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Via Electronic Mail

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**Re: OPIC's Review of its Environmental and Social Policy Statement:
Opportunity to Provide Early Comments**

Dear President Littlefield, Ms. Kuhlow and Ms. Boomgard:

Thank you for the invitation to provide early comments on the review by the Overseas Private Investment Corporation (OPIC) of its Environmental and Social Policy Statement (ESPS). Based on discussions at the ESPS review roundtable on December 9, 2015, we understand that OPIC will take such comments into account when preparing its draft revised ESPS. We also look forward to the opportunity to provide formal comments on the draft once it is available.

As an overview, we recommend that OPIC revise its ESPS and its associated Procedures Manual to include:

1. Clear, robust criteria and processes for human rights due diligence;
2. Effective assessment of the cumulative environmental and social impacts of related projects;
3. A clear requirement to collect baseline environmental and socio-economic data for all potentially vulnerable groups prior to the start of operations;
4. Protections for vulnerable parties contracting with OPIC clients;
5. Recognition of the elevated risks of post-conflict environments;
6. Enhanced monitoring procedures, especially for high risk projects;
7. Improved assessment and monitoring of development outcomes;
8. Enhanced community consultation and engagement;
9. Support for OPIC's Office of Accountability (OA); and
10. A requirement to publish all relevant policies, procedures, sectoral guidance and project related information.

These recommendations are divided into separate sections for clarity and ease of reference, however they should be understood as interrelated. For example, while we make explicit human rights due diligence recommendations in section one, robust human rights due diligence procedures will also require the adoption of the recommendations contained in sections two through nine.

We have limited our comments to those policy issues that are most relevant to our experience and expertise in supporting project affected communities that have suffered harm to seek remedy through relevant grievance mechanisms within development finance institutions. We understand that there are other areas of policy concern and that many of those will be addressed by other civil society organizations (CSOs) in their submissions.

In the following paragraphs, we explain our recommendations in more detail with reference to: the OA Review of the Buchanan Renewable Energy Projects in Liberia (OA Report)¹; recent reports by the U.S. Agency for International Development Office of Inspector General² (USAID OIG) and the U.S. Government Accountability Office³ (GAO); and specific examples of policies or procedures to which OPIC may wish to look for guidance in its review. We also attach a **schedule** of our specific recommendations, for ease of reference.

Our primary goal is to ensure that OPIC is a leader in environmental and social accountability. For this reason, we note that OPIC's adoption of the International Finance Corporation (IFC) Performance Standards (PS),⁴ while commendable, does not guarantee compliance with best practice for environmental and social sustainability. The PS are not a complete set of environmental and social safeguards. The IFC itself supplements the PS with its Policy on Environmental and Social Sustainability.⁵ In addition, the PS are not immune from criticism, due to inadequate coverage against certain development risks, including human rights risks, and other weaknesses in their due diligence procedures.

¹ 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].

² 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, 15 May 2015), available at <https://oig.usaid.gov/sites/default/files/audit-reports/8-opc-15-002-s.pdf> [USAID OIG Report].

³ U.S. Government Accountability Office, *Overseas Private Investment Corporation, Additional Actions Could Improve Monitoring Processes* (GAO-16-64, December 2015), available at <http://www.gao.gov/assets/680/674142.pdf> [GAO Report].

⁴ IFC, *Performance Standards on Environmental and Social Sustainability* (1 Jan. 2012), available at http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf [IFC PS].

⁵ IFC, *Policy on Environmental and Social Sustainability* (1 Jan. 2012), available at http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf.

1. Human rights due diligence

One of the major recommendations of the OA following OPIC's failed Buchanan Renewables project in Liberia was that OPIC establish formal criteria and processes for human rights due diligence within the ESPS. This recommendation remains unfulfilled and therefore must be addressed during the ESPS revision.⁶

The OA found that OPIC failed to provide detailed guidance to its client on human rights risks.⁷ Although the project was principally administered under OPIC's earlier Environmental Handbook, the OA also analyzed whether the gap persisted under the ESPS, following the 2012 amendment to the IFC PS.⁸ The OA concluded that it did, as the ESPS failed to comprehensively systematize human rights considerations.⁹ In particular:

- a) The "human rights review" referred to in ¶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. This process is plainly insufficient as a means of project-level human rights risk assessment;
- b) The ESPS provides no clear guidance on how human rights considerations should be incorporated within OPIC's general environmental and social risk screening, categorization and assessment process, referred to in ¶¶3.2 and 3.11 of the ESPS. On the contrary, the ESPS Procedures Manual¹⁰ suggests that the human rights review process is disconnected from the OPIC Office of Investment Policy's environmental and social risk screening and categorization process;
- c) The ESPS and the accompanying Procedures Manual do not clearly identify when or how enhanced human rights due diligence, referred to in the IFC PS,¹¹ is triggered; and
- d) If there is an elevated human rights risk, the resulting enhanced due diligence process is unclear.

The OA recommended that OPIC use the review of the ESPS to establish specific procedures for identifying, assessing and managing human right risks.¹²

Robust human rights due diligence requires policies and procedures at different levels and stages of project appraisal and supervision. These policies and procedures must satisfy the following core criteria:¹³

⁶ Although we understand that OPIC has established some internal procedures for human rights review of projects on a transaction-by-transaction basis, those procedures have not been made available for review or comment.

⁷ OA Report, pp. 51-52.

⁸ OA Report, p. 53.

⁹ OA Report, pp. 54-55, 75-76.

¹⁰ OPIC, Office of Investment Policy's Environmental and Social/Labor and Human Rights Group, *Procedures Manual* (2012), p. 12, fig 2.1, available at <https://www.opic.gov/sites/default/files/files/opic-procedures-manual-2012.pdf>.

¹¹ IFC PS 1, note 12.

¹² OA Report, pp. 12, 75-76.

- a) A commitment to not cause or contribute to any breaches of international human rights standards and to utilize such standards as a benchmark for the identification, assessment and management of project risks and impacts;
- b) Emphasis on the principles of participation and inclusion, equality and non-discrimination, transparency and accountability, *in both process and outcome*, paying particular attention to vulnerable groups and to the different risks, impacts and opportunities faced by different groups;
- c) Clear obligations (including assigned responsibilities) to screen, identify and assess human rights risks and impacts (whether actual, potential, direct, indirect, secondary or cumulative) prior to the start of operations and to develop robust risk management plans (avoiding, reducing, mitigating and/or remedying risks and impacts), drawing on relevant expertise and in meaningful consultation with affected communities; and
- d) Clear obligations to monitor and manage human rights risks and impacts at regular intervals during project implementation and operation, including by reevaluating risks as appropriate, by adequately and transparently reporting on project performance and impacts and by providing access to remedy.

We will focus our comments on policy-level changes that should be reflected in the ESPS. While we make some comments about accompanying procedures or guidance, we may provide more detailed comments on those at a later date as appropriate.

Commitment to respect human rights

In ¶1.3, the ESPS contains a commitment to ensure that its projects respect human rights, including the rights of workers and affected communities. This commitment should be clarified to state that: OPIC will respect human rights and ensure that projects it supports do not cause, contribute to or exacerbate human rights violations. This includes undertaking necessary due diligence in the design, implementation, monitoring and evaluation of those projects, and taking appropriate steps to respond to any violation.¹⁴

The ESPS should also include an appropriate and inclusive definition of “human rights.” The GAO Report indicates that OPIC’s current definition may be too limited.¹⁵ OPIC clients and staff need to consider the standards contained in the core human rights treaties including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and others relating to

¹³ See also United Nations Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (A/HRC/17/31) (21 Mar. 2011) [UN Guiding Principles]; The Danish Institute for Human Rights, *Human Rights and Impact Assessment Conceptual and Practical Considerations in the Private Sector Context* (2014), especially pp. 11-12 and ch. 3, available at http://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/research/matters_of_concern_series/matters_of_concern_huri_and_impact_assessment_gotzmann_2014.pdf [Danish Institute (2014)].

¹⁴ UN Guiding Principles, Principles 15 and 17.

¹⁵ The GAO report states that “the [human rights] clearance process does not encompass a review of all the human rights contained in the Universal Declaration for Human Rights, and it only reviews those human rights that private companies can impact.” GAO Report, note 47.

non-discrimination, women’s rights, torture, children’s rights, migrants, enforced disappearance and persons with disabilities.¹⁶ OPIC clients and staff also need to consider other instruments of international human rights and humanitarian law, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁷ While some of those rights may be of particular relevance to the conduct of business, none can be categorically excluded as irrelevant.

A human rights-based approach to development also seeks to ensure participation and inclusion, equality and non-discrimination, transparency and accountability, both in process and in outcome.¹⁸ Accordingly, ¶1.3 of the ESPS should also include: a commitment to 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; and a commitment to continuing, timely, meaningful community consultation and participation.

The relevance of international human rights standards should be reflected in Part 4 of the ESPS. We recommend including a reference to “human rights” (as defined above) in ¶¶4.3, 4.8 and 4.12. We recommend that “human rights” is also added to ¶4.11 as standards that must be met from the outset.

Finally, consistently with its human rights commitments, OPIC should include a categorical prohibition for projects involving excessive human rights risk. We recommend that Appendix B of the ESPS include projects that are likely to cause, contribute to or exacerbate human rights violations.

Project appraisal

There are two general approaches to incorporating human rights risk considerations into project appraisal processes. The first is to integrate human rights considerations within the general environmental and social risk identification and assessment procedures, including any resulting environmental and social impact assessment (ESIA) and risk management plan

¹⁶ Specifically, International Convention on the Elimination of All Forms of Racial Discrimination (1969), Convention on the Elimination of All Forms of Discrimination against Women (1981), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), Convention on the Rights of the Child (1990), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (2003), International Convention for the Protection of All Persons from Enforced Disappearance (2010) and the Convention on the Rights of Persons with Disabilities (2008).

¹⁷ See IFC, *Environmental and Social Performance Standards Guidance Note 1* (1 Jan. 2012), ¶GN44, available at http://www.ifc.org/wps/wcm/connect/b29a4600498009cfa7fcf7336b93d75f/Updated_GN1-2012.pdf?MOD=AJPERES; UN Guiding Principles, Principle 12. Where projects may involve the use of private security providers, OPIC should require adherence to the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Service Providers.

¹⁸ See, for example, UNDP, *Social and Environmental Standards*, Principle 1, ¶12, available at <http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDPs-Social-and-Environmental-Standards-ENGLISH.pdf>. See also Danish Institute (2014), pp. 19-20.

(integrated assessment). Alternatively, human rights risks can be identified and assessed in a stand-alone assessment, such as a human rights impact assessment (HRIA).¹⁹

The IFC PS supports integrated assessment in the majority of cases,²⁰ but expressly provides that in certain “high risk” cases, supplementary, enhanced human rights due diligence may be required.²¹ In its Guide to Human Rights Impact Assessment and Management (HRIAM), it explains that stand-alone HRIAs may have advantages over integrated assessments in ensuring a systematic and comprehensive consideration of human rights.²² However, stand-alone assessment may also result in unnecessary duplication. Accordingly, we will provide recommendations and examples for both integrated and stand-alone human rights risk identification and assessment, and many recommendations will be adaptable to either approach.

As a useful example of the integrated assessment of human rights risks, OPIC should consider the **draft methodology designed by the Coalition for Human Rights in Development (Coalition methodology)**.²³ The Coalition methodology is intended to guide development institutions to integrate human rights standards and principles into various stages of development project design and delivery. Key features of the 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.

Although the Coalition methodology is specifically designed with the World Bank’s policy framework in mind, it can be adapted for use by other financial institutions. Similarly, while the methodology focuses on the social aspects of risk and impact assessment, it is meant to be incorporated within an integrated ESIA process.

¹⁹ Danish Institute (2014), notes 6 and 15, p. 12.

²⁰ IFC PS 1, ¶3.

²¹ IFC PS 1, note 12: “In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.”

²² IFC and International Business Leaders Forum, *Guide to Human Rights Impact Assessment and Management*, pp. 19-20, available at https://www.unglobalcompact.org/docs/issues_doc/human_rights/GuidetoHRIAM.pdf [HRIAM]. “While other risks and impacts assessments [such as ESIA] focus on some human rights concerns, they often do not address human rights issues in a systematic and comprehensive way. A reliance on existing risks and impacts assessment without considering human rights in a comprehensive and systematic way may leave the company exposed to a host of hidden and nascent human rights issues that may develop into significant human rights risks (including legal, financial and reputational) for the company, its investors and its shareholders in the future.”

²³ For an overview of the project, see <http://rightsindevelopment.org/HRDD>. The methodology itself is available at <http://rightsindevelopment.org/wp-content/uploads/2015/08/HRDD-Draft-Methodology-3.22.15.pdf>. The methodology is currently in draft while feedback is solicited.

This methodology can be modified for incorporation in the ESPS alongside the IFC PS. To achieve this, the ESPS should:

- a) Define “social” to expressly include, inter alia: (i) the realization or enjoyment of human rights; (ii) disproportionate accrual of adverse impacts on different groups due to their experience of marginalization, discrimination or exclusion; and (iii) inequitable access to development benefits due to a group’s experience of marginalization, discrimination or exclusion;²⁴
- b) Clearly explain the relationship (and the distinction) between the “human rights review”/clearance process involving the Department of State (referred to in ¶3.5) 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 process, in addition to any human rights review or clearance by the Department of State; and, importantly, that a positive human rights clearance from the Department of State does not indicate that the project’s human rights risks are acceptable;
- c) Incorporate features of the Coalition methodology’s Social Risk and Opportunity Analysis into the project screening and categorization procedure in Part 2. For example:
 - i. ¶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”;²⁵
 - ii. ¶2.4 should expressly 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;
 - iii. Appendix A should include, as illustrative high risk/sensitive 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/out of the project area”; “projects involving land acquisition or physical and economic displacement”; and “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)”; and “projects located in countries in which the International Labor Organization (ILO) has an open Commission of Inquiry”; and
 - iv. The definition of Category A should be amended to include projects that “may” have significant adverse environmental and/or social impacts, on the basis that

²⁴ The definition of “social” within the IFC PS is inadequate to account for the full range of social risks and impacts of development activities.

²⁵ Consequent changes should also be made to include the identification and evaluation of alternatives/opportunities within the scope of OPIC’s and its client’s responsibilities. It is important to note, however, that the references to positive development benefits are not intended for clients to offset adverse impacts through positive impacts elsewhere. This is plainly contrary to UN Guiding Principles, Principle 11.

where significant adverse risks are involved, a precautionary approach is appropriate;

- d) Provide that, where a project poses human rights risks, 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;
- e) Provide that, where a project is categorized as Category A, the ESIA will be verified by an Independent Panel of Experts, including, where appropriate, human rights experts;
- f) Require that clients 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 client;
- g) Require that the client's environmental and social review, for both Category A and B projects, includes an analysis of:
 - i. How the project will contribute to inclusive, sustainable development;
 - ii. Socio-economic history and context, including discrimination, inclusion and other human rights issues, and conflict analysis where relevant;
 - iii. Plausible alternatives that may avoid and minimize potential adverse impacts and maximize inclusive development benefits;
 - iv. The severity of risks and impacts, based on their scope, extent and remediability;
 - v. The justification for the choice and any prioritization of mitigation measures;
 - vi. The severity of any residual impacts;And includes:
 - vii. Identified impact indicators, for both positive and negative impacts;
 - viii. A timeline for monitoring and supervision measures;
 - ix. A plan for appropriate grievance mechanisms (discussed further below); and
 - x. The client'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;
- h) Ensure that OPIC's review of its client's environmental and social review includes:
 - i. OPIC reviewing and verifying the information provided by the client 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 client;
 - iii. OPIC providing guidance to assist the client in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social risks and impacts in accordance with the ESPS and IFC PS and in compliance with national and international law;
 - iv. OPIC seeking input from affected communities where appropriate. As discussed in section eight, OPIC should require and verify FPIC for projects impacting indigenous peoples;
 - v. OPIC consulting the U.S. Department of Labor's International Labor Affairs Bureau regarding potential labor rights risks;

- i) Include a reference to “human rights” within ¶3.11; and
- j) Ensure that any Environmental and Social Action Plan (ESAP): has the express agreement of project affected people; includes time-bound supervision, participatory monitoring and reporting plans; includes a time-bound Stakeholder Engagement Plan; identifies impact indicators; allocates specific resources for mitigation measures as well as a contingency for unanticipated mitigation or remedial measures; includes specific timelines for mitigation measures and pegs funding disbursements to the completion to significant steps; provides for sanction and remedy in the case of non-compliance; and outlines the client’s dedication of resources to a contingency arrangement (e.g., fund, insurance, bond, etc.) to provide remedy if harm occurs.

OPIC should also consider the Coalition methodology’s thematic approach for the identification and evaluation of social risks and opportunities, designed to be employed together with the Coalition’s Risk and Opportunities Analysis Tool.²⁶ We would be happy to provide further information about the operation of this Tool and its interrelationship with the methodology if that would be helpful.

Second, as discussed, in certain high risk cases, the IFC PS provide that it may be necessary to supplement environmental and social impact assessment processes with enhanced human rights due diligence.²⁷ The OA recommended that OPIC require such enhanced due diligence through a stand-alone, independent HRIA in appropriate cases.²⁸

While stand-alone HRIAs can achieve a more detailed analysis of identified, elevated human rights risks, it remains important to ensure that human rights standards are incorporated within every ESIA or environmental and social review in order to capture unanticipated or less obvious human rights risks and impacts and to strengthen the robustness of those ESIA’s. If used, HRIAs should supplement, not substitute, the integrated assessment of human rights risks and impacts. To determine when an HRIA is required, screening criteria should be established and publicly released. The criteria should incorporate country, sector and client characteristics. For example, risk factors should include, but are not limited to:

- a) Activity related to certain sectors such as agribusiness, chemicals, forestry, mining, oil and gas, power, infrastructure or water;²⁹
- b) The scale of the activity (larger scale projects will require an HRIA);

²⁶ The Risk and Opportunities Analysis Tool is designed to supplement human rights policy safeguards, *inter alia* for operational use by financial institution staff. It identifies 12 thematic human rights standards relating to poverty alleviation, labor, social services, security, environment, disability, gender/sex, public health, land, indigenous people, culture and participation. It helps the user to identify and evaluate human rights-related risks using a set of risk indicator questions, adjust the design of an activity to address those risks and develop a monitoring plan and indicators based on the particular risks involved.

²⁷ IFC PS 1, note 12.

²⁸ OA Report, pp. 12, 76.

²⁹ See HRIAM, p. 29 (highlighting the importance of assessing the particular sector of the business activity). Where the client is involved in sectors with high risk of human rights impacts, exclusion lists may also be appropriate as a means of meeting policy commitments and excluding these activities. See IFC Exclusion List, available at http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/ifc+projects+database/projects/aips+added+value/ifc_project_exclusion_list.

- c) Activity impacting weak governance, post-conflict and/or post-disaster zones;³⁰
- d) Projects that require sophisticated security arrangements or collaboration with public security forces;³¹
- e) Type and level of host government involvement in the project (risk is highest where there is a high level of host government involvement and low capacity to address human rights issues or government reputation for abuse);
- f) Physical or social challenges while safeguarding project personnel and property in a manner that respects the human rights and security of project affected people;
- g) Activity impacting vulnerable groups such as indigenous people, women and children and/or the disabled;³²
- h) Activity that potentially requires resettlement;
- i) Activity impacting areas or entities with known labor rights issues;³³
- j) Activity related to areas or entities with known human rights issues; and
- k) Activity related to areas or entities with known environmental issues affecting communities; or
- l) Due to relevant historical information related to the project.³⁴

Many of the recommendations above, taken from the Coalition methodology, can be adapted for use as part of a stand-alone HRIA. Accordingly, if OPIC proposes to use stand-alone HRIAs, the recommendations above remain relevant.

In providing guidance to clients on how to carry out a stand-alone HRIA, the OA suggested that OPIC consider the **IFC's Guide to HRIAM**. While this Guide usefully identifies and explains various steps in an HRIA process, because it is designed for use by the private sector generally, it is framed in optional, generalized terms.

Compared to the IFC's Guide to HRIAM, **The Danish Institute's Human Rights Compliance Assessment (HRCA)** provides more detailed guidance to undertaking an HRIA for private sector operations, with a database of 195 questions and 947 indicators each measuring the implementation of human rights considerations within company policies and procedures.³⁵ However, this tool also has limitations, as it is not specifically designed to measure human rights impacts over the course of the project.

³⁰ See OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (2006), available at http://www.oecd.org/document/5/0,3343,en_2649_33765_36899994_1_1_1_1,00.html; see also HRIAM, pp. 29-30 (advocating the importance of understanding and acknowledging the host country's human rights record).

³¹ See Voluntary Principles on Security and Human Rights, available at <http://www.voluntaryprinciples.org/>.

³² HRIAM, pp. 31-33 (highlighting the need to consider vulnerable or marginalized groups).

³³ Where an activity impacts areas or entities with known issues, the term "known" should include where a regulator or court has been involved in an ongoing case, complaint or investigation.

³⁴ In particular, the client should ensure that any past concerns about the project are identified and addressed so that the proposed project does not "exacerbate past injustices." See Amnesty International, *Time to invest in human rights, A human rights due diligence framework for the International Finance Corporation* (2010) at 25, available at <https://www.amnesty.org/en/documents/ior80/004/2010/en/>.

³⁵ The Danish Institute for Human Rights, *Human Rights Compliance Assessment*, available at <https://hrca2.humanrightsbusiness.org/>.

In addition, neither tool provides a detailed methodology for the supervisory due diligence obligations of a development finance institution like OPIC. Accordingly, the Coalition methodology is likely to be more helpful for the purpose of the ESPS revision process.³⁶

*Ongoing risk monitoring and management*³⁷

Human rights risk must also be reflected in project monitoring and other risk management processes, including requirements for, and supervision of, project-level grievance mechanisms (PLGMs).

Again OPIC should refer to the Coalition methodology. By analogy to this methodology, the ESPS should include the following risk monitoring and management procedures:

- a) The project's environmental and social risks and impacts (both positive and negative) will be revisited and updated by the client in consultation with project affected communities at each stage of implementation – construction, operation, rehabilitation or decommissioning – and upon any major changes in project design or context;
- b) OPIC will review risk and impact updates and perform necessary site visits to monitor project implementation, mitigation and social impacts. For Category A and B projects, social and labor rights specialists should visit the project site every 6 months during construction, every 12 months during implementation and at any time that project risk is reassessed and found to have increased;
- c) Affected communities will be engaged in participatory monitoring (discussed further below);
- d) Category A projects will utilize independent monitoring with reporting directly to OPIC's Board;
- e) Reporting of ESAP implementation will include primary source evidence as well as verified performance indicators;
- f) Where actual impacts, mitigation measures and residual impacts do not match those anticipated in the environmental and social review, or impact indicators are not met, the environmental and social review will be updated and implementation and mitigation plans will be adjusted to ensure that sustainable, inclusive development impacts are maximized and negative impacts are avoided and minimized. If the environmental and social review cannot be adjusted to satisfactorily address impacts, compliance remedies, such as the activation of the contingency arrangement (e.g., fund, insurance plan, bond, etc.), and appropriate sanctions, including funding termination, will be employed;
- g) Midterm and completion reports will be drafted by OPIC and its client in consultation with affected communities and made publicly available. Funding disbursement will be linked to realization of impact indicators;
- h) All monitoring, midterm and completion reports will be publicly disclosed;³⁸ and
- i) Requirements for PLGMs are commensurate with the level of human rights risk.

³⁶ A useful list of additional sources is contained in Danish Institute (2014), note 8.

³⁷ We also provide general comments relating to enhanced monitoring of high risk projects below in section six.

³⁸ Subject to any confidentiality necessary to protect persons from harm due to retaliation. *See also* section nine below.

Participatory monitoring is an important tool for monitoring and managing human rights risk, building trust and fostering inclusive development. It can provide critical and ongoing risk assessment to supplement OPIC's own monitoring systems. The **Rights & Democracy Human Rights Assessment Tool (HRAT)** provides a useful example of community-based participatory monitoring of human rights impacts.³⁹ The HRAT tool is designed to be utilized by affected communities and/or local CSOs to identify and document the human rights impacts of projects and to more effectively voice their concerns and engage stakeholders on proposed actions in response. The HRAT starts with educating communities about their rights. The tool then leads communities, step-by-step, through an iterative process of investigation, analysis, reporting, stakeholder engagement, monitoring and follow-up. In order for participatory monitoring to be successful, OPIC must commit to:

- a) Facilitating community-based monitoring, including facilitating community access to information and facilitating client engagement; and
- b) Responding to its findings and seeking its client's agreement to do the same. If the client 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).

The OA also specifically recommended that OPIC ensure that its requirements for PLGMs are commensurate with the level of human rights risk.⁴⁰ We make additional recommendations regarding PLGMs in section six below.

³⁹ 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, 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.

⁴⁰ OA Report, pp. 12, 75-76.

2. Cumulative impact assessment

The Buchanan project in Liberia also highlighted a risk that OPIC is failing to properly account for the cumulative impact of related projects. The OA found that the separate environmental and social classification of power plant and biofuel projects may have resulted in the under-classification of those projects, avoiding a more robust assessment of their combined impacts.⁴¹

The OA also found that separate categorization might still have occurred under the current ESPS framework.⁴² While the ESPS states that OPIC will take into account “cumulative environmental and social risks and impacts” when categorizing and reviewing projects,⁴³ it does not provide any guidance to its clients or staff as to how it will do this.

To provide necessary clarity, we recommend that ¶¶2.5 and 3.11 of the ESPS 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. ¶2.9 should also expressly require the identification of “groups and communities that may be directly *and indirectly* affected by the Project.” Further, the definition of “project affected people” should also expressly refer to the project’s entire area of influence.

⁴¹ OA Report, pp. 56-57.

⁴² *Id.*

⁴³ ESPS, ¶¶2.7, 3.2.

3. Collection of baseline data

In order to properly assess the potential environmental and social impacts of a project, positive or negative, there must first be a baseline against which comparisons can be made.⁴⁴ However, as the OA has recognized,⁴⁵ the ESPS does not contain any clear requirement to collect and assess baseline data relating to all potentially affected groups, prior to the start of an operation. “Baseline audits” are required only as a component of an ESIA for non-greenfield Category A projects. Although OPIC’s clients have the obligation under the IFC PS to base the risks and impacts identification process “on recent environmental and social baseline data at an appropriate level of detail,”⁴⁶ this obligation lacks precision and is not clearly supervised through any equivalent obligation on OPIC under the ESPS.

The OA recommended that the ESPS be amended to require the collection and assessment of baseline data relating to all potentially vulnerable groups, prior to the start of an operation.⁴⁷ We recommend that this recommendation be fulfilled by amending ¶3.11 to require as part of the environmental and social review process 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.

⁴⁴ See OA Report, p. 31.

⁴⁵ OA Report, pp. 32-33.

⁴⁶ IFC PS 1, ¶1.7. There is currently no express requirement within the ESPS to include appropriate baseline data; and for Category B projects, the ESPS only requires “sufficient information” for OPIC to review the project’s environmental and social management system. While ¶6.2 of the ESPS says that OPIC will review information provided by its client with respect to baseline environmental and social conditions, the ESPS does not state when such information is required.

⁴⁷ OA Report, pp. 32-33, 76.

4. Protections for vulnerable parties contracting with OPIC clients

The Buchanan project also demonstrated weaknesses in OPIC’s treatment of vulnerable stakeholders in a project’s value chain. Parties contracting with OPIC’s client were not treated as project beneficiaries or potentially vulnerable parties, notwithstanding the fact that smallholder farmers were giving up subsistence incomes in return for potential future income following farm rejuvenation (with a gap between incomes of approximately seven years). The OA found that OPIC did not conduct sufficient due diligence or monitoring of the contractual relationship between its client and the smallholder farmers to ensure that the contracts were fair and adequately protected this vulnerable group. Instead, OPIC’s due diligence focused on ensuring that the contracts were protective of its client’s profit-making interests. The OA also concluded that this was an ongoing gap in OPIC’s policy framework.⁴⁸ The OA made two recommendations that should be fulfilled during this ESPS revision.⁴⁹

The first is that the ESPS needs to ensure that the scope of groups that might be considered vulnerable to include vulnerable contracting parties who are part of the project’s value chain. This could be achieved by expressly stating that “project affected people” includes potentially vulnerable parties within the project’s value chains and potentially vulnerable parties entering into contracts with the client. The ESPS should also make it clear that “vulnerable” includes those who have little flexibility to rebound when disruptions to their livelihoods occur due to their economic and social circumstances.⁵⁰

The second is that the ESPS should require that OPIC review contracts between the client and potentially vulnerable parties for fairness to those potentially vulnerable parties. In appropriate cases, the ESPS should also provide for third-party assistance (such as independent legal advice) to those parties.

⁴⁸ OA Report, pp. 25-26, 76.

⁴⁹ OA Report, p. 76.

⁵⁰ OA Report, p. 75, note 33.

5. Recognition of the elevated risks of post-conflict environments

As the Buchanan project highlighted, there are elevated environmental, social and human rights risks associated with post-conflict environments. In its Report to Congress following the OA Report on the Buchanan Renewables project, OPIC Management acknowledged that additional safeguards may be appropriate in post-conflict environments.⁵¹

In addition to the recommendations contained elsewhere in this letter, we recommend that the ESPS' illustrative list of Category A projects be amended to expressly include: "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."

⁵¹ OPIC, *Report in Response to the FY15 Consolidated and Further Appropriations Act (H.R. 83)* (16 Mar. 2015), p. 3, available at <https://www.opic.gov/sites/default/files/files/report-to-congress-03172015.pdf>.

6. Enhanced monitoring, especially for high risk projects

A 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 OPIC's client) and the allegations in the complaint, including allegations which the OA found credible.⁵² The OA recommended that OPIC improve the range of information available to it about high risk projects, both from affected stakeholders and from clients.⁵³ The OA suggested that OPIC consider: more frequent site visits by OPIC staff; mechanisms to obtain real-time feedback from affected stakeholders; use of qualified local CSOs as information channels; and early notification to both affected stakeholders and clients about the availability of OA services.⁵⁴ The OA also suggested that OPIC provide more detailed guidance to clients on matching the level of risk with enhanced requirements for PLGMs.⁵⁵

The OA's concerns about inadequate information and monitoring have been echoed in other reports. The USAID OIG noted vulnerabilities in OPIC's management of environmental and social risks because OPIC relies on client-reported data and does not visit most projects for several years.⁵⁶ GAO also raised concerns about the fact that OPIC's project monitoring remains substantially based on client-reported data, with little on-site or off-site verification by OPIC staff.⁵⁷ For the limited number of projects where OPIC staff have carried out a site monitoring visit, the lack of any specific timeframe for documentation of that visit has resulted in reports written several years after the visits occur.⁵⁸ GAO therefore concluded that OPIC's current monitoring processes may not provide adequate information to support its program goals.⁵⁹ GAO contrasted the IFC's monitoring practices, where every project is subject to a site visit at some point.⁶⁰ GAO recommended that OPIC review its monitoring processes to ensure that the risks associated with current practices are acceptable.⁶¹

On-site and off-site verification of client-reported data

We recommend that the ESPS commit OPIC to conducting site monitoring of all Category A and B projects by OPIC staff or independent consultants during the construction phase of projects (when negative environmental and social impacts can be at their highest) and at regular intervals throughout OPIC's participation in the project. As discussed above, for Category A and B projects, site visits should be conducted every 6 months during construction,

⁵² OA Report, pp. 71-72.

⁵³ *Id.*

⁵⁴ Discussed further in section nine of this letter.

⁵⁵ OA Report, p. 76.

⁵⁶ USAID OIG Report, pp. 5-6, 10-11, 15.

⁵⁷ GAO Report, pp. 40-43.

⁵⁸ GAO Report, p. 39.

⁵⁹ GAO Report, pp. 41 and 43.

⁶⁰ *See* GAO Report, p. 42.

⁶¹ GAO Report, p. 43.

every 12 months during implementation and at any time that project risk is reassessed and found to have increased. Monitoring will extend to verifying development outcomes, as well as environmental and social risks and impacts. OPIC's resource restrictions cannot justify inadequate monitoring of high risk projects.⁶² As also recommended by the OA, where resources are not available to adequately monitor high risk projects, OPIC should decline approval for the project.⁶³ As discussed in section 10, all project monitoring reports should be made publicly available in a timely manner.

Participatory monitoring, also discussed above in the context of human rights due diligence, is a useful method to improve OPIC's information availability. Indeed, in its Report on Liberia, the OA recommended that OPIC encourage its clients to use qualified CSOs to help them understand baseline local conditions and changes in such conditions.⁶⁴

Project-level grievance mechanisms

We note that in ¶3.9 the ESPS briefly refers to PLGMs. PLGMs, when operating well, provide another useful information channel and means to access remedy. Following the December 9, 2015 ESPS review roundtable, we understand that OPIC clients and/or staff have requested further guidance on the establishment and operation of PLGMs.

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.⁶⁵ Therefore, 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:⁶⁶

- a) **Lack of independence and trust:** In-house mechanisms allow perpetrators with a conflict-of-interest to internally investigate claims, determine culpability, exonerate, waive victims' rights, determine outcomes and keep those outcomes confidential to avoid public and shareholder scrutiny. As a result, project affected people have little reason to trust the process or have confidence that their grievances will be resolved fairly or transparently.
- b) **Inappropriate for human rights abuses:** These mechanisms have neither the expertise nor the authority to adequately deal with cases of human rights abuses,

⁶² Those resource restrictions are noted in *id.*

⁶³ OA Report, pp. 10, 71.

⁶⁴ OA Report, p. 73.

⁶⁵ See Katherine McDonnell (EarthRights International), "Community-Designed Grievance Mechanisms: A Proposal to Ensure Effective Remedies for Corporate Human Rights Abuses at the Operational Level," 10 June 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," Sept. 2009, 4, *available at* <http://www.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18>.

⁶⁶ 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>.

violations of international human rights and humanitarian law or serious crimes such as torture, rape and extrajudicial killings.

- c) **No oversight or accountability:** These mechanisms are void of third-party oversight to monitor the grievance process and ensure that outcomes are enforced. PLGMs provide a means to control any negative repercussions from in-house investigations of rights violations in order to maintain secrecy, thereby avoiding legal and financial consequences and thwarting the possibility of learning lessons at higher levels of management and throughout the organization.
- d) **Barriers to other forms of judicial and non-judicial remedy:** The complete control of information, legal waivers and confidentiality clauses associated with a one-sided grievance process severely limits the victims' ability to raise awareness of their plight, escalate their claims or seek redress through other means, such as through the OA. Furthermore, victims may not have access to legal counsel or advisors when making decisions about waivers and other agreements throughout the grievance process.
- e) **No protection against reprisals:** PLGMs may fall short in terms of ensuring freedom from reprisals by the government, company or community. Even when provisions on reprisal prevention exist, there is no process to address the threat or execution of reprisals when they occur, leaving vulnerable people even more at risk for their safety and wellbeing.
- f) **Lack of community participation:** These mechanisms rarely involve communities or potential mechanism users in the design, implementation or monitoring and evaluation of outcomes. As a result, the PLGM may lack local buy-in and trust, and may fail to account for critical cultural and project-specific factors that should shape and drive the grievance process.

We strongly discourage this method of redress without appropriate precautions, including oversight and auditing. However, we recognize that communities value and should have options for seeking redress. We urge OPIC to avoid the pitfalls of poorly designed and implemented PLGMs and require clients to incorporate best practice.

In ¶3.9 or in a separate provision, the ESPS should expressly require, at a minimum, that PLGMs incorporate the “effectiveness criteria”⁶⁷ set forth in the 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.⁶⁸ All grievance mechanisms should embody these principles and serve as a means for ensuring accountability and redress. In fact, as the Commentary to the Guiding Principles duly recognizes, “[p]oorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders

⁶⁷ See UN Guiding Principles, Principle 31(a)-(h).

⁶⁸ 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.

by heightening their sense of disempowerment and disrespect by the process.”⁶⁹ As such, OPIC should incorporate specific language and requirements to guard against the pitfalls mentioned above.

⁶⁹ UN Guiding Principles, Principle 31 (commentary).

7. Improved assessment and monitoring of development outcomes

The risk that OPIC's projects will not achieve their projected development benefits is a major feature of the OA Report and the subject of some of its most detailed recommendations. The OA found that OPIC's risk management system failed to explicitly assess the elevated risks that the Buchanan Renewables project would not achieve its projected development benefits.⁷⁰ 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.⁷¹

While OPIC asserts that it has strengthened how it screens and monitors projects, the recent reports of the USAID OIG and GAO suggest otherwise. 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 contribution to development might be reduced by overemphasizing financial considerations;⁷² and (2) development scores assigned to each project rely on self-reported estimates and might be inaccurate.⁷³ The OIG's review of OPIC investment documents and interviews with senior OPIC officials gave the impression that "OPIC is a bank focused on credit risk and self-sufficiency... as long as OPIC gets repaid, social or economic development impact is assumed to have taken place."⁷⁴ The OIG referred to an example where a project's development score was based in part on the client's assertion that it would hire 70 employees, yet the client told the OIG that after receiving funding, the client did not hire any employees.⁷⁵

The GAO report also 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.⁷⁶ The GAO reviewed a sample of 21 OPIC projects, only three of which received an OPIC site visit after the projects became operational. Of those three projects, two had their development scores downgraded following the site visit because the project was not meeting its projected development goals.⁷⁷ The GAO report refers to OPIC's commitment to ensure sufficient capacity and resources to review and monitor high risk projects in response to the OA Report,

⁷⁰ 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.

⁷¹ OA Report, pp. 9-10, 69-72.

⁷² USAID OIG Report, p. 5.

⁷³ *Id.* at p. 5.

⁷⁴ *Id.* at p. 7.

⁷⁵ *Id.* The report goes on to add that these statements "suggest a risk that OPIC development scores provided by its Office of Investment Policy could overestimate development impact and that its clearance requirements might not be enforced." *Id.*

⁷⁶ GAO Report, pp. 40 and 43.

⁷⁷ The third project received a higher overall score after the site visit. *See id.* at pp. 38-39.

but warns that “[w]ithout analyzing the risk to information quality inherent in its project monitoring process,” OPIC cannot be assured that it is satisfying its monitoring objectives.⁷⁸

A number of the recommendations made in other sections of this letter will support OPIC to better assess and monitor development outcomes. For example, we recommended in section one that the project appraisal process include the identification and assessment of potential positive impacts and opportunities (as well as negative risks), the identification of verifiable impact indicators and the regular reassessment of risks and impacts following implementation (including against those impact indicators). We also recommended that this process be more robust, including through requirements on OPIC to take steps to verify client-reported information and to seek additional information where necessary. In section three, we recommended an explicit requirement to collect appropriate baseline data, as without such data it is impossible to accurately assess development impacts. And in sections 6 and 10, we proposed enhanced monitoring and disclosure procedures that require regular monitoring of, and publically reporting on, development impact.

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,⁷⁹ however we recommend that the improved systems apply to all projects, given the ongoing flaws identified by the USAID OIG and GAO reports. 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.⁸⁰

⁷⁸ *Id.* at p. 41.

⁷⁹ OA Report, pp. 9-10, 69-72.

⁸⁰ *See* Foreign Assistance Act of 1961, §231 (as amended); *see also* USAID OIG Report, p. 6.

8. Enhanced community consultation and engagement

Achieving meaningful, informed, community participation continues to be a challenge for OPIC. While we commend the ESPS' definition of meaningful consultation, we are concerned that the obligation to conduct such consultation is weakened by the absence of specific supervisory requirements.

Accordingly, we recommend that the ESPS provide more explicit requirements for stakeholder engagement and community consultation and requirements to evidence the same. The ESPS should expressly provide that:

- a) Clients must provide potentially project affected people with access to information in an understandable language and format about the project, partners, location, alternatives, risks, benefits and their likelihood and about the existence of PLGMs and the OA throughout the course of the project. Clients must provide primary source evidence of this information and its distribution as part of its environmental and social review, any update of that review following changes in project design or context and any monitoring reports;
- b) In ¶3.5, a draft ESAP should be made public and be subject to meaningful consultation for both Category A and Category B projects. The adverse impacts of Category B projects, while localized (under OPIC's definition), must still be mitigated. Local communities that are familiar with the environmental and social context are well-placed to provide input into the design of those mitigation measures. Communities must be consulted on any changes to that plan following any modifications in project design or context;
- c) In ¶¶3.12 and 3.13, for both Category A and Category B projects, the client must provide evidence of: (a) its responsiveness to the views of project affected communities; (b) broad community support; and (c) for Special Consideration Projects, 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;
- d) In ¶3.15, the ESAP must include a timeline for full, effective and continuous participation of project affected people in the monitoring and management of impacts. Communities must be consulted on this timeline and its components. Monitoring reports must contain primary source evidence of compliance with this timeframe;
- e) In ¶5.7, the ESPS should clarify that "significant adverse impacts on project affected people" includes all Category A projects and all projects involving resettlement. In addition, ¶5.7 should clarify that OPIC will undertake independent verification of compliance;
- f) For projects impacting indigenous people, OPIC should require free, prior and informed consent (FPIC). FPIC should be independently verified by OPIC before the project is approved and then monitored during project implementation. In this regard,

- the IFC PS do not align with international law or obligations as set out in UNDRIP;⁸¹ and
- g) As discussed in more detail in section 10, all relevant project related information should be made publicly available in a timely manner. 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.

The OA Report on Liberia also recommended that OPIC improve its engagement with CSOs, especially local CSOs, in order to support community engagement and ultimately enhance the project's development outcomes. In particular, the OA suggested that CSOs with community engagement capacity can serve as intermediaries with project affected people, especially when there are vulnerable stakeholders or when the client is working in a sensitive or high risk environment.⁸²

⁸¹ Compare UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent*, available at http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/ 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.

⁸² OA Report, p. 71.

9. Support for OPIC's Office of Accountability

The OA concluded that the Buchanan project in Liberia demonstrated⁸³ 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.⁸⁴ As the OA pointed out, awareness is a prerequisite to access to remedy. Accordingly, the OA recommended that OPIC take steps to promote awareness among affected communities of the problem-solving services offered by the OA.⁸⁵

The OA Report was one of the last acts of the outgoing OA Director, Keith Kozloff, who completed his term on September 30, 2014.⁸⁶ Shockingly, despite the recommendations contained in his report, the OA was left entirely unstaffed for almost 16 months after his departure, and more than a year after the Congressional direction to recruit his replacement.⁸⁷ OPIC has only recently hired a replacement.⁸⁸

To avoid recurrence of such an unacceptable delay, we recommend that the ESPS:

- a) Includes a requirement that the OA is staffed by highly qualified personnel at all times; and
- b) Imposes an obligation on OPIC's clients (supervised by OPIC) to ensure that all project affected persons are aware of the existence of the OA and its services from the beginning of OPIC's engagement, including throughout consultation processes.

⁸³ The OA acknowledged that this problem is common among communities affected by OPIC projects. OA Report, p. 55.

⁸⁴ *Id.* Due to the client's repayment of the loan and the end of its contractual relationship with OPIC.

⁸⁵ OA Report, p. 76.

⁸⁶ See OA Director's Fiscal Year 2014 Letter, available at <https://www.opic.gov/sites/default/files/files/oa-director-letter-fy14.pdf>.

⁸⁷ Congress, concerned about the OA Report and the harm caused by the Buchanan 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, available at <https://www.congress.gov/crec/2014/12/11/CREC-2014-12-11-bk2.pdf> at H9954.

⁸⁸ See 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).

10. Publication of all relevant policies, procedures, sector guidance and project related information

Finally, in the interests of transparency and accountability of OPIC operations, the ESPS should expressly require the publication of:

- a) All relevant policies, procedures and sector-specific guidance; and
- b) Project screening and categorization, environmental and social reviews (including ESIA's and assessments undertaken for Category B 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. They should be disclosed 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 and B projects) and whenever updated. Monitoring reports will be disclosed to the public and affected communities as they are completed.

Transparency is a key principle of a human rights-based approach to development and a key prerequisite to accountability.⁸⁹ Both project affected people and the wider public have a legitimate interest in accessing and reviewing project related information as well as general policies and procedures, to assess and verify OPIC's and its client's self-reported performance and compliance with environmental and social standards. As the U.S. Government's development finance institution, OPIC should strive for the highest possible transparency and accountability standards.

Thank you for considering our recommendations. We look forward to engaging further in the ESPS review process and providing feedback on the revised draft during the public comment period.

Sincerely,

Accountability Counsel - USA

Actions pour les Droits, l'Environnement et la Vie (ADEV) - Democratic Republic of Congo

AFL-CIO - USA

American Jewish World Service - USA

Association Guinéenne pour la Transparence (l'AGT) - Republic of Guinea

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 - Democratic Republic of Congo

Foundation for the Development of Sustainable Policies (FUNDEPS) - Argentina

Friends of the Earth-US - USA

⁸⁹ See Danish Institute (2014), pp. 25-26.

Gobi Soil - Mongolia
Green Advocates - Liberia
Jamaa Resource Initiatives - Kenya
Lumière Synergie pour le Développement - Senegal
Narasha Community Development Group - Kenya
NGO Mer Bleue - Mauritania
OT Watch - Mongolia
Rivers without Boundaries (Mongolia) - Mongolia
Sierra Club - USA
Solidarity Center - USA
Swedwatch - Sweden
Worldview - The Gambia

SCHEDULE OF RECOMMENDATIONS

1. Human rights due diligence

- a) OPIC should establish specific procedures for identifying, assessing and managing human right risks, that satisfy the following core criteria:
 - i. A commitment to not cause or contribute to any breaches of international human rights standards and to utilize such standards as a benchmark for the identification, assessment and management of project risks and impacts;
 - ii. Emphasis on the principles of participation and inclusion, equality and non-discrimination, transparency and accountability, *in both process and outcome*, paying particular attention to vulnerable groups and to the different risks, impacts and opportunities faced by different groups;
 - iii. Clear obligations (including assigned responsibilities) to screen, identify and assess human rights risks and impacts (whether actual, potential, direct, indirect, secondary or cumulative) prior to the start of operations and to develop robust risk management plans (avoiding, reducing, mitigating and/or remedying risks and impacts), drawing on relevant expertise and in meaningful consultation with affected communities;
 - iv. Clear obligations to monitor and manage human rights risks and impacts at regular intervals during project implementation and operation, including by reevaluating risks as appropriate, by adequately and transparently reporting on project performance and impacts and by providing access to remedy;

Commitment to respect human rights

- b) ¶1.3 should commit OPIC to: (i) respect human rights and ensure that projects it supports do not cause, contribute to or exacerbate human rights violations, including undertaking necessary due diligence in the design, implementation, monitoring and evaluation of those projects, and taking appropriate steps to respond to any violation; (ii) 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; and (iii) continuing, timely, meaningful community consultation and participation;
- c) The ESPS should define “human rights” to include all of the core human rights treaties, as well as other instruments of international human rights and humanitarian law;
- d) References to “human rights” (as defined above) should be inserted in ¶¶4.3, 4.8 and 4.12. “Human rights” should be added to ¶4.11 as standards that must be met from the outset;
- e) Appendix B of the ESPS should include projects that are likely to cause, contribute to or exacerbate human rights violations.

Project appraisal – the ESPS should:

- f) Define “social” to expressly include, inter alia: (i) the realization or enjoyment of human rights; (ii) disproportionate accrual of adverse impacts on different groups due to their experience of marginalization, discrimination or exclusion; and (iii) inequitable access to development benefits due to a group’s experience of marginalization, discrimination or exclusion;
- g) Clarify that: human rights risks will be integrated within the environmental and social

screening, categorization and review process, in addition to any human rights review or clearance by the Department of State; and, importantly, that a positive human rights clearance from the Department of State does not indicate that the project's human rights risks are acceptable;

- h) Incorporate features of the Coalition methodology's Social Risk and Opportunity Analysis into the project screening and categorization procedure. For example:
 - i. ¶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";
 - ii. ¶2.4 should expressly 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;
 - iii. Appendix A should include, as illustrative high risk/sensitive 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/out of the project area"; "projects involving land acquisition or physical and economic displacement"; "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)"; and "projects located in countries in which the International Labor Organization (ILO) has an open Commission of Inquiry";
 - iv. The definition of Category A should include projects that "may" have significant adverse environmental and/or social impacts, on the basis that where significant adverse risks are involved, a precautionary approach is appropriate;
- i) Where a project poses human rights risks, 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;
- j) Where a project is categorized as Category A, the ESIA will be verified by an Independent Panel of Experts, including, where appropriate, human rights experts;
- k) Require that clients 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 client;
- l) Require that the client's environmental and social review, for both Category A and B projects, includes an analysis of: (i) how the project will contribute to inclusive, sustainable development; (ii) socio-economic history and context, including discrimination, inclusion and other human rights issues, and conflict analysis where relevant; (iii) plausible alternatives that may avoid and minimize potential adverse impacts and maximize inclusive development benefits; (iv) severity of risks and impacts, based on their scope, extent and remediability; (v) justification for the choice and any prioritization of mitigation measures; and severity of any residual impacts; and includes: (vii) identified impact indicators, for both positive and negative impacts;

(viii) a timeline for monitoring and supervision measures; (ix) a plan for appropriate grievance mechanisms (discussed further below); (x) the client'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;

m) Ensure that OPIC's review of its client's environmental and social review includes: (i) OPIC reviewing and verifying the information provided by the client 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 client; (iii) OPIC providing guidance to assist the client in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social risks and impacts in accordance with the ESPS and IFC PS and in compliance with national and international law; OPIC seeking input from affected communities where appropriate, as well as requiring and verifying FPIC for projects impacting indigenous peoples; and OPIC consulting the U.S. Department of Labor's International Labor Affairs Bureau regarding potential labor rights risks;

n) Include a reference to "human rights" within ¶3.11;

o) Ensure that any Environmental and Social Action Plan (ESAP): (i) has the express agreement of project affected people; includes time-bound supervision, participatory monitoring and reporting plans; (ii) includes a time-bound Stakeholder Engagement Plan; (iii) identifies impact indicators; (iv) allocates specific resources for mitigation measures as well as a contingency for unanticipated mitigation or remedial measures; (v) includes specific timelines for mitigation measures and pegs funding disbursements to the completion to significant steps; and (vi) provides for sanction and remedy in the case of non-compliance; and outlines the client's dedication of resources to a contingency arrangement (e.g., fund, insurance, bond, etc.) to provide remedy if harm occurs;

p) If utilized, a stand-alone, independent Human Rights Impact Assessment (HRIA) must supplement, not substitute, integrated assessments of human rights risks within general environmental and social risk review processes. Screening criteria should be established and publicly released, and should incorporate country, sector and client characteristics (refer to suggestions at pp. 9-10). The recommendations above relating to integrated assessment also remain relevant;

Ongoing risk monitoring and management

q) The project's environmental and social risks and impacts (both positive and negative) will be revisited and updated by the client in consultation with project affected communities at each stage of implementation – construction, operation, rehabilitation or decommissioning – and upon any major changes in project design or context;

r) OPIC will review risk and impact updates and perform necessary site visits to monitor project implementation, mitigation and social impacts. For Category A and B projects, social and labor rights specialists should visit the project site every 6 months during construction, every 12 months during implementation and at any time that project risk is reassessed and found to have increased;

s) Affected communities will be engaged in participatory monitoring. OPIC commits to:

(i) facilitating community-based monitoring, including by facilitating community access to information and by facilitating client engagement; and (ii) responding to its findings and seeking its client's agreement to do the same. If the client 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);

t) Category A projects will utilize independent monitoring, reporting directly to OPIC's Board;

u) Reporting of ESAP implementation will include primary source evidence as well as verified performance indicators;

v) Where actual impacts, mitigation measures and residual impacts do not match those anticipated in the environmental and social review, or impact indicators are not met, the environmental and social review will be updated and implementation and mitigation plans will be adjusted to ensure that sustainable, inclusive development impacts are maximized and negative impacts are avoided and minimized. If the environmental and social review cannot be adjusted to satisfactorily address impacts, compliance remedies, such as the activation of the contingency arrangement (e.g., fund, insurance plan, bond, etc.), and appropriate sanctions, including funding termination, will be employed;

w) Midterm and completion reports will be drafted by OPIC and its client in consultation with affected communities and made publicly available. Funding disbursement will be linked to realization of impact indicators;

x) A requirement that all monitoring, midterm and completion reports are publicly disclosed; and

y) Requirements for PLGMs are commensurate with the level of human rights risk.

2. Cumulative impact assessment

a) ¶¶2.5 and 3.11 of the ESPS 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;

b) ¶2.9 should require the identification of "groups and communities that may be directly *and indirectly* affected by the Project"; and

c) The definition of "project affected people" should expressly refer to the project's entire area of influence.

3. Baseline data

a) ¶3.11 should be amended to require as part of the environmental and social review process 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.

4. Other vulnerable parties

a) The ESPS should define "project affected people" as including potentially vulnerable parties within the project's value chains and potentially vulnerable parties entering into contracts with the client;

b) The ESPS should define "vulnerable" as including those who have little flexibility to rebound when disruptions to their livelihoods occur due to their economic and social circumstances;

c) The ESPS should require that OPIC review contracts between the client and potentially

vulnerable parties for fairness to those potentially vulnerable parties; and

- d) In appropriate cases, the ESPS should require the provision of third-party assistance (such as independent legal advice) to those parties.

5. Post-conflict environments

- a) The ESPS' illustrative list of Category A projects should be amended to expressly include: "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."

6. Monitoring – the ESPS should require that:

- a) For Category A and B 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;
- b) Monitoring will extend to verifying development outcomes, as well as environmental and social risks and impacts;
- c) Where resources are not available to adequately monitor high risk projects, OPIC will decline approval for the project;
- d) Participatory monitoring (as discussed above at (1)(o) and (1)(s)) will be utilized to improve OPIC's information availability; and
- e) PLGMs should incorporate the principles of legitimacy, accessibility, predictability, equitability and fairness, transparency, rights compatibility, serving as a source of continuous learning and based on engagement and dialogue. OPIC should incorporate language and requirements to avoid common pitfalls associated with PLGMs, including: the lack of independence and trust; their inappropriate use to address human rights abuses; the lack of oversight and accountability; the creation of barriers to other forms of judicial and non-judicial remedy, such as the OA; the lack of protection against reprisals; and the lack of community participation.

7. Improved assessment and monitoring of development impact

- a) A number of the recommendations made in other sections will support OPIC to better assess and monitor development outcomes. For example, we recommended in section one that the project appraisal process include the identification and assessment of potential positive impacts and opportunities (as well as negative risks), the identification of verifiable impact indicators and the regular reassessment of risks and impacts following implementation (including against those impact indicators). We also recommended that this process be more robust, including through requirements on OPIC to take steps to verify client-reported information and to seek additional information where necessary. In section three, we recommended an explicit requirement to collect appropriate baseline data, as without such data it is impossible to accurately assess development impacts. And in sections 6 and 10, we proposed enhanced monitoring and disclosure procedures that require regular monitoring of, and publically reporting on, development impact;
- b) In addition, we recommend that the OPIC President transparently task an appropriate internal group to improve OPIC's risk management systems, by developing an approach to robustly and explicitly assess, manage and monitor the risk that projects

will not achieve projected development benefits.

8. Community consultation and engagement – the ESPS should require that:

- a) Clients provide potentially project affected people with access to information in an understandable language and format about the project, partners, location, alternatives, risks, benefits and their likelihood and about the existence of PLGMs and the OA throughout the course of the project. Clients must provide primary source evidence of this information and its distribution as part of its environmental and social review, any update of that review following changes in project design or context and any monitoring reports;
- b) In ¶3.5, a draft ESAP be made public and be subject to meaningful consultation for both Category A and Category B projects. Communities must be consulted on any changes to that plan following any changes in project design or context;
- c) In ¶¶3.12 and 3.13, for both Category A and Category B projects, the client provide evidence of: (a) its responsiveness to the views of project affected communities; (b) broad community support; and (c) for Special Consideration Projects, 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;
- d) In ¶3.15, the ESAP include a timeline for full, effective and continuous participation of project affected people in the monitoring and management of impacts. Communities must be consulted on this timeline and its components. Monitoring reports must contain primary source evidence of compliance with this timeframe;
- e) In ¶5.7, the ESPS clarify that “significant adverse impacts on project affected people” include all Category A projects and all projects involving resettlement. In addition, ¶5.7 clarify that OPIC is to undertake independent verification of compliance;
- f) For projects impacting indigenous people, OPIC require FPIC. FPIC should be independently verified by OPIC before the project is approved and then monitored during project implementation;
- g) OPIC improve its engagement with CSOs, especially local CSOs, in order to support community engagement and ultimately enhance the project’s development outcomes; and
- h) All relevant project related information be made publicly available in a timely manner. 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.

9. Office of Accountability – the ESPS should require that:

- a) The OA is staffed by highly qualified personnel at all times; and
- b) OPIC’s clients (supervised by OPIC) ensure that all project affected persons are aware of the existence of the OA and its services from the beginning of OPIC’s engagement, including throughout consultation processes.

10. Transparency – the ESPS should require the publication of:

- a) All relevant policies, procedures and sector-specific guidance; and
- b) Project screening and categorization, environmental and social reviews (including ESIA’s and assessments undertaken for Category B 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, will be disclosed 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 and B projects) and whenever updated. Monitoring reports will be disclosed to the public and affected communities as they are completed.