

**AMNESTY
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**Comments on the Draft Environmental & Social Policy Statement of the
United States' Overseas Private Investment Corporation (OPIC)**

Submission of Amnesty International

March 2010

1. INTRODUCTION

This document is a submission by Amnesty International to the review of OPIC's Environmental & Social policy statement (ESPS) on the basis of the draft statement released in January 2010. The approach followed in this paper draws on the framework outlined by the UN Special Representative of the Secretary-General on business and human rights, Professor John Ruggie, which looks both at the State's duty to protect against human rights abuses by business and the responsibility of business actors to respect human rights. The recommendations put forward in this document are consistent with what Amnesty International is recommending to all states in terms of regulation of the operations of officially supported Export Credit and Investment Insurance Agencies (ECAs).

ECAs and foreign investment finance and insurance agencies (such as OPIC) are set up by governments for the purpose of providing various forms of financing and insurance to corporations from their country that seek to do business abroad. Similarly to ECAs, the commercial projects supported by OPIC often face substantial risks in relation to their potential impact on human rights. OPIC supports projects in environments that are considered high risk - both from a commercial and political perspective. OPIC finances and insures in the context of political risks that can include civil war, social unrest, political coup or sudden change in government. These are contexts which are often associated with increased risks to human rights in a specific country. ECAs and OPIC frequently support industries of a particularly invasive nature, such as oil, gas and mining, which are often associated with environmental damage and human rights harm.¹

Numerous credible reports have documented adverse human rights impacts as a result of ECA-supported projects. Amongst the human rights abuses reported in the context of ECA-supported projects are incidents of violence, forced displacement of people, violations of

¹ The BERNE Union (the international union of credit and investment insurers) confirmed that one of the reasons why ECAs were able to deliver "excellent results" in 2007-2009 is their major involvement in large oil and gas, as well as mining and other natural resources projects. The Berne Union, 2008 Yearbook, page 12.

the rights of Indigenous people and denial of access to basic services.² In the context of the ECA-backed Chad-Cameroon Pipeline, for example, affected communities were exposed to serious health risks from dust pollution, stagnant water, oil flares and toxic waste.³ Consultation processes with affected communities - which included Indigenous peoples - were reported to have been inadequate and to have left people exposed to human rights violations.⁴ Despite such reports, most governments do not require ECAs to consider the human rights impacts of the projects and commercial activities that they support. Almost no ECA has in place adequate due diligence measures that would enable the ECA to identify and prevent or mitigate potential negative human right impacts. The same is true for OPIC.

While the primary responsibility for the protection of human rights lies with the state where a company or project operates, a failure of that state to protect rights does not mean agencies that provide export credits, foreign investment finance and insurance, and their home states, have no responsibility in cases where a project, to which they have provided support, leads to human rights abuses. The failure of states to make sure their export credit and foreign investment finance and insurance agencies take reasonable action to become aware of and prevent commercial activities that they support abroad from leading to human rights harm puts governments at risk of effectively supporting abuses in other countries. The failure to take adequate and reasonable steps to prevent decisions and actions taken within the state's jurisdiction from leading to abuses beyond the state's jurisdiction may, in some cases, represent a breach of the state's international legal obligations.

Human right bodies are increasingly recognising that human rights obligations can extend beyond borders in certain circumstances.⁵ The Committee on Economic, Social and Cultural Rights (ICESCR), for instance, has confirmed that states have a legal obligation to respect economic, social and cultural rights beyond their borders, which means that they may not take action that has the effect of undermining economic, social and cultural rights beyond their borders.⁶ This would include refraining from supporting business projects that would undermine economic, social and cultural rights in other countries.

2. A human rights due diligence framework for OPIC

OPIC currently has in place a human rights policy that requires the agency to cooperate with the U.S. Department of State's Bureau for Democracy, Human Rights and Labor (DRL), to obtain human rights clearance on all prospective projects. Amnesty International welcomes the introduction of this policy and the opportunity to comment on its revision. In particular Amnesty international welcomes the recognition of the need to align policy and actions of the United States that have impacts beyond its jurisdictions with human rights standards.

² For detailed examples of cases receiving ECA support which resulted in human rights abuses check the ECA-Watch report, *A race to the bottom: creating risk, generating debt, and guaranteeing environmental destruction*, March 1999, http://www.eca-watch.org/eca/race_bottom.pdf; *Race to the Bottom: take two*, 2003, http://www.eca-watch.org/eca/race_bottom_take2.pdf.

³ Horta, Korinna, et al. *The Chad-Cameroon Oil & Pipeline Project: A Project Non-completion Report*. Environmental Defence, Center for Environment and Development, and Chadian Association for the Promotion and Defence of Human Rights. April 2007. http://www.forestpeoples.org/documents/africa/chad_cameroon_proj_report_apr07_eng.pdf

⁴ See note 3

⁵ The UN Human Rights Committee has clarified that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." Human Rights Committee, General Comment no. 31, 26 May 2004, para 2. Similar conclusions have been drawn by national, regional and international Courts. For more information see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971; International Court Of Justice, Reports Of Judgments, Advisory Opinions And Orders, Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory, Advisory Opinion Of 9 July 2004. From the European Court of Human Rights see judgments *Soering v UK*; From the International American Court of Human Rights see *The Coard case and Armando Alejandro Jr. and Others v Cuba ("Brothers to the Rescue")*.

⁶ See United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 12 (The right to Adequate Food), para 36-37, General Comment No. 14 (The Right to the Highest Attainable Standard of Health), para. 39 and General Comment No. 15 (The Right to Water), para. 31-34, contained in 'Note by the Secretariat: Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

In parallel to the revision of OPIC's human rights policy, it is critical that human rights are also integrated into the proposed new ESPS, which outlines the process for assessing and preventing adverse impacts of prospective and ongoing projects. In particular Amnesty International is calling for a robust due diligence process to be built into the Environmental and Social Management System of the proposed draft statement to ensure that OPIC does not provide support to commercial activity that causes or contributes to human rights violations.

Box 1: The Ilisu Dam Case

The decision in July 2009 by the governments of Austria, Germany and Switzerland to withdraw ECA support to the Ilisu Dam in Turkey was welcomed by Amnesty International. The process established in this case demonstrates that human rights due diligence by ECAs is workable.

When the three ECAs granted their support, a committee of independent experts was set up to evaluate and monitor the implementation of an agreement between the governments of Switzerland, Germany and Austria and the Turkish government on the impacts of the dam, including the social and environmental impacts. The agreement required the Turkish government to put in place mitigating measures, adequate compensation and a comprehensive scheme for the resettlement of affected communities. In July 2009, following repeated breaches of this agreement, the governments of Germany, Switzerland and Austria withdrew support to companies involved in the project.

OPIC could build on this useful example and review its ESPS to ensure that human rights standards are monitored and enforced throughout the lifespan of supported projects.

A robust human rights due diligence framework is necessary to ensure that OPIC does not provide support to commercial activity that causes or contributes to human rights violations. A human rights due diligence framework for OPIC should include: specific reference to international human rights standards; human rights due diligence processes (both for OPIC and its clients); transparency and disclosure of information, and mechanisms for accountability.

Box 2: The corporate responsibility to respect human rights

When a government fails to protect people's human rights against harm by non-state actors, this amounts to a violation under international law. However, the fact of government failure to protect rights does not absolve the non-state actor from responsibility for their actions and the impact of them on human rights.

The emerging consensus on corporate responsibility for human rights is that companies should - as a minimum - respect all human rights. This is the position articulated by Professor John Ruggie, the UN Special Representative of the Secretary-General (UN SRSG) on the issue of human rights and transnational corporations and other business enterprises, in his 2008 report to the Human Rights Council.

OPIC's review of its ESPS should ensure that the ESPS is aligned with the increasing consensus at the international level that companies must operate in line with their baseline responsibility to respect all human rights, which responsibility requires concrete action by companies.

A. Adequate processes to assess potential adverse human rights impacts

Establishing a clear requirement for OPIC to exercise adequate human rights due diligence to ensure that the projects to which they provide support do not cause or contribute to human rights abuses is a vital foundational step. The following are considered the main elements of a human rights due diligence process for OPIC's operations.

I. A specific reference to international human rights standards

Section four of OPIC's ESPS references a range of standards but makes no reference to international human rights standards. The standards currently referenced do not address human rights consistently, or adequately. The IFC Performance Standards, for example, contain provisions aimed at avoiding some negative social impacts of projects, such as involuntary resettlement and negative impacts on community health. However, these provisions cannot be considered adequate to comprehensively address the human rights that may be affected by projects. The ESPS should recommend that OPIC-backed projects are assessed against international human rights standards, with a clear view to preventing projects from causing or contributing to human rights abuses.

II. Impact assessment

Assessment of human rights impact is at least as critical as assessment of environmental impact, and such assessment is increasingly seen as vital for business. Environmental and social impact assessments - which OPIC requires of its clients - are not sufficient to identify, assess or address the range of human rights impacts a project is likely to have. This point was expressly recognised by the UN Special Representative on business and human rights, who has stated that, "While [human rights impact] assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis."⁷

Under Section two on "Screening and Categorization", OPIC should undertake preliminary assessment of the human rights context of any project before granting support. Such a preliminary human rights impact assessment carried out by OPIC could inform the classification and categorization of projects on the basis of their likelihood to have adverse human rights impacts (as well as environmental and social impacts). The preliminary impact assessment should identify individuals or communities likely to be affected by the proposed project (for example, whether any indigenous communities are likely to be affected by the supported transactions), any major concerns as a result of proposed activities and the proposed responses of the host state and the commercial operators of the project. The preliminary human rights impact assessment should be conducted in an open and transparent manner involving consultation with those likely to be affected by the commercial activity and it should be made public in the United States as well as in the host state of the project or commercial activity.

A fuller human rights impact assessment should be required of clients - in particular for projects which are categorised as having the potential to have significant adverse impacts (discussed further below)

III. Ongoing monitoring

Ongoing monitoring of the human rights context and impacts of a project, and action to address problems identified, are vital components of effective due diligence. Without this,

⁷ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/8/5 7 April 2008. Paragraph 68.

due diligence can become a 'box ticking' exercise. Section seven of OPIC's ESPS lays out monitoring requirements for OPIC. OPIC should establish a clear system for monitoring projects, with specific reference to the human rights risks that have been identified in the impact assessment process, as well as being able to identify new risks that may emerge, as projects develop. It should be made clear that all category A and B projects should be routinely monitored, as opposed to on the basis of a discretionary prioritisation of projects, as currently suggested in the draft ESPS. In particular OPIC should commit to its own site visits, starting at the initial phase of projects and at programmed intervals throughout OPIC's participation in the project. In addition, in cases of heightened risk or where community complaints are received, OPIC should have in place a means to independently assess the situation. While some monitoring can be based on receipt of information from the client company, OPIC should have a system for assessing reports from clients and conducting independent verification exercises where appropriate.

IV. Engagement with the project host state

OPIC should have clear policies for engagement with the host state on issues of human rights. The Illisu Dam case provides one example of how this might work. However, different contexts would require different approaches.

V. Establishing core requirements for all OPIC clients: What OPIC should require of companies that they support:

A key element of human rights due diligence for a financial institution is ensuring that the companies to which it provides support are committed to respecting human rights and that they carry out adequate human rights due diligence. OPIC should have in place policies and measures to proactively ensure that robust human rights due diligence is undertaken by their clients. The responsibilities and commitments of clients in relation to prevention of negative human rights impacts should be clarified within the contractual agreements with OPIC. The core human rights requirements for companies applying for state support should be built into OPIC's application process and in sections three and four of the ESPS. These requirements could include:

- **Human rights policies**

Companies seeking state support should be required to have in place a human rights policy, and be able to demonstrate that the policy is integrated into their management systems and is implemented and monitored throughout the company.

- **Requiring client companies to act within a human rights due diligence framework**
OPIC should require companies to exercise due diligence in relation to the project or commercial activity for which support is granted. This is additional to the OPIC's own due diligence. This requirement is critical to ensure that companies operate in line with the responsibility to respect rights (see box 2). To achieve this, the contractual obligation between OPIC and the client should specify the steps that a company should take in order to discharge its responsibility to respect human rights.

- **Requiring clients to conduct a full human rights impact assessment**

A core element of client due diligence should include carrying out a full impact assessment - in particular for projects which are categorised as having the potential to have significant adverse impacts. An impact assessment process is currently laid out in Section four of the ESPS but is limited to requiring an impact assessment of environmental and social impacts. A human rights impact assessment should involve: the provision of information on all aspects of the project to people likely to be affected in a manner and within a time frame that ensures the information is accessible and useful; participation of the affected communities or individuals in the assessment process; disclosure, in accessible form, of the outcomes of the assessment, including a process to allow people to query and challenge the assessment. As a result of the impact assessment an Action Plan should be devised by the clients in consultation with affected communities on how to prevent the project from undermining human rights or leading to human rights abuses. Such Action Plans should be submitted to OPIC before a final decision on support is made.

- **Engagement with affected communities and individuals**

Section five of the draft ESPS outlines public consultation and disclosure provisions. OPIC's revised ESPS should specify that all companies receiving OPIC support should present a clear explanation of how affected communities will have access to information and be consulted on decisions and activities that are likely to affect their human rights throughout the project's lifespan.

In cases where indigenous communities are likely to be affected in the context of supported transactions, given the special relationship Indigenous peoples have with their ancestral lands, international human rights standards would require that their informed consent be obtained prior to any developments on their lands. In addition to this, an independent monitoring of the consultation process should also be put in place. Such requirements should not be limited to Category A projects (as currently provided in the draft ESPS) but to all projects which are likely to have adverse impacts on human rights of affected communities.

A grievance mechanism should be put in place to allow affected communities to raise complaints to the company as a result of alleged or potential negative impacts on their human rights; this mechanism could be established by the project overall.

B. The importance of information and transparency

Transparency and access to information are vital for the full and meaningful participation of people and communities in decision-making processes that are likely to affect their rights. Amnesty International and many other organisations and institutions have documented how greater transparency and access to information have enabled people to hold their governments to account, prevent human rights abuses and tackle corruption, particularly in the context of economic activity and commercial projects.

As institutions that use public monies to support commercial activities export credit and foreign investment finance and insurance agencies should operate in an open and transparent manner. OPIC's draft ESPS outlines that documents on the potential adverse impacts of projects should be made public without compromising confidential business information. It is critical that any limitations on disclosure of information should be clearly defined and narrowly drawn. While some information may legitimately be considered confidential, confidentiality must not be used as an excuse to withhold information relevant to understand the impact of the project. In particular, section three of the ESPS should specifically require the public disclosure of the human rights, environmental and social action plan, monitoring and reporting performance - including as a result of any revisions - throughout the lifespan of a project.

OPIC should also require that companies that it supports make available and accessible all relevant information to the communities that are likely to be affected. Within a context where multiple companies or financial institutions may be involved in a project, OPIC should - directly or via its clients - seek all necessary assurances on transparency and access to information from the host state authorities and/or commercial operators of any business project they support, as appropriate, where the client is not in a position to guarantee such disclosure itself.

Reliability and impartiality of information is also very important - both for OPIC's due diligence process and for affected communities. In the draft ESPS, OPIC relies extensively on information from clients to determine the client's compliance with OPIC's policies. While it is important that companies gather and compile data on their impacts, allowing a client to have substantial control over the compilation of information raises concerns about the independence and reliability of the information. While OPIC does provide for some level of auditing of information, it should strengthen its processes to verify information, and ensure that information is both accurate and complete.

C. Accountability

Due diligence is vital to help prevent harm to and abuse of human rights. However, for due diligence to be effective there must be in place mechanisms to hold actors to account for failure to exercise adequate due diligence. Without effective accountability measures, due diligence may not move beyond vague commitments or box ticking exercises. In the context of export credit and foreign investment finance and insurance agencies there are two levels of accountability that need to be considered:

- the accountability of companies that receive financing support
- the accountability of the export credit and investment finance and insurance agency

While the responsibility for preventing violations of human rights, and taking appropriate steps to hold those responsible accountable, rests with the state, OPIC can and should take appropriate action when clients breach their obligations in relation to the human rights impact of projects or commercial activity.

Section six of OPIC's draft ESPS outlines provisions on what specific measures can be taken in case of non compliance with OPIC policies by clients. This includes contract termination, or acceleration of loan repayment. Section six should be aligned with the earlier recommendations of this paper on requiring human rights due diligence of clients, and ensuring that this is appropriately reflected in contractual arrangements between OPIC and its clients.

The Draft ESPS does not address the accountability of OPIC. This gap weakens OPIC's own accountability and the ability of the Office of Accountability to review OPIC's compliance with its own policies. The ESPS should include measures to be taken by the Office of Accountability to address OPIC's compliance with its own policies.