



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

March 22, 2010

Mary Boomgard
Office of Investment Policy
US Overseas Private Investment Corporation (OPIC)
1100 New York Avenue, NW
Washington, D.C. 20527

Re: CIEL Comments on OPIC's Draft Environmental and Social Policy Statement

Dear Ms. Boomgard:

The Center for International Environmental Law (CIEL) welcomes the opportunity to comment on the draft Environmental and Social Policy Statement of the U.S. Overseas Private Investment Corporation (OPIC). To the extent the Policy Statement more clearly indicates that the Performance Standards of the International Finance Corporation apply to OPIC-supported projects it will be a significant improvement over the current 2004 Environmental Handbook. Further improvements are necessary to ensure that the Policy Statement establishes clear and comprehensive requirements for OPIC and its clients, provides certainty for the affected community and civil society regarding the standards applied to OPIC-supported projects, and achieves the goal of protecting people and the environment from adverse impacts of OPIC-supported projects.

Statement of Purpose and Scope

Paragraph 1.1 identifies the purpose of the document itself, but not the purpose of the provisions contained therein. It is unclear what OPIC seeks to achieve with the implementation of the Policy Statement. Does OPIC, through the Policy Statement, seek to “do no harm” or contribute positively to sustainable development? Further, as written, the Policy Statement is for the benefit of the Applicant only. Clear social and environmental policies will also serve to ensure that communities and civil society know what they can expect from an OPIC-supported project. OPIC should explicitly recognize that its Policy Statement is intended to protect the interests of the project-affected communities and the public at large.

The San Bartolome case, which was the subject of a complaint to the Office of Accountability, revealed that OPIC did not consider its policies to be binding on itself or its clients. As a result, project-affected communities and civil society had no way of knowing the requirements, if any, that applied to OPIC-supported projects. That OPIC is publishing these requirements as a policy statement, and thus without the force of law, only reinforces that concern. For greater certainty, Paragraph 1.1 should state that:

“This Policy Statement applies to all projects supported through OPIC insurance, direct loans, or investment guaranties, including support through Financial Intermediaries such as investment funds of financial institutions that make equity or loan investments. Project specific requirements will be identified through the assessment process and included in the legal agreement.”

This Policy Statement should serve as a “one stop shop” for OPIC’s requirements in order to eliminate confusion for an Applicant or a project-affected community. All of OPIC’s requirements should be included in this Policy Statement, including its transparency policy, which is referenced in Paragraph 5.14, and its Worker Rights and Human Rights Policy, referenced in footnote 1, which we understand is currently being developed.

On the latter policy, we urge OPIC to take a broader view than it has to date regarding its obligations and those of its clients under international human rights law. The last several years have seen a new, more robust understanding of a state’s obligations under international human rights law with regard to the impacts of projects it supports overseas. In his report to the United Nations Human Rights Council, the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, found that states have a duty to protect against human rights violations of third parties, such as corporations. He also found that corporations have a responsibility to respect all internationally-recognized human rights. Ruggie explicitly singles out export credit agencies (ECAs), because of the state nexus, as an example of entities that should address human rights impacts, and argues that ECAs should require their clients to perform adequate due diligence to identify the potential human rights impacts of their operations.¹ Although OPIC is not technically considered an ECA, the same argument applies.

This due diligence should take the form of a human rights impact assessment that is performed prior to OPIC approval of the project, similar to an environmental and social impact assessment. OPIC can then require the client to take measures, as appropriate, to prevent human right violations or decline support in projects for which the risk of human rights violations is too great. The third pillar of Ruggie’s report is that corporations should establish a project-level grievance mechanism for people who feel their rights have been violated. This requirement is included in Performance Standard 1 of the International Finance Corporation (IFC), and, therefore, is included in OPIC’s policy to the extent that OPIC has adopted the IFC’s Performance Standards (see below). Further guidance to OPIC’s clients on the establishment of a project-level grievance mechanism can be found in an advisory note by the IFC’s

¹ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Secretary-General’s Special Representative on the issue of human rights and transnational corporations and other business enterprises, paras. 39-40 (April 7, 2008) (“39. Now consider an example from the home State side. It concerns export credit agencies (ECAs), which finance or guarantee exports and investments in regions and sectors that may be too risky for the private sector alone. ECAs may be State agencies or privatized, but all are mandated by the State and perform a public function. Despite this State nexus, however, relatively few ECAs explicitly consider human rights at any stage of their involvement; indeed, in informal discussions, a number indicate they might require specific authority from their government overseers to do so. 40. On policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight - and possibly indicate where State support should not proceed or continue.”).

Compliance Advisor Ombudsman.² Incorporating these requirements in OPIC's Policy Statement would not conflict with OPIC's obligations under the Foreign Assistance Act because OPIC would be evaluating the human rights impacts of its *clients* rather than the human rights record of the host country, which is the responsibility of the State Department.

Source of Policy

It is unclear whether the Policy Statement intends to adopt the IFC's Policy Standards on Social and Environmental Sustainability (PS) in their entirety or merely OPIC's interpretation of them. OPIC should adopt the IFC's PS in their entirety, and remove Appendix C. Appendix C provides an inadequate summary of the standards, omitting several important requirements. For example, one of the most important requirements in IFC PS 7 on Indigenous Peoples is that the client "enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and the successful outcome of the negotiation." This requirement, however, is not included in OPIC's summary of PS 7. These incomplete and misleading summaries of the PS will result in confusion about what the client is required to do.

Because the PS have now been adopted by 67 private banks (known as the Equator Principle Financial Institutions) and ECAs from OECD countries, which together represent over 70% of project finance in developing countries, we agree that it is not unreasonable to expect that OPIC's clients should be required to comply with them. However, we disagree with the implication in Paragraph 1.3 that the purpose of the PS is to identify "reasonable responsibilities and obligations of private sector investors in projects in emerging markets." Rather, as described above, the PS and OPIC's Policy Statement should identify the responsibilities of its clients that will ensure that the projects OPIC supports do not harm communities or the environment.

The IFC is currently conducting a three-year review of the Policy and Performance Standards on Social and Environmental Sustainability, which will result in substantive changes. OPIC should not peg its policy to one that will be obsolete within a year. At a minimum, OPIC should explicitly state that it is adopting the PS, including any subsequent revision by the IFC. OPIC should also consider policies adopted by regional development banks after the IFC approved the PS, in order to identify best practice. For example, the European Bank for Reconstruction and Development (EBRD) adopted its Environmental and Social Policy in 2008, which includes a specific Performance Requirement for Financial Intermediaries that should inform OPIC's requirements for FI projects.³

Screening and Categorization

Defining the scope of a project is a critical decision. Many controversial projects supported by multilateral development banks and ECAs are controversial because the scope of the project was drawn too narrowly, ignoring impacts the project had on communities and environment. Identifying a project scope that includes impacts outside the site boundary will reduce the risk of controversy that could

² *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*, Compliance Advisor Ombudsman, (2008) at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.

³ Environmental and Social Policy, European Bank for Reconstruction and Development, <http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf>.

interfere with project implementation. IFC uses the term “area of influence” and defines it to include areas “potentially impacted by cumulative impacts from further planned development of the project, any existing project or condition...areas potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location.” Indeed, Paragraph 3.6 states that, for Category B projects, the Applicants should include a map or drawing of the “area of influence”. OPIC should either adopt the IFC’s term or broaden its definition of project scope to include impacts caused by the project but outside of the site boundary.

The recent audit conducted by the IFC’s Compliance Advisor Ombudsman of an investment in a palm oil company demonstrates the importance of considering the environmental and social impacts associated with the supply chain. The Policy Statement would include those impacts only if material inputs were sourced from ecologically sensitive areas, but that is not the only type of impact that could arise. For example, materials could be sourced from an operation that uses child or slave labor. OPIC should broaden its project scope to include supply chain impacts and specify how they will be assessed.

The great disparity between Category A and Category B, especially with regard to disclosure of information, will create the incentive to downplay risks and narrow the scope of the project to avoid “burdensome” requirements. A similar risk of avoiding social and environmental requirements can occur through investments in financial intermediaries, or Category D projects. Category D subprojects that have the same impacts as Category A or B projects should not receive different treatment. As written, OPIC will determine how these subprojects are assessed and approved “at a time and in the manner” described in an agreement that is not publicly available. It is unclear how that is consistent with Paragraph 3.22, which states that OPIC will apply all the same procedures as direct applicants. OPIC should clarify how the public will know when a subproject is being considered for OPIC approval and what standards will be applied to subprojects.

Environmental and Social Review

As we have seen with the IFC over the last four years, it is not sufficient for the financing entity to ensure that the environmental and social management *system* complies with certain standards. A client may have a system that looks good on paper, but does not achieve the objective of protecting communities and the environment on the ground. OPIC’s responsibility should not constitute a “box-ticking” exercise. Rather, it is OPIC’s responsibility to ensure that the client’s system actually achieves results. To discharge its responsibility, OPIC should not rely exclusively on client-provided information to determine whether requirements are being met, but independently verify that adverse environmental and social impacts are avoided or mitigated.

The difference between an Environmental and Social Impact Assessment (ESIA) for Greenfield Category A projects and a Baseline Audit for existing Category A projects, described in Paragraph 3.5, is not clear. Although Paragraph 3.5 states that a Baseline Audit is required for pre-existing projects, Appendix E, in its definition of a Baseline Audit, states that it is used for pre-existing facilities *or* new construction on a site where prior industrial activities have occurred. If the Baseline Audit is any less rigorous than an ESIA, then, at a minimum, it should not be applied to new construction. Just because industrial activity occurred on a site previously does not mean that the new construction could not produce impacts that are different in nature than the previous activity or that continued industrial activity is sustainable for that ecosystem.

Environmental and Social Action Plan

Paragraph 3.8 should specify that the Environmental and Social Action Plan (ESAP) describe the schedule, in addition to the mechanism, for external reporting to affected communities on implementation of the Plan. As described above, in order to reduce the incentive to miscategorize projects to avoid the application of requirements, ESAPs for Category B projects should also be disclosed on the OPIC website.

Forestry Projects

As written, the Policy Statement requires that forest products be certified according to a common set of principles and procedural protocols, but gives no indication what the purpose of the certification is. There are many different forest certification programs available. Forest products could be certified only for their legality or for their legality and sustainability. OPIC should have minimum criteria for the explicit forestry certification programs it allows. OPIC should also require that its clients, regardless of the location of their operations, comply with the requirements of the Lacey Act, as amended, which prohibits the purchase or sale of timber products that have been harvested illegally in their country of origin.

Financial Intermediaries

As described above, the manner and timing for OPIC consent to FI subprojects should be consistent across FIs and made public through OPIC's website. Paragraph 3.27 does not provide sufficient clarity on the responsibilities of the FIs to OPIC or to the project-affected communities. We urge OPIC to consider the policies at the Asian Development Bank and the EBRD regarding Financial Intermediaries. In addition, the Policy Statement does not identify any requirements for the FI itself. The EBRD's Performance Requirement on Financial Intermediaries requires its FI clients in their human resources policies and practices to comply with its Performance Requirement on Labor and Working Conditions.

Environmental and Social Standards

As described above, it is unclear whether the IFC's Performance Standards will apply to OPIC projects, and if not, what other standards will apply. Paragraph 4.2 states that the Performance Standards "are considered" along with other approaches in developing project specific requirements. As currently written, this does not provide project-affected communities or civil society with enough information or certainty about what standards they should expect will be applied to any given project. It also does not ensure that a consistent set of standards will be applied across OPIC projects. This is a **significant** deficiency in the Policy Statement and is *inconsistent with recently passed legislation regarding OPIC's requirements*. OPIC should also explicitly state that project specific requirements will be included in OPIC's legal agreements, including compliance with the ESAP, environmental and social reporting, ongoing stakeholder engagement, periodic audits by independent specialists, the inclusion of environmental performance criteria in the definition of "project completion," and monitoring visits by OPIC personnel or representatives. Legal agreements should also include, where appropriate, remedies OPIC can pursue in the event a client fails to comply with environmental or social provisions during the term of the legal agreements. The project specific requirements, including the relevant provisions in the legal agreement, should be made public on OPIC's website for all Category A and B projects.

Public Consultation and Disclosure

OPIC's requirements for community consultation are not consistent with best practice, especially as it is unclear whether the IFC's Performance Standards apply. OPIC's Policy Statement does not even require the client to demonstrate how it has changed its plans to address concerns raised through the consultation process. Documenting only that the consultation process occurred is not sufficient. Further, OPIC should explicitly adopt the IFC's requirement that for all projects with significant adverse impacts the client's process of free, prior, and informed consultation result in broad community support for the project. The standard should be higher for projects that impact indigenous communities, requiring the free prior and informed consent (FPIC) of the community. Requiring FPIC for projects impacting indigenous peoples would be consistent with the indigenous peoples' policies of the EBRD and the ADB.

Paragraph 5.3 requires that for Category A projects only a local language translation of the executive summary of the ESIA be disclosed to the project-affected community. This is insufficient. Project-affected communities and host government officials should have access to local language translations of the full environmental and social assessment for all Category A and B projects.

OPIC should disclose the project specific requirements for all Category A and B projects. As it is unclear from the outset what requirements OPIC might apply to any given project, the project summaries posted on OPIC's website should explicitly disclose policies that have been triggered and what environmental and social provisions have been included in the legal agreement for each Category A and B project. As described above, requiring the same level of information disclosure for Category A and B projects will reduce the incentive to miscategorize projects.

In addition, several other documents should be routinely disclosed, including the client's annual environmental and social report submitted to OPIC for all Category A and B projects, reports from on-site monitoring (paragraph 7.2), and the full reports from third-party auditors (paragraph 7.5).

Further, clients should be required to disclose to project-affected communities that they have received support from OPIC and information regarding OPIC's Office of Accountability (OA), including how project-affected communities can contact the OA should they be harmed by the project.

Conditions and Compliance

OPIC should not rely exclusively on material representations of its clients in its environmental and social review. Rather, OPIC should undertake its own investigation to ensure that its evaluation is based on accurate, independent information.

More importantly, environmental and social requirements of the client must be included in its legal agreements for all Category A and B projects. It is not enough that these provisions "may be" or "typically" are included in OPIC agreements. The extent to which OPIC is seriously committed to its environmental and social policy is demonstrated by whether it includes environmental and social provisions in its legal agreements with clients. This is especially true when OPIC monitors only requirements included in OPIC agreements, as stated in paragraph 7.0. Further, OPIC agreements should also require that OPIC clients cooperate with the Office of Accountability should any complaints be filed. It would be appropriate in this section of the Policy Statement to include additional

information regarding the functions of the Office of Accountability so as to alert Applicants and project-affected communities to its existence.

Climate Change and Renewable Energy

We incorporate by reference comments submitted by Pacific Environment on March 19, 2010 with regard to climate change and renewable energy.

OPIC Capacity to Ensure Compliance with Policy Statement

In order to ensure implementation of this Policy Statement, OPIC must allocate sufficient resources for the environmental and social appraisal and monitoring processes. This is especially critical with regards to social impacts of the projects it supports, as the San Bartolome case demonstrated. Additional staff may be needed to ensure that the Policy Statement is not an empty commitment to sustainable development.

We appreciate the opportunity to comment on the draft Policy Statement. Please do not hesitate to contact me at (202) 742-5831 or kgenovese@ciel.org, if I can provide any additional information.

Sincerely,

Kristen Genovese
Senior Attorney

CC: Honorable Brad Sherman, Chairman, Subcommittee on Terrorism, Nonproliferation and Trade
Jean Aden, Director, Office of Accountability