ANNEX

24 February 2021

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Inclusive Development International (IDI) is an international human rights organization that works to make the global economy more just and inclusive. IDI supports affected communities to defend their rights and the environment in the face of harmful investment, trade and development activities.

The Centre for Research on Multinational Corporations (SOMO) is a critical, independent, non-profit knowledge center on multinationals. SOMO seeks to address the global governance gaps that allow multinational corporations to operate with impunity, including by supporting communities in filing complaints to non-judicial grievance mechanisms.

Oxfam Novib is a Dutch foundation and the Dutch affiliate of the international Oxfam organization. Oxfam Novib is a world-wide development organization that mobilizes the power of people against poverty, working to find practical, innovative ways for people to lift themselves out of poverty and thrive.

[redacted], IDI, SOMO and Oxfam Novib (collectively "advisors") are supporting the Liberian communities of New Kinjor, Jikando, Jawaje Marvoh, Jenneh Brown and Gold Camp in defending their rights and the environment against the operations of Avesoro Resources and Bea Mountain Mining Corporation (BMMC) in the Gola Konneh District of Grand Cape Mount County, Liberia. BMMC, a wholly owned special project vehicle of Avesoro Resources, developed and currently operates the New Liberty Gold Mine, Liberia's first and largest commercial gold mine. The New Liberty mine covers only a small portion of BMMC's mining license area, which includes a series of other gold deposits, the majority of which are still unexplored. In March 2019, Avesoro Resources announced an expansion of the New Liberty project to include the Ndablama satellite deposit, which is about 40 km northeast of the New Liberty mine.

FMO, DEG and Proparco are exposed to BMMC through their longstanding relationship with financial intermediary client FirstRand Bank, which has provided two project loans to the New Liberty project. We believe that all three European development finance institutions have failed to act in accordance with their policy obligations, including their due diligence responsibilities, in their transactions with FirstRand Bank.

Advisors have prepared this Annex in support of the communities' complaints to the Independent Complaints Mechanism (ICM). The Liberian advisors have worked closely with the affected communities since 2015. This process began with a socioeconomic impact study of large scale land acquisition for mining, agriculture and forestry investments in the area. The findings of the study clearly demonstrated BMMC's negative impacts on its host communities, including environmental pollution, forced displacement, loss of livelihoods, food insecurity and conflict between the communities and the company.

Upon discussion with the affected communities to address the findings of the research, Liberian advisors agreed to work with and on behalf of the affected communities to develop and initiate a strategy to advocate for the communities' rights. Liberian advisors sought the assistance of Inclusive Development International (IDI) to help map the investment chain of BMMC, which identified FMO's, DEG's and Proparco's exposure to BMMC through FirstRand Bank, opening the possibility of an ICM complaint.

Through a series of community workshops and small group meetings, taking place between July 2019 and February 2021, Liberian advisors directly engaged with more than 300 affected community members to present the ICM complaint process, gather evidence and assist affected communities in writing complaint letters. International advisors supported this community engagement process and preparation of this Annex.

This Annex is structured as follows:

- Section I: Description of the impacts of BMMC's operations on complainant communities.
- Section II: Description of FMO's, DEG's and Proparco's exposure to BMMC's New Liberty Project through FirstRand Bank.
- Section III: Description of FMO's, DEG's and Proparco's non-compliance with applicable policies.
- Section IV: Description of efforts to address the issues.
- Section V: Outcomes sought by the complainants.

Due to concerns for their personal security, the complainants request that their complaint letters and their identities be kept confidential at this time. It should be noted that members of these affected communities have already been subjected to threats and attacks, including harassment, physical violence, arbitrary detention and blacklisting. Complainants will consider waiving their confidentiality in the context of an ICM dispute resolution process, but only with security assurances and after providing their express consent.

Please direct all correspondence related to the complaint to advisors, specifically:

- Liberian advisors[redacted]

[1] For security reasons, the Liberian advisors are sharing an email address set up specifically for the purpose of communicating about this complaint. They request that their identities be kept confidential at this time.

[redacted]

- IDI: Sarah Singh (sarah@inclusivedevelopment.net) and Natalie Bugalski (natalie@inclusivedevelopment.net)
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- Oxfam Novib: Imke Greven (Imke.Greven@oxfamnovib.nl)

I. Bea Mountain Mining Corporation's Operations Have Destroyed Community Livelihoods and the Local Environment

Complainant communities live in small, remote, forest towns in western Liberia. With infrastructure, social services and the economy decimated by Liberia's 14-year civil war, complainants were susceptible to company promises of a better life: functional roads, safe drinking water, electricity, education for their children, properly equipped health centers and employment opportunities with the company. More than six years after BMMC began developing the mine, the reality looks nothing like what the communities thought they had agreed to.

Though they live next door to Liberia's first and largest commercial gold mine, most community members are worse off than before. As farmers and artisanal miners, community survival previously relied on access to land and natural resources. They ate primarily what they could grow, hunt and fish, supplementing their farming income with small-scale mining.

Now, many find themselves cut off from the land and unable to support themselves, and they face violent retaliation when they try to hold the company to its promises. Community members report participating in a protest to try to secure the benefits promised to them, only to face serious police violence, with community members beaten, arrested and detained for two weeks on charges of destroying company property and later blacklisted for employment. Some residents were allegedly injured by police and never received proper medical care. Many report feeling afraid to voice concerns. Despite these fears, many community members recently participated in another large-scale demonstration to try to secure promised benefits from the company. Security forces were present at the demonstration, but fortunately the situation remained peaceful. The company has since begun making at least some initial progress to fulfill its commitments to communities. However, the situation remains volatile.

BMMC and the Liberian Government originally signed a Mining Development Agreement (MDA) in 2001.[2] BMMC, a wholly-owned subsidiary of Jersey-based company Avesoro Resources Inc.[3] (formerly Aureus Mining Inc.), holds a Class A mining license covering a 457 km^2 area in the Gola Konneh District of Grand Cape Mount County in western Liberia.[4] The mining license area contains a series of gold deposits, of which New Liberty Gold Mine (NLGM) was the first to be developed. NLGM includes an open pit mine, a gold processing

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[2] Aureus Mining, New Liberty Gold Mine: Resettlement Action Plan, § 1.1 Introduction (Mar. 2014), https://avesoro.com/wp-content/uploads/2014/05/NLGM%20RAP.pdf [hereinafter "RAP"].
[3] *See* Jersey Financial Services Commission Companies Registry: https://www.jerseyfsc.org/registry/documentSearch/NameDetail.aspx?Id=399925.
[4] RAP at §§ 1.1 Introduction and 1.2 Project Location.

plant, a tailings storage facility and a waste rock dump, as well as related infrastructure.[5] Construction of NLGM began in April 2014, and the first gold was poured from the processing plant in May 2015.[6] Full commercial production began in March 2016.[7] Avesoro Resources estimates that the open pit mine will be exhausted in 2022,[8] but in March 2019, it announced a new plan to transition to underground mining operations, extending the life of the New Liberty mine to 2029 and perhaps longer.[9]

At the same time, Avesoro Resources announced an expansion of the New Liberty project to include the Ndablama satellite deposit.[10] According to the company's pre-feasibility report, in 2022, once the New Liberty open pit mine is exhausted, BMMC will move its fleet of mining equipment to Ndablama for open pit extraction there.[11] It will transport the ore mined at the Ndablama deposit back to the New Liberty mill for processing.[12] Tailings from the Ndablama deposit will also be transported back and stored at the New Liberty tailings facility, which BMMC will have to expand.[13]

All five complainant communities are suffering serious harm as a result of BMMC's operations. Old Kinjor and Larjor were located in the open pit and surrounding blasting zone, so the company forcibly resettled both villages to New Kinjor.[14] Additionally, the Mavo River[15] ran through the open pit area, so the company diverted the river through a series of interconnected channels.[16] Other nearby communities, including Jikando, Jawaje Marvoh and Jenneh Brown, have been affected by this river diversion, as well as land takings, restrictions on land use, blasting at the open pit and increased cost of living related to the huge, project-related population influx. Despite a detailed Resettlement Action Plan (RAP), the company's livelihood restoration activities have been nearly non-existent. Similarly, although the company developed a lengthy Stakeholder Engagement Plan (SEP), which was revised in 2018, that accurately identifies many of the concerns described in this complaint, there has been little done to address those concerns.

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[5] *Id*. at § 2.1 Project Description; Aureus Mining, ESIA Update for the New Liberty Gold Mine in Liberia: ESHS submission and update of specialist reports, prepared by Digby Wells Environmental, p. ii (Mar. 2014), https://avesoro.com/wp-content/uploads/2014/04/ESIA_Update_for_Aureus_Mining_10_04_14_InclAppendicesRedSize.pdf [hereinafter "2014 ESIA"].
[6] Avesoro Resources, New Liberty Gold Mine, https://avesoro.com/operations/liberia/new-liberty-gold-mine/.
[7] *Id.*
[8] *See* Avesoro Resources, Amended and Restated 2017 Consolidated Financial Statements, p. 31 (Aug. 2018), https://avesoro.com/wp-content/uploads/2018/08/Restated-FY-2017-Financial-Statements.pdf [hereinafter "2017 Consolidated Financial Statements"].
[9] Avesoro Resources, "New Liberty Pre-feasibility Underground Study and 2019 Production Guidance" (6 Mar. 2019), https://avesoro.com/2019/03/06/new-liberty-pre-feasibility-underground-study-and-2019-production-guidance/.
[10] *Id.*
[11] Avesoro Resources, Pre-feasibility Report, Mineral Resource and Mineral Reserve Update for the New Liberty Gold Mine, Liberia, prepared by CSA Global, § 16.3.2 Fleet Assumptions and § 18.2.12 Transport (Apr. 2019), https://avesoro.com/wp-content/uploads/2019/04/ASO-NLGM-NI%2043-101-PFS.pdf [hereinafter "Pre-feasibility Report"].
[12] *Id.* at § 16.3.1.4 Stockpiling Strategy; § 17 Recovery Methods; § 21.2 Project Execution.
[13] *Id.* at § 18.3 Tailings.
[14] *See* RAP at p. iii.
[15] Also referred to as Mavo Creek or Marvoe Creek.
[16] *See* RAP at § 2.1 Project Description.

Moreover, while some communities have recently been informed about BMMC's plans to transition to underground mining at the New Liberty mine, the company is moving forward with this significant expansion of the project without meaningfully consulting with community members. Community members are concerned about the possible environmental and social impacts of the expanded project and lack information about these impacts or any related mitigation plans.

Further contributing to the serious harm being experienced by local communities, between December 2015 and June 2016, the mine's tailings storage facility was periodically releasing harmful chemicals, including cyanide and arsenic, into the environment because of a defect in the processing plant.[17] During this time, the processing plant caused at least one significant cyanide spill, in March 2016,[18] eventually prompting the company to temporarily suspend operations of the processing plant in May 2016.[19] Nearby communities suffered from mass fish deaths and serious skin rashes, and fear other health risks from their exposure to the polluted water,[20] but company disclosures downplayed the incident, stating that "there has been no adverse impact on any human settlement."[21] Communities continue to fear that BMMC's operations may be negatively impacting their water, and they lack alternatives to using local streams and rivers. They also lack sufficient information about the overall water quality in the area.[22]

In addition to harming communities living near the New Liberty mine, BMMC has failed to provide many of the agreed community benefits. In March 2013, Aureus Mining Inc. (now Avesoro Resources) bought 150 acres of land from members of the Dablo Clan for resettlement of the residents of Kinjor and Larjor. As part of the land sale, the company agreed to several community development projects in four towns, including Jewaje Marvoh and Jenneh Brown.[23] In April 2014, BMMC entered into a land lease agreement with members of the Dablo Clan, leasing 5,000 acres for the New Liberty mine. In addition to paying rent, BMMC agreed to various community development activities, including: upgrading the 16-km road connecting New Kinjor, Jawaje Marvoh and Jenneh Brown; construction of a school and a health clinic; scholarships; and construction of water and sanitation facilities.[24] However, the company has

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[17] Avesoro Resources, Technical Report, New Liberty Gold Mine, Bea Mountain Mining License Southern Block, Liberia, West Africa, prepared by SRK Consulting, § 18.9.2 Current Status (Nov. 2017), https://avesoro.com/wp-content/uploads/2017/11/NLGM-43-101-Nov-2017.pdf [hereinafter "Technical Report"].

[18] Emmanuel Freudenthal and Alloycious David, 100 Reporters, "At Liberian Gold Mine, World Bank Money Flows, Despite Broken Promises (19 Mar. 2017), https://100r.org/2017/03/at-liberian-gold-mine-world-bank-money-flows-despite-broken-promises/; Emmanuel Freudenthal and Alloycious David, The New Humanitarian, "How a gold mine has brought only misery in Liberia" (21 Mar. 2017), https://www.thenewhumanitarian.org/investigations/2017/03/21/how-gold-mine-has-brought-only-misery-liberia.

[19] Avesoro Resources, "New Liberty Temporarily Suspends Gold Plant Operations" (10 May 2016), https://avesoro.com/2016/05/10/new-liberty-temporarily-suspends-gold-plant-operations/.

[20] Freudenthal and David.

[21] "New Liberty Temporarily Suspends Gold Plant Operations."

[22] For example, SRK Consulting, as of 2017, noted that while it has seen evidence that cyanide and arsenic monitoring data is recorded and interpreted on an ongoing basis, it "has not seen evidence this is the case for other quality parameters." Technical Report at § 20.5.2 Interpretation of Water Quality Impacts and Implementation of Pollution Control Measures.

[23] Real Estate Sale Agreement, para. 4, (5 Mar. 2013), attached as Exhibit A.

[24] Agreement of Lease, para. 4, (2 Apr. 2014), attached as Exhibit B.

failed to live up to these agreements, and many of these community development projects have not been completed.[25] Moreover, even when the company has made some effort, the results have not always been satisfactory for the communities. For example, in 2019, BMMC began to work on the road connecting New Kinjor, Jawaje Marvoh and Jenneh Brown, a road that is important for transporting goods and services. However, the improvements were not sufficient, and travel on the road remained challenging, especially during the rainy season. In particular, the bridges were not repaired, and the community considered them very dangerous. Among BMMC's recent steps to engage with the communities has been a renewed commitment to improving the road conditions. While this is a welcome step, it comes many years later than originally agreed, and communities are uncertain whether the company will complete the work in a satisfactory manner.

Finally, communities located near the Ndablama satellite deposit, such as the Gold Camp community, have also been harmed. Although BMMC is not yet actively mining the Ndablama deposit, the community reports that the company began restricting access to land for farming and artisanal mining several years ago. BMMC recently informed the Gold Camp community that it will begin mining soon, and it has nearly completed construction of the haul road that will connect the satellite deposit to the New Liberty mine.[26] However, BMMC has not yet officially recognized Gold Camp as an affected community and as such, has not taken appropriate steps to address negative impacts on the community's livelihoods.

Below is a brief and non-exhaustive description of the situation in each complainant community.

New Kinjor

The towns of Kinjor and Larjor were completely destroyed to make way for the New Liberty Gold Mine. Around 2,000 residents lost their homes, their farmland and many important assets such as fruit trees. The company purchased and cleared 150 acres of land to build New Kinjor, which was supposed to include: (1) 322 "elegant" replacement homes for the resettled households; (2) agricultural land; (3) a dedicated market with individual business units as compensation for certain qualifying households; (4) water and sanitation facilities, including hand pumps throughout the village, toilet facilities and two waste sites; (5) community facilities, including a school for primary and secondary students, a health clinic, a community center, a mosque, a church, a police station and a football field; and (6) additional land to accommodate the expected population influx.[27]

When construction of permanent homes in New Kinjor was delayed, community members report that they were pressured into signing a memorandum of understanding with the company that extended the construction timeline, while still allowing development of the mine to move forward.[28] They were then moved into temporary, inadequate housing in 2014, while the

[25] Overview of Agreements, attached as Exhibit C; Avesoro Resources, Community Visioning, Governance Framework and Livelihood Development Plan, prepared by Sazani Consulting, § 2.4 Existing Obligations (Jul. 2019), https://avesoro.com/wp-content/uploads/2019/07/Avesoro-Community-Visioning-Framework.pdf [hereinafter "Community Visioning Plan"].
[26] *See* Pre-feasibility Report at § 18.2.2 Ndablama – New Liberty Haul Road.
[27] RAP at § 10.4.2 Community Agreement.
[28] Freudenthal and David.

company stopped construction of the permanent homes, leaving them unfinished for years. Community members did not begin to get possession of their permanent resettlement homes until 2018,[29] and many have complaints about the size and quality of the homes. They also lack deeds to the land.[30]

To make matters worse, the company seriously underestimated the amount of land needed in New Kinjor and failed to acquire enough land to ensure that resettled residents of old Kinjor and Larjor, many of whom report that they were farmers,[31] would have access to agricultural land. New Kinjor's population has swelled to over 7,000,[32] and there is no land available for farming.[33] While the company did provide some compensation for lost fruit trees and crops, it used a government formula that, for many farmers, failed to compensate for their expected yields. They received no compensation for their lost farmland, and have been left without the means to rent or buy new land for farming. Previously self-sustaining farmers now have no way to continue their livelihoods.

Many community members also participated in artisanal mining, either directly or indirectly by providing goods and services to miners. Yet many of these opportunities have also disappeared, as the company's mining license permitted it to restrict this type of small-scale mining. Community members who previously earned enough to support their families through artisanal gold mining and farming now find themselves destitute, relying on friends and relatives for support. Company support for alternative livelihoods has been ineffective at best.[34]

Finally, the company has also failed to live up to its promises of modern, functioning community buildings and social services. While it constructed both a school and a clinic,[35] neither is adequate for the population and both are under-equipped and under-staffed. The clinic charges fees that are beyond the means of many vulnerable community members. Similarly, the water

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[29] *See* Bea Mountain Mining Corporation, New Liberty Gold Mine, Stakeholder Engagement Plan, § 7.1 Land Acquisition and Resettlement Completed for the Project (Apr. 2018), https://avesoro.com/wp-content/uploads/2019/07/NLGM_Stakeholder-Engagement-Plan.pdf [hereinafter "SEP"]; *see also* Technical Report at § 20.6.2 Implementation of the Resettlement Process.

[30] They have instead been given certificates of ownership for the homes. *See id.* Even so, an apparent lack of or delay in issuing land registration certificates for displaced families may have contributed to conflict between those who have been in the community for a long time and more recent arrivals. *See* Community Visioning Plan at § 3.2 Findings.

[31] In contrast, the Technical Report indicates that very few households of old Kinjor and Larjor had access to farmland, instead purchasing food from surrounding farmers or from Monrovia. Technical Report at § 20.2 Environmental and Social Setting. Regardless, the need for New Kinjor residents to have access to agricultural and forest land is acknowledged in other documents, like the Stakeholder Engagement Plan. *See* SEP at § 7.1 Land Acquisition and Resettlement Completed for the Project.

[32] SEP at Table 3 Summary of Project Social Setting.

[33] Notably, the Stakeholder Engagement Plan acknowledges, but fails to address, the lack of sufficient access to agricultural and forest land. *See* SEP at § 7.1 Land Acquisition and Resettlement Completed for the Project. The Plan determines that the lack of sufficient land relates to the population influx, without proposing any solutions or even acknowledging that the population influx was foreseeable and even anticipated in the RAP. *See* RAP at § 10.7 Population Influx.

[34] The Community Visioning Plan indicates that the company's obligations under the RAP relating to the replacement of livelihoods lost is "incomplete." Community Visioning Plan at § 2.4 Existing Obligations.

[35] According to the Community Visioning Plan, as of 2019, one primary school was built, but the secondary school was still incomplete. *Id.*

and sanitation facilities are inadequate, leaving community members without access to safe drinking water. Community members believe that it is telling of the company's priorities that the biggest and best equipped building constructed by the company in New Kinjor is the police station and barracks.

Jikando

The town of Jikando is just three kilometers from the open pit mine[36] — so close that the company considered resettling its residents as well.[37] While the approximately 125 residents[38] of Jikando were not resettled during mine construction, they are experiencing such serious impacts from mine operations that they now feel they have no choice but to relocate. In particular, the blasting from the mine, which occurs without warning, day and night, causes such serious vibrations in Jikando that homes and community buildings are cracking. Community members report that they live in fear that their houses could collapse.

Residents of Jikando have also experienced some of the most serious environmental impacts. Jikando lies just downstream of the mine, and community members were the first to report the serious cyanide spill in 2016 when they saw hundreds of dead fish in the river.[39] The community, which traditionally used the river for drinking water, bathing and fishing, was told to stop using the water, but not until after community members were already suffering from serious skin rashes. For approximately four months, the company provided cartons of fish, as the community's main source of protein was fish from the river. The company also built three hand pumps for drinking water, but has failed to maintain them. At this point, two of the pumps do not work and the third is not deep enough to provide water in the dry season, leaving the community with a shortage of water and no choice but to continue to use the river. Crops yields have also been affected. Residents fear future spills or even a breach of the holding dam that was part of the river diversion project, which could be disastrous for the community.

Finally, while this community has retained most of its land, the company has taken some farmland without compensation and has also restricted hunting, fishing and artisanal mining. Some community members report being beaten by police for hunting or mining in the mine license area.

Jawaje Marvoh

The town of Jawaje Marvoh lies just four kilometers upstream of the mine, and its 400 residents[40] face similar problems as in Jikando. According to community members, blasting from the mine is also affecting homes, and although they are upstream from the mine, they report having been impacted by the mass fish deaths and lower crop yields as well. The community also reports that the river diversion has had a negative impact on traditional fishing activities,[41]

[36] SEP at Table 3 Summary of Project Social Setting.
[37] *See* RAP at Table 18 Summary of Key Stakeholder Meetings, 19 May 2012 Meeting with Jikando elders.
[38] SEP at Table 3 Summary of Project Social Setting.
[39] Freudenthal and David.
[40] SEP at Table 3 Summary of Project Social Setting.
[41] In contrast, the Stakeholder Engagement Plan states that "The Marvoh Creek has been diverted without having any negative impact on the surrounding communities." SEP at § 3.3 Physical and Economic Displacement.

and lost farmland and other restrictions on access to land and resources have not been properly compensated.

Additionally, the company's recent construction of the haul road connecting the Ndablama satellite deposit to the New Liberty mine is causing further negative impacts. In addition to destroying more community farmland, community members believe that the road is polluting their drinking water. The company is using waste rock from the mine for road construction, and since construction began, community members started noticing a strange taste in their water. The company has since begun construction of a water pump for the community.

Finally, as with the other communities, Jawaje Marvoh has not seen effective livelihood support from the company, nor meaningful infrastructure improvements. For instance, although interactions with the company led the community to believe that the project would help improve their roads, the roads remained practically unusable for many years, with the main bridge connecting Jawaje Marvoh to New Kinjor down for over three years. As described above, the company has not begun making these improvements, which is a welcome step, but communities are uncertain whether the company will continue to fulfill this and other commitments.

Jenneh Brown

The town of Jenneh Brown is approximately 16 kilometers from the mine,[42] but has still suffered from similar pressures as the above communities, particularly with regard to blasting impacts, the loss of artisanal mining and the lack of alternative livelihood support from the company. Its approximately 1,200 residents[43] have not received the employment, infrastructure or social services benefits that were promised and are instead feeling serious economic pressure caused by increased prices of food and other goods, as well as the loss of mining income.

Gold Camp

Unlike the other complainant communities, Gold Camp is located about 40 kilometers from the New Liberty mine, near the Ndablama satellite deposit.[44] Although BMMC does not yet have significant mining operations at this site, community members report that they have already lost access to farmland, and that artisanal miners with Class B and Class C mining claims have been told to move or restrict operations without compensation.[45] Despite this clear economic displacement, the company has told the community of approximately 6,700 people that they are not eligible to receive any benefits until the company begins mining activities. Similarly, while the 2018 Stakeholder Engagement Plan anticipated that the company would begin drilling at the

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[42] SEP at Table 3 Summary of Project Social Setting.
[43] *Id.*
[44] *See* Avesoro Resources, Ndablama Gold Project, https://avesoro.com/operations/liberia/ndablama-gold-project/.
[45] Company documents indicate that exploration activities at the Ndablama deposit began as early as 2007 and that Avesoro began diamond drilling at Ndablama in 2018. *See* Pre-feasibility Report at § 9.4 Ndablama Exploration.

Ndablama deposit in early 2019,[46] it failed to appropriately identify impacts on the Gold Camp community.[47]

Recently, the company began preliminary preparation of the Ndablama mine operations, including construction of the haul road from the Ndablama deposit to the New Liberty Mine, as well as construction of a camp facility. Despite all of these new developments, there has still not been any meaningful consultation with the Gold Camp community regarding potential environmental and social impacts, nor has the company begun any negotiations regarding social benefits for the community. The Gold Camp community fears that negative impacts will increase as full scale exploration of the deposit begins and are concerned that they may be resettled.

II. FMO, DEG and Proparco are Exposed to the New Liberty Project through FirstRand Bank

This section explains the financial relationships between the three development finance institutions (DFIs) and the New Liberty project through a financial intermediary client FirstRand Bank. Subsection A sets out FirstRand's financing of the New Liberty project. Subsection B describes the active, repeat, and continuous financial relationship between all three DFIs and FirstRand since at least 2012. All three DFIs are linked to the adverse impacts caused by the New Liberty project through these relationships.

A. FirstRand Bank is the Main Financier of the New Liberty Project

Financing for the New Liberty project has been provided by just two banks, both South African, through two syndicated project loans to Avesoro Resources. FirstRand Bank is the lead arranger of both loans and provided the majority of financing. In December 2013, FirstRand Bank and Nedbank provided a $100 million loan for the project.[48] FirstRand Bank served as the lead arranger of that transaction and provided $56 million of the total amount.[49] In December 2015, FirstRand Bank and Nedbank provided an additional $10 million loan for the New Liberty mine. The first project loan is due in January 2022, and the second loan has a maturity date of January 2023.[50]

While the financing originally may have been intended for the New Liberty mine, there are also clear links to the newly expanded New Liberty project, including development of the Ndablama satellite deposit. As mentioned above, the same equipment will be used to extract the Ndablama

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[46] SEP at § 8 Proposed Expansion Project.

[47] Instead, the Plan included a general commitment to disclosure and consultation, *see* SEP at § 9.1.5 During Project Expansion and ESIA Development, and suggested that if resettlement became necessary, which was not anticipated, a RAP and SEP for the Gold Camp community would be considered. *See* SEP at §8 Proposed Expansion Project.

[48] Avesoro Resources, "First Drawdown on New Liberty project finance loan facilities of US$100 Million" (28 Apr. 2014), https://avesoro.com/2014/04/28/first-drawdown-on-new-liberty-project-finance-loan-facilities-of-us-100-million/.

[49] RMB, 'New Liberty' for Liberia, https://www.rmb.co.za/historic-deal/new-liberty-for-liberia.

[50] 2017 Consolidated Financial Statements at p. 27.

deposit,[51] the Ndablama ore will be transported back to the New Liberty processing plant,[52] and the Ndablama tailings will be stored in the New Liberty tailings facility.[53] Moreover, revenue from the Ndablama deposit will be used to service the loan.[54]

Financing from FirstRand was critical in getting the New Liberty project off the ground. At the time of the loans, the mine was not yet operational, and it did not begin generating revenue from gold sales until 2016. The lenders, and especially FirstRand as lead arranger, had considerable leverage to insist on human rights, social and environmental covenants in the loan agreement and even to link these to disbursements, given the high-risk nature of the project. By the time the second loan was approved, the New Liberty mine had already started causing serious harms, including the resettlement of communities to temporary and inadequate housing, without livelihood opportunities. Yet, FirstRand failed to use its leverage to address these emerging human rights violations and prevent the foreseeable harms to come.

In April 2017, Avesoro announced it had refinanced its loans with FirstRand and Nedbank, agreeing to new terms of the loan facilities, including a reprieve in repayments for a year and an extension on the loan.[55] The refinancing required a new legal agreement (effectively, a new loan), providing FirstRand with a full opportunity to require environmental and social conditions. In the week before the new loan agreement was signed, an exposé of the severe harms caused by the mine to local communities and the environment was published online. The article described the desperate situation of the displaced Kinjor and Larjor communities and the catastrophic arsenic and cyanide spill into the river used by local communities.[56] In a spectacular failure of due diligence, FirstRand did nothing to insist on the remediation of these harms as part of its loan negotiations, despite its considerable leverage over Avesoro at the time.

In July 2019, Avesoro reported that it had breached two undertakings of the 2017 refinancing agreement. These breaches allowed the lenders to accelerate repayment of the loans before their final maturity date; but instead, in September 2019, FirstRand Bank and Nedbank agreed to waive the events of default.[57] The breaches created another opportunity for FirstRand to apply its leverage and negotiate social and environmental terms in light of the serious harms that eventuated. But FirstRand failed to use its leverage once again.

B. FirstRand Bank is a longstanding, repeat and currently active financial intermediary client of FMO, DEG and Proparco

FMO, DEG and Proparco all have longstanding relationships with FirstRand Bank. As the table

[51] Pre-Feasibility Report at § 16.3.2 Fleet Assumptions and § 18.2.12 Transport.
[52] *Id.* at § 16.3.1.4 Stockpiling Strategy; § 17 Recovery Methods; § 21.2 Project Execution.
[53] *Id.* at § 18.3 Tailings.
[54] *Id.* at § 22.2.3 Debt.
[55] Avesoro Resources, "Amended and Restated Project Finance Facility Terms" (3 Apr. 2017), https://avesoro.com/2017/04/03/amended-and-restated-project-finance-facility-terms/.
[56] Freudenthal and David.
[57] Avesoro Resources, Condensed Interim Consolidated Financial Statements (Unaudited) for the Three and Nine Months Ended September 30, 2019 and 2018, Note 1 Nature of operations and basis of preparation: Going concern, https://avesoro.com/wp-content/uploads/2019/11/ASO-Q3-2019-Financial-Statements.pdf [hereinafter "2018-2019 Condensed Interim Consolidated Financial Statements"].

shows, all three DFIs have had a continuous relationship with FirstRand since at least 2012, and currently have an active financial relationship with the bank.

DFI	Signing Date	Loan Amount	Status	E&S Risk
Proparco	1994[58]			
DEG	2002[59]			
Proparco	2010[60]			
FMO, DEG & Proparco (plus OeEB)	June 29, 2012	$90 million	Matured June 29, 2019	
DEG & Proparco (plus OeEB)	August 18, 2016	$90 million (DEG = lead arranger; Proparco = $30 million)	Active; 7-year maturity[61]	A
DEG & Proparco	August 2, 2018	$100 million (DEG = lead arranger; $50 million each)	Active	A
FMO	November 15, 2018	$50 million	Active	A
Proparco	August 14, 2019	$50 million	Active; 12-year maturity	FI-A
FMO (plus IFC)	August 4, 2020	$75 million from FMO ($225 million total)	Active	A

As discussed in more detail in Section III, all three DFIs take a portfolio-wide approach to environmental and social (E&S) risk management for financial intermediaries.[62] They require

[58] Proparco's more recent disclosures indicate that FirstRand Bank has been a longstanding partner "since the agency opened in 1994, and it has been allocated several credit lines." *See, e.g.*, Proparco, FirstRand 2016 Project Disclosure, *https://www.proparco.fr/en/carte-des-projets/firstrand-bank-2016?origin=/en/rechercher?query=firstrand*.

[59] DEG's press release regarding its 2018 loan to FirstRand Bank indicated that it had provided six loans to the bank since 2002 to support SMEs. DEG, "DEG invests 50 million US-dollars in South African bank" (24 Aug. 2018), https://www.deginvest.de/Newsroom/News/News-Details_484992-2.html. Note that the above chart only includes four loans between 2002 and 2018, meaning that there DEG also provided an additional two loans about which we have no information.

[60] Proparco's press release regarding its 2018 loan to FirstRand Bank indicated that it had provided seven loans in "less than 20 years" including a loan in 2010. Proparco, "Proparco grants a new credit line to bank to support SMEs in South Africa" (3 Aug. 2019), https://www.proparco.fr/en/actualites/proparco-grants-new-credit-line-firstrand-bank-support-smes-south-africa. Note that the above chart only includes four loans in the 20-year period between 1998 and 2018, meaning that Proparco also provided an additional three loans about which we have no information.

[61] Proparco indicates that the loan structuring, including maturity, was exactly the same as in 2012, in which case we expect the loan to mature in August 2023. *See* FirstRand 2016 Project Disclosure.

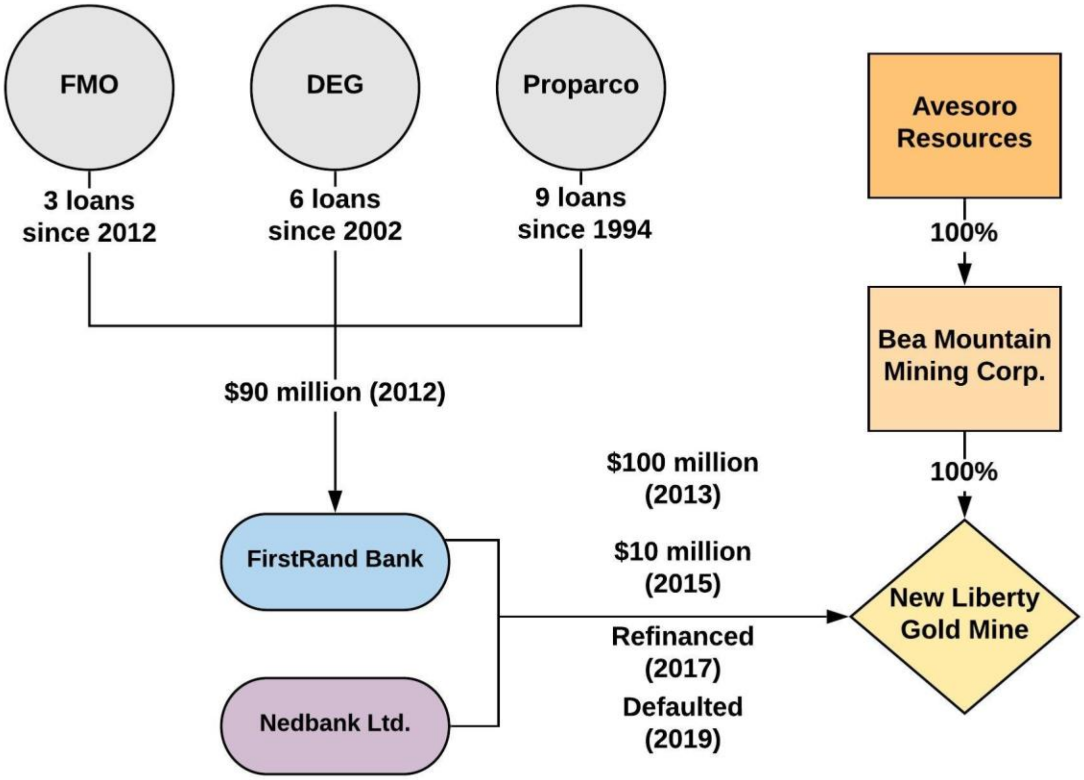
[62] FMO clearly describes this approach in its 2016 Sustainability Policy. *See* FMO, Sustainability Policy, pp. 7-8 (23 Dec. 2016), https://www.fmo.nl/l/library/download/urn:uuid:9978eafe-864f-4b3a-bed1-5e0563df0c85/fmo+sustainability+policy.pdf?format=save_to_disk&ext=.pdf [hereinafter "FMO Sustainability Policy"]. While less detailed, FMO's earlier Environmental & Social Policy also indicated that FMO took a portfolio-wide approach to E&S risk management for financial intermediary clients even prior to the adoption of its current Sustainability Policy. *See* FMO, Environmental & Social Policy, Indirect Investments pp. 3-5 [hereinafter "FMO Environmental & Social Policy"].

high risk financial intermediary clients, like FirstRand Bank, to develop, implement and maintain E&S risk management systems appropriate to the respective risk levels of their own clients. The portfolio-wide approach means that even for financial intermediary loans targeted at particular categories of on-lending, such as small and medium enterprises or climate finance, E&S responsibilities apply to a financial intermediary's entire portfolio. Thus, each of the various DFI loans to FirstRand should have triggered a requirement to apply the DFIs' environmental and social standards to high risk sub-projects, including the New Liberty mine. As described above, FirstRand had ample opportunities and leverage to do so – in 2013, 2015, 2017 and again in 2019 when it issued and refinanced or restructured its loans to Avesoro – but chose not to.

By adopting a portfolio-wide approach to their financial intermediary lending, the DFIs have made a laudable commitment to ensuring that financial intermediary clients apply the DFIs' environmental and social standards to all high risk sub-projects. It follows, therefore, that in order to ensure accountability to this commitment, communities harmed by a high risk sub-project due to a failure to apply those standards should have access to the ICM. Such access should be available so long as the DFIs continue to have an active financial relationship with the financial intermediary in question and the financial intermediary has an active relationship with the project. That threshold has been met in this case.

While DEG's Guideline for Environmental and Social Sustainability does not mention financial intermediaries, its recent disclosure statement for the Operating Principles for Impact Management reveals that DEG similarly takes a portfolio-wide approach to E&S risk management for financial intermediaries. *See* DEG, Disclosure Statement, Operating Principles for Impact Management, p. 5 (Apr. 2020), https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/DEG_Disclosure-Statement_Operating-Principles_2020.pdf [hereinafter "DEG Impact Disclosure Statement"].

Unlike FMO and DEG, Proparco does not appear to publish its sustainability or environmental and social policies, nor does its disclosure statement for the Operating Principles for Impact Management provide as much detail as DEG's with regard to its approach to E&S risk management for financial intermediaries. That being said, the Agence Française de Développement (AFD) has an E&S Risk Management Policy that appears to indicate that it too takes a portfolio-wide approach to financial intermediaries. *See* AFD, Environmental and Social Risk Management Policy for AFD-funded Operations, p. 8 (Oct. 2017), https://www.afd.fr/sites/afd/files/2017-10/Environmental-social-risk-management-policy-afd_0.pdf. Proparco is a member of the AFD Group, and although the AFD policy appears to be specific to AFD, not the AFD Group as a whole, we assume that Proparco takes a similar approach. Proparco's website supports this assumption, indicating that "client banks are engaged in, or pledge to engage in, an environmental and social risk management process related to their activity and the activities of companies in their portfolio." Proparco, Banks and Financial Services, Building the capacities of financial actors to invest in key activities for development, https://www.proparco.fr/en/page-thematique-axe/banks-and-financial-services.



Even if the DFIs did not adopt a portfolio-wide approach to their financial intermediary lending, in this case, all three DFIs are clearly exposed to the New Liberty project. Among the long list of loans to FirstRand, three stand out for creating clear exposure of the DFIs to the New Liberty mine. First, the three DFIs jointly participated in a $90 million syndicated loan to FirstRand Bank in 2012. According to an announcement by FirstRand, the loan targeted "small and medium sized enterprises (SMEs) and infrastructure projects […] in South Africa and other African countries."[63] However, the Bloomberg financial terminal notes that the loan was for general corporate purposes, implying that there was no ring fence on the use of proceeds. None of the DFIs' websites currently disclose information about the loan, beyond a passing reference in Proparco's statement regarding its 2018 loan to FirstRand.[64] IDI wrote to FMO and DEG requesting further information on the loan, including details on ring fences. FMO responded and confirmed that it provided $20 million for on-lending to "any person with an annual turnover between ZAR 7,500,000 and up to a maximum of ZAR 400,000,000."

[63] FirstRand Bank, "FirstRand signs a USD90 Million Seven Year Dual Currency Term Loan Facility" (2 Aug. 2012), https://www.firstrand.co.za/Lists/FRBNews/DispForm.aspx?ID=48&ContentTypeId=0x0100D9997E7B437BCC459B4A4AB8058EDA07. Note that FirstRand redesigned its website and the link no longer works. A list of FirstRand Bank's older press releases, including this one, can still be found here: https://web.archive.org/web/20130305165851/http://www.firstrand.co.za/Pages/News.aspx.

[64] *See* Proparco, "Proparco Grants New Credit Line to FirstRand Bank to Support SMEs in South Africa" (3 Aug. 2018), https://www.proparco.fr/en/actualites/proparco-grants-new-credit-line-firstrand-bank-support-smes-south-africa.

The conflicting information about the nature of the loan may be explained by a 2014 independent assessment of financial intermediary lending by European DFIs targeting SMEs, which concluded that the vast majority of such deals do not effectively ring fence the use of proceeds. The assessment found that rather than specifically target SMEs through ring fences, European DFIs take an indirect approach: they provide general corporate loans to strengthen a bank's overall operations, which among other things improves its ability to lend to SMEs.[65]

However, even if the loan to FirstRand Bank was contractually targeted exclusively to SMEs, the loans that FirstRand provided to Avesoro Resources would have likely fallen within the scope of a ring fence, as New Liberty did not start generating revenue from gold sales until 2016, when the mine became operational, and Avesoro Resources had no other revenue sources.[66] In 2015, when the second loan was issued, Avesoro Resources reported approximately $19 million in pre-production gold sales, falling within the definition of an SME of the European Commission[67] and the definition provided by FMO.[68]

Consequently, FirstRand Bank provided two critical project loans for New Liberty while it was a financial intermediary client of FMO, DEG and Proparco, clearly exposing the DFIs to the New Liberty project. However, the 2012 syndicated loan from the three DFIs matured in 2019, before complainants found out that they were affected by a sub-project of the European DFIs.

A second loan, however, creates another clear link between two of the DFIs and New Liberty. In 2016, DEG and Proparco provided a $90 million loan to FirstRand, with DEG as the lead arranger. This loan remains active.[69] FirstRand refinanced its two loans to Avesoro Resources in 2017, with new terms and new legal agreements, effectively issuing a new consolidated loan whilst a financial intermediary client of the two DFIs. While the 2016 loan to FirstRand was also ostensibly targeted to SMEs, the financing agreement was unlikely to have effectively restricted the use of proceeds, as described above. Indeed, the Bloomberg financial terminal describes this loan as intended for general corporate purposes.

As to FMO, while it did not participate in the 2016 loan with DEG and Proparco, it provided a separate loan to FirstRand that creates another clear link between FMO and New Liberty. In 2018, FMO provided a $50 million loan to FirstRand, which remains active.[70] As discussed above, in July 2019, Avesoro Resources reported that it had breached two undertakings of the 2017 refinancing agreement, which would have allowed FirstRand and Nedbank to accelerate

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[65] *See* Horus Development Finance, "Evaluation of the Effectiveness of EDFI Support to SME Development through Financial Institutions in Africa," Summary and pp. 63-64 (May 2014), https://www.deginvest.de/DEG-Documents-in-English/About-DEG/What-is-our-impact/14-06-02-Evaluation-of-EDFI-support-to-SMEs-through-FIs.pdf.

[66] *See* Avesoro Resources, 2015 and 2016 Consolidated Financial Statements (28 Mar. 2017), https://avesoro.com/wp-content/uploads/2017/03/FY2016_Financial_Statements.pdf.

[67] European Commission, Internal Market, Industry, Entrepreneurship and SMEs, SME definition, https://ec.europa.eu/growth/smes/sme-definition_en.

[68] On December 1, 2015, $19 million was equivalent to ZAR 274.2 million, well within FMO's definition of between ZAR 7,500,000 and ZAR 400,000,000.

[69] Proparco indicates that the loan structuring, including maturity, was exactly the same as in 2012, in which case we expect the loan to mature in August 2023. *See* FirstRand 2016 Project Disclosure.

[70] FMO, FirstRand Bank Limited Project Detail, https://www.fmo.nl/project-detail/55091.

repayment. Instead, the banks waived the events of default,[71] in essence reestablishing the relationship with Avesoro Resources while a financial intermediary client of FMO, and without seizing the opportunity presented by the breaches to insist on compliance with FMO's social and environmental policies. Moreover, while FMO's 2018 loan was targeted at trade finance, the Bloomberg Terminal refers to the loan as intended for general corporate purposes. It is therefore unlikely that the financing agreement effectively restricted the use of proceeds, and in any case, the New Liberty loan likely qualified as trade finance: the Export Credit Insurance Corporation of South Africa Limited supported at least the first New Liberty loan, suggesting that it was export credit, a form of trade finance.[72]

This repeat and continuing financial relationship gives FMO, like the other DFIs, leverage over FirstRand to use its influence with its client Avesoro. FMO, DEG and Proparco all endorse, or at minimum acknowledge the relevance of, the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.[73] These standards require them to take appropriate action, including using their leverage to prevent or mitigate adverse impacts that are directly linked to their business operations.[74] As explained above, all three DFIs are unequivocally linked to the adverse impacts caused by the New Liberty project through their 2012 syndicated loan to FirstRand, which then on-lent to Avesoro for the project in 2013 and 2015. Further, in the case of DEG and Proparco, the DFIs are linked to the harm caused by New Liberty through the 2016 loan to FirstRand, which then refinanced its loans to Avesoro with new legal terms in 2017. In the case of FMO, the 2018 loan to FirstRand creates another link to New Liberty's adverse impacts, after which FirstRand failed to use the leverage created by Avesoro's 2019 breaches to address the adverse impacts.

In a 2020 letter from the UN Working Group on Business and Human Rights (the Working Group) to the Chair of the Review Team conducting the external review of the environmental and social accountability framework of the International Finance Corporation (IFC) and the Multilateral Insurance Guarantee Agency (MIGA), the Working Group stated that where the IFC/MIGA is directly linked to adverse impacts through a financial intermediary, "the Guiding Principles would suggest that the IFC/MIGA exercise leverage to seek to mitigate impacts as a

[71] 2018-2019 Condensed Interim Consolidated Financial Statements at Note 1 Nature of operations and basis of preparation: Going concern.
[72] *See* "First Drawdown on New Liberty project finance loan facilities of US$100 Million."
[73] *See, e.g.*, FMO Sustainability Policy at § 4 Principles; Proparco, Disclosure Statement, Operating Principles for Impact Management, p. 5 (25 Jun. 2020), https://www.proparco.fr/en/ressources/disclosure-statement-operating-principles-impact-management [hereinafter "Proparco Impact Disclosure Statement"]; DEG, Guideline for Environmental and Social Sustainability, Principle 3, https://www.deginvest.de/International-financing/DEG/Über-uns/Was-wir-tun/DEG-Umwelt-und-Sozialrichtlinie/ [hereinafter "DEG Guideline"]; DEG Impact Disclosure Statement at Principle 5, n. 7; European Development Finance Institutions (EDFI), EDFI Principles for Responsible Financing of Sustainable Development, n. 5 (15 May 2019), https://www.edfi.eu/wp/wp-content/uploads/2017/09/EDFI-Responsible-Financing-SDG_Principles_final_190515-1.pdf [hereinafter "EDFI Principles"].
[74] United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Principle 19 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Organisation for Economic Co-operation and Development (OECD), OECD Guidelines for Multinational Enterprises, Part 1, Chapter IV Human Rights, para. 3 and Commentary, para. 43 (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

critical step in addressing harms to rights-holders."[75] The same principles and responsibilities apply to other DFIs, including FMO, DEG and Proparco. Pertinent to the 2012 syndicated loan – through which all three DFIs became directly linked to the adverse impacts, but which then matured in 2019 – the Working Group reiterates in the same letter that under the UNGPs, human rights due diligence and remediation responsibilities are ongoing and do not cease by virtue of divestment or discontinuance of financing services.[76]

Therefore, all three DFIs, along with FirstRand Bank, have a responsibility under the UNGPs (and the OECD Guidelines) to take steps to gain and use leverage to address the adverse impacts caused by the New Liberty project. We submit that the most effective way to exercise leverage is through the ICM process. We concur with the Working Group that DFIs and their accountability mechanisms are "uniquely placed to play a positive enabling role in helping address project-level impacts."[77]

For the multiple reasons stated above, the communities harmed by the New Liberty project should be able to access the accountability mechanism of the DFIs in order to seek redress for harms caused by the serious non-compliance with the DFI policies, as described in the next section.

III. FMO's, DEG's and Proparco's Non-Compliance with Environmental and Social Sustainability Policies

FMO, DEG and Proparco are all members of the Association of European Development Finance Institutions (EDFI), and as such, adhere to harmonized environmental, social and governance standards.[78] Members have endorsed a set of commitments set out in the EDFI Principles for Responsible Financing of Sustainable Development, which include the commitment that: "When investing through intermediaries, such as financial institutions or funds, we require these to implement systems to ensure adherence to our standards."[79]

While we are unable to ascertain what the precise policy approaches each DFI took to FI lending during the period that each loan to FirstRand was approved,[80] current policy documents of the DFIs, as well as the EDFI Principles, point to the core DFI responsibilities with respect to their investments: risk categorization and due diligence, social and environmental contracting and monitoring requirements.[81] These components are consistent with the policy requirements with respect to FI lending at other DFIs, including the IFC.

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[75] Letter to Mr. Peter Woicke, Chair of the Review Team, IFC, p. 4 (5 Mar. 2020), https://www.ohchr.org/Documents/Issues/Business/WG/20200304_WG_BHRLetter_IFC_AccountabilityReview.pdf.
[76] *Id.*
[77] *Id.* at 6.
[78] *See* EDFI Principles at p. 1 & n. 1.
[79] *Id.* at n. 3.
[80] None of the DFIs archive older policies online, making it difficult to ascertain the policy requirements at the time of some of the older loans.
[81] *See, e.g.*, FMO Sustainability Policy; DEG Guideline; DEG Impact Disclosure Statement; Proparco Impact Disclosure Statement. *See also* EDFI Principles at n. 1.

As discussed above, all three DFIs are currently required to conduct portfolio-wide due diligence on their financial intermediary clients.[82] The risk categorization of financial intermediary clients is then made on the basis of the client's existing or proposed portfolio.[83] For all of the loans for which we were able to find risk categorization information, all three DFIs correctly categorized FirstRand Bank as a high risk, Category A, financial intermediary client.

As Category A projects, FMO's, DEG's and Proparco's loans to FirstRand Bank created responsibilities for both the DFIs and FirstRand Bank with regard to FirstRand's entire portfolio. Under their policies, the DFIs should have required FirstRand Bank to establish and maintain a rigorous E&S management system commensurate with the level of risk of its subclients' projects, like New Liberty. While we lack specific information about the DFIs' efforts in this regard, the continued failure of FirstRand to insist on full and effective implementation of environmental and social conditions as part of its loan agreements with Avesoro – even as the mine's impacts on local communities became increasingly severe – suggests that the bank's E&S management system is ineffective. Given the serious and unresolved social and environmental impacts of the New Liberty project, it is clear that FirstRand either failed to require Avesoro to comply with the IFC Performance Standards in the loan agreements or failed to adequately monitor and enforce compliance with those provisions.

Under its Sustainability Policy, FMO requires its higher risk FI clients (FI-A and FI-B) to apply the IFC Performance Standards to IFC PS-triggered transactions, defined as project finance and corporate loans related to project finance with a total project size greater than $10 million or tenor longer than 36 months, as well as some projects involving country-specific sensitive issues.[84] While DEG's and Proparco's policies are less clear, we assume they are consistent with FMO's approach, given their commitment to harmonization generally, and to requiring financial intermediaries, specifically, to implement systems to ensure adherence to their environmental and social standards.[85] Therefore, the DFIs should have required FirstRand to apply the Performance Standards to high risk projects, including the New Liberty project, and to monitor compliance with those standards.

Yet, there is no indication that FirstRand Bank has taken appropriate steps to ensure that Avesoro Resources is complying with the Performance Standards in its development and operation of the New Liberty project, despite the repeated opportunities to do so after becoming a client of the DFIs.[86] While development of a RAP and other related documents may indicate that FirstRand

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[82] *See* footnote 60.
[83] *See, e.g.* FMO Sustainability Policy at pp. 7-8.
[84] FMO Sustainability Policy at p. 8 & n. 15. FMO's prior Environmental and Social Policy similarly required higher risk FI clients to apply the IFC Performance Standards to their high risk subclients. FMO Environmental & Social Policy at p. 4.
[85] *See* EDFI Principles at n. 3.
[86] FirstRand's failure in this regard is especially notable because it became a signatory to the Equator Principles in July 2009, before making either of the New Liberty loans. As such, the application of the Equator Principles forms part of its environmental and social risk assessment due diligence process, holding FirstRand to the International Finance Corporation's Performance Standards and associated guidelines. FirstRand Limited, 2013 Environmental and Social Risks in Banking and Equator Principles Report, p. 1 (Sept. 2013), https://www.firstrand.co.za/media/1031/2013_EP_report.pdf. *See also* FirstRand, FirstRand's Contract with Society, https://www.firstrand.co.za/society/firstrand-contract-with-society/. Thus, on the basis of both its Equator

required at least some initial adherence to the Performance Standards, most likely because of the early involvement of the IFC in the project,[87] the blatant lack of follow through on the RAP's commitments, as well as the serious other social and environmental failures, demonstrate major deficiencies in FirstRand's E&S management system.[88]

Therefore, either the DFIs failed to effectively require FirstRand to apply the Performance Standards to high risk transactions, including through covenants in financing agreements, or they failed to effectively monitor and supervise FirstRand to ensure that it implemented these requirements.

In conducting their due diligence for the more recent loans to FirstRand, the DFIs should have identified the extremely high risk New Liberty project in its portfolio, and used their leverage to insist that FirstRand work with its client to address and remediate the adverse impacts. The exercise of this leverage with the primary financier of the mine could have had important implications for the lives of the complainants. Repeated failure to use this leverage by FMO, DEG and Proparco when they negotiated and approved loan after loan to FirstRand is a breach of their own policies and their responsibilities under the UNGPs and OECD Guidelines.

Given the serious and ongoing social and environmental impacts on the ground, none of the DFIs should have approved new loans for FirstRand Bank without insisting on an action plan to deal with the problems with the New Liberty project. The impacts indicate that New Liberty project is operating inconsistently with several key provisions of the Performance Standards, including:

- **Failure to Avoid and Minimize Displacement:** Recognizing the involuntary resettlement – including both physical and economic displacement – can cause long-term hardship and impoverishment, IFC PS 5 requires projects to avoid resettlement whenever possible or minimize resettlement and mitigate impacts whenever it is unavoidable.[89] In this case, despite preparing a lengthy RAP and SEP, Avesoro Resources and BMMC have repeatedly failed to meet this standard. The extent of economic displacement in particular is largely unacknowledged and planned mitigation measures described in the RAP remain almost entirely unimplemented. Moreover, the physical resettlement of Kinjor and Larjor, which may have been unavoidable given their proximity to the New

Principles commitments and its relationships with the DFIs, FirstRand should have been actively applying the Performance Standards to the New Liberty loans.

[87] In July 2014, the IFC took an equity stake in BMMC; it then quietly divested sometime after the cyanide spill, probably in 2017. This is supported by the SEP, which notes that the IFC had "required extensive review and revision of the mine's ESMP prior to making an investment." *See* SEP at Table 5 Internal Stakeholders. Therefore, the mere existence of the RAP and SEP are not necessarily evidence that FirstRand required Avesoro to apply the Performance Standards to the mine.

[88] This is perhaps unsurprising considering the results of FMO's recent evaluation of its FI portfolio, which found that most clients struggle with implementing and monitoring their E&S management systems. A staggering "60% of FI-A and B+ clients have red or amber scores on proper E&S due diligence, establishing external E&S agreements and E&S monitoring and follow-up," which means that while they have made some progress in managing E&S risks, they have not yet done so successfully or made sufficient, meaningful progress. FMO, Evaluating FMO Investments in Financial Institutions, p. 6 (1 Jul. 2020), https://reporting.fmo.nl/FbContent.ashx/pub_1000/downloads/v201103155523/200701%20Final%20report%20FI%20Evaluation_ext.pdf.

[89] PS 5 at para. 2.

Liberty mine, was handled in a way that has exacerbated, rather than mitigated, negative impacts. As a result, many community members are facing livelihood disruption, economic hardship and food insecurity. Gold Camp community members now fear that they may have to be physically resettled due to the development of the Ndablama deposit, but lack concrete information about the company's plans.

- **Failure to Provide Adequate Replacements or Compensation for Losses:** IFC PS 5 requires compensation of both physically and economically displaced communities and individuals. Compensation must cover the full replacement cost of loss of assets and other assistance to help displaced persons improve or at least restore their standards of living or livelihoods.[90] For communities whose livelihoods are land or natural resource-based, compensation should prioritize equivalent replacement land and/or access to alternative resources with equivalent livelihood-earning potential,[91] and reasonable transitional support should be provided.[92] None of these standards have been met. Those community members who received compensation for lost assets report that the compensation did not cover full replacement costs, and in some communities, individuals were not compensated at all for lost assets. No one has received equivalent replacement land or access to equivalent natural resources, nor have they received adequate transitional support or effective, alternative income earning opportunities.

- **Failure to Restore Livelihoods with Disproportionate Impact on Vulnerable Groups Including Women:** Although the RAP, in line with the requirements of IFC PS 5, puts significant emphasis on livelihood restoration, noting the vulnerability of many community groups, including women, artisanal miners and subsistence farmers,[93] implementation of any livelihood restoration programs has been, at best, seriously ineffective from the point of view of affected communities.[94] As just one example, all complainant communities would like access to employment opportunities at the mine, but many report that the company's training programs are so ineffective that they give the impression that the company does not want to employ local community members. The 2018 revised SEP acknowledges that the Community Development Plan was "found unfit for purpose, while efforts toward providing opportunities for livelihood restoration and associated support has lagged behind,"[95] yet there is nothing to indicate that the company has developed or implemented a new plan to address these problems.

- **Serious Pollution of Water Sources and Exposure of Communities to Harmful Chemicals:** IFC PS 1 includes overarching obligations to avoid, minimize and compensate for E&S impacts, while PS 3 (resource efficiency and pollution prevention), PS 4 (community health, safety and security) and PS 6 (biodiversity, conservation and sustainable management of living natural resources) include specific obligations to avoid

[90] *Id*. at para. 9.
[91] *Id.* at para. 28.
[92] *Id.* at para. 29.
[93] RAP at §§ 8.5.1 Vulnerable Persons and Groups and 8.5.2 Artisanal Miners.
[94] The Community Visioning Plan affirms this point of view, indicating that all livelihood replacement and livelihood development obligations were "incomplete" as of 2019 when the report was published. Community Visioning Plan at § 2.4 Existing Obligations.
[95] SEP at §7.3 Compensation Entitlement Framework.

and reduce harm to the natural environment, as well as associated impacts on community health and livelihoods. Operations of the New Liberty project violate all of these provisions. The tailings storage facility and the cyanide leak present the clearest examples. Risks were evident even before the mine began operations: in 2014, at the time of Board approval of the IFC's investment in the project, the U.S. government raised concerns about both the use of cyanide and the tailings storage facility.[96] Nonetheless, the project moved forward, and communities have had to bear the burden of the foreseeable problems: seven months of cyanide and arsenic leaks from the tailings storage facility[97] and at least one significant cyanide spill from the processing plant.[98] The response from the company was insufficient, and affected community members are still concerned about associated water pollution, food insecurity and health impacts. Now, the tailings facility will have to be expanded to handle waste from underground mining at the New Liberty mine and waste from the Ndablama deposit. However, affected communities lack any concrete information about the risks associated with this expansion or what mitigation plans, if any, the company has developed.

- **Failure to Avoid or Minimize Health and Safety Risks to Affected Communities:** PS 4 also requires appropriate identification and mitigation of safety risks,[99] a standard that is not being met with regard to blasting associated with mine operations. In Jikando and other complainant communities, the blasting has cracked homes and community buildings, leaving community members in fear that the buildings could collapse. Noise from the blasting, which occurs without warning, day and night, causes fear and scares away wildlife, contributing to poor health and food insecurity. Jikando community members also fear that a breach of the river diversion holding dam could inundate their community. Finally, the soon-to-be expanded tailings facility likely also poses a risk to nearby communities.

- **Retaliation and Absence of Meaningful Consultation, Participation or an Effective Grievance Mechanism:** PS 1 requires a process of informed consultation and participation throughout the life of the project, and PS 5 echoes these requirements with regard to land acquisition and resettlement.[100] Both PS 1 and PS 5 also require establishment of a readily accessible grievance mechanism.[101] In this case, although many so-called consultation meetings have taken place, the significant discrepancies between what community members believe they were promised in terms of benefits from the project and their actual lived experience indicates serious flaws in the company's consultation process. These flaws have continued, with complainant communities reporting a serious lack of meaningful consultation regarding the newly expanded New Liberty project. Moreover, at least one protest aimed at raising concerns about the lack

[96] U.S. Department of the Treasury, U.S. Position on IFC Investment in the New Liberty Gold Project in Liberia (15 Jul. 2014), https://home.treasury.gov/system/files/206/US-Position-Liberia-New-Liberty-Gold.pdf.
[97] Technical Report at § 18.9.2 Current Status.
[98] Freudenthal and David.
[99] PS 4 at paras 5-6.
[100] PS 1 at paras. 30-31; PS 5 at para. 10.
[101] PS 1 at para. 35; PS 5 at para. 11.

of social benefits from the project was met with police violence and retaliation.[102] Community members report being beaten, arrested and detained for two weeks and later blacklisted for employment. Many now report feeling afraid to voice concerns.

IV. Efforts to Address These Issues to Date Have Not Been Successful

For years, complainants have attempted to raise these concerns directly with the company, with no success. They have also tried reaching out to local government officials and political leaders, with similar results. It is in that context that they sought assistance from advisors, who helped complainants identify BMMC's parent company, Avesoro Resources, as well as the links to FirstRand Bank and FMO, DEG and Proparco.

As an intermediate step before filing this complaint, complainants attempted to raise their concerns with Avesoro Resources. At complainants' request, [redacted] and Inclusive Development International, along with [redacted], sent a letter in October 2019 briefly describing community concerns and requesting a meeting and meaningful engagement to find an amicable resolution to the situation.[103] The company responded by threatening legal action.[104]

In early 2021, after engagement by the Liberian government and a community demonstration, the company has taken initial steps to fulfill some of its outstanding commitments to communities. However, these steps are not sufficient to fully address community's concerns. Moreover, given the communities' past experiences with the company, they fear that the company's renewed engagement on these issues may be short-lived.

V. Outcomes sought

Complainant communities request the ICM to undertake both dispute resolution and compliance review. They are seeking full and fair redress for all the harms and losses suffered, in line with the protections and entitlements of the IFC Performance Standards, as well as to prevent future harms and receive development benefits from the project as envisioned by the Performance Standards.

Complainant communities have not had an opportunity to engage in fully informed consultation and participation about the project, and the retaliation they have suffered when they have attempted to raise concerns has caused fear. While the company's recent steps to reengage with some affected communities in a more positive manner are welcome, they are not sufficient. Complainants have therefore concluded that a neutral, third-party facilitated dialogue process is the best way to build on the company's recent steps address their concerns and ensure full and

[102] This also raises a potential violation of PS 4, which requires assessment and documentation of risks arising from a project's use of government security personnel and seek to ensure that security personnel engage appropriately with affected communities. PS 4 at para. 13.
[103] Letter to Mr. Serhan Umurhan, CEO, Avesoro Resources and Mr. Debar Allen, General Manager, Bea Mountain Mining Corporation/Avesoro Resources Inc. (7 Oct. 2019), attached as Exhibit D.
[104] Letter to [redacted] (19 Nov. 2019), attached as Exhibit E.

fair redress for all of the harms. They believe that an amicable resolution is possible and can produce a positive relationship going forward. Complainants therefore request that the ICM initiate a mediation process between complainant communities and the company to discuss:

- Full implementation of all agreements already signed with the company;
- Just compensation for lost land and assets;
- Livelihood restoration and social benefit programs, including skill training programs, employment opportunities, business loans, construction of schools and clinics, social services, road repair and electricity;
- Remediation of polluted water sources and access to adequate, clean water;
- Measures to stop further pollution of water and land;
- Agreements to respect community land rights; and
- Appropriate resettlement of communities that are directly threatened by the mining operations.

Complainants also request that the ICM take concrete steps to create a safe and secure environment for the mediation process.

Finally, complainants also urge the ICM to conduct an investigation of FMO's, DEG's and Proparco's non-compliance with their own standards and due diligence policies in lending to FirstRand, which should include a site visit and interviews with affected communities in Liberia.