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HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

IFC/MIGA draft Approach to Remedial Action

Comments and recommendations of the UN Human Rights Office

13 April 2023

Key messages

1. A robust remedy framework can support informed risk-taking. There is no such thing as a perfect project. However a robust remedy framework helps to avoid mistakes, correct those that do occur, and ensure that mistakes are not repeated.
2. The remedy gap is significant and warrants an ambitious response. However many elements in the draft Approach appear to be routine in nature or already under implementation, or otherwise seem suitable for implementation without need for piloting.
3. If piloting is not strategically prioritized, in OHCHR's view, more complex and challenging issues will not be adequately addressed, piloting resources will not be optimized, and opportunities to remedy E&S harms may be missed, along with important learning opportunities. IFC/MIGA may effectively be yielding to the market, rather than leading it, and ceding the innovation space to others.
4. International standards on remedy, and an increasing number of finance sector frameworks, have moved ahead of IFC standards in important respects. However practice on remedy is inconsistent and most DFIs are looking to IFC/MIGA for leadership. IFC/MIGA innovation, resources and convening power are needed in order to raise standards and encourage more consistent and confident practice.
5. The principle that those contributing to harms should contribute to remedy is fundamental to international human rights standards and responsible business conduct (RBC) standards, and an increasing range of emerging E&S frameworks. Should piloting fail to give attention to and operationalize this principle, it may undermine international human rights and RBC standards and foreclose remedy where it should otherwise be available.
6. Acceptance by IFC/MIGA of the principle that lenders may contribute to harm, and should therefore contribute to remedy, would make a triple contribution: it would not only create possibilities for remedy where they otherwise would not exist, but equally importantly, it would strengthen incentives for IFC/MIGA to build and exercise all available forms of leverage to ensure that clients more frequently discharge their own responsibilities, and it would help to ensure that all project costs are internalized within the project rather than externalized onto communities and the environment.
7. Concerns about litigation risk, moral hazard and cost-benefit may be overstated and would benefit from public justification and discussion.

Priority recommendations

1. The IFC Sustainability Framework should be updated to more explicitly and effectively enable remedy, and should be aligned with international human rights and Responsible Business Conduct standards and best practice.
2. The 2nd version of the draft Approach should be grounded in a clear analysis of existing remedy gaps and should reflect strategic priorities, clarity and specificity.
3. Piloting should be accompanied by an explicit accountability framework.
4. Where IFC/MIGA contribute to harms, they should contribute to remedy. This is a major gap in policy and practice and should be a priority for piloting.
5. Client contracts should make clear the requirement to remedy adverse impacts, and spell out the client's and IFC/MIGA's roles in this regard.
6. Client contracts should systematically require the disclosure to project-affected people of the fact of IFC/MIGA financing and availability of recourse through CAO.

Contents

Introduction

The Office of the UN High Commissioner for Human Rights (OHCHR) is grateful for the opportunity to comment upon the draft Approach to Remedial Action of IFC/MIGA ("draft Approach").

We recognize that IFC's Sustainability Framework set important benchmarks in sustainability at the time of its adoption, and that sustainability and innovation are considered central to IFC's value proposition. We note that a robust E&S remedy framework is essential for sustainability, project quality and addressing operational challenges in higher risk and FCV settings. Mistakes will never entirely be avoided. However mistakes are less likely when accompanied by rigorous due diligence, and less consequential when accompanied by remedy.

Yet as illustrated below, on the issue of remedy, the IFC Sustainability Framework has been overtaken in numerous respects by international business and human rights standards and sustainability policies and risk management frameworks of an increasing number of other financial institutions. At the same time, actual practice in enabling and providing remedy across bilateral and multilateral development finance institutions (DFIs) is uneven, and often, beset by confusion. For serious harms arising from DFI-supported projects, people are often left without any, or any adequate, redress.[1] Subject to the comments below, OHCHR expresses the hope that the approach to remedy eventually adopted by IFC/MIGA may help to re-set expectations, clarify assumptions and set a more decisive course forward, with positive ripple effects in development finance globally.

Subject to the comments below, OHCHR welcomes the fact that the IFC/MIGA draft Approach at least implicitly acknowledges the relevance of certain international human rights standards[2] and

[1] See OHCHR, Remedy in Development Finance: Guidance and Practice (Feb. 2022) (hereinafter "Remedy Report"), nn. 321-332 and accompanying text and sources cited therein. It is difficult to quantify the remedy gap for any given DFI given data constraints.
[2] IFC/MIGA Approach, footnote 5, noting that remedy may encompass restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. This stems from the UN Basic Principles and

recognizes (in para. 25) that affected stakeholders should be consulted on remedial options, with due sensitivity to reprisals risks. We welcome the intention to address remedy throughout all phases of the project cycle, from preparation through to implementation and, where needed, the retrospective application of remedial measures. Commitments to strong preventive action and early, effective remedy are undoubtedly important: justice delayed is justice denied. However as discussed below we consider that the draft Approach would have benefited from a more detailed discussion of remedial actions in line with international business and human rights standards.

Subject to the comments below, we also note the important discussions in the draft Approach on preparing for remedial actions including assessing and building leverage early, assessing client preparedness, and strengthening contractual provisions. The enumeration of existing client contingency funding mechanisms (Box 1) is of interest in this regard. The discussion of the measures taken by IFC and MIGA to build internal E&S capacities (para. 22) is also noteworthy in OHCHR's view, although a discussion of measures taken to align organizational incentives with E&S goals would also be valuable.[3] Nevertheless, there appear to be a number of significant weaknesses and gaps, in OHCHR's view, as outlined below.

Lack of baseline assessment of the remedy gap

A threshold problem with the draft Approach, in OHCHR's view, is that there is no recognition or analysis up-front of the extent of the remedy gap in practice, and its causes and consequences. Without such a baseline assessment, and without understanding how seriously IFC/MIGA view the remedy issue, it is difficult to discern what the draft Approach is responding to and whether it is adequate for those purposes.

OHCHR's understanding is that existing market practice in development finance entails the widespread externalization of costs on project-affected communities.[4] In the case of IFC/MIGA, CAO has found that current E&S risk management approaches have left many people affected by IFC/MIGA financed projects without remedy.[5] According to CAO, seventy-eight per cent of closed CAO compliance cases that made project-level findings did not lead to satisfactory project-level actions to address policy non compliance, and only fifty-six per cent of dispute resolution cases resulted in agreement or partial agreement.[6] According to CAO's Management Tracking Record, IFC/MIGA responsiveness to CAO compliance recommendations has, on average, been better at the systems level (policy change) than project level (remedy for complainants).[7]

However CAO only sees a fraction of the IFC/MIGA portfolio, and many problems do not rise to the surface. Clients are still not contractually obliged to make CAO known to potential complainants, meaning that many affected people still are not aware of the fact of IFC/MIGA financing or where they can go to raise concerns.[8] Many others are precluded by reprisals risk, which has been

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Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations, and the UN Guiding Principles on Business and Human Rights (UNGPs), principle 25.

[3] For suggested elements of the internal incentives and accountability structure see OHCHR, Benchmarking Study of DFI Safeguard Policies (Feb. 2023), pp.10-11.

[4] See footnote 1 above.

[5] CAO, Insights on Remedy: The Remedy Gap; Lessons from CAO Compliance and Beyond (Apr. 12, 2023).

[6] *Id*., pp. 9-12. To similar effect, according to Accountability Counsel, only 15% of publicly disclosed commitments from CAO compliance reviews are reported to have been fulfilled, compared with 37% for dispute resolution agreements. Megan Pearson, Data Doesn't Support IFC/MIGA Remedy Proposal (Mar. 6, 2023).

[7] CAO in Numbers (2022), Institutional Responsiveness 2015-2021.

[8] For discussion of this problem see CAO, Insights on Remedy: The Remedy Gap; Lessons from CAO Compliance and Beyond (Apr. 12, 2023), p.14.

increasing across DFIs. Project-level grievance mechanisms (GRMs) are not always well suited to addressing serious harms, and evaluations of GRMs across the board are mixed at best.[9] Further data seems to be needed on how problems are resolved through ordinary project supervision, IFC's Stakeholder Grievance Redress service, and other available means.

More fundamentally still, it was only in 2021 that CAO policy was updated to focus compliance investigations on findings of harm related to policy non-compliance. And while the IFC Sustainability Framework was state-of-the-art in 2012, and explicitly recognizes the concept of remedy and international human rights standards,[10] it has fallen behind the latter standards and leading practice on remedy since then.[11] In light of all available evidence, therefore, in OHCHR's view, the remedy gap is in all likelihood a very significant one.

The need for a strategic focus

In view of the above, an ambitious policy re-set would seem to be necessary. Given the shortcomings in current approaches to remedy in development finance generally,[12] it is axiomatic that an effective remedy framework should in many respects be ahead of market practices. Yet the draft Approach is presented largely as an articulation of existing practice, subject to certain broadly defined areas for potential enhancement (Section E) which, on their face, seem modest against the scale of needs. The draft twice raises concerns regarding possible client resistance to elements that are considered innovative and ahead of market practice.[13] This apparent reticence seems hard to square with IFC's influential standard-setting role, track record on innovation, and mission to create markets in difficult settings. Innovation is surely a feature, not a bug, of any pilot initiative, on remedy or any other issue.

In OHCHR's view, piloting should not include elements which are already reasonably common market practice, or which only represent a modest enhancement of existing practice, or which are self-evidently good ideas or are already being implemented in connection with IFC/MIGA's response to the External Review (referenced in the draft Approach, footnote 19). Clear examples in OHCHR's view would include costing ESAPs (which appears to be common practice in commercial project finance contracts and should be standard practice for DFIs) and the great majority of the preparation and supportive measures in paras. 17-19.[14]

The need for strategic focus seems to apply with particular force in connection with para. 17(c) (contractual provisions). In OHCHR's understanding, existing contractual clauses already reflect many of the subject areas outlined in para. 17(c). For example the loan agreement in 2008 between IFC and Coastal Gujarat Power Limited (at issue in the *Jam v. IFC* case)[15] contains a number of

[9] OHCHR, Remedy Report (2022), pp. 66-67 citing recent studies of the World Bank.
[10] IFC Environmental and Social Sustainability Policy (Jan. 1, 2012), paras. 12 and 16; IFC Performance Standard 1, para. 3 and footnote 12; Guidance Note 1 (updated June 14, 2021), GN44-47.
[11] OHCHR, Benchmarking Study on Development Finance Institutions' Safeguard Policies (Feb. 2023), pp.83-89, 129 and 133-36.
[12] OHCHR, Remedy Report (2022).
[13] Draft Approach p. iv (E) and p.8, para. 17(c).
[14] Certain preparatory measures seem distinctly unambitious. For example para. 17(a) states that IFC/MIGA will "advise clients on how to provide information to access remedy" through GRMs, CAO and other mechanisms. However given the persistent ignorance of these mechanisms by project-affected people, this should surely be a contractual requirement. See Remedy Report (2022), footnote 142 and accompanying text.
[15] Available at IFC-Loan-Agreement.pdf (earthrights.org). OHCHR acknowledges that this is a common terms contract for a co-financed project and makes no claim about whether it is standard for IFC.

important provisions to encourage compliance with E&S requirements, create financial leverage and incentives for E&S performance, report on corrective action plans in a manner satisfactory to IFC, and indemnify IFC for "all costs and expenses … arising out of or in connection with any failure by the Project or the Borrower to comply with any Environmental and Social Requirements."[16] Its provisions also include:

- A requirement for notification of E&S claims as a condition of disbursement (Common Terms 4.2(q), Conditions of all Disbursements);
- Detailed site inspection requirements as needed by IFC and/or CAO, at the client's cost, until all contractual obligations are paid to IFC in full (Common Terms 5.1(f), Affirmative Covenants);
- The right of IFC to conduct an independent audit of E&S compliance and "identify any adverse impacts, risks or liabilities with respect to Environmental and Social Matters that have not been adequately mitigated or compensated" (Common Terms 5.1(ii), Affirmative Covenants);
- Reporting to IFC of "material adverse impacts relating to any environmental or social matter", along with remedial actions undertaken and, as needed, a corrective action plan satisfactory to IFC (Common Terms 5.5(c), Reporting Requirements); and
- Authority of the IFC, at the expense of the borrower, to "prepare a corrective action plan, in form and substance satisfactory to [IFC], to correct any identified non-compliance or deficiency, whereupon the Borrower shall implement such corrective action plan" (Common Terms 5.1 (ii)(B); Affirmative Covenants: "Environmental and Social Compliance).

When assessing the level of ambition of para. 17(c) of the draft Approach, it is also relevant to consider the state of play on E&S contractual provisions in the commercial banking sector. In OHCHR's understanding, E&S provisions found in commercial financing terms for major projects overlap significantly with what is outlined in para. 17(c), including in connection with remedial action plans and serious incident reporting requirements.[17] Commercial contracts may even contain more detailed requirements than the IFC/Coastal Gujarat Power Limited contract in certain respects, such as in connection with the specificity and costing of remedial E&S action plans. Moreover, the scope of E&S requirements in project finance contracts are not necessarily limited to the IFC Performance Standards but may include OECD or other lender-specific standards. Breaches of human rights are commonly within scope.[18]

OHCHR does not have access to current IFC/MIGA model contractual provisions, however if our analysis is correct, this would suggest that the majority of the provisions outlined in para. 17(c) of the draft Approach should simply be incorporated into routine practice, with any minor enhancements needed, as outlined in Table 1. Column A of Table 1 lists elements that, in OHCHR's best judgement, are innovative and warrant piloting. Column B lists elements which more closely reflect common practice and/or existing IFC/MIGA policy, and could therefore be expected to be implemented on a routine basis without any need for piloting. The Table includes only those elements which are defined clearly enough to afford a basis for judgement.[19]

[16] *Id*, Common Terms 5.5(c) (reporting requirements), 6.1(x) (events of default), and 8.4(ii)(5) (expenses and indemnity).
[17] Analysis of project finance E&S provisions on file with OHCHR (2023).
[18] *Id*.
[19] The Table omits "Financial incentives to encourage compliance with the Performance Standards", which does not necessarily relate directly to remedy and in any case needs clearer definition about what is proposed. It also omits "Specific contractual remedies, including for non-compliance with E&S requirements", which is not only vague but on its face appears to relate to situations of default triggering repayment to IFC (not remedy to project-affected people).

Table 1 – Contractual provisions listed in para. 17(c) of the draft Approach

A. Innovative issue for piloting	B. Issue for routine implementation
Participation in alternative dispute resolution (arbitration example)	Client commitments to remediate/develop remedial plans for certain potential adverse impacts
Responsibilities for remedy or compliance with other E&S-related requirements post-exit (e.g. for a fixed period of time)	Strengthening existing provisions on responsibilities to report on and assess allegations and adverse impacts emerging from serious incidents
	Strengthening provisions to participate in the CAO process, including Management Action Plan preparation[20]
	Considering how support for remedial actions extends to relevant third parties (e.g. associated facilities, sub-contractors)[21]

If the majority of the contractual provisions in paragraph 17(c) were absorbed more systematically into existing practice, a piloting initiative could then focus on a handful of authentically innovative actions which deserve particular focus and support, and which are essential to a more robust approach to remedy, and which may set a new (high) standard for DFIs and the finance sector generally. Without strategic prioritization of this kind, in OHCHR's view, more complex and challenging issues will not be adequately addressed, piloting resources will not be optimized, and opportunities to remedy E&S harms may be missed, along with important learning opportunities. IFC/MIGA would effectively be yielding to the market, rather than leading it, and ceding the innovation space to others.

Finally, and perhaps most critically, in OHCHR's view, any piloting of contractual conditions should be anchored in a clear assessment of the extent to which *existing* contractual leverage has been exercised in practice, and an analysis of the causes of any shortcomings in this regard. According to CAO, "in circumstances when IFC/MIGA considered a client's E&S actions inadequate, they made use of [disbursement-linked] contractual leverage in only 23 percent of cases."[22] Without analysing and addressing the reasons for which existing leverage is not utilized, piloting new (innovative) contractual provisions may ultimately be of little benefit in practice.

Piloting IFC/MIGA "contribution" to remedy

The most critical issue that needs to be piloted, in OHCHR's view, concerns the responsibility of IFC/MIGA to contribute to remedy where they have contributed to harm. This principle is fundamental to the UNGPs, international RBC standards[23] and other relevant E&S frameworks

[20] This is already part of the CAO Policy (2021). Policy compliance is mandatory and should be routine.
[21] The vagueness of this formulation complicates judgement however this already appears to be the subject of requirements under the IFC Environmental and Social Sustainability Policy (Jan. 1, 2012), para. 23.
[22] CAO, Insights on Remedy: The Remedy Gap; Lessons from CAO Compliance and Beyond (Apr. 12, 2023), p.16. Also (at p.16): "CAO's review of compliance cases processed since 2018 found that, for nearly 70 percent of these projects, IFC did not exhaust the leverage at its disposal to address outstanding E&S concerns."
[23] The UNGPs, OECD Guidelines for Multinational Enterprises, and experience under the Dutch Banking Sector Agreement were included within the literature review for the draft Approach (para. 4) although implementation practices on remedial actions were described as "limited and ad hoc." International business and human rights principles are referenced in para. 5 of the updated CAO Policy (2021), and IFC's Guidance Note 1 for Performance Standard 1 (2012), GN44-45, reference the UNGPs specifically.

including the Equator Principles.[24] However this foundational principle is mentioned only in passing in the draft Approach, subject to a number of questionable premises discussed further below.

Annex A (para. 2) of the draft Approach usefully highlights the External Review's recommendation that "[a]n IFC/MIGA framework needs to be established for remedial action in cases in which non-compliance contributes to harm." As noted in Annex A, it was also recommended that IFC and MIGA "should define a framework for remedial action … building in part on the Dutch Banking Sector Agreement" (a holistic framework informed by the UNGPs and RBC standards, resulting from a multistakeholder process) and 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." IFC/MIGA were encouraged to establish contingent liability funding requirements and mechanisms for all higher E&S risk investments, and funding mechanisms for IFC/MIGA contributions in the event that either organization contributed to harms. CAO has supported these recommendations.[25]

However, contrary to these recommendations and international principles, the draft Approach effectively limits direct contributions to remedy only from those (most obviously the client) who have *caused* harms*,* not those (potentially including IFC/MIGA) which may have *contributed* to harms.[26] IFC/MIGA's own potential financial contributions to remedy are ruled out in all but "exceptional circumstances" (draft Approach, para. 30). The draft Approach (para. 21) also expressly excludes admission of any responsibility where IFC/MIGA is involved in remedial action; any direct contribution is said to be "*ex gratia*."

There is no basis for an "exceptional circumstances" exclusion or blanket disclaimer of responsibility in international business and human rights standards. Rather, the extent to which a lender or investor contributes to impacts, or alternatively is linked to impacts through its business relationships, is a question of fact, taking into account (among other things) the rigor of its own due diligence. The questionable premises in the draft Approach risk putting IFC/MIGA well behind international standards and best practice in the private sector, in OHCHR's view, and may well undermine the latter standards and practices.

To compound this problem, in the draft Approach, the responsibilities of those who have *caused* or *contributed* to harms are not distinguished from the roles of a potentially wide range of other actors in the remedy "ecosystem." It is inappropriate to shift responsibility to other actors where one's own actions or omissions (and not those of the other actors) have contributed to harm, in OHCHR's view. Under the UNGPs and other RBC standards, the extent to which a given actor incentivizes harms, facilitates harms,[27] and conducts human rights due diligence, are relevant for determining

[24] Guidance Note on the Implementation of Human Rights Assessments under the Equator Principles (Sept. 2020), p.18; Tools to Enhance Access to Effective Grievance Mechanisms and Enable Remedy (Equator Principles and Shift), p.7; and Shift, Operationalizing Remedy for Financial Institutions with the Equator Principles Association (Nov. 2022).

[25] CAO, Insights on Remedy: The Remedy Gap; Lessons from CAO Compliance and Beyond (Apr. 12, 2023), pp.21-22.

[26] Para 30: "IFC/MIGA would not expect to provide direct financing of remedial action but nothing in the Approach would preclude IFC/MIGA from considering the provision of direct financing for remedial action in exceptional circumstances, subject to existing policies and procedures."

[27] See OHCHR, Response to BankTrack on the Application of the UNGPs to the Banking Sector (2017), p. 8, noting that, with respect to "facilitating" harms, "providing a financial product or service, is not inherently problematic … and as such not the facilitating factor in and of itself because the potential for abuse relates to external factors, i.e. the decisions of the client. However, a [financial institution] may facilitate a client or other entity to cause harm, if it knows or should have known that there is human rights risk associated with a

whether that actor has "contributed" to those harms.[28] A bank contributing to adverse impacts should provide for remediation appropriate to its share in the responsibility for the harm.[29] The increasing volume of complaints involving lenders under the OECD MNE Guidelines illustrates the increasing strength of norms and stakeholder expectations on this issue,[30] as does emerging guidance on remedy issued by the Equator Principles Association.[31]

On the question of IFC/MIGA contributing to remedy, the draft Approach otherwise relies upon a broadly-drawn and, arguably, static delineation between a lender's and client's roles, in OHCHR's view, and unsubstantiated concerns about litigation risk, moral hazard and cost.[32] Concerns about litigation risk exposure seem difficult to square with the historical record: OHCHR is not aware of any successful lawsuit against IFC or other multilateral development banks in respect of E&S harms suffered by third parties.[33] Practical and legal barriers are formidable,[34] and given organizational immunities it is rare that such cases reach the merits stage. As a policy matter, rigorous due diligence is a lender's best defense against legal liability.[35] Moreover, providing realistic roads to remedy *decreases* litigation risk in those jurisdictions where organizational immunity is balanced against the right to remedy.[36] Indemnification provisions in client contracts may decrease liability exposure further.[37]

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particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks."

[28] OHCHR, Response to BankTrack on the Application of the UNGPs to the Banking Sector (2017), pp.5-10. See also OECD, Responsible Business Conduct Due Diligence for Project and Asset Finance Transactions (2022), pp.31-34, and the examples therein, and the discussion in the Annex to this memorandum.

[29] UNGPs, Principle 22; and OHCHR, Response to BankTrack on the Application of the UNGPs to the Banking Sector (2017), pp.11-12.

[30] Farrell, M. et al, Human Rights Risks for the Financial Sector: Lessons from Ten Years of the OECD Guidelines for Multinational Enterprises (Mar. 2023).

[31] See the references in footnote 24 above.

[32] Draft Approach, p. vi ("Key Considerations..") and para. 30. See *contra* Remedy Report (2022), pp. 1, 5, 20-21 and 83.

[33] Treichl C., Reinisch A., Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation, *International Organizations Law Review*, 2019, Vol. 16(1), 107; Simon M., Graziano M., Jam v International Finance Corporation: The US Supreme Court Decision and its Aftermath, *Business and Human Rights Journal*, 2020, Vol.5(2), 286.

[34] Remedy Report (2022), pp.20-21. Barriers typically include financial cost, the substantive complexity of tort law claims in the context of financing relationships, *forum non conveniens* doctrines, political question doctrines, territorial nexus requirements, proof that harms complained of relate to "commercial activity," and overcoming the restrictive scope of lender liability laws in many jurisdictions.

[35] For analysis of the relationship between human rights due diligence and determinations of corporate liability, see UN Doc. A/HRC/38/20/Add.2. For comments on the relationship between human rights due diligence and legal liability more generally, see UN Doc. A/HRC/11/13, paras. 80–84. On the relationship between commercial banks' remedial mechanisms and the risk of legal liability, see Brightwell R., Gardener D., Developing effective grievance mechanisms in the banking sector (Nijmegen, BankTrack and Oxfam Australia, 2018), p. 29.

[36] See e.g. Beer and Regan v. Germany, Application No. 28934/95, European Court of Human Rights, 18 February 1999, [1999] ECHR 6 *(*summary *p 32);* Waite and Kennedy v. Germany, Application No. 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13, para. 52. Other case law can be found in Belgium and Italy. To similar effect, when *Jam v. IFC* reached the US Supreme Court, Justice Breyer (in a dissenting opinion upholding IFC immunity) stated that where alternative dispute settlement mechanisms are inadequate, the International Organizations Immunities Act of 1945 allowed the US executive branch to set aside an organization's immunity. Jam v. IFC, 139 S. Ct. 759 (2019), 780.

[37] See for example the loan agreement in 2008 between IFC and Coastal Gujarat Power Limited, cl. 8.4(ii)(5) (expenses and indemnity), available at IFC-Loan-Agreement.pdf (earthrights.org).

Concerns about moral hazard, as articulated in the draft Approach, seem equally problematic in OHCHR's view. In the draft Approach, moral hazard seems to be viewed uniquely through the frame of the IFC/MIGA-client relationship without adequately considering the more pressing problem that, under current arrangements, remedy costs are routinely being externalized onto project-affected people. A more holistic and principled remedy framework predicated upon all relevant parties' respective involvement in impacts shifts the costs borne by affected people back onto those responsible for harms.

Acceptance by IFC/MIGA of the principle that lenders may contribute to harm, and should therefore contribute to remedy, would make a triple contribution: it would not only help to internalize E&S costs within projects and create possibilities for remedy where they would otherwise not exist, but it would also *strengthen incentives for IFC/MIGA to build and exercise all available forms of leverage* to ensure that clients more frequently discharge their own responsibilities.

While certain DFIs and other finance sector actors are moving ahead in defining the scope of their own contributions to remedy, many others appear to be holding off pending clarification of IFC/MIGA's intentions. To OHCHR's knowledge, contributions by banks to remedy are generally not publicized due to reputational concerns and fears of altering perceptions of established roles (concerns reflected in the draft Approach). The possibility that a robust approach to remedy may lead to "win/win" outcomes does not yet appear to be widely appreciated,[38] and may require a shift in incentives and mind-set.[39]

A pilot on "IFC/MIGA contribution to remedy" could play a valuable role at this critical juncture, in OHCHR's view, drawing from and reinforcing leading practices elsewhere. Should IFC/MIGA fail to address this issue, with the benefit of their enhanced leverage, resources, reputational advantages, convening power and organizational immunities, they will not only lose an opportunity to lead but may inadvertently discourage innovation by others.

In OHCHR's view, piloting "IFC/MIGA contribution to remedy" should be applicable to all cases under active CAO monitoring (legacy projects) as well as new investments. Management Action Plans (MAPs) under CAO's pre-2021 policy are not necessarily "remedial" in any direct sense because the pre-2021 CAO policy did not require findings of harm. By reviewing all MAPs under active monitoring through a remedy lens, informed by CAO non-compliance findings, a pilot initiative could help to address existing remedy gaps and develop a clear and robust set of criteria to guide IFC/MIGA contribution to remedy in future projects.

OHCHR would also suggest that a pilot for "IFC/MIGA contribution to remedy" should ideally be the product of a multi-stakeholder process such as that of the Dutch Banking Sector Agreement. Through such a process, roles and responsibilities would be worked out transparently, in the context of specific investments, and perverse incentives of the kind referred to in the draft Approach[40] could

[38] Two of the better known examples of lenders contributing to remedy, the World Bank's remediation program in connection with the Uganda Transport Sector Development Project and ANZ's contribution to resettlement costs in connection with a loan to Phnom Penh Sugar in Cambodia, generated widespread reputational benefits for the lenders as well as substantive remedy for project-affected people. See Remedy Report (2022), Boxes 5 and 7.

[39] According to CAO: "CAO's findings … highlight the need for a culture shift at IFC and MIGA toward staff not only valuing the client relationship but also embracing their role to protect the interests and wellbeing of impacted communities and the environment." CAO, Insights on Remedy: The Remedy Gap; Lessons from CAO Compliance and Beyond (Apr. 12, 2023), p.15.

[40] The draft Approach notes possible perverse incentives arising from IFC/MIGA being seen to assume roles normally associated with the client. But as we have noted earlier, the more pressing moral hazard problem is

be minimized. Clarity of roles could be reinforced through spelling out in contractual provisions the specific circumstances in which IFC will contribute financially, and through what means. Suggested criteria and elements of a framework for determining IFC/MIGA involvement in impacts and contribution to remedy are set out in the Annex.

Piloting and creating markets for remedy financing mechanisms

Developing, testing and building markets for different remedy financing mechanisms could be another valuable function to be served by an IFC/MIGA piloting initiative. The draft Approach (para. 17(b) and Table 1) already envisages the use of certain existing mechanisms, such as insurance, cash waterfall account structures (for project finance) and contingency cost lines (in the case of high-risk infrastructure and natural resource projects). However the draft Approach argues for selective contingency funding requirements (rather than "blanket" requirements) on the grounds of costs (to the client) and context specificity, and appears to limit piloting to the financing instruments already available.[41]

In OHCHR's view, consistent with that of the External Review, a more strategic approach commensurate with needs would be to test the feasibility of tailored contingency financing mechanisms in all higher risk projects. In OHCHR's view, such an exercise should be predicated upon a comprehensive cost/benefit analysis encompassing community and development benefits as well as costs to clients. New financing mechanisms might also be identified and tested, rather than (or in addition to) applying and enhancing existing requirements.[42]

Piloting "collective leverage" within the World Bank Group

When identifying strategic candidates for piloting, in OHCHR's view consideration should be given to the potential to exercise collective leverage with the World Bank. The draft Approach refers to co-financers but not specifically the World Bank, whether in the capacity of co-financer or otherwise. The Bank may often have relationships with host governments and other actors that may be valuable for addressing impacts in IFC/MIGA-supported projects, as well as additional convening power and leverage through the project pipeline. A piloting exercise could serve a valuable function in modelling collective leverage across the World Bank Group, helping to maximize opportunities and address barriers to the more frequent deployment of this kind of leverage in practice.

Remedy for digital technology projects

Digital technology is of critical importance in the global economy, and impacts upon people's lives positively as well as negatively, in a growing number of ways. However the implications of digitalization are not always easy to grasp, and existing approaches to risk management and remedy across DFIs do not appear to be well suited to addressing potential human rights impacts beyond privacy, data protection and cyber security, and in particular "downstream" impacts in the value chain.[43]

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surely the extent to which E&S costs are not adequately being priced into projects, but rather are being externalized onto people and the environment.

[41] Draft Approach, para. 17(b): "IFC/MIGA may consider, on a case-by-case basis, certain instruments, provided they are relevant and available for the particular project structure, effective in the given circumstances, and not excessive in their cost or unreasonably burdensome in their oversight/implementation."

[42] For a discussion of potential contingency financing mechanisms see Remedy Report (2022), Chap. IV, pp.88-89.

[43] OHCHR, Benchmarking Study of DFI Safeguard Policies (Feb. 2023), pp.112-118.

In OHCHR's view, in digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented. IFC has innovated in important ways in the digital tech space and has developed a draft Code of Conduct for artificial intelligence.[44] Innovation is now needed specifically on remedy.

Responsible exit principles

OHCHR welcomes IFC's intention to address responsible exit but finds it difficult to comment on the draft IFC Responsible Exit Principles given their schematic nature. Nevertheless a number of general recommendations are included in the Recommendations section below, drawing from more extensive analysis in our Remedy report (2022) (Chap. V).

Recommendations

Draft Approach of IFC/MIGA to Remedy:

OHCHR respectfully recommends that:

- The IFC Sustainability Framework should be updated to more explicitly and effectively enable remedy, and should be aligned with international business and human rights standards and best practice.
- The 2nd version of the draft Approach should include, and be predicated upon, a clear and objective assessment of the state of play on remedy.
- Piloting should not include actions which are common market practice, or which only represent a modest enhancement of existing practice, or which are required (and ought to have been implemented) under existing policy, or are already being implemented as part of IFC/MIGA's response to the External Review. These elements should be integrated into all projects without need for piloting.
- Piloting should focus on a small handful of issues which are truly innovative, or where practice is emerging or understanding unclear, and where dedicated support and learning are clearly needed.
- Piloting should be based upon a clearly defined baseline, commitments and outcomes, and annual reviews and reporting to the Board.
- Pilots should be informed by international standards on business and human rights, which provide a more robust framework for remedy than the IFC Sustainability Framework.
- As a matter of priority, piloting should focus on criteria, processes and financial mechanisms through which IFC/MIGA may contribute directly to remedy where they have contributed to harms.
- In any given project, the extent of IFC/MIGA's involvement in harms should provide a baseline for assessing its potential contributions to remedy.
- The outcomes of assessments of IFC/MIGA's contributions to harm (and therefore, contribution to remedy) should be seen as a floor, not a ceiling. Given their mandates, IFC/MIGA should also look upon unmet remedy needs as a development opportunity. The additional challenges of enabling remedy in FCV contexts and in connection with complex financing structures should also be taken into account.

[44] Myers G., Nejkof, K., Developing Artificial Intelligence Sustainably: Toward a Practical Code of Conduct for Disruptive Technologies, IFC, *EM Compass* Note 80 (Mar. 2020).

- Piloting "IFC/MIGA contribution to remedy" should be carried out through a multistakeholder process modelled upon that of the Dutch Banking Sector Agreement.
- Pilots should not be limited to new projects, but should also include a review of MAPs for all projects under active CAO monitoring under CAO's pre-2021 policy.
- ESAPs and management action plans should systematically be costed, including in relation to legacy impacts.
- Client contracts should make clear the requirement to remedy adverse impacts, and spell out the client's and IFC/MIGA's roles in this regard.
- Client contracts should systematically require the disclosure to project-affected people of the fact of IFC/MIGA financing and availability of recourse through CAO. This measure should be supported by piloting as outlined in the final paragraph of the Annex.
- Piloting should explore opportunities to demonstrate the value of collective leverage across the World Bank Group.
- IFC/MIGA should explore new approaches to remedy for digital tech projects, and projects with significant digital dimensions.
- Concerns about litigation risk, moral hazard and cost-benefit may be overstated and would benefit from public justification and discussion.

Responsible Exit principles

OHCHR respectfully recommends that:

- IFC/MIGA responsible exit principles should be expanded to include passive as well as active exits.
- Clearer and more detailed, differentiated treatment should be given to how to approach responsible exit in connection with loan and equity investments.
- The principles should contain clearer commitments that IFC/MIGA will not exit without first using all available leverage to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders, and that remedial actions will take into account IFC/MIGA's own contributions to harms (if any).
- Principle 3 ("Use leverage pre-exit") should be reformulated to "building and using" leverage, and the "likely and severe" criterion should be removed.
- A fuller range of leverage options should be specified for different kinds of exits, taking into account OHCHR's Remedy Report (2022), Chap V.

Annex

Criteria and elements of a framework to assess IFC/MIGA involvement in harms and contribution to remedy

An appropriate system for assessing involvement in harms and contribution to remedy needs to be worked out in context, supported by piloting. A number of other DFIs, commercial banks and finance institutions have been innovating and developing more holistic remedy frameworks, along with analytical tools to help assess the extent to which the lender has contributed to harms (and is thereby responsible to contribute to remedy in addition to exercising leverage) or alternatively is solely "linked" to impacts through its business relationships (and thereby responsible to exercise leverage). Some have also contributed financially to remedy where circumstances so warrant.

The Dutch Banking Sector Agreement working group on enabling remediation is a well-known example,[45] as noted in the External Review and draft Approach. Other examples of innovation include ANZ's experience on remediating forced resettlement impacts in Cambodia,[46] the new Safeguard policies of the International Climate Initiative of the government of Germany,[47] Finnfund's Sustainability Framework (2020),[48] guidance on remedy produced by the Equator Principles Association,[49] and the new ESAP Guidelines of the Legacy Landscapes Fund, produced with contributions from KfW.[50] The latter guidelines include a user-friendly decision tree which can guide a DFI in determining its involvement in harms and the consequences which should follow:

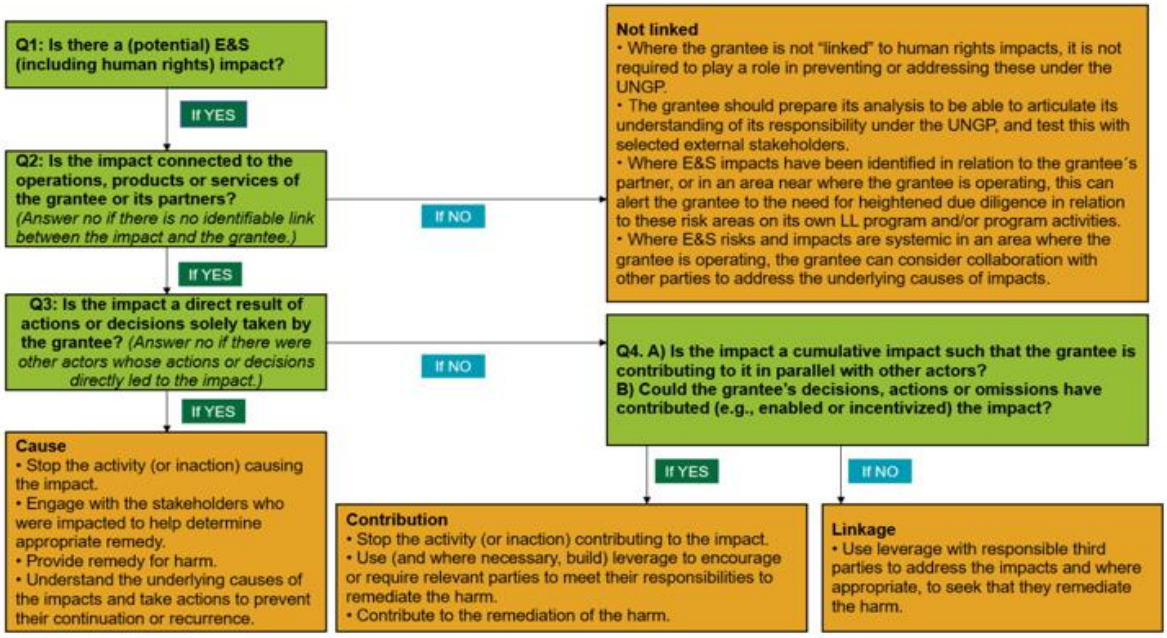

Figure 5-2 Decision Tree Flowchart for Establishing Responsibility under the UNGP

[45] Dutch Banking Sector Agreement, Working Group on Enabling Remediation, Discussion Paper (May 2019).
[46] Remedy Report (2022), p.19, Box 5.
[47] OHCHR, Benchmarking Study of DFI Safeguard Policies (Feb. 2023), p.25, Box 9.
[48] *Id*, p. 85, Box 48, footnote 291 and accompanying text.
[49] See Tools to Enhance Access to Effective Grievance Mechanisms and Enable Remedy (Equator Principles and Shift), p.7.
[50] Legacy Landscapes Fund, Guidance Note on ESAP Development (2023), produced with contributions from KfW and Shift. The decision tree is reproduced here with permission of Legacy Landscapes Fund and KfW.

The boundary between "contributing" and being "linked" to harms is porous and requires dynamic assessment. Drawing from emerging policy and practice, questions that may help to determine a DFI's involvement in E&S impacts, and baseline expectation regarding contribution to remedy, may include the following:

- Was the project or investment given an appropriate risk classification?
- Was the given risk or impact reasonably foreseeable?
- Was the scope and rigor of due diligence adequate?
- Did the due diligence process consider contextual risk factors, which would have made the impacts more likely to occur?
- Were stakeholder engagement processes effective?
- Were effective grievance mechanisms in place and made known to project-affected people?
- Were the commitment, track record and capacity of partners to identify and manage relevant human rights or other E&S risks properly assessed as part of the regular E&S due diligence process?
- What steps were taken to build leverage early in the project cycle, and exercise leverage to prevent and mitigate risks and harms?
- Was monitoring adequate and commensurate with risk?
- Where a third-party financial institution's risk assessment was relied upon, what steps were taken to ensure that the assessment was reliable?
- Where legacy impacts have been identified, were appropriate steps taken to encourage remediation of these?[51]

Such factual determinations are contextual and not always clear-cut. The exact allocation of each responsible actor's 'share' of the harm will depend entirely on the specific situation and should be determined through a legitimate process.[52] However, in OHCHR's view, the outcomes of assessments of IFC/MIGA's contributions to harm (and therefore, contributions to remedy) should be seen as a minimum level of commitment (not a ceiling) and should not prevent IFC/MIGA from addressing other unmet remedy needs as a development opportunity. This would seem to be particularly important in FCV settings, given the increased likelihood of severe risks, weaker remedy ecosystem, and potential for unaddressed grievances to fuel violent conflict.[53]

When considering its potential contributions to remedy, OHCHR would also suggest that IFC/MIGA take into account the complexity of financing structures, which may obfuscate accountability for adverse impacts and put remedy further out of reach for affected people.[54] For example, financial intermediary lending has raised a range of concerns about the transparency of what is being funded, due diligence and supervision of the capacity of financial intermediaries to manage the risks and impacts of subprojects. Infrastructure investment funds, public-private partnerships and other blended finance mechanisms present additional challenges, given the complexities of the financing structures and multiple parties involved.

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[51] See e.g. Dutch Banking Sector Agreement, Report of the Working Group on Enabling Remediation (2019), pp.33-51; Legacy Landscapes Fund, Guidance Note on ESAP Development (2023), pp.10-14; OECD, Responsible Business Conduct Due Diligence for Project and Asset Finance Transactions (2022), pp.31-34.
[52] OHCHR, Response to BankTrack on the Application of the UNGPs to the Banking Sector (2017), pp.11-12.
[53] World Bank Group Strategy for Fragility, Conflict, and Violence 2020–2025 (Feb. 2020) at pp. viii-ix, 2-3, and paras. 8, 12-13, 48, 53, 87, 97, 99, 126-8, 148, 164, 172, 230 and Annex 2.
[54] Remedy Report (2022), Chap. IV, Table 2.

It seems self-evident that CAO should have an important role to play in determining whether or the extent to which IFC or MIGA have contributed to harms in a given project.[55] However, as indicated earlier, only a small fraction of potentially problematic projects are subject to CAO compliance review. Project-affected people are still frequently unaware of the fact of IFC/MIGA financing and possibility of redress through CAO. The draft Approach foreshadows that IFC/MIGA will "advise clients on how to provide information on access to remedy,"[56] however if CAO is to play an effective role in this context, clients will need to be contractually obliged to disclose the fact of IFC/MIGA financing and the existence of CAO at the project site. This overdue change should be implemented immediately, in OHCHR's view, without need for piloting.

Piloting may nevertheless play a role in making this change effective. OHCHR suggests that IFC/MIGA consider a pilot initiative at two levels: (1) through surveys or other means, undertake a baseline assessment of project-affected peoples' knowledge of CAO prior to the introduction of contractual requirements to make IFC/MIGA financing and CAO known, and repeat the assessment at appropriate intervals in order to determine the impact of those contractual requirements; and (2) bearing in mind the critical role played by community-based and civil society organizations in making CAO access possible, establish a CSO support fund to help complainants bring claims, and subject the fund to independent evaluation after a suitable interval.

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[55] The External Review reported noted the role of management in this regard, as well as CAO, however in OHCHR's view such determinations require independence and methodological rigor characteristic of the CAO compliance review function.

[56] Draft Approach, para. 17(a), and to similar effect, para. 18(iii).