THE DANISH INSTITUTE FOR HUMAN RIGHTS

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RESPONSE TO DRAFT IFC/MIGA APPROACH TO REMEDIAL ACTION AND IFC RESPONSIBLE EXIT PRINCIPLES

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The Danish Institute for Human Rights (the "Institute") is grateful for the opportunity to provide comments on the proposed IFC Approach to Remedial Action and the Draft IFC Responsible Exit Principles.

The Institute focuses on the financial sector as one area of its work and in that connection has worked with numerous development finance institutions (DFIs) on human rights issues. It draws on its expertise on human rights, the financial sector and DFIs in providing these comments, which we hope IFC and MIGA will find constructive and useful.

I. COMMENTS ON IFC/MIGA DRAFT APPROACH TO REMEDIAL ACTION

A. EXECUTIVE SUMMARY

1. OVERARCHING COMMENTS

The Institute appreciates IFC/MIGA's past leadership in the sustainability space and their ambition to maintain that leadership. We recognise and congratulate IFC/MIGA[1] for developing a draft Approach to Remedial Action (the draft Approach) in response to the "External Review of IFC/ MIGA Environmental Social (E&S) Accountability, including CAO's Role and Effectiveness"[2] (the External Review). While the draft Approach offers a useful state of play, we expected that IFC's ambition to maintain its leadership would translate into a more robust approach to remedial action, including more specific actions to respond to adverse impacts, a broader approach covering more situations and a more forward-looking proposal to advance IFC's mandate to improves the lives of people, especially the poor and vulnerable.

There are several useful points in the draft Approach, starting with the important recognition that remedial action is a core part of IFC's mission and mandate. We also welcome the recognition that remedial actions can be strengthened throughout the project cycle – before, during and after concerns have been raised, with an emphasis on early action.

However, neither the draft Approach on Remedial Action nor the draft Principles on Responsible Exit are sufficient to address the evidence of the increasingly recognised "remedy gap" [3] between commitments to "do no harm" and what happens on the ground. The draft Approach does not recognise nor provide any analysis of the gap in policy or practice around unresolved harms in IFC-finance projects as a starting basis.

[1] This consultation response refers to IFC, but should also be read to apply to MIGA as relevant.
[2] P Woicke, et al, "External Review of IFC/ MIGA Environmental & Social (E&S) Accountability, including CAO's Role and Effectiveness," (2020).
[3] OHCHR, "Remedy in Development Finance: Policy and Practice (2022), M Pearson, "Data Doesn't Support IFC's Remedy Proposal," (March 6, 2023).

The 30-year anniversary of the World Bank Inspection Panel and more than 20 years of the CAO are a testament to the World Bank Group's recognition that accountability to those affected by its projects is important. This recognition should be the starting point for a discussion on remedy – in other words, it is not something new but rather deeply rooted in the institutions. This earlier leadership role on accountability in prompting other DFIs to establish independent accountability mechanisms is playing out again: other DFIs are waiting to see where IFC goes with this initiative. Given IFC's past leadership, its enhanced leverage, resources, reputational advantages, and convening power, its failure to play a leading role at this critical moment has implications not only IFC but for the wider DFI community as its current approach is likely to discourage necessary and more appropriate responses to the remedy gap by others.

The draft Approach on Remedial Action is also missing important framing within broader trends. It could be usefully contextualized in the trends of sustainable finance and ESG (environmental-social-governance) that are prompting other DFIs and a far wider range of private sector financial institutions around the world to address environmental, social and human rights impacts more seriously. The draft Approach to Remedial Action also, surprisingly, misses the opportunity to make a clear link to its development mandate: It makes no mention of the positive development outcomes of remediating harms. There can be no "offsetting" of human rights, as there is with carbon credits or biodiversity offsets. Reducing and redressing adverse impacts of projects – whether on the environment or human rights – is the baseline on which positive impacts can be built.

Finally, when thinking about the draft Approach overall, it is useful to frame the roles of the different actors: IFC and its clients are *voluntary risk takers*; communities and workers are *involuntary risk bearers*.[4] This should guide thinking about which are the most appropriate parties to be actively involved in enabling remedy if and when things go wrong. The costs and impacts of development should not fall on the shoulders of those least able to bear them.

2. MAIN CONCERNS

The Institute is concerned that the draft Approach to Remedial Action:

- Does not address – and in fact manifestly side-steps – the External Review's recommendations on remedy, which it names as an impetus for articulating the IFC's approach to remedial action.
- Retreats from the welcome commitment of the former IFC CEO Le Houérou to "*react proactively to fix problems. We will be more transparent about what went wrong in the first place. When we make a mistake, we will own it, and we will do our best to rectify the problem*."[5]

[4] From the World Commission on Dams report, 2000.
[5] P Le Houérou, *"*Opinion: At IFC, accountability is of utmost importance," Devex *(10 April 2019).*

- Instead of building on existing commitments, it largely restates what is already being done or what should be done, as IFC acknowledged in the document. Some of the measures highlighted have been required since the 2006 version of the Performance Standards (PS); these core steps should therefore not be considered "enhancements."
- Does not address IFC's role in harm and its subsequent responsibility. The Institute is disappointed that the draft Approach does not even make a clear commitment to remedy in cases in which the CAO has found non-compliance or to more robust and costed Management Action Plans (MAPs).
- Leaves the burden of dealing with harm on communities when there are doubts about who is responsible.
- While it accounts for client capacity to a certain extent, does not take a risk-based approach to addressing project risks.
- Lacks detail on the types of actions to be taken.
- Provides no evidence of actions IFC has taken to enable remedy in the past. The draft Approach presents no evidence base that is the hallmark of good evidence-based policy-making; on the contrary, existing evidence indicates very limited remedial actions from CAO cases,[6] and there is no reporting on corrective actions in the IFC project disclosure portal to draw on.
- Presents an unbalanced picture of legal risks. The surest way to minimize risk of litigation is to abide by IFC's own policies and standards, to conduct robust due diligence and to actually support or, as relevant, contribute to remedial actions where harms arise.
- Lacks clarity on application to Financial Intermediary (FI) lending.
- Does not address how IFC will work with clients to address remediation "*including past or present adverse impacts caused by others*"[7] as required under the Sustainability Framework (SF).
- In some dimensions is less ambitious than existing practices at other DFIs.

3. KEY RECOMMENDATIONS

The Institute makes the following overall recommendations (detailed recommendations in Section II below):

- Implement the steps in the draft Approach. There is nothing wrong in principle with these steps (with some small exceptions) – but many of them should have been in place already and should not be the focus of a pilot.
- Acknowledge and address IFC's role in contributing to harm and therefore contributing to remedy, which will be more than "exceptional" as the draft currently provides based on existing evidence.
- Commit to contributing to remedial action when there are CAO findings of non-compliance and IFC contribution to harm.

[6] M Pearson, "Data Doesn't Support IFC's Remedy Proposal," (March 6, 2023).
[7] IFC Sustainability Policy, paragraph 26 and MIGA Sustainability Policy, paragraph 24.

- Commit to contributing to remedial action in non-CAO cases where IFC identifies, or it has been brought to its attention, that it has contributed to harm.
- Demonstrate leadership by committing to taking active steps to innovate and help develop financial instruments and markets for funding remedial action and to exploring alternative methods of resolving disputes.
- Use the opportunity to address how remedy can be provided in more complex situations, such as when there are multiple actors and multiple financiers involved in large-scale projects, in fragile and conflict-affected situations, or post-exit .[8]

B. DETAILED CRITIQUES IN RESPONSE TO SEVERAL KEY POINTS IN IFC/MIGA DRAFT APPROACH TO REMEDIAL ACTION

1. WHAT SHOULD BE ROUTINE PRACTICE PUT FORWARD AS THE CORE OF THE DRAFT APPROACH

The Institute, similar to other stakeholders, is surprised to see numerous points of the draft Approach described as something new or enhancements, when many of these dimensions should have already been in place, several from the first round of the Performance Standards in 2006. The draft Approach itself cites provisions from the SF that already require IFC to "*work with its client to determine remediation measures where there are significant environmental or social impacts associated with the business activity*," "*including past or present adverse impacts caused by others*."[9]

- ***Costing ESAPs should have been routine practice from 2006***

Perhaps one of the most surprising points of the draft Approach was the admission that IFC does not routinely require costing of ESAPs – even for large-scale or high-risk projects. It is equally surprising to see that assessing and monitoring ESAP implementation is not a matter of routine.

- ***Strengthening grievance mechanisms should have been routine practice since 2006***

The requirement for client-level grievance mechanisms has been a part of IFC PS since 2006, long before their inclusion in the UN Guiding Principles on Business and Human Rights (UNGPs). IFC showed bold leadership in recognising their importance very early, and itself issued guidance on grievance mechanisms as early as 2009;[10] the World Bank conducted a portfolio review of client borrower grievance mechanisms in 2012;[11] and the CAO likewise has a whole toolkit on grievance mechanisms from 2016,[12] so IFC should not present assuring effective mechanisms as something new. In addition, it should already be part of and reinforced by IFC's six-part Client Corporate Governance Risk assessment that includes a

[8] OHCHR, "Remedy in Development Finance: Policy and Practice (2022). Table 2, pp 86-87 for further explanation.
[9] IFC Sustainability Policy, paragraph 26 and MIGA Sustainability Policy, paragraph 24.
[10] IFC, "Addressing Grievances From Project-Affected Communities," (2009).
[11] D Post, S Agarwal, "Feedback Matters: Designing Effective Grievance Redress Mechanisms for Bank-Financed Projects, Part 2. The Practice of Grievance Redress," (2012).
[12] CAO, "CAO Grievance Mechanism Toolkit" (2016).

review of the *"[a]dequacy of governance of stakeholder engagement*."[13] The Institute would also caution about putting sole reliance on client's grievance mechanisms, as evaluations of their effectiveness inside and outside the World Bank Group[14] show limited results.

- ***Using leverage should be routine practice at the core of ongoing supervision***

IFC already wields and, presumably, exercises leverage over its clients. IFC needs leverage over clients not only for environmental and social (E&S) matters, but for all kinds of other compliance requirements which could have serious implications for clients and IFC – such as anti-money laundering or anti-terrorism requirements or simply to ensure repayment. It is difficult to imagine that IFC's compliance departments have not systematically assessed leverage options in general to address these compliance requirements. These approaches can be adapted for E&S matters. What IFC is suggesting as a new approach is, or at least should be, at the core of on-going supervision – "*considering whether to exercise applicable rights or remedies under the relevant agreements*" – is a core function for lenders. In addition, if IFC has already has leverage to implement the Responsible Exit Principles, it should also have for addressing remedial actions.

- ***Many of the proposed contractual requirements are already part of DFI and IFC's own practice***

IFC has had E&S provisions in legal contracts since at least the first PS in 2006; updating contractual requirements to address evolving issues is a routine part of the Legal Department's functions. As with the costed ESAPs, it is very surprising that IFC's standard legal clauses do not address remedial actions, at least for large-scale or high-risk projects, as this is already a routine part of contracting for other DFIs, export credit agencies and commercial banks. We question the statement that many of the contractual provisions proposed are *"not consistent with current market practice."* The Institute had discussions with practicing lawyers on standard contract provisions in DFI contracts; apart from testing provisions on arbitration and post-exit actions, the list of legal provisions appear to be part of current market practice in project finance.

The Institute also notes that IFC's list of possible draft clauses excludes provisions from existing IFC loan agreements which are relevant to the discussion. For example, the IFC's loan agreement made available as part of evidence in the *Jam v. IFC* case included: the power to compel corrective and remedial action, with the borrower's failure to comply constituting grounds for default; requiring the borrower to pay for potential remedies in connection with violations of environmental and social obligations, even *after* the loan is repaid; broad indemnification rights for IFC where it incurs any costs in connection with such violations, meaning IFC can recover full costs from the borrower; the right to perform an

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[13] IFC, Information Statement (2022), p. 43.
[14] D Post, S Agarwal, "Feedback Matters: Designing Effective Grievance Redress Mechanisms for Bank-Financed Projects, Part 2. The Practice of Grievance Redress," (2012) and see O Belanger and L Laplante, "Trends and General Practices of Operational Level Grievance Mechanisms," (2021), pp 16-17.

independent audit of E&S compliance at the borrower's expense; and measures requiring access for IFC, its consultants and CAO to project facilities and records.[15]

2. CHALLENGING THE 3 KEY RISKS IDENTIFIED

IFC identified three particular risks in taking a remedial approach (p. v), each of which are addressed below in turn.

(i) ***"the possibility of shifting how clients and other stakeholders understand their roles and responsibilities and act on them;"***

IFC has framed this concern in other discussions as creating a "moral hazard" – i.e. disincentivising action by clients if they think that IFC will step in to provide remedies. The Institute considers that this risk is overstated for several reasons:

- IFC appears to conflate its own role in remedy with the client's role in this statement. No one is suggesting that IFC should take the client's share of responsibility on a routine basis; indeed the SF is clear about the division of roles. No one is suggesting that these provisions change – and indeed, the Institute encourages IFC to enhance requirements to ensure that clients understand and are required to fulfil their obligations to take corrective and remedial action when they are the source of the harm.
- However, what should become clear in an appropriate Remedial Action framework, is IFC's commitment to take *its* share of responsibility where IFC has contributed to harm. Clients would still have to bear their share of the responsibility. The draft Approach does not express any concern on IFC's part about the current unfairness to its clients who are currently asked to pay for IFC's mistakes in complying with their own policies. Instead, it seems indefensible to shift responsibility to clients or other actors where IFC's own actions or omissions (and not those of the other actors) have contributed to harm.
- Nor does the draft Approach express any concerns about the true moral hazard: where DFIs themselves contribute to harm and are willing to leave the unremediated consequences of those harms on the shoulders of the very people that the institutions were established to support – poor and vulnerable community members.
- Other types of risk mitigation measures are not treated as moral hazards – for example, no one suggests there should not be insurance available because this would dissuade clients from taking preventive action because harms would be covered by insurance. Environmental insurance covers harms to third party beneficiaries and can and is used for remediation. Far from being treated as a moral hazard, environmental insurance is a routine part of commercial transactions.

(ii) ***"increased litigation risk (under a range of possible legal theories)"***

The Institute recognises that legal protection of IFC (and other DFIs) is a valid and important consideration. However, we believe that the risk of increased litigation (under a range of possible legal theories) is significantly overstated, for several reasons. We also note that an

[15] IFC's Loan Agreement in Jam v. IFC.

authoritative voice – the US Supreme Court – agrees with this assessment.[16]

- First and foremost, the draft Approach does not acknowledge that taking proactive steps to address risks and impacts once they occur is the best way to *reduce litigation risks.* Better due diligence and prompt, effective responses to impacts once they do occur is better for the local communities and workers, for clients and for lenders. It is far better to be seen to be making an effort, even if there are disagreements about precisely what action should be taken. The most obvious example seems to be one in which IFC itself was involved: it is no coincidence in the *Jam v. IFC* case that the ADB, which was a co-financier in the project, was not involved in litigation as ADB responded to the concerns and took action to try to address the complaint. In other examples, other DFIs have not been exposed to litigation when they have stepped in to provide remedy: far from being subject to litigation, the World Bank was praised for stepping in to ensure that survivors of gender-based violence were provided with appropriate services in connection with the Uganda road transport project.[17]
- The draft Approach instead presents a one-sided view of litigation concerns and seems to assume that its approach to remedy must be all or nothing – either *"a systemic process to financing of direct contribution to remedial action by IFC*" or no financing at all, except in "*exceptional circumstances*." IFC is not expected to contribute financially to remedy routinely, but instead only when it has contributed to harm. This is a very different proposition than a "systemic process" and in line with general principles of accountability.
- The Approach gives disproportionate weight to the legal risks IFC faces as an institution, which should be addressed with a dose of realism. Public records show only two cases brought against global multilateral development banks, both of which were against IFC, alleging involvement in E&S harms. When placed in the context of IFC's 60-year history and its extensive level of funding,[18] two cases puts IFC's litigation risk at something like .000000001%. For an organization *"founded on a bold idea"* and set up to *"create markets in the toughest places."*[19] retreating from remedial action sounds an extraordinarily risk adverse approach to meeting what is, by IFC's own agreement, an integral part of its "do no harm" mandate. Legal risk should be considered, but at this level of risk, it is a minor factor, rather than a driver.
- If there are other litigation risks, IFC should provide a public explanation and justification in general of those risks to public. IFC would not be expected to give a detailed accounting of those risks to the public, but it should do so to the Board which should request a detailed briefing on this issue to better understand the concerns and context.

[16] A Howe, *Opinion analysis: Justices hold that international organizations do not have near-complete immunity* (2019), noting that the Supreme Court "dismissed the IFC's concerns about a 'flood' of lawsuits in U.S. courts by foreign plaintiffs as 'inflated'."
[17] https://www.worldbank.org/en/country/uganda/brief/uganda-transport-sector-development-project-fact-sheet
[18] In 2022 alone, IFC had US$32.8 billion in investment commitments. https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/Annual+Report. From 2014-2023, the figure for loans, equity and guarantees is US$99,261.09 million. https://financesapp.worldbank.org/summaries/ifc/#ifc-isp/.
[19] https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/About+IFC_New/IFC+History

- IFC noted that it sets aside USD$15 million annually to cover costs associated with litigation. As IFC has included the figure, IFC should provide more public detail as to what this figure covers and encourages Board members to ask more detailed questions to understand what percentage of the contingency is used for E&S claims vs. other legal issues. Does it cover issues involving administrative litigation with staff, real estate disputes involving IFC offices, other compliance issues? It would also be interesting to compare the annual costs for running the World Bank Group's Administrative Tribunal versus what is spent annually for any kind of remedial action for workers or community members as part of IFC's response to non-compliance findings. In other words, does IFC currently spend more on remedies for staff than for community members or workers harmed in IFC-financed projects?
- It is also worth putting these amounts into perspective against other types of provisioning. As of June 2022, IFC had a book of Non-Performing Loans totalling $1.3 *billion* across its portfolio.[20] Given these annual figures, it is difficult to understand that the institution can tolerate this level of non-performing loans from clients but cannot afford supporting remedy when IFC itself has been non-performing towards poor and marginalised affected stakeholders.
- Although the CAO function does not represent a litigation risk, it is also important to put the CAO data into context. IFC helpfully provided data in Figure 1 of the draft Approach that covers cases from 2012–2021. Even within that period, it shows that only .029% of projects committed were subject to a complaint that was found eligible.[21] The cases in which IFC was potentially found non-compliant in some dimension (assuming that cases that went to compliance review involved some finding of non-compliance) is .008%.[22] In the Institute's view, such low numbers do not seem an appropriate basis for driving decisions about remedial actions, especially when balanced against the types of environmental, social and human rights harms that are at issue.
- Finally, this statement in the draft Approach does not reflect, as the data points above show, the significant barriers to even making claims to the CAO, much less through formal litigation which are significant.

(iii) ***"increased costs and decreased competitiveness"***

The Institute is concerned that this identified risk does not align with IFC's development mandate or value proposition:

- The Approach states *"[b]lanket contingency funding requirements indiscriminately raise project costs, decrease IFC's and MIGA's competitiveness, and could unnecessarily undermine development impact by reducing the likelihood of the project reaching financial close (given higher capital requirements)*" (p. 7). However, contingency funding for remedial action need not be an all-or-nothing approach. Rather than reject the External Review's suggestion on contingency funding out of hand, IFC should consider

[20] IFC, Information Statement (2022), p. 50.
[21] See Figure 1: 126 complaints found eligible out of 4220 projects committed. The Figure does not say what percentages were finalized, but even if it is assumed that the 52 cases in dispute resolution and the 37 cases that went to compliance investigation resulted in findings, that is still .021% of 4220 projects were there was some resolution of concerns, potentially providing remedy (although that cannot be assumed).
[22] Figure 1: 37 projects out of 4220.

incorporating this into its pilot stage – both in terms of (i) requiring contingency funding for higher-risk Category A and B projects (which likely already include some kind of contingency funding arrangement that could be expanded) and (ii) piloting innovative risk management products.

- The draft Approach notes that IFC already requires contingency funding in higher-risk projects that helps ensure *IFC* is repaid. The public and the Board are entitled to ask why IFC is willing to impose some costs for contingency financing on clients to ensure the *institution* is repaid, but not when it is for the benefit of harmed community members or workers or the environment, and how this asymmetry fits with IFC's development mandate.
- As to the competitiveness argument, in its 3.0 Strategy, IFC recognises its important role in making markets where there would be no other investors but for IFC. IFC prides itself on being a leader in investing to bring others along. In more developed and competitive markets, the rise of ESG and the sources IFC used to benchmark its own preparation for the draft Approach clearly indicate that other DFIs and commercial lenders are also paying attention to remedy, prompted by the adoption of the UNGPs and the OECD Guidelines on Multinational Enterprises, as well as the wealth of sustainable finance developments and regulation around the world that increasingly reference these frameworks, including the basic concept that if harm has been done, it should be remedied. In other words, addressing these standards is becoming a regular cost of doing business and will not decrease IFC's competitiveness but rather help it keep pace with its peers and more importantly, help clients improve the sustainability of their operations.
- Finally, framing "*increased costs and decreased competitiveness*" as a significant risk contradicts IFC's own point in the draft Approach that "*E&S standards contained in the SFs constitute a critical aspect of IFC's value proposition for clients to avoid or minimize adverse E&S impacts*." Remedial action should be viewed as a complementary critical aspect of IFC's value proposition in avoiding and addressing adverse E&S impacts.

C. RECOMMENDATIONS ON IFC/MIGA DRAFT APPROACH TO REMEDIAL ACTION

1. EXPAND THE SCOPE OF THE APPROACH

The scope of the final Approach should be expanded as follows:

- Clients should also be required to take remedial actions where they have **contributed** to adverse E&S impacts.
    - The draft Approach notes that *"[r]emedial action should be provided by clients whose projects **cause** adverse E&S impacts*" (emphasis added), which is too limited even on the client's side. The draft Approach notes that it is in line with international standards, but the UNGPs envision businesses providing for remedy when they contribute to adverse impacts, not only cause them.
- Include projects with existing harms within the scope of the Approach. This should include at least the 37 cases in compliance investigation that IFC has flagged in the Approach, where those require remedial actions to provide redress to complainants.

- E&S harms should be interpreted broadly in light of developments since the last update of the PS in 2012
    - Unlike other major DFIs or even the Equator Principle banks, IFC has not updated its PS in over a decade. New issues, such as harms from digital technologies, retaliation against environmental and human rights defenders and gender-based violence, have come on the DFI agenda since the last update. They are not explicitly covered by the PS, but these and other harms that can be identified through an expanded interpretation of the PS should be considered within the finalised Approach.
- IFC should address the issue of working with clients to address adverse impacts in value chains
    - IFC has done valuable and innovative work on certain commodity supply chains in particular and covers supply chains in various parts of the PS. It is thus well-positioned to build client capacity to use their leverage to address harms throughout their value chains, yet this issue which is attracting increasing global attention, including from regulators, is not even mentioned in the draft Approach.

2. ADDRESS IFC'S ROLE IN CONTRIBUTING TO REMEDY

The Institute had hoped that IFC would continue to provide the pioneering leadership it has often shown in the E&S sphere and the leadership expected from the External Review by addressing IFC's role when it has played a part in contributing to E&S harms. The expectation under the External Review, and international standards, particularly the UNGPs, is that if IFC contributed to harms, it should contribute to remedy. After two years of work, stakeholders expected that the draft Approach would address these issues and, in line with IFC's leadership, help develop thought leadership and viable options and spur further discussions and developments among DFIs on this dimension. Very disappointingly, the draft Approach does not.

It was expected that, as a starting point for a new approach, IFC would at least clearly commit to taking necessary remedial actions when the CAO found non-compliance. Yet no such commitment is included. It was also expected that IFC's draft Approach would cover the additional situations identified in the External Review, *"where clients take no action, wrongly guided by the IFC; and when clients fail to comply with the PS, and IFC does not provide effective supervision*."

As noted above, IFC is not expected step into the shoes of its clients and take remedial action indiscriminately, as some of the phrases in the draft Approach seem to suggest. IFC has not provided any empirical data to support its "*exceptional circumstances*" claim, while on the contrary, there is significant data showing that concerns routinely go unremedied, including as a result of IFC contributions. IFC should take responsibility for its *own* actions and omissions that contribute to harms and should, in appropriate circumstances and in proportionate measure to its share of responsibility for harm, contribute to remedy. That does not necessarily or always mean financial compensation, but can also be a range of actions depending on the circumstances. IFC should also contribute solutions-oriented approaches, drawing on its wide expertise.

The Board should not overlook the important incentive that this approach could prompt: It would strengthen incentives for improved IFC due diligence and building and exercising all available forms of leverage which would lead to less harm in projects and improve development outcomes in line with IFC's mandate.

3. DEMONSTRATE IFC'S INNOVATIVE SPIRIT

The Institute had also hoped to see the pioneering approach that IFC has taken to innovating financial instruments applied to innovations for remedy, both in terms of (i) helping develop new products that clients, particularly those in high-risk projects, could use to finance remedial actions where not already covered by other risk management products such as insurance; and (ii) committing to identifying and developing different financing mechanisms from World Bank Group resources to use when its own actions contributed to harm.

There is no indication in the draft Approach that IFC has yet even explored the recommendation set out in the External Review on this point; there is no explanation, no weighing of pros and cons of different options or recognition of options put forward by others.[23] The actions suggested in the draft Approach are overlayed with excessive caveats, rather than committing to undertaking an appropriate exploration of funding mechanisms, perhaps with other DFIs. While funding mechanisms will need to be tailored to specific circumstances as the draft Approach suggests, the IFC should develop an underlying baseline of options as part of its pilot that the draft Approach currently lacks.

The draft Approach also does not address innovations in alternative dispute resolution that could be piloted, beyond a very brief reference to arbitration. There are numerous types of dispute resolution models that could be further explored and piloted with clients. The draft Approach should devote more attention to this area of work.

4. USE THE PILOT TO DEVELOP AND TEST TRUE INNOVATIONS THAT ARE CURRENTLY MISSING FROM THE DRAFT APPROACH

There are missing pieces of the draft Approach that would usefully be the focus of a pilot period:

- Develop criteria for situations when IFC would contribute to remedy, building on situations where CAO has found non-compliance, where IFC has decided it may have contributed to harm and should step in, and the remaining situations identified by the External Review
- Explore different arrangements for funding IFC's contribution to remedy in these cases and in cases where there may be multiple financiers involved
- Explore different types of funding arrangements that could be required of clients to fund remedial action – such as further exploring contingency funding arrangements,

[23] See for example, OHCHR, "Remedy in Development Finance: Policy and Practice (2022), pp. 86-90, Accountability Counsel, Establishing a Remedy Fund at the IFC (2020).

insurance, etc. This should be explored on a case-by-case basis, but also more broadly, with a view to helping develop the market for these instruments. IFC has already flagged in its draft Approach some existing types of financing arrangements. These did not come out of the blue – they were developed in response to a need and after work and discussion. The IFC has an opportunity to do similar work here.

- Explore and promote different options on alternative dispute resolution with clients and with other DFIs to reduce disputes and develop appropriate remedial responses with affected stakeholders as noted above.
- Address situations where truly enhanced actions are required for remedy. The OHCHR Remedy in Development Finance report highlighted five different situations that are so risky or so complex or challenging due to client or IFC exit that specific arrangements and specific funding should be made available to ensure that IFC can deliver on its mandate.[24]

5. LIMIT THE PILOT TO NEW DIMENSIONS AND IMPLEMENT EXISTING ACTIONS

Given how little new there is in the Approach (as IFC has recognised in the statement *"[m]ost of elements of the proposed Approach are already being implemented to varying degrees*"), piloting the entire Approach seems an unjustifiably timid approach. Nor has IFC justified such an excessively long pilot period. The Approach should be applied from the date of adoption. Instead, the pilot period should be used to address real innovations (see above).

We recognise that IFC needs to develop or refine tools and processes, but these changes should be underway already, again given the admission that many of these steps are a core part of its mandate. Refinement can take place in parallel with finalising the Approach, rather than waiting for the final Board adoption of the Approach. It will soon be three years since the External Review issued its report – closer to four years by the time the Board will approve an Approach – which provides sufficient time to develop tools and approaches.

6. REVISE THE MITIGATION HIERARCHY TO PROVIDE FOR APPROPRIATE REMEDY

IFC should amend its mitigation hierarchy to appropriately reflect remedy as the final step. As IFC has not updated its PS in the past decade, the current mitigation hierarchy in PS 1 is not appropriate for an increasing range of harms – not only for human rights harms that cannot be offset, but also for environmental impacts where restoration may be more appropriate than offsetting.

The IFC should also elevate the different forms of remedy currently set out in a footnote, giving more prominence and further explanation to the types of remedial action at the core of an Approach to remedy. The draft Approach also, somewhat surprisingly, does not reflect where these types of reparative actions are already incorporated into the PS.

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[24] See OHCHR, "Remedy in Development Finance: Policy and Practice (2022), Table 2, pp 86-87.

7. SCALE THE REMEDIAL RESPONSES TO RISKS IN PROJECTS AND WITH CLIENTS

IFC should commit to scaling attention to remedy so riskier or more complex situations get more attention – and the innovations needed. Neither the draft Approach nor the pilot clearly reflects a risk-based approach. The draft Approach does seem to recognise the need for additional attention to low-capacity clients and projects in FCS/IDA countries, which is welcome, but does not seem to reflect risks in particular types of projects. The "enhancements" IFC addresses in the draft Approach should be made routine for all clients. Real enhancements should be applied in cases of higher-risk projects.

8. REQUIRE CLIENTS TO MAKE INFORMATION ON CAO AND ACCESS TO REMEDY AVAILABLE

IFC should require clients to make information on the CAO known to stakeholders and, in addition, require actions to provide access to files or sites.[25] The draft Approach states that IFC "*would also **advise** clients on how to provide stakeholders with information to access remedy, including project- and operational-level grievance mechanisms, as well as other parts of the grievance infrastructure, including the CAO*." (emphasis added). This falls below good practice already established at other DFIs that require clients to disclose their accountability mechanisms.

9. CLARIFY APPLICATION TO FINANCIAL INTERMEDIARY TRANSACTIONS

The final Approach should clarify what IFC will require of Financial Intermediaries. The draft Approach is vague on exactly what will be applied to Financial Intermediary (FI) transactions.

10. COMMIT TO COSTING MAPS

While the draft Approach addressed the issue of costing ESAPs, it did not address the issue of costing Management Action Plans (MAPs) in response to CAO non-compliance findings. Costing MAPs should become a routine part of responding to CAO findings. Ideally, the costings would be disclosed to the public, but if that is too sensitive, this should nonetheless be done for internal purposes to guide analysis on the cost-effectiveness of upfront actions to prevent harms versus remedying them once they have materialised. Putting numbers to MAP responses also is a clear signal that in fact there are internal IFC funds that can be made available as necessary to take corrective and remedial action – a point that is particularly obtuse in the draft Approach.

11. BETTER LINK REMEDIAL APPROACH TO RESPONSIBLE EXIT PRINCIPLES

It is welcome that the draft Approach covers responsible exit and highlights the importance of preparing early and in conjunction with considering remedy. The draft Approach does not clearly refer to the draft Responsible Exit Principles, nor does not it describe specific actions IFC and MIGA should take to provide access to remedy after a project is finalised. See comments on the draft Responsible Exit Principles below.

[25] CAO Policy, Art. 26. It is worth noting that the loan agreement in *Jam v. IFC* already includes the requirements on access to the project, documents, staff and contractors.

12. COMMIT TO WORKING WITH OTHER FINANCIERS/GUARANTORS TO STRENGTHEN THE APPROACH WHEN CO-FINANCING

The draft Approach takes a fatalistic tone in situations of co-financing rather than committing to working together with other partners as it has done on many other areas of E&S requirements. There has been active cooperation across DFIs on a whole range of E&S and broader collaboration to streamline cooperation;[26] that same level of cooperation could be applied to agreeing how DFIs will clarify with clients and among themselves approaches to remedial action.

13. COMMIT TO EXPLORING A FULL WBG APPROACH

A recent analysis by Accountability Counsel flagged that even where there have been CAO cases that resulted in commitments, the commitments do not materialise because *"[o]ne of the most common roadblocks was a lack of requisite government support*," such as authorization facilitating land transfers or other support from the local or national government.[27]

Recognising that it can be challenging at the country level to coordinate across the World Bank Group institutions, it would be important that they at least commit to trying to improve this record. Footnote 6 notes that *"Efforts to strengthen national systems based on legal, regulatory and country frameworks are pursued by other programs."* Some level of coordination on these kinds of actions can be useful for providing remedy at the country level.

14. DO NOT PRE-JUDGE THE DISCUSSION FOR DFIS LENDING TO SOVEREIGNS

The discussion on sovereign lenders is particularly convoluted in the draft Approach. The IFC approach should not and cannot speak for DFIs that lend to sovereign borrowers. There is no reason that remedial actions should not be required in sovereign operations – they may take a different form, but it is beyond IFC's remit to say that a remedial approach is "*not necessary or applicable*."

II. COMMENTS ON DRAFT IFC RESPONSIBLE EXIT PRINCIPLES

The Institute welcomes IFC's draft Responsible Exit Principles (the "Principles"). It recognises IFC's leadership in preparing a set of principles on another topic that has been on the DFI agenda for several years. However, we find the proposed Principles are quite difficult to understand even from a plain-language reading, do not clearly communicate what they are trying to cover, and are incomplete, with significant gaps in their coverage. We suggest they require substantial rethinking and reworking.

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[26] IFC Annual Report (2020) on IFC Strategy 3.0, noting that IFC developed the Joint Collaboration Framework Agreement (JCFA) to provide a structure for increased collaboration among DFIs. The JCFA builds on existing partnership frameworks, such as the IFC Master Cooperation Agreement, to cover a range of new areas of collaboration, including the DFI Collaboration Pilots at the country level (see p. 31).

[27] M Pearson, "Data Doesn't Support IFC's Remedy Proposal," Accountability Console Newsletter (March 6, 2023).

1. MAIN CONCERNS

The Institute has provided more detailed critique of the specific draft Principles in the Annex. Here it expresses its main concerns, namely that the draft Responsible Exit Principles:

- Lack clarity in what is being proposed. The section "Preparing for Exit" is not written in a clear manner, making it hard to understand what is being committed to, and yet this is an important step as flagged in the draft Approach to Remedial Action.
- Lack clarity about when the Principles would be triggered or applied. The section on "Process" indicates that the Principles would only be applied when exit is being contemplated, but this contradicts the opening discussion that notes that introduces the Principles as part of IFC's ongoing efforts to "*further and more systematically integrate how it analyzes and addresses environmental and social (E&S) issues* ***throughout its investment project cycle***" (emphasis added). As the draft Approach and other publications on responsible exit have highlighted, exit should be planned for from the beginning of investments, not only when the exit is about to occur.
- Have too limited a scope, with unclear and contradictory provisions. The Principles say they cover "active exits," which include "*[t]he majority of equity sales, as well as debt accelerations or situations in which IFC has the right to consent to loan prepayment*." However, the draft also says that the Principles would apply when contemplating an active exit from all projects in which "*(i) there is an associated open CAO case past eligibility and/or (ii) the project's environmental and social performance is unsatisfactory*." This is a crucial point and must be clarified: Would the Principles apply to all active exits or only the 2 narrow circumstances in (i) and (ii)?
- Do not clearly distinguish exits from loans versus equity exits. This distinction would seem to be a basic and necessary point as there are very different points of leverage, timing, etc.

2. MAIN RECOMMENDATIONS

The Institute makes the following recommendations:

- Reconsider, revise and re-issue a new set of draft Responsible Exit Principles for consultation
- Make explicit that responsible exit should be a cross-cutting consideration for all projects – loan and equity, and in active and passive exits.
- The revised Principles should clearly include four key points that are at the core of a responsible exit approach: (i) preparation for Responsible Exit should start at an early stage; (ii) an IFC exit should not leave behind unremediated adverse E&S impacts to which IFC has contributed (in other words, its exit does not extinguish its responsibility to remedy adverse impacts to which it contributed); (iii) its exit should not create new adverse E&S impacts; (iv) IFC as a matter of presumption should not exit if the client is involved in significant adverse E&S impacts and should instead presume to stay and support the client in addressing and remedying adverse impacts appropriately or ensure there is a clear, costed and committed remedial action plan developed in a collaborative

process with those affected about how the client or remaining funders will address the impacts.

- IFC should not exit any project subject to an ongoing CAO process without the consent of community complainants.
- The Principles should apply as a matter of presumption, with exceptions permitted on a justified basis.
- The two points on what are now Additional Guidance should be developed into Principles. Stakeholders should be consulted as a matter of routine unless the specific circumstances do not permit them to be consulted, which should require careful analysis and justification, and retaliation risks should be routinely considered.
- The Principles should apply during equity sales or debt acceleration, particularly where clients seek to prepay and exit projects early to avoid E&S obligations. This could be done for example through pre-payment penalties that are specifically put aside to address E&S impacts and provide funding for necessary remedial actions that would otherwise go unremedied.
- The Principles should clearly address how IFC would deal with remedial actions if a project has closed.
- The Principles should ensure that any benefits and opportunities promised to workers and communities have been provided and that community benefits and other development opportunities will continue after IFC's exit. Delivery of a Development Benefits Action Plan should be a compliance requirement in appropriate cases and should be part of considerations on responsible exit.
- IFC should commit to considering the E&S record of buyers of their shares as a presumption, with exception where the type of transaction (such as selling shares on an exchange), does not permit such a review.

III. NEXT STEPS

GIVEN THE DEPTH AND BREADTH OF COMMENTS, PREPARE 2ND DRAFTS OF BOTH DOCUMENTS FOR CONSULTATION

Given that it is the first attempt among DFIs, and given the breadth and depth of comments, it would be far more appropriate for IFC to issue a 2nd draft of both documents for a short consultation, rather than final versions.

CLOSE BOARD SUPERVISION OF A REVISED APPROACH, PILOTING AND IMPLEMENTATION

The Institute would welcome close Board oversight of consultations on a revised Remedial Approach, revised Responsible Exit Principles, and on supervising limited piloting and implementation. The Institute would encourage the Board not to wait for the end of a four-year pilot to take action on this crucial dimension of IFC and MIGA's mandates.

THE DANISH
INSTITUTE FOR
HUMAN RIGHTS

ABOUT THE INSTITUTE

The Danish Institute for Human Rights is an independent National Human Rights Institution established by the Danish Parliament in accordance with the UN Paris Principles. Under its legal mandate, the DIHR's main functions are to monitor human rights in Denmark and promote human rights internationally, including through engagement with non-state actors. The DIHR’s Human Rights and Business Department has been working in the area since 1999 and is an internationally recognised centre of expertise on the application of human rights norms to business actors, across all world regions and industry sectors.

ANNEX – DETAILED REVIEW OF THE DRAFT RESPONSIBLE EXIT PRINCIPLES

The Institute provided its overarching comments on the draft Principles above. This section provides more detailed review and questions about the meaning and interpretation of each principle.

- Principle 1 is very unclear. The Institute encourages IFC to consider the following questions:
    - Is it about protecting only the positive development impacts that IFC has selected for measurement? IFC measures only selected issues for development impact and does not cover adverse impacts.
    - It is not clear what "*mitigating significant adverse results*" refers to – results of what?
    - Does "*sustainability*" refer to longevity or to E&S sustainability?
- Principle 1 Guiding Questions would also benefit from additional clarity:
    - "*Can IFC protect the impacts and outcomes that have been achieved*" – Clarify in what way: During the exit? After the exit?
    - "*Can the development impact still be achieved*?" – Clarify when: If IFC exits? Before IFC exits?
    - "*For equity investments in which IFC has taken nominee director rights, consider the potential impacts achieved (e.g., enhancing a company's E&S capacity) through exercising such rights*" – Consider also what IFC might do with such rights and whether impacts may be lost if IFC gives up the rights.
- Principle 2 is too caveated to operate effectively as a principle:
    - It only operates "*to the extent practicable,*" which undermines the point of having a principle. At a minimum, the Principle should be presumed to apply, with exceptions made on a reasoned basis to take account of circumstances where it is impossible to apply the Principle.
    - It does not provide conditions on exit or before IFC can exit.
    - The Institute welcomes Principle 2's acknowledgement of the important point that the exit should not increase or exacerbate existing E&S issues; however, it is again too heavily qualified to operate as a principle.
    - It does not address new E&S issues that may arise due to exit.
    - While (c) could be important, it again sounds optional "whether" to address, and it does not address issues of significant harm to project-affected people – only the environment or the public more generally.
- Principle 2 Guiding Questions further reinforce the optional nature of this principle, e.g. through *"consider whether"* language.
    - As a rule, IFC should not exit if there are "*significant E&S issues*" absent clear justification and arrangements to address the E&S issues.
    - While it is helpful to see a reference to reprisals, there should be clearer guidance on this – not just "*take account*" but "*address and take action on*" reprisals.
- Principle 3 is too vague, and it is unclear how it fits with Principle 2. While the Principle positively refers to remedial actions, as with Principle 2, it is too caveated (e.g. *"considering"*

language) to be operate effectively as a principle. The Institute encourages IFC to consider the following questions:
  - Does IFC or the client implement the ESAP? The suggestion that IFC implements the ESAP seems to be at odds with the draft Remedial Approach.
  - Does IFC mitigate adverse impacts or supervise clients in their mitigation?
  - How do Principle 2 and 3 fit together? Should Principle 3 come before Principle 2 – i.e. using leverage to address E&S issues before exit?
- Principle 4:
  - If the Principle relies on IFC's *"operational principles (Article III, Section 3),"* for transparency, the document should clarify what this Section covers.
  - While it is understandable that IFC needs to take account of its mandate, operational principles, and risk considerations, the Principles should also say explicitly that these should be balanced with the reputational risks of remaining in an investment.
- Principle 5 is unclear and unnecessary:
  - What is the "appropriate standard"? A revised draft should clarify and/or provide Guiding Questions.
  - The Principle also does not balance this out with positive precedential considerations.
- Additional Guidance
  - The two points covered should not be "additional guidance" but, instead, should be integrated as core principles and should also apply to the client. It is unclear why the Additional Guidance repeats a point which is already in a guiding question (Principle 2) on reprisals. A revised draft should clarify the relevance of the Guiding Questions to enhance understanding of how the whole approach works.
  - The guidance does not even commit IFC to engaging with stakeholders – it only "*allows*."