

ANNEX 14

THE OFFICE OF ACCOUNTABILITY OF THE US OVERSEAS PRIVATE INVESTMENT CORPORATION

INTRODUCTION

This section assesses the Office of Accountability (OA) of the US Overseas Private Investment Corporation (OPIC). The assessment uses a standardised framework, based on the UNGPs, which is available in Annex 2. This assessment framework clarifies how each of the UNGP criteria was operationalised for the purpose of the assessment of individual mechanisms. The assessment draws on information made publicly available by OPIC, the OA and the US Government through their websites and reports, and a survey which was sent out to users of the OA (see Annex 3). Two CSOs have shared their experiences with the OA through that survey.

MECHANISM AT A GLANCE

OPIC is the US Government's development finance institution. Its independent accountability mechanism, the OA, was established in 2005. The OA can provide both problem-solving and compliance review functions. The OA Director resigned on 30 September 2014. At the time of writing, the post remains vacant and the office is unstaffed.

TABLE 1: OA/OPIC CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
12	4	4	4

TABLE 2: OA/OPIC PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	0	12 ¹
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE ²	0	8
CASES ACHIEVING RESULTS	1 ³	4

KEY FINDINGS AND RECOMMENDATIONS

The release of the OPIC OA's Operational Guidelines in 2014 brought improvements to the Mechanism in a number of areas, including clear deadlines for various stages of the process and a new policy allowing complainants to request confidentiality. However, there remains a strong need for improvement in other areas. The OA Director vacancy at the time of writing leaves the OA completely unstaffed and unable to handle complaints. OPIC must take immediate action to fill the OA Director position through a consultative process that includes external stakeholders. Further, OPIC must improve its perceived poor record of responding to the findings and recommendations of OA reports, including improving transparency around the formal implementation of recommended policy changes.

Table 3 on the next page contains the recommendations derived from the UNGP assessment that follows. The recommendations describe the reforms needed to the policy and practice of each actor, the IAM and the DFI. It should be noted, however, that the power to implement some of these recommendations regarding the IAM rests with the DFI's Board of Directors.

UNGP ASSESSMENT

LEGITIMACY

IAM: The OA's Operational Guidelines do not include any rules to guarantee the independence of its staff, which diminishes its legitimacy.⁴ The only exception is that consultants hired to assist in the compliance review must not have provided services to OPIC within the previous 12 months.⁵ There are no similar provisions for the OA's Director. User experience with the OA has varied over time. Some users reported that the OA has shown cultural and gender insensitivity and an appearance of bias in certain aspects of its complaint handling.

TABLE 3: RECOMMENDATIONS DERIVED FROM UNGP ASSESSMENT

	OA	OPIC
LEGITIMACY	<ul style="list-style-type: none"> Observe pre-employment 'cooling off' periods and post-employment bans for the OA Director and staff. Establish an external advisory group to provide guidance and feedback on the OA's activities. 	<ul style="list-style-type: none"> Hire a new Director and include external stakeholders in the hiring process.
ACCESSIBILITY	<ul style="list-style-type: none"> Make the website accessible in more languages. Allow for complaints after project closure. 	<ul style="list-style-type: none"> Require clients to disclose the availability of the OA to project-affected people.
PREDICTABILITY	<ul style="list-style-type: none"> Provide regular updates to complainants on the status of their complaints. Monitor findings of non-compliance until remedied, not just the implementation of Management Action Plans. In the case of problem-solving, monitor the implementation of agreements reached. Eliminate appraisal stage for compliance reviews or make criteria clearer and less discretionary. 	<ul style="list-style-type: none"> Address findings of non-compliance in OA investigations.
EQUITABILITY	<ul style="list-style-type: none"> Provide complainants with the same opportunities to review draft documents as OPIC. Share final reports with complainant at the same time they are sent to OPIC. Allow complainants' advisors to be present and participate in the process, at complainants' request. 	<ul style="list-style-type: none"> Consult with complainants in developing corrective actions in response to a compliance report. Ensure the OA is adequately resourced to assist complainants with translation and other needs.

	OA	OPIC
TRANSPARENCY	<ul style="list-style-type: none"> Publish all complaints in online registry, including those found ineligible. 	<ul style="list-style-type: none"> Provide detailed information on OPIC-financed activities.
RIGHTS COMPATIBILITY	<ul style="list-style-type: none"> Make recommendations to suspend projects in cases of imminent harm. Develop protocols to prevent and address reprisals against complainants. Assess OPIC compliance against human rights standards. 	<ul style="list-style-type: none"> Operationalise commitment to respect the human rights of project-affected people, including by requiring human rights impacts assessments for all projects. Develop measures to address reprisals against complainants.
LESSONS LEARNED	<ul style="list-style-type: none"> Publish all complaints in online registry, including those found ineligible Provide for regular reviews of the Operational Guidelines with input from external stakeholders. Analyze and document lessons learned from cases. 	<ul style="list-style-type: none"> Develop a process for institutionalising lessons learned from OA findings, including by reporting on changes to policy/procedure. Commit not to provide additional financing for similar activities to clients found to be in non-compliance until the non-compliance has been remedied.

DFI: OPIC has failed to ensure the independence and legitimacy of the OA. The Office has not had a Director since September 2014,⁶ despite direction from US Congress to "fill the vacant Office of Accountability Director position through an open and competitive hiring process".⁷ OPIC now relies fully on its own staff to handle complaints, which negates the independence of the process and is inconsistent with the requirements of the Board resolution and Congressional language establishing the OA. A vacancy notice was posted in May, but no further information was available at the time of writing. The Board resolution establishing the OA provides that the director will be approved by OPIC's President,⁸ but there is no provision for the participation of external stakeholders in the selection of the OA's Director. Although Congress recommended that the OA should report directly to OPIC's Board of Directors, the OA still reports directly to the President. Users also report that OPIC Management has previously interfered in the OA's handling of complaints, delaying the publication of compliance reports.

ACCESSIBILITY

IAM: The OA provides brochures in nine languages, although its own website is available only in English. Online complaint templates are also available to complainants.⁹ These measures increase the accessibility of the Office. The OA's filing requirements, however, are considered to diminish the Office's accessibility. In practice, they prove to be burdensome and not easy to follow. In particular, the OA will not address complaints regarding projects in which OPIC no longer has an investment, even though it is difficult for potential complainants to discover OPIC's involvement and the status of the investment.

DFI: The OA's website is one click away from OPIC's homepage,¹⁰ which is positive for the visibility of the Office. However, despite the Board resolution, which states that "OPIC will work to ensure that local communities are aware of the OA and its procedures", OPIC does not require its clients to disclose the availability of the OA to project-affected people.¹¹

PREDICTABILITY

IAM: Clear deadlines for eligibility determination and compliance review processes are established in the OA's Operational Guidelines.¹² These measures improve the predictability of the Office, however, some users report that the OA does not always communicate adequately with complainants about the status of the process. The 2014 Operational Guidelines introduced an appraisal phase to determine whether an investigation is warranted.¹³ The criteria used during appraisal leave much discretion to the OA Director and, as a result, diminish the predictability of the process for the complainant. As a result, some eligible complaints requesting a compliance review may not result in an investigation. Although the OA will monitor the implementation of any corrective actions to be taken by OPIC in response to a compliance review,¹⁴ the OA leaves the monitoring of commitments reached through problem-solving to the agreement of the parties.

DFI: OA's Operational Guidelines establish deadlines for OPIC's responses during the complaint process.¹⁵ OPIC's response to a compliance review will be posted on the OA's website and should include follow-up actions that it considers to be appropriate. Users have raised concerns regarding OPIC's commitment to addressing findings of non-compliance and responding to OA recommendations. Experience shows that the actions described in the response to findings of non-compliance remain vague and difficult to assess.

EQUITABILITY

IAM: Complainants do not have the same opportunities as OPIC's Management to review draft reports, which diminishes the OA's equitability. Instead, the Guidelines state that the Office will circulate the draft report solely to OPIC for factual review and comment.¹⁶ The

complainants are only notified after the final report is transmitted to OPIC. Users also raise concerns about the fairness of the process. A survey respondent reports that the role of the complainants' representatives is not always respected, even when complainants directly request their support. For example, representatives have been excluded from being present during interviews with complainants who specifically requested their presence. Also, according to some users, translation of written OA documents has sometimes been denied, even to complainants who request translation.

DFI: Management is not required to consult with complainants in developing corrective actions in response to a compliance report. Instead, Management will take what actions "it considers to be appropriate".¹⁷ It remains unclear whether OPIC has provided the OA with sufficient resources to fulfil its mandate, including hiring the translators and consultants that may be necessary to ensure an equitable process. The most recent information on the budget dates from 2013, and reads that "OPIC's overall FY13 budget was affected by the federal government sequester. The OA's administrative expenditures for the Togo consultation and the public comment process were \$31,043.38".¹⁸ That year's report further states that there were no case-related expenses.

TRANSPARENCY

IAM: In accordance with its Operational Guidelines,¹⁹ the OA maintains a registry with the cases it handles, including relevant documents such as the complaints and the final reports.²⁰ However, users state they have knowledge of at least one case that was supposed to be eligible, but which was not included in the registry.

DFI: The information that OPIC provides on the projects it finances is neither sufficient nor in a format accessible for potential complainants. The Bank has a project database where it posts brief descriptions of most projects at the time they are approved. However, the descriptions are quite limited and do not provide regular updates on the status of these projects.²¹ The environmental and social assessments for higher risk projects are not linked to the project database, but maintained on a different website.²² OPIC considers disclosure of project-related information the primary responsibility of its clients.²³ This creates significant barriers to project-affected people, as it is unclear whether OPIC is still involved in a specific project. This is especially problematic considering that active involvement in a project is one of the filing requirements of the OA. In order to obtain sufficient information, OPIC has told some users that they must submit a request under the US Freedom of Information Act.

RIGHTS COMPATIBILITY

IAM: The OA's mandate explicitly includes assessing OPIC's compliance with its human rights policy, among other policies. Complainants also have the option of requesting that their identities to be kept confidential. These policies are important to ensuring rights

compatibility, but there is still room for improvement. For instance, the Office does not have a mandate to recommend suspension of a project if it believes there is risk of imminent harm. Despite the explicit inclusion of human rights in its mandate, users report that the outcomes of the complaints are rarely compatible with human rights.

DFI: OPIC's Environmental and Social Policy Statement requires projects that receive OPIC support to "respect human rights, including the rights of Workers...and the rights of affected communities".²⁴ OPIC consults with the US Department of State on its projects, which provides OPIC with information on the human rights record of the host country. However, OPIC does not require its clients to assess the possible human rights impacts as part of the environmental and social impact assessment process. So it remains unclear how OPIC operationalises its commitment to respect the rights of people directly affected by the activities it finances.

LESSONS LEARNED

IAM: The OA's Operational Guidelines do not provide for regular reviews of the Mechanism nor describe the process that would be undertaken.²⁵ There has been one review of the Mechanism since its creation, which led to the adoption of the 2014 Operational Guidelines. This initial review solicited input from a select group of stakeholders, and was only open to public input after advocacy efforts by CSOs. The OA can include "systemic recommendations for improving OPIC's application of its policies to future projects" in its compliance reports.²⁶ The OA has also published a series of Advisory Papers on a number of different topics, including project-level grievance mechanisms, fragile states and community engagement on energy and infrastructure projects in Africa.²⁷ Nonetheless, some users do not believe that the OA has displayed a willingness to improve its practices and policies in response to lessons learned from cases.

DFI: OPIC does not seem to have a process in place for capturing the lessons learned from the OA's cases.²⁸ In 2014, a complaint was filed by hundreds of Liberians, with support from CSOs in the United States, Liberia and the Netherlands, about a biomass project financed by OPIC. The complaint was not officially eligible because the project and OPIC's involvement had already ended. However, in response to pressure from CSOs, the President of OPIC directed the OA to undertake a lessons learned process, which involved a visit to the project site and interviews with affected people. The process resulted in several recommendations to improve OPIC's implementation of its policies. In response to the OA's report and a request by Congress, OPIC Management agreed to adopt certain measures to improve its policy and practice.²⁹ However, it has not committed to addressing any of the harm caused by its financing of the project and it is as yet largely unclear what measures it has taken to improve its practices.³⁰

NOTES

- 1 Note: One case is included here that is not in the normal case registry, nor mentioned in the annual reports, but reference is made to it in the OA's report on the Buchanan Renewables project.
- 2 This row includes cases that were not registered, were found ineligible or were closed after being found eligible, but before reaching a substantive phase.
- 3 This is the Buchanan Renewables case, which is an anomaly since it did not undergo standard procedures. Nevertheless, it did achieve a result in the sense that a report with lessons learned was developed.
- 4 Overseas Private Inv. Corp. [OPIC] Office of Accountability, Operational Guidelines (2014), https://www.opic.gov/sites/default/files/files/final_draft_OA_guidelines.pdf [hereinafter Operational Guidelines].
- 5 *Id.* at ¶ 7.4.1.
- 6 At the time of writing, Oct. 2, 2015, the position was still vacant.
- 7 113TH US Cong., 2d Sess., H. Cong. Rec. H9954 (2014), <https://www.congress.gov/crec/2014/12/11/CREC-2014-12-11-bk2.pdf>.
- 8 Overseas Private Inv. Corp., Board Resolution Establishing the Accountability and Advisory Mechanism for the Overseas Private Investment Corporation ¶ e (2004), <https://www.opic.gov/sites/default/files/docs/BDR-04-33.pdf> [hereinafter Board Resolution Establishing OA].
- 9 OPIC Office of Accountability, A Guide for Communities and Other Affected Parties, <https://www.opic.gov/who-we-are/office-of-accountability/a-guide-for-communities>.
- 10 OPIC Office of Accountability, Office of Accountability, <https://www.opic.gov/who-we-are/office-of-accountability>.
- 11 OPIC, Environmental and Social Policy Statement 19 (2010), https://www.opic.gov/sites/default/files/consolidated_esps.pdf.
- 12 Operational Guidelines, *supra* note 4, at 6-7.
- 13 *Id.* at ¶ 7.3.
- 14 *Id.* at ¶ 7.6.
- 15 *Id.* at ¶ 7.7.
- 16 *Id.* at ¶ 7.4.2.
- 17 *Id.* at ¶ 7.5.
- 18 OPIC Office of Accountability, Annual Report FY2013 7 (2014), <https://www.opic.gov/sites/default/files/files/FY13%20Annual%20Report.pdf>.
- 19 Operational Guidelines, *supra* note 4, at 12.
- 20 OPIC Office of Accountability, Annual Report FY2013 7 (2014), <https://www.opic.gov/sites/default/files/files/FY13%20Annual%20Report.pdf>.
- 21 Active OPIC Projects, <https://www.opic.gov/opic-action/active-opic-projects>.
- 22 Environmental and Social Projects Documents, <https://www.opic.gov/doing-business-us/OPIC-policies/environment/documents>.
- 23 OPIC, Environmental and Social Policy Statement, *supra* note 11, at 17.

- 24 *Id.* at 2.
- 25 Operational Guidelines, *supra* note 4.
- 26 *Id.* at ¶¶ 7.4.2.
- 27 OPIC, Accountability Resources, <https://www.opic.gov/who-we-are/office-of-accountability/accountability-resources>.
- 28 OPIC, Environmental and Social Policy Statement, *supra* note II.
- 29 OPIC, Report in Response to the FY15 Consolidated and Further Appropriations Act (H.R. 83) (2015), <https://www.opic.gov/sites/default/files/files/report-to-congress-03172015.pdf>.
- 30 Press Release, Accountability Counsel, et al., US Agency Plan Promises Improvements by Lacks Critical Details on Reform (Mar. 24, 2015), <http://www.accountabilitycounsel.org/wp-content/uploads/2014/12/3.24.15-Final-press-release-re-OPIC-response-to-Congress.pdf>.