

February 8, 2018

Via Electronic Mail

Mr. James Bobbitt
Records and Information Management Specialist
Department of Management & Administration (DMA)
Overseas Private Investment Corporation
1100 New York Avenue NW
Washington, D.C. 20527

Re: Comments on OPIC's Application for Financing (OPIC-115)

Dear Mr. Bobbitt,

Thank you for the opportunity to comment on the Overseas Private Investment Corporation's (OPIC) Application for Financing (OPIC-115). As civil society organizations and practitioners who advocate for accountability in development finance and support those who have been harmed by development projects, we have a deep interest in ensuring that OPIC's projects adequately address risks to communities affected by these projects, which can undermine the sustainability of OPIC's investments.

OPIC-115, in accordance with Title IV of the Foreign Assistance Act of 1961, is the principal document used by OPIC to determine an investor's and project's eligibility for project financing. Although this form is just one part of OPIC's assessment of potential clients and projects, it is important that the form be robust enough to properly identify, at an early stage, projects that could result in potential negative impacts to communities affected by OPIC projects. We accordingly provide the following comments to both strengthen OPIC-115 and OPIC's assessment of the information provided in the form:

Question Six: Project Description

OPIC-115 requires applicants to identify the positive social and developmental impacts that they expect from the project, in accordance with OPIC's statutory mandate to contribute to the economic and social development of less developed countries and areas. We recommend that OPIC's assessment of this information provided on developmental impacts include screening and assessment of the risk that the project will not achieve the promised developmental impacts. OPIC should additionally commit sufficient resources for enhanced monitoring and site visits throughout the project cycle to ensure that all projects, and particularly high-risk projects, actually fulfill their projected developmental impacts.

Supporting Documentation: Complete Business Plan/Preliminary Information Memorandum

Project Description/Status

The Supporting Documentation section of OPIC-115 requires applicants to submit a business plan, which is expected to be as complete as possible. One section of the provided checklist for the business plan concerns the project description and status, which requests information on project development activities completed to date. This section currently does not request information on the project's consultations with project-affected communities. Projects that respect the rights of project-affected communities are only possible when communities are consulted early in the project development process and continuously throughout the project cycle. Consultations should be meaningful and should ensure the full participation of disadvantaged or vulnerable groups. Accordingly, this section of the checklist should be changed in the following manner:

Project Description/Status (Describe the purpose for which the OPIC loan is to be used and the Project development activities completed to date – the Project Company's date of incorporation, investment made to date, market or feasibility studies performed, past and ongoing consultations with project-affected communities (including disadvantaged and vulnerable groups), status of documentation/permits/government consents/land acquisition, etc.)

Legal, Economic, Political Environment, and Government Participation

The provided checklist for the business plan also asks applicants to address the legal, economic, and political environment as well as government participation, including current or pending litigation. In addition to inquiring about current or pending litigation, the checklist should require applicants to disclose if they are currently listed on any debarment lists at an International Financial Institution (IFI). Several IFIs have these lists including, the World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and the Inter-American Development Bank. This requirement would help OPIC identify applicants that have engaged in sanctionable conduct at these and other IFIs. The checklist should add the following:

International Financial Institution Debarment Lists (State whether the Project Company is currently listed on any publicly available debarment lists at an International Financial Institution, including the World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and the Inter-American Development Bank).

In addition to debarment lists, several IFIs, including OPIC, have Independent Accountability Mechanisms (IAMs) that receive complaints concerning IFI-financed activities and offer to convene the complainants (often from project-affected communities) and the IFI's client to resolve the conflict, conduct an investigation to determine if the IFI's environmental and social policies have been violated, or both. Similarly, adhering governments to the Organisation for Economic Co-operation and Development's (OECD) Declaration on International Investment

and Multinational Enterprises,¹ including the United States, are required to establish a National Contact Point (NCP) to receive complaints (known as specific instances) against companies that are operating in or from their respective countries and that have allegedly violated the standards in the OECD Guidelines for Multinational Enterprises.² NCPs are able to offer “good offices,” which can include conciliation or mediation, to the complainants and the company to facilitate resolution of the dispute.³

In order to minimize risks to OPIC and its investments, OPIC should require applicants to disclose prior, current, or pending involvement in or association with an IAM, NCP, or other community-related complaint. This can provide useful information on both the applicant’s practices, including environmental and social practices, and their willingness to rectify problems that may occur. Accordingly, the following should be added to the checklist for the business plan:

Prior, Current, or Pending Independent Accountability Mechanism and OECD National Contact Point Complaints (Describe all prior, current, or pending International Financial Institution Independent Accountability Mechanism and OECD National Contact Point complaints involving or associated with the Project or the Project Company, or shareholders, and include the nature and status of the complaint or complaints).

Risks

The checklist for the business plan additionally requires a description of the project risks and the steps that the project company will take to mitigate these risks. While the given examples of risks include credit risks, sector/market risks and competition, and political/economic risks, this section fails to specifically include environmental, social, and human rights risks. Mutually beneficial investment that increases opportunities for American businesses and workers and supports economic development abroad is only achievable when project design properly accounts for environmental, social, and human rights risks. This includes not just analysis at the project approval stage but also ongoing monitoring as well as accountability and remedy if negative impacts occur. Research has shown that the costs of negative environmental and social impacts are chronically undervalued.⁴

The sustainability of projects depends on the proper planning, monitoring, and implementation of projects to avoid and mitigate these impacts and providing remedy to communities that have been harmed by project activities. These processes should be developed and conducted in consultation with project-affected communities, and impacts (both positive and negative) should

¹ OECD. *OECD Declaration on International Investment and Multinational Enterprises*. 2011, <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm>.

² The OECD Guidelines for Multinational Enterprises are a component of the OECD Declaration on International Investment and Multinational Enterprises.

³ OECD. “Specific Instances Mechanism of the OECD Guidelines for Multinational Enterprises.” 2017, <http://mneguidelines.oecd.org/specificinstances.htm>.

⁴ Davis, Rachel and Daniel M. Franks. “Costs of Company-Community Conflict in the Extractive Sector.” *Corporate Social Responsibility Initiative Report*, No. 66, Harvard Kennedy School, 2014, https://sites.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

be revisited and updated by the applicant in consultation with these communities. This should occur at each stage of implementation – construction, operation, rehabilitation, or decommissioning – and upon any changes in project design or context. Accordingly, the text concerning risks in the business plan checklist should be changed in the following way:

Risks (describe Project risks such as credit risks, sector/market risks and competition, operational and management risks, political/economic risks, legal/regulatory risks, environmental, social, and human risks and what steps the Project Company will take to avoid and mitigate such risks and provide access to accountability and remedy for negative project impacts on individuals and communities).

Although applicants are given opportunities to provide some (not all) of this information later in the application process and OPIC engages in environmental and social screening processes for proposed projects, OPIC would benefit from an additional level of early screening to get an indication of projects that could have negative impacts. Additionally, applicants would be incentivized to start developing these processes sooner rather than later in the application process.

Thank you for considering our recommendations. We look forward to continued engagement with OPIC to ensure that the agency is a leader in environmental, social, and human rights accountability so that projects will result in benefits to the American people and communities around the world.

Sincerely,

Accountability Counsel – USA

African Law Foundation (AFRILAW) – Nigeria

Buliisa Initiative for Rural Development Organisation (BIRUDO) – Uganda

Center for International Environmental Law (CIEL) – USA

Friends of the Earth U.S. – USA

Friends with Environment in Development (FED) – Uganda

Observatoire d'Etudes et d'Appui à la Responsabilité Sociale et Environnementale (OEARSE) – Democratic Republic of the Congo

Oyu Tolgoi Watch – Mongolia

Public Interest Law Center (PILC) – Chad

Rivers without Boundaries – Mongolia

cc: The Honorable Ray Washburne, President and CEO, OPIC

Mr. Ryan Brennan, Vice President, Office of Investment Policy, OPIC