

October 1, 2010

Connie Tzioumis
Director, Labor and Human Rights Group
Overseas Private Investment Corporation (OPIC)
Washington, DC

Re: OPIC's Proposed Labor and Human Rights Policy Statement

Dear Ms. Tzioumis:

Please find attached the comments of the AFL-CIO with regard to OPIC's Proposed Labor and Human Rights Policy Statement. Please do not hesitate to contact me with any questions.

Sincerely,

Jeff Vogt, Deputy Director
International Department, AFL-CIO

AFL-CIO COMMENTS ON OPIC'S PROPOSED LABOR AND HUMAN RIGHTS POLICY STATEMENT

I. Proposed Labor and Human Rights Policy Statement

Section 1: Introduction

Section 1.3

Section 1.3 explains that OPIC will ensure through its processes that the projects it supports meet five goals. However, these goals are more aspirational than they need to be. At the project level, projects must not merely “promote” respect for worker rights and compliance with applicable nation labor and employment laws but should actually respect them. In other cases, the terminology used is peculiar. For example, the term “international worker rights standards” fuses together the distinct concepts of rights and standards into a single term.¹ Further, it is unclear what a “labor risk” is. In still other cases, the goal is vague or confusing. For example, the fourth bullet point states that OPIC will ensure that a project “promote[s] due diligence in areas in which labor risks exist.” It is unclear how a project promotes due diligence rather than exercises it.

Section 2: Country Eligibility

Section 2.5

Section 2.5 is incorrect in one very material respect. In addition to withdrawal, suspension or limitation, the TPSC can and routinely does put a country under “continuing review.” This means that the TPSC has found that a country has not taken steps to afford internationally recognized worker rights, but the TPSC has decided to give the beneficiary country an opportunity (usually one or two petition cycles) to make necessary improvements before determining whether trade preferences should be withdrawn, suspended or limited. Countries under continuing review should either be temporarily ineligible for OPIC support for the length of that review or, at the very least, subjected to rigorous additional scrutiny – especially if the project is in a sector that is highlighted in the GSP complaint. Thus, OPIC should not rely entirely USTR’s list of GSP eligible countries but must also review the list of countries under continuing review and the reasons therefore.²

¹ A better term would simply be “international workers rights.” A second option could be “international worker rights and standards.”

² Taking note of those countries under “continuing review” is important but insufficient. USTR assumes that all countries currently in the GSP program are taking steps to afford internationally recognized worker rights. However, numerous countries may not in fact be eligible due to serious and systemic violations of worker rights but nonetheless remain on the list because a third-party petition was not filed during that petition cycle (for any number of reasons, including the safety of workers in a repressive regime) or the U.S. government did not self-initiate action. OPIC should therefore adopt a presumption that any country currently eligible for GSP benefits is taking steps to afford internationally recognized worker rights, which can be rebutted if a petitioner presents evidence that the country does not in fact meet the eligibility standard. This suggestion would appear less of a burden than what OPIC has already agreed to rake on

Section 2.7

OPIC states that it will provide the public an opportunity to submit petitions with regard to non-GSP eligible countries seeking OPIC support. The guideline suggests a 20 day notice. As it can take substantial time to collect information from international sources and to organize it into a submission, the AFL-CIO recommends at least 30-45 days. Petitions should also be accepted not only before each annual meeting but also before any board meeting. It is often the case that serious violations of worker rights which may disqualify a country do not occur in the weeks or month prior to the annual meeting. If anti-labor legislation were to be enacted or a major crackdown on labor organizers were to occur one month after the annual public hearing, that country could remain eligible for OPIC support for another eleven months – until the next annual hearing. Allowing for submissions of petitions more frequently, which is permitted by the statute, would avoid this problem.

Section 2.8

OPIC provides a non-exhaustive list of sources to inform its review of a non-GSP eligible country's labor practices. The list should of course include the reports, observations and recommendations of the International Labor Organization (ILO).

Section 2.9

The criteria suggested to determine whether a country is “taking steps” are not consonant with the GSP standard as it has been applied. Under 2.9, a country could be considered to be “taking steps” even if they banned unions, abolished collective bargaining, allowed for the employment of 6 year old children and subjected the population to periods of forced labor, so long as they respected domestic laws with regard to the minimum wage, overtime laws and provided safety and health protections (acceptable conditions of work). Of course, a country's laws need not be fully consistent with all of the internationally recognized worker rights in order to become or to remain eligible for trade benefits under the current GSP standard; however, Section 2.9 seriously understates the necessary minimum measure of consistency between internationally recognized worker rights and a country's labor laws. The same observation applies to the enforcement of those laws. Finally, as nearly every country is a member of the ILO, membership in that institution is not a suitable measure. Although not much better of an indicator, the ratification of ILO core and priority conventions would be somewhat more meaningful.

Section 2.10

It is unclear what criteria OPIC would use to determine whether a country belongs in the category of a “particularly sensitive” country and how that decision would be made. OPIC should publish a list of countries that it currently deems “sensitive” and the reasons for the determinations.

under Section 4.6, where it commits to undertake its own human rights impact review of a proposed project.

Section 2.11

A change in a country's designation should not affect existing projects; however, OPIC should substantially increase monitoring of those projects to ensure that the contract provisions on worker rights are being respected.

Section 3: Project Labor Requirements

Section 3.1

This section provides that all projects must *comply* with three overlapping but distinct bodies of law: national law, internationally recognized worker rights and the IFC performance standards. It then lists the main requirements. This list is not sufficiently clarifying or comprehensive to be useful; moreover, it contains some internal contradictions. If the list is maintained, it should note that the list is not exhaustive. Below are further observations on the list:

In the first bullet point, it is unclear what the terms “labor risks” or “labor impacts” of the project mean. Further, it is unclear how the project itself, rather than the administration of the project, could have an impact on enjoyment of labor rights and standards. A better phrased indicator could be borrowed from the IFC's Labor Toolkit, which explains that the purpose of a “risk assessment” is to ascertain: “the likelihood that there will be labor rights violations within a particular project, but also considering the severity of any labor rights violations and the degree to which any violations in a project would have an impact on [OPIC].”

The fourth bullet point is a rough summary of PS-2 paragraphs 9 and 10. The “alternative means” language applies to *countries* where national law substantially restricts worker organizations. However, a country that substantially restricts the right of workers to form a union should be ineligible for OPIC support as such a restriction would be clear evidence that the country is not taking steps to afford internationally recognized worker rights. In such a case, there would simply be no OPIC-supported project in that country to carry out the contents of bullet point four.

The fifth bullet point mandates a prohibition on the use of child labor. This is a stronger (and much better) formulation than that which is contained in the sixth bullet point, the establishment of a minimum age for employment. If child labor is prohibited in accordance with relevant ILO and UN conventions, then the establishment of a minimum age for employment in the sixth bullet point is superfluous. The only way that these two points could be reconciled would be to amend bullet point five to refer to the elimination of the *worst forms of child labor* (which may have been the intent given the references in the footnote).

The eighth bullet point refers to “reasonable working conditions.” This is in some respects broader than the statutory term “acceptable conditions of work,” which refers only to “minimum wage” but is narrower in that it does not appear to cover occupational

safety and health. Indeed, there is no mention in the list of any requirement to provide workers with a safe and healthy work environment.

Finally, it is not clear what is meant in the footnotes when the policy states that OPIC is “guided” by an ILO convention. One could read the term to mean that a project need only comply “more or less” with the relevant provisions on, for example, freedom of association, rather than adhere to the terms of the relevant convention. We would suggest a more active verb such as “defined by.”

Section 3.2

Once again, it is unclear what is meant here by adverse labor impacts of a proposed project. Further, this section should clarify what is meant by “international worker rights standards.” The policy statement previously referred to a requirement to comply with domestic laws, internationally recognized worker rights and the IFC Performance Standards at Section 3.1. Is “international worker rights standards,” a term which is itself confusing, meant to be shorthand for the three bodies of law referred to in Section 3.1? If not, then this must be corrected.

The statement also provides that the purpose of the project-level screening and review is not to determine whether the project applicant complies with those rights, but whether it cannot or does not have the capacity to implement those rights “in a satisfactory manner” or cannot be expected to meet those rights and standards “over a time frame considered reasonable and feasible.” This appears to contemplate OPIC support for a project that may not be compliant with national law, internationally recognized worker rights and/or IFC PS-2 at the time an OPIC agreement is reached but which could come into compliance over time. However, an OPIC-supported project is required by statute to be in full compliance with those rights, not “in a satisfactory manner.” A project must also comply with those rights from the start, not at some indeterminate time in the future.

Section 213A of the OPIC statute mandates the inclusion of contractual language in all project agreements that requires full and immediate compliance with internationally recognized worker rights.

The investor agrees not to take actions to prevent employees of the foreign enterprise from lawfully exercising their right of association and their right to organize and bargain collectively. The investor further agrees to observe applicable laws relating to a minimum age for employment of children, acceptable conditions of work with respect to minimum wages, hours of work and occupational health and safety, and not to use forced labor.

The statutory requirement of full and immediate compliance with internationally recognized worker rights also appears to conflict with the approach taken by PS-1, which is incorporated by reference into this document. PS-1 provides that a project, upon completion of a risk assessment, must develop a management program and produce an action plan, if necessary, to come into compliance with applicable laws and the relevant

performance standards. The project is also required to adopt a monitoring mechanism to verify compliance. PS-1 appears to contemplate the possibility that a project will not be in compliance with the applicable laws or PS-2 from the beginning, but that it will take appropriate measures to do so over time.³

Screening to determine whether a project applicant can or will comply with national law, internationally recognized worker rights and IFC PS-2 is of course much easier when the project is already operating at the time the application is under review. OPIC can investigate to see whether any complaints or lawsuits were filed against that project applicant and could interview workers off-site to assess whether there are any relevant worker rights issues. If a project concerns a new operation, OPIC should investigate to see whether worker rights claims have been filed against the entity's other operations in the country in question or elsewhere.

In sum, a far better description of OPIC's screening methodology is needed. It is impossible from the proposed policy to ascertain how the screening is carried out – and thus whether it is adequate – based on this single paragraph.

Section 3.3

This section should delineate what will be requested of applicants in this self assessment, and how OPIC will assess its veracity.

Section 3.4

Sections 3.2 and 3.3 describe screening and review, though with insufficient information to fully understand what that screening and review entails. Thus, it is not clear what additional review is undertaken under Section 3.4 beyond what is already undertaken in the previous sections. Further, it is unclear how the level of review differs for projects considered “high risk” and “low risk,” as those terms are described in the following sections.

Section 3.5 and 3.6

These indicators may indicate a high risk situation. However, bullet point two is problematic, as a project applicant with a history of labor violations should be disqualified, not merely put into a “high risk” category. As for low risk indicators, I am aware of no sector that historically does not violate labor rights (bullet point four). Further, the fact that a project may be small does not in any way mean that labor

³ The IFC Performance Standards provide substantial rights for workers, among others, with regard to IFC funded projects. However, the wholesale incorporation of these standards into the proposed OPIC policy statement presents several inconsistencies due to the requirements of the OPIC statute. While the IFC Performance Standards could and should provide meaningful guidance to OPIC, care needs to be taken to identify where the OPIC statute requires a different approach and to draft policies accordingly.

violations are less likely. Many serious abuses occur in small firms. The IFC Labor Toolkit, in the shaded box on page 2, provides a much better set of high risk indicators.
Section 3.7

This section does not describe what kind of projects would be considered Category A on labor grounds. Annex A in the Environmental and Social Policy Statement appears to limit such categorization to serious occupational or health risks. If OPIC believes that a project could be deemed “Category A” on labor grounds other than occupational safety and health, it would be useful to know what those circumstances might be.

II. OPIC’s Environmental and Social Policy Statement

Below are our observations on these sections.

Footnote 1 of the proposed Labor and Human Rights Policy Statement incorporates by reference Sections 5-7 of the Environmental and Social Policy Statement. These sections concern public consultation and disclosure, conditions and compliance and monitoring respectively. Below are our observations on these three sections.

1. Section 5: Public Consultation and Disclosure

A. OPIC Roles and Responsibility

With regard to non-“Category A” projects, Section 5 appears to offer little more than a commitment to provide general information about its activities (Section 5.2) or project summaries and monitoring reports (Section 5.3) on its website. The information available on the website with regard to most projects, however, provides workers with little useful information. Further, information is not available in the language of the country in which the project is located, making what information is available of little use to most workers. The burden of providing most project-related information is with the Applicant (Section 5.3). It is unclear from the ESPS what effort OPIC has made or will make to ensure that workers are actually provided relevant information by the Applicant.

Most of Section 5 (15.1-15.14) concerns “Category A” projects, a designation for those projects that could have a significant adverse social or environmental impact. Such a designation requires enhanced consultation, the preparation of impact studies and greater opportunities for public comment. It is unclear from the information available in the ESPS that a project could be designated “Category A” on the basis of “labor risks” alone, such as a high likelihood of trafficked labor. However, it appears from a review of Annex A of the ESPS that the designation of a project as Category A is confined largely to those with a significant adverse impact on the environment or local communities (with the exception of projects that pose “serious occupational or health risks”). To date, we are unaware of any project that was designated “Category A” on the basis of a high risk of labor law violations. As it appears that labor concerns are largely irrelevant to the project’s designation as Category A, we do not here review the adequacy of the procedures established for Category A projects. However, as explained further below, a

“high risk” designation should be established, which would require more rigorous pre-approval screening and post-approval monitoring.

B. Applicants Roles and Responsibilities

Section 5.16 requires an Applicant to disclose to workers OPIC’s potential participation in a project. However, missing is a clear requirement to inform workers of the implications of OPIC’s involvement. For example, workers on OPIC-sponsored projects may have greater labor protections by virtue of the “internationally recognized worker rights” enumerated in the OPIC statute and IFC PS-2. Further, workers would have access to a complaint mechanism to raise labor violations to the Office of Accountability. Such information must also be shared with workers on any potential and operational OPIC-sponsored project.

Section 5.18 refers to projects with the “potential” for “significant adverse impacts.” It is unclear whether this section contemplates projects that may pose risks other than those that may lead to a “Category A” designation. For example, does a high potential for forced labor or trafficking trigger the additional consultations and requirement of community support required under 5.18?

2. Section 6: Conditions and Compliance

A. OPIC’s Roles and Responsibilities

Section 6.4 should include an obligation to work with those affected by a curable default to devise the remediation plan.

3. Section 7: Monitoring

A. OPIC Roles and Responsibilities

Section 7.3 provides that OPIC or its consultants will conduct periodic site visits to projects to review compliance with, inter alia, labor criteria in OPIC agreements. With the exception of Category A projects, however, Section 7.3 provides no guidance as to how frequently monitoring is to take place, merely that the scope, timing and frequency of the visits is commensurate with the risks. This section needs to include an outer limit for non-Category A projects. Further, projects that have a high likelihood of labor violations but which are not Category A should be monitored with at least the same frequency and depth as a Category A project. If, for example, the project is identified as having a high risk for trafficking given the sector, location and/or country, the project should be monitored early and frequently. This section should be amended to so provide.

Section 7.4 requires OPIC to review the Applicant’s periodic monitoring report. The section is silent, however, on what OPIC will do to verify the content of the reports to ensure their veracity.

B. Applicants Roles and Responsibilities

Section 7.11 provides that the Applicant has an obligation to ensure that OPIC has a right to visit and inspect projects. Fatally, Section 7.11 gives Applicants the right to reasonable prior notice. Without the right of OPIC to perform unannounced visits, credible monitoring with regard to labor rights will be all but impossible.

Importantly, what is not found in this document is any description of the methodology used to perform monitoring on worker rights. The ad-hoc monitoring procedures utilized in the recent past include some very troubling practices, including worker interviews (if at all) in the presence of management or on workplace property (rather than confidential, offsite interviews with workers and unions) and extremely slow reaction times to clear evidence of obvious and serious labor violations. In our view, the current methods are wholly inadequate to ensure that worker rights violations are detected and remediated. It is important that OPIC have a written methodology, which is publicly available, that explains how labor monitoring is to take place.