

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 Impact Assessment Questionnaire (DFC-007)

Dear Ms. Andrade,

Thank you for the opportunity to comment on the United States International Development Finance Corporation's (DFC) Impact Assessment Questionnaire (DFC-007). 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 opening date of October 1, 2019, it is crucial that DFC is established with strong policies and practices.

DFC-007 will be the principal document that DFC will use to initiate the assessment of a project's development impact and ability to comply with environmental and social policies.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, clients and projects that could result in negative impacts to communities affected by DFC-supported activities. Several of the signatories to this letter submitted recommendations on OPIC's Office of Investment Policy Questionnaire (OPIC-248) on June 14, 2018.³ In its response, OPIC stated that they intended to only make minor changes to OPIC-248 to capture gender-disaggregated data but would revisit our recommendations in a broader revision process

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 ACCOUNTABILITY COUNSEL ET AL., COMMENTS ON OPIC'S OFFICE OF INVESTMENT POLICY QUESTIONNAIRE (OPIC-248) (June 14, 2018), https://www.accountabilitycounsel.org/wp-content/uploads/2019/05/6-14-18-joint-submission-on-form-248_final.pdf.

in 2019.⁴ We are pleased to see that some of our feedback on OPIC-248 has been incorporated in DFC-007. However, to ensure that DFC-007 solicits the information necessary for a robust assessment of potential projects and clients, we provide the following recommendations:⁵

Environmental, Social, and Human Rights Due Diligence

Investment that 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 access to remedy if negative impacts occur. Research has shown that the costs of negative environmental and social impacts are chronically undervalued.⁶ The sustainability of projects, and ultimately the avoidance of harm to project-affected communities, depends on the proper planning, implementation, and monitoring 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 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.

Although DFC-007 does include questions about the project’s Environmental and Social Management System (ESMS), it is important for the form to also explicitly ask about the applicant’s due diligence processes. DFC should include the following under the Questions Common to All Project Types section:

2 Project Social Characteristics:

Please attach documentation detailing the Project’s plans for environmental, social, and human rights due diligence processes that will be used to assess, avoid, mitigate, and monitor project risks.

Prior and Ongoing Project Complaints

We appreciate the inclusion in DFC-007, per our previous recommendation on OPIC-248, of questions on past or ongoing community dispute or complaint resolution processes in the section for non-financial services projects. While it is positive that these questions are included, they can be strengthened by additionally asking about independent accountability mechanism (IAM) and Organisation for Economic Co-operation and Development (OECD) National Contact Point (NCP) complaints. Several international financial institutions (IFIs), including OPIC and DFC,⁷

⁴ OPIC, RESPONSE TO COMMENTS TO OPIC NOTICE ON FORM OPIC-248 83 FED. REG. 16404 (APRIL 16, 2018) (June 20, 2018), <https://www.accountabilitycounsel.org/wp-content/uploads/2019/05/response-to-comments-to-opic-notice-on-form-opic-248.pdf>.

⁵ We additionally recommend that revisions to DFC-007 include the implementation of the line edits contained in our previous submission.

⁶ Rachel Davis & Daniel M. Franks, *Costs of Company-Community Conflict in the Extractive Sector*, 66 CORPORATE SOCIAL RESPONSIBILITY INITIATIVE REPORT (2014), https://www.csr.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf.

⁷ Section 1415 of the BUILD Act mandates the creation of an independent accountability mechanism for DFC. BUILD Act, *supra* note 1, §1415.

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 Declaration on International Investment and Multinational Enterprises,⁸ including the United States, are required to establish a 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.⁹ 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.¹⁰

In order to minimize risks to DFC and its investments, DFC should require the applicant to disclose prior or current IAM, NCP, or other community-related complaints against the project, applicant, any related party or affiliate of the applicant, or any supplier to the project. This can provide useful information on both the applicant's practices, including environmental and social practices, and its willingness to rectify problems that may occur. DFC-007 should be changed in the following ways (highlighted and in bold):

Questions for Non-Financial Services Projects Only

2 Project Environmental and Social Characteristics

C. Has the Project been involved in any past or ongoing community dispute or complaints resolution processes, **including at an Independent Accountability Mechanism of an International Financial Institution?** Yes No

Has the Project been involved in any past or ongoing OECD National Contact Point complaints? Yes No

Please describe the nature **and status** of the dispute(s)/complaint(s) and steps being taken to resolve (if applicable). **Please attach supporting documentation.**

Furthermore, these questions should also be included in the section for financial services projects. Although investing in financial intermediaries (FIs) can help mobilize funds and attract private capital for economic development, this type of lending also comes with significant risks, particularly around clients' adherence to environmental and social safeguards.¹¹ It is therefore

⁸ 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>.

⁹ 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>.

¹⁰ OECD, *Specific Instances Mechanism of the OECD Guidelines for Multinational Enterprises*, <http://mneguidelines.oecd.org/specificinstances.htm> (last visited Apr. 1, 2019).

¹¹ See the "Outsourcing Development" investigative series by Inclusive Development International, in collaboration with Bank Information Center, Urgewald, 11.11.11, Ulu Foundation, and Accountability Counsel. INCLUSIVE DEVELOPMENT INTERNATIONAL, OUTSOURCING DEVELOPMENT: LIFTING THE VEIL ON THE WORLD BANK GROUP'S

crucial that DFC's FI clients have robust environmental and social practices, including human rights, environmental, and social due diligence and monitoring of sub-projects as well as accountability and access to remedy, including through DFC's IAM, for project-affected communities. DFC must properly screen and identify potential clients that lack these practices.

Community Consultations

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. DFC must ensure that applicants have processes in place to ensure robust consultation and must acquire Free Prior and Informed Consent (FPIC) from affected communities. DFC-007 includes a question on community consultations. To make this question more robust, the question should be revised in the following manner (highlighted and in bold):

Questions for Non-Financial Services Projects Only

2 Project Environmental and Social Characteristics

B. Has the Project conducted or will the Project conduct consultations with Project-affected communities **throughout every stage of project design and implementation** (including disadvantaged and vulnerable groups)?

Please describe the scope and results (if applicable) of these consultations. **Please attach supporting documentation.**

The form should be revised to require this question for financial services projects as well.

Debarment Lists

DFC-007 should require applicants to disclose if they are currently listed on any debarment lists at an IFI. Several IFIs have these lists, including the World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank. This requirement would help DFC identify applicants that have engaged in sanctionable conduct at these and other IFIs. The following should be added to the Questions Common to All Project Types Section:

Is the Project, applicant, any related party or affiliate of the applicant, or any supplier to the Project 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? Yes No

LENDING THROUGH FINANCIAL INTERMEDIARIES, <https://www.inclusivedevelopment.net/wp-content/uploads/2016/09/Outsourcing-Development-Introduction.pdf>; *see also* COMPLIANCE ADVISOR OMBUDSMAN, CAO AUDIT OF A SAMPLE OF IFC INVESTMENTS IN THIRD-PARTY FINANCIAL INTERMEDIARIES (Oct. 10, 2012), http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf; COMPLIANCE ADVISOR OMBUDSMAN, THIRD MONITORING REPORT OF IFC'S RESPONSE TO: CAO AUDIT OF A SAMPLE OF IFC INVESTMENTS IN THIRD-PARTY FINANCIAL INTERMEDIARIES (Mar. 6, 2017), http://www.cao-ombudsman.org/newsroom/documents/documents/CAOMonitoringReport_FIAudit_March2017.pdf.

If Yes, please provide additional information.

Grievance Mechanisms

Project-affected communities must have robust avenues to bring complaints concerning potential or realized adverse impacts of DFC-supported activities. OPIC's Environmental and Social Policy Statement (ESPS) requires each applicant to establish a grievance mechanism,¹² and this requirement will transfer to DFC.¹³ When operating well, project-level grievance mechanisms can provide a useful information channel and means to access remedy. However, many of these mechanisms are poorly designed and suffer from the following fundamental flaws:

- Lack of independence and trust
- Incapability to properly address human rights abuses
- No oversight or accountability
- Barriers to other forms of judicial and non-judicial remedy
- No protection against reprisals
- Lack of community participation

To avoid these flaws, DFC must ensure that project-level grievance mechanisms are designed and operate according to the UN Guiding Principles on Business and Human Rights “effectiveness criteria” for grievance mechanisms – legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, and lessons learned.¹⁴ As discussed above, in addition to asking about the project's ESMS, DFC-007 should include a separate question on the project's grievance mechanism. We recommend the following for the Questions Common to All Project Types Section:

Does (or will) the Project have a grievance mechanism? Yes No

If Yes, please attach detailed information about the mechanism, including information about past and ongoing complaints and whether the mechanism undergoes a regular third-party audit to assess its effectiveness.

Protections Against Reprisals

Globally, individuals defending their human rights and the environment have increasingly faced intimidation, violence, and reprisals. DFC-007 should include a question on the applicant's protocol for preventing and addressing threats of and actual retaliation against complainants or those associated with project complaints or grievances. We recommend the following for the Questions Common to All Project Types Section:

Please describe the Project's protocol to prevent and address threats of or actual

¹² OPIC, ENVIRONMENTAL AND SOCIAL POLICY STATEMENT para. 3.8 (Jan. 13, 2017), [https://www.opic.gov/sites/default/files/files/final revised ESPS 01132017\(1\).pdf](https://www.opic.gov/sites/default/files/files/final%20revised%20ESPS%2001132017(1).pdf).

¹³ BUILD Act, *supra* note 1, §1466(a).

¹⁴ Office of the U.N. High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Principle 31, U.N. Doc. HR/PUB/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

retaliation against grievance mechanism complainants and those associated with Project complaints or concerns. Please attach supporting documentation.

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