Realizing the Right to an Effective Remedy within the IFC/MIGA Accountability Framework

Joint Submission on the External Review of IFC/MIGA E&S Accountability
September 11, 2020

I. Introduction

In July 2014, the IFC invested $19.2 million for the development of Liberia's first commercial gold mine, New Liberty. At the time of Board approval, the U.S. government abstained, citing "serious concerns" and flagging foreseeable risks in the resettlement of project-affected people and raised concerns about the disposal of cyanide in the company's tailings storage facility.[1] Nonetheless, the IFC moved forward, purchasing 12.8% of the company's stock. One year later, it increased its stake to 17.4%.[2]

Unsurprisingly, local communities were left bearing the burden of the IFC's reckless decision-making. The company grossly mishandled the resettlement process, leaving over 300 families uncompensated and living in temporary housing for at least five years. The eventual final resettlement site proved wholly unsuitable to the communities' needs, with no agricultural land to support subsistence and livelihoods. In March 2016, the mine's tailings facility, which had been leaking pollutants for over seven months, failed disastrously, releasing high levels of cyanide and arsenic into the surrounding area.[3] The company's response was to construct two hand pumps and begin delivering frozen fish.[4]

Meanwhile, the IFC quietly divested its stake in the New Liberty project. The affected communities were left to fend for themselves, with few options available for recourse.

Unfortunately, this story is all too common. Communities face numerous barriers to securing remedy for harm related to IFC and MIGA projects, stemming from both common systemic weaknesses and issues specific to the IFC/MIGA's accountability framework. In this context, we welcome the recommendations of the External Review of IFC/MIGA E&S to assure effective

[1] Liberia – IFC – New Liberty Gold Project, U.S. Position paper, July 2014. https://www.treasury.gov/resource-center/international/development-banks/Documents/US%20Position%20Liberia%20New%20Liberty%20Gold.pdf
[2] IFC, "IFC Equity Financing Supports Liberia Gold Mine Through Ebola Crisis," February 2015. https://ifcextapps.ifc.org/ifcext%5Cpressroom%5Cifcpressroom.nsf%5C0%5CEFC722AAB1352A2485257DF00056D224
[3] IRINews, "How a gold mine has brought only misery in Liberia," March 2017. https://www.irinnews.org/investigations/2017/03/21/how-gold-mine-has-brought-only-misery-liberia
[4] Front Page Africa, "Aureus Mining: A Promise Betrayed; World Bank Funded Project Dashed Hopes," March 2017.

remedial actions by IFC/MIGA. We urge the Board to endorse the recommendations on remedy and instruct IFC/MIGA to propose an implementation plan for public review and input.
The adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011 solidified the global norm that when a business causes or contributes to adverse impacts, it is expected to provide an effective remedy to those affected. The UNGPs recognize the primary role of States in protecting against human rights abuses by business enterprises that receive substantial support and services from State agencies, including development finance institutions.[5] In line with the Guiding Principles, the Review Team concluded—despite some assertions that it heard from IFC staff and managers to the contrary—that the correction of non-compliance and remediation of harm are key objectives of independent accountability mechanisms (IAMs) at development finance institutions, including the Compliance Advisor Ombudsman (CAO).[6] We could not agree more with the Review that where IFC/MIGA is found to have contributed to harm, determined through a finding of non-compliance by the CAO, it should be expected to undertake actions contributing to remedy.[7]

This position aligns with recent developments in the normative framework governing the role of financiers with respect to remedy, including the Dutch Banking Sector Agreement, which the Review Team draws upon in their recommendations.[8] The 2019 OECD guidance on Due Diligence for Responsible Corporate Lending and Securities Underwriting,[9] and current working draft of the OECD guidance for Responsible Project and Asset-based Finance also delineate the responsibility of financial institutions to contribute to remedy in instances where they are found to have caused or contributed to harms through the provision of finance or banking services. These frameworks clarify attribution of responsibility between financiers and clients, and establish parameters for distinguishing between 'contribution' and 'direct linkage' to harms through banking services and the requisite responsibility for bringing about remedial action.[10]

We also note the Review Team's essential recognition of the IFC's failure to fulfill its remedial responsibilities in many instances of harm. The report notes, "most CAO non-compliance findings do not lead to effective remedy," and that, "in the vast majority of cases, IFC responses to address project-level compliance findings are insufficient and/or ineffective."11 This reflects the experience of many affected communities seeking redress for adverse impacts associated with IFC/MIGA-supported projects through the CAO complaints process, including those that each of our organizations have supported.

[5] Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," A/HRC/17/31 (21 March 2011), Principle 4 Commentary, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[6] Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," A/HRC/17/31 (21 March 2011), Principle 4 Commentary, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
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External Review Report 70, para 307-308.
[7] External Review Report 76, para 327.
[8] External Review Report 76, para 328.
[9] Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises. 29 October 2019. https://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.htm
[10] Due Diligence for Responsible Project and Asset-Based Finance: Key considerations for financial institutions implementing the OECD Guidelines for Multinational Enterprises. Zero Draft – Version 2 July 2020.
[11] External Review Report 71, para 311.

Options for how to finance remedy are not new or unknown to IFC/MIGA, and we trust these institutions are already equipped with the expertise to implement a remedy framework. This submission discusses concrete reforms IFC/MIGA should consider, including multiple funding options to support delivering effective remedy when harm occurs due to projects supported by IFC/MIGA. Critical to the implementation of any option is that remedy must center on the needs of communities affected by projects. Any remedy framework must be tailored and flexible enough to respond to individual communities' needs and project circumstances.

II. Brief Summary of External Review Recommendations

The Review Team sets out several sets of recommendations to address the remedy gap. The first, in Section 7.8.1, deals primarily with the mandate, objectives and operational guidelines of the CAO Compliance process, and the need for a remedial "roadmap" to follow findings of non-compliance. Namely, the report recommends the development of a Management Action Plan (MAP) in response to each finding of non-compliance and related harm, to be developed by IFC/MIGA Management and approved by the Board. The MAP should contain time-bound remedial measures, drafted in consultation with complainants and in agreement with the client. The Review Team also notes that dispute resolution processes are often necessary to appropriately implement certain types of remedial actions and recommends that the CAO should consider the feasibility of supporting such processes.

The second set of recommendations, contained in Section 7.8.2 of the report, call on IFC/MIGA to determine a framework for remedial action, to be reviewed and approved by the Board, building on the Dutch Banking Sector Agreement. It further calls for the establishment of two types of mechanisms to fund remedial actions: i) contingent liability funding from clients for all high-risk investments that can be tapped in the event that E&S harm materializes in conjunction with a failure to meet the Performance Standards and ii) funds that IFC/MIGA can contribute in the event that IFC/MIGA has contributed to harm.[12]

Establishment of the client-contributed "contingent liability fund" to ensure availability of resources for remedy would be agreed to by the client as a provision in the investment agreement. The review report notes, "the contingent fund could take the form of E&S insurance (through a third party or self-funded), E&S provisions within an overall project contingency fund agreed with IFC/MIGA, a performance bond, or an equivalent contingent mechanism, in an amount scaled to the likelihood and magnitude of E&S risk associated with the project."[13] The report recommends that IFC and MIGA should develop, in collaboration with CAO, 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."[14]

[12] External Review Report 79, paras 333-339.
[13] External Review Report 78, para 334.
[14] External Review Report 79, para 339.

Case Study: Remedy Delayed is Remedy Denied for communities in Egypt affected by the Titan Cement project

In April 2015, the Compliance Advisor Ombudsman (CAO) received a complaint against Alexandria Portland Cement Company (APCC), in which the IFC held a 15.2 percent equity stake. Although it has since divested, the IFC continues to have exposure to the Titan Group, the parent company of APCC, through its investments in financial intermediary banks Audi Bank and Ahli United Bank.

One of the major concerns raised by complainants in the case was the impact of dust and air pollution coming from the plant. During the compliance process, IFC worked with the client to reduce dust coming from plant smokestacks. However, the measures were not directly shared with communities by the client or IFC, and the communities reported to the CAO that they continued to experience dust pollution at the same levels and frequency.

The compliance investigation report was finalized in July 2020—5 years after the case was originally filed—and the complainants are still awaiting a management response. As a result, communities, and the national civil society organizations supporting them, lost faith in the effectiveness of the CAO process and felt that the time they had dedicated and the risks of retaliation they had faced had not led to the results or remedy that they had expected.

Adequately resourcing the CAO is critical not only to shortening the compliance process, as the Review Team recommends, but also to achieving effective remedy. While this case lasted an extraordinary five years, many other CAO compliance processes are also much too long. In addition to the loss of leverage that such delays cause, they also erode public trust in IFC/MIGA's accountability framework, and—as in this case—the almost total loss of hope for any meaningful remedy.

This case also illustrates the need for IFC/MIGA to consult directly (with or without the client) with complainants on remedial actions: The mismatch between what communities experienced, as opposed to what the company communicated to the IFC, underscores the importance of remedial actions being jointly negotiated between complainants, the company, and IFC.

In addition, despite IFC's inaction contributing to the harm, it has not contributed to remedy. Nor has IFC used leverage to influence its client to contribute to remedial action. IFC did not conduct the necessary due diligence before making the decision to invest in this project, and failed to take action when laborers and community members protested the serious harm caused by the project. Over the course of the five-year complaint process, IFC divested from its direct financial stake in Titan, and despite maintaining exposure through a financial intermediary client, it has failed to take any action to contribute to remedy or insist the company does so.

III. Comments on External Review Recommendations and Concrete Reform Proposals

In the remainder of this submission, we set out our comments to the recommendations made in Section 7.8 of the External Review Report and offer our ideas, based on research that we have undertaken collectively, on how these recommendations can be translated into concrete reform measures by IFC/MIGA.

General Comment: IFC/MIGA's Remedial Framework Must Consider Dispute Resolution

While the External Review Report focuses on the role of IFC/MIGA in ensuring remedies are provided in cases where CAO determines non-compliance with environmental and social standards, it also, albeit briefly, discusses the role of IFC/MIGA in contributing to remedy in the context of CAO dispute resolution cases:

> *a CAO finding of IFC/MIGA non-compliance (when de facto accepted by the Board) should in principle establish the need for IFC/MIGA to contribute to remedy along with the client. Contributions could be made in other circumstances in which IFC/MIGA acknowledged a contribution to harm and a responsibility to contribute to remedy, including CAO Dispute Resolution cases, or in non-CAO contexts where Management determined that IFC/MIGA had contributed to harm and therefore had a responsibility to contribute to remedy.*[15]

In our view, the role of IFC/MIGA in ensuring the provision of remedy in instances of dispute resolution cases deserves greater consideration. There is great potential for amicable resolution of grievances and effective remediation of harm through mediation, where negotiated outcomes are upheld in good faith by the parties. In our view, IFC/MIGA has a critical role to play in ensuring that its clients engage in dispute resolution processes in good faith and that they respond appropriately to legitimate demands of complainants for redress. This is consistent with IFC/MIGA's supervision responsibilities under its Sustainability Policy and its international human rights responsibility to use its leverage to ensure effective remedy even in cases where it has not contributed to harms through non-compliance with its policies but where it is nonetheless directly linked to the harms through its operations.

Where IFC/MIGA has in fact contributed to harms that are subject to a CAO dispute resolution process, including through due diligence failures on its part (i.e. where harms materialize that were not adequately mitigated in environmental and social action plans approved by IFC/MIGA), it is appropriate for IFC/MIGA to contribute materially to the solutions agreed to by the parties.

IFC/MIGA should play an active role in CAO dispute resolution processes and provide technical and/or financial assistance to its clients to implement both procedural and substantive remedial actions, where necessary.

Furthermore, where remedial agreements are reached by parties to a mediation process, IFC/MIGA should undertake a greater role in monitoring the effective implementation of those agreements and ensuring the sustainability of client-instituted remedies. IFC/MIGA should

[15] External Review Report 78, 337.

prepare something akin to a MAP following the completion of a dispute resolution process, which binds IFC/MIGA to monitor and support its clients to honor their time-bound commitments.

In certain circumstances, particularly when it contributed to harm, IFC/MIGA should consider active participation in implementing remedial agreements reached as a result of CAO dispute resolution. Examples of bank participation in dispute resolution and agreement implementation already exist. For instance, after an industrial park project largely funded by the Inter-American Development Bank (IDB) upended the livelihoods of farmers in Haiti, the IDB agreed to participate in a dialogue process with community members and the Haitian Government, facilitated by the IDB's Independent Consultation and Investigation Mechanism.[16] After approximately a year and a half of engaging in dispute resolution, the parties (including the IDB) signed an agreement to restore farmers' livelihoods.[17] In this instance, the IDB's engagement and participation in both the dialogue process and during agreement implementation was integral to more holistically addressing adverse social impacts to improve sustainable project outcomes.

IFC/MIGA participation in dispute resolution processes, including in agreement implementation, when so desired by complainants, can similarly contribute to ensuring effective remedy for harm and improving project outcomes. IFC/MIGA monitoring of, support for and/or participation in the effective implementation of remedial agreements could serve to encourage client engagement, enable more effective remedies, restore its relationship with communities, and legitimize the institution's commitment to positive development outcomes.

General Comment: The Remedial Framework Must Address Situations in Which IFC/MIGA's Financial Interest Has Ended

We wholeheartedly agree with the Review Team's assessment that "the end of the business relationship between the client and IFC/MIGA does not necessarily end IFC responsibility to contribute to remedy."[18] As the Review Team discusses, some types of harm only become apparent over time, and many potential complainants may not initially be aware of IFC/MIGA involvement in a project. Moreover, the active financial relationship between IFC/MIGA and the client may be severed quickly if, for instance, the project fails, the client goes into bankruptcy, or the IFC chooses to divest. The above-mentioned case of the New Liberty Mine in Liberia, in which the IFC divested following a devastating cyanide spill and flawed resettlement process, is a classic example and the case study below on the Alto Maipo Hydroelectric Project in Chile is another.

Despite its nuanced understanding of IFC/MIGA's continued responsibility in these situations, the Review Team's recommendations do not explore *how*, as a practical matter, communities would access remedy, particularly in the event of IFC/MIGA divestment. Moreover, the recommendations regarding the CAO's eligibility criteria do not go far enough in ensuring access to remedy for such communities. Given that a CAO finding of non-compliance is a

[16] Independent Consultation and Investigation Mechanism, "Consultation Phase Assessment Report: Productive Infrastructure Program," Jun. 27, 2017, pp. 15-16, https://www.accountabilitycounsel.org/wp-content/uploads/2017/11/MICI-BID-HA-2017-0114_Consultation_Phase_Assessment_Report.pdf#page=22.
[17] "Summary of the Agreement between Stakeholders in the Case MICI-IDB-HA-2017-0114: 'Productive Infrastructure Program' (HA-L1055 and others)," Dec. 2018, https://www.accountabilitycounsel.org/wp-content/uploads/2018/12/agreement-summary-pic-mici-bid-ute-kol-december-19-2018-final-eng.pdf.
[18] External Review Report 77, 332.

potentially crucial trigger for accessing funding for remedial actions, the Review Team's eligibility recommendations risk marginalizing communities who do not file a complaint during the sometimes-unpredictable time period in which an active financial relationship exists. In our view, the limited exception suggested by the Review Team, in which the CAO Vice President can allow such complaints in exceptional cases where the complainants *could not have* brought the complaint earlier, is not sufficient to address IFC/MIGA responsibility in these cases. The exception ignores many challenges that communities face in filing complaints within the suggested time period, including the lack of transparency with regard to how long IFC/MIGA's financial interest will remain active.

Communities' access to remedy should not be determined by factors such as IFC divestment or early loan repayment. Communities in this situation should have equal access to the CAO, at least for a reasonable period of time after the end of IFC/MIGA's financial interest, such that they could benefit from the same remedial framework as other communities. However, even if the CAO's eligibility criteria are not changed, IFC/MIGA's remedial framework must specifically address how access to remedy will be ensured even when the client relationship with IFC/MIGA has ended.

Case Study: Without Changes to the IFC/MIGA Accountability Framework, CAO Process is Unlikely to Bring Remedy for Communities Harmed by the Alto Maipo Hydroelectric Project

Chile's large-scale hydroelectric project Alto Maipo, currently under construction just outside of Santiago, has enjoyed financing from numerous banks, including the IFC, Inter-American Development Bank, and U.S. Overseas Private Investment Corporation. This support has allowed the project to go forward despite serious concerns raised by residents of the Maipo River Valley, including via a complaint submitted to the CAO in early 2017, regarding issues such as flawed environmental impact assessments and deficient environmental and social due diligence for the project. As it became increasingly clear that these concerns were well-founded and that the project was also plagued by technical and financial problems, the IFC ultimately made the decision to divest from Alto Maipo in May 2018. However, the IFC has yet to make a public statement about its divestment, let alone acknowledge its own responsibility to mitigate or repair harm.

Moreover, much environmental and social damage associated with Alto Maipo — including exacerbated water shortages, damage to aquifers and contamination of groundwater, and fissuring of surrounding glaciers, as well as social cleavages, sexual harassment experienced by local residents, and loss of adequate housing and livelihoods — has already been done. Despite the fact that the CAO's ongoing compliance investigation may well result in findings of noncompliance, past experiences have borne out that such findings often fail to produce effective remedy. Not to mention that in this instance, the IFC's divestment may provide yet another excuse for the IFC to avoid taking responsibility.

As this submission points out, divestment from a harmful project does not eliminate IFC/MIGA's responsibility to provide remedy. Moreover, remedy should be shaped by affected communities and respond to the needs they identify. The IFC/MIGA accountability framework must be revised to ensure that communities harmed by IFC/MIGA investments no longer get left behind.

Recommendations 7.8.1: Developing Remedial Actions in Response to CAO Findings of Non-Compliance

The Review Team notes that IFC/MIGA's current accountability framework has specific deficiencies that make it less likely than other international financial institutions to take correct actions in response to CAO findings of non-compliance. We agree and therefore strongly welcome the Review Team's related recommendations.

In particular, the report identifies the lack of a detailed, operational, time-bound Management Action Plan as an essential weakness, making several concrete recommendations related to development of effective Management Action Plans, developed in consultation with complainants and the CAO and in agreement with the client.

We note, however, that even if IFC/MIGA responds to CAO findings of non-compliance by developing a MAP, positive change on the ground for communities may still be impeded by a lack of follow-through. In 2016, for instance, the CAO released an investigation report regarding IFC-financed tea plantations in the Indian state of Assam. The report found a raft of substandard

living and working conditions on the plantations imperiling worker health and safety. The IFC drafted an action plan detailing a number of remedial measures to be taken, with both the IFC and the client to play implementing roles. However, more than three years later, a 2019 CAO monitoring report found that most of those remedial actions remain unimplemented. As the monitoring report notes, the IFC's client sought financial support from the IFC and other shareholders for implementing remedy, but support has yet to meaningfully materialize.[19] In response, the IFC committed to a facilitated dialogue, among other measures to improve implementation.[20]

The IFC's commitment to facilitated dialogue in Assam, three years after the CAO's compliance report, highlights the importance of the Review Team's recommendation regarding possible CAO dispute resolution support in remedying non-compliance. We agree with the Review Team that dispute resolution processes may be required to effectively remedy non-compliance in many cases, and appropriate collaboration with and support from the CAO, which has extensive expertise in dispute resolution, could assist IFC/MIGA in ensuring implementation of remedial actions. Additional emphasis must be placed on the role of the Board in assuring not only approval, but also effective and timely implementation of Management Action Plans. The small percentage of projects that result in CAO findings of non-compliance[21] deserve the utmost attention from IFC/MIGA. These projects provide IFC/MIGA the opportunity to demonstrate its commitment to its development and sustainability mandate at the most critical moments.

Recommendations 7.8.2: Mechanisms for Funding Remedial Action

In our experience, and as noted in the External Review Report, redress remains elusive for many affected communities in part due to a lack of dedicated financing mechanisms for corrective or restorative measures in response to environmental and social harm within the IFC/MIGA accountability framework. For this reason, we strongly welcome the Review Team's recommendations to establish such mechanisms through which funds can be set aside at the outset of an investment to ensure the provision of financial remedy if harm materializes.

In the annex that follows, we will elaborate on some of mechanisms proposed by the Review Team and other options IFC/MIGA could consider to enable access to remedy by persons whose human rights are adversely impacted in relation to an IFC/MIGA investment. We recognize that IFC/MIGA have the expertise to structure funding mechanism(s) in a way that ensures proper incentives, and fair allocation of responsibility and costs between parties. The annex presents several suggestions regarding how this could be accomplished, keeping in mind that any such mechanism should adhere to core principles such as being community-driven and holding all actors accountable.

We should note that, while these mechanisms would be well-suited first and foremost to providing financial compensation as a form of remedy to victims of adverse impacts, they need

[19] Compliance Advisor Ombudsman, "Compliance Monitoring Report: IFC Investments in Amalgamated Plantations Private Limited (APPL), India, Jan. 23, 2019, p. 10, http://www.cao-ombudsman.org/cases/document-links/documents/CAOComplianceMonitoringReport_APPL2019.pdf.

[20] International Finance Corporation, "IFC Response to CAO Monitoring Report of IFC's Investment in Amalgamated Plantations Private Limited (APPL), India (Project #25074," Mar. 4, 2019, http://www.cao-ombudsman.org/cases/document-links/documents/IFCResponsetoCAOMonitoringReportofIFCInvestmentinAPPLIndiaProjectNo25074.pdf.

[21] CAO has only issued reports finding non-compliance in response to 33 complaints regarding 24 projects.

not be limited as purely compensatory schemes. Rather, they can be used as a means to mobilize resources for the financing of various forms of remedial action as defined in IFC/MIGA's MAP in consultation with complainants and/or community representatives, which may include various other forms of collective or individual remedy and restorative measures.[22] That said, in cases where mobilized funds are to be used for collective purposes rather than individual compensation to affected community members, it is crucial that the MAP reflect the needs and desires of all victims in a particular case.

The mechanisms discussed in the annex all have one important thing in common: they set aside funds for remedy, or a mechanism for accessing funds for remedy, at the outset of an investment when IFC/MIGA has the most leverage and before a controversy over liability for harm arises. This is achieved by embedding the mechanisms in the investment agreement. This critical factor addresses one of the root causes of the systemic failure to provide remedy when IFC/MIGA investments lead to harm. In too many situations, harm only occurs or is documented after a project is underway, when the IFC has diminished leverage, and parties may focus more on questions of who is to blame than on remedying the harm. Additionally, these instruments avoid situations in which borrowers escape financial responsibility for remediation through dissolution or bankruptcy, or as a result of IFC/MIGA exiting the relationship, by setting aside funds and designating solvent third parties liable for the costs of a failure to perform.[23]

We echo the Review Team's recommendation that the client must agree, as a condition of IFC/MIGA support, to provide contingent funding to address E&S harm; that legally binding investment contracts commit clients to utilize remedy funds in the event that harms occur due to clients' failure to meet the Performance Standards; and that contracts also grant IFC/MIGA co-authorization to access the contingent funding in the event that clients are unwilling to utilize the funds for contribution to remedy.[24]

The external review report calls for the establishment of two types of funding mechanisms: one through which client resources are mobilized for remedy, and another through which IFC/MIGA resources are mobilized. This allows for two entirely separate financial streams, each of which may be engaged in a particular case depending on the contribution to harm by the two actors.

In the annex, we present four funding options to support remedies when harm occurs due to projects supported by IFC/MIGA: 1) Common Performance Funds; 2) Project-Specific Escrow Funds; 3) Environmental and Social Performance Insurance and 4) Environmental and Social Performance Bonds.

[22] In addition to compensation, this may include measures of restitution, satisfaction, rehabilitation, guarantees of non-repetition. For example, in response to a complaint filed with the Inspection Panel on the World Bank-financed Uganda Transport Sector Development project, the World Bank contracted international non-governmental organizations that worked with the community to support children and young women who had been impacted by the project with psychosocial support, skills and job training, and family planning education, as well as direct financial support. In addition to creating an action plan to address the harm in that particular case, the World Bank also took the additional step of examining systemic failures within the institution that lead to the harm in the project and created a framework for broader measures in order to prevent future projects from having similar impacts. *See* Elana Berger, How a Community-Led Response to Sexual Exploitation in Uganda Led to Systemic World Bank Reform (2018), https://bankinformationcenter.cdn.prismic.io/bankinformationcenter%2Fce8a9d3e-4bf1-4b07-9259-fcee487077e6_an3_june18-v-4-jun-18+%281%29.pdf.

[23] James Boyd, "Financial Responsibility for Environmental Obligations: An Analysis of Environmental Bonding and Assurance Rules," p. 8, http://www.ucl.ac.uk/cserge/Boyd.pdf.

[24] External Review Report 78, 335.

Annex 1

Options for IFC/MIGA Financial Remedy Mechanisms

Each of the options presented below have advantages and disadvantages, with some better suited to particular project contexts and financing instruments. We believe that a one size fits all approach may not be ideal. Instead, we recommend that IFC/MIGA develop a menu of options so that it has an appropriate level of flexibility to choose the best option for a given project.

No matter how a chosen funding mechanism is structured, its operations must adhere to a set of core principles. It should be community-driven, with procedures that empower affected communities to shape remedy. It should bolster accountability, ensuring that actors with responsibility for harm contribute to resourcing remedial measures and incentivizing good environmental and social practice across the entire IFC/MIGA portfolio. It should be transparent, with detailed information about the mechanism, including remedial actions taken, and resources allocated for implementation, disclosed publicly. And it should follow an impartial process for objectively determining the resources necessary to implement effective remedy, without undue consideration of commercial factors.

1. Common Performance Funds

The External Review Report states that "in situations where IFC/MIGA action or inaction (in addition to client action or inaction) contributed to harm… IFC/MIGA should also contribute to remedial action." The Review Team is of the view that "a CAO finding of IFC/MIGA non-compliance (when de facto accepted by the Board) should in principle establish the need for IFC/MIGA to contribute to remedy along with the client."

One way in which IFC/MIGA can set aside resources for this purpose is to create a Common Performance Fund or Trust Fund. In this model, IFC/MIGA would have a single fund administered as a trust by a non-party that can act as a neutral and independent fiduciary. For example, in the case of the Rana Plaza Donors Trust Fund, the International Labour Organization acted as trustee for the fund.[25] An advantage of having a Trust Fund, in addition to the client-contributed project-specific arrangements discussed below, is that more resources will be available to protect against rare but costly risks that may materialize (for example in the event of a disaster, like a tailings dam break). Additionally, IFC/MIGA may allow these funds to be used to provide redress for ongoing harms related to current or past projects that were financed before the implementation of the common performance fund. As acknowledged in the external review report, "the end of the business relationship between the client and IFC/MIGA does not necessarily end IFC responsibility to contribute to remedy," especially in contexts where adverse impacts materialize or worsen over time.[26]

There are several options for securing contributions for such a fund, which can be explored exclusively or in combination. Contributions could come directly from World Bank Group member states, from a fixed percentage of all interest payments to the institutions, or from a fixed percentage of IFC/MIGA profits, as recommended by the Review Team.[27]

[25] "Terms and Conditions of the Rana Plaza Donors Trust Fund," Feb. 18, 2014, http://ranaplaza-arrangement.org/fund/termsandconditions.
[26] External Review Report 77, para 332.
[27] External Review Report 79, para 339.

Another option for sourcing funds is through penalty fees imposed by the IFC on the borrower as part of the loan agreement. If a borrower violates an agreed upon standard in the loan agreement (ie Performance Standards) and causes harm, a penalty grid can be used by an independent third party to assess the level of harm associated with that instance of non-compliance. In accordance with the IFC's ranking of a project's risk from low to high,[28] the penalty grid would assess the level of harm associated with that instance of non-compliance and provide increased monetary penalties for higher severity contraventions. The penalties can be progressive, so that repeat offenders would receive progressively higher penalties. For example, in Canada, progressive risk-based penalties are used as monetary coverage for the customs and trade regulatory agency, Canadian Border Services Agency.[29] While administration and harm valuation will present challenges, this method of raising funds has the advantage of reducing the competitive advantage of non-compliance and encourage precaution.

The trigger for accessing the Common Performance Fund would have to be established in advance and should incorporate the Review Team's observations regarding circumstances in which an IFC/MIGA client may not be willing or able to carry our remedial actions. One possibility would be for IFC/MIGA to incorporate guarantees or letters of credit into its investment agreements to cover the three situations described by the Review Team: (1) IFC/MIGA wrongly guided clients in their preparation of environmental and social impact assessments and action plans; (2) IFC/MIGA failed to sufficient alert, support or supervise the client in its responsibilities under the Performance Standards; and (3) the client relationship with IFC/MIGA has ended and there are not adequate funds set aside in, for example, a project-specific escrow fund (described below) to remedy harm.[30] Incorporating such guarantees or letters of credit into investment agreements would help delineate the appropriate responsibility for and contribution to remedy between IFC/MIGA and its client. The client, through its approved environmental and social action plan, would have responsibility to avoid, mitigate and redress adverse impacts identified during IFC/MIGA's due diligence, supervision and monitoring. However, the guarantee would be triggered in the situations described above, and subsequent remedial actions could be paid for out of the Common Performance Fund.

Both IFC and MIGA have experience in administering trust funds, which could be applied to the remedy context. For example, MIGA's Environmental and Social Challenges Fund for Africa provides technical advice to overseas investors in Africa. Through this trust fund, investors can receive advice from MIGA and consultants in order to comply with MIGA's environmental and social policies, including advice on issues such as resettlement and environmental health and safety.[31]

[28] International Finance Corporation, Environmental and Social Categorization https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/es-categorization

[29] Canada Border Services Agency, *Memorandum D22-1-1: Administrative Monetary Penalty System*, Jan. 30, 2015, http://www.cbsa-asfc.gc.ca/publications/dm-md/d22/d22-1-1-eng.pdf.

[30] External Review Report, 76-77, para. 330-332.

[31] Multilateral Investment Guarantee Agency (MIGA), "Environmental and Social Challenges Fund for Africa," https://www.miga.org/Pages/Projects/Environmental%20and%20Social%20Sustainability/Environmental-and-Social-Fund-for-Africa.aspx.

2. Project-Specific Escrow Funds

Project-specific escrow funds differ from the performance funds described above in that they are specific to an IFC/MIGA project and exist only for a defined, contractual period. There are several ways in which a project-specific escrow fund could be funded. Part of an escrow fund could be deposited upfront by either IFC/MIGA, the project company, or both, with ongoing contributions. Alternatively, it could be sourced from the cash flows of the project at regular intervals. For example, the contributions to an escrow fund may be a percentage of the monthly revenue during the operational phase of the project. The funds may also be sourced from a percentage of the debt and equity of the project during the construction phase, but could be allocated at intervals, rather than taken all at once before disbursement.

To set up an escrow fund, the terms of an IFC/MIGA investment agreement would entrust an escrow agent with the task of overseeing and administering the account. The investment agreement, or a separate escrow agreement, should clearly outline the circumstances in which the funds can be withdrawn. For example, the escrow agent could be instructed to release the funds if a request is made by IFC/MIGA or by the CAO after a (Board accepted) finding of non-compliance or a CAO-facilitate dispute resolution process resulting in a remedial agreement. The escrow agent would release the funds to IFC/MIGA, which would then allocate the funds to effectuate agreed remedial actions, including those set out in a Management Action Plan and/or a Dispute Resolution agreement.

IFC/MIGA could specify that the escrow funds will be returned if they are not needed for redress within a certain number of years after the project is closed/completed and if the project is in full compliance. The external review report recommends a two-year limit to accessing funds from the client-contributed contingent liability fund, which seems reasonable.[32]

Escrow funds have an advantage over insurance arrangements, described below, in that an insurance company must not be paid for taking the risk of an uncertain pay-out amount. Thus, the periodic deposit into an escrow fund will be lower than an insurance premium for the same period.[33] The funds would also be immediately available on presentation of pre-agreed documentation, enabling timely delivery of remedy and avoiding the risk, presented by insurance arrangements, that the insurer challenges the liability trigger.

The World Bank has experience using escrow funds in the Chad-Cameroon Petroleum Development and Pipeline Project. The remaining monthly revenues for this project that are not used to cover debts are transferred to an escrow account; ten percent of which is set aside for future use in the Future Generations Fund, kept in an escrow account in London, and invested in an interest-bearing investment account.[34] Additionally, IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement calls for escrow funds to be established to compensate displaced persons if they do not accept compensation offered to them before being displaced.[35]

[32] External Review Report 78, para 336.
[33] Jan Willem van Gelder, Karlijn Hogenhuis-Kouwenhoven, and Bondine Kloostra, "Financial mechanisms to ensure responsible ship recycling: a research paper prepared for the NGO Shipbreaking Platform," Profundo Economic Research, Jan. 22, 2013, p. 8, http://www.shipbreakingplatform.org/shipbrea_wp2011/wp-content/uploads/2013/01/Financial-mechanisms-for-resonsible-ship-recycling-22_01_2013-FINAL.pdf.
[34] "The Chad-Cameroon Petroleum Development and Pipeline Project: How Do Revenues Flow? Descriptions for Each Component," The World Bank, http://web.worldbank.org/archive/website01210/WEB/0__CO-58.HTM.
[35] IFC Performance Standards (2012), PS5, footnote 14.

3. Environmental and Social Performance Insurance

Another option to finance remedy is Environmental and Social Performance Insurance, which could be issued by a third-party insurer or even by MIGA itself, which already has a line of insurance products. The external review report notes that the "contingent liability fund" to ensure availability of client resources in case of harm "could take the form of E&S insurance (through a third party or self-funded)," but does not set out this option in any level of detail.[36]

Various different types of third-party beneficiary insurance products are available in the market, including for environment liability in the mining, oil and gas and construction industries.[37] MIGA offers political risk insurance, which protects clients against the risks of unforeseen government actions or inactions such as war, civil strife, and terrorism.[38] It is therefore conceivable that MIGA could also develop an innovative new environmental and social liability insurance product.

This could be required by IFC/MIGA as a contractual condition for all higher risk investments to cover liabilities owed to communities that have suffered harms as a result of the project. The insurance could cover harms resulting from non-compliance with the Performance Standards or unforeseen liabilities, such as those resulting from natural disasters, up to the maximum level of indemnity set by the policy. Any remaining harms beyond the scope of indemnity could be covered by the Common Performance Fund. The trigger for the policy would need to be worked out (which is beyond the scope of this submission), but options could include the borrower's notification of the insurer, IFC's notification of the insurer, or a CAO finding of covered harms following an investigation of a complaint.

Premium rates could be set according to the risk categorization and profile of the project, taking into account the capacity and track record of the client. IFC/MIGA already has the systems in place to consider environmental and social risks in its investment decisions and monitor its clients' implementation of E&S risk management measures, so incorporating environmental and social risk assessment into insurance premium determinations should be a feasible endeavor.

The insurance model has various advantages. One is that it is already a market standard and would not require a big leap to factor this into the deal economics, and it would be applicable in most if not all types of IFC/MIGA funding scenarios. It does not require collateral so it would not tie up a large amount of the client's capital, as in the case of a bond. And it incentivizes the client to reduce the risk of incurring liabilities by adopting robust mitigation measures in order to reduce premiums or avoid increases due to claims. On the other hand, the process of making a claim could be protracted, especially if the insurer challenges the liability trigger, which could impact the timely delivery of remedy to harmed communities.

[36] External Review Report 78, para 334.
[37] Insurance coverage for high-risk projects," Mining Weekly, Jul. 1, 2005, http://www.miningweekly.com/article/insurance-coverage-for-highrisk-projects-2005-07-01/rep_id:3650.
[38] MIGA, "About Political Risk Insurance," https://www.miga.org/Pages/Resources/AboutPoliticalRiskInsurance.aspx.

4. Environmental and Social Performance Bonds

In a 2016 assessment of a transport sector development in Uganda, the World Bank committed to pilot an environmental and social performance bond for its civil works as part of an effort to improve its ability to guide borrowers to better safeguard performance. As described, the bond could be cashed by the contracting entity "should a contractor fail to remedy cases of environmental and social non-compliance."[39] The bond would be for a reasonable amount, normally not to exceed 10 percent of the contract amount, and be cashable based on failure to comply with the engineer's notice to correct defects.[40]

IFC/MIGA could require that clients take out such environmental and social performance bonds. A third-party institution would act as a bondsman, or surety, in issuing a bond guaranteeing the borrower's environmental and social obligations under its contract with IFC/MIGA, in consideration of the borrower's contribution to the bond and collateralization of all or some percentage of the bond by cash or other assets.[41] Like an insurer, the bondsman would bear the risk of compensating for the borrower's failure to perform its obligations under the underlying contract. The trigger could be either a CAO finding of harm or notification from IFC/MIGA or its client. Once triggered, the bondsman would distribute the funds to IFC/MIGA, which would use the funds to pay for remedial actions, including those set out in a Management Action Plan and/or a Dispute Resolution agreement.

Unlike in the case of insurance, however, those who take out performance bonds are still responsible to pay bond claims in full, which can be as large as the full bond amount. This is because the indemnity agreement required for bonds requires pledging assets as collateral in the event of bond claims.[42]

In the private construction sector, performance bonds are typically set at 10 percent of the contract value,[43] but for exporters, the coverage can range from 5 to 25 percent depending on the risk and industry standards.[44] Environmental performance bonds foster swift, relatively low-cost access to compensation for environmental harm, thus minimizing damage.[45]

[39] "Uganda Transport Sector Development Project – Additional Financing: Lessons Learned and Agenda for Action," World Bank, Nov. 11, 2016, p. 41, http://documents.worldbank.org/curated/en/948341479845064519/pdf/110455-BR-PUBLIC-LESSONS-LEARNT-IDA-SecM2016-0204.pdf.

[40] *Id.*

[41] Daniel Ford, "Surety Bonds for Exporters What is a Performance Bond?," Export-Import Bank Blog, May 19, 2015, http://grow.exim.gov/blog/surety-bonds-for-exporters-what-is-a-performance-bond.

[42] "Performance & Payment Bond Guide," JW Surety Bonds, http://www.jwsuretybonds.com/surety-bonds/contract-bonds/performance_bond.htm.

[43] "Bonds in Construction Contracts," Design Buildings Wiki, Jan. 6, 2017, https://www.designingbuildings.co.uk/wiki/Bonds_in_construction_contracts.

[44] Daniel Ford, "Surety Bonds for Exporters What is a Performance Bond?," Export-Import Bank Blog, May 19, 2015, http://grow.exim.gov/blog/surety-bonds-for-exporters-what-is-a-performance-bond.

[45] James Boyd, "Financial Responsibility for Environmental Obligations: An Analysis of Environmental Bonding and Assurance Rules," p. 8, http://www.ucl.ac.uk/cserge/Boyd.pdf.