

Comments by Indian groups on the proposed IFC/MIGA Approach to Remedial Action

We, people's movements, trade unions, civil society organisations and concerned citizens share our comments on the proposed IFC/MIGA Approach to Remedial Action. As people working on accountability of Financial Institutions and helping grassroots movements and organizations seek justice we are deeply concerned about lack of consultation with representatives of affected communities on the draft approach. At the very outset we would like to place on record that the proposed Approach to Remedial Action (Approach paper), published online and translated in very few languages none of them in any Indian language where IFC has a massive footprint of investments, which means a large number of communities who would eventually get impacted with this policy are not consulted.

We demand Remedy as a right of the communities negatively impacted by IFC's investments, and not as charity. Avoiding harm needs to be fundamental to the discussion on Remedy, rather than waiting for the harm to happen, communities require to establish harm and then take actions. For that, impact assessments have to be credible and independently verified to assess and avoid the harm early on, rather than letting the damages devastate communities and their livelihoods, ecosystems and the interconnectedness to social cultural traditions, norms and practices; which once destroyed, then at that stage, the options for remedy in its true sense is limited.

Placing the onus of complaining of negative impacts on communities makes the chances of taking remedial action delayed. Accountability mechanisms need to be empowered to take *suo moto* actions in problem projects, rather than waiting for the communities to bring it up.

Remedy cannot be a foreign idea imposed on communities, nor can it be a one-size-fit-all approach. It will never be a meaningful remedy nor will it be accepted when it is imposed on them. It has to be developed in consultation with communities. But if meaningful consultations are held with the communities right from the planning stage, a lot of harm can be averted in the first place.

The Remedy discussions will be meaningful provided efforts are made to fundamentally change the policies of IFC and CAO, both to ensure verification of clients claims on impacts and compliance, as well as to empower CAO to do a proactive role in recommending remedial actions which are time bound, monitored, and fix responsibility for violations.

Remedy has to be from the perspective of the affected communities, who are absent from, and therefore do not have their voices heard in this consultation process. For any accountability mechanism to be effective and useful to the communities, it needs to be rooted in the socio ecological cultural needs and acceptance of communities. By not reaching out to the representatives of affected communities specifically, primary

custodians stakeholder in this whole process has been missed out.

To begin with we want to express our disappointment over the proposed Approach to Remedial Action and Responsible Exit Principles published by IFC and MIGA. Not only is it narrow in its approach but it does not deliver remotely on remedy or even reflect IFC's and MIGA's intent for accountability. The draft approach falls short of the 2020 *External Review* and its observations and recommendations. The draft approach does not in any way protect the interest of communities, rather looks at the approach from the lens of protecting the institutions and clients. It's rather unfortunate that the long wait of the affected communities and civil society organizations for remedy has completely fallen short of the definition of remedy itself.

Major concerns with proposed Approach to Remedial Action:

1. The report of the external review of IFC's Environmental and Social Accountability and CAO's Effectiveness was a result of the struggle of communities across the globe who have been fighting the destructive projects financed by the IFC. In fact, post the litigation filed by fishworkers from Mundra impacted by the Tata Munda Power Project suing IFC in the US Courts there was a recognition that IFC would remain vulnerable to lawsuits if it refused to provide an adequate internal grievance mechanism. The review also emphasized the need for remedy for communities harmed by IFC projects, which the CAO has no authority to require and the IFC has refused to provide. The report found IFC's approach to remedies inadequate in numerous respects, and made numerous recommendations for changes. The report also indicated that IFC needed to take a more active role in ensuring remedial action for project-affected communities and recommended that IFC create and implement a remedial action framework in order to facilitate this¹. It is really unfortunate that the approach paper fails to live upto the recommendations of the External Review. The approach paper needs to re-evaluated against the external review and recommendations therein to address gaps in remedy approach.
2. Approach should not be limited only to new or future projects but include existing and legacy harms from completed or ongoing projects. It would be travesty if the approach paper does not apply to legacy harms, ongoing projects and projects where CAO cases are still ongoing/in the monitoring phase. The fact remains that many communities continue to suffer the disastrous impacts of projects where despite the recognition of the harms by the CAO, IFC either dismissed the findings or came out with an action plan which did not provide communities any support or remedy in any sense. In India alone, many communities continue to suffer the destructive impacts of projects which have been financed by IFC; the Tata Mundra Project where the action plan (which was rejected by the communities) is still in monitoring phase after more than a decade of it being

¹ <https://www.brettonwoodsproject.org/2022/07/ending-absolute-immunity-for-the-international-finance-corporation-the-legacy-of-jam-v-ifc/>

filed with CAO, or the communities in Orissa impacted by the GMR Kamalanga Power Project supported by IFC through its financial intermediary investment who file the complaint with CAO in 2011. In the GMR Kamalanga case the affected community continues to suffer as the monitoring phase of the action plan (which was rejected by the affected community) continues with only one monitoring report which came out in 2017. The communities who continue to suffer from the disastrous projects financed by IFC should be provided remedy and approach paper needs to incorporate that, anything less would be unacceptable and fail the entire effort and purpose of having this approach paper.

3. Approach paper needs to define remedy in a holistic manner. Where harms have been done it needs to specifically include the restoration and restitution in its approach. Rather, safeguarding IFC. In a number of cases even with the IFC's assessment and monitoring, there are huge lapses which impact communities and ecosystems. There is an urgent need to include restoration and restitution in the remedy approach.
4. Approach paper is extremely vague and inadequately defines roles and responsibilities, and needs to delineate these more clearly. IFC/MIGA should provide examples of current roles and responsibilities in projects and show how these have enabled remedy and, if remedial action has not been provided, the Approach should be revised in response to this gap.
5. Approach fails to provide a clear framework for what remedial mechanisms or outcomes should look like. Some said that remedial action should be available in all cases, not just on an ad hoc basis, or in 'exceptional circumstances'; and that in its current approach is not 'holistic'. IFC/MIGA should explain why remedial action would be considered on a case-by-case basis, and what the criteria for 'exceptional circumstances' or such selection may be.
6. Approach focuses on the responsibility of the client and completely fails to provide agency to communities who are at the most disadvantaged end. Communities most of the time lack sufficient information around a development finance project, availability and access of redressal and remedy functions, language barriers, threats and conflicts that arise due to these projects. The fact that there is no role or decision making power with them in the remedial process would mean failure of the process itself. Communities need to be the center point of approach to remedy.

Remedy ecosystem:

7. Approach is too vague and inadequately defines roles and responsibilities, and needs to delineate these more clearly. IFC/MIGA should provide examples of current roles and responsibilities in projects and show how these have enabled

remedy and, if remedial action has not been provided, the Approach should be revised in response to this gap.

8. Approach does not provide evidence, rationale or justification on what prevents it from embracing fully any contribution to harm. This is extremely disappointing for those currently involved in CAO dispute resolution processes, and many others who have been through compliance processes and are still waiting for remedy. Some of the cases have been ongoing for more than a decade now with communities endlessly waiting for remedy.
9. The Approach pushes responsibility onto the client while the IFC/MIGA cannot shed its responsibilities under international and domestic law. IFC needs to take responsibility for remedial action where it's contributed to harm. Non-compliance with Performance Standards contributes to harm, therefore IFC bears responsibility or becomes a contributor to harm and must take responsibility. IFC cannot push these responsibilities onto clients. IFC/MIGA should be the guarantor of compliance with the performance standards and thus provide remedy whenever the client is unable to do so. Both in the Tata Mundra case and GMR Kamalanga case (*referenced above*) in India, CAO compliance audit report found IFC's failure in monitoring the performance standards. IFC needs to take responsibility to provide a remedy which is acceptable to the communities. This was also the ground on which the fishworkers impacted by the Tata Mundra Project sued IFC for destroying their livelihoods and ecosystem. Despite, the court dismissing the lawsuit on strictly technical grounds, IFC still has an obligation to provide remedy to the community for the harms caused and harms people continue to suffer. IFC never denied causing the lawsuit.
10. Risk to communities, and that communities should enjoy the same protection from risk as do IFC clients. The community should be involved in remedy planning in all cases. Communities should be given a seat at the table in the contracting phase and should be recognised as having third party beneficiary rights. The Approach should address in detail when and how communities are to be involved in discussion and planning.
11. Financial Intermediaries (FIs) should be integrated into the Approach to Remedial Action as well as the Responsible Exit Principles. IFC should clarify how FIs will be expected to apply the Approach to their (sub)projects. Where FIs outsource projects to commercial banks or private equity funds, they should have their own remedy frameworks in place and provide funds for remedy. Projects financed through FIs cause as much harm as directly financed projects. Communities find it harder to approach for remedy as disclosure for information remains a challenge with FI projects. The first ever complaint filed to CAO on a FI project was filed by communities impacted by the GMR Kamalanga project (*referenced above*). A decade later as communities continue to suffer as remedy still remains

unavailable. There is no reason why FIs are not integrated and placed with the same obligations on the part of IFC as directly financed projects.

Preparation for Remedial Action

12. There is no reference in the proposed Approach to IFC/MIGA establishing a fund or funding mechanisms for remedy, such as a contingent liability fund, despite the External Review recommending the creation of a fund to which IFC/MIGA would contribute. There needs to be the establishment of a fund for remedial action. Availability of funds and commitment of IFC and MIGA to contribute to the fund is non negotiable. No remedy or remedial action is possible without the availability of a contingent liability fund.
13. IFC/MIGA should be the guarantor of Performance Standard compliance and thus provide remedy whenever the client is unable to do so. The IFC/MIGA should assume increased responsibility for a portion of Environmental and Social harm risk and establish a fund or funding mechanism to support remedy in these circumstances.

Access to Remedial Action

14. There must be inclusion of communities in project planning, monitoring, establishment and in access to remedial action. Communities need to be given agency and decision making powers. Communities should be afforded the same protection from risk as do IFC/MIGA clients.
15. The Approach says that it will facilitate access to and the extension of responsibility for remedial action to Financial Intermediaries (FIs) without stating any requirements or providing further detail. This is inadequate. FIs should be taken into consideration and included in the Approach.

Facilitation and Support for Remedial Action

16. IFC/MIGA is best placed to take remedial action, and that these institutions already have all the legal powers they need to enforce remedy but do not use them.
17. IFC/MIGA should not let risks of litigation stand in the way of its responsibilities for remedial action, as this in itself risks IFC/MIGA liability.

Example of What Remedy should be look like:

Tata Mundra, India

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

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

In 2011 the fishworkers affected by the project filed a complaint with the CAO drawing attention to numerous ways in which the project was out of compliance with IFC standards and policies and threatened substantial harm to the local community. After a failed dispute resolution process, the CAO conducted a CAO compliance audit. That report, released by the CAO in 2013, validated the concerns of the community, finding that IFC had failed to ensure the project met the applicable Environmental and Social Standards necessary for IFC projects. This included a failure to conduct adequate due diligence, a failure to ensure proper consultation and accounting for impacts to the local community, a failure to ensure baseline studies and data were collected, specific failures relating to thermal pollution and air pollution standards, shortcomings in supervision, among others. Yet IFC management largely rejected the findings of the reports, putting out only an empty action plan promising to do baseline studies that were not even possible to do anymore with no remedial action. Management's response was rejected by the communities.² The local organization Machimar Adhikar Sangharsh Sangathan (local fishworkers union) called it “empty and a non-starter.” It further stated:

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

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

Left with no other options, in April 2015 the community filed a lawsuit, *Jam v. International Finance Corporation*, against IFC in federal court in Washington D.C. Again, IFC sought to deny the communities relief, arguing they should not be able to have their claims heard in court at all. IFC even argued that they did not need to be able to access the court because it was sufficient that they could go to the CAO - despite the fact they had already done that, and nothing had changed. IFC argued it was protected

² IFC Hide behind Tata's False Claims: No Actions Taken on CAO Findings yet President Dr.Kim's claims about Accountability Goes for a Toss!!, May 21, 2014. Available here: <http://masskutch.blogspot.com/>

by “absolute immunity” and could not be sued. In February 2019, the U.S. Supreme Court rejected that claim, deciding that international organizations do not enjoy absolute immunity, giving hope to the community to go ahead in their fight to hold IFC responsible for the damage caused to them. IFC could have acted then to remedy the harm the communities were continuing to suffer, but instead it moved to dismiss, again claiming immunity. Unfortunately, the claims were dismissed on the basis that the relevant conduct occurred in India, and immunity applies unless the lawsuit is based upon commercial activity in the United States. The fishworkers filed their appeal with the D.C. Circuit Court of Appeals in September 2020. The appeals were subsequently dismissed. IFC still could have done right by these communities at that point, but it decided not to.

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

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

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

Compensation for economic loss, restoration and rehabilitation:

IFC needs to provide compensation for economic losses and loss of livelihood to the fishing communities, farmers and pastoralists due to damage to the land and marine environment caused by the construction and operation of The Tata Mundra Power Project.

IFC must provide for setting up of a Community Development Fund and provide compensation through this fund. The compensation is for restoration of environmental

damage, rehabilitation of the affected communities and needs to be paid for by IFC. The Community Development Fund would be governed by, fishing community, farmers group, elected *panchayat* (local governance body at village level) members, representatives of civil society organization and specially women members from the fishworkers community. An advisory group with experts on each sector like ground water, fisheries, agriculture etc nominated by the community governing body to advise on the activities to be taken up by the trust for the restoration, rehabilitation and mitigation measures.

Restoration of the Marine Environment:

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

Building a better screening of water intake channel and/or a diversion system to prevent entrainment of fish, including at further point of the intake channel of the Power project. Before taking the water into the power plant from the intake channel, there should be a closed water filtration device or system to prevent the fish eggs and fish larvae from entering the plant. The fish eggs and the larvae that are trapped in the filtration system should be collected carefully and released back into the open sea.

The plant must be retrofitted with a closed-cycle cooling system to minimize the thermal discharge temperature contrast into the local marine environment. The system utilized is inappropriate for the plant's size; IFC should have required this system from the beginning. The system had not yet been chosen when IFC approved the loan and it specifically identified the choice of an inappropriate cooling system as an issue that could lead to substantial harm.

Restoration of mangrove and seagrass beds and deployment of artificial reefs to help with the restoration of species.

Restoration of land environment:

Access to clean water for drinking and agriculture is essential for survival of people and agriculture. Saltwater intrusion is already a problem in the area and with plants' intake channels this has become worse. Community level (at villages and fishing harbors) Reverse Osmosis(RO) plants need to be provided. Provisions need to be made for RO discharge to be scientifically managed.

Fresh water supply water connection lines through pipelines should be provided to households.

Purchase land for grazing from Tata (they have acquired excess land for the project keeping in mind the expansion of the project as well) to be managed by the panchayat (*local governance body*) as grazing land for pastoralists to continue with their livelihood.

An assessment study is needed into the extent of harm to groundwater to determine ways to mitigate impacts.

Infrastructure needs to be built for restoration and storage of rainwater.

Addressing Air Quality/Health

Fully cover the Conveyor belt for coal transportation to the plant site from the Mundra port must be entirely covered and storage of coal on site.

Installation of technology that reduces particulate matter pollution from the plant e.g. replacing the Electrostatic Precipitators (ESP) with fabric filters (to reduce the particulate matter (PM) emissions), installing the flue gas desulfurization unit (to reduce SO₂ emissions), installation of ammonia injection (to reduce NO_x emissions), selective catalytic reduction [SCR] or selective non-catalytic reduction [SNCR]), installing a system for activated carbon injection upstream of a fabric filter (to reduce Mercury emissions)etc.

Regular and reliable monitoring of air quality with information publicly available at all times, as monitoring has been inconsistent, incorrect, and frequently not working at all.

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

Mitigating the social loss and rehabilitation:

Establish Vocational Training centers for those who have been pushed out of fishing and want to now explore opportunities to establish new sources of livelihood.

Provide for Quality primary and secondary level education at panchayat (administrative unit) level as poverty from the loss of livelihood for fishing families has substantially reduced access to education

Provide for covered infrastructure for fishworkers to store and dry fish now that this can no longer be done outside without contamination from ash.

Provide for access to housing for those who have lost livelihoods.

ON DRAFT IFC RESPONSIBLE EXIT PRINCIPLES

The draft is extremely sketchy and inadequate, with no reference to what the document is based on. There is no reference to any study or material its based on.

1. Responsible exit is strongly linked to remedial actions, and that the two should be viewed together. Two more principles be included: that responsible exit is related to remedy, and that exit cannot occur if remedy has not been provided.
2. IFC's decision to exit, and reasons for exiting, a project should be more transparent. Using project exit to release or avoid responsibility for remedy is not acceptable. IFC loses influence after exiting a project, and therefore exit should only happen if the Performance Standards have been complied with and there are no pending cases, litigation or complaints.
3. IFC should commit to not exiting a project where there is an active CAO case unless they have the consent of the complainants in the community.
4. Planning for responsible exit must start at the beginning of a project, at the time of contracting. Communities should participate in exit planning, including detailed discussions, such that the process is transparent.
5. Zero tolerance policies should apply to reprisals against communities post exit.
6. Responsible Exit Principles should apply equally to FIs. FIs should be integrated into both the Approach to Remedial Action and Responsible Exit Principles.

Conclusion

In conclusion, what we demand is a remedy with accountability. Remedy should not take away the powers to hold the institution accountable. Remedy for and with people, and not to make the exit honorable to IFC. Avoiding harm should be the objective and in rare cases there are negative impacts, the remedy process should start early on the project. Responsible exit can only be ensured when there is accountability to people, remedy is available and responsibilities are fixed at the beginning and not in the end.

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[1] <https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/>

[2] <https://www.brettonwoodsproject.org/2022/07/ending-absolute-immunity-for-the-international-finance-corporation-the-legacy-of-jam-v-ifc/>