

September 10, 2010

Via Electronic Mail

Ms. Elizabeth Littlefield, CEO
Ms. Connie Tzioumis, Office of Investment Policy
Overseas Private Investment Corporation
1100 New York Avenue, N.W.
Washington, DC 20527
Email: labor@opic.gov

Re: Comments on the OPIC Draft Labor and Human Rights Policy Statement

Dear Ms. Littlefield and Ms. Tzioumis:

Accountability Counsel is pleased to provide the following comments regarding OPIC's Draft Labor and Human Rights Policy Statement ("Draft Policy"). Accountability Counsel, based in San Francisco, California, works to support communities seeking to use accountability mechanisms to uphold environmental and human rights. We work at the policy level to ensure that accountability systems are robust, fair and effective for all parties. We therefore take great interest in OPIC's creation of this Draft Policy, as it marks a significant commitment by OPIC to ensure that human rights are respected by OPIC and its clients. Further, the Draft Policy sends a message to project partners that OPIC, as a U.S. Government agency, takes its human rights responsibilities and those of its clients seriously. In particular, we congratulate OPIC on taking a strong position on the application of its Draft Policy to Financial Intermediaries.

We are encouraged by the Draft Policy and thank OPIC for taking on this difficult but necessary task. We note, however, a number of areas where the Draft Policy could benefit from greater attention, such as the clarity of the rights at issue, the responsibilities of parties, indigenous rights, and grievance mechanisms. With these changes, we believe OPIC can serve as a leader among other development finance institutions and export credit agencies with its new Labor and Human Rights Policy Statement.

We provide our comments below, first in general terms, and then in more specific terms according to the corresponding sections of the Draft Policy. We focus our General Comments (Section I, *infra*) primarily on our proposed changes to Section 4 regarding Human Rights Requirements, and address all sections, including Sections 2 and 3, in our Specific Comments section (Section II, *infra*).

I. General Comments

As a general matter, we recommend restructuring Section 4, Human Rights Requirements, to include four distinct sections, which we propose here as Sections 4(A)-(D).

Timeline – Proposed Section 4(A)

We propose that Section 4(A) be a timeline of the events required in OPIC’s human rights due diligence process so that Applicants, OPIC, and the public have a clear view of the process. The timeline should generally include OPIC’s initial screening process, the Applicant’s due diligence requirements, OPIC’s due diligence evaluation and review process and consequences.

The timeline should clarify that OPIC will not approve projects unless the Applicant’s human rights due diligence process results in a finding, verified by OPIC, that (1) there are no human rights risks or that they can be avoided through mitigation measures, (2) that an action plan has been created in consultation with the affected communities, and consent has been freely given by any indigenous communities, and (3) that a grievance mechanism has been established at the project level and project affected people are aware of the Office of Accountability.

Each of the events in the timeline would then be detailed in Sections 4(B) through (D).

Statement of Policy – Proposed Section 4(B)

We recommend that a proposed Section 4(B) be a Statement of Policy describing *which* human rights OPIC commits to uphold through its own activities and those of its clients. This Statement of Policy should include the affirmation that the Policy applies to all projects supported by OPIC, including those supported through Financial Intermediaries.

In addition to the IFC Performance Standards and host country human rights laws,¹ which are stated in the current Draft Policy, Section 4(B) should include a commitment to follow the “International Bill of Human Rights” per the “UN Framework” developed by the United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie.² The Statement of Policy

¹ For a discussion regarding why these references alone are insufficient, please see the Specific Comments section of this letter regarding Section 4.1, below.

² The International Bill of Human Rights consists of the Universal Declaration of Human Rights (“UDHR”); the International Covenant on Civil and Political Rights (“ICCPR”); the International Covenant on Economic, Social and Cultural Rights (“ICESCR”); and the eight core International Labor Organization (“ILO”) conventions. See United Nations 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 toward the operationalization of the “protect, respect and remedy” framework*, U.N. DOC. A/HRC/14/27 (Apr. 9, 2010), ¶ 60 (“companies should look to these instruments as authoritative lists of internationally recognized rights.”); see also International Finance Corporation (IFC), Global Compact, International Business Leaders Forum (IBLF), GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT (2010), Establishing the Framework of the Assessment,

should also include a commitment to follow the UN Declaration of the Rights of Indigenous Peoples (“UNDRIP”) and the Convention on the Elimination of Discrimination Against Women (“CEDAW”). For projects involving private security forces, OPIC should commit to adherence with the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the Voluntary Principles on Security and Human Rights.

The Draft Policy should then contain two additional sections regarding the obligations of OPIC and the Applicant to implement this Statement of Policy.

OPIC’s Duties – Proposed Section 4(C)

We propose that Section 4(C) cover OPIC’s own obligations under the Draft Policy, containing the following steps:

- (i) For each Project, OPIC consults with the U.S. Department of State per requirements of the Foreign Assistance Act (former Section 4.0 in the Draft Policy). This section will need to describe the implications of this consultation on OPIC practice (*e.g.*, could this result in Projects being rejected?). Furthermore, if the results of this consultation are public, this should be made clear in the Draft Policy.
- (ii) OPIC conducts its own initial human rights Project Screening.³ This should first include application of an ‘exclusion list’ to determine if the type of proposed activity should be rejected because of an exclusion.⁴ The remainder of the screening should be based on a proposed OPIC pre-determined ranking system for **each type of activity** OPIC undertakes, so that individual judgment of OPIC staff is not required at this stage.⁵ The ranking of each activity should be agreed upon

available at <https://www.guidetohriam.org/guide/drawstep/step4/establishing-the-framework-of-the-assessment-> (last visited Sept. 1, 2010) (suggesting that a framework of assessment should be formulated with respect to the various internationally agreed human rights standards)[hereinafter HRIAM].

³ This recommendation draws from Natalie L. Bridgeman, BankTrack Publication, *Human Rights responsibilities of private sector banks: The policy required to “Respect” and provide “Access to remedy”*, Submission to Professor John Ruggie, United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (July 2010), available at http://www.accountabilitycounsel.org/Accountability_Counsel/AC_Publications_files/Banking_and_Human_Rights_Paper.pdf.

⁴ Current exclusions should be maintained. See, e.g. OPIC Environmental & Social Review –Dam Projects. Additional references to exclusions should be added, including IFC Exclusion List, available at <http://www.ifc.org/ifcext/disclosure.nsf/Content/IFCExclusionList> (last visited Sept. 6, 2010) (includes, *inter alia*, production of or trade in banned activities, weapons and munitions, alcohol and tobacco, gambling, and specific exclusions for FI and microfinance lending).

⁵ See Identification: Business Relationships, HRIAM, *supra* note 2, available at <https://www.guidetohriam.org/guide/drawstep/step2/business-relationships> (last visited June 30, 2010) (highlighting the various business relationships that may impact human rights); see also Peter Frankental, Consultation on Human

by OPIC management and should be altered by their approval only. Such a categorization process should happen only once (see examples below), and should be re-examined only as OPIC takes on new activities. The ranking system for OPIC's activities could use the following system, with Level I representing the highest degree of risk, impact, or leverage,⁶ and Level III representing the lowest:⁷

- Level I** – clear risk, clear impact, and/or high leverage over activities (such as project finance, advisory services, insurance, investment funds and certain types of credit facilities and corporate loans)
- Level II** – some risk, some impact, and/or some leverage over activities (such as franchise loans)
- Level III** – no risk, no impact, and/or no leverage over activities (such as housing or mortgage financing or provision of credit to small microfinance enterprises)

(iii) After assigning the level of risk, OPIC would then turn the human rights due

Rights and the Financial Sector Before the United Nations High Commissioner on Human Rights: How Can Financial Institutions Strengthen the Role of International Human Rights Standards in Their Decision-Making? (Feb. 16, 2007) (transcript on file with author) (“[Human rights impact assessments (HRIA)] should apply to all investment projects, not just to major infrastructure projects, such as dams and oil pipelines. Any manufacturing plant, hotel or leisure centre, or significant operation of any kind that will have impacts on human rights should be accompanied by a HRIA.”).

⁶ See Identification: Determining the Company's Level of Control, HRIAM, *supra* note 2, available at <https://www.guidetohriam.org/guide/drawstep/step2/determining-the-company-s-level-of-control> (last visited Sept. 1, 2010) (providing key questions to ask when determining the bank's level of control).

⁷ These categorizations are based on the concept of risk categories used by the international financial institutions (IFIs) and Equator Principle Financial Institutions (EPFIs) to identify and separate levels of risk. The IFIs and EPFIs rank activities as Category A, B or C to identify levels of risk within project finance and advisory services and to assess the type of social and environmental due diligence required. While the Level I, II, III categories draw upon this concept, the Levels differ from the Categories in that they would allow OPIC to place all of its *activities* (not just project finance and advisory services) into these three areas of risk. This is an intentionally separate categorization in recognition of separate human rights risk issues. See The Int'l Finance Corporation [IFC], *Policy on Social and Environmental Sustainability*, ¶ 18 (2006), available at <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards> (last visited Sept. 1, 2010); The Equator Principles: *A Financial Industry Benchmark for Determining, Assessing, and Managing Social & Environmental Risk in Project Financing*, Principle 2 (2006), available at http://www.equator-principles.com/documents/Equator_Principles.pdf (last visited Sept. 1, 2010); The World Bank Group, Operational Policy [OP] 4.01: Environmental Assessment, ¶ 8 (1999), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,print:Y~isCUR L:Y~contentMDK:20064724~menuPK:64701763~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (last visited Sept. 1, 2010); European Bank for Reconstruction & Dev. [EBRD], *Environmental and Social Policy*, ¶¶ 19-22 (2008), available at <http://www.ebrd.com/downloads/about/sustainability/2008policy.pdf> (last visited Sept. 1, 2010) [hereinafter EBRD ESP].

diligence process over to the Applicant, per proposed Section 4(D), below.

- (iv) After the Applicant completes the required analysis per Section 4(D), OPIC would then conduct its own human rights impact review of each project to evaluate the information provided by the Applicant.⁸
1. Particular attention should be paid to the Applicant’s scoping of the human rights risks involved in the Project, disclosure of information, consultation with Project Affected People – including practicing free, prior, informed consent (FPIC) with Indigenous People – formation of resettlement plans, development of indigenous peoples development plans and human rights risk management plans, and establishment of a grievance mechanism.
 2. If OPIC finds that the Applicant has correctly conducted its due diligence and finds that there are either no human rights risks or that they are avoidable through mitigation measures, OPIC would then apply current Section 4.5(2) and (3) criteria to determine the “Applicant’s commitment and capacity to effectively manage the human rights risks and impacts, including the ability to implement any required mitigation” and “the potential role of third parties in achievement of successful outcomes.” An example of this final factor should be given.⁹
- (v) OPIC should then either send the due diligence materials back to the Applicant for revision(s), refrain from involvement in the project, or accept the project provided there is confirmation that:
- a. there are no human rights risks or that they can be avoided through mitigation measures,
 - b. that an action plan has been created in consultation with the affected communities, and consent has been freely given by any indigenous communities, and
 - c. that a grievance mechanism has been established at the project level and project affected people are aware of the Office of Accountability.
- (vi) If the project goes forward, OPIC must regularly review monitoring reports involving implementation of any action plan and must independently verify such information. In particular, OPIC’s review should follow functioning of grievance mechanisms, and ensure that Project Affected People are properly consulted in

⁸ This is consistent with Section 4.6 of the Draft Policy.

⁹ The example could be: “where the operator in a structured finance for a power project is an entity with a history of poor labor practices, forcible removal of people from their land, or engagement of security forces without proper training, this factor will undermine the Applicant’s analysis of how risks could be mitigated if the Applicant is relying on this third party to achieve a successful outcome and, if unchanged, will require rejection of the project.”

their creation and aware of their purpose.

- (vii) Finally, the policy should address OPIC's response and the consequences to the Applicant for the Applicant's failure to follow this policy. For example, this could include immediate cancelation of project support, engagement with the client and other operators to address and resolve human rights issues, referral of the issue to the Office of Accountability, or any number of responses scaled to the issues.

The Applicant's Duties – Proposed Section 4(D)

The proposed Section 4(D) should address the Applicant's human rights due diligence, impact assessment, and operational human rights requirements.

First, regarding due diligence, the Applicant will have received a Level I, II or III rating from OPIC of its proposed project. For each type of activity ranked above as Level I, II or III, each of the risk factors below should be analyzed to determine *whether and what type of human rights impact assessment is required*. The risk factors should include,¹⁰ but are not limited to:

- i. activity related to certain sectors such as agribusiness, chemicals, forestry, mining, munitions,¹¹ oil and gas, power, infrastructure, or water;¹²
- ii. the scale of the activity (larger scale projects will require a more in-depth HRIA);¹³
- iii. activity impacting weak governance zones;¹⁴

¹⁰ These factors draw on and supplement Sections 4.6 - 4.8 in the Draft Policy.

¹¹ As noted above, where the Applicant is involved in sectors with high risk of human rights impacts, such as munitions, exclusion lists may be appropriate as a means of meeting policy commitments and excluding these activities. *See e.g.*, EBRD ESP, *supra* note 7, Appendix 2; IFC Exclusion List, <http://www.ifc.org/ifcext/sustainability.nsf/Content/IFCExclusionList> (last visited June 28, 2010); *see also* Jan Cappelle, Human Rights, Banking Risks: Incorporating Human Rights Obligations in Bank Policies 20 (Mar. 17, 2007) (BankTrack briefing paper, on file with BankTrack) at 16-17.

¹² *See* Identification: Industry Sector, HRIAM, *supra* note 2, *available at* <https://www.guidetohriam.org/guide/drawstep/step2/industry-sector> (last visited June 30, 2010) (highlighting the importance of assessing the particular sector of the business activity).

¹³ *See* Sections 4.6 in the Draft Policy.

¹⁴ *See* OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, *available at* http://www.oecd.org/document/5/0,3343,en_2649_33765_36899994_1_1_1_1,00.html (last visited Sept. 1, 2010); OECD Draft due diligence guidance for responsible supply chain management of minerals from conflict-affected and high-risk areas (April 28, 2010), *available at* http://www.oecd.org/document/36/0,3343,en_2649_33765_44307940_1_1_1_1,00.html (last visited Sept. 1, 2010); *see also* Identification: Country of Operation, HRIAM, *supra* note 2, *available at* <https://www.guidetohriam.org/guide/drawstep/step2/country-of-operation> (last visited July 1, 2010) (advocating the importance of understanding and acknowledging the host country's human rights record); Identification: Potential Consequences for Companies: Civil and Political Rights, HRIAM, *supra* note 2, *available at*

- iv. activity impacting conflict zones;¹⁵
- v. projects that require sophisticated security arrangements or collaboration with public security forces;
- vi. the type and level of host government involvement in the Project (risk is highest where there is a high level of host government involvement and low capacity to address human rights issues or government reputation for abuse);
- vii. physical or social challenges while safeguarding project personnel and property in a manner that respects the human rights and security of Project Affected People;
- viii. activity impacting “at risk” groups such as indigenous peoples, women and children, or the disabled;¹⁶
- ix. activity impacting areas or entities with known labor rights issues;¹⁷
- x. activity related to areas or entities with known human rights issues;¹⁸ and
- xi. activity related to areas or entities with known environmental issues affecting communities;¹⁹
- xii. relevant historical information related to the Project;²⁰

<https://www.guidetohriam.org/guide/drawstep/step2/civil-and-political-rights> (last visited July 1, 2010) (highlighting the potential consequences to the company associated with specific human rights challenges); Identification: Set the Baseline, HRIAM, *supra* note 2, available at <https://www.guidetohriam.org/guide/drawstep/step2/set-the-baseline> (last visited Sept. 1, 2010) (suggesting companies set a human rights baseline for a given type of project that can be used as a barometer by which to measure project impact).

¹⁵ See Voluntary Principles on Security and Human Rights, available at <http://www.voluntaryprinciples.org/> (last visited Sept. 1, 2010).

¹⁶ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Report, Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework*, U.N. DOC. A/HRC/14/27 (Apr. 9, 2010) ¶ 97; see also Economic, Social and Cultural Rights, HRIAM, *supra* note 2, available at <https://www.guidetohriam.org/guide/drawstep/step2/economic-social-and-cultural-rights> (last visited Sept. 1, 2010).

¹⁷ Where an activity impacts areas or entities with known issues, the term “known” should include where a regulator or court has been involved in an ongoing case, complaint, or investigation.

¹⁸ See *id.*; see also Identification: Potential Consequences for Companies: Civil and Political Rights, HRIAM, *supra* note 2, available at <https://www.guidetohriam.org/guide/drawstep/step2/civil-and-political-rights> (last visited Sept. 1, 2010) (highlighting the potential consequences to the company associated with specific human rights challenges); see also Identification: Set the Baseline, HRIAM, *supra* note 2, available at <https://www.guidetohriam.org/guide/drawstep/step2/set-the-baseline> (last visited Sept. 1, 2010) (suggesting companies set a human rights baseline for a given type of project that can be used as a barometer by which to measure project impact).

¹⁹ See *supra* note 17.

²⁰ In particular, the Applicant should ensure that any past concerns about the project are identified and addressed so that the proposed project does not “exacerbate past injustices.” See Amnesty International, TIME TO INVEST IN HUMAN RIGHTS, A HUMAN RIGHTS DUE DILIGENCE FRAMEWORK FOR THE INTERNATIONAL FINANCE CORPORATION

The level of analysis of these risk factors depends on the ranking of the activity. For example, for a Level I activity, such as project finance, an in-depth analysis of these factors is required and if any of these risk factors are present or possibly present, an in-depth human rights impact assessment is required. For a Level II activity, such as a franchise loan, an analysis of the risk factors may result in the requirement of a less extensive impact assessment if any of the risk factors are triggered. For Level III activities, such as provision of small-scale micro-finance, the lowest degree of analysis is required and no further impact assessment may be needed if none of the risk factors are triggered. To assist in evaluation of these factors, a number of online tools are available.²¹

Based on the above screening, when a human rights impact assessment (“HRIA”) is required, the assessment should be based on recent social and environmental baseline data. The assessment should be based on guidance from OPIC regarding the elements of and process for conducting an HRIA.²² Where risks are identified, OPIC policy should then require a human rights management system (including action plans which should be made in consultation with Project Affected People),²³ the Applicant’s obligations in implementing such a management

(2010) at 25, available at <http://www.amnesty.org/en/library/asset/IOR80/004/2010/en/4c6c3700-22ba-47fd-9da7-a442d7e19594/ior800042010en.pdf> (last visited September 10, 2010) [hereinafter Time to Invest].

²¹ See Danish Institute for Human Rights, Country Risk Assessment Reports, available at http://humanrightsbusiness.org/?f=country_risk (last visited Sept. 1, 2010) (“The Country Risk Assessment is the most comprehensive available report on the human rights risks to business. As well as in-depth descriptions of legal protections and violation risks in practice, the report includes detailed recommendations, topic-specific focal areas and extensive background information on the country in question.”). The Danish Institute has begun work on a HRCIA tool that is specifically for financial institutions. See RITA ROCA & FRANCESCA MANTA, VALUES ADDED: THE CHALLENGE OF INTEGRATING HUMAN RIGHTS INTO THE FINANCIAL SECTOR 2 (The Danish Inst. for Human Rights ed., 2010), available at http://www.humanrightsbusiness.org/files/320569722/file/values_added_report_dihr.pdf (last visited Sept. 1, 2010); see also HRIAM, *supra* note 2; U.S. Department of State Human Rights Reports, available at <http://www.state.gov/g/drl/rls/hrrpt/> (last visited Sept. 1, 2010).

²² Based on these factors, an HRIA should be conducted if required. Where an HRIA is required, it should minimally conform with the following principles: comprehensive scoping of applicable standards; focus on anticipating and avoiding potential adverse human rights impacts; best practice methodology assessing risks to and rights of communities; determination of willingness of client to manage risks; evaluation of short-, medium-, and long-term human rights impacts and the cumulative nature of impacts (*i.e.* if a project adds to or exacerbates existing impacts); a transparent and consultative process; publicly released findings, with specific timely notice to affected people; and implementation plan agreed upon by the client and all relevant stakeholders.

²³ Consultations regarding resettlement should be based on free, prior informed consultation; if projects propose impacting indigenous peoples, Applicants should follow the requirement of “free, prior informed consent.” See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 32, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); Rodolfo Stavenhagen, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, ¶ 66, submitted in accordance with Commission resolution 2001/65, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003) (providing that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects”); Case of the Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, at ¶ 137 (Nov. 28, 2007) (noting the internationally-recognized right to “free, prior and informed consent”); see also Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); see also M. Janis, *The International Court of Justice: Advisory Opinion on the Western Sahara*, 17 HARV. INT’L L.J. 609, 61 (1976).

system, and a discussion of monitoring and reporting duties, including requirements for the establishment of project-based grievance mechanisms. There should be an explicit requirement that when the Applicant consults with communities regarding a proposed project, the information regarding the project and its risks should include discussion of creation of a grievance mechanism at the local level and information about the OPIC Office of Accountability.²⁴

OPIC should state in the proposed Section 4(D) that in some cases, the HRIA may identify impacts that are so large or so challenging to mitigate that ***refraining from taking on the activity is the only acceptable step that will allow adherence to OPIC's policy.*** In order to have meaning and provide public assurance that OPIC will not tolerate human rights abuse in its projects, OPIC's human rights policy must have the option of 'refraining from involvement.'

While each of these topics must be dealt with in the OPIC policy, the degree of detail can be minimal to the extent that comprehensive guidance already exists on these topics that may be incorporated by reference. For example, there are a number of in-depth tools regarding human rights impact assessment and management²⁵ and the establishment of grievance mechanisms.²⁶

II. Specific Comments on the Draft Policy

Section 1.1

We applaud OPIC for confirming that the policy applies to all of its activities, including support through Financial Intermediaries. We recommend that this provision be maintained at the beginning of the OPIC policy in Section 1 (to note applicability to Labor and Human Rights issues) and should be reiterated in the Statement of Policy in Section 4(B) as noted above.

Section 1.3

We note that in Section 1.3, OPIC is not making a commitment if it is only ensuring that projects will "promote" certain standards, rather than adhere to them. The word "promote" should be deleted.

²⁴ This is consistent with the UN Special Representative's framework regarding provision of access to remedy. See 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 toward the operationalization of the "protect, respect and remedy" framework, U.N. DOC. A/HRC/14/27 (Apr. 9, 2010) ¶ 1.

²⁵ See, e.g., HRIAM, *supra* note 2; THE DANISH INSTITUTE FOR HUMAN RIGHTS, STRATEGIC FRAMEWORK 2009-2010, 26 (2009) [hereinafter DI Framework]; Principles for Social Impact Assessment, available at <http://www.iaia.org/publicdocuments/special-publications/SP2.pdf> (last visited June 30, 2010) (the Principles were prepared over a five year period through workshops and conferences on six continents and are meant to represent best practice).

²⁶ IFC Good Practice Note, Addressing Grievances from Project-Affected Communities, available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_GrievanceMechanisms/\\$FILE/IFC+Grievance+Mechanisms.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_GrievanceMechanisms/$FILE/IFC+Grievance+Mechanisms.pdf) (last visited July 1, 2010); A Guide to Designing and Implementing Grievance Mechanisms for Development Projects, Advisory Note, CAO (2008), available at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf> (last visited Sept. 1, 2010).

Section 2.9

We note that in this section, subsection (2) provides too wide a loophole, allowing activity in countries that have failed to adopt four out of five of the core labor standards, thus allowing certain forms of forced and child labor. We note that this is addressed in 3.1 to some extent, but this should be corrected for consistency in Section 2.9.

Section 3.1

Similar to our Statement of Policy recommendation for Section 4(B), above, we recommend that instead of reference to other policies, this section enumerate the labor standards that OPIC and its clients must follow. We note that reference to the IFC Performance Standards here will leave the policy weak in certain areas unless the areas of deficiency are specifically enumerated in the policy.

For example, without specific enumeration, the current Draft Policy is unclear as to whether threatening, abusive, exploitative or sexually coercive disciplinary practices are allowed.²⁷

Section 4.1

We appreciate reference to the IFC Performance Standards and host country laws, including host country human rights law. However this is an insufficient statement of human rights policy.²⁸ First, IFC has explicitly refused to adopt a human rights policy.²⁹ While we welcome its inclusion because it does address some human rights issues, it is out of step with international human rights law in a number of areas.³⁰ For example, IFC has long refused to meet its international law obligations to obtain free, prior, informed consent (“FPIC”), when projects impact indigenous groups.³¹ We note that the IFC Performance Standards also fail to

²⁷ IFC Performance Standard 2 currently allows this practice. Withholding of documents, a common human rights abuse in the workers’ rights arena, is similarly un-enumerated.

²⁸ For a detailed critique of the IFC Performance Standards and their deficiencies with regard to human rights, see Time to Invest, *supra* note 20; see also Joint Civil Society Submission, COMMENTS ON IFC’S CONSULTATION DRAFTS OF THE IFC SUSTAINABILITY POLICY AND PERFORMANCE STANDARDS AND DISCLOSURE POLICY (August 27, 2010) (on file with author).

²⁹ IFC Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, Review and Update, “The International Bill of Human Rights and IFC Policies and Performance Standards” (Draft June 1, 2010).

³⁰ For a detailed analysis, see Time to Invest, *supra* note 20; see also NomoGaia Global Human Rights and WRI, The IFC’s “Social Impact Assessment” Process: Adequate to Respect Human Rights? (Aug. 5, 2010), available at http://nomogaia.org/SIA_v_HRIA_IFC_files/SIA%20vs%20HRIA%20-%20Commentary%20to%20the%20IFC.pdf (last visited Sept. 6, 2010).

³¹ See *supra* note 29 (denying the IFC’s obligation to obtain free, prior, informed consent when projects impact indigenous groups).

explicitly require a human rights impact assessment (despite IFC’s sponsoring of the HRIAM).³² Further, the IFC Performance Standards lack, and the OPIC Policy should include, a requirement that clients “ensure that private security at [OPIC]-supported projects is provided in line with the principles contained in the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the Voluntary Principles on Security and Human Rights.”³³

Second, where host country international human rights obligations incorporated into national laws are weak, reference to these as additional to the IFC Performance Standard requirements, while still a worthwhile requirement, will not be sufficient. As noted above in the proposed new Section 4(B), Statement of Policy, the “International Bill of Human Rights”, UNDRIP, CEDAW, and the relevant private security standards form the appropriate reference points for OPIC’s human rights policy.

Regarding the first of three bullet points in Section 4.1, “Identification of human rights risks and impacts,” it is unclear who does the identification and what particularly they are identifying. Is this the Applicant’s duty? OPIC’s duty? There is also no information regarding when this is required and who determines what human rights risks are short of “significant.”

Regarding the second bullet point, there is no indication of how a social management system should be established. Additionally, there is no sentence connecting the identification of risks with the social management system. For example, there would need to be a reference to a management plan that results from the HRIA. This is addressed in our proposal above in the General Comments section.

Regarding the third bullet point in 4.1, while we agree that there must be appropriate consultations with Project Affected People – and we applaud OPIC for making this specific - this should happen in the context of the conduct of the HRIA and again to gain consent (FPIC in the case of Indigenous Peoples) when conducting project due diligence and in design of grievance mechanism, etc. This bullet point should be an overarching sub-point rather than a separate requirement. We address this issue above.

Section 4.2

The first sentence of 4.2 is unclear as to when this consultation with the State Department happens in the OPIC process. This issue can be resolved by adopting the proposed timeline suggested above in the General Comments section (proposed as Section 4(A)). It is also unclear what the purpose or consequences are of OPIC’s reliance on this guidance. Finally, there is a

³² In the April 14, 2010 IFC mark-up of the IFC Performance Standards, PS1, para. 6, footnote 7, it is suggested that IFC Clients “consider and identify [human rights risks and impacts] if reasonably expected to be significant” – this is hidden in a footnote, is too vague to be useful as guidance to Clients, fails to make mention of how this should be done, and the bar of what is reasonably expected to be significant excludes evaluation of potential human rights risks.

³³ Time to Invest, *supra* note 20 at 15.

transparency issue regarding the consultation with the State Department – is this guidance available to the public and when is it made public? We propose that this 4.2 requirement be incorporated into a new Section 4(C)(i) as the first sub-point.

Section 4.3

This section is also more appropriate for our proposed Section 4(C) involving OPIC’s duties, where we propose that OPIC identify the risk level based on the project activity and then apply the exclusion list. As it currently stands, there are open questions in 4.3 regarding the timeline for this OPIC screening, when it is administered, whether it happens before the Applicant is required to conduct a risk assessment, etc. Again, these issues could be made clearer with the proposed timeline in Section 4(A) above.

It is also unclear whether 4.3 duties are independent of duties in 4.1. For instance, is this screening conducted in reliance on client information alone? How does OPIC do this screening? Who does it? What measurements are used to make the identification? What are the types of impacts that could/ should/ must preclude OPIC support? If an applicant does not demonstrate capacity and willingness to respect human rights, why are there any circumstances that would allow a project to continue nonetheless? There should be situations that are intolerable that trigger application of the OPIC exclusion list.

Section 4.4

Again, we propose that the OPIC review here be contained in a new Section, 4(C). The current section 4.4 is confusing. It should be made clear when the applicant is to provide information to OPIC for internal review.

There are further questions regarding how OPIC is to know whether information from the Applicant is accurate and objective. If not corrected, OPIC is relying on the Applicant’s own self-serving information.

Also, is the 4.4 review the same as the 4.3 screening? How is it different? How will it be determined whether third party information and verification is required?

Section 4.5

Section 4.5 should also be reorganized into a new Section 4(C). First, we are unclear when the “review” mentioned takes place in OPIC’s process? Who at OPIC applies the level of review? What are the different levels of review? Are these factors more appropriate for initial screening or for review of the Applicant’s own assessment?

Regarding section 4.5(1), where is the information coming from for this review of human rights risks and impacts? Regarding (2), upon what is OPIC basing its analysis of this element regarding “the **Applicant’s** commitment and capacity to effectively manage the human rights risks and impacts, including the ability to implement any required mitigation”? We applaud

OPIC's inclusion of this as a factor for consideration, but clarification is needed. Regarding (3), clarification is needed to reflect the role of the analysis of third parties on OPIC's support. In general, what are the results of this analysis of (1) – (3)? Please note that we have incorporated these factors into our proposed Section 4(C).

Section 4.6

Section 4.6 states: "OPIC conducts its own human rights impact review of each project." We applaud OPIC for taking a strong position on the need to independently review the human rights impacts of projects.

However, this section raises several questions for clarification: who conducts this review at OPIC? Are they trained in human rights impact assessment? Are outside experts consulted? What tools and resources are used for this review and in consultation with whom? The word "directly" should be deleted, as indirect human rights impacts are equally unacceptable.

Regarding the Section 4.6 factors that determine the level of due diligence, we have incorporated these into proposed Section 4(D), above. These factors are important for OPIC's consideration, but should first be part of the Applicant's analysis and should then be verified by OPIC. We note that a number of relevant and useful factors have been added in our proposal above.

Section 4.7

Section 4.7 contains an important listing of high-risk elements, but as stated above, these should be incorporated into Section 4(D), as we propose in our General Comments. This list is duplicative and confusing when read along with 4.6 and 4.8.

Section 4.8

As discussed above, when analyzing factors, the low-risk of projects is part of the high-risk analysis (each factor is analyzed along a scale of risk). These factors are therefore unnecessary. We recommend that this section be deleted.

Section 4.9

Regarding 4.9, this provision feels out of place. The reference to Category A projects is a bit of a "catch all" that would be unnecessary if our suggestions regarding proposed Section 4(A) – (D) are adopted.

Omissions

Finally, we note that the Draft Policy should have included the following additional provisions.

First, the Draft Policy is missing explicit mention of project-level grievance mechanisms and the requirement that they be legitimate, accessible, predictable, equitable, transparent, and operated in a manner that ensures independence from the company or project sponsor. The Policy must also provide people impacted by project activities the ability to raise grievances and have them addressed promptly in order to avoid human rights (and other) violations. We address this issue in our proposed Section 4(C) & (D), above.

Second, OPIC needs to make clear what its response will be if there is a breach of the OPIC human rights policy. That these are contractual breaches enforced through a breach of contract action is a first step, but immediate engagement to correct the breach and avoid harm (in whatever response can accomplish such a goal), should also be mentioned. We address this in our proposed Section 4(C)(viii).

We appreciate the opportunity to comment on the Draft Policy and look forward to continued engagement with OPIC staff on creation of this important policy.

Sincerely,



Natalie Bridgeman Fields, Esq.
Executive Director
Accountability Counsel
natalie@accountabilitycounsel.org