

May 20, 2019

Via Electronic Mail

Ms. Catherine F. I. Andrade
Agency Submitting Officer
Overseas Private Investment Corporation
1100 New York Avenue NW
Washington, D.C. 20527

Re: Comments on DFC's Application for Debt Financing (DFC-001)

Dear Ms. Andrade,

Thank you for the opportunity to comment on the United States International Development Finance Corporation's (DFC) Application for Debt Financing (DFC-001). 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 DFC's projects adequately address risks to communities affected by these projects, which can undermine the sustainability of DFC's investments.

DFC, the new development finance institution created by the Better Utilization of Investments Leading to Development (BUILD) Act,¹ will subsume the Overseas Private Investment Corporation (OPIC) as well as the United States Agency for International Development's (USAID) Development Credit Authority. With a projected operational date of October 1, 2019, it is crucial that DFC is established with strong policies and practices. DFC will use DFC-001 to determine eligibility for debt financing.² Although this form will presumably be just one part of DFC'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 DFC projects. We accordingly provide the following comments to both strengthen DFC-001 and DFC's assessment of the information provided in the form:

Question 5: Describe the Transaction

DFC-001 asks applicants to identify the "commercial-financial and/or social-developmental" objectives of the proposed transaction. As DFC's mandate includes "achiev[ing] clearly defined economic and social development outcomes,"³ all applicants should list the developmental objectives of the proposed transaction. Accordingly, we recommend the following change (in

¹ The BUILD Act was passed as a part of the FAA Reauthorization Act. FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §§1401-1470, <https://www.congress.gov/115/bills/hr302/BILLS-115hr302enr.pdf> [hereinafter "BUILD Act"].

² United States International Development Finance Corporation [DFC] & Overseas Private Investment Corporation [OPIC], Agency Information Collection Activities: Comment Request, 88 FR 10843 (Mar. 22, 2019), <https://www.federalregister.gov/documents/2019/03/22/2019-05436/submission-for-omb-review-comments-request>.

³ BUILD Act, *supra* note 1, §1411(4).

bold):

What are the objectives – commercial-financial and ~~or~~ social-developmental – of the proposed transaction?

Furthermore, we recommend that DFC’s assessment of this information provided on developmental impacts include screening and assessment of the risk that projects will not achieve the promised developmental impacts. DFC 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.⁴

Supporting Documentation

Several of the signatories to this submission submitted recommendations on OPIC’s Application for Financing (OPIC-115) on February 8, 2018.⁵ We appreciate the positive changes made to the Complete Business Plan/Preliminary Information Memorandum section of OPIC-115⁶ in response⁷ to our recommendations and appreciate that several of these changes are being carried over to DFC-001. However, further changes should be made to DFC-001 to ensure that it comprehensively captures the information necessary for DFC to assess potential clients and projects. DFC-001 presents the items under the checklist for the business plan as “items that applicants *may want* to consider as they prepare their business plans” (emphasis added). This language should be strengthened to strongly encourage all applicants to include the important information outlined in the checklist, such as information on past and ongoing consultations with project-affected communities. The language should be changed accordingly (in bold):

The following checklist details the items that applicants ~~may want to~~ **should** consider as they prepare their business plans.

⁴ A February 1, 2019 USAID Office of Inspector General report highlighted shortcomings with OPIC’s approach to assessing and monitoring development impacts, and issued several recommendations to improve OPIC’s current practice and inform the practice of the future DFC. USAID OFFICE OF INSPECTOR GENERAL, OPIC INVESTMENTS INCREASED CHILE’S ENERGY CAPACITY, BUT WEAK PROCESSES AND INTERNAL CONTROLS DIMINISH OPIC’S ABILITY TO GAUGE PROJECT EFFECTS AND RISKS 17, 23-25, 28 (Report No. 9-OPC-19-002-P, Feb. 1, 2019), <https://oig.usaid.gov/index.php/node/1892>. See also ACCOUNTABILITY COUNSEL ET AL., JOINT COMMENTS ON OPIC’S DRAFT REVISED ENVIRONMENTAL AND SOCIAL POLICY STATEMENT (Nov. 23, 2016), <https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/11.23.16-OPIC-ESPS-Joint-Submission-1.pdf>; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, OVERSEAS PRIVATE INVESTMENT CORPORATION, ADDITIONAL ACTIONS COULD IMPROVE MONITORING PROCESSES (GAO-16-64, December 2015), <http://www.gao.gov/assets/680/674142.pdf>; USAID OFFICE OF INSPECTOR GENERAL, ASSESSMENT OF THE OVERSEAS PRIVATE INVESTMENT CORPORATION’S DEVELOPMENT OUTCOME AND COMPLIANCE RISKS (Report No. 8-OPC-15-002-S, May 15, 2015), <https://oig.usaid.gov/sites/default/files/2018-06/8-opc-15-002-s.pdf>.

⁵ ACCOUNTABILITY COUNSEL ET AL., COMMENTS ON OPIC’S APPLICATION FOR FINANCING (OPIC-115) (Feb. 8, 2018), <https://www.accountabilitycounsel.org/wp-content/uploads/2019/05/2-8-18-submission-on-form-115.pdf>.

⁶ OPIC, APPLICATION FOR FINANCING (FORM 115) (n.d.), https://www3.opic.gov/OPICForms/Documents/OPIC_115_for_Reference_Purposes.pdf.

⁷ OPIC, RESPONSE TO COMMENTS TO OPIC NOTICE ON FORM OPIC-115 82 FEDERAL REGISTER 58456 (DECEMBER 12, 2017) (Feb. 26, 2018), <https://www.accountabilitycounsel.org/wp-content/uploads/2019/05/opic-response-to-accountability-counsel-re-opic-115-dated-2-26-2018.pdf>.

Legal, Economic, Political Environment, and Government Participation

The provided checklist for the business plan asks applicants to address the legal, economic, and political environment as well as government participation. This section includes a question on current or pending litigation, community dispute, or complaint resolution processes. While it is positive that the checklist includes community dispute or complaint resolution processes, it should be more specific and additionally inquire about independent accountability mechanism (IAM) or Organisation for Economic Co-operation and Development (OECD) National Contact Point (NCP) complaint processes. Several international financial institutions (IFIs), including the World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, OPIC, and DFC,⁸ have IAMs that receive complaints concerning IFI-financed activities and offer to convene the complainants (often members of project-affected communities), the IFI's client, and other relevant parties to resolve the conflict, conduct an investigation to determine if the IFI's environmental and social policies have been violated, or both. Similarly, governments adhering to the OECD's Declaration on International Investment and Multinational Enterprises,⁹ including the United States, are required to establish an 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.¹⁰ NCPs are able to offer "good offices," which can include conciliation or problem solving, to the complainants and the company to facilitate resolution of the dispute.¹¹

In order to minimize risks to DFC and its investments, DFC should require applicants to disclose prior, current, or pending involvement in or association with an IAM and NCP complaint in addition to asking about community dispute resolution processes. This can provide useful information on both applicants' practices, including environmental and social practices, and their willingness to rectify problems that may occur. Accordingly, this section of the checklist should be amended accordingly (in bold):

Describe any litigation, ~~or~~ community dispute, ~~or~~ complaint resolution, **International Financial Institution Independent Accountability Mechanism, and/or OECD National Contact Point** processes that have occurred or are occurring involving any of the key parties ~~to that could affect~~ this investment.

Additionally, the checklist should require applicants to disclose if they are currently listed on any IFI debarment lists. Several IFIs have these lists, and this requirement would help DFC identify applicants that have engaged in sanctionable conduct at IFIs. The checklist should add the

⁸ Section 1415 of the BUILD Act mandates the creation of an independent accountability mechanism for DFC. BUILD Act, *supra* note 1, §1415.

⁹ Organisation for Economic Co-operation and Development [OECD], *OECD Declaration on International Investment and Multinational Enterprises* (2011), <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm>.

¹⁰ The OECD Guidelines for Multinational Enterprises are a component of the OECD Declaration on International Investment and Multinational Enterprises. OECD, *OECD Guidelines for Multinational Enterprises* (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹¹ OECD, *Specific Instances Mechanism of the OECD Guidelines for Multinational Enterprises*, <http://mneguidelines.oecd.org/specificinstances.htm> (last visited Apr. 1, 2019).

following:

International Financial Institution Debarment Lists State whether the key parties associated with the transaction are 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 Inter-American Development Bank. If so, provide additional information.

Thank you for considering our recommendations. We look forward to continued engagement with DFC 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,

Abibiman Foundation – Ghana
Accountability Counsel – United States
Actions Paysages contre la Faim – Democratic Republic of the Congo
African Coalition for Corporate Accountability (ACCA) – South Africa
Buliisa Initiative for Rural Development Organisation (BIRUDO) – Uganda
Center for Biological Diversity – United States
Center for International Environmental Law (CIEL) – United States
Centre for Human Rights and Development – Mongolia
COMPPART – Nigeria
Conseil Régional des Organisations Non Gouvernementales de Développement – Democratic Republic of the Congo
Friends of the Earth U.S. – United States
Fundación Ambiente y Recursos Naturales – Argentina
Gender Action – United States
Greenpeace U.S. – United States
International Accountability Project (IAP) – United States
Lumière Synergie pour le Développement – Senegal
Nash Vek Public Foundation – Kyrgyzstan
Observatoire d'Etudes et d'Appui à la Responsabilité Sociale et Environnementale (OEARSE) – Democratic Republic of the Congo
Oyu Tolgoi Watch – Mongolia
Rivers without Boundaries Coalition – Mongolia
Youth For Environment Education And Development Foundation (YFEED Foundation) – Nepal
Youth Group on Protection of Environment – Tajikistan

cc: The Honorable David Bohigian, Acting President and Chief Executive Officer, OPIC
Mr. Ryan Brennan, Chief Operating Officer, OPIC
Ms. Anne Lesser, Acting Deputy Vice President, Office of Investment Policy, OPIC