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Submission to OPIC on Revisions to its Environmental and Social Policy Statement

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Columbia Center on Sustainable Investment

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THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

November 23, 2016

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

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

Dear Ms. Dunbar:

I write to provide input on the Overseas Private Investment Corporation's (OPIC) draft revised Environmental and Social Policy Statement (Draft ESPS), released in September 2016. My comments are limited to two discrete issues that we have been examining at the Columbia Center on Sustainable Investment: (1) contract transparency for natural resource and infrastructure projects, and (2) redress for harms in the context of project abandonment or failure.

By way of background, the Columbia Center on Sustainable Investment (CCSI) is a joint center of Columbia Law School and the Earth Institute at Columbia University. At the Center, we focus on how outward investment can accelerate sustainable development in host countries. In this way, our mission is similar to that of OPIC, which was created to “mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed [and emerging economy] countries ... thereby complementing the development assistance objectives of the United States.”¹ In light of its purpose, OPIC's ESPS is critical to ensuring that its activities do in fact contribute to sustainable development. We are pleased that OPIC is undertaking efforts to update the ESPS, and urge OPIC to explore incorporating explicit requirements on contract transparency and on closure plans covering harms for Project Affected People.

1. The ESPS should require Applicants to disclose any Project-related investor-state resource contracts or infrastructure contracts, and should encourage compliance with the UN Principles for Responsible Contracts.

Natural resource investments—such as for extractive projects, commercial agriculture, and forestry—and infrastructure projects have transformative potential in some countries, yet they can also pose extremely high social and environmental risks. These investments are often governed by investor-state contracts that allocate rights and obligations, the terms of which can have wide-ranging implications for citizens in the host country. Historically, these contracts have not been made publicly available, although this has begun to change with regard to extractive industry contracts² as the importance of contract disclosure as a tool for monitoring and accountability has become more clear.³ Indeed, CCSI's review of

¹ OPIC Statute, s. 231. <https://www.opic.gov/sites/default/files/statute1.pdf>.

² As of November 2016, at least 28 countries have committed to disclosure of at least some of their extractive industry contracts or licenses: <http://www.open-contracting.org/2016/10/28/contract-transparency-open-contracting-natural-resources/>. Progress has been much more limited for commercial agriculture and forestry contracts, with less than a handful of countries having either disclosed or committed to disclosing some of these contracts.

³ See e.g., NRG, “Contract Transparency: Creating Conditions to Improve Contract Quality” (March 2015), http://www.resourcegovernance.org/sites/default/files/documents/ngi_primer_contract-transparency.pdf; Columbia Center on Sustainable Investment and Open Contracting Partnership, “Transparency in Land-Based Investment: Key Questions and Next

guidelines and principles related to responsible land or agriculture investment shows that contract transparency is overwhelmingly seen as a best practice.⁴ This includes operational guidelines issued by USAID, which urge investors to, “[f]or transparency and monitoring purposes, consider making the terms of agreement public.”⁵

The Draft ESPS highlights OPIC’s commitment to promoting good governance through, *inter alia*, “improving transparency and accountability.”⁶ The Draft ESPS also states that it “is committed to making non-confidential project-specific information available to enhance transparency and accountability and to foster good governance.”⁷ It requires applicants involved with extractive projects to implement principles of the Extractive Industry Transparency Initiative.⁸ Yet the Draft ESPS neither requires nor encourages contract transparency. Nor does it encourage Applicants to align their contracting practices with international best practices.

This gap means that the Draft ESPS does not accord with the emergent consensus that disclosure of investor-state contractual terms constitutes a best practice and should be encouraged as such. The failure to address contract transparency also renders the Draft ESPS a less useful risk management tool, given that contract disclosure can help mitigate tensions with communities regarding opaque investments projects.

We thus urge OPIC to add into the ESPS a requirement that Applicants involved in natural resource or infrastructure projects commit to publicly disclosing any investor-state contracts related to the underlying Project. This would be similar to the approach taken by the International Finance Corporation, which requires that its extractive industry clients disclose “terms and conditions agreed with host governments under which a resource is being developed.”⁹ A more robust approach would be to also require that Applicants align their Project-related contracting practices with the UN Principles for Responsible Contracts;¹⁰ this would help guard against problematic practices from a sustainable development perspective, such as abusive stabilization clauses, and would help ensure that, as described on its website, OPIC’s projects respect human rights and its standards “raise the industry and regional standards in countries where it funds projects.”¹¹ At a minimum, however, we respectfully suggest that the Draft ESPS be revised to encourage Applicants to meet best practices related to transparency and

Steps” (March 2016), <http://ccsi.columbia.edu/2016/03/09/transparency-in-land-based-investment-key-questions-and-next-steps/>;
Gavin Hayman and Rob Pitman, “From contract transparency to open contracting in natural resources,” Open Contracting Partnership blog (October 2016), <http://www.open-contracting.org/2016/10/28/contract-transparency-open-contracting-natural-resources/>.

⁴ See Columbia Center on Sustainable Investment, “Recommending Transparency in Land-Based Investment: A Summary of Relevant Guidelines and Principles” (March 2016), <http://ccsi.columbia.edu/2016/03/09/recommending-transparency-in-land-based-investment-a-summary-of-relevant-guidelines-and-principles/>.

⁵ USAID, Operational Guidelines for Responsible Land-Based Investment (March 2015), https://www.land-links.org/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated.pdf, at p. 39.

⁶ Draft ESPS 1.2.

⁷ The Draft ESPS notes that “Project-related information that is posted on the OPIC web site includes project summaries, summaries of OPIC environmental and social site-monitoring reports, OPIC’s active portfolio list and portfolio company investments of OPIC-supported investment funds.” Draft ESPS 5.3. Additional information that similarly could be disclosed includes OPIC’s own contracts with Applicants (with confidential information redacted as necessary) and full project audits.

⁸ Draft ESPS 5.21.

⁹ IFC, “Contract Disclosure,”

http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/oil+gas+and+mining/transparency/contract+disclosure.

¹⁰ Endorsed by the UN Human Rights Council in June 2011 as part of the UN Guiding Principles on Business and Human Rights, http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf.

¹¹ OPIC, “Overview,” <https://www.opic.gov/who-we-are/overview>.

disclosure. This could include, for example, a change to Draft ESPS 5.3 so that the paragraph ends with: “For Projects related to natural resources (including extractive industries, commercial agriculture, and forestry) or infrastructure, OPIC strongly encourages Applicants to disclose any contracts entered into with the host government related to the Project.”

2. The ESPS should require closure plans covering harms to Project Affected People that would apply in cases of project abandonment or failure.

While projects financed by OPIC have presumptive “development” benefits, certain types of projects—such as those falling within “Category A”—present the risk of serious negative impacts for Project Affected People. In our work on natural resource investments, we have become increasingly concerned with the frequent lack of appropriate redress options for Project Affected People in situations of project abandonment or failure. This is particularly relevant in the context of large-scale land-based investments, as the “rush for land” in the last decade or so has resulted in multiple abandoned or failed projects.¹²

To date, the impacts of project abandonment or failure on Project Affected People—and those people’s ability to seek redress for social harms—have not been comprehensively documented and are not widely understood. Yet anecdotes and case studies highlight the real potential for Project Affected People to suffer negative effects or continuing harms even after investors have left the scene. This includes, for example, negative impacts on public health, uncompensated damage to the resources of local communities, or widespread retrenchment of workers due to project failure. The Draft ESPS does not provide any safeguards for such a situation;¹³ in this way, the ESPS fails to ensure that OPIC support will lead to sustainable development outcomes. Of additional concern is the deletion of “retrenchment” in the Draft ESPS text (though not glossary), which may increase the likelihood that Applicants will ignore the issue altogether.

We therefore suggest that OPIC: (1) incorporate into the Draft ESPS a requirement that Applicants develop appropriate closure plans that would cover harms to Project Affected People and would apply in the case of both anticipated and unanticipated project closure, (2) incorporate into the Draft ESPS a requirement that Applicants make provisions for financial assurances to guarantee performance of closure plan provisions covering harms to Project Affected People, and (3) add back into the text a reference to “retrenchment.” The concepts of social closure requirements and financial assurances for social harms are underdeveloped in academic literature and professional practice, but could be modeled off of environmental closure requirements and related financial assurances. Such a requirement could help to support access to remedies even after the Applicant has left—a period in which it is much more difficult for Project Affected People to raise grievances and receive remedies.

¹² While its data is inherently unreliable, the Land Matrix has documented, for example, failed land deals targeting over 7 million hectares of land that had been initiated since 2000. Kerstin Nolte, Wytse Chamberlain, Marcus Giger, “International Land Deals for Agriculture: Fresh insights from the Land Matrix: Analytical Report II” (2016), p. vi, http://www.landmatrix.org/media/filer_public/ab/c8/abc8b563-9d74-4a47-9548-cb59e4809b4e/land_matrix_2016_analytical_report_draft_ii.pdf.

¹³ While the Draft ESPS does note that OPIC “assesses risks at key stages in the project life cycle including ... closure” (Draft ESPS 2.7), a risk assessment of the closure stage does not equate to a closure plan addressing harms to Project Affected People or an assurance guaranteeing performance of that plan.

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Conclusion

Thank you for the opportunity to provide input on the Draft ESPS, and for your consideration of these comments. Should you have any questions, I would be happy to discuss further.

Sincerely,



Kaitlin Y. Cordes

Head: Land and Agriculture

Lead: Human Rights and Investment

Columbia Center on Sustainable Investment