outset of projects, and not only after conflict has taken root and the damage, often irreversible, has been done. By providing communities with the technical and advisory support they need to engage in the development of ESAPs and monitor their implementation, a respectful dynamic between IFC

[8] External Review, paragraph 17.
[9] External Review, paragraph 21.
[10] External Review, paragraph 35.

clients and affected communities can be established from the start, avoiding much of the imbroglio IFC encounters in its projects down the track.

Support to CAO and other remedial processes:

IFC/MIGA's proposed Approach briefly discusses enabling activities for remedial action:

> *In situations where the client lacks capacity to resolve complaints, IFC/MIGA may additionally support the client or relevant third parties throughout the project cycle, including during a CAO dispute resolution process, at the end of a CAO compliance investigation, or during a non-CAO complaint process. This could entail support for enabling activities such as technical assistance, capacity building, fact-finding, dialogue facilitation, or community development which could be provided in the context of CAO cases or otherwise. Where possible, IFC/MIGA would also work within the broader remedy ecosystem to mobilize other stakeholders.*[11]

Our own experience is that IFC's technical support in CAO processes can be crucial and without it, successful outcomes can be difficult to achieve. We have regularly witnessed missed opportunities for remedy because of IFC's hands-off approach to dispute resolution processes (and its project supervision responsibilities). This places an undue burden on the communities and their NGO advisors to hold IFC clients accountable to the PSs and find the resources to pay for technical E&S experts.

IFC/MIGA have a critical role to play in supporting independent fact-finding in the context of CAO mediations by providing or supporting technical analysis of impacts and offering practical solutions. For example, in several of our CAO cases, there has been a need for technical assessments regarding impacts of projects on water sources and the options available for restoration or creating alterative access to water for local communities. In the context of mediation, where community trust in company-commissioned experts can be low (and sometimes for good reason), IFC/MIGA should offer that technical expertise when requested to do so. (IFC/MIGA may reserve reimbursement rights in contracts for this purpose.) In the case of the mediation process with CBG in particular, IFC is currently not providing that badly needed support or even engaging with us and the communities (or apparently its client) to support the generation of ideas for rehabilitation and remediation.

While we welcome IFC/MIGA's recognition of the need to support remedial action, we recommend that IFC/MIGA take a more proactive and systemic approach to offering this support. This should include the establishment of dedicated programs and funds to make a range of E&S technical expertise available to parties for CAO and other remedial processes.

In addition, IFC/MIGA should increase involvement in and support of CAO-facilitated dispute resolution by using its maximum leverage to get clients to agree to and engage in good faith in mediation. IFC/MIGA should also hold a special observer status in CAO mediations (as default), which allows it to provide technical input at request of the parties or the CSO regarding the application of PSs or technical E&S issues to facilitate an informed dialogue. We have

[11] Approach to Remedial Action, paragraph 19(b).

witnessed how the presence of more senior IFC personnel in mediation can positively influence its client's conduct towards the communities and the mediation.

(3) Contingency funds

As the "first element" of a stronger framework for remedial action, the External Review recommended that "clients should set aside their own resources to remedy instances of non-compliance with E&S requirements." The "foundation" for the remedy framework, according to the External Review, is "stronger contingency mechanisms that trigger client action, using client resources, to remedy client non-compliance." The Review continues:

> "Whether in the form of E&S contingency reserves, insurance, performance bonds, or other contingent funds, such mechanisms and their triggers can be specified in IFC/MIGA covenants with the client, with provisions allowing IFC/MIGA to exercise remedies if the client refuses to use the contingent funds for the intended purpose when triggered. These contingent resources can be used both in response to IFC/MIGA supervision, where IFC/MIGA identify non-compliance and there is a need to trigger the contingency, and in the context of complaints (whether CAO Dispute Resolution and Compliance cases, or complaints made directly to the client and/or IFC/MIGA)."[12]

We note that the OECD also recommends that commercial banks should establish "contingency plans and remediation funds in the event that expected standards of RBC [responsible business conduct] performance are not respected and/or adverse impacts occur," and "mechanisms for ensuring the client/project sponsor has financial resources in case actual adverse impacts occur."[13]

In our own submission to the Board of September 2020, made jointly with other civil society organizations, we expressed our support of the External Review's recommendations, along with our own analysis of several funding options that we believe IFC/MIGA should consider for this purpose, including project-specific escrow funds, E&S performance insurance and E&S insurance bonds.[14]

We continue to see the need for IFC/MIGA to require contingency funds to cover the costs of remedial action, and to allow, through contractual provisions, IFC/MIGA to trigger access to the funds if the client refuses to provide remedy. In addition to the contexts set out by the External Review that would trigger IFC/MIGA access to the contingency, we contend that an arbitral award in favor of affected communities could be an additional trigger to access funds to cover the costs of monetary compensation or non-monetary relief.

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[12] External Review, paragraph 59. *See also* paras. 334-336.
[13] OECD (2022), "Responsible business conduct due diligence for project and asset finance transactions," pages 37 and 55. https://www.oecd-ilibrary.org/docserver/952805e9-en.pdf?expires=1680729849&id=id&accname=guest&checksum=48622C511441CD333AA9FA121C7A20A4
[14] *See Realizing the Right to an Effective Remedy within the IFC/MIGA Accountability Framework: Joint submission on the External Review of IFC/MIGA E&S Accountability* (Sept. 11, 2020) at Annex 1, https://www.inclusivedevelopment.net/wp-content/uploads/2023/04/IFC-Remedy-Submission-_11-Sept-2020_FINAL.pdf.

Unfortunately, instead of grappling with one of the major impediments to remedy and addressing the External Review recommendations, IFC/MIGA have demurred, suggesting instead a continuation of the ineffective status quo. Moving forward, they propose considering using existing funding instruments, on a case-by-case basis at their unfettered discretion.

One of the arguments IFC/MIGA makes against "blanket contingency funding requirements," is that they would "indiscriminately raise project costs, decrease IFC's and MIGA's competitiveness, and could unnecessarily undermine development impact by reducing the likelihood of reaching financial close (given higher capital requirements)."[15] This argument ignores the fact that when IFC/MIGA and their clients fail to ensure contingencies are set aside to cover the costs of remedial action, the cost of adverse impacts does not just disappear: it is externalized on to the shoulders of some of the world's most vulnerable communities, who, by no choice of their own, lose their productive resources and economic base to make way for IFC-supported projects. It is galling to see IFC/MIGA argue that it could undermine development if it were to systematically ensure that the poorest communities do not bear those costs.

That said, we do not contend that a one-size-fits-all approach is appropriate, given the wide variety of high-risk projects in IFC/MIGA's portfolios; nor does the External Review recommend instituting a single blanket requirement that would be applied to every project regardless of context. Instead, what is called for is the development of contingent liability funding requirements and mechanisms that are appropriate for and apply to all investments that present significant E&S risk.[16]

The Approach should commit to ensuring that all high-risk projects will have funds available and accessible for remedial action in the event that harm occurs, and articulate a menu of options, with criteria and factors that will guide IFC/MIGA staff in determining which option is best suited for a given project.

IFC/MIGA does refer to a number of funding instruments – insurance assessments, cash waterfall account structures, and bankable feasibility studies and contingency cost lines – that are already in place and could be expanded. But IFC/MIGA should provide much more information about these options: Under what circumstances are the instruments currently being used, and have any of these options ever been used to pay for remedial actions to address harm suffered by affected communities? Have they been proven effective in funding remedy? What triggers the disbursal of funds, and what happens if the client is resistant to using the instruments to cover the costs of remedial action? How and in what circumstances could the use of these options be expanded? What "selective additional requirements" are IFC/MIGA considering? In which contexts should other options be considered, and what are those options? The unexplained examples provided in the Approach raise more questions than they answer.[17]

Finally, we note that at times the Approach seems to conflate funding for mitigation measures with funding for remedial actions. (See, e.g., Box 1 "The implementation of the SFs already

[15] Approach to Remedial Action, Box 1.
[16] External Review, paragraph 339.
[17] In contrast, the External Review was quite specific and practical in its articulation of the recommendation, providing suggestions about different events that might trigger use of the funds, appropriate timelines for such funds, and ways to deal with situations in which clients do not agree to the use of funds. *See* External Review at paras 59, 334-336.

employs modalities that contribute to mitigation measures having the requisite funding possibilities.") Adequate funding for mitigation measures – in other words, agreed measures meant to prevent or minimize harm usually documented in ESAPs – is extremely important, and we would expect that IFC/MIGA would already have mechanisms in place to ensure such funding is available. In fact, it is alarming to us that IFC/MIGA are not already taking basic steps such as costing ESAPs and ensuring the client has budgeted for them. However, ensuring adequate funding for prevention and mitigation measures is not the same as ensuring contingency funds are available in case those measures fail to prevent harm and additional remedial actions become necessary. Better resourcing of mitigation measures upfront is likely to reduce the need for remedial actions, but will not eliminate the need in all cases. The Approach should address the question of how IFC/MIGA will ensure themselves that sufficient funds are available for both purposes.

(4) IFC/MIGA's contribution to remedy

The External Review made a clear recommendation "that the Board establish the principle that IFC/MIGA contribution to harm triggers an obligation for their contribution to remedy," building upon the approach outlined by the Dutch Banking Sector Agreement.[18] It further recommended that "IFC and MIGA should develop, in collaboration with CAO, and present to the Board a draft policy on the use of IFC/MIGA resources to contribute to remedy, clarifying the criteria, potential uses, and limitations of such resources to contribute to remedy."[19]

IFC/MIGA, in their proposed Approach to Remedial Action, have disregarded these recommendations. Instead, the Approach takes a regressive interpretation of IFC/MIGA's remedial obligations, which departs from international standards and financial industry best practice. This, despite IFC/MIGA beginning their Approach paper by purporting to be leaders in the field of sustainability.

The Approach should contain a commitment that IFC/MIGA will contribute to remedy where it contributes to harm, including through due diligence and supervision failures, and should establish a guiding framework to determine a) under what circumstances IFC/MIGA contribution to remedy is required and b) what IFC/MIGA contribution to remedy could entail in practice. Such a commitment would bring the Approach into alignment with international standards, financial sector best practice, and the External Review recommendations.

Moreover, IFC/MIGA should actively look for ways to contribute to the development aspirations of project affected communities, who should share in the benefits of investment projects. In doing so, IFC/MIGA can encourage their clients to

International standards on contribution to remedy:

It is a general principle and customary norm of international law that a human rights violation gives rise to an obligation to provide remedy.[20] Under the UN Guiding Principles on Business

[18] External Review paragraph 60.
[19] External Review paragraph 339.
[20] Dinah Shelton, *Remedies in International Human Rights Law* (3rd ed Oxford University Press 2015). See, e.g., Chorzów Factory (F.R.G. v. Pol.), 1928 P.C.I.J. ("it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.")

and Human Rights, business enterprises— including financiers, investors, and development finance institutions—have a responsibility to ensure that remedy is provided for harms to which they have caused or contributed.[21] Yet, the IFC/MIGA's proposed Approach to Remedial Action explicitly rejects this established legal principle, declining to establish a systemic process for the financing of direct contribution to remedial action. Elsewhere, the Approach says: "IFC/MIGA would not expect to provide direct financing of remedial action."

This position is contrary to all the major international frameworks guiding the human rights responsibilities of financial institutions, including the UN Guiding Principles on Business and Human Rights,[22] the OECD Guidelines for Multinational Enterprises[23] and associated OECD guidance for financial institutions,[24] and the Dutch Banking Sector Agreement.[25]

The UN office for human rights and the OECD have provided extensive guidance on how financial institutions, including development finance institutions, should fulfill their human rights responsibility to remedy. According to this authoritative guidance, where a financial institution is "directly linked" to harms caused by a client through a financial relationship, the institution has a responsibility to build and use its leverage to prevent or mitigate the adverse impact. As currently written, the IFC/MIGA draft Approach stops there in contemplating the potential role and responsibility of IFC in enabling remedy.

However, the UN and the OECD go on to explain that in situations where a financial institution by its own acts or omissions has *contributed* to harms together with a client, the institution must a) cease or prevent its own contribution, b) use its leverage over the client to mitigate remaining impacts and **c) actively engage in remediation appropriate to its share in the responsibility for the harm**.[26] The Dutch Banking Sector Agreement similarly requires that, "when enterprises identify […] that they have caused or contributed to an adverse impact they should provide for

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[21] Pillar 3 of the UNGPs requires businesses to provide or cooperate in the provision of remedy to which they have contributed or are directly linked. According to OHCHR, the UNGPs "apply to all States and to all economic actors, including those with State connections, such as State-owned enterprises, State-owned financial institutions and DFIs." See: OHCHR, Remedy in Development Finance https://www.ohchr.org/sites/default/files/2022-03/Remedy-in-Development.pdf#page=92 page 16.

[22] UN OHCHR, ""Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"", https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

[23] OECD, OECD Guidelines for Multinational Enterprises https://www.oecd.org/daf/inv/mne/48004323.pdf

[24] OECD (2022), "Responsible business conduct due diligence for project and asset finance transactions," https://www.oecd-ilibrary.org/docserver/952805e9-en.pdf?expires=1680729849&id=id&accname=guest&checksum=48622C511441CD333AA9FA121C7A20A4. And OECD (2019), "Due Diligence for Responsible Corporate Lending and Securities Underwriting," https://mneguidelines.oecd.org/Due-Diligence-for-Responsible-Corporate-Lending-andSecurities-Underwriting.pdf.

[25] https://www.ser.nl/-/media/ser/downloads/overige-publicaties/2016/dutch-banking-sector-agreement.pdf

[26] 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", https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf. pp. 7–10.

or cooperate in their remediation."[27] This responsibility applies to development institutions, including the IFC, and should be reflected in the Approach.[28]

It is worth noting that the OECD's two due diligence guidance documents for banks, which provide extensive detail on how banks should fulfill their human rights responsibilities—including with respect to remedy—were developed in consultation with, and endorsed by, financial sector industry leaders.[29] The remedial responsibility of banks is no longer in debate among reputable players in the financial sector. IFC needs to catch up.

Current practice of reputable financial institutions:

Commercial and development finance institutions in recent years have increasingly acknowledged their remedial responsibilities, with several adopting policy commitments to provide for or cooperate in the provision of remedy.

The IFC/MIGA draft Approach, as currently written, falls far behind the policies of several commercial banks. For instance:

In 2021, the Australian commercial bank ANZ adopted a Framework for its newly established Human Rights Grievance Mechanism, which closely follows the OECD Guidelines. One core function of ANZ's mechanism is to assist the bank in assessing its connection to the human rights impacts associated with its clients (using the frameworks of the UNGPs and OECD Guidelines as guidance) and to recommend remedy as appropriate, including remedial actions that ANZ itself should carry out. According to the policy, where ANZ is found to have contributed to impacts:[30]

> 23.3.1 ANZ will provide for, or cooperate in, the remediation of the impact in a manner proportionate to its involvement and in a manner it considers appropriate in consultation with the Affected People;
> 23.3.2 ANZ will, acting reasonably, seek to use leverage to encourage the Customer to prevent or mitigate the impact, and where relevant, remedy the impact appropriate to the Customer's own conduct and Contribution.

Similarly, the UK bank Standard Chartered Human Rights Position Statement[31] states:

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[27] DBSA, page 24.
[28] According to OHCHR, "In situations in which DFIs, by action or omission, have contributed to harm, they should also contribute to remedy. Alternatively, in situations in which DFIs have not contributed to harm but they are directly linked to adverse impacts through their business relationships, they should build and use their leverage to encourage remedy by those directly responsible." https://www.ohchr.org/sites/default/files/2022-03/Remedy-in-Development.pdf#page=92
[29] OECD Guidance for project and asset finance transactions," Forward, page 3; and OECD Guidance for Corporate Lending and Securities Underwriting," Forward, page 3.
[30] https://www.anz.com.au/content/dam/anzcomau/documents/pdf/aboutus/anz-grievance-mechanism-framework-nov2021.pdf
[31] https://www.sc.com/en/sustainability/position-statements/human-rights/#:~:text=All%20individuals%20are%20equally%20entitled,all%20interrelated%2C%20interdependent%20and%20indivisible.

> Where Standard Chartered identifies that we have caused or contributed to adverse impacts, we endeavor to address these by providing remedy or cooperating in the remediation process.

The Australian commercial bank Westpac states, in its Human Rights Position Statement:[32]

> In line with the UN Guiding Principles on Business and Human Rights, where we identify that we have caused or contributed to an adverse human rights impact, we recognise our responsibility to provide for or cooperate in its remediation. Where we have not caused or contributed to an adverse impact, but are directly linked to it through our products, operations or services, we recognise that we may be able to play a role in remediation.

The Dutch commercial bank ABN AMRO Human Rights Statement and Human Rights Report,[33] explains:

> When we cause harm to somebody's human rights, we are responsible for setting the situation to right – providing remedy for the affected person. This is more likely to happen when we have a direct connection to potentially affected people, for example in our role as an employer and service provider to individuals and families. When we are connected to a human rights harm through another party, such as a supplier, a corporate client or company we are connected to through our investment services, we are committed to contribute to enabling remedy for affected people.

It also states:

> We've used our policies and leverage to push and support our corporate clients to provide people harmed by their business activities with access to remedy, in line with the UN Guiding Principles on Business and Human Rights and our Human Rights Statement.

The Dutch commercial bank Rabobank says, in its Sustainability Policy Framework:[34]

> Even with the best policies and practices in place, Rabobank may cause or contribute to an adverse impact that it has not reasonably been able to foresee or prevent. If this happens, Rabobank will endeavor to remedy or cooperate in the remediation of the situation.

Instead of embracing and encouraging the acceptance of responsibility and accountability by the commercial banking sector—as one may expect from a self-

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[32] https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/sustainability/WBC-human-rights-position-statement.pdf

[33] https://assets.ctfassets.net/1u811bvgvthc/6P4BH2sq0yp2kvQr7PnQVw/3ec01f7b29571c59eaab51b1efae373e/ABN_AMRO_____Human_Rights_Report_2020.pdf

[34] https://www.rabobank.com/en/images/sustainability-policy-framework.pdf

proclaimed sustainability leader, with an explicit development mandate—IFC/MIGA's proposed approach would cement them as industry laggards.

When is IFC/MIGA's remedial responsibility triggered?

The External Review sets out three situations in which clients are often unwilling or unable to carry out remedial action at their own expense:[35]

1. Where a client is **wrongly guided by IFC/MIGA staff during the preparation and implementation of the investment,** allowing the client to proceed with a project assuming that they were in compliance with the Performance Standards. This would include instances in which IFC/MIGA accept ESIAs and mitigation plans that fail to comply with the Performance Standards (and are not on track to meet the standards over a defined period of time). In these cases, clients will often refuse to bear the cost burden of corrective actions, "as they argue the fault does not rest with them."
2. Where a client fails to comply with the Performance Standards, **but IFC/MIGA fails to sufficiently supervise its client** to ensure that the client fulfills its responsibilities, **and fails to alert the client of its non-compliance or support the client to address areas of non-compliance.**
3. Where the client relationship has ended. In these instances, IFC/MIGA argue that they do not have leverage to persuade the client to take corrective action.

In our view, IFC has a responsibility to contribute to remedy in each of the above instances. In instances 1 and 2, IFC should contribute to remedy because it has contributed to harm, in line with international standards. In instance 3, IFC has a responsibility to ensure affected communities' access to remedy is not undermined by irresponsible exit and should support communities as part of its development mission and mandate.

Trigger 1: Where IFC/MIGA has contributed to harm

As expressed by the External Review, IFC/MIGA bears a responsibility to contribute to remedy where it has contributed to harm by enabling or failing to prevent harmful action or inaction by the client.[36] This includes instances where IFC/MIGA has failed in its due diligence and supervision responsibilities.

According to the External Review, a finding of IFC/MIGA non-compliance by the CAO should trigger responsibilities on the part of IFC/MIGA to contribute to remedy.[37] We agree with this framing. In most of these instances, the critical problem lies in IFC's failure to identify and address foreseeable risks associated with its client's operations, including by approving ineffective ESAPs and failing to ensure the client is equipped and committed to implementing the plan; and failure to use its leverage with and support its clients to implement the ESAPs and remedy harmful impacts when they do occur. As the External Review notes:[38]

[35] External Review, paragraph 330.1-330.3.
[36] External Review, paragraph 60.
[37] External Review paras 60-62.
[38] External Review, paragraph 314.

> **[A]ll IAM compliance reviews focus on IFI staff/Management and not on the borrower/client.** The compliance review process **establishes whether the IFI staff/Management has done due diligence** in assuring that mandated Environmental and Social Policies are applied. The client is not the focus of the review**. Yet, corrective actions are expected to be undertaken and funded by the borrower/client of the IFI**. This dichotomy, with the focus of the compliance review on IFI staff/Management, and the corrective action expected to be performed by the client/borrower, creates a "systemic disconnect." **In some cases, borrowers/clients are simply unwilling to carry out required actions, especially if significant due diligence failures of the IFI resulted in designs of investments that were inconsistent with policies and where corrective actions would be very expensive.** (emphasis added)

This guiding framework broadly aligns with the OECD's guidance for financial institutions, which states that a financial institution is considered to have contributed to adverse impacts where its actions "cause, facilitate or incentivize another entity (e.g. a client/project sponsor) to cause harm."[39] A financial institution may be considered to have "facilitated" an impact where all of the following elements occur:

- The impact was foreseeable;
- The use of proceeds was known or likely to be used for a client's high risk activities; and
- The financial service was provided *without adequate due diligence.*[40]

According to OECD guidance on Project and Asset-based Finance, if a client provides a bank with an ineffective ESIA and the bank proceeds with financing the project anyway, without assessing the adequacy of the ESIA and requiring it to be revised, and harms materialize as a result, the bank will have *facilitated* the impact and thereby contributed to it. In this case, the bank would have a responsibility to contribute to remediating the harms. [41]

This example can easily be applied in the context of the IFC/MIGA, and it aligns well with the framework proposed by the External Review: IFC/MIGA can be considered to have facilitated — and thereby contributed to— harm caused by a client by approving an inadequate ESIA and/or ESAP.

This theoretical example may also provide a helpful case study through which the IFC/MIGA can begin to measure how it might contribute to remedy. In a case where IFC/MIGA has approved an inadequate ESAP containing gaps that would foreseeably result in harm, and those harms do occur, IFC/MIGA should bear the responsibility (financial and otherwise) to support its client to effectively close those gaps and remediate any outstanding harms that occurred as a result.

Trigger 2: Loss of leverage, including in the context of responsible exit

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[39] OECD Project Finance Guidance, p 32. https://www.oecd-ilibrary.org/docserver/952805e9-en.pdf?expires=1680729849&id=id&accname=guest&checksum=48622C511441CD333AA9FA121C7A20A4
[40] Ibid p 33.
[41] OECD Project Finance Guidance, p. 34 https://www.oecd-ilibrary.org/docserver/952805e9-en.pdf?expires=1680729849&id=id&accname=guest&checksum=48622C511441CD333AA9FA121C7A20A4

IFC/MIGA should also commit to contributing to remedy where the client relationship has ended, and IFC no longer holds contractual leverage to ensure remedy is provided by the client. In these circumstances, IFC/MIGA may have contributed to the harm through due diligence and supervision failures and should therefore contribute to remedy even though the relationship has ended. However, even where it that is not the case, the IFC should do all that it can to ensure affected communities are not left bearing the brunt of an irresponsible investment project that it financed. IFC/MIGA should look for ways to directly support the affected communities to meet their development goals as part of its development mandate.

What should IFC contribution to remedy look like?

Where IFC/MIGA remedial responsibility is triggered, the process that follows should, in all cases, be informed through close consultation with affected communities and their representatives and/or advisors. Remedy can take various forms, and the Approach should establish a process through which IFC/MIGA and its clients can respond with flexibility to the particular needs and desires of the impacted stakeholders.

That said, almost every type of remedy will require funding. As the External Review noted, it is essential to ensure the availability of two separate pools of resources—from clients, and from IFC/MIGA —to support remedial action. We address the issue of client contingency funding in section 3 above. Separately, however, IFC/MIGA must ensure that it has sufficient resources of its own to contribute to remedy as needed. We have previously submitted to the Board an analysis of several funding options for this purpose, including the creation of a Common Performance Fund or Trust Fund, which can be drawn upon to finance remedial actions.[42] The creation of such a financing mechanism would align with the OECD's recommendations for commercial banks.[43] We have heard IFC/MIGA representatives, during the consultations, express a reluctance to create a standing fund on its balance sheet due to concerns that this might affect its credit rating. While we cannot comment on those concerns because they have not been clearly explained, what is important is that IFC/MIGA has at its disposal the funds necessary to contribute to remedy and the ability to deploy those funds directly to provide support to affected communities as outlined above.

The Approach should contemplate ways in which IFC could assess its responsibility for remedial action and approach its contribution to remedy. For example:

- IFC could assess its contribution to remedy based on the gaps in approved ESAPs or other E&S measures that led the client to mistakenly believe that if they implemented those plans, they would be in compliance with the PSs and their contractual obligations. In appropriate cases, it will make sense for IFC to contribute to the costs of closing those gaps or the remedial action needed to address the harm resulting from those gaps.
- In other cases, IFC's contribution to remedy may be through the provision of E&S specialists or funding for technical experts to support CAO dispute resolution and other remedial processes.

[42] See Realizing the Right to an Effective Remedy within the IFC/MIGA Accountability Framework: Joint submission on the External Review of IFC/MIGA E&S Accountability (Sept. 11, 2020) at Annex 1, section 1 on Common Performance Funds. https://www.inclusivedevelopment.net/wp-content/uploads/2023/04/IFC-Remedy-Submission-_11-Sept-2020_FINAL.pdf

[43] OECD Guidance on Project Finance, p. 37 and 55.

- **In all cases, IFC should look for ways to support the development aspirations of project affected communities—who should *benefit* from investments that affect them and their resources. This support should aim over and above a "do no harm" standard, though it may have the effect of reversing adverse impacts that communities have suffered.**

None of these approaches risk moral hazard: they would align with the concept of a "remedy ecosystem" and continue to place primary responsibility for remedy on the client, while also acknowledging that IFC has its own proactive role to play as an investor and a development institution.

(5) Financial Intermediary Investments[44]

Over the past 20 years, IFC has dramatically expanded its investments through financial intermediaries (FIs), which now account for more than half of IFC's total commitments.[45] IFC asserts that working with local financial intermediaries allows it to "provide much-needed access to finance for millions of individuals and micro, small and medium enterprises that [it] would never be able to reach directly."[46] IFC takes credit for the development impact that these investments have had on increasing access to credit for women-owned enterprises, housing loans and microfinance. However, these investments can also cause substantial harm to the environment and to local communities, particularly when IFC fails to ensure that its FI clients apply the Performance Standards to their high-risk projects.

Since it first undertook its audit of a sample of IFC's FI portfolio in 2012, the CAO has consistently found that IFC does not have effective procedures in place to assure itself that its FI clients are effectively managing E&S risks at the sub-project level, which potentially exposes IFC to widespread harms.[47]

Our own research in 2016 uncovered 138 projects implicated in serious environmental harms and human rights violations that IFC had supported indirectly through its FI investments.[48] We have supported some of the communities affected by these projects to file complaints to the CAO. These cases are briefly summarized in the box below.

Ratanakiri, Cambodia: After IFC made a series of investments in Dragon Capital's Veil Fund between 2002-2006, the private equity fund went on to invest in the Vietnamese agribusiness firm Hoang Anh Gia Lai (HAGL). While IFC remained invested in the fund, HAGL acquired vast land concessions in Laos and Cambodia that were well in excess of the legal limits on such concessions and which overlapped with the customary lands and territory

[44] Given that MIGA does not do business with financial intermediaries, we only address IFC in our recommendations in this section.
[45] According to IFC's 2022 Annual Report, 55.33% of its FY22 long-term commitments were directed to financial markets and funds (page 14), available at: https://www.ifc.org/wps/wcm/connect/28955e97-2398-4f91-9e5f-3979ec5fecc1/IFC-AR22-WBG-IFC-Financial-Highlights.pdf?MOD=AJPERES&CVID=oePWFV1
[46] https://www.ifc.org/wps/wcm/connect/Industry_EXT_Content/IFC_External_Corporate_Site/financial+institutions
[47] CAO, *Audit Report: CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries,* October 2012, and the subsequent CAO monitoring reports, available at: http://www.cao-ombudsman.org/newsroom/documents/FIAUDIT.htm
[48] https://www.inclusivedevelopment.net/policy-advocacy/outsourcing-development-campaigning-for-transparency-and-accountability-in-financial-intermediary-lending/

of Indigenous communities. At least 12 of the Cambodian affected communities were forcibly displaced and dispossessed of their land, natural resources and cultural heritage as HAGL developed rubber plantations on their territory in Ratanakiri province. The communities have yet to receive any remediation of these harms. And yet, despite an unresolved CAO complaints process that has been ongoing since 2014, IFC made new investments in two Vietnamese banks – VP Bank and TP Bank – which went on to provide substantial new debt financing to HAGL.[49]

Kintinian, Guinea: In 2007, IFC provided the South African bank Nedbank with a $140 million loan for "cross-border corporate lending across Africa." The deal was designed to increase the bank's lending for *inter alia* "resource extraction projects" in Africa.[50] One such corporate loan that the bank made was to the South African firm AngloGold Ashanti, which used the funds to expand its Siguiri gold mine in Guinea. The mine expansion caused the violent forced displacement of 380 families, who were impoverished after being moved to a barren resettlement site with no trees, no functioning water supply and no school, market or economic opportunities nearby.[51] An ongoing CAO dispute resolution process has only led to partial remedies of these harms.[52]

Multiple areas, the Philippines: Between 2011-2015, IFC made a series of debt and equity investments in Rizal Commercial Banking Corporation (RCBC) of the Philippines, totaling $228 million. After making its first equity investment in 2013, the IFC and its Asset Management Company held a 12.3 percent equity stake in the bank and a seat on its board. Soon after receiving IFC's backing, RCBC went on to become the leading national financial backer of the coal power boom in the Philippines – financing at least 11 new coal fired power stations between 2013-2017. A CAO compliance investigation found a high likelihood that these projects have caused serious adverse impacts on the health and livelihoods of local communities living around the power plants; threats and violence against local environmental defenders; and significant carbon emissions that were neither minimized, measured nor mitigated in accordance with the IFC Performance Standards.[53]

Each of these cases is illustrative of how IFC fails to prevent, enables and even contributes to harm when it fails to conduct adequate due diligence and E&S supervision of financial intermediary investments. And yet, despite the fact that financial intermediary investments make up more than 55 percent of IFC's total business, the draft Approach paper devotes only 38 words to the subject, half of which are to confirm, "for the avoidance of doubt" that "IFC/MIGA will not require FI clients to establish their own Approach equivalents" to prevent and remedy harm. The draft merely promises to apply unspecified "relevant elements of the proposed Approach, particularly related to client preparedness" to new FI transactions. This is unacceptable.

[49] See: https://www.inclusivedevelopment.net/cases/cambodia-hoang-anh-gia-lai-rubber-plantations/
[50] IFC Press Release, July 2, 2007, available at: http://ifcext.ifc.org/ifcext/pressroom/ifcpressroom.nsf/1f70cd9a07d692d685256ee1001cdd37/ab073109ea552bde8525730c006c3afa?OpenDocument
[51] https://www.inclusivedevelopment.net/wp-content/uploads/2020/12/Letter-of-Complaint-to-CAO_Siguiri_-Guinea-FINAL.pdf
[52] See: https://www.cao-ombudsman.org/cases/guinea-nedbank-tier-ii-01kintinian
[53] CAO, *Compliance Investigation Report, IFC investments in Rizal Commercial Banking Corporation (RCBC), The Philippines,* November 2021, available at: https://www.cao-ombudsman.org/sites/default/files/downloads/CAO%20Compliance%20Investigation_RCBC-01_Philippines_Nov%202021.pdf

IFC should spell out exactly which elements of the Approach will apply to financial intermediary investments and related sub-projects and which elements will not or will require adaptation to be applied to its financial sector portfolio. In our view, the following elements of an effective remedy framework can and should be applied to financial intermediaries:

a. Preparation for remedial action:

- IFC should strengthen its due diligence on prospective FI clients during appraisal and only invest in clients that are capable of and committed to: 1) applying the Performance Standards to their higher risk transactions; 2) adopting effective grievance mechanisms that are accessible to communities affected by the projects they finance; and 3) using their leverage and supporting sub-clients to provide remedy if harms arise.
- IFC should contractually require its FI clients to incorporate, in their Category A and B sub-project covenants the provisions described above (see (1)), in particular: 1) the application of the PSs and project specific E&S measures to all investments that present significant E&S risks, 2) agreement to submit to IFC, CAO and third-party assessments of alleged harms and non-compliance with E&S standards, 3) a commitment to provide effective remediation of any harms that are found to have resulted from their investments.
- As recommended by the External Review, IFC should develop contingent liability funding requirements and mechanisms for all FI-1 and FI-2 investments.[54] This could take the form of funds set aside at the FI to contribute to remedy and/or a commitment by the FI client to incorporate contingent liability funding requirements and mechanisms into their sub-project covenants for all their Category A and B investments.
- IFC should build the capacity of FI clients to prevent, assess and, if necessary, facilitate and contribute to the remediation of harms that may arise from their investments.

Had IFC applied this approach to its investments in TP Bank and VP Bank, the communities affected by HAGL's operations in Cambodia would have had substantially more leverage to secure remedy years ago (and indeed those harms may have been prevented in the first place). Instead IFC's clients have been absent from the CAO dispute resolution process and have taken no observable actions to push their client to reach a settlement with the communities. The result is a dispute resolution process that has now been ongoing for more than eight years with no result.

Had IFC required RCBC to incorporate the PSs and expectations that clients provide remedy in its loan agreements with the coal plant developers, Complainants and the IFC would not be facing the situation they are in today in which only four out of ten sub-clients have agreed to engage in third-party assessments of the alleged harms that IFC has commissioned as part of its Management Action Plan. Moreover, if those assessments confirm the harms that the Complainants have alleged and the CAO has found likely, the IFC and its FI client would have contractual leverage to compel the sub-clients to act on those findings and provide remedy. In the absence of such requirements, the burden will fall on IFC to address the harms if faced with a recalcitrant client and sub-clients.

[54] External Review, para 339.

b. Facilitating and supporting remedial action by FI clients and sub-clients:

- IFC should exercise its leverage, to the maximum extent necessary and possible, to prompt remedial action by its FI clients and their sub-clients. This should include exercising applicable contractual rights and remedies to enforce the contractual requirements we recommend above. It should also involve working with other lenders, parent companies and governments with which the World Bank Group has influence to exercise collective leverage with FI clients and sub-clients.

- IFC should provide support to FI clients, sub-clients and affected communities during CAO dispute resolution processes, at the end of a CAO compliance process or in any other non-CAO complaint process to enable remedial action. As set out in the draft Approach, this support could entail enabling activities such as technical assistance, capacity building, independent fact-finding or dialogue facilitation. However, this type of support should be provided in *currently ongoing* complaints processes and not only to new transactions after the adoption of the Approach, as the draft implies it would.

IFC technical support and provision of independent experts to assess impacts, arbitrate factual disputes between parties, and propose technical solutions would have been instrumental in advancing the CAO dispute resolution processes in the Dragon Capital/TP Bank/VP Bank-HAGL and Nedbank-AngloGold Ashanti cases.

c. Direct contribution to remedy:

As with its direct investments, IFC should contribute directly to remedy for FI sub-project related harms, 1) when it contributed to the harms through a due diligence failure (namely failing to ensure application of the Performance Standards at the sub-project level), and/or 2) when the client or sub-client is unwilling or unable to take effective remedial action and IFC does not have the leverage to persuade it do so. The latter situation, which the External Review pointed to as a scenario that should trigger IFC to take remedial action unilaterally,[55] is particularly relevant in the case of FI sub-projects where IFC does not have a direct contractual relationship with the sub-client. In these cases, if IFC has no prospect of influencing or enabling the sub-client to take action, IFC should act on its own accord to help remediate the harms, while publicly debarring the sub-clients from any future business with IFC.

[55] External Review, para 330.