

## ACCOUNTABILITY COUNSEL

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October 18, 2013

***Via Electronic Mail***

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**Re: Comments on the OPIC Office of Accountability Draft Operational Guidelines Based on Experience from the Cerro de Oro Case**

Dear Dr. Kozloff,

We write to thank you for engaging civil society and external stakeholders in the review of the OPIC Office of Accountability (“OA”) Operational Guidelines, and to provide feedback and suggestions based on our experience working with the OA on the complaint regarding the Cerro de Oro Hydroelectric Project from Oaxaca, Mexico. These comments are supplementary to the civil society letter on the August 2013 Draft Operational Guidelines Handbook for Problem-Solving and Compliance Review Services (“Draft Guidelines”), submitted to your office by Accountability Counsel and other civil society organizations on October 18, 2013.<sup>1</sup>

The role of the OA in addressing the concerns of communities affected by the Cerro de Oro Hydroelectric Project was critical, without which community members would have had limited opportunities for recourse.<sup>2</sup> The communities of Paso Canoa, Santa Ursula, and Cerro de Oro, who were signatories to the complaint<sup>3</sup> (the “Communities”), were ultimately satisfied with the negotiated agreement resulting from the OA facilitated process, providing them the right to understand and participate in the development decisions that would affect their lives and livelihoods. We thank you for your work on that case, but in the interest of improving the process for future complainants who approach the OA for support, we believe that there are opportunities

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<sup>1</sup> See Joint Civil Society Letter to OPIC Office of Accountability, Submitted October 18, 2013, available at: <http://www.accountabilitycounsel.org/policy/existing-mechanisms/opic/2013-opic-oa-policy-review/>.

<sup>2</sup> Accountability Counsel, along with a coalition of local, national, and international civil society organizations, supported the affected communities to file their complaint and participate in the OA facilitated process.

<sup>3</sup> The community of Los Reyes participated in the negotiations, but was never one of the signatories to the complaint.

for change that could improve the process substantially. As an organization working closely with the Communities and participating in the OA process, we would like to provide our feedback and raise some concerns about the OA process that can be addressed in the current Draft Guidelines review.

### Problem-solving

The OA facilitated problem-solving process in the Cerro de Oro case resulted in an historic negotiated agreement.<sup>4</sup> While the Communities were satisfied with the language of the agreement, there were problems and misunderstandings throughout the process that could be avoided in the future through procedures that take the following concerns into consideration.

#### *Termination of the process*

The Communities expected the OA to work with the parties through the dialogue process to build and maintain trust, and to stay engaged as long as the parties wanted to continue dialogue. When the OA unilaterally decided that there was not enough trust between the parties to continue the process, though neither party had indicated a desire to leave the mediation, it created an unpredictable and disheartening situation, given the advances made through the process. The option for unilateral termination is in the Draft Guidelines in Section 3.1.7, which provides the OA the right to suspend or terminate a problem-solving process where continuing is “unlikely to produce positive results because, for example, sufficient trust cannot be established or the integrity of the process has been irreparably damaged.” While we appreciate the need to keep problem-solving voluntary to create meaningful results, a decision about termination of a process should be done in consultation with the parties involved, and ideally with their consent. In processes involving historic or complex problems, issues of trust will always be present and the OA should expect trust levels to vary between high and low points throughout a process. It is the work of the OA to assist parties in building trust over time so that solutions are possible. In the Cerro de Oro case, trust issues were present on both sides, but both parties had expressed interest in the process and were not given an opportunity to discuss the OA’s decision to withdraw.

We suggest that Section 3.1.7 include a requirement that suspension or termination of a problem-solving process be undertaken only after consultation with the parties, including a meeting devoted to a meaningful discussion of the future of the process. Furthermore, this option should only be used in the rarest of cases where trust and integrity do not allow any kind of decision to be reached, which was not the case in the Cerro de Oro process.

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<sup>4</sup> March 11, 2011 agreement reached in Tuxtepec, Oaxaca, *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2012/01/March-11-Agreement-English.pdf>.

### *Transfer to third parties*

As the OA prepared to terminate its problem-solving role in the Cerro de Oro case, the OA held meetings with representatives of the State of Oaxaca in an attempt to transfer to the State Government, an entity with a direct interest in the project, the facilitation of any ongoing negotiations between the parties. The Communities and their representatives did not anticipate this transfer, as such a practice is not stipulated in either the materials on the OA's website at the time or the OPIC Board Resolution establishing the OA. Because of the conflict-of-interest and historical police violence used by authorities against rural and indigenous communities in the region, the Communities did not want the State to facilitate the process. They wanted an external facilitator and approached the OA with that goal in mind. They were further upset about the transfer process as they were not consulted and learned about the meeting from local media reports. It should not be the role of the OA to assess whether a party other than the OA should be facilitating a problem-solving process, and the OA should respect the decision of complainants in the processes that they elect to use.

The Draft Guidelines do not specify whether the OA can transfer an existing process to a third party, as was done in the Cerro de Oro case. We recommend that the OA clarify this in the Draft Guidelines, noting that the OA must respect the complainants' decisions about choice of facilitator. Section 2.2.1 of the Draft Guidelines, allowing the OA to "[e]valuate the extent to which further efforts to address the conflict bilaterally with local third parties would be productive" during the initial assessment, should be stricken. This provision is counterproductive and could be harmful when a group of complainants has specifically sought the OA, rather than a local third party, through a complaint to its office.

### *Communication and culture*

The OA facilitated process in the Cerro de Oro case would have benefited from greater understanding of the cultural context, as well as the specific situation of the Communities, both before and during the process. Additionally, more effective communication based on the contextual norms would have greatly improved the process. Currently, the Draft Guidelines only mention cultural norms in Section 3.1.4 on implementation of the ground rules. However, greater attention to both broad cultural norms, as well as situation specific issues must be integrated into any OA process at all stages.

For a successful problem-solving process, OPIC and the OA must ensure that there are sufficient resources to ensure that the OA has a solid understanding of the case and context, ideally as early as possible in the process. Even where cultural norms may inform a process, there can also be significant differences between communities in the same region, based on ethnicity, language, class, or religion, that impact how affected communities communicate not only with the OA, but also with OPIC, the OPIC client, and each other. In the Cerro de Oro case, there were a large number of indigenous people in the Communities, with some identifying and adhering to customary laws and modes of

decision-making. Community members expressed frustration about the imposition of a mediation form that limited participation in the process, both in number and in style. Community members requested that a greater number of participants be present during the meetings, or that meetings take place in the communities, but were told that this would not foster an environment for a productive mediation process. The dispute resolution process would have been smoother if the OA had established a better understanding of how local processes functioned, and had been more willing to engage with the communities regarding these differences from the beginning.

We urge the OA to incorporate lessons from the Cerro de Oro into the Draft Guidelines, including the specific recommendation to consider hiring local consultants to assist in understanding local contexts.<sup>5</sup> The importance of respect for cultural practices should also be incorporated into the Draft Guidelines, particularly in the Guiding Principles at the beginning of the document. Furthermore, the OA should ensure that there are sufficient resources to translate all documents to the local language or dialect in a timely manner, preferably not creating delays in the prescribed timeframe set out in the Draft Guidelines.<sup>6</sup> Apart from the OA's translator used during site visits, Accountability Counsel served as the primary and nearly full-time translator for the communities the duration of the Cerro de Oro case. This was a service, unlikely to be available in many cases, that benefited the OA and was required by our clients in order for them to participate in the OA's complaint process.

### *Representation*

The Communities in the Cerro de Oro case felt their communication with both the OA and the other parties was supported by participation and coordination of a third party, namely Accountability Counsel. Communities were open to direct communication with the OA, but requested that the OA direct their communication through Accountability Counsel first. We believe that this largely functioned efficiently, with Accountability Counsel coordinating calls between the OA and community leaders, and helping to arrange meetings at various stages in the process. In moments where coordination was not done through Accountability Counsel, such as when the OA appointed mediator went to the affected communities without prior notice or proper coordination, there was considerable and unnecessary concern caused to the communities because this was contrary to their express wishes.

We are troubled that the Final OA Report on Problem-Solving Phase of Cerro de Oro Case expresses concern that the NGO representative "inhibited" the OA's ability to communicate directly with the communities.<sup>7</sup> On the contrary, we served as critical

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<sup>5</sup> Final OA Report on Problem-Solving Phase of Cerro de Oro Case, p.4, *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2012/01/2.19.12-OA-Final-Report-Problem-solving.pdf>.

<sup>6</sup> Draft Guidelines at §2.3, §3.1.2, and §4.9.

<sup>7</sup> Final OA Report on Problem-Solving Phase of Cerro de Oro Case, at p.4.

Spanish translators on an almost daily basis, facilitated hundreds of community voices reaching the OA in an organized and clear way, worked hard to ensure that the communities (both the three communities that filed the complaint and the community of Los Reyes) understood communications from the OA, and facilitated each and every request made for direct contact between the OA and the communities. While we applaud the decision of the OA to consider hiring local consultants who can assist in understanding the local and cultural context of affected parties, we also feel that the Guidelines should include respect for the decision of affected communities on how to structure their interactions with the OA.

We support the ability of documented and authorized representatives to file a complaint, but we urge the OA to go further and work with representatives through the process and respect the decision of complainants with respect to representatives' role and authority.

### Compliance review

In the Cerro de Oro case, the OA process did not result in a compliance investigation, though there were specifically alleged and well-documented violations of OPIC policies and procedures in the complaint, particularly those related to consultation, indigenous peoples, and the quality of due diligence. A full investigation could and should have resulted in many lessons to prevent these risks to OPIC investments in the future. While the compliance appraisal did generate some important recommendations, the process suffered from problems that caused the appraisal to fall short of the OA's compliance mandate.

### *Compliance Appraisal*

Neither the OPIC Board Resolution nor the 2005 Operating Guidelines that are currently in place require, or even mention, a compliance appraisal process as a prerequisite to a full compliance investigation. However, the Draft Guidelines outline a process for compliance appraisal, which creates various barriers to entry. We strongly urge the OA to follow its own guiding principle of accessibility and responsiveness, and return to the 2005 Guidelines process for assessing whether or not to conduct a compliance investigation.<sup>8</sup>

The 2005 Operating Guidelines require that a decision to investigate be based on three factors: (1) request filed by an eligible party, (2) documentation of representation authority, and (3) an ongoing contractual relationship with the project in question.<sup>9</sup> These basic criteria make the compliance review function accessible by minimizing barriers to entry, and should be maintained as the OA's standard. In the Cerro de Oro

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<sup>8</sup> Draft Guidelines at §1.2.

<sup>9</sup> Problem-solving and Compliance Review Procedures, Administrative Order 05-02.1 (July 1, 2005), at §6.2.5.

case, the OA applied an appraisal process that is not required or even described in either the OPIC Board Resolution or the 2005 Operating Guidelines, imposing a list of criteria that was non-transparent and unexpected by the complainants.<sup>10</sup> These criteria included factual determinations like the magnitude of environmental and social risks posed by the project, whether those risks were caused by violations of OPIC policies and procedures, and mitigation measures already in place. These criteria are largely repeated in the Draft Guidelines in Section 4.3.1. However, these criteria require fact-finding and fact-determination that are more suited for investigation rather than an appraisal process.

The appraisal criteria in the Draft Guidelines require reliance by the OA on existing information and documentation to determine if there have been adverse impacts and whether there is a causal relationship between harm and violations, but in many cases this documentation is precisely what is disputed. Where implementation differs greatly from the documents that OPIC clients file, there may be nothing wrong on paper, but very real and serious problems on the ground. If a community does not have the ability to document those impacts, or where relevant information or evidence is not available to the OA, communities may not have the resources or capacity to present a case for compliance investigation under the Draft Guidelines. In the Cerro de Oro case, there was official documentation of information meetings with communities, consultation, and a local grievance office. However, on the ground, information had not been distributed in an accessible format, there had been no recognition of indigenous peoples in the affected communities, and some potentially affected communities were disregarded in the consultation process. These were serious violations of OPIC policy that were not evident in documents, and may not have been apparent without an in-depth investigation. OPIC management and leadership were deprived of an accounting of these violations because of the appraisal stage replacing what should have been a full investigation and report.

We strongly urge the OA to eliminate any compliance appraisal process, and maintain accessibility to the compliance review function through the adoption of simple eligibility criteria, such as those described in the 2005 Operating Guidelines.

### *Independence from Problem-solving*

A guiding principle in the Draft Guidelines is objectivity “by avoiding pre-conceptions,” but this may not be possible when the same person or people are involved in the decision making about problem-solving and compliance review, as is the current OA procedure. The process would be more fair and objective if the problem-solving function were independent from the compliance review function.

In the Cerro de Oro Hydroelectric Project Compliance Review Appraisal Report, which finds that a full investigation is not needed, the OA acknowledges that it relies on observations during site visits under the problem-solving process to reach substantive

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<sup>10</sup> Cerro de Oro Hydroelectric Project Compliance Review Appraisal Report, *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2012/01/4.27.12-OA-Appraisal-Report.pdf>.

compliance-related conclusions. While certain eligibility questions may be answered simultaneously during these visits, the very different natures of problem-solving and compliance review require different kinds of enquiry.<sup>11</sup> The OA visits during the problem-solving phase of the Cerro de Oro case focused on community requests for mediation as part of the OA's dispute resolution process, rather than non-compliance with OPIC policies and procedures.

Independence between the two functions would ensure that interactions during the problem-solving phase do not affect or influence the compliance review phase. It is for precisely this reason that the separation of functions exists at other independent accountability mechanisms.<sup>12</sup> We strongly urge OPIC and the OA to secure resources to ensure independence between the problem-solving and compliance review functions to ensure objectivity and fairness. Such a separation should be reflected in the Draft Guidelines.

Thank you for taking the time to consider these issues, as well as those raised in the civil society response to the Draft Guidelines review. We look forward to continuing engagement on this review. Please do not hesitate to contact us regarding these comments.

Sincerely,



Natalie Bridgeman Fields  
Executive Director

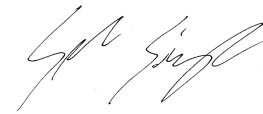


Komala Ramachandra  
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<sup>11</sup> For example, conclusions that the OA drew regarding OPIC compliance on indigenous peoples issues were based on observations of the dispute resolution process, but without asking key questions, conducting interviews, consulting with experts, or demonstrating an understanding of the history and context of indigenous communities in the region. Appraisal Report at 10. cursory compliance conclusions in the Cerro de Oro case regarding indigenous peoples issues speak to the need for independence of the two functions. Additionally, the OA's process of conducting an appraisal rather than a full investigation deprived the OA and OPIC of key information that was required to make mandated compliance findings.

<sup>12</sup> Independent problem-solving and compliance review functions are found at the Compliance Advisor / Ombudsman at the International Financial Corporation of the World Bank Group, the Accountability Mechanism at the Asian Development Bank, the Independent Consultation and Investigation Mechanism at the Inter-American Development Bank, among others.



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