

November 23, 2016

***Via Electronic Mail***

Kate Dunbar, Director of Social Assessment  
Overseas Private Investment Corporation  
1100 New York Avenue NW  
Washington, DC 20527  
Email: [esps@opic.gov](mailto:esps@opic.gov)

**Re: Comments on OPIC'S Draft Revised Environmental and Social Policy Statement**

Dear Ms. Dunbar:

We are writing in response to your release of revisions to the Overseas Private Investment Corporation's (OPIC) draft Environmental and Social Policy Statement (Draft ESPS) on September 23, 2016. Based on our assessment of the latest draft, we wish to provide the following comments.

Our comments are, in part, based upon the aftermath of OPIC's investment in the Buchanan Renewables (BR) energy projects in Liberia. In January 2014, hundreds of Liberian farmers, charcoalers, and workers filed a complaint about harm caused by OPIC's investment in BR. OPIC's President and CEO then requested that the Office of Accountability (OA) conduct a review to assess the credibility of the allegations, the application of relevant policies to the project, and the adequacy of OPIC's policy framework. In September 2014, the OA released its report (OA Report)<sup>1</sup>, finding many of the allegations of harm credible and making a number of recommendations in order to avoid such harm recurring in the future. The OA report stressed that revising the ESPS would address several of the recommendations.<sup>2</sup>

In its response to the OA's recommendations and prompting by Congress<sup>3</sup>, OPIC committed to reviewing the ESPS, taking into consideration stakeholder input.<sup>4</sup> We are encouraged that OPIC has incorporated some of our recommendations from the discussions at the December 9, 2015 and April 11, 2016 ESPS review stakeholder consultations, as well as our comments on the current ESPS submitted on March 28,

---

<sup>1</sup> OPIC Office of Accountability, *OA Review: Buchanan Renewable Energy Projects in Liberia* (Sept. 2014), available at [https://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report\(1\).pdf](https://www.opic.gov/sites/default/files/files/OA%20Buchanan%20Report(1).pdf) [OA Report].

<sup>2</sup> OA Report, pp. 12, 54-55, 75-76.

<sup>3</sup> *Explanatory Statement to the Consolidated and Further Continuing Appropriations Act (2015)*, available at <https://www.gpo.gov/fdsys/pkg/BILLS-113hr83enr/pdf/BILLS-113hr83enr.pdf>.

<sup>4</sup> Accountability Counsel, *Scoring OPIC One Year On 25* (Jan. 2016), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/Final-OPIC-Report.pdf> [OPIC Scorecard].

2016.<sup>5</sup> We note, however, several areas where further improvement is necessary to ensure that the ESPS comprehensively provides for the proper due diligence and monitoring of environmental, social, and human rights impacts.

We provide our comments and recommendations below, first in general terms on the most significant gaps in the revised Draft ESPS, and then in more specific terms according to the corresponding sections of the revised draft. We have coordinated our comments to provide feedback on those policy issues that are most relevant to our collective experience and expertise, particularly in working with project affected communities.

In addition to referencing the OA report, we also refer to recent reports on OPIC by the U.S. Agency for International Development Office of Inspector General<sup>6</sup> (USAID OIG) and the U.S. Government Accountability Office<sup>7</sup> (GAO), as well as specific examples of policies and procedures to which OPIC may wish to look for guidance in its review.

## **I. General Comments**

Our general comments discuss the significant gaps in the Draft ESPS in the following areas:

1. Human Rights Due Diligence
2. Assessment and Monitoring of Development Outcomes
3. Monitoring Procedures
4. Access to Remedy and Accountability

### **1. Human Rights Due Diligence**

One of the major recommendations of the OA following OPIC's failed BR project in Liberia was that OPIC establish formal criteria and processes for human rights due diligence within the ESPS, including a review of the ESPS to establish specific procedures for identifying, assessing, and managing human right risks.<sup>8</sup>

We recognize and appreciate OPIC's efforts to include more references to human rights and social impacts in the Draft ESPS. However, this inclusion remains incomplete.

---

<sup>5</sup> *Joint Submission on OPIC's Review of its Environmental and Social Policy Statement* (Mar. 28, 2016), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2012/02/3.28.16-OPIC-ESPS-Joint-Submission.pdf> [Joint Submission].

<sup>6</sup> Office of Inspector General, U.S. Agency for International Development, *Assessment of the Overseas Private Investment Corporation's Development Outcome and Compliance Risks* (Report No. 8-OPC-15-002-S, May 15, 2015), available at <https://oig.usaid.gov/sites/default/files/audit-reports/8-opc-15-002-s.pdf> [USAID OIG Report].

<sup>7</sup> U.S. Government Accountability Office, *Overseas Private Investment Corporation, Additional Actions Could Improve Monitoring Processes* (GAO-16-64, Dec. 2015), available at <http://www.gao.gov/assets/680/674142.pdf> [GAO Report].

<sup>8</sup> OA Report, pp. 12, 75-76.

The ESPS's requirements for compliance with legal frameworks should more adequately incorporate international human rights law. Furthermore, the definition of human rights is inappropriately narrow. Provisions relating to non-discrimination could be clarified and strengthened.

We additionally note the expansion of the Special Consideration category to include project-related social risks. While this is an improvement to the current ESPS, the Draft ESPS does not establish a clear system whereby due diligence measures are assigned based on varying levels of risk. There are now potentially seven different risk categories, including: Categories A, B, C, and D;<sup>9</sup> Special Consideration,<sup>10</sup> projects with “significant adverse impacts;”<sup>11</sup> and projects with “heightened social risk.”<sup>12</sup> The distinction between these risk categories is not clear. Additionally, there is no clarity as to what specific due diligence measures, such as screening, impact assessment, monitoring, reporting, disclosure, use of experts, etc., are required for each risk category.

We further note the addition of Social Risk Due Diligence (SRDD). Again, it is unclear what SRDD entails. For instance, it is not clear whether an Environmental and Social Impact Assessment (ESIA) or additional monitoring is required as a part of SRDD.<sup>13</sup> An actual procedure is necessary to spell out the requirements for SRDD. As such, while human rights and social risk receive more mention in this Draft ESPS, there is still no defined process of human rights due diligence.<sup>14</sup> Moreover, in the Draft ESPS, diligence is at times based on the “size and nature of the project activity,” rather than the significance or severity of potential impacts, as human rights due diligence would require.

Although the ESPS has added new human rights elements, the applicant<sup>15</sup> roles and responsibilities are still listed in terms of compliance with the IFC Performance Standards (PS).<sup>16</sup> OPIC's adoption of the PS, while commendable, does not guarantee compliance with best practice for environmental and social sustainability. The PS are not

---

<sup>9</sup> OPIC, *Draft Environmental and Social Policy Statement*, para. 2.6, (Sept. 2016), available at [https://www.opic.gov/sites/default/files/files/draft\\_revised\\_ESPS\\_092216.pdf](https://www.opic.gov/sites/default/files/files/draft_revised_ESPS_092216.pdf) [Draft ESPS].

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* at paras. 5.7 and 5.17.

<sup>12</sup> *Id.* at para. 3.10.

<sup>13</sup> This point is further explored in our comments on Paragraph 3.10.

<sup>14</sup> For examples of methodologies for human rights due diligence, see Coalition for Human Rights in Development, *Rights Due Diligence Methodology*, available at [www.rightsindevelopment.org/HRDD](http://www.rightsindevelopment.org/HRDD) [Coalition Methodology] and Social Risk Analysis Tool (forthcoming); Shift Project, *Human Rights Due Diligence in High Risk Circumstances* (March 2015), available at <http://www.shiftproject.org/resources/publications/human-rights-due-diligence-high-risk-circumstances/> [Shift]; Danish Institute for Human Rights, *Impact Assessment and Guidance*, available at [http://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria\\_toolbox/hria\\_guidance\\_and\\_toolbox\\_final\\_may2016.pdf\\_223795\\_1\\_1.pdf](http://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/hria_guidance_and_toolbox_final_may2016.pdf_223795_1_1.pdf) [Danish Institute].

<sup>15</sup> To parallel the Draft ESPS, this submission will use the term “applicant” to refer to investors, lenders, insurers, or projects sponsors applying for (or receiving) OPIC support. See Draft ESPS, Appendix D. Some sources cited by this submission use the term “client” instead of “applicant.”

<sup>16</sup> IFC, *Performance Standards on Environmental and Social Sustainability* (Jan. 1, 2012), available at [http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbff1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbff1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES) [IFC PS].

a complete set of environmental and social safeguards and do not include human rights due diligence. Basing social due diligence on the limited areas addressed in the PS can mean that important impacts, including human rights impacts, are missed.<sup>17</sup> For this reason, many institutions that require compliance with the PS also require compliance with other standards and protocols, such as those dealing with gender, land tenure, non-discrimination, or conflict. In addition to requiring compliance with the PS, OPIC should require applicants to comply with the UN Guiding Principles on Business and Human Rights<sup>18</sup> (UN Guiding Principles) and the OECD Guidelines on Multinational Enterprises<sup>19</sup> (OECD Guidelines), and should additionally spell out a procedure for human rights due diligence for OPIC staff.<sup>20</sup>

OPIC asserts that it has developed due diligence guidance for projects with social risks.<sup>21</sup> We request that OPIC make publicly available any internal guidance, procedures, or policies on human rights or social risk due diligence.

## 2. Assessment and Monitoring of Development Outcomes

OPIC is a development finance institution with a specific mandate to contribute to the economic and social development of less developed countries and areas.<sup>22</sup> In order to ensure that OPIC-supported projects deliver on development outcomes, the OA recommended that OPIC consider explicit screening and assessment of the risk that a project will not achieve positive, projected development impacts, with enhanced monitoring and internal resources for projects that carry elevated risk.<sup>23</sup>

OPIC is statutorily required to monitor the economic and social impacts and benefits of its projects and report this information to Congress annually.<sup>24</sup> Notwithstanding this mandate, in Liberia, the OA found that OPIC's risk management

---

<sup>17</sup> CDC, "Human Rights," *ESG Toolkit for Fund Managers* (June 2015), available at <http://toolkit.cdcgroup.com/e-and-s-briefing-notes/human-rights>.

<sup>18</sup> UN, *UN Guiding Principles on Business and Human Rights* (2011), available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [UN Guiding Principles].

<sup>19</sup> OECD, *OECD Guidelines for Multinational Enterprises* (2011), available at <http://dx.doi.org/10.1787/9789264115415-en> [OECD Guidelines].

<sup>20</sup> Key features of the Coalition Methodology include: a definition of social impacts that include human rights impacts and any inequitable distribution of development risks and opportunities; procedures for screening and categorization of social impact risk by the financial institution, which will determine the level of required due diligence; a requirement on the client, with support from the financial institution, to conduct a Social Impact Assessment (SIA) (the SIA incorporates human rights impacts prior to project approval and at key project milestones) to evaluate project alternatives and determine project design in order to ensure a fair distribution of positive social impacts, avoid human rights abuses and minimize negative social impacts; and a requirement to formalize mitigation, supervision, and monitoring plans in a "commitment plan" signed by the financial institution, the client, and affected communities.

<sup>21</sup> OPIC Scorecard, pp. 24-25.

<sup>22</sup> *Foreign Assistance Act of 1961 (as amended)*, Pub. L. No. 87-195, §231 (2016), available at <http://legcounsel.house.gov/Comps/Foreign%20Assistance%20Act%20Of%201961.pdf> [Foreign Assistance Act]; see also USAID OIG Report, p. 6.

<sup>23</sup> OA Report, pp. 9-10, 69-72.

<sup>24</sup> Foreign Assistance Act, §§239 (g)-(h), 240a (1).

system failed to explicitly assess the elevated risks that the BR project would not achieve its projected development benefits.<sup>25</sup> A document recently released under the Freedom of Information Act (FOIA) shows that OPIC was well aware of the challenges that BR faced.<sup>26</sup> Staff at the U.S. Embassy in Monrovia wrote to OPIC expressing “significant concerns” about the viability and sustainability of the BR project.<sup>27</sup> The post identified a number of risks that ultimately eventuated and became the subject of the complaint and OA Report, including: the uncertain and potentially detrimental supply relationships with smallholder plantations;<sup>28</sup> lower than projected rates of rubber replanting;<sup>29</sup> and potentially negative impacts on the downstream charcoal industry, posing particular risks for women and other vulnerable groups that rely on this source of income.<sup>30</sup> In relation to BR’s asserted engagement with a local rubber plantation association, the post had received information that directly conflicted information provided by BR.<sup>31</sup> For these and other reasons, the post concluded that it could not support the project without additional information. We assume, based on the approval and ultimate failure of the BR project, that these warnings were not adequately accounted for within OPIC’s project appraisal and monitoring processes.

In our March 2016 submission, we made several recommendations to address this gap, including a requirement to collect baseline data, and enhanced monitoring and disclosure procedures that require regularly monitoring and publicly reporting on development impacts.<sup>32</sup> We are highly disappointed that our recommendations were not included in the Draft ESPS and call on OPIC to include these recommendations in its final draft.

A robust system for assessing and monitoring development outcomes will also require broader risk management systems and procedures, likely outside the scope of the ESPS. The OA recommended that the OPIC President task an appropriate internal group to develop an approach to improve risk management systems for projects with a high risk of not achieving projected development impacts;<sup>33</sup> however, we recommended that the improved systems apply to all projects, given the ongoing flaws identified by the USAID OIG<sup>34</sup> and GAO<sup>35</sup> reports. In March of 2016, OPIC formally created a Risk Committee

---

<sup>25</sup> OA Report, pp. 9, 12, 68-69. Among other reasons, the OA explains that: projected development benefits are currently based on self-reports from clients or prospective clients (OPIC does not conduct an explicit *ex ante* assessment of those reports); OPIC’s risk management system is principally focused on credit (financial) risk, the management of which only indirectly supports development impacts; and there may in fact be internal tensions between allocating credit risk and ensuring development impacts, with the result that credit risk is managed to the detriment of development outcomes. *See also* USAID OIG Report, p. 5.

<sup>26</sup> Doc. No. C05960391 (Jan. 3, 2011), *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2016/11/State-Response-Doc.-No.-2.pdf> [FOIA Document].

<sup>27</sup> *Id.* at para. 1.

<sup>28</sup> FOIA Document, paras. 1, 9-11.

<sup>29</sup> *Id.* at para. 13.

<sup>30</sup> *Id.* at paras. 1 and 14.

<sup>31</sup> *Id.* at para. 10.

<sup>32</sup> Joint Submission, p. 22.

<sup>33</sup> OA Report, pp. 9-10, 69-72.

<sup>34</sup> The USAID OIG report identifies OPIC as having “medium” vulnerability of not meeting its statutory requirement to “achieve social and economic development in target countries,” because: (1) OPIC’s

of the Board of Directors, which is tasked with providing oversight on policies concerning the assessment, monitoring, and management of “strategic, reputational, regulatory, operational, and financial risks.”<sup>36</sup> The Risk Committee’s<sup>37</sup> mandate should be expanded to provide oversight on development risks as OPIC must robustly and explicitly assess, manage, and monitor the risk that projects will not achieve projected development benefits. Any failure to do so is unacceptable given that development is a core feature of OPIC’s statutory mandate.<sup>38</sup>

### 3. Monitoring Procedures

Another frequent theme among the OA Report and the recent USAID OIG and GAO reports is the need for OPIC to improve its project monitoring processes.

In Liberia, the OA found a substantial disconnect between the information received by OPIC through its formal monitoring channels (including self-monitoring questionnaires submitted by BR) and the allegations in the complaint, including allegations which the OA found credible.<sup>39</sup> This finding is reinforced by the aforementioned document recently released under FOIA, where the U.S. Embassy in Monrovia cast substantial doubt on a number of BR’s claims, including regarding the security of its supply relationships with smallholder plantations, its engagement with a local plantation association, and its rate of rubber replanting.<sup>40</sup> In our March 2016 submission, we recommended enhanced monitoring procedures, particularly for high-risk projects. Our recommendations included more frequent site visits and the extension of monitoring to verifying development outcomes, as well as environmental and social risks and impacts.<sup>41</sup> Additionally we recommended OPIC support for participatory and community-based monitoring.

We have found little improvement in the Draft ESPS concerning monitoring. The Draft ESPS still has OPIC heavily relying on applicant supplied information for monitoring. The Draft ESPS does include a provision requiring the risk-based

---

contribution to development might be reduced by overemphasizing financial considerations; and (2) development scores assigned to each project rely on self-reported estimates and might be inaccurate. OIG Report, p.5.

<sup>35</sup> The GAO report found that OPIC’s reliance on client-reported data, combined with limited resources for data verification (including limited site visits post-approval), may result in OPIC having inadequate or inaccurate information about a project’s development impact. GAO Report, pp. 40 and 43.

<sup>36</sup> OPIC, *Risk Committee Charter* (Mar. 17, 2016), available at [https://www.opic.gov/sites/default/files/files/BDR\(16\)21Charter\\_Risk%20Committee.pdf](https://www.opic.gov/sites/default/files/files/BDR(16)21Charter_Risk%20Committee.pdf).

<sup>37</sup> OPIC has stated that, in 2014, they created an “an internal risk management committee to monitor and assess potential agency risk related to client, credit, reputation, and resources.” OPIC, *Report in Response to the FY15 Consolidated and Further Appropriations Act (H.R. 83) 3* (Mar. 16, 2015), available at <https://www.opic.gov/sites/default/files/files/report-to-congress-03172015.pdf> [OPIC Response]. It is not clear whether the Risk Committee is a continuation of the committee created in 2014. We have not found any publicly available information on the 2014 committee.

<sup>38</sup> Foreign Assistance Act, §231; See also USAID OIG Report, p. 6.

<sup>39</sup> OA Report, pp. 71-72.

<sup>40</sup> See FOIA Document, paras. 10 and 13.

<sup>41</sup> Joint Submission, pp. 12, 17-18.

prioritization of OPIC site visits. However, the timeline and number of site visits are still insufficient to adequately monitor projects.

Although we recognize OPIC's resource constraints, this should not justify inadequate monitoring of high-risk projects,<sup>42</sup> particularly given that OPIC "operates on a self-sustaining basis at no net cost to American taxpayers."<sup>43</sup>

As the OA report outlined, where resources are not available to adequately monitor high-risk projects, OPIC should decline approval for the project.<sup>44</sup>

#### **4. Access to Remedy and Accountability**

To date, the affected communities and individuals in Liberia have yet to receive any meaningful remedy for the harm caused by the BR projects. The case highlighted OPIC's need to: strengthen its policies on the OA, require grievance mechanisms to follow best practice, and create avenues for receiving meaningful redress.

In its report, the OA concluded that the BR project in Liberia demonstrated<sup>45</sup> a serious limitation to the effectiveness of the OA itself. Vulnerable, project affected people only became aware of the OA's services after it was too late for them to request its services.<sup>46</sup> As the OA pointed out, awareness is a prerequisite to access to remedy. In our March 2016 submission, we recommended that the ESPS explicitly require applicants to promote awareness of OA services in affected communities. Unfortunately, this recommendation was not incorporated into the Draft ESPS.

We additionally called for a requirement in the ESPS that the OA be staffed by highly qualified personnel at all times.<sup>47</sup> After leaving the OA Director post vacant for almost 16 months, OPIC hired its current OA Director in February 2016.<sup>48</sup> The current Director's position is not full time and the Office lacks the necessary staff support to fulfill its mandate. Troublingly, the Draft ESPS does not include the requested staffing requirement. We recommend that the final ESPS incorporate our previous recommendations, as well as include a requirement that OPIC dedicate sufficient resources to support the OA's work.

---

<sup>42</sup> OPIC's resource limitations are mentioned in the GAO Report, p. 43.

<sup>43</sup> OPIC FAQs, <https://www.opic.gov/who-we-are/faqs> (last visited Nov. 20, 2016).

<sup>44</sup> OA Report, pp. 10, 71.

<sup>45</sup> The OA acknowledged that this problem is common among communities affected by OPIC-supported projects. OA Report, p. 55.

<sup>46</sup> *Id.* This was due to BR's repayment of the loan and the end of its contractual relationship with OPIC.

<sup>47</sup> Joint Submission, p. 25.

<sup>48</sup> Congress, concerned about the OA Report and the harm caused by the BR project, included provisions in an explanatory statement to the Consolidated and Further Continuing Appropriations Act, 2015 that required OPIC to staff its vacant OA through an open and competitive process. Explanatory Statement to the Consolidated and Further Continuing Appropriations Act, 2015; *See also* OPIC Welcomes Dr. William Kennedy As Director, Office of Accountability, (2016), <https://www.opic.gov/press-releases/2016/opic-welcomes-dr-william-kennedy-director-office-accountability> (last visited Feb. 23, 2016).

OPIC requires most applicants to establish Project Level Grievance Mechanisms (PLGMs).<sup>49</sup> PLGMs are systems designed and operated by project management to address concerns of individuals, communities, and/or workers who are negatively affected by a project's impacts.<sup>50</sup> When operating well, PLGMs provide another useful information channel and means to access remedy. However, the effectiveness of PLGMs is often questionable as the actors who manage the mechanism and determine outcomes are the same as those who potentially perpetrated the harm. Many of these mechanisms suffer from the following fundamental flaws:<sup>51</sup>

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

We urge OPIC to avoid the pitfalls of poorly designed and implemented PLGMs and require applicants to incorporate best practice. In our March 2016 submission we recommended<sup>52</sup> that the ESPS expressly require, at a minimum, that PLGMs incorporate the “effectiveness criteria”<sup>53</sup> set forth in the UN Guiding Principles, which the U.S. government has endorsed. These include: legitimacy, accessibility, predictability, equitability and fairness, transparency, rights compatibility, serving as a source of continuous learning and based on engagement and dialogue.<sup>54</sup> The Draft ESPS does not include the requested provisions on the effectiveness criteria, nor does it indicate any process for systematically monitoring PLGMs. This omission keeps applicants' PLGMs vulnerable to the flaws mentioned above.

---

<sup>49</sup> Draft ESPS, paras. 3.8 and 7.7.

<sup>50</sup> See Katherine McDonnell (EarthRights International), Community-Designed Grievance Mechanisms: A Proposal to Ensure Effective Remedies for Corporate Human Rights Abuses at the Operational Level (June 10, 2014), available at <http://www.earthrights.org/blog/community-designed-grievance-mechanisms-proposal-ensure-effective-remedies-corporate-human>; IFC, *Addressing Grievances from Project-Affected Communities: Guidance for Projects and Companies on Designing Grievance Mechanisms* 4 (Sept. 2009), available at <http://www.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18>.

<sup>51</sup> Rights and Accountability in Development, *Principles without Justice: The Corporate Takeover of Human Rights* (Mar. 2015), available at <http://www.raid-uk.org/sites/default/files/principles-justice-summary.pdf>.

<sup>52</sup> Joint Submission, p. 19.

<sup>53</sup> See UN Guiding Principles, Principle 31(a)-(h).

<sup>54</sup> For additional guidance, see the joint letter dated April 24, 2015 to Secretary Kerry on project-level grievance mechanisms (co-signed by Accountability Counsel, the Center for International Environmental Law, and Friends of the Earth), available at [http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/4.24.2015-NAP-submission\\_AC-CIEL-FoE.pdf](http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/4.24.2015-NAP-submission_AC-CIEL-FoE.pdf).



In this current submission we additionally recommend that OPIC require an independent audit of applicants' PLGMs to ensure that they are functioning according to the effectiveness criteria. We do note that OPIC has asserted that they now require "more robust" grievance mechanisms to address allegations of harm.<sup>55</sup> We request that OPIC make publicly available any internal guidance, procedures, or policies on PLGMs.

To ensure accountability and redress, we also recommended that OPIC require that applicants contribute to an OPIC (or third-party) administered contingency arrangement, such as a fund, insurance plan, or bond, to provide financial or other remedy in case negative impacts occur.<sup>56</sup> Contributions would be based on project risks and built into OPIC's contractual arrangement with its applicant. Unfortunately, OPIC did not include this requirement in the Draft ESPS, leaving the real potential for harmed individuals and communities to be left without redress, as the communities in Liberia have been.

## **II. Specific Comments by Section**

### **Section 1: Introduction**

#### Paragraph 1.1, Footnote 1

We appreciate the expanded definition of "social." However, it is also important to have a definition of "social impacts" which would explicitly include: i) human rights impacts; ii) the different or disproportionate accrual of adverse impacts on groups due to their experience of marginalization, discrimination, or exclusion and iii) the inequitable access to developmental benefits due to a group's experience of marginalization, discrimination, or exclusion. This definition of social impacts should be included in the Glossary.

#### Paragraph 1.3

The ESPS should provide that, in addition to respecting human rights, projects receiving OPIC support "undertake necessary due diligence in the design, implementation, monitoring and evaluation of those projects, and take appropriate steps to remedy any violation, following the UN Guiding Principles on Business and Human Rights and OECD Guidelines." Additionally, projects receiving OPIC support should "promote substantive equality and avoid prejudice or discrimination (whether formal or informal, direct or indirect), particularly toward disadvantaged or vulnerable groups, including in the distribution of adverse impacts or in access to development resources and project benefits."

### **Section 2: Screening and Categorization**

#### Paragraph 2.0

---

<sup>55</sup> OPIC Response, p.2.

<sup>56</sup> Joint Submission, pp. 8-9.

Paragraph 2.0 should expressly include, as an objective, “the identification and evaluation of project alternatives and other opportunities to minimize adverse impacts and to maximize inclusive development benefits,” to be investigated as part of the environmental and social review process. Changes should also be made throughout this section to ensure that OPIC’s screening and categorization process considers the risk that projected development benefits will not be realized or will be realized inequitably, in addition to the risk of negative impacts.

#### Paragraph 2.4

Paragraph 2.4 should explicitly provide that, when assessment of a given impact scenario is incomplete or impossible to undertake at the time of analysis, a precautionary approach will be applied.

#### Paragraph 2.5

We appreciate the expansion of the fourth bullet point in this section, dealing with adverse impacts on project affected people. The first point of Paragraph 2.5 should be amended to expressly require that the study area of the environmental and social screening and categorization and the environmental and social review extend to the project’s entire area of influence.

#### Paragraph 2.6

The definition of Category A should include projects that “may” have significant adverse environmental and/or social impacts, and not just projects that are “likely” to have significant adverse impacts. Where significant adverse risks are involved, a precautionary approach is appropriate.

Additionally, there is a significant drafting error in the bullet point with the definition of Category A project. The phrase, “in the absence of adequate mitigation measures” should be attached to the end of the first sentence. The sentence “Category A projects are considered high risk,” should stand alone. This will clarify that the risk level of projects is assessed without taking into consideration mitigation measures.

The inclusion of other social risks within the definition of Special Consideration, while appreciated, could be more coherent. Special Consideration projects, at their core, are those that because of the location, sector, nature of the project, capacity or track record of the applicant, country context or history, or presence of vulnerable groups, present a heightened potential for significant adverse social impacts, including human rights and labor rights impacts. It is positive that the determination of risks for Special Consideration considers the severity of risks. However, it is not appropriate to base this determination on likelihood or probability. Additionally, severity (or significance) should be defined based on the scale of impacts (number of those affected), the vulnerability of those affected, and the remediability of the potential impacts.

In light of the heightened potential for adverse risks posed by Special Consideration projects, we recommend a robust protocol commensurate with human rights due diligence.

#### Paragraph 2.7

We welcome the inclusion of supply-chain impacts in Paragraph 2.7. Human rights impacts should be added to the list of impacts that OPIC considers in categorizing projects unless OPIC employs a definition of social impacts that explicitly includes human rights impacts. Risk assessment should additionally be conducted “upon significant changes in the project or local context.”

#### Paragraph 2.9

To parallel the new system of project screening and due diligence outlined earlier in Section 2, under “OPIC’s Roles and Responsibilities,” Paragraph 2.9 should be amended to reflect the greater emphasis on human rights impacts. In addition to meeting the requirements of the PS, applicants should be required to follow due diligence requirements set forth in the UN Guiding Principles and OECD Guidelines, or another specified protocol for human rights or social risk due diligence. Additionally, the process for identifying risks should not be based on the “size and nature of the Project activity.” Rather it should be based on the severity of project risks and significance of project impacts.

### **Section 3: Environmental and Social Review**

#### Paragraph 3.4

Paragraph 3.4 should more specifically outline that OPIC is required to provide guidance to assist the applicant in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social risks and impacts in accordance with the ESPS and PS and in compliance with national and international law.

#### Paragraph 3.5

The “human rights review” referred to in Paragraph 3.5 of the ESPS is based on the Department of State’s binary, country-level human rights clearance. The only output of this process is a clearance date, a brief description of the clearance process, and a public project summary.<sup>57</sup> This process is plainly insufficient as a means of project-level human rights risk assessment. We appreciate the increased references to human rights and human rights screening in Section 3. However, Paragraph 3.5 should explicitly and clearly explain the relationship (and the distinction) between the Department of State human rights review process and any project-specific screening and review of human rights risks and impacts. Importantly, it should be clear that human rights risks will be integrated within the environmental and social screening, categorization and review

---

<sup>57</sup> OA Report, p. 54.

process, in addition to any human rights review or clearance by the Department of State. Furthermore, it should state that a positive human rights clearance from the Department of State does not indicate that the project's human rights risks are acceptable.

#### Paragraph 3.6

To ensure from the outset that OPIC-supported projects will be adequately and appropriately monitored throughout the project's lifecycle, Paragraph 3.6 should include that OPIC will also decline support for a project if resources are not available to adequately monitor the high-risk project. Paragraph 3.6 should also specify in point four that projects may not contravene a country's obligations under international law.

#### Paragraph 3.7

The Environmental and Social Management System (ESMS) should be commensurate with the "significance of potential impacts or severity of risk," not just the "size and nature of the project organization."

#### Paragraph 3.8

To avoid common pitfalls associated with PLGMs, the ESMS should expressly require, in Paragraph 3.8 or in a separate provision, that at a minimum PLGMs incorporate the "effectiveness criteria" set forth in the UN Guiding Principles and should be developed in consultation with project affected people and stakeholders.

#### Paragraph 3.10

We appreciate the inclusion of human rights as a topic for the environmental and social assessment review. However, Paragraph 3.10 still does not fully provide for a comprehensive environmental and social assessment review that includes proper assessment of human rights risks. We have several recommendations to improve this paragraph. We recommend that Paragraph 3.10 expressly require that the applicant's environmental and social review extend across the project's area of influence. In addition to looking at future impacts, Paragraph 3.10 should also require applicants to conduct a baseline assessment of all project affected people related to potential (including differentiated) environmental and social risks and impacts, including the level of rights-enjoyment.

Importantly, as a development agency, OPIC should require and review a thorough assessment of a project's development goals. Accordingly, Paragraph 3.10 should require an analysis of: i) how the project will contribute to inclusive, sustainable development; and ii) plausible alternatives that may avoid and minimize potential adverse impacts and maximize inclusive development benefits. Additionally, the environmental and social review should include an analysis of the socio-economic history and context, including discrimination, inclusion, and other human rights issues, and conflict analysis where relevant.

The environmental and social review should additionally include an analysis of the severity of risks and impacts, based on their scope, extent, and remediability; justification for the choice and any prioritization of mitigation measures; and severity of any residual impacts.

The ESPS should require that any environmental and social review include identified impact indicators, for both positive and negative impacts; a timeline for monitoring and supervision measures; a plan for appropriate grievance mechanisms; and the applicant's contribution to an OPIC (or third-party) administered contingency arrangement (e.g., fund, insurance, bond, etc.) to provide financial or other remedy in case negative impacts occur.

We welcome the provision requiring OPIC to review the SRDD process for projects with heightened social risks. However, the reference to "projects with heightened social risks" is unclear. For example, OPIC should clarify when a review for all Category A and Special Consideration projects is triggered. We additionally seek clarification on what SRDD entails, as it is ambiguous how SRDD differs from standard environmental and social management. A protocol is necessary. In any event, this provision should be expanded to specifically require that the findings of the environmental and social screening, categorization, and review must be reviewed by a human rights specialist within OPIC before those findings are finalized.

In the second bullet point under Paragraph 3.10 discussing discrimination and vulnerability, the list of vulnerability factors should be expanded beyond gender and poverty to include marginalization, including because of gender, race, ethnicity, age, social status, disability, sexual orientation or gender identity, health status, or political opinion, and those who have little flexibility to rebound when disruptions to their livelihoods occur due to their economic and social circumstances. Additionally, where conditions exist for discrimination or community conflict, the ESPS should outline that management plans should be designed to avoid contributing to or exacerbating conflict, rather than merely mitigating impacts on conflict.

Lastly, in Paragraph 3.10 or in a separate paragraph, the ESPS should require that the project's environmental and social risks and impacts (both positive and negative) will be revisited and updated by the applicant in consultation with project affected communities at each stage of implementation – construction, operation, rehabilitation, or decommissioning – and upon any changes in project design or context.

### Paragraph 3.11

We recommend that Paragraph 3.11 require the submission of a full-scale ESIA for all Category A and Special Consideration projects. Moreover, where a project is categorized as Category A or Special Consideration, the ESPS should require that the ESIA be verified by an Independent Panel of Experts, including, where appropriate, human rights experts.

Additionally, Paragraph 3.11 should require that for Category A projects, the applicant provide evidence of: i) its responsiveness to the views of project affected communities; ii) broad community support; iii) for Special Consideration Projects involving labor risk, a plan to promote social dialogue in the workplace, as well as evidence that it has already opened dialogue with worker representatives, including unions where they exist; and iv) for Special Consideration projects involving human rights risks, evidence of a dialogue with relevant civil society organizations.

#### Paragraph 3.12

As with Paragraph 3.11, Paragraph 3.12 should require that for Category B projects, the applicant provide evidence of: i) its responsiveness to the views of project affected communities; ii) broad community support; iii) for Special Consideration Projects involving labor, a plan to promote social dialogue in the workplace, as well as evidence that it has already opened dialogue with worker representatives, including unions where they exist; and iv) for Special Consideration projects involving human rights risks, evidence of a dialogue with relevant civil society organizations.

The reference to international social performance requirements is unclear. The requirement should be in compliance with international legal standards, including environmental, labor, and human rights agreements.

#### Paragraph 3.14

We have several recommendations to ensure that the process of creating, implementing, and monitoring Environmental and Social Action Plans (ESAPs) actively involves project affected people and stakeholders and that these plans properly provide for the monitoring and management of impacts. Paragraph 3.14 should require mitigation measures for a project to comply with human rights standards. Moreover, the ESAP should extend the requirement for an ESAP to Special Consideration projects. We also recommend an expansion of the current disclosure requirement for draft ESAPs to include meaningful consultation with project affected people. Communities must be consulted on that plan following any changes in project design or context.

Paragraph 3.14 should require that the ESAP:

- Has the express agreement of project affected people, following meaningful consultation;
- Includes identified impact indicators for both positive and negative impacts;
- Includes specific timelines for mitigation measures and pegs funding disbursements to the completion to significant steps;
- Includes a time-bound Stakeholder Engagement Plan;
- Includes time-bound supervision and participatory monitoring and reporting plans;

- Provides for sanction and remedy in the case of non-compliance; and outlines the applicant’s dedication of resources to a contingency arrangement (e.g., fund, insurance, bond, etc.) to provide remedy if harm occurs; and
- Allocates specific resources for mitigation measures as well as a contingency for unanticipated mitigation or remedial measures.

We additionally recommend that publicly reporting of ESAP implementation will include primary source evidence as well as verified performance indicators.

### Additional Paragraphs

#### *OPIC Review of the Environmental and Social Review*

In addition to the provisions already included in the ESPS, the ESPS should add a paragraph(s) outlining that OPIC’s review of its applicant’s environmental and social review includes: i) OPIC reviewing and verifying the information provided by the applicant relating to the project’s risks and impacts, and requesting additional and relevant information or conducting additional research where necessary for OPIC to complete its environmental and social due diligence; ii) OPIC reviewing the applicable legal framework, implementation practices, track record, and the commitment and capacity of the applicant; iii) OPIC seeking input from affected communities where appropriate, as well as requiring and verifying Free Prior and Informed Consent (FPIC) for projects impacting Indigenous Peoples; iv) OPIC consulting the U.S. Department of Labor’s International Labor Affairs Bureau regarding potential labor rights risks; and v) OPIC consulting with Environmental Protection Agency, the Fish and Wildlife Service, and the National Marine Fisheries Service on relevant environmental regulations, policies, and procedures, including full compliance with the U.S. Endangered Species Act, National Environmental Policy Act, and other applicable legislation.

#### *Contingency Fund*

To date, despite numerous requests, OPIC has taken no steps to provide remedy for those harmed as a result of its investment in BR in Liberia. To ensure that harmed communities and individuals receive meaningful remedy, we recommend a paragraph in the ESPS obliging OPIC to require that applicants contribute to an OPIC (or third-party) administered contingency arrangement, such as a fund, insurance plan, or bond, to provide financial or other remedy in case negative impacts occur. Contributions should be based on project risks and built into OPIC’s contractual arrangement with its applicant. OPIC may wish to consult with the Government Services Administration on the configuration of various arrangements.

#### *Value Chain Support*

The BR project also demonstrated weaknesses in OPIC’s treatment of vulnerable stakeholders in a project’s value chain. In its report, the OA found that OPIC did not

conduct sufficient due diligence or monitoring of the contractual relationship between BR and the smallholder farmers to ensure that the contracts were fair and adequately protected this vulnerable group. We now know from the FOIA documents that the U.S. Embassy expressly raised this concern with OPIC prior to its approval of the project, reporting that, “USAID still has concerns on BRF’s business model and implied interest costs that may be detrimental to small-holders.”<sup>58</sup> The OA concluded that this was an ongoing gap in OPIC’s policy framework.<sup>59</sup> The Draft ESPS has included more references to vulnerabilities in the supply chain, for example in Paragraph 2.6. However, the ESPS still lacks necessary provisions for OPIC support of value chain workers. Accordingly, we recommend a paragraph that requires OPIC to review contracts between the applicant and potentially vulnerable parties for fairness to those potentially vulnerable parties. The ESPS should also provide for third-party assistance (such as independent legal advice) to those parties in appropriate cases.

#### **Section 4: Environmental and Social Standards**

##### Paragraphs 4.2, 4.7, and 4.11

Paragraphs 4.2, 4.7, and 4.11 should clarify that projects are required to comply with host country obligations under international law, including international environmental agreements and human rights treaties and standards. As presently worded, it is unclear whether compliance is only required where national laws implementing host country obligations under international law exist.

##### Paragraph 4.10

In addition to Labor Rights requirements, Paragraph 4.10 should require that existing projects meet human rights requirements from the outset.

#### **Section 5: Public Consultation and Disclosure**

##### Paragraph 5.2

In the interests of transparency and accountability of OPIC operations, Paragraph 5.2 should be made more comprehensive by requiring that OPIC publish *all* relevant policies, procedures, and sector-specific guidance.

##### Paragraph 5.3

In addition to the documents mentioned, Paragraph 5.3 should require OPIC to publicly disclose all project monitoring, midterm, and completion reports, including reports provided to OPIC by its applicants.

##### Paragraphs 5.4 and 5.5

---

<sup>58</sup> FOIA Document, para. 15.

<sup>59</sup> OA Report, pp. 25-26, 76.



To better facilitate transparency and community engagement, Paragraphs 5.4 and 5.5 should be amended to require that OPIC disclose all project screening and categorization, environmental and social reviews (including ESIA and assessments undertaken for Category B and Special Consideration projects), baseline audits, ESAPs, Resettlement Plans, any other environmental and social plans, as well as any Terms of Reference, completed drafts and updates or revisions of the same, to the public and potentially affected communities in a language and form accessible to those communities, prior to project approval (120 days prior for Category A, B, and Special Consideration projects)<sup>60</sup> and whenever updated. These paragraphs should additionally include disclosure of information on the proposed development impacts of projects.

#### Paragraph 5.7

In Paragraph 5.7, the ESPS should clarify that “significant adverse impacts on project affected people” include all Category A projects and all projects involving resettlement. In addition, Paragraph 5.7 should clarify that OPIC is to undertake independent verification of compliance.

#### Paragraph 5.14

Paragraph 5.14 should include a provision that requires that the OA be staffed by highly qualified personnel at all times. Paragraph 5.14 should also include a provision that requires OPIC to confirm that applicants ensure that all project affected people are aware of the existence of the OA and its services from the beginning of OPIC’s engagement, including throughout the consultation process. Furthermore, the ESPS should include a requirement that OPIC dedicate sufficient resources to support the OA’s work.

#### Paragraph 5.15

In Paragraph 5.15, after the word “development,” the ESPS should outline that requirements for PLGMs be commensurate with the level of human rights risk.

#### Paragraph 5.18

While Paragraph 5.18 currently requires that the applicant provide and make available a local language translation of the executive summary of the ESIA and Baseline Audit, this is not sufficient to ensure meaningful and informed community participation. Transparency is a key principle of a human rights-based approach to development and a key prerequisite to accountability.<sup>61</sup> Both project affected people and the wider public have a legitimate interest in accessing and reviewing project related information as well

---

<sup>60</sup> Our recommendation for a 120-day public disclosure period (versus the 60-day period outlined in the Draft ESPS) is consistent with the Pelosi Amendment requirement for the World Bank and other multilateral development banks. International Development and Finance Act of 1989, Pub. L. No. 101-240, §1308 (1989), available at <https://www.congress.gov/bill/101st-congress/house-bill/2494/text>. We believe that OPIC and other U.S. government agencies should be held to the same 120-day standard.

<sup>61</sup> See Danish Institute, pp. 25-26.

as general policies and procedures, in order to assess and verify OPIC's and its applicant's self-reported performance and compliance with environmental and social standards.

We recommend that Paragraph 5.18 be revised to provide that all published documentation relating to environmental and social risks and impacts, including any ESIA, ESAP, ESMS, any other environmental and social review, and all monitoring reports must also be translated into the local language(s) of the project affected people. Additionally, this requirement should be extended to all projects, and not just Category A projects.

### Additional Paragraphs

#### *Indigenous Peoples*

We are troubled by the removal of Paragraph 5.17 from the current (2010) ESPS that read, "In the case of projects involving Physical or Economic Displacement or impacts on Indigenous People or Cultural Heritage, Applicants are required to comply with the additional consultation and disclosure requirements identified in Performance Standards 5, 7 and 8."<sup>62</sup> As Indigenous People are often among the most marginalized and vulnerable segments of the population, it is important that the ESPS explicitly include provisions concerning disclosure and consultation with these groups. Paragraph 5.17 should be reinserted into the Draft ESPS.

It is important, however, to note that the PS do not completely align with international law or obligations as set out in the Indigenous and Tribal Peoples Convention No. 169 of the International Labour Organization, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>63</sup>, or national legal frameworks. Accordingly, in this paragraph or in a new paragraph, the ESPS should insert the following phrase: "For projects impacting Indigenous People, OPIC should require an appropriate FPIC process. The FPIC process should be independently verified by OPIC before the project is approved and then monitored throughout project implementation."

#### *Human Rights Defenders*

As a U.S. development finance institution, OPIC has an obligation under international law to respect and protect the rights of those affected by the activities it finances, including those who raise their voices in dissent. In the event that negative impacts occur in the course of a project, OPIC and its applicants must be prepared to

---

<sup>62</sup> OPIC, *Environmental and Social Policy Statement 5.17* (Oct. 2010), available at [https://www.opic.gov/sites/default/files/consolidated\\_esps.pdf](https://www.opic.gov/sites/default/files/consolidated_esps.pdf).

<sup>63</sup> Compare UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent*, available at <http://www.unclearn.org/sites/default/files/inventory/un-redd05.pdf> and International Fund for Agriculture and Development, *How to do: Seeking free, prior and informed consent in IFAD investment projects*, available at [http://www.ifad.org/knotes/consent/htdn\\_fpic.pdf](http://www.ifad.org/knotes/consent/htdn_fpic.pdf).

ensure the safety of human rights defenders (HRDs) who raise concerns through filing a complaint with the OA or through other means.

The ESPS should include a provision expressing OPIC’s zero-tolerance approach to the killings of and violent acts, threats, and intimidation against HRDs, as they are defined by the UN Declaration on Human Rights Defenders.<sup>64</sup> The ESPS should require OPIC to use human rights due diligence in order to ensure that HRDs are not put at risk and where risks arise, to use its leverage and relationships to respond effectively to minimize and remedy any harm. This includes inserting in its agreements with its applicants clauses requiring them to take all reasonable measures to prevent, investigate, and respond to reprisals, and to avoid any action or omission that facilitates such reprisals, failure for which should result in withdrawal and full repayment of investments. OPIC should be required to develop a rigorous process for monitoring threats to or other reprisals against people who express their views about OPIC-supported projects. Moreover, OPIC should ensure that those communities likely to be affected by a project are aware of and feel safe in approaching the OA, and should empower the OA to examine any instances of retaliation for opposition to the project and/or participation in OA processes.

## **Section 6: Conditions and Compliance**

### Paragraph 6.2

Paragraph 6.2 should insert the phrase “including development impacts” after the word “net” in the first sentence. We also request clarification on the meaning of “host country obligations under international law.”

### Paragraph 6.5

Paragraph 6.5 identifies two additional requirements for Special Consideration projects: an annual performance report and a third-party audit. A requirement to develop and implement an ESAP should be added. Furthermore, it is unclear what the relationship is between these requirements and Social Risk Due Diligence. Again, a more comprehensive protocol is required for Special Consideration projects, commensurate with human rights due diligence.

## **Section 7: Monitoring**

### Paragraph 7.2

As discussed in sections above, the Draft ESPS does not include provisions that adequately address the monitoring and assessment of development outcomes.

---

<sup>64</sup> United Nations General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* [A/53/625/Add.2], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>.

Accordingly, Paragraph 7.2 should extend OPIC’s monitoring to verifying development outcomes, as well as environmental and social risks and impacts.

### Paragraph 7.3

Paragraph 7.3 should clarify that “risk-based” prioritization should be based on the significance or severity of impacts on project affected communities.<sup>65</sup> While prioritization can help ensure that projects that pose severe risks are prioritized for monitoring, we believe that the paragraph should also include that for all Category A and B projects, as well as Special Consideration projects, site visits are conducted by OPIC staff or independent consultants every 6 months during construction, every 12 months during implementation, and at any time that project risk is reassessed and found to have increased. Where resources are not available to adequately monitor projects, OPIC should decline approval for the project.<sup>66</sup>

### Paragraph 7.8

We seek clarification on which agencies comprise the “regulatory agencies” mentioned in Paragraph 7.8. Additionally, annual reports should be completed in consultation with project affected people.

### Additional Paragraphs

#### *Participatory Monitoring*

Participatory or community-based monitoring is an important tool for monitoring and managing human rights risk, building trust, and fostering inclusive development.<sup>67</sup> It can provide ongoing risk assessment to supplement OPIC’s own monitoring systems. Section 7 should add a paragraph that commits OPIC to facilitating participatory monitoring, including facilitating community access to information and facilitating applicant engagement, and commits OPIC to responding to participatory monitoring

---

<sup>65</sup> Shift, p. 4.

<sup>66</sup> OA Report, pp. 10, 71.

<sup>67</sup> The Rights & Democracy Human rights Assessment Tool (HRAT) provides a useful example of community-based participatory monitoring of human rights impacts. Rights and Democracy, *Getting it Right: Human Rights Impact Assessment Guide* (2011), available at <http://policy-practice.oxfamamerica.org/work/private-sector-engagement/community-based-human-rights-impact-assessment-initiative/>. For an example of the utilization of this tool, see Oxfam America, *A State of Fear: Human rights abuses in North Carolina's tobacco industry* (2011), available at <http://www.oxfamamerica.org/explore/research-publications/a-state-of-fear-human-rights-abuses-in-north-carolinas-tobacco-industry/>. With Oxfam’s support and guidance, a team of Farm Labor Organizing Committee researchers used the HRAT methodology to document living and working conditions among migrant farmworkers and to evaluate the status of human rights in the North Carolina tobacco industry. Face-to-face interviews were conducted with farm workers and other key stakeholders including growers, local CSOs working with farm workers, government agencies, and 10 of the largest tobacco companies. The research provided improved knowledge of human rights impacts and supported and empowered communities and companies to engage constructively about those impacts. It resulted in companies taking positive steps to address the concerns of communities.

findings and seeking its applicant's agreement to do the same. If the applicant refuses to agree, its refusal should be taken into account as an indicator of high risk as part of the project risk categorization and assessment (and be publicly disclosed).

Additionally, Section 7 should include a provision that requires that midterm, annual, and completion reports will be drafted by OPIC and its applicant in consultation with affected communities and made publicly available. Funding disbursement will be linked to realization of impact indicators.

### *Independent Monitoring*

As discussed above, OPIC's current reliance on applicant-reported data may result in OPIC having inadequate or inaccurate information about a project's environmental, social, human rights, and development impacts. We therefore recommend that Category A and Special Consideration projects be required to use independent, third-party monitors who report directly to OPIC's President and Board. We additionally recommend that OPIC require independent audits of PLGMs to ensure the implementation of the UN Guiding Principles' effectiveness criteria.

## **Section 8: Climate Change and Renewable Energy**

### Paragraph 8.2

We appreciate the additions that OPIC has made to emphasize the importance of assessing climate risks and vulnerabilities. Assessing the impacts of potential investments on climate change is of the utmost importance to ensure that OPIC's investments result in sustainable development that does not put the world's most vulnerable populations at even greater risk.

### Additional Paragraph

#### *Natural Gas*

OPIC has provided a great deal of support for natural gas projects despite the negative climate impacts of this fossil fuel. When assessing the impacts of these projects, OPIC must ensure that it and the project sponsors are accurately calculating the effects of natural gas and its impacts on communities. The ESPS should require a 20-year Global Warming Potential (GWP) for methane of 87, as well as a calculation of potential methane leakage, which is a significant issue. Some estimates put methane leakage from oil and gas production at 17 percent.<sup>68</sup> Without these calculations, environmental impact assessments will underestimate the climate impacts of methane and inappropriately encourage such financing without a full assessment of impacts.

---

<sup>68</sup> Oliver Schneising, et al., *Remote Sensing of Fugitive Methane Emissions from Oil and Gas Production in North American Tight Geologic Formations*, 2 EARTH'S FUTURE 548 (2014), available at <http://onlinelibrary.wiley.com/doi/10.1002/2014EF000265/pdf>.

## **Appendix A: Illustrative List of Category A Projects**

We welcome the added reference to conflict in Paragraph 2.6 and the reference to environments of fragile security in Paragraph 2.5, as there are elevated environmental, social, and human rights risks associated with post-conflict environments such as Liberia. We recommend that the ESPS also expressly include in Appendix A the following: “...any investment in a country and/or sub-national district that has experienced conflict within the past five years. Conflict is defined as (a) violence between population groups, (b) violence committed by the state against civilians or opposition groups, or (c) violence committed by non-state armed groups against civilians.”

We additionally recommend that Appendix A include the following in its list of illustrative Category A projects:

- Projects where disadvantaged or vulnerable groups are likely to be disproportionately affected by adverse environmental and social impacts, or disadvantaged in access to positive development impacts.
- Projects where there is a presence of indigenous people in, or with a collective attachment to, the project area.
- Projects likely to involve significant migration in or out of the project area.
- Projects involving land acquisition or physical or economic displacement.
- Projects with a high level of complexity, e.g., land reform, closed facilities, etc.
- Projects in countries that have an open petition regarding labor rights under the African Growth and Opportunity Act (AGOA) or Generalized System of Preferences (GSP), or an open submission regarding labor rights under a free trade agreement (FTA).
- Projects located in countries in which the International Labour Organization (ILO) has an open Commission of Inquiry.

## **Appendix B: Categorical Prohibitions**

While Appendix B now helpfully includes a prohibition on OPIC support for “projects and companies that provide significant, direct support to a government that engages in a consistent pattern of gross violations of internationally recognized human rights, as defined by the U.S. Department of State,” this prohibition, with its focus on human rights violations committed by the government, is too narrow. Appendix B should also include any projects that are likely to cause, contribute to, or exacerbate human rights violations.

## **Appendix D: Glossary**

### CO<sub>2</sub>eq

The current definition of “CO<sub>2</sub>eq” (Carbon Dioxide Equivalents) provides a 100-year GWP for methane (CH<sub>4</sub>) of 28, which underestimates the climate impact of methane. Instead, the GWP for methane should be 87, as measured by the most recent

Intergovernmental Panel on Climate Change report for a 20-year GWP.<sup>69</sup> This GWP more appropriately reflects methane's stronger impact in the short-term due to its atmospheric lifespan of about 12 years. Considering that scientists have concluded that significant reductions must take place in the next decade in order to limit the worst impacts of climate change, it is imperative to take into account this warming impact of methane in the short term.

### Environmental and Social Action Plan

The current definition of "Environmental and Social Action Plan" specifies that it is required for all Category A projects. This requirement should be extended to include all Special Consideration projects.

### Human Rights

We welcome the inclusion of human rights in the glossary and the increased references to human rights throughout the Draft ESPS, as this was a key request from our March 2016 submission. However, we note that the definition of human rights in the Draft ESPS is too limited, as it is restricted to the treaties and conventions to which the United States has been or is party. OPIC investments must not contravene host country obligations under international law and must comply with applicable law, including international human rights standards. When identifying applicable law, OPIC applicants and staff should consider the nine core international human rights treaties, applicable regional treaties, and other key human rights instruments such as the UNDRIP.<sup>70</sup>

### Project Affected People

We commend the inclusion of the reference to the project's area of influence in the definition of project affected people. The definition should be further expanded to specifically include potentially vulnerable parties within the project's value chains and potentially vulnerable parties entering into contracts with the applicants. Emphasis should not only be placed on those who are directly adversely affected, but also those indirectly adversely affected.

### Social Impacts

---

<sup>69</sup> IPCC, *Working Group I Contribution to the IPCC Fifth Assessment Report Climate Change 2013: The Physical Science Basis* (2013), available at [https://ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5\\_Frontmatter\\_FINAL.pdf](https://ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Frontmatter_FINAL.pdf).

<sup>70</sup> The nine core international human rights conventions are: International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons from Enforced Disappearance; and Convention on the Rights of Persons with Disabilities. Applicable regional treaties will include, for example, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights.

As mentioned in Section 1, a definition of “social impacts” should be added, to include among others: i) human rights impacts; ii) different or disproportionate accrual of adverse impacts on different groups due to their experience of marginalization, discrimination or exclusion; and iii) inequitable access to developmental benefits due to a group’s experience of marginalization, discrimination, or exclusion. Here is one sample formulation:

Social risks and impacts include, among others: i) threats to human security through the escalation of personal, communal, or inter-state conflict, crime, or violence; ii) differentiated impacts or risks that project impacts fall disproportionately on individuals or groups who, because of their particular circumstances, may be disadvantaged or vulnerable; iii) any prejudice or discrimination toward individuals or groups in providing access to development resources and project benefits, particularly in the case of those who may be disadvantaged or vulnerable; iv) negative economic and social impacts relating to the involuntary taking of land or restrictions on land use; v) risks or impacts associated with land and natural resource tenure and use, including (as relevant) potential project impacts on local land use patterns and tenurial arrangements, land access and availability, food security and land values, and any corresponding risks related to conflict or contestation over land and natural resources; vi) impacts on human health, safety, and the well-being of workers and project affected communities; vii) risks to cultural heritage; and viii) any other human rights-related risks or impacts.

#### Social Risk Due Diligence

This definition does not appear different from standard environmental and social management. If social risk due diligence is meant to be the due diligence accorded for all social risks, then a more detailed protocol is necessary to explain what enhanced due diligence measures will be employed in the case of heightened human rights risk.

#### Special Consideration

Instead of taking into consideration the “likelihood, severity, and relevance to the project” of social risks for the classification of a project as Special Consideration, the definition should instead call for the consideration of the significance of the risks, defined as the scale and severity/irremediability of the potential impacts, as well as the vulnerability of population groups to these impacts. This framework better assesses the risks posed by Special Consideration projects.

#### Vulnerable

We appreciate the increase in references to vulnerable people and the particular vulnerabilities that may be present among project affect people, including in Paragraphs 1.1 – Footnote 1 and 2.6. We recommend that the ESPS include a definition of



“vulnerable” in the glossary and that this definition include the provisions in the aforementioned paragraphs. Additionally, vulnerability factors should be expanded beyond gender and poverty to include marginalization, including because of gender, race, ethnicity, indigeneity, age, social status, disability, sexual orientation or gender identity, health status or political opinion, and those who have little flexibility to rebound when disruptions to their livelihoods occur due to their economic and social circumstances.

Thank you for considering our recommendations. We look forward to reviewing the revised ESPS. We strongly desire a continued engagement with OPIC to ensure that OPIC is a leader in environmental, social, and human rights accountability.

Sincerely,

Accountability Counsel – USA  
Action Paysanne Contre La Faim – Democratic Republic of the Congo  
Bank Information Center (BIC) – USA  
Buliisa Initiative for Rural Development Organisation (BIRUDO) – Uganda  
Center for Biological Diversity – USA  
Center for International Environmental Law (CIEL) – USA  
The Centre for Research on Multinational Corporations (SOMO) – The Netherlands  
Conseil Régional des Organisations Non Gouvernementales de Développement (CRONGD) – Democratic Republic of the Congo  
EG Justice – Equatorial Guinea  
Friends of the Earth-U.S. – USA  
Friends with Environment in Development (FED) – Uganda  
Jamaa Resource Initiatives – Kenya  
Lumière Synergie pour le Développement – Senegal  
Narasha Community Development Group – Kenya  
Observatoire d'Etudes et d'Appui à la Responsabilité Sociale (OEARSE) – Democratic Republic of the Congo  
ONG Mer Bleue – Mauritania  
OT Watch – Mongolia  
Rivers without Boundaries (Mongolia) – Mongolia

cc: Elizabeth Littlefield, President & CEO  
Merryl Burpoe, Acting Vice President, Office of Investment Policy  
Mary Boomgard, Managing Director, Environment