



AMNESTY INTERNATIONAL

**Comments and Recommendations on the Overseas Private
Investment Corporation's Proposed Labor and Human Rights
Statement**

September 29, 2010

Amnesty International welcomes the opportunity to comment on OPIC's Proposed Labor and Human Rights (LHRP) Statement. Amnesty International's recommendations will focus on strengthening and putting into practice OPIC's commitment to respect human rights. This contribution also builds on the meeting with OPIC's President Elizabeth Littlefield and civil society held on September 1, 2010, where Amnesty International was able to raise some of its concerns. Amnesty International's comments respond to the human rights provisions contained in the proposed LHRP Statement, released for public consultation on August 4, 2010.

1. OPIC's Commitment to respecting human rights

Amnesty International is calling on OPIC to put in place a human rights due diligence process throughout its operations and the ones of its clients, with a view to ensuring that supported operations do not cause or contribute to human rights abuses. This should be explicitly spelled out in OPIC's commitment, outlined in paragraph 1.3 of the draft policy.

Human rights due diligence for financial institutions: two levels

There is an emerging consensus that all companies have a responsibility - as a minimum - to respect all human rights. This responsibility requires companies to know whether their activities would result in negative impacts on human rights and to take steps to prevent and address such impacts. In effect, companies must exercise "due diligence" to ensure they respect human rights.

In the provision of financial support, an adequate human rights due diligence process has two levels: first, there are steps that a financial institution, such as OPIC, ought to take; and second, there are steps that OPIC should ensure its clients are taking. All companies, including OPIC's clients, have a responsibility to exercise due diligence in order to ensure that they respect all human rights in their operations. OPIC has a responsibility to ensure that its supported clients do not engage in activities that cause or contribute to human rights violations.

Given that financial support to corporate actors is stipulated through a contractual agreement, it is through such a contract that OPIC can require its clients to put in place adequate human rights due diligence processes.

Currently the proposed LHRP Statement does not explicitly commit OPIC to ensure that its projects do not have adverse impacts on human rights but rather to ensure its projects "promote" respect for human rights. "Promoting respect" is a significantly lower level of commitment by OPIC and does not require neither OPIC nor its clients to "adhere" to respecting for human rights. Similarly, due diligence processes and compliance with national laws should be "promoted" by projects, as opposed to actually being adhered to.

In order to address these shortcomings we recommend that section 1.3 of OPIC's LHRP statement be revised to read as follows:

*1.3 This Policy Statement outlines how OPIC will put into practice its commitment to the development goals (See Paragraph 1.2 of the ESPS) **by conducting its own due diligence, including through its labor and human rights review. Specifically, OPIC will ensure through its processes that projects receiving OPIC support:***

- ***Comply with applicable national employment and labor laws.***
- ***Carry out a due diligence process in areas in which labor and human rights risks exist.***
- ***Respect all human rights.***
- ***Do not cause or contribute to human rights or labor rights violations.***

2. Human rights due diligence requirements

Amnesty International recommends OPIC to clearly outline the responsibilities of both OPIC and its clients with regards to ensuring respect to human rights throughout their operations. Section 4 of the LHRP Statement should clearly spell out the practical steps that should be put in place by both OPIC and its clients to discharge such responsibility.

a) Reference to international human rights standards

Amnesty International is calling for a specific reference to international human rights standards, as articulated in internationally agreed instruments, to be included in the contractual requirements for all projects supported by OPIC. It is now widely acknowledged that corporate actors can have adverse impacts on all human rights - either directly or

indirectly. Given that a due diligence framework is aimed at preventing potential adverse impacts on all human rights, it is critical that OPIC refers to the full range of human rights rather than a limited set. These include those outlined in the following internationally agreed instruments:

- the **Universal Declaration of Human Rights**;
- the **core UN human rights conventions** (as defined by the UN Office of the High Commissioner for Human Rights¹);
- **UN Declarations** (such as the UN Declaration on Rights of Indigenous Peoples)
- Core **ILO Conventions**.

All of these instruments must be read in conjunction with the work of UN expert bodies such as Special Procedures and Treaty Bodies which provide useful interpretation and guidance on how to respect and implement such standards. While corporate actors are not bound directly by these instruments, these do outline the human rights that all corporate actors have a responsibility to respect. As such, it is essential that the impact of the activities of companies is benchmarked against human rights instruments, not other documents or principles.

The approach advocated by AI seems to have been followed by OPIC with regards to the provisions on Labor requirements, which specifically refer to internationally recognised workers' rights (see Paragraph 3.1.). The same level of clarity is not provided for the international human rights protection framework, which the US government is also bound by.

A reference to IFC Performance Standards is not adequate to ensure that OPIC's clients respect all human rights. The IFC Performance Standards do not reflect the full range of human rights that companies may impact and some of the guidelines provided fall below international standards.² For example, Performance Standard 3, which deals with pollution and the prevention of pollution, contains no explicit requirement for clients to identify and address the risks or potential impacts that pollution may have in relation to human rights. Similarly, Performance Standard 5, which deals with involuntary resettlement does not stipulate that clients should ensure they do not carry out forced evictions, which have been described by the UN Commission on Human Rights as a "gross violation of human rights, in particular the right to

¹ <http://www2.ohchr.org/english/law/index.htm>

² For more information see: *Amnesty International Submission to the Review of the International Finance Corporation (IFC) Sustainability Framework*, May 2010, (IOR 80/003/2010); *Amnesty International Time to invest in human rights: A human rights due diligence framework for the International Finance Corporation* (IOR 80/004/2010)

adequate housing”.³ Finally, IFC Performance Standard 7 outlines how clients must respect the rights of Indigenous Peoples and requires a process of free, prior and informed consultation. This is a requirement that falls short of international human rights standards, given that the UN Declaration on the rights of Indigenous Peoples speaks of free, prior and informed consent – which is a different concept.

For the reasons outlined above Amnesty International would like to see a specific reference to international human rights standards, as articulated in internationally agreed instruments, in paragraph 4.1.

Paragraph 4.1:

OPIC contractually requires all Projects to comply with International Human Rights Standards, IFC Performance Standards, and all applicable laws in the host country, including all human rights laws. The main requirements include:

b) Client requirements

Paragraph 4.1. is a critical section in LHRP Statement as it is meant to outline the due diligence requirements that clients ought to put in place in order to be granted and retain OPIC support. According to Professor John Ruggie, the Special Representative of the UN Secretary-General on human rights and transnational corporations and other business entities (Special Representative on Business and Human Rights), corporate human rights due diligence comprises four aspects:⁴

1. *a statement of policy articulating the company’s commitment to respect human rights;*
2. *periodic assessment of actual and potential human rights impacts of company activities and relationships;*
3. *integrating these commitments and assessments into internal control and oversight systems; and*
4. *tracking and reporting performance.*

Drawing from this emerging consensus at the international level, Amnesty International believes that the practical steps that OPIC should contractually require *its clients* to follow

³ UN Commission on Human Rights, Resolution 1993/77, para 1.

⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further steps towards the operationalization of the “Protect, Respect and Remedy” Framework*, A/HRC/14/27, 9 April 2010, paras 83-84.

as part of *their human rights due diligence process* are the following:

1. **Human rights policies** - Clients seeking OPIC support should be required to have in place a human rights policy in line with international human rights standards, and systems to ensure that corporate operations do not result in harm to or abuse of human rights. Clients should be able to demonstrate that policies are integrated into management systems and are implemented and monitored with adequate resources throughout the company.
2. For projects that pose a risk of significant adverse human rights impacts OPIC should require clients to carry out a full **human rights impact assessment** before final support is granted. A human rights impact assessment can occur along with environmental impact assessments - as long as it covers the full range of human rights⁵ and conforms to the principles outlined above.
3. For projects that pose a risk of adverse human rights impacts, OPIC should require clients to submit **an Action plan** that sets out how identified risks of adverse human rights impacts will be addressed and managed. Such an Action Plan should be submitted before final support is agreed. Involvement of affected communities in the development of the Action plan will be instrumental in identifying effective avoidance and mitigation measures.
4. **Engagement with affected communities and individuals** - All clients 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. Ideally this information will be captured in the impact assessment phase. For this purpose, OPIC should require the client to have in place a grievance mechanism to allow affected communities to raise issues with the company and ensure they are addressed at an early stage.

⁵ As recognised by the UN Special Representative on Business and HR, John Ruggie. *Protect, Respect and Remedy: a Framework for Business and Human Rights*. UN Special Representative on human rights and Transnational Corporations and other entities, June 2008, paragraph 61 (A/HRC/8/5).

Amnesty International recommends OPIC to include these provisions in its LHRP Statement, in particular by amending paragraph 4.1. as follows:

Paragraph 4.1. (continued)

- *Identification of human rights risks and impacts that are relevant to the Project and are reasonably expected to be significant;*
- *Establishment of an effective social management system that is appropriate to the size and nature of the Project activity and that is commensurate with the level of its human rights risks and impacts, **with a view to avoid adverse human rights impacts;***
- *Ongoing monitoring and public reporting to OPIC of human rights impacts of a project throughout its whole lifespan;*
- *Appropriate consultations with identified Project Affected People (see Glossary).*
- *Establishment of a grievance mechanism to allow affected communities to raise issues with the company and ensure they are addressed at an early stage;*
- *Establishment of a human rights policy that commits the client to respect human rights throughout its operations, and to be fully integrated into management systems and implemented and monitored with adequate resources throughout the company.*

3. Additional concerns

- a) Clarity on scope and timeline of roles and responsibilities

Section 4.2 refers to a “consultative human rights impact review” with the US Department of State. It is unclear what this review entails, on the basis of what information is this review carried out, by whom and at what stage of the review process. There also seems to be confusion on the provision outlined in paragraph 4.6. that commits OPIC to conduct its own human rights impact review for each project. While this latter provision is a welcome addition to OPIC’s policies, it remains unclear how such impact assessment will relate to the consultative impact review referred to earlier – both in terms of their scope and timeline within the review process. Amnesty International recommends OPIC to clearly state that it will carry out its own human rights impact assessment in order to indentify the level of risk of a project and provide on-going monitoring of high-risk projects throughout the project’s duration.

Greater clarity is needed in the LHRP Statement also with regards to the requirements placed over clients. For instance, must companies have a human rights policy in place before they apply for OPIC support or funding, or must they develop and adopt such a policy before any contract can be agreed? When should the Action Plan for addressing and mitigating human rights impacts be submitted? When will OPIC review performance and conduct a gap analysis?

In order to provide prospective clients with greater clarity, it might be useful for OPIC to include a timeline in its LHRP statement that indicates clearly what specifically is required of prospective clients and of OPIC itself. This should include at what point in time of the review process or lifespan of a project the different steps should be taking place.

b) Addressing adverse human rights impacts

The Labor section of the proposed LHRP Statement includes a requirement for OPIC to perform a "gap analysis" on each project to identify those cases where projects may fall below international standards. The same is not provided for in the human rights section of the Statement. Instead, if included, this would provide OPIC with a framework to decide what corrective measures need to be put in place by OPIC and its clients in the case of a project falling below international human rights standards. As a result of this process corrective measures should be spelled out explicitly in OPIC's contractual agreements with its clients.

In line with OPIC's commitment to respect human rights, the LHRP statement should also make clear that if corrective measures are not implemented or violations of the rights of those affected by the projects cannot be avoided, OPIC should terminate support for such project.

c) Protecting the rights of indigenous peoples and vulnerable groups

Paragraph 4.6 requires the identification of Project Affected People, including those particularly vulnerable. However there is no reference to Indigenous Peoples, whose rights are often undermined by the operations of corporate actors. Indigenous Peoples must be provided with adequate protection in line with international human rights standards. In this respect OPIC should amend paragraph 4.6. to include a specific reference to the rights of Indigenous Peoples, as well as amending the definition of Project Affected People, as contained in the Glossary to the LHRP Statement.



In conclusion, Amnesty International welcomes OPIC's desire to strengthen its Labor and Human Rights standards. In particular, we recognize OPIC's evident commitment to respect labor and human rights, and its desire to implement the framework developed by the UN Special Representative on Business and Human Rights. At the same time Amnesty International believes that its recommendations are necessary to turn OPIC's commitment into a reality and ensure that respect for human rights is fully integrated and implemented both by OPIC and its clients.