

April 6, 2012

Via Electronic Mail

Ms. Elizabeth Littlefield, President & CEO
Members of the OPIC Board of Directors,
via Connie Downs, Corporate Secretary
Overseas Private Investment Corporation
1100 New York Avenue, N.W.
Washington, D.C. 20527

Re: Concerns About the Review of Procedures of the OPIC Office of Accountability

Dear President Littlefield and Members of the OPIC Board of Directors:

The undersigned civil society organizations fully support the mission of the Overseas Private Investment Corporation's ("OPIC") Office of Accountability ("OA") to provide a forum to address concerns of local communities impacted by OPIC projects.¹ We are therefore concerned that the OA is currently undertaking an opaque process to alter the OA's operational procedures in ways that contradict Congressional guidance² as well as the OPIC Board of Directors' Resolution ("Board Resolution") creating the office.³ While we welcome a review of the OA's operational procedures, the process as currently defined by the OA's Director is not independent, transparent, objective or fair.

1. The Office of Accountability's current review lacks transparency and public process.

Congress envisioned an accountability mechanism that followed best practice in the field and that is "transparent in its operations and outputs[.]"⁴ Nonetheless, in stark contrast to practices at other similar institutions and other policy reviews at OPIC itself, the OA is currently undertaking a private review and revision of the OA's operational procedures. The OA Director has denied requests for public participation in the policy review process. Instead, the Director convened an invitation-only, two-hour workshop and refused to invite other interested parties, including several signatories to this letter.⁵ None of the invited workshop participants were directly affected communities or potential users of the OA.

¹ See House of Representatives Report 108-339 for the Overseas Private Investment Corporation Amendments Act of 2003, Pub.L. 108-158 ("House Report"). Congress directed OPIC to create an accountability mechanism that is "responsive to stakeholders' considerations ...[;] accessible to project-affected parties; and insure the independence and integrity of the evaluations and advice provided..."

² See House Report.

³ See OPIC Board Resolution BDR(04)33 ("Board Resolution").

⁴ See House Report.

⁵ Of the signatories to this letter, only Doug Norlen of Pacific Environment, Kristen Genovese of the Center for International Environmental Law, and Natalie Bridgeman Fields of Accountability Counsel were invited to the workshop.

Following the workshop, the OA Director requested that participants provide additional feedback on discussion topics within approximately one month. The review process, as currently designed, will provide no opportunity for the public, including potential users of the mechanism and other interested stakeholders, to comment on draft procedures. While the Director stated that he plans to solicit comments from users involved in the three complaints addressed by the OA to date, he provided no detail as to when he will conduct these consultations and in what manner.

The lack of transparency, balance and fairness in the OA's current review stands in stark contrast to the review processes at similar accountability mechanisms, which typically: (1) involve hiring independent consultants to conduct the review;⁶ (2) seek input and comments from a wide range of internal and external stakeholders;⁷ and (3) provide opportunities for the public to comment on drafts.⁸

In this case, the independence of the OA review is important because having the sole person in charge of the OA elicit and process comments for the review regarding current problems with the mechanism may leave some of the most pressing issues facing the OA's procedures unaddressed.⁹

To justify a truncated and private process, the OA's Director has claimed that the changes to the OA's operational procedures will be minor. While we strongly disagree with this characterization of the proposed changes, best practice mandates a transparent review process even for minor changes to operational procedures. For example, in an analogous case, the World Bank Inspection Panel is currently undergoing an update to its Operating Procedures that avoids changes that undermine or conflict with its founding documents. In contrast to the OA, the Panel's update includes targeted discussions with internal and external stakeholders, as well as plans for public discussion and 45-60 days for public comment on draft procedures.¹⁰

Moreover, precedent within OPIC itself indicates that a review should be far more transparent and open. To review its environmental and human rights policies, OPIC distributed a draft of the new policies available for public comment via its website during the course of several

⁶ The World Bank Inspection Panel, the Asian Development Bank, African Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development all hired independent experts to conduct reviews of their accountability mechanisms. The World Bank Group's CAO will be undergoing a review of their Operational Guidelines soon and the proposed draft will be posted for comment on the CAO's website.

⁷ All other reviews have been open to, and have actively solicited, public comment.

⁸ For example, the European Bank for Reconstruction and Development's public comment period lasted 60 days on one occasion and 75 days on another occasion, the public comment period for the European Investment Bank lasted 20 days on one occasion and 45 days on another, the Inter-American Development Bank comment period lasted 10-12 weeks, and the Asian Development Bank lasted 8 weeks on one occasion and 12 weeks on another.

⁹ Despite a year of repeated requests for information about the compliance review process by communities who filed the Cerro de Oro complaint to the OA in November 2010, the communities only received word about how the OA plans to conduct the compliance review process in November 2011. The last public information about the status of the compliance review request is the December 6, 2010 registration of the complaint.

¹⁰ The World Bank Inspection Panel Update of the Panel Operating Procedures, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:22991942~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>.

weeks and disclosed on its website copies of the written comments, a summary of the comments, and responses to the comments.¹¹

As currently designed, the OA Director’s review process would undermine the legitimacy and credibility of the OA’s operations and is out of step with stated Congressional expectations and best practice. We call on OPIC’s President and Board to ensure that any review of the OA follow best practice as envisioned by Congress.

2. The proposed changes conflict with the Office of Accountability’s foundational documents.

Materials provided for the workshop mentioned above indicate that the OA Director is proposing changes that undermine the OA’s main objectives as described by Congress and the OPIC Board Resolution. For example, the proposed changes would limit access to the mechanism by creating new bars to eligibility that contradict the relatively low bar to “standing” set forth in the Board Resolution. Specifically, the proposed changes would conflict in several substantive ways with the Board Resolution establishing the OA:

First, the proposed changes would require complainants to demonstrate that “good faith efforts” to otherwise address the conflict have been exhausted, including the use of existing local problem-solving resources. The Board Resolution states simply that “[t]aking into consideration prevailing practices at other IFIs and OPIC’s own structure... impacted communities in the host country and those documented as their authorized representatives . . . have requisite ‘standing’ to request a response and report from the OA”¹² The proposal that impacted communities cross this additional, un-defined, and highly discretionary “good faith efforts” hurdle to filing a complaint with the OA (which may be dangerous or impossible to overcome) is a substantive limitation on access to the mechanism.

Second, the proposed changes envision that the OA conduct compliance reviews only if the potential benefits merit the time and resources. While the Board Resolution does mention that the OA should be “cost effective[,]” it also calls on the OA “to provide a forum to investigate and report on complaints regarding OPIC’s compliance” and does not limit such investigations to those that pass an initial and highly discretionary cost-benefit analysis.¹³ We do not believe that either Congress or the OPIC Board intended that the right of a complainant to seek compliance review should be weighed against the cost to OPIC and its clients. Were this provision to become OA policy, this could effectively remove the forum for compliance review envisioned by Congress and OPIC’s Board.

¹¹ OPIC used the following process to solicit comments on its Human Rights and Labor Policy: “During the forthcoming 60 days, ... OPIC will seek comments from a broad range of public stakeholders through this website. ... OPIC will publish a summary of all comments made, and its response to the comments. ... Should there be in OPIC’s view, sufficient widespread interest among stakeholders in further dialogue, OPIC will schedule stakeholder meetings during or after the comment period.” See http://www.opic.gov/doing-business/investment/rights/policy_statement. OPIC followed a similar approach to receive comments on its Environmental and Social Policy. See http://www.opic.gov/doing-business/investment/environment/policy_revision.

¹² See Board Resolution ¶ 4(b).

¹³ See Board Resolution ¶¶ 1 & 2.

Each of these proposed changes limit access to the mechanism in ways not envisioned in the Board Resolution. Such changes cannot, therefore, be considered minor and should not be undertaken in the absence of a transparent, properly noticed opportunity for public comment.

To meet Congressional expectations that the OA be transparent, responsive to stakeholders and in-line with best practice, we call on the OPIC President and Board to ensure that the review of OPIC's OA: (1) be conducted by independent consultants; (2) be transparent regarding the timeline and scope of the review; (3) involve a wide range of stakeholders including affected and potentially affected communities; and (4) provide a well-noticed, reasonable and meaningful opportunity for public comment on a draft of a revised operational procedure.

We appreciate your attention to this matter and look forward to meaningful engagement with a transparent OA review process.

Sincerely,

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Accountability Counsel, USA

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cc: Senate Committee on Foreign Relations, Chairman John Kerry
Senate Committee on Foreign Relations, Ranking Member Richard Lugar
House Committee on Foreign Affairs, Chairman Ileana Ros-Lehtinen
House Committee on Foreign Affairs, Ranking Member Howard Berman
House Committee on Foreign Affairs Subcommittee on Terrorism, Nonproliferation and
Trade, Ranking Member Brad Sherman