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The Nexus of Public and Private in Foreign Direct Investment: An Analysis of IFC, MIGA, and OPIC

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Abstract

This Report will provide an exposition of the most recent activities of three of the most important public supporters of foreign direct investment ("FDI"): the International Finance Corporation ("IFC"), the Multilateral Investment Guarantee Agency ("MIGA"), and the Overseas Private Investment Corporation ("OPIC"), with a focus on their regional and sectoral investment patterns. While not a panacea to the incredible challenges in achieving reductions in poverty, FDI is an essential element in the overall strategy to ensure successful, sustainable development. It is also an element that, especially in the least developed countries ("LDCs"), has suffered from consistent underperformance. Part I will provide a background, including a sketch of relevant theories underlying the international law of development ("ILD"), examining their origins and content. It will then discuss FDI as a method to achieve sustainable development, and the unique problems of risk and accountability that are associated with it. Part II will address existing sources of public support for private sector development through FDI. It will discuss the IFC and MIGA, the private sector branches of the World Bank. It will then look at OPIC, a United States government agency that addresses development in a similar manner. Part III will examine the three agencies' most recent activities, with a focus on their annual reports. It will provide regional and industry breakdowns of each agency's portfolio and evaluate the regional and sectoral exposure of the agencies in light of the concerns of the ILD.

REPORT

THE NEXUS OF PUBLIC AND PRIVATE IN FOREIGN DIRECT INVESTMENT: AN ANALYSIS OF IFC, MIGA, AND OPIC

*Adam L. Masser**

INTRODUCTION

This Report will provide an exposition of the most recent activities of three of the most important public supporters of foreign direct investment (“FDI”): the International Finance Corporation (“IFC”), the Multilateral Investment Guarantee Agency (“MIGA”), and the Overseas Private Investment Corporation (“OPIC”), with a focus on their regional and sectoral investment patterns. While not a panacea to the incredible challenges in achieving reductions in poverty, FDI is an essential element in the overall strategy to ensure successful, sustainable development. It is also an element that, especially in the least developed countries (“LDCs”), has suffered from consistent underperformance.

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Between writing and publishing, newer data has been released, including the 2007 OPIC Annual Report. All data used was the most recent available at the time of writing.

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I. BACKGROUND

A. Overview of the International Law of Development

The ILD has been an evolving force since the end of the Second World War, when it emerged as a way to address the economic disparity between the developed world and the newly independent states, especially in Africa and Asia.¹ In the intervening sixty years, the ILD has undergone significant changes. While there are several schools of thought regarding the proper status and content of the ILD, a thorough examination of these differences is beyond the scope of this Report. I will instead very briefly discuss the elements of ILD for which there is growing consensus, and how modern ILD differs from past models.

In the past, traditional notions of development centered solely on economic growth; while the social, political, cultural, and environmental issues might be recognized as important, they were considered to be separate from the core issues of development.² Under this view, development was split into two types of considerations: first, broad policy decisions determining the macroeconomic structure of development and overall strategies; and second, concrete decisions informing how best to promote overall strategies through specific projects or policies.³ Under the traditional theory, decision making in the first con-

1. Daniel D. Bradlow, *Development Decision-Making and the Content of International Development Law*, 27 B.C. INT'L & COMP. L. REV. 195, 196-97 (2004) ("ILD began to emerge as a distinct body of law after World War II. It was inspired by Latin American dependency theorists and by the experience of the newly independent countries of Africa and Asia, which discovered that despite their political independence, they were locked into unequal and unfavorable economic relations with their former colonial masters that constrained their ability to develop.") (internal citations omitted).

2. Bradlow, *supra* note 1, at 200 ("[D]evelopment is primarily an economic process Development has social, environmental, and political implications, but . . . these should be dealt with separately from the economic aspects."); see also JAMES WEAVER & KENNETH JAMESON, *ECONOMIC DEVELOPMENT: COMPETING PARADIGMS* 7-11 (1981) (describing the traditional model of development, which focuses primarily on economic growth per capita).

3. Bradlow, *supra* note 1, at 200-01 (discussing traditional view of development).

text is generally top-down, and is determined through the policies on which the host state or sponsor organization focuses;⁴ in the second category, the investors, organization, or development agency implementing the project has a greater degree of discretion.⁵

In contrast, the modern view of development takes a more holistic approach, recognizing the relevance of economic, social, environmental, and cultural aspects of development and incorporating them all into a fuller strategy.⁶ While there is convergence, especially in recent years, over the need to promote universal standards for sustainable development, there is not one canonical source of the ILD. Rather, the modern view attempts to promulgate international standards through application of a variety of regulatory frameworks from IGOs and NGOs that elaborate best practices and guidelines for effective, sustainable development.⁷

A comprehensive analysis of the sources of the ILD is beyond the scope of this Report. Briefly, however, all sources of the ILD contain norms that attempt to ensure that the benefits of development accrue to general populations, and are distributed in a non-discriminatory manner. Further, they work to en-

4. *Id.* at 201-02 (“[T]he society or state in which the project is located will decide how it wishes to manage its own environment and to share the costs and benefits of the project among various stakeholders. . . . Decision making under the traditional view is likely to be ‘top-down.’”).

5. *Id.* at 202 (“The only aspects of a project that would require a broader consultative process involve issues regarding the social and environmental externalities that are the responsibility of the government and not the specific decision-makers.”).

6. *See, e.g.*, Declaration on the Right to Development, G.A. Res. 41/128, annex, art. 2(2), U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc A/RES/41/128, (Dec. 4, 1986) (“All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.”); *see also* Bradlow, *supra* note 1, at 210-11 (“[T]he modern view holds [a project’s] decision-makers responsible for the [project’s] social, economic, cultural, political, and environmental impact . . .”).

7. Examples of regulatory frameworks for development include the laws of individual states, international organizations like the World Bank and the International Monetary Fund, trade and industry associations such as the Kimberley Process or the International Organization for Standardization, and individual codes of corporate conduct. *See* Bradlow, *supra* note 1, at 215 (“[A]ctors who fail to act in conformity with the best practices established by this collection of laws, regulations, guidelines, and examples of good conduct risk incurring reputation and moral damages, if not legal liability.”).

sure that all the potential social and environmental costs related to a development goal are carefully considered and mitigated, and that the benefits do in fact outweigh those harms. Some of the most important norms are: eradication of extreme poverty and hunger;⁸ gender equality;⁹ environmental sustainability practices;¹⁰ respect for human rights;¹¹ intergenerational equity;¹² investment in people;¹³ and standards of living that com-

8. See U.N. MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS at xviii, U.N. Sales No. 05.III.B.4 (2005) [hereinafter INVESTING IN DEVELOPMENT] (stating that Millennium Development Goal (“MDG”) number one is to “[e]radicate extreme poverty and hunger”); see also U.N. Dep’t of Econ. & Soc. Affairs, MILLENNIUM DEVELOPMENT GOALS REPORT 2007, 7, U.N. Sales No. E.07.I.15 (discussing the progress towards halving, between 1990 and 2015, the proportion of people whose income is less than one dollar a day) [hereinafter MDG 2007].

9. See MDG 2007, *supra* note 8, at 12; Johannesburg Declaration on Sustainable Development, ¶ 20, in World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, at 1, U.N. Doc. A/CONF.199/20 (2002) (“We are committed to ensuring that women’s empowerment, emancipation and gender equality are integrated in all . . . activities . . .”) [hereinafter Johannesburg Declaration].

10. See Johannesburg Declaration, *supra* note 9, at ¶ 13 (discussing the global environment, loss of biodiversity, desertification, climate change, and scarcity of clean water and air); Org. for Econ. Co-operation & Dev. [OECD], *OECD Guidelines for Multinational Enterprises*, at 19-20 (2008) (recommending that industries: establish environmental management systems, take account of environmental impact, health, and human safety in decision-making, mitigate environmental damage, and work continually to improve environmental performance) [hereinafter OECD GME]; MDG 2007, *supra*, note 8, at 22 (discussing MDG Goal 7: Ensure Environmental Sustainability).

11. See, e.g., U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 9, U.N. Doc. A/HRC/8/5, (Apr. 7, 2008) (stating three core principles: “the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.”); OECD GME, *supra*, note 10, at 16 (“Enterprises should . . . [r]espect the human rights of those affected by their activities.”).

12. See COMM. ON LEGAL ASPECTS OF SUSTAINABLE DEV., INT’L LAW ASS’N, NEW DELHI CONFERENCE, APR. 2002 REPORT ON SEARCHING FOR THE CONTOURS OF INTERNATIONAL LAW IN THE FIELD OF SUSTAINABLE DEVELOPMENT, 6 (identifying “inter- and intra-generational equity” as important dimensions of sustainable development); Philippe Sands, *Environmental Protection in the Twenty-First Century: Sustainable Development and International Law*, in R.L. REVESZ, P. SANDS, & R.B. STEWART, ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT 369, 374 (2000) (stating that sustainable development includes “a commitment to preserve natural resources for the benefit of present and future generations”); see also Alhaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT’L ENVTL. L. REV. 21, 61. (2003) (“[T]he principles of inter and intra-generational equity are both said to be emerging principles of international law.”).

13. See, e.g., OECD GME, *supra*, note 10, at 240 (“Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.”).

port with the need for human dignity for all.¹⁴ These norms are highly relevant in considering the role of the private sector in development, because private enterprises have historically viewed them as externalities.

B. *Overview of Foreign Direct Investment*

FDI is, quite simply, the activities of private investors who are investing in the private sector of a foreign host state. It is a key element of development; increasing the capacity of the private sector in the developing world will allow more of the benefits of trade to reach the world's poorest people. The vast majority of gains from international trade liberalization have accrued to the richest countries and the middle-income countries.¹⁵ While there are proven benefits to trade liberalization and large economic gains to be made, a great deal more equity is required in the distribution of these benefits.¹⁶ The private sector, as the key force behind a country's ability to trade internationally, is the obvious starting point to allow the advantages of trade to flow to LDCs, and a prerequisite to effective trade liberalization measures.

Technical innovations in fields such as information communications technology ("ICT") and agribusiness are providing new and less costly solutions to improve standards of living. Innovative financing structures, such as microcredit, can reshape entire economies. While these solutions offer much faster and less costly methods of providing services in the developing world, the most efficient driving force is generally not the host state government, especially if more distributed methods of development are

14. See Johannesburg Declaration, *supra* note 9, at ¶¶ 2, 18 ("We commit ourselves to building a humane, equitable and caring global society, cognizant of the need for human dignity for all. . . . We welcome the focus of the Johannesburg Summit on the indivisibility of human dignity and are resolved, through decisions on targets, timetables and partnerships, to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity.").

15. JEFFREY D. SACHS, *THE END OF POVERTY* 281 (2005) ("When huge gains are attributed to trade reforms (hundreds of billions of dollars), we need to look at the fine print: almost all of those gains accrue to the richest countries and the middle-income countries, not the poorest countries, and especially not the poorest countries in Africa.").

16. *Id.* ("Sustained economic growth requires that poor countries increase their exports to the rich countries, and thereby earn the foreign exchange to import capital goods from rich countries.").

involved that do not require centralized authority or infrastructure. Smaller, privately-funded enterprises are better equipped to determine and service the needs of populations, and foreign direct investment is a key way of bringing together the capital and expertise to deliver such solutions.

The establishment of businesses in LDCs through foreign direct investment also provides many collateral benefits to a host state's economy. Demonstration effects that show how the private sector can succeed in a difficult environment lead to additional projects, both by foreign investors and host country citizens.¹⁷ FDI enterprises can also lead to direct stimulus of local economies, beyond employee compensation, in the form of links to local suppliers, which increase demand for local goods and offer new economic possibilities for host state entrepreneurs.¹⁸ There may also be revenue for the state in the form of taxes and duties. Finally, the presence of a private sector may encourage reform of the host state's business regulation, a move which would increase its attractiveness to both foreign and local investors.¹⁹

C. *Special Problems in Foreign Direct Investment*

FDI, especially in LDCs, is subject to special problems that do not inhere in domestic or developed markets—both from the viewpoint of the investors themselves, and in reference to international standards and the lives of employees, the local community, and other stakeholders. From the perspective of an investor, perhaps the most salient feature of the developing world is risk. Beyond the inherent risks in project finance, including delays, capital cost overruns, technical failures, increased prices or

17. See 2007 IFC ANN. REP. 16, available at <http://www.ifc.org/AR2007> ("Sometimes an investment has demonstration effects—when it shows how the private sector can succeed in a difficult country environment; when it improves environmental, social, or corporate governance standards; or when it uses new technologies.")

18. *Id.* ("[A]dded impact comes from links to the local economy: for example, [the International Finance Corporation's ("IFC"s)] manufacturing and services clients alone purchased over [US]\$24 billion of goods and services locally in 2006.")

19. *Id.* ("IFC investments help bring changes in the business environment, particularly when [combined] with advisory services: for example, IFC helps governments revise laws and regulations to allow leasing and is also able to help firms enter this new market.")

shortages of raw materials, and poor management,²⁰ investment in LDCs also raises serious risks that are not present in projects located in developed countries. Political risk includes the possibility of expropriation by the host government, either outright or through creeping expropriation by regulations limiting the ability of the project to operate as intended or demands for equity in the project.²¹ Additionally, the ease of doing business in many developing states is not on par with the developed world.²² Some of these elements are relevant to risk management, such as the difficulty in obtaining and retaining permits or licenses and being able to employ qualified workers, while others, such as high taxes, may simply impose additional costs. Corruption is also more frequent in developing countries where the rule of law is not fully established or adhered to.²³ Far more than simply imposing costs or risks, participation corruption in a host country by U.S. investors may result in criminal sanctions and civil penalties under the Foreign Corrupt Practices Act.²⁴ Currency

20. See PETER K. NEVITT & FRANK J. FABOZZI, *PROJECT FINANCING 2* (7th ed. 2000) (discussing the common causes for project failure).

21. Scott L. Hoffman, *A Practical Guide to Transactional Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations*, 45 *BUS. LAW.* 181, 202 (1989) (“The risk of expropriation by developing countries is obvious. Less obvious is the negative effect of indirect governmental action in the form of tax increases or demands for equity participation on project economics.”); see also NEVITT & FABOZZI, *supra* note 20, at 20-21 (“The risk of direct expropriation in a developing country is fairly obvious . . . [but] can be greatly lessened if the project company is owned by a number of investors from a variety of countries. Prominent local investors from the host country should be involved, if feasible.”).

22. See World Bank Group, *Rankings—Doing Business*, <http://www.doingbusiness.org/economyrankings/> (last visited Apr. 19, 2009). The World Bank’s “Ease of Doing Business Index” is a ranking of countries that includes the following factors: starting a business, dealing with licenses, employing workers, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, and closing a business. It demonstrates the differences between state and how they can affect a foreign investor’s capacity to do business in a particular country.

23. See NEVITT & FABOZZI, *supra* note 20, at 26-27 (“Unfortunately . . . [in developing countries] bribery is often customary and necessary to gain contracts, permits, and even the right to bid on contracts.”); see also OECD, *Statement on Shared Commitment to Fight Against Foreign Bribery*, <http://www.oecd.org/dataoecd/53/14/39656560.pdf> (2007) (declaring that combating bribery is one of the “most important tasks to promote sustainable development and ensure a level playing field in worldwide business.”). See generally Charles Kenny, *Construction, Corruption, and Developing Countries*, http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/06/26/000016406_20070626142601/Rendered/PDF/wps4271.pdf (2007) (discussing the construction industry, which is “consistently ranked as one of the most corrupt,” and the need for simple, transparent, and enforceable regulation to curb the corruption).

24. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1998) (prohibiting issuers

risk is also a major concern—sudden devaluation or appreciation of the host country's currency relative to the currency used for financing can dramatically affect operating expenses and profits. Thus, any investment in a developing economy requires careful planning to insulate against currency fluctuations.²⁵ Finally, and quite aside from the question of risk, from the perspective of both local affected parties and the international community, there are many issues that can arise when foreign investors lack appropriate consideration of the social and environmental costs of their activities—recognition of and respect for the implications of investment activities on all stakeholders is a vital ingredient of sustainable economic development.²⁶

Any effort to increase foreign direct investment must address both of these concerns. It must, in short, mitigate risk sufficiently to spur investment in markets that would otherwise be unattractive, and it must contain a normative framework that en-

registered with the Securities Exchange Commission to undertake an “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official for purposes of influencing any act or decision of such foreign official in his official capacity, inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or securing any improper advantage”) (internal statute numbering omitted); see generally, Lucinda A. Low et al., *The Foreign Corrupt Practices Act: Coping With Heightened Enforcement Risk*, 1619 PLI/Corp 95 (2007) (discussing the U.S. Foreign Corrupt Practices Act (“FCPA”), its relation to a variety of international anti-corruption conventions, and recent trends in FCPA enforcement).

25. See Hoffman, *supra* note 21, at 203 (discussing sensitivity to currency fluctuations).

26. See Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3, 71 (2007) (“If foreign direct investment projects are to contribute to development, their human rights impacts must be addressed; however, those who make decisions regarding investment—generally governments and companies—often fail to adequately consider these impacts.”); Open Letter from Rights & Democracy to John Ruggie, U.N. Special Representative to the Secretary General on Business and Human Rights (Sept. 24, 2006), available at http://www.dd-rd.ca/site/what_we_do/index.php?id=2105&lang=en&subsection=themes&subsubsection=theme_documents (“While we recognize that investment itself is not inherently good or bad for human rights, experience has shown us that if foreign direct investment projects are to contribute to development, their human rights impacts have to be addressed.”); see generally Shannon Lindsay Blanton & Robert G. Blanton, *Human Rights and Foreign Direct Investment: A Two Stage Analysis*, <http://bas.sagepub.com/cgi/content/abstract/45/4/464> (contrasting the conventional wisdom that foreign direct investment (“FDI”) has a negative impact by encouraging repressive governments, with countervailing factors such as quality of labor and the “spotlight regime” that suggest that states respectful of human rights are more conducive to FDI).

tures the investors' conformity to standards of the international law of development.

II. *IFC, MIGA, AND OPIC*

This Part will analyze the World Bank's private sector arm, consisting of IFC and MIGA, as well as the United States' OPIC. It will provide grounding for the evaluation of their investment activity in Part III.

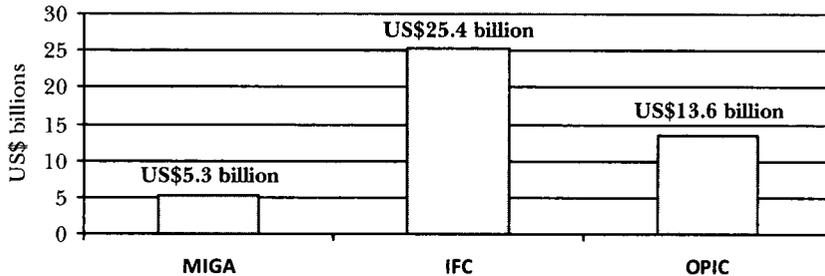


Figure 1: Total exposure. (Data from 2007 IFC ANN. REP. 23, available at <http://www.ifc.org/AR2007>; 2007 MIGA ANN. REP. 94, available at <http://miga.org/documents/07arenglish.pdf>; Overseas Private Inv. Corp. [OPIC], Current OPIC Projects, <http://www.opic.gov/pubs/currentprojects/>.)

A. *The World Bank*

The World Bank was created after World War II to facilitate international trade, and to help avoid the worldwide economic problems that led to the Great Depression.²⁷ Widespread devaluation of currencies and the erection of trade barriers by major industrialized nations exacerbated the adverse impact of the Great Depression and contributed to a contracting global economy.²⁸ As a result of this initial mandate, the Bretton Woods

27. See Sandra Blanco & Enrique Carrasco, *The Functions of the IMF and World Bank*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 67, 69-71 (1999) (discussing the creation of the International Monetary Fund ("IMF") and the World Bank as following World War II in response to worldwide economic crisis of the interwar period and a desire to avoid a repeat of the chaotic policies of the interwar period).

28. Rajesh Swaminathan, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights*, 37 *COLUM. J. TRANSNAT'L L.* 161, 164 ("As the global economy sharply contracted during the 1930's, most major industrial countries simultaneously devalued their currencies and erected trade barriers in an effort to buttress income levels in their domestic economies."); Blanco & Carrasco, *supra* note 27, at 69 (discussing the interwar period, and how commodity prices first soared, then crashed, how "country after country began to devalue its currency" in or-

institutions of today are concerned primarily with maintaining the stability of the world economy.

The World Bank Group is comprised of a group of institutions that carry out different, but complimentary, functions.²⁹ The International Bank for Reconstruction and Development (“IBRD”) is the core of the World Bank Group, and is itself often referred to as the World Bank.³⁰ Its primary functions are to assist in the reconstruction and development of its members, particularly middle-income countries, and to promote the balanced growth of international trade.³¹ The International Development Association (“IDA”) furthers the goals of the IBRD through increasing standards of living and productivity, focusing directly on less-developed members.³² The International Finance Corporation is oriented towards assistance in the private sector, especially in encouraging further economic development through private enterprise.³³ The Multilateral Investment

der to make exports cheaper, and how these led to a severe drop in global economic activity and the rise of Hitler in Germany).

29. ASIF H. QURESHI, INTERNATIONAL ECONOMIC LAW 346 (1999) (discussing the institutions that were created alongside the original World Bank, which are collectively known as the World Bank Group); Halim Moris, *The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?*, 4 ILSA J. INT’L & COMP. L. 173, 178 (1997) (“The World Bank is comprised of four different agencies known as The World Bank Group.”).

30. See Qureshi, *supra* note 29, at 346 (“The International Bank for Reconstruction and Development [“IBRD”], known as the World Bank, came into being in 1946.”); see also Fed. Ministry for Econ. Cooperation & Dev. [BMZ], IBRD, http://www.bmz.de/en/approaches/multilateral_cooperation/players/WorldBankGroup/ibrd/ (last visited Apr. 23, 2009) (“The [IBRD] was founded in 1944 at the Bretton Woods Conference as part of the World Bank Group. In 1946 it began its work.”).

31. See Qureshi, *supra* note 29, at 348 (discussing the functions of the IBRD; see also World Bank Group, IBRD, <http://go.worldbank.org/SDUHVGE5S0> (last visited Apr. 23, 2009) (“The [IBRD] aims to reduce poverty in middle-income and creditworthy poorer countries by promoting sustainable development through loans, guarantees, risk management products, and analytical and advisory services. Established in 1944 as the original institution of the World Bank Group, IBRD is structured like a cooperative that is owned and operated for the benefit of its 185 member countries.”).

32. See Qureshi, *supra* note 29, at 348-49 (“The purposes of the [International Development Association (“IDA”)] are . . . (1) to promote economic development, increase productivity and standards of living in less-developed countries of its membership; and (2) to further the developmental objectives of the IBRD.”); see also World Bank Group, What is IDA?, <http://go.worldbank.org/ZRAOR8IWW0> (last visited Apr. 23, 2009) (“IDA aims to reduce poverty by providing interest-free credits and grants for programs that boost economic growth, reduce inequalities and improve people’s living conditions.”).

33. See Qureshi, *supra* note 29, at 349 (“The IFC, [the Multilateral Investment Guarantee Agency (“MIGA”),] and the [International Centre for Settlement of Invest-

Agency aims to enhance the flow of private investment among developing member countries through issuing guaranties against non-commercial risks and other complementary activities.³⁴ Finally, the International Centre for Settlement of Investment Disputes (“ICSID”) provides a method of arbitration of investment disputes between member states and the nationals of other member states.³⁵ The majority of the World Bank’s development efforts are in based on Comprehensive Development Frameworks and Comprehensive Assistance Strategies—models of top-down development. The notable exceptions to this are the IFC and MIGA, usually operating on a client-by-client basis, encouraging development in the private sector.³⁶

ment Disputes (“ICSID”) are more oriented towards assistance in the private sector . . . through: (1) financing, in association with private investors, the establishment and growth of productive private enterprises, without guarantee of repayment by the member government concerned, where sufficient private capital is not available on reasonable terms; (2) bringing together investment opportunities, domestic and foreign private capital, and experienced management; and (3) creating conditions for the flow of investment in member countries.” (internal footnotes omitted); *see also* Int’l Finance Corp. [IFC], *What We Do*, <http://www.ifc.org/ifcext/about.nsf/Content/WhatWeDo> (last visited Apr. 23, 2009) (“IFC fosters sustainable economic growth in developing countries by financing private sector investment, mobilizing capital in the international financial markets, and providing advisory services to businesses and governments.”).

34. *See* Qureshi, *supra* note 29, at 349 (“The objective of MIGA is to encourage the flow of private investments for productive purposes among member countries . . . through: (1) issuing guarantees against non-commercial risks . . . and (2) engaging in complementary activities to encourage the flow of investments in developing country members.”) (internal footnotes omitted); *see also* Multilateral Inv. Guar. Agency [MIGA], *About MIGA*, <http://www.miga.org/about/> (last visited Apr. 23, 2009) (“MIGA specializes in facilitating investments in high-risk, low-income countries—such as in Africa and conflict-affected areas. By partnering with the World Bank and others, MIGA is able to leverage finance for guarantee trust funds in these difficult or frontier markets.”).

35. *See* Qureshi, *supra* note 29, at 350 (“The purpose of the ICSID is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.”); *see also* ICSID – International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org> (last visited Apr. 23, 2009) (“The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes.”).

36. *See* IFC, *supra* note 33 (“IFC helps companies and financial institutions in emerging markets create jobs, generate tax revenues, improve corporate governance and environmental performance, and contribute to their local communities.”); MIGA, <http://www.miga.org/guarantees/> (last visited May 6, 2008) (“MIGA can help investors and lenders deal with . . . risks by insuring eligible projects against losses relating to: [c]urrency transfer restrictions; [e]xpropriation; [w]ar and civil disturbance; [and] [b]reach of contract.”) (internal bullets omitted, punctuation added).

1. IFC

The IFC was founded in 1956, and was the first intergovernmental organization which had as its main objective the promotion of private enterprise.³⁷ The agency works primarily in two contexts. First, it acts as a participant in large scale development efforts, working to rally private investors to assist in some aspect of a state-sponsored project.³⁸ In the other contexts, the IFC acts as a development bank, providing funding, insurance, and guarantees for private investors seeking to operate projects in developing states, through debt or equity.³⁹

In its capacity as a direct source of project support for private enterprises, the IFC has a set of basic eligibility requirements: the project must be located in a developing country that is a member of the IFC, the project must be in the private sector, be technically sound, have good prospects of being profitable, benefit the local economy, and satisfy both the IFC's environmental and social standards, as well as those of the host country.⁴⁰ The IFC offers a range of products, which are broken

37. See IFC, IFC's Origins, http://www.ifc.org/ifcext/about.nsf/Content/IFC_Origins (referring to a speech given by IFC's first president, Robert L. Garner, stating, "Garner opened IFC's inaugural press conference . . . by saying that IFC was the first inter-governmental organization, which had as its main objective the promotion of private enterprise.").

38. See, e.g., WORLD BANK, Bank Management Response to Request for Inspection Panel Review of the Uganda: Private Power Generation Project (Proposed) 10-11, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementResponse.pdf> [hereinafter BUJAGALI MANAGEMENT RESPONSE] (describing the IFC's role in the Bujagali Falls hydroelectric power generation project). Projects of this nature operate in conjunction with Comprehensive Development Framework within the larger World Bank context. See generally Comprehensive Development Framework, <http://www.worldbank.org/cdf> (last visited Mar. 31, 2008) ("The CDF advocates: a holistic long-term vision; the country in the lead, both "owning" and directing the development agenda, with the Bank and other partners each defining their support in their respective business plans; stronger partnerships among governments, donors, civil society, the private sector, and other development stakeholders in implementing the country strategy; and a transparent focus on development outcomes to ensure better practical success in reducing poverty.").

39. See 2007 IFC ANN. REP. 10 ("IFC works with private investors, putting money at risk alongside theirs to support promising business projects that might not otherwise attain financing. . . . [This is done by] taking debt and equity risks that the market would not otherwise bear [which] helps expand opportunities, especially in frontier countries and for poor people.").

40. IFC, About IFC Financing, http://www.ifc.org/ifcext/about.nsf/Content/How_Apply_Financing (last visited May 6, 2008) (elaborating the eligibility criteria for project funding from IFC).

down into four main categories. In fiscal year 2007, 68.7% of its investments were loans, 19.3% were equity investment in private sector projects, 11.9% were guaranties, and less than 1% were risk management products.⁴¹ Methods of support include a variety of innovative products, including microfinance⁴² and local currency financing.⁴³

2. MIGA

The MIGA is, like the IFC, a member of the World Bank Group. It was formed via the MIGA Convention, and was established in 1988.⁴⁴ Also like the IFC, and complementary to its goals, MIGA's purpose is to promote foreign direct investment in developing members of the World Bank.⁴⁵ However, unlike the IFC, which focuses heavily on direct finance through lending and equity investment, MIGA mitigates risk exposure through insurance against noncommercial risks: transfer restriction and inconvertibility of currency; expropriation; politically motivated war and civil disturbance; and breach of contract by the host government.⁴⁶ In addition to its primary role as an insurer, MIGA

41. 2007 IFC ANN. REP. 25.

42. *Id.* at 41 (discussing investment in firms such as Aavishkaar Microfinance, in India, which in turn "will invest in 35 to 40 start-up microfinance institutions and promote their growth through an innovative franchise model."). Microfinance is lending small amounts, or providing small scale financial services to the poor in order to, for example, start small businesses. They have been incredibly successful in stimulating local economies, creating markets that provide services (such as cellular communications to an otherwise isolated village), and empowering women and those who would otherwise be unable to achieve economic independence. See generally Celia R. Taylor, *Microcredit as Model: A Critique of State/NGO Relations*, 29 SYRACUSE J. INT'L L. & COM. 303, 317-19 (2002) (discussing the rise in microcredit); Terry M. Dworkin & Cindy A. Schipani, *Linking Gender Equities to Peaceful Societies*, 44 AM. BUS. L.J. 391, 410-14 (2007) (discussing how microcredit can improve the lives of women and their communities).

43. *Id.* at 29 ("To date, IFC has committed over \$3.8 billion equivalent in local currency, using derivatives for 137 transactions in 18 currencies."). Local currency financing allows borrowers to avoid the risks inherent in currency volatility and focus on running their business rather than worrying about exchange rates. *Id.*

44. See Qureshi, *supra* note 29, at 346 ("[T]he [MIGA was] established in 1988."); CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY, adopted Oct. 11, 1985, T.I.A.S. 12089, 1508 U.N.T.S. 99 available at http://www.miga.org/quickref/index_sv.cfm?stid=1583 [hereinafter MIGA CONVENTION] (establishing the MIGA and defining its mission).

45. See MIGA Convention, *supra* note 44, art. 2 ("The objective of the Agency shall be to encourage the flow of investments for productive purposes among member countries, and in particular to develop member countries, thus supplementing the activities of the [IBRD], the [IFC] and other international development finance institutions.").

46. See 2007 ANN. REP. 68, available at <http://www.miga.org/documents/07aren>

provides a suite of technical assistance services to help governments and other intermediaries respond to investor needs.⁴⁷

MIGA insurance is only available for projects in a developing member country where the investor is a national of a member country other than the host country.⁴⁸ Further, the host country must approve any proposed projects before MIGA will issue insurance.⁴⁹ In its fiscal year 2007 annual report, MIGA defined its niche as “encouraging FDI into the poorest countries.”⁵⁰

B. OPIC

The final organization that this Report will examine is the OPIC. OPIC was established as a U.S. government agency on January 19, 1971, by executive order.⁵¹ OPIC’s legislative man-

glish.pdf (listing the risks covered by MIGA guarantees); Paul E. Comeaux & N. Stephan Kinsella, *Insuring Investments in Russia and Other C.I.S. Republics: OPIC and MIGA, Russian Oil and Gas Guide*, 5 (Oct. 1993) (elaborating the terms of MIGA insurance and the risks it covers).

47. See 2007 MIGA ANN. REP. 34. MIGA offers technical assistance in cooperation with the World Bank Group’s Foreign Investment Advisory Services (“FIAS”). While MIGA provides budgetary support and guidance, FIAS manages daily operations. *Id.* at 69.

48. See MIGA Convention, *supra* note 44, arts. 13-14 (Article 13 reads: “(a) Any natural person and any juridical person may be eligible to receive the Agency’s guarantee provided that: (i) such natural person is a national of a member other than the host country; (ii) such juridical person is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above cases; and (iii) such juridical person, whether or not it is privately owned, operates on a commercial basis.” Article 14 reads: “Investments shall be guaranteed under this Chapter only if they are to be made in the territory of a developing member country.”); see also Comeaux & Kinsella, *supra* note 46, at 6. This applies to natural person as well as corporations, which much either be incorporated in, or have their principle place of business in a member country, or be majority owned by nationals of member countries. *Id.*; see also Comeaux & Kinsella, *supra* note 46, at 6 (discussing eligibility for MIGA insurance).

49. See MIGA Convention, *supra* note 44, art. 15 (“The Agency shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover.”); see also Comeaux & Kinsella, *supra* note 46, at 6 (“[T]he host government must approve the project before MIGA insurance coverage will issue.”).

50. 2007 MIGA ANN. REP. 22.

51. Exec. Order No. 11,579, 36 Fed Reg. 969 (Jan. 19, 1971) (establishing the Overseas Private Investment Corporation (“OPIC”)). The executive order was signed by U.S. President Richard Nixon, and was authorized by the Foreign Assistance Act of 1969, 22 U.S.C. § 2191. See also Comeaux & Kinsella, *supra* note 46, at 3 (“OPIC, established under the Foreign Assistance Act . . . is a self-sustaining U.S. government agency

date was created via an amendment to the Foreign Assistance Act in 1969, which is currently codified as 22 U.S.C. § 2191. Its mission is “to mobilize and facilitate the participation of United States private capital and skills in the economic and social development of LDCs in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United States.”⁵² A key difference between OPIC and the World Bank structures is its emphasis on the impact of projects in the U.S. economy; OPIC has a legislative mandate to ensure that U.S. jobs and competitiveness are not compromised as the result of its activities.⁵³

These goals are achieved through direct and indirect support of development-related projects in eligible LDCs through the provision of financing and political risk insurance to investors, contractors, and financial institutions. In the range of services it provides, OPIC is closer to IFC than to MIGA. Host country eligibility is determined based per capita income; the establishing legislation instructs OPIC to “give preferential consideration” to countries with less than US\$984 per capita income, and “restrict its activities” in countries that have higher than US\$4,296 per capita income in 1986 U.S. dollars.⁵⁴ Methods of support include direct issuance of loans, and providing

that provides political risk insurance, project financing through direct loans and loan guarantees, and a variety of investor services to U.S. investors.”).

52. 22 U.S.C. § 2191 (2006); *see also* THEODORE H. MORAN & C. FRED BERGSTEN, INTERNATIONAL ECONOMICS POLICY BRIEF NUMBER PB03-5: REFORMING OPIC FOR THE 21ST CENTURY 1 (May 2003) (discussing OPIC’s mission), *available at* <http://www.iie.com/publications/pb/pb03-5.pdf>.

53. *See* 22 U.S.C §§ 2191(h), (k)-(m) (2006) (defining circumstances where OPIC must decline coverage).

54. 22 U.S.C. § 2191(2) (2006). The levels have been adjusted by amendment several times:

The per capita income levels were increased from \$896 and \$3,887 in 1983 U.S. dollars by sec. 102 of the OPIC Amendments Act of 1988, S. 2757, enacted into law by reference in the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989 (Public Law 100-461; 102 Stat. 2268). Sec. 102 also added “(other than countries designated as beneficiary countries under section 212 of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2702))”. Previously the per capita income levels were increased from \$680 and \$2,950 in 1979 U.S. dollars to \$896 and \$3,887 in 1983 U.S. dollars by sec. 3 of the OPIC Amendments Act of 1985 (Public Law 99-204; 99 Stat. 1669), and from \$520 and \$1,000 in 1975 U.S. dollars to \$680 and \$2,950 in 1979 U.S. dollars, respectively, by sec. 2(1) of the OPIC Amendments Act of 1981 (Public Law 97-65; 95 Stat. 1021).

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loan guaranties to encourage third party lending by protecting against noncommercial risk, and reinsurance of third party lenders.⁵⁵

C. Common Development Agenda

Each agency, given its public nature and development agenda, has a strong mandate to support sustainable development. Both IFC and MIGA must adhere to World Bank standards for environmental and social responsibility as well as their own operational constraints.⁵⁶ Further, they are frequently called upon to rally private sector investment in support of wider World Bank comprehensive development frameworks.⁵⁷ OPIC has its own set of environmental and social standards, some of which are set out in its establishing legislation and others which were developed internally. OPIC has an independent Office of Accountability which assesses projects in (1) the environment; (2) worker rights; (3) human rights; and (4) economic impact analysis for both the United States and the host country.⁵⁸

CONG., LEGISLATION ON FOREIGN RELATIONS THROUGH 2005, VOLUME I-A, at 117 n.208, available at <http://foreignaffairs.house.gov/archives/109/24796.pdf>.

55. 2006 OPIC ANN. REP. 48-50, available at http://www.opic.gov/pdf/OPIC_AR.pdf (describing OPIC's forms of investment support).

56. See generally World Bank, *World Bank OP 4.01: Operational Manual: Operational Policies: Environmental Assessment* (Jan. 1999), available at <http://siteresources.worldbank.org/INTFORESTS/Resources/OP401.pdf> (mandating environmental assessments as part of the World Bank Operational Policies); IFC, *Policy and Performance Standards on Social & Environmental Sustainability* (Apr. 2006), available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/\\$FILE/SustainabilityPolicy.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/SustainabilityPolicy.pdf) (elaborating IFC's policy on environmental and social sustainability); MIGA, *Multilateral Investment Guarantee Agency's Policy on Social & Environmental Sustainability* (Oct. 1, 2007) (elaborating MIGA's policy on environmental and social sustainability), available at http://www.miga.org/documents/environment_social_review_021507.pdf.

57. See *supra* note 38 and accompanying text (discussing the Comprehensive Development Framework and partnerships with host states).

58. See Overseas Private Inv. Corp. [OPIC], *Investment Policy*, <http://www.opic.gov/doingbusiness/investment/index.asp> (last visited May 6, 2008); see also OPIC, *OPIC Environmental Handbook* (Feb. 2004), available at http://www.opic.gov/doingbusiness/investment/environment/documents/opic_env_handbook.pdf (providing "information to OPIC's users, as well as the interested public, with respect to the general environmental guidelines, assessment and monitoring procedures that OPIC applies, in its discretion, to prospective and ongoing investment projects"). OPIC's establishing legislation contains provisions requiring that host countries have implemented laws respecting internationally recognized human rights, and also requiring a contract clause for each OPIC project which requires the recipient to refrain from interfering with its worker's rights. See 22 U.S.C. § 2191a(1) (2006) ("[OPIC] may insure, reinsure, guaran-

III. *REGIONAL AND INDUSTRY ANALYSIS*

This Part will examine the activities of each of the three institutions discussed in Part II. It will first briefly discuss the methodology used to assess the institutions. It will then provide an evaluation of their activities in light of the ILD through a discussion of the regional and industry distributions of IFC, MIGA, and OPIC exposure. Part III will conclude that a greater focus must be placed on critical industries such as health and education and critical regions, such as sub-Saharan Africa.

A. *Methodology*

This Section culls data from the annual reports of MIGA and the IFC, and the OPIC's online project database in order to estimate total exposure by region and industry. Total exposure includes all loans, insurance, and guaranties, by dollar amount. The method of measuring exposure varies from organization to organization, and the figures are aggregated by the author based on the sometimes incomplete information made public by the agencies, so pinpoint accuracy cannot be guaranteed.⁵⁹ Nonetheless, the figures do meaningfully represent both the regional and sectoral focus within each agency and relative to the other agencies. The data analyzed was the most recent available at the time of writing.

B. *Regional Distribution of Exposure*

All three institutions, in public statements and annual reports, aver that funding investment in the poorest regions is a

tee, or finance a project only if the country in which the project is to be undertaken is taking steps to adopt and implement laws that extend internationally recognized worker rights, as defined in section 2467(4) of Title 19, to workers in that country (including any designated zone in that country)."); *see also* 22 U.S.C. § 2191 (2006) (establishing legislation, which makes direct reference to 22 U.S.C. §§ 2151(p)-(q), relating to endangered species, the environment and natural resources). OPIC is also required to comply with environmental provisions in the Foreign Operations Appropriations Act. *See* 22 U.S.C. §§ 262m-262m-7 (1987) (promoting mechanisms to enhance the environmental performance of multilateral development banks).

59. This is especially true for the OPIC data. While IFC and MIGA provide disaggregated data in their annual reports, OPIC does not. Figures relating to OPIC's industry and regional exposure are the result of compiling all projects listed in the OPIC project database and sorting by region and industry. *See* OPIC, Current OPIC Projects, <http://www.opic.gov/pubs/currentprojects/>. The complete OPIC data is contained in the two appendices following this Report.

top priority.⁶⁰ The following will analyze the breakdown of lending and insurance by OPIC, IFC, and MIGA by region. This Section will conclude that, despite what the agencies say about their policy, their activities are not focused on least developed regions.

In the most recent fiscal data available, the regional distribution of each of the agency's exposure is weighted away from least developed countries. As Figures 2-4 demonstrate, a relatively small percentage of exposure is committed to Africa and Asia, the regions with the greatest number of people living in extreme poverty. Neither IFC nor MIGA devotes more than 18% of its total portfolio to sub-Saharan Africa. OPIC performs significantly better than the Bretton Woods institutions in this regard, with 27% of its total exposure dedicated to Africa and the Middle East, although the data lacks disaggregation as to how much exposure OPIC has in the sub-Saharan region.

Europe and Central Asia (or Eurasia as OPIC terms the region) account for the largest percentage of funding for all three institutions, above 20% for all and as high as 36% for MIGA. This, despite the fact that the region has a relatively low percentage of the population living under US\$1 a day in purchasing power parity, a key indicator of economic need—in 2005 only .9% of the population of Europe and Central Asia lived below the threshold, compared to 41.1% in sub-Saharan Africa.⁶¹ Disproportionate funding in this region is at least partly due to intensive efforts at reconstruction following the collapse of the Soviet Union.⁶²

Similarly, Latin America and the Caribbean receive a large

60. See, e.g., 2006 IFC ANN. REP. 6 ("Our priority markets are what IFC calls the 'frontier': countries eligible for interest-free, public sector loans from the [IDA] as well as countries that have high risk ratings for private sector investment."); 2006 MIGA ANN. REP. 11 ("Supporting FDI into Africa is a strategic priority for the agency."); 2006 OPIC ANN. REP. 9 ("[OPIC has] a mission to encourage investment in the most underserved emerging markets in the developing world . . ."); MIGA, *MIGA in Frontier Markets*, http://www.miga.org/news/index_sv.cfm?stid=1506&aid=10, (last visited Apr. 24, 2009) ("[Frontier] markets [are] where the [MIGA] can help the most.").

61. World Bank, World Development Indicators Database, <http://www.worldbank.org/data/countrydata/> (last visited Apr. 24, 2009) (showing percentage of population living under a dollar per day by region).

62. See, e.g., S.C. Res. 1244, ¶ 11(g), U.N. Doc. S/RES/1244 (June 10, 1999) (discussing the need for a comprehensive approach by international institutions to provide economic development and stabilize the region affected by the Kosovo crisis); see also SVETLA TRIFONOVA MARINOVA & MARIN ALEXANDROV MARINOV, FOREIGN DIRECT INVEST-

proportion of the investment support disbursed by OPIC, IFC, and MIGA: 27% of the committed portfolio for both MIGA and IFC, and 28% for OPIC.⁶³ Although the region has a higher poverty headcount than Europe and Eurasia, it is still significantly better situated than many, with 8.6% of the population living on less than US\$1 a day.⁶⁴ This region receives more funding than more impoverished ones primarily due to the larger economies already extant in the region, which are presumed to have lower overall risk.⁶⁵

MIGA Regional Exposure

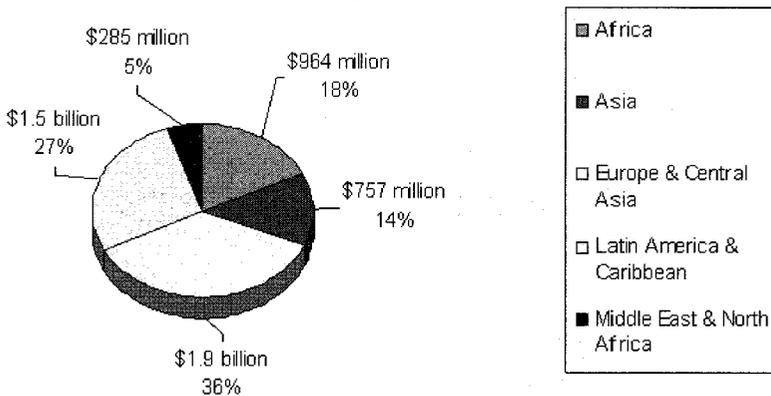


Figure 2: Data from 2007 MIGA ANN. REP. 94.

Further, examining country specific investments indicates that even within regions, investments are not always made in the countries that need them the most. Less than half of the

MENT IN CENTRAL AND EASTERN EUROPE 39-42 (2003) (discussing the growth of FDI in Commonwealth of Independent States ("CIS") countries in the 1990s).

63. 2007 IFC ANN. REP. 23; 2007 MIGA ANN. REP. 94; OPIC, *supra* note 59 (figure compiled by author, data contained in Appendix 1).

64. See World Bank, *supra* note 61.

65. See U.N. ECON. & SOC. COMM'N FOR ASIA AND THE PACIFIC, INTERREGIONAL COOPERATION IN TRADE AND INVESTMENT: ASIA-LATIN AMERICA 163 (2000), available at <http://www.unescap.org/tid/publication/tipub2069.pdf> (discussing the relatively high inflows of FDI to Latin America, Caribbean, and East Asian countries); *How to Boost Foreign Direct Investment*, <http://www.ameinfo.com/34651.html> (Feb. 11, 2004) (describing Latin America and Southeast Asia as a model for the Middle East to follow in obtaining more FDI inflows); TORSTEN WEZEL, DISCUSSION PAPER 11/03, ECONOMIC RESEARCH CENTRE OF THE DEUTSCHE BUNDESBANK, DETERMINANTS OF GERMAN FOREIGN DIRECT INVESTMENT IN LATIN AMERICAN AND ASIAN EMERGING MARKETS IN THE 1990s 7 ("larger economies have consistently been shown to receive larger FDI inflows"), available at <http://www.bundesbank.de/download/volkswirtschaft/dkp/2003/200311dkp.pdf>.

IFC Regional Exposure

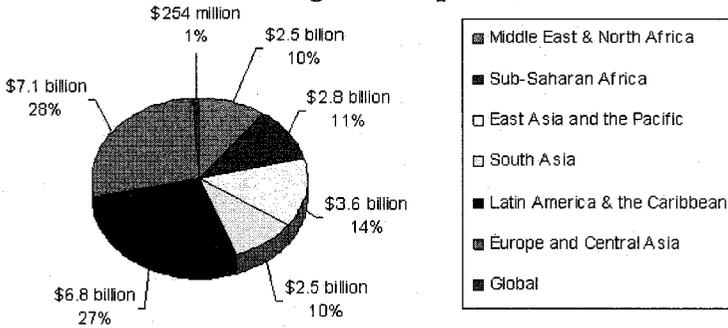


Figure 3: Data from 2007 IFC ANN. REP. 23.

projects supported by MIGA in 2007 were in IDA-eligible countries, and its overall exposure in those countries was 41%.⁶⁶ However, new commitments in IDA-eligible countries in 2007 ac-

OPIC Regional Exposure

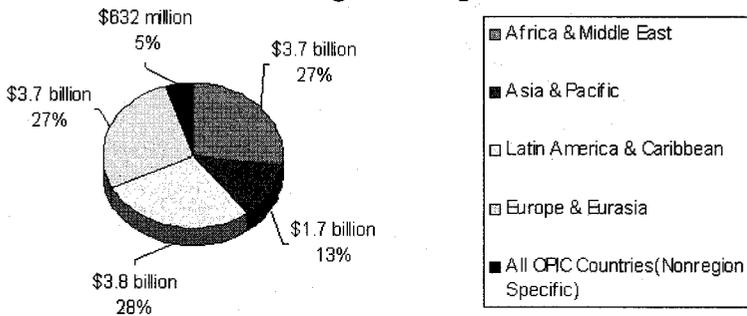


Figure 4: Figures compiled by author from OPIC Projects Database, <http://www.opic.gov/pubs/currentprojects/index.asp>. Raw Data available in Appendix I.

counted for just US\$387 million, or 29% of new issuances.⁶⁷ IFC's 2007 loan and equity commitments in frontier markets were near the same level, at 31% of its total.⁶⁸ OPIC's track record in this area was the worst of the agencies: support for projects in IDA-eligible countries accounted for just 16% of its

66. See 2007 MIGA Ann. Rep. 5.

67. *Id.* at 23.

68. See 2007 IFC ANN. PORTFOLIO PERFORMANCE REV. 16, available at [http://www.ifc.org/ifcext/disclosure.nsf/AttachmentsByTitle/APPR_2007_Full/\\$FILE/APPR_2007_Full.pdf](http://www.ifc.org/ifcext/disclosure.nsf/AttachmentsByTitle/APPR_2007_Full/$FILE/APPR_2007_Full.pdf) ("New loan and equity commitments for frontier markets . . . represented about 31% of total new commitments.").

total issues in 2006.⁶⁹

OPIC Regional Exposure (2006)

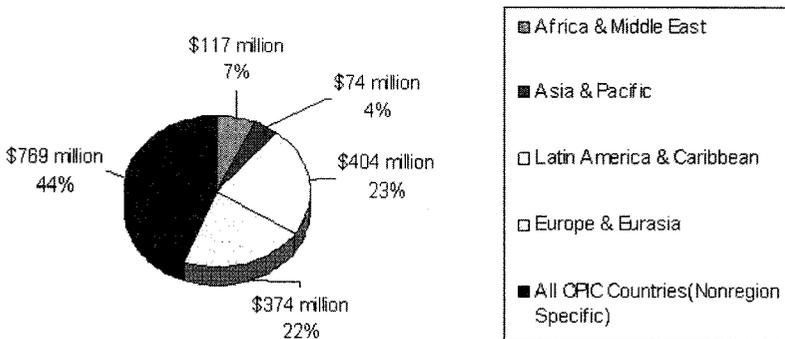


Figure 5: Figures compiled by author from 2006 OPIC ANN. REP. 30-35.

It is an interesting side note that the 2006 activities of OPIC seem to paint a dramatically different picture than its total exposure, as figure 5 shows. For example, investment in Africa, the poorest continent, represented a mere 7% of new loan issues, insurance, and guaranties in that year—down from 27% when looking at all active projects.⁷⁰ One hopes that 2006 represents an anomaly, and that the future will show a return to the higher portions of total investment in frontier countries seen in OPIC's overall portfolio.

There are clear reasons for investing such large amounts in relatively well-off regions such as Europe, Central Asia, and Latin America. Investments in more prosperous regions help provide a diversified portfolio that protects investments in riskier regions by ensuring returns. In Eastern Europe, investments may be efforts at geopolitical stabilization and the prevention of further balkanization.⁷¹ In the case of OPIC, which often serves as a complement to U.S. foreign policy, funding may be motivated by a desire to benefit friendly states in volatile regions.

Nonetheless, committing such a proportionally limited per-

69. See 2006 OPIC ANN. REP. 30-35 (data compiled by author, summing the exposure of 2006 projects in IDA countries and then dividing by total 2006 exposure). IDA Eligible countries are defined by the World Bank. See IDA Borrowing Countries, <http://go.worldbank.org/83SUQPXD20> (last visited Apr. 24, 2009).

70. See 2006 OPIC ANN. REP. 30-35; OPIC, *supra* note 59 (data compiled by author, from the 2006 annual report and the project database, then compared).

71. See S.C. Res 1244, *supra* note 62, ¶ 17 (discussing the need for economic development to promote geopolitical stability following the breakup of Yugoslavia).

centage of overall investment support to least developed regions is a major shortcoming of all three FDI promoting agencies. In view of the development goal that is central to the mission of each agency, it is essential that the proportion of funding going to least developed regions, primarily Africa, the Middle East, and South Asia, be increased.⁷²

C. *Industry Distribution of Exposure*

Broadly speaking, development goals are better served through investment in certain categories of industry. Education, health, and agriculture, for example, tend to do a great deal to directly improve the condition of the impoverished. Further, some industries, such as ICT, can stimulate economies through enabling other businesses in a way that, say, the extractive industry generally does not. Further, within an industry, some investments will be more beneficial than others, for example, microcredit usually provides more distributed benefits than corporate loans within the financial services sector.

The Section will discuss and analyze an industry breakdown of lending and insurance by OPIC, IFC, and MIGA in their most recent annual reports to evaluate their efficacy in relation to development goals in the following sectors: (1) financial services; (2) infrastructure; (3) extractive; (4) agribusiness; (5) housing; (6) health and education; and (7) information communications technology.

1. Financial Services

Financial services accounts for the greatest proportion of

72. There is considerable discussion in the development literature regarding the shortfall of FDI in the poorest parts of the world. See U.S. AGENCY FOR INT'L DEV., FOREIGN DIRECT INVESTMENT: RECENT TRENDS AND IMPLICATIONS FOR USAID 2 (2007), available at http://pdf.usaid.gov/pdf_docs/PNADK049.pdf ("While their regional totals are now higher than ever, the shares of FDI held by Sub-Saharan Africa (7 percent of total), Middle East and North Africa (6 percent) and South Asia (4 percent) still lag other regions."); MOSES M. IKIARA, ATPS SPECIAL PAPER SERIES NO. 16, FOREIGN DIRECT INVESTMENT (FDI), TECHNOLOGY TRANSFER, AND POVERTY ALLEVIATION: AFRICA'S HOPES AND DILEMMA 2 (African Technology Policy Studies Network 2003), available at <http://www.atpsnet.org/pubs/specialpaper/SPS%2016.pdf> (noting that sub-Saharan Africa's share of FDI remains low). See generally Amar Bhattacharya, Peter J. Montiel & Sunil Sharma, *How Can Sub-Saharan Africa Attract More Private Capital Inflows?*, 34 FIN. & DEV. 3 (June, 1997), available at <http://www.imf.org/external/pubs/ft/fandd/1997/06/pdf/bhattach.pdf> (discussing ways to improve FDI in sub-Saharan Africa).

OPIC Industry Exposure

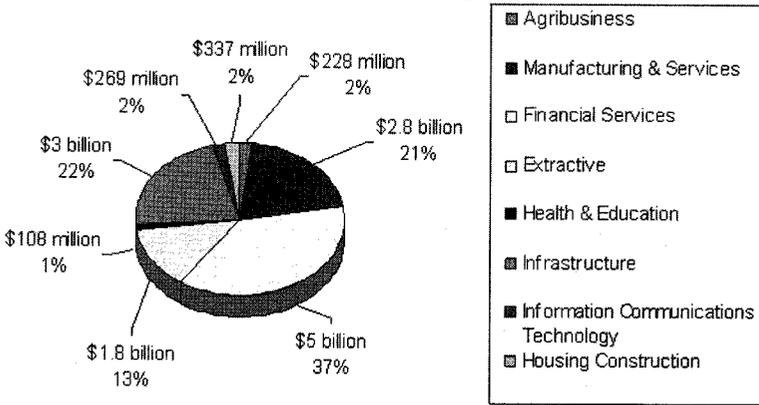


Figure 6: Figures compiled by author from OPIC Projects Database, <http://www.opic.gov/pubs/currentprojects/index.asp>. Raw Data available in Appendix II.

exposure for both OPIC and IFC. For MIGA, it is the second greatest. This fact alone does not indicate much about the actual investments being made. It does, however, indicate an af-

IFC Industry Exposure

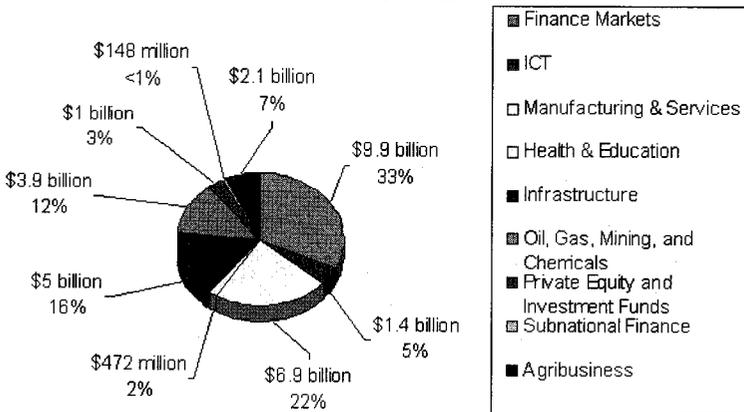


Figure 7: Figures compiled by author from 2007 IFC ANN. REP. 48-66.

firmative belief by the institutions that improvements in capital markets form a foundation for economic development. This is corroborated by statements in the annual reports and other public releases made by the agencies. IFC, for example, has noted that “sound financial institutions ensure that an economy’s resources are allocated where they are most productive, enhancing

MIGA Industry Exposure

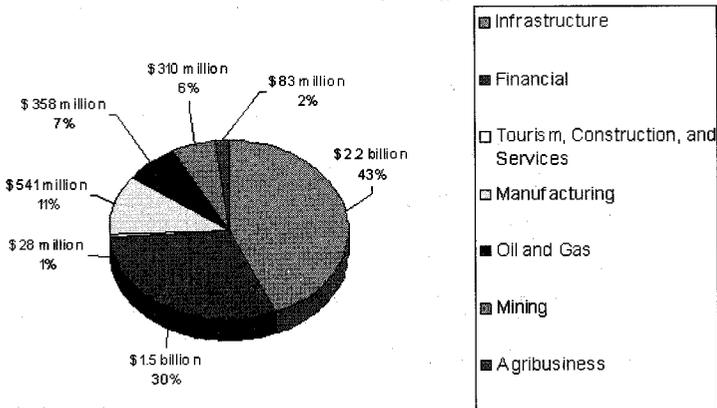


Figure 8: Data from 2007 MIGA ANN. REP. 95.

development in all other sectors.”⁷³ This belief may be informed by an institutional bias—as financial institutions themselves, it is not surprising that MIGA, IFC, and OPIC would see financial markets as the most important sector for development. Regardless of bias, analysis of the projects and initiatives the agencies have undertaken in financial services do demonstrate a significant impact that is widely distributed.

There are two major focal points in the financial markets that are common to all three institutions. The first is assuring the availability of lending to Small and Medium Enterprises (“SMEs”). The second is microfinance programs for entrepreneurs, especially in LDCs.

The availability of loans for SMEs is crucial to development. SMEs by their nature tend to be more responsive to market conditions, and are often the first to respond to economic opportunities.⁷⁴ They can provide a bottom-up effect in developing

73. 2006 IFC ANN. REP. 52; *see also* 2006 MIGA ANN. REP. 15 (“The financial sector is at the heart of a functioning economy.”); 2006 OPIC ANN. REP. 8 (describing “scarcity of access to capital for small businesses and microfinance institutions” as a “critical barrier” to development.); Press Release, OPIC, OPIC Provides US\$250 Million for Three New Investment Funds in Africa (Nov. 19, 2007), <http://www.opic.gov/news/press-releases/2007/pr11907.asp> (“Strengthening these [financial] markets will provide both African and foreign companies with the financial tools necessary to attract investment, and lay a strong foundation for projects in a variety of industries.”).

74. See Cameron Half, Note, *Funding Growth: Leasing and Small and Medium Enterprise Financing in Russia*, 43 HARV. INT’L L.J. 469, 470 (2002) (“[S]mall and medium enterprises (SMEs) are likely to be among the firms most responsive to available eco-

economies: financing for SMEs accelerates expansion and drives development.⁷⁵ However, throughout much of the developing world, SMEs lack sufficient access to financial markets.⁷⁶ The need for lending programs serving SMEs is readily apparent, and there is evidence that MIGA, IFC and OPIC are strengthening the necessary financial infrastructure.

OPIC has undertaken a number of initiatives related to funding for SMEs, primarily through partnerships with large international banks. In 2002, OPIC provided a US\$100 million loan guaranty to Wachovia for SMEs worldwide, and US\$300 million to Citibank for lending facilities in Latin America and Pakistan.⁷⁷ In 2006, OPIC's new issuance related to this type of fi-

nomic opportunities, and to serve as an important source of economic dynamism and employment creation.") (citation omitted).

75. *Id.* (discussing how financial services to SMEs can stimulate growth in a developing economy).

76. See generally OECD, *Report of 2nd OECD Conference Of Ministers Responsible For Small And Medium-Sized Enterprises (SMEs), Promoting Entrepreneurship and Innovative SMEs in a Global Economy* 23, available at <http://www.oecd.org/dataoecd/6/11/31919231.pdf>. The OECD report frames the difficulties inherent in all SMEs quite nicely:

Uncertainty and informational asymmetries that characterise SMEs are amplified for innovative SMEs making it more difficult for them to access financing. First, the returns to innovative activities are often skewed and highly uncertain. Second, entrepreneurs may possess more information about the nature and characteristics of their products and processes than potential financiers. Third, innovative activities are usually intangible thereby making the assessment of their monetary values difficult before they become commercially successful. Thus, financing innovative SMEs is very risky and uncertain, making it difficult to come up with a mutually agreeable financing contract. This has led to a proliferation of government programmes to close perceived financing gaps faced by innovative SMEs.

Id. at 5. The report also discusses the unique problems faced by SMEs in developing countries:

Surveys often indicate that [investors] are constrained by the lack of what they perceive to be promising entrepreneurs and high-potential firms suitable for investment. This is especially true for developing countries. For instance, all the transition economies had been dominated by large firms where SMEs played a very small role.

Id. at 23; see also Joseph J. Norton, *Banking Law Reform and Users-Consumers in Developing Economies: Creating an Accessible and Equitable Consumer Base from the "Excluded,"* 42 *TEX. INT'L L.J.* 789, 807-08 (2007) ("Despite media hype, only a small percentage of SMEs at the moment have access to formal financial services in Latin America."); Half, *supra* note 74, at 470 ("Many firms, particularly SMEs, have insufficient access to the necessary funds for investment.").

77. See 2002 OPIC ANN. REP. 1 ("[A] \$100 million OPIC loan guaranty enabled Wachovia Bank to expand its lending to small- and medium-sized businesses investing in emerging markets worldwide. Another \$300 million in loan guaranties to Citibank established similar lending facilities for projects in Latin America and Pakistan.").

nance was over US\$306 million, with projects primarily in Europe, Eurasia, and Latin America.⁷⁸ Most of these efforts involved helping local banks to expand their loan portfolios into SMEs.⁷⁹ IFC is similarly working to increase its lending to SMEs, with US\$1.62 billion in exposure in 2006 in sub-Saharan Africa alone.⁸⁰ Further, IFC's clients there had roughly 144,000 outstanding loans to SMEs that year, again demonstrating the magnifying effect that financial sector investments can have on economies.⁸¹ Finally, MIGA also provides guaranties to establish new banks serving local entrepreneurs.⁸² Its total exposure addressing the lack of financial support for SMEs was US\$28 million in 2007.⁸³

Microfinance is another area that has received a lot of attention in recent years as a method of empowering individuals to improve their economic fortunes.⁸⁴ One of microfinance's most salient features is its strength at mitigating risk through character-based lending, distribution of lending across many borrowers, and highly diversified portfolios.⁸⁵ Nonetheless, even given

78. See 2006 OPIC ANN. REP. 30-35 (figure compiled by author, summing SME finance projects listed in Annual Report).

79. *Id.*

80. 2006 IFC ANN. REP. 37.

81. *Id.*

82. See, e.g., 2007 MIGA ANN. REP. 15 (discussing a US\$1.8 million guarantee to establish an SME-serving microcredit bank in Cameroon); 2006 MIGA ANN. REP. 28 (discussing a US\$1.5 million guarantee in Afghanistan to provide finance for small entrepreneurs).

83. 2007 MIGA ANN. REP. 28.

84. See Taylor, *supra* note 42, at 317-19 ("Microcredit programs are a paradigm example of a trickle-up approach to poverty alleviation and are widely viewed as far superior to programs commonly used by State-centric, trickle-down models. . . . The theoretic appeal of these programs is apparent. Lack of access to credit is often cited as a significant factor in perpetuating poverty. Microcredit provides access to groups that otherwise are excluded from credit, enabling them to enter the formal market.") (citations omitted); Dworkin & Schipani, *supra* note 42, at 410-14 (discussing how microlending has been used to promote gender equity by giving women entrance to markets, and the collateral benefits that accrue to families when microlending enables small entrepreneurs, especially women, to participate in the economy).

85. See ROBERT PECK CHRISTEN & DOUGLAS PEARCE, MANAGING RISKS AND DESIGNING PRODUCTS FOR AGRICULTURAL MICROFINANCE: FEATURES OF AN EMERGING MODEL 22, available at <http://www.ifad.org/ruralfinance/pub/risks.pdf> ("If a lender has reliable knowledge of a potential client's character, as is the case with a well-functioning credit bureau, the lender can make a loan based on that person's history of repaying financial obligations and on its assessment of that person's financial situation and plans. But developing countries almost never have a credit reference system with good coverage of poor families. Microcredit techniques were developed as a substitute for microlenders'

the low value of individual loans, microcredit financing done on a large scale requires significant funding. The involvement of large-scale international banks in the world of microfinance is often made possible through the support of the agencies. In 2006, OPIC supported Citigroup with a US\$70 million loan guaranty to leverage Citigroup's financing of up to fifty microfinance institutions ("MFIs") across the developing world.⁸⁶ Similarly, IFC has engaged in a number of microfinance projects. Highlights include a US\$1.6 million investment in Aavishkaar Microfinance, a firm that will, in turn, invest in thirty-five to forty start-up MFIs in India.⁸⁷ By investing in large firms with the capacity to reinvest in a large number of smaller MFIs, institutions are able to widely distribute the benefits of microfinance and highly leverage their funding.

Investment support in the financial sector has a disproportionately large impact, as it allows far more funding to be disbursed than with a direct loan to those who need it. This is illustrated in the IFC's annual report from 2007. IFC's total exposure in financial markets in 2007 was US\$9.85 billion.⁸⁸ Yet the exposure of its clients, lenders, and insurers themselves far exceeds this amount: US\$52 billion in SME loans and US\$4.95 billion in microfinance loans were supported through the IFC exposure.⁸⁹ This clearly demonstrates the widespread impact that can be achieved through financial sector support, as the estab-

lack of knowledge about the characters of potential clients and their willingness to repay debt. To serve small farmers and farmers in remote or marginal rural areas, group-based savings and lending techniques may be essential to mitigate risk, reduce operating costs and enforce repayment."); Dustin Miller, Note, *Climbing The Mountain: Providing a Vehicle for Banking Services to Kenya's Rural Farmers*, 19 *GEO. INT'L ENVTL. L. REV.* 783, 799 (2007) ("Traditionally microfinance is a group-based approach to providing credit, which has replaced collateral with 'joint liability, appeals to religion or character, and promises of larger loans.'") (quoting Rachel Errett Figura, *An End to Poverty through Microlending: An Examination of the Need for Credit by Poor, Rural Women and the Success of Microlending Programs*, 8 *NEW ENG. INT'L & COMP. L. ANN.* 157, 166 (2002)).

86. See 2006 OPIC ANN. REP. 8 ("OPIC's Board of Directors approved a \$70 million loan guaranty which will leverage Citigroup's own financing under a new microfinance local currency lending program designed to fund MFIs in Africa, Asia, Central and Eastern Europe, and Latin America, particularly smaller MFIs that have not traditionally received medium-term bank funding, such as non-profit institutions and cooperatives.").

87. 2007 IFC ANN. REP. 41.

88. *Id.* at 52.

89. *Id.* at 53.

lishment of a financial service firm or program can lead to further support in other sectors.

2. Infrastructure

Infrastructure includes utilities, such as water, energy, and sanitation, as well as transportation.⁹⁰ In the case of MIGA, infrastructure also includes telecommunications.⁹¹ It is a key sector supported by all three agencies. For MIGA, it is the industry that accounts for the highest proportion of its total exposure, at 44%.⁹² For the IFC, infrastructure accounts for the third highest percentage of exposure.⁹³ Political risk insurance is vital in this industry, as it is more prone than others to expropriation, which explains its high proportion of the agencies' portfolios, especially MIGA. However, it is also an area that is often dominated by government, explaining why it is not universally the greatest proportion of project support by the agencies.

IFC's total infrastructure portfolio was at US\$5 billion in 2007, a small decrease from the previous year.⁹⁴ One of IFC's major projects was the Bujagali hydropower plant in Uganda, expected to reduce reliance on expensive diesel generators.⁹⁵ The project was hailed as the "Africa power deal of the year" by *Project Finance Magazine* and is seen by many as an example of the kind of key infrastructure development to address African power crises.⁹⁶ The project was several years in the making and had re-

90. *See id.* at 60; 2006 MIGA ANN. REP. 12.

91. *See* 2007 MIGA Ann. Rep. 12.

92. *Id.* at 95.

93. *See* 2007 IFC ANN. REP. 48-66 (stating infrastructure exposure is US\$5.06 billion, which is about 16% of total exposure, putting it third, behind financial services and manufacturing and services).

94. *Id.* at 60.

95. *See id.* at 61 ("Uganda has experienced power shortages and a sharp rise in electricity tariffs due to reliance on expensive diesel-based power. To help, IFC is leading a group of investors to finance the Bujagali hydropower project, one of the largest private sector investments in Africa's power sector to date. It will allow Uganda to meet electricity demand and retire expensive diesel plants when the plant is commissioned in 2011."); *see also generally* World Bank, Bujagali Hydro Power Project, <http://www.worldbank.org/bujagali> (last visited Apr. 24, 2009) (discussing the Bujagali project and its expected impact on Uganda's power capacity and long-term economic development).

96. *See* Press Release, Bujagali Hydro: African Power Deal of the Year, http://www.ifc.org/ifcext/media.nsf/Content/Bujagali_Hydro_Feature (last visited Apr. 24, 2009) ("The Bujagali Hydropower Project in Uganda recently received the 2007 African Power Deal of the Year award from Project Finance Magazine. This recognition from

ceived heavy criticism for failing to adequately address concerns including resettlement, the safety of the dams, and conservation.⁹⁷ Following the criticism and a request for inspection submitted by the Ugandan National Association of Professional Environmentalists and other local organizations and individuals, the World Bank reevaluated the project, addressed concerns, and has approved a new plan designed to improve upon the earlier one.⁹⁸ Other major projects for the IFC in 2007 include power generation in Pakistan and improving rail networks in Eastern Africa.⁹⁹

MIGA's total committed portfolio in the infrastructure industry amounts to nearly US\$2.2 billion dollars; at 41% of their total portfolio, MIGA has the highest proportion of infrastructure projects. Of the eleven new investments described in the 2007 annual reports, five out of nine are related to power provision, two are water treatment and supply facilities, two are waste management, and two are telecommunications projects.¹⁰⁰ The largest project that MIGA participated in was the Bujagali hydro-power plant, described above, for which MIGA issued US\$115 million in guaranty coverage.¹⁰¹ The second-largest new project involved political risk coverage for Termoguayas Generation, S.A., which is operating a five-barge, 150 MW floating power plant in Guayaquil, Ecuador.¹⁰² MIGA also insured an innova-

one of the world's leading project finance publications validates the joint efforts by IFC, the World Bank, and the [MIGA] to address the energy crisis in Uganda."); *see also African Power Deal of the Year 2007*, PROJECT FIN., Mar. 2007, at 79.

97. BUJAGALI MANAGEMENT RESPONSE, *supra* note 38, at 7, 10-11, 21; *see also, e.g., INTERNATIONAL RIVERS NETWORK, REVIEW OF IFC'S REPORT "BUJAGALI PROJECT: SUMMARY OF ECONOMIC DUE DILIGENCE" 1* (Nov. 19, 2001), *available at* <http://internationalrivers.org/files/011119.irm-sedd.pdf> ("The Summary of Economic Due Diligence (SEDD) contains numerous shortcomings. It is based on over-optimistic assumptions about growth in GDP and electricity demand. It fails to assess adequately the costs, benefits and risks of various non-Bujagali options, and uses questionable logic in discussing the impacts of a delay in Bujagali. It gives the impression of being written to justify the decision to build Bujagali rather than to assess in an open-minded manner the relative economic merits of Uganda's energy options.").

98. *See generally* BUJAGALI MANAGEMENT RESPONSE, *supra* note 38 (acknowledging the requester's concerns, but affirming that the project will adequately address them and concluding that the project will "significantly benefit Uganda's development and drive for poverty alleviation" and should go forward).

99. *See* 2007 IFC ANN. REP. 61 (discussing investment in KESC in Pakistan and the Kenya Railways Corporation and the Uganda Railways Corporation in East Africa).

100. 2007 MIGA ANN. REP. 40-63.

101. *Id.* at 62.

102. *Id.* at 52.

tive waste-to-energy plant, with US\$24.96 million in guaranties to Beijing Gaoantun Waste to Energy Co. Ltd., in Beijing, China.¹⁰³ The project addresses a growing sanitation problem resulting from rapid urban development, and will conserve Beijing's limited landfill space while utilizing residual heat to generate 225 million kilowatt-hours annually.¹⁰⁴

Infrastructure represents a significant proportion of OPIC's total exposure in the infrastructure sector, at US\$2.96 billion, or 22%.¹⁰⁵ Of the ten active projects that represent the largest proportion of OPICs infrastructure exposure, eight of them relate to building out or modernizing power generation.¹⁰⁶ Most are traditional fossil-fuel-based projects, with the exception of US\$137 million of insurance provided to Ce Casecanan Water And Energy Company, Inc. of the Philippines for a hydroelectric plant and irrigation project.¹⁰⁷ Of the remaining ten largest projects, one provides insurance for the privatization of a power company in the Philippines, and the other is a reverse-osmosis water desalinization plant in Algeria.¹⁰⁸

OPIC's most recent annual report shows a much smaller infrastructure focus for 2006, just 3% of its new issuances, roughly US\$49 million.¹⁰⁹ The two largest projects in 2006 were a power station in Nepal, receiving US\$19 million, and an airport in Ecuador, receiving US\$16 million, both in the form of OPIC insurance. It seems that despite a claimed preference for projects "that improve a developing country's infrastructure, both physical and financial,"¹¹⁰ OPIC's most recent efforts have not addressed physical infrastructure in a significant way.

103. *Id.* at 42.

104. *Id.*

105. OPIC, *supra* note 59 (figures compiled by author, data contained in Appendix 2).

106. *Id.*

107. *Id.*

108. *Id.*

109. See 2006 OPIC ANN. REP. 30-35 (figure compiled by author, summing infrastructure projects listed in annual report).

110. See *id.* at 4. As discussed above, financial services is the largest sector receiving OPIC financing and insurance. Financial infrastructure is indeed a focus of OPIC. However, physical infrastructure does not seem to be a priority.

3. Extractive

Extractive industry activities are crucial to development.¹¹¹ In the absence of adequate alternatives to fossil fuels, energy needs mandate the extraction of natural resources. Further, in many developing states, an untrained labor force and weak local economies mean that exploitation of natural resources may be the best option for improving GDP.¹¹² However, investments in the extractive industry may be troubling when viewed through the lens of the development agenda.¹¹³ Perhaps more than any other, the extractive industry is associated with a wide variety of activities contrary to the standards of sustainable development: poor labor conditions, environmental degradation, and perpetuation of despotic regimes.¹¹⁴ While it remains essential to sup-

111. See 1 EMIL SALIM, *STRIKING A BETTER BALANCE: THE WORLD BANK GROUP AND EXTRACTIVE INDUSTRIES: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW* 53 (2003) (suggesting that with the proper frameworks in place, “extractive industries [can] lead to poverty alleviation and sustainable development.”); Matthew Jones, *Industry Digs Deep to Make Friends*, *FIN. TIMES* (London), Aug. 23, 2002, at 8 (noting the “whole host of essential things” the extractive industry can provide).

112. See Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT’L ECON. L. 1, 8 (2005) (“[E]conomic theorists [have] stridently argued that low growth in developing countries may be linked to a lack of access to the necessary capital for development. The ‘staple theory’ of growth maintained that countries rich in oil and mineral resources may be able to overcome this predicament by attracting foreign companies to exploit these resources. Money generated from a growing extractive sector would then be used in the construction of needed infrastructure and in the establishment of secondary industries and diversification.”); *Twelve Banks Speak Out on the Extractive Industries Review*, ICMM NEWSL. (Int’l Council of Mining & Metals, London, UK), May 5, 2004 (“[E]xtractive industries are essential to global economic growth and poverty reduction, and that for some countries the extractive industries represent a very important means of creating revenue for government programs. The extractive industries are so central to growth, poverty alleviation and social stability that it is difficult to envisage that such resources will remain unexploited.”), available at http://www.equator-principles.com/documents/EIR_Banks_Letter.pdf.

113. See Debbie Johnston, *Lifting the Veil on Corporate Terrorism: The Use of the Criminal Code Terrorism Framework to Hold Multinational Corporations Accountable for Complicity in Human Rights Violations Abroad*, 66 U. TORONTO FAC. L. REV. 137, 141 (2008) (“Human rights advocates, academics, and other state and non-state actors have extensively documented the chronic coexistence of extractive industry foreign direct investment and human rights violations, and corporate ties to oppressive regimes or groups.”); Margaret Satterthwaite & Deena Hurwitz, *The Right Of Indigenous Peoples To Meaningful Consent In Extractive Industry Projects*, 22 ARIZ. J. INT’L & COMP. L. 1, 3 (2005) (“Extractive industries are among the worst of the worst in terms of their impact on the rights of indigenous peoples to self-determination, land rights, and economic development.”).

114. See G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Jan. 29, 2001) (discussing the role of diamonds in fuelling conflict); Joanna Kyriakakis, *Australian Prosecution of Corpo-*

port the sector, a high level of care is required to ensure that recipients of funding from the agencies comply with development norms. Due to this sensitive nature of extractive industry investments, the following will take a closer look at agency-funded projects in this sector than others.

Extractive industries account for a relatively small, but not insignificant, portion of the total portfolio of all three agencies. OPIC's investments total US\$1.8 billion, or 13% of its issues.¹¹⁵ Some of its largest clients in 2006 included Lazare Kaplan International in Namibia, getting over US\$25 million in finance for diamond cutting and polishing operations,¹¹⁶ and US\$142 million of insurance for copper ore mining by Sociedad Minera Cerro Verde ("SMCV") in Peru.¹¹⁷ It is heartening to see that these companies are relatively innocuous compared to some of their industry counterparts. Lazare Kaplan adheres to a zero-tolerance policy regarding trade in conflict diamonds, in accordance with U.N. General Assembly resolution 55/56, and is in compliance with the Kimberley Process, a certification scheme to combat trade in conflict diamonds.¹¹⁸ Phelps Dodge Corpora-

rations for International Crimes, 5 J. INT'L CRIM. JUST. 809, 810 (2007) ("The World Bank Extractive Industries Group has acknowledged that the practice of human rights violations by military, police or commercial mercenaries in the context of securing company control over a given territory and protecting their operations is not uncommon."); Chistiana Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARV. INT'L L.J. 109, 146 (2008) ("[I]nvestments, such as extractive industry investments and other types of FDI, sometimes play direct, facilitative, or complicit roles in human rights violations."); Jennifer Oetzl, Kathleen A. Getz & Stephen Ladek, *The Role of Multinational Enterprises in Responding to Violent Conflict: A Conceptual Model and Framework for Research*, 44 AM. BUS. L.J. 331, 351 (2007) ("[N]atural resource extraction often entails significant environmental disruption, the negative effects of which are felt primarily by local stakeholders significant environmental disruption, the negative effects of which are felt primarily by local stakeholders."); Sarah Rackoff, Note, *Room Enough for the Do-Gooders: Corporate Social Accountability and the Sherman Act*, 80 S. CAL. L. REV. 1037, 1041 n.19 (2007) ("The extractive industry has the worst record on human rights . . ."); see generally GLOBAL WITNESS, OIL AND MINING IN VIOLENT PLACES: WHY VOLUNTARY CODES FOR COMPANIES DON'T GUARANTEE HUMAN RIGHTS (2007), available at http://www.globalwitness.org/media_library_detail.php/580/en/oil_and_mining_in_violent_places.pdf.

115. See OPIC Project Database, <http://www.opic.gov/pubs/currentprojects/index.asp> (figure compiled by author, data contained in Appendix 2).

116. 2006 OPIC ANN. REP. 30.

117. *Id.* at 35.

118. See LAZARE KAPLAN INT'L INC., 2004 ANNUAL REPORT 4 ("As a concerned member of the international diamond industry and global community at large, the Company fully supports and complies with policies which prohibit the trade in conflict diamonds, prevent money laundering and combat the financing of terrorism . . . [Lazare Kaplan]

tion, the U.S. insured investor of the SMCV project in Peru prominently discusses its adherence to social and environmental norms in general terms in an SEC filing regarding investment support for SMCV projects from the Japan Bank for International Cooperation (OPIC's Japanese counterpart).¹¹⁹

IFC's exposure in the extractive industry was US\$3.9 billion, 12% of its total.¹²⁰ IFC, for its part, noted in its 2007 annual report that it works to maintain transparency in its extractive investments, and also to ensure that the benefits are shared.¹²¹ IFC has also taken steps beyond the formal World Bank requirements for funding—utilizing US\$10 million of IFC funds and an additional US\$2 million raised by the Norwegian government, IFC set up CommDev, a program designed to involve stakeholders such as local communities and government in extractive industry development. Among other things, CommDev attempts to build capacity by managing royalty flows, integrating small businesses into the supply chain, and setting up community foundations to address the environment, gender, and HIV/AIDS in mining regions.¹²² IFC notes that the relatively high rate of return on large extractive projects helps to offset weaker performance by smaller projects in other sectors.¹²³ Extractive industry investments are an important part of the IFC portfolio and it has done surprisingly well in integrating development norms into its extractive partnerships.

In particular, two of IFC's projects in the extractive industry demonstrate this success. First, the Cote d'Ivoire Offshore Oil

compl[ies] fully with World Diamond Congress resolutions for industry self-regulation in respect of the Kimberley Process Certification Scheme . . ."); *see also* Welcome to The Lazare Diamond, <http://lazarediamonds.com/main.html> (click on FAQ, then Are Lazare Diamonds Conflict Free?).

119. *See* Phelps Dodge Corp., Quarterly Report (Form 10-Q), exhibit 10.5 (Oct. 27, 2005), available at <http://www.sec.gov/Archives/edgar/data/78066/000095015305002696/p71362exv10w5.txt> (detailing Sociedad Minera Cerro Verde project); *see also* OECD, GLOBAL FORUM ON INT'L INVESTMENT: FOREIGN DIRECT INVESTMENT AND THE ENVIRONMENT: LESSONS FROM THE MINING SECTOR 67 (OECD 2002) (discussing FDI's positive impact on the environmental impact of extractive industries, citing Sociedad Minera Cerro Verde as an example).

120. 2007 IFC ANN. REP. 62.

121. *Id.* at 63.

122. *Id.*

123. *Id.* at 37. IFC's overall success rate is 63%, compared to 75% for extractive industry investments. The only industries with higher rates of success are infrastructure and financial markets. *Id.* at 23.

and Gas Project is a relatively old investment: the project was started in 1989, and the initial loans of US\$70 million to the original private sector partners have all been repaid. However, IFC retains a 19% equity interest in the project, which has been successful in reducing reliance on imported energy and has allowed state utility companies to run on cleaner burning natural gas.¹²⁴ The other project, more recent, is the Chad-Cameroon Petroleum Development and Pipeline Project. The project was approved in 2000, and the World Bank Group as a whole will provide US\$200 million of the US\$3.7 billion of finance. It represents a novel effort to avoid the externalities common to the extractive industry, and transform oil resources into direct benefits for the poor, and includes a program to devote revenues towards social and economic development in Chad. In response to an initially negative evaluation of risk, an environmental impact assessment and management plan was developed that reduces environmental impact, limits resettlement, and results in the creation of two new national parks in Cameroon.¹²⁵

MIGA's portfolio in the extractive industries is at a similar level to both IFC and OPIC, at 13%, or US\$668 million.¹²⁶ MIGA suggests that its activities in the sector offer collateral benefits—the environmental and social mandates that are tied to MIGA improve industry practice, and projects generate income, produce jobs, encourage infrastructure, and transfer skills.¹²⁷ The only guaranty made by MIGA in the extractive industry in 2007 was in sub-Saharan Africa.¹²⁸ This is not surprising given the region's rich natural resources and otherwise underachieving economic potential.¹²⁹ The project is an extension of addi-

124. See World Bank, Oil, Gas, Mining & Chemicals—Cote d'Ivoire, <http://go.worldbank.org/FD9IGWKJZ0> (providing project information for the Cote d'Ivoire Offshore Oil and Gas project).

125. See World Bank, Oil, Gas, Mining & Chemicals—Chad-Cameroon Pipeline, <http://go.worldbank.org/ZPA9V9JFJ0> (providing project information for the Chad-Cameroon Pipeline).

126. 2007 MIGA ANN. REP. 95.

127. See *id.* at 15 (“[Oil, gas, and mining p]rojects that have benefited from MIGA's support and environmental and social advice generate income and jobs in some of the world's poorest countries. They also are an important means of transferring skills and technological know-how, as well as providing critical infrastructure.”).

128. See *id.* at 60. The only extractive project receiving guarantees in 2007 was the Sasol Pipeline in Mozambique, which was issued an additional US\$49.7 million of coverage, bringing its total to US\$176.6 million.

129. See, e.g., James C. Owens, Note, *Government Failure in Sub-Saharan Africa: The*

tional coverage to the Standard Bank of South Africa (“SBSA”) in the amount of US\$49.7 million for loans and guaranties SBSA provided in support of the Sasol Pipeline Project in Mozambique.¹³⁰ The Sasol project is an above-average performer in its sector for human rights and environmental practices, asserting compliance with the United Nations Global Compact, efforts to promote minority empowerment, and a high score on the Dow-Jones Sustainability Index.¹³¹

It is clear IFC, MIGA, and OPIC attempt to differentiate themselves from the extractive industry through adherence to international norms and close attention to environmental, labor, and political practices. For all three agencies, the activities of their partners and the results of their projects demonstrate a commitment to the ILD in the extractive sector, although concerns remain whether that commitment is strong enough, and whether promoting extractive industry is even a legitimate goal of the three agencies.¹³²

4. Agribusiness

Agribusiness is a very important sector from a development perspective. It directly implicates Millennium Development Goal 1, the eradication of poverty and extreme hunger, and is

International Community's Options, 43 VA. J. INT'L L. 1003, 1006 (2003) (“Sub-Saharan Africa is a study in economic contrasts. Home of some of the world’s richest sites of natural resources, the people who live there nevertheless remain mired in inconceivable poverty.”).

130. 2007 MIGA ANN. REP. 60-61.

131. See SASOL LTD. GROUP, 2007 ANNUAL REPORT 67-69 (2008). Sasol’s Dow-Jones Sustainability Index score rose from 68% in 2006 to 70% in 2007, with the oil & gas producers industry average at 53%. *Id.*

132. See, e.g., SALIM, *supra* note 111, at ix-xii (suggesting, among other things, that better safeguards are needed for the protection of the environment and human rights, pro-poor poverty development outcomes and sustainable development should be accorded strategic importance within the extractive sector, and scarce resources should be prioritized towards finding renewable sources of energy); Melissa A. Jamison, *Rural Electric Cooperatives: A Model For Indigenous Peoples' Permanent Sovereignty Over Their Natural Resources*, 12 TULSA J. COMP. & INT'L L. 401, 437 n.242 (“After a review of its participation in extractive industries such as mining, the World Bank is contemplating withdrawal from projects that do not adequately respect the right of indigenous peoples to control their land and natural resources.”); Kyriakakis, *supra* note 114, at 810 (“The World Bank Extractive Industries Group has acknowledged that the practice of human rights violations by military, police or commercial mercenaries in the context of securing company control over a given territory and protecting their operations is not uncommon.”).

also relevant to Goal 7, ensuring environmental sustainability.¹³³ Investment in agribusiness is vital in that it improves incomes in rural regions, and is one of a very few sectors that can advance alongside of, rather than only after, improvements in education and telecommunications infrastructure.

In 2007, IFC saw a 38% increase in agribusiness investments over 2006,¹³⁴ to US\$2.14 billion, or a total of 7.6% of IFC's total committed portfolio in 2007.¹³⁵ A "significant share" of IFC's agribusiness portfolio is in Latin America and the Caribbean.¹³⁶ Investment commitments reached US\$628 million over 23 projects, 27% of which are in frontier countries.¹³⁷ The agency's investments have demonstrated that agribusiness projects can lead to highly distributed results—as a result of IFC commitments, an estimated 87,500 agribusiness jobs will be created, and financing will be available to over 357,100 farmers and 27,600 medium and small businesses.¹³⁸

MIGA's exposure in the agribusiness sector amounts to US\$83 million, 2.2% of its total.¹³⁹ Despite the low number, MIGA has made a not-insignificant effort to promote the sector, especially in sub-Saharan Africa, where it has invested US\$162 million on sixteen projects in nine countries since 1994, and where 7% of its regional exposure is in the industry.¹⁴⁰ The agency works primarily with projects to help provide critical agricultural technology, and recognizes the many beneficial effects of agribusiness: new jobs, higher export revenues, monetary flows to rural areas, and decreased need to import food.¹⁴¹

The disparity between IFC and MIGA levels of funding, a nearly fourfold difference in relative portfolio size, is probably best explained by their different methods of operations. Whereas IFC's core competence is mainly in lending, where di-

133. See 2007 IFC ANN. REP. 11, 15 (noting the MDG significance of agribusiness: "[a] strong focus on socially critical sectors like agribusiness can improve both our development and our sustainability impact"); INVESTING IN DEVELOPMENT, *supra* note 8, at xviii (listing the MDGs).

134. 2007 IFC ANN. REP. 49.

135. *Id.* at 50.

136. *Id.* at 44.

137. *Id.* at 50.

138. *Id.*

139. 2007 MIGA ANN. REP. 95.

140. *Id.* at 13-14.

141. See *id.* at 14 (discussing the collateral benefits of agribusiness investments).

rect finance of many smaller agricultural projects is much needed, small farmers are less likely to seek MIGA insurance against expropriation.

OPIC does not talk about agribusiness as much as IFC—the word isn't even mentioned in the agency's 2006 annual report. Exposure in the sector is also significantly lower than IFC, but about on par with MIGA, with agribusiness representing 2% of its portfolio for a total exposure of US\$228 million.¹⁴²

5. Housing

Housing is not included in the sector breakdown by either IFC or MIGA, and OPIC does not provide a sector breakdown in its annual reports. Nonetheless, it is a very important area of development, and is directly implicated in Millennium Development Goal 1, the alleviation of poverty.¹⁴³ The initiatives undertaken by the three institutions in housing are of two types: (1) financial services aimed at increasing the availability of mortgages and providing them at lower cost, and (2) direct financing or insurance for building infrastructure such as low-income housing.¹⁴⁴ The majority of projects supported by the agencies are in the financial services category. Of the three, only OPIC described projects in residential construction in its most recent annual report.

OPIC's initiatives are balanced between financial services projects and direct support to builders. In 2006, OPIC's exposure in the housing industry totaled US\$157 million, or a little over 9% of its exposure.¹⁴⁵ Of that, US\$97 million was in support of the financial services sector in offering low-cost residential mortgages, and US\$60 million went directly to residential builders. Major projects included a US\$30 million loan to Ghana Home Loans Ltd. for residential mortgages,¹⁴⁶ US\$20.8 million of finance for low-income housing construction in Mexico to Credito Inmobiliario SA de SV,¹⁴⁷ and US\$12.4 million in

142. See OPIC, *supra* note 59 (figure compiled by author, data contained in Appendix 2).

143. See *INVESTING IN DEVELOPMENT*, *supra* note 8, at xviii (listing the MDGs).

144. See 2006 OPIC ANN. REP. 29 (discussing both financial services and construction projects in the housing sector).

145. 2006 OPIC ANN. REP. 30-35 (figure compiled by author).

146. *Id.* at 30.

147. *Id.* at 34.

insurance for housing development issued to Enterprise Homes Tanzania, Ltd.¹⁴⁸ The increased project support in the housing industry comes after OPIC organized an international “Housing Africa” conference in Cape Town, South Africa in 2006; OPIC subsequently broadened its housing initiatives, and looked for innovative ways to provide finance and infrastructure to alleviate worldwide housing crises.¹⁴⁹ The 2006 investments show a major initiative in housing, nearly doubling OPIC’s exposure in the sector—for all active projects the total exposure in housing is US\$337 million, or 2%,¹⁵⁰ an increase of US\$157 million.¹⁵¹

Unlike OPIC, IFC approaches lack of housing primarily as a problem in financial infrastructure and did not directly support any new housing construction projects in 2007.¹⁵² The agency works to improve access to residential mortgages by partnering with commercial banks and financial institutions, and has spent a total of US\$2.9 billion in forty countries in fiscal years 2001-2007.¹⁵³ Financial institutions in Europe and Central Asia have been some of the biggest beneficiaries of IFC housing programs. Since 2000, thirty-four institutions in the region have received a total of US\$872 million in financing for residential mortgage programs.¹⁵⁴ In addition, IFC activities in the region include helping to establish best practices in lending institutions, drafting a lending code of ethics, and working with governments to introduce legislation that will reduce transaction costs for prop-

148. *Id.* at 30.

149. See Press Release, U.S. Embassy, Uganda, OPIC to Host “Housing Africa” Conference in South Africa (May 2-4), <http://kampala.usembassy.gov/opic.html> (last visited Apr. 28, 2008); 2006 OPIC ANN. REP. 4 (“Following the conference, OPIC focused its housing initiative on establishing innovative financing and infrastructure development models that can be applied essentially anywhere. . . . In choosing projects to support, OPIC has a strong preference for those that improve a developing country’s infrastructure, both physical and financial, and provide local entrepreneurs access to more affordable credit. Such projects are more likely to stimulate the local economy and efficiently develop the structures for sustained economic growth.”).

150. OPIC, *supra* note 59 (figure compiled by author, data contained in Appendix 2).

151. See 2006 OPIC ANN. REP. 30-35 (figure compiled by author, summing 2006 housing projects listed in annual report and subtracting from total active projects).

152. See IFC, Housing Finance, <http://www.ifc.org/ifcext/gfm.nsf/Content/HousingFinance> (last visited Apr. 24, 2009) (discussing IFC’s Housing Finance group).

153. 2007 IFC ANN. REP. 53.

154. See *id.* at 43 (discussing mortgage industry investment in Europe and Central Asia).

erty purchases.¹⁵⁵ Similarly, in Latin America and the Caribbean, IFC's long-term housing strategy has resulted in US\$317 million in financing for four projects, representing over 170,000 mortgages.¹⁵⁶ IFC also attempts to address its housing projects through South-South cooperation: for example, the agency was responsible for helping to establish a relationship between Zephyr-Nexxus Mexico Fund I, a fund manager, and Su Casita, a Mexican mortgage lender, which are working together to increase access to loans for affordable housing.¹⁵⁷

MIGA has also made a significant effort in addressing housing, issuing guaranties for new projects totaling nearly US\$300 million in 2007, or over a fifth of its total new issuance.¹⁵⁸ However, the new projects are limited to the Europe and Eurasia region, with US\$285 million in Russia for a mortgage specialty firm, and US\$10.2 million in Kazakhstan for residential mortgages.¹⁵⁹ In 2006, MIGA also issued a US\$6.3 million guaranty to alleviate a Ghanaian housing crisis.¹⁶⁰ These projects demonstrate that, like IFC, MIGA focuses its housing initiatives on the financial services sector rather than providing direct support for construction projects.

6. Health and Education

Health and education are both sectors that clearly implicate development norms. Together, they are directly related to half of the Millennium Development Goals.¹⁶¹ Education is crucial to sustainable development because it is the only way to ensure

155. *Id.*

156. *Id.* at 45.

157. *See id.* at 65 ("IFC's Private Equity and Investment Funds Department introduced [the Zephyr-Nexxus Mexico Fund I] manager to Su Casita, a mortgage lender in which IFC's Financial Markets Department had invested. This relationship increased the availability of mortgage loans for affordable housing and complemented IFC's work on primary and secondary mortgage markets in Mexico.").

158. *See* 2007 MIGA ANN. REP. 40-63 (figure compiled by author, summing housing projects listed in annual report).

159. *See id.* at 47 (discussing investments in Société Générale in Russia, and First Kazakh Securitization Company in Kazakhstan).

160. *Id.* at 15 (discussing investment in Metro Ikam as "the first step in a multi-pronged, government-backed approach to ease Ghana's housing crunch").

161. *See* INVESTING IN DEVELOPMENT, *supra* note 8, at xviii (goals implicated are: MDG 2: achieve universal primary education; MDG 4: reduce child mortality; MDG 5: improve maternal health; and MDG 6: combat HIV/AIDS, malaria, and other diseases).

the existence of the capable workforces crucial to economic growth.¹⁶² Health, likewise, is essential to development; disease accounts for a dramatic level of economic underperformance in developing countries.¹⁶³ Both are also key concerns of the people-centered standards of the ILD.

Yet, despite the vast importance of the two sectors, none of the agencies devote a particularly large proportion of their portfolio to investment in them. Even with a 58% increase since 2006,¹⁶⁴ IFC's current investments in the combined industries are only US\$472 million—less than 2% of its total portfolio.¹⁶⁵ MIGA does not even include health and education in its industry breakdown.¹⁶⁶ The agency lists just one healthcare related investment in its 2007 annual report—a pharmaceutical manufacturing plant in Afghanistan, which received a US\$365,000 guaranty—and no educational projects.¹⁶⁷

OPIC is hardly more active in either area. In its total committed portfolio, just .8% is represented in health and educa-

162. See Jennifer Elrod, *Critical Inquiry: A Tool For Protecting The Dissident Professor's Academic Freedom*, 96 CAL. L. REV. 1669, 1690-91 (2008) ("General education equips students for their roles as contributing members of the workforce and as active citizens in society."); Sandra C. Lee, *WiMax in Africa: A New Frontier*, 15 COMM.LAW CONSP. 517, 543 (2007) ("[Education] simultaneously benefits students and the local and regional communities; the increased amounts of available knowledge and numbers of trained professionals and technicians inadvertently and directly advantage attempts towards economic development."); Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87, 104 (1998) ("The President's Council on Sustainable Development has observed that 'education and training are arguably the most valuable pieces of any economic development strategy because they are the only way to build the intellectual capacity necessary for a trainable and employable workforce.'") (quoting The President's Council on Sustainable Development, *Sustainable America: A New Consensus for Prosperity, Opportunity, and a Healthy Environment for the Future* 101-02 (1996)).

163. See, e.g., The Gleneagles Communiqué Climate Change, Energy and Sustainable Development, 12 L. & BUS. REV. AM. 245, 263 (2006) (referring to Malaria as a "drag on African economies"); Charles T. Collins-Chase, Comment, *The Case Against Trips-Plus Protection in Developing Countries Facing AIDS Epidemics*, 29 U. PA. J. INT'L L. 763, 783-85 (discussing the social costs of HIV/AIDS). See generally Markus Haacker, *HIV/AIDS: The Impact on the Social Fabric and the Economy*, in THE MACROECONOMICS OF HIV/AIDS 41, (Markus Haacker ed., 2004) (estimating a nearly twenty percent reduction in GDP of countries most affected by HIV/AIDS).

164. 2007 IFC ANN. REP. 49.

165. *Id.* at 52.

166. See 2007 MIGA ANN. REP. 95.

167. See *id.* at 40.

tion—about US\$108 million.¹⁶⁸ In 2006, OPIC showed some improvement over previous years, with 2% of its committed portfolio, or just less than US\$33 million, invested in a total of one health and five education projects.¹⁶⁹ However, more than two-thirds of its 2006 investments went to a single recipient, the American Embassy School of Lusaka, located in Zambia, receiving US\$24.2 million in insurance, and US\$4.2 million in financing for an expansion.¹⁷⁰ The school, which is also known as the American International School of Lusaka (“AISL”), is managed by a board chaired by, and with a majority makeup of, members of the U.S. Embassy; has approximately 25% American students, 10% of whom are from the embassy or the U.S. Agency for International Development (“USAID”); with only 10% of the students from Zambia; is the most expensive school in Lusaka; and does not provide scholarships at this time.¹⁷¹ While AISL is undoubtedly a very good school, this investment does little to help the local population or the impoverished. Regarding impact, it may provide some short term economic stimulus as the expansion occurs, but it largely fails to leverage the kind of distributed benefits that education sector investments are uniquely positioned to offer.

The agencies may not be entirely to blame for the scarcity of investment in health and education, however. There are few investors seeking financing or insurance in these sectors, and perhaps with good reason. Data from IFC shows that, based upon internal evaluation metrics, projects in education and healthcare have an astonishingly low success rate: just 39%.¹⁷² In least-developed countries, market demand for paid services in both sectors is low; while real demand may be high, the average person cannot afford to spend scarce resources on services that lack immediate survival value, i.e., primary education and non-acute health services.¹⁷³

168. See OPIC, *supra* note 59 (figure compiled by author, data contained in Appendix 1).

169. See 2006 OPIC ANN. REP. 30-35.

170. *Id.* at 31.

171. Conversation with Jane Van Vlaanderen, Director of Admissions at the American International School of Lusaka (May 7, 2008) (notes on file with author); see also generally American International School of Lusaka, <http://www.aislusaka.org> (last visited May 7, 2008) (describing the school).

172. 2007 IFC ANN. REP. 23.

173. See James Ottavio Castagnera, *Groping Towards Utopia (II): Speculations on Law,*

However, while education and healthcare are often seen as within the purview of government, IFC argues for the role of the private sector if government cannot effectively provide solutions.¹⁷⁴ In the future, all three agencies should devote greater resources towards identifying and supporting clients in health and education, and work more closely with partner agencies—specifically IBRD and IDA with IFC and MIGA, and USAID with OPIC—to build stronger public-private cooperation bringing the resources of foreign direct investment to bear on problems of great social concern.

7. Information Communications Technology

Information communications technology is an incredibly important sector to development, more so now than ever.¹⁷⁵ Costs of doing business in the developing world are high due to a lack of ICT infrastructure. Low internet penetration in much

Policy, and Human Life, 12 J. TRANSNAT'L L. & POL'Y 1, 4 n.7 (2002) ("The [AIDS] epidemic is fueled by taboos against discussing sex, lack of education about the transmission of HIV, women's second-class status, and the high cost of treatment."); Evelina Dagnino, *Dimensions Of Citizenship In Contemporary Brazil*, 75 FORDHAM L. REV. 2469, 2479 (2007) (discussing how privatization makes education only available to those who can afford it); Lora A. Green, Note, *The Global Fight for the Elimination of Child Labor in Pakistan*, 20 WIS. INT'L L.J. 177, 178 (2001) ("Many families cannot afford education for their children, and believe that learning a trade at a young age will prepare them for entering the workforce and contribute to the family income."); Leah B. Mendelsohn, Comment, *A Piece Of The Puzzle: Telemedicine As An Instrument To Facilitate The Improvement Of Healthcare In Developing Countries?*, 18 EMORY INT'L L. REV. 151, 192-94 (2004) ("[T]he ability to afford care in developing countries has a direct impact on the quality of care received. . . . The cost of healthcare causes families in developing areas . . . to be in debt. These costs of healthcare have a direct impact on access to care as well as health outcomes, as poor people delay seeking healthcare until an emergency situation arises due to the financial constraints.").

174. See 2007 IFC ANN. REP 58 ("[P]ublic resources have not been able to meet quality or quantity needs of the health and education sectors. The private sector plays a growing role in providing, and in some cases financing, these services in developing countries, complementing the public sector. In poorer countries, reliance on the private sector tends to be greater, as the public sector is often unable to deliver essential services. Many governments are now seeking to broaden the private sector's role as a way to reach underserved groups, increase efficiency, and promote innovation.").

175. See Lee, *supra* note 162, at 519 ("Development of national telecommunications infrastructures and deployment of ICTs, including WiMAX, are crucial to meeting the most important challenge facing many sub-Saharan African and other developing nations: economic development."); Knowledge Matters: Apply ICTs for African Rural Sustainability (Jan. 28, 2009), <http://eonyango.blogspot.com/2009/01/apply-icts-for-african-rural.html> ("ICT services and the accessibility of . . . the internet . . . are less established in most rural communities in Africa.").

of the developing world and the high cost of access to telecommunications remain major barriers to trade and freedom of information.¹⁷⁶ The provision of ICT engenders many benefits: from helping to encourage an open and democratic society, to stimulation of economies, and improved educational possibilities.¹⁷⁷ Finally, exciting innovations in wireless technology are making leapfrogging—bypassing wired infrastructure to quickly and inexpensively provide wireless communications to large developing populations, e.g. with cellular networks or wide area wireless internet—a reality.¹⁷⁸

MIGA does not include ICT as an independent category in their official breakdown, choosing instead to combine it with in-

176. Gerald R. Faulhaber, *Wireless Telecommunications: Spectrum as a Critical Resource*, 79 S. CAL. L. REV. 537, 540 (2006) (“Wired communications require not only a receiving unit and a transmitting unit . . . but also a physical network infrastructure to transmit the signal. . . . This huge infrastructure is extremely capital intensive and highly distributed geographically.”); Samuel O. Manteaw, *Entering the Digital Marketplace: E-Commerce and Jurisdiction in Ghana*, 16 TRANSNAT’L LAW. 345, 354 (2003) (“Phone and Internet services, where available, are expensive and erratic. . . . [I]t is apparent that Africa faces a large digital divide from the rest of the world; . . . telecommunications services in Africa are scarce, expensive, and unreliable.”); ANITA ANAND & MAHESH UPAL, *ENGENDERING MANAGEMENT AND REGULATION OF ICTS: NARROWING THE DIGITAL DIVIDE FOR WOMEN 3* (2002), available at http://www.un-instraw.org/en/docs/gender_and_ict/Annand.pdf (“[ICT] [i]nfrastructure is expensive to install and equipment is costly.”).

177. See Lee, *supra* note 175, at 542-43 (discussing how ICT can broaden educational opportunities); Knowledge Matters, *supra* note 175 (“People need channels of communication in rural areas for . . . access to agricultural commodities and prices, education, livelihood and healthcare in order to maintain social networks as well as participating in democratic process.”); UNITED NATIONS DEVELOPMENT PROGRAM, *HUMAN DEVELOPMENT REPORT 77* (2002) (suggesting that the internet can promote press freedom and democracy).

178. See Lee, *supra*, note 175, at 567 (“WiMAX presents the potential for leapfrogging barriers in the short-term, and the means to initiate and provoke systemic changes for long-term development in many African nations.”); STIJN CLAESSENS ET AL., *FINANCIAL SECTOR DISCUSSION PAPER NO. 7, E-FINANCE IN EMERGING MARKETS: IS LEAPFROGGING POSSIBLE?* 12 (2001) (discussing the sharp increase in cellular and internet connectivity in the 1990s, and arguing that “new technologies not only allow countries to leapfrog in connectivity, they also open new channels for delivering . . . services”), available at http://www1.worldbank.org/finance/assets/images/E-Finance_ii.pdf (last visited Apr. 10, 2008) (“Mobile phones have made telecommunications available even to the world’s poor.”); *Internet Links Boost Wealth*, BUSINESS DAY (South Africa), Sept. 6, 2006, available at <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=2213498> (“[The] WiMAX wireless standard [could be] a viable technology to drive widespread internet connectivity in SA and the rest of Africa. . . . A single WiMAX access point can be used to service an entire community . . .”).

frastructure.¹⁷⁹ However, analysis of active projects reveals that MIGA leads the other agencies in its exposure in the sector; it currently supports nine active ICT projects, accounting for US\$517 million of its exposure, 9.5% of its total.¹⁸⁰ MIGA guaranteed a total of two new projects in 2007.¹⁸¹ The larger of the two was a US\$74.5 million guaranty for a comprehensive state-of-the-art telecommunications network in Afghanistan, providing a digital GSM cellular network, internet, satellite services, and public pay phones to a country with a severe lack of telecommunications infrastructure.¹⁸² It has a growing customer base of 400,000 and the network is expected to open many doors to private sector development by removing a key restraint on business.¹⁸³

IFC's exposure in the telecommunications sector totaled US\$1.44 billion in 2007, a 40% increase over 2006, and accounting for 5% of its total exposure.¹⁸⁴ IFC has focused on developing mobile communications throughout the developing world, with significant projects in Haiti, Democratic Republic of the Congo, Madagascar, Malawi, Sierra Leone, and Uganda.¹⁸⁵ In the period of 1996-2006, IFC's investments helped create 93 million phone connections, and since 2000, 17,500 new jobs were created in IT and media as a result of IFC projects.¹⁸⁶ The agency's investments in mobile and cellular communications sector show how developing countries can take advantage of the

179. See 2007 MIGA ANN. REP. 12 (including "telecommunications" as a subcategory of infrastructure).

180. See MIGA, Projects, http://www.miga.org/projects/index_sv.cfm?srch=s§or=12&dispset=all&sortorder=asc&dmode=col&row=1&erow=all (listing all active, inactive, and proposed MIGA telecommunications projects; figure compiled by author from project data).

181. See 2007 MIGA ANN. REP. 40-63 (figure compiled by author).

182. See *id.* at 40 (describing the Areeba Afghanistan LLC project, working with guarantee holder MTN Group Limited, which will "provide state-of-the-art telecommunications services to clients throughout [Afghanistan]. The network launched in 2006 and covered 13 provinces at the end of 2006. The [network's] subscriber base of 400,000 is growing rapidly. . . . The project involves the installation, operation and maintenance of a 100 percent digital GSM technology network, wireless cell phone, Internet, and satellite services, as well as public pay phones.").

183. *Id.*

184. 2007 IFC ANN. REP. 54.

185. See *id.* at 55 (describing mobile and cellular projects in Haiti, Democratic Republic of Congo, Madagascar, Malawi, Sierra Leone, and Uganda).

186. See *id.* ("Since 2000, investments in the IT and media sectors have helped create 17,500 jobs, most of them highly skilled and well-paying.").

leapfrogging phenomenon. Further, the agency notes that around 10% of its clients are prepaying loans, a strong indicator of success, and a demonstration of the high demand for ICT services.¹⁸⁷

In terms of ICT investment, OPIC lags far behind the other agencies. Its exposure in the ICT sector is US\$269 million dollars, just 2% of its total.¹⁸⁸ There were seven projects across all regions in 2006;¹⁸⁹ the largest project by far was a cellular communications network expansion in Bangladesh, which was issued US\$15 million in finance, accounting for over half of the US\$27 million allocated that year.¹⁹⁰ Nowhere in the 2006 annual report does OPIC mention ICT or telecommunications, and it is clearly not a focus for the agency.¹⁹¹ Given the importance of the sector for development and new trends in global business, OPIC should work to increase its portfolio in the industry.

CONCLUSION

This Report has analyzed the regional and sectoral activities of IFC, MIGA, and OPIC, and evaluated those activities in light of the concerns of the ILD. The financing, insurance, and technical support of all three agencies play a major role in encouraging vital FDI, and in turn are essential elements of the overall development picture. Given their key role, the agencies have an elevated duty to adhere to and promote the norms of the ILD. This Report has provided evidence that the agencies are failing to do so effectively—there is a gap in what the agencies say and what they do, and the agencies consistently focus their activities in regions and sectors that less directly implicate their human development agendas. There is much room for improvement.

OPIC, MIGA, and IFC serve two important roles: they make the developing world a less risky place for foreign investors and

187. *See id.* (“Around 10 percent of our clients are prepaying our loans, a good indicator that we can move toward riskier investments in less developed markets, where we can make the biggest difference.”).

188. OPIC, *supra* note 59 (figure compiled by author, data contained in Appendix 1).

189. *See* 2006 OPIC ANN. REP. 30-35 (figure compiled by author, summing number of new ICT projects listed in Annual Report).

190. *See id.* at 31 (describing a \$15 million loan to Citigroup Corporate and Investment Bank, working with Pacific Bangladesh Telecom Limited for cellular telephone network expansion).

191. *See generally* 2006 OPIC ANN. REP.

in doing so allow economic development to occur where conditions would otherwise prevent it. The Report has argued that, in light of the norms of the ILD, it is the latter task which is more important, and the one to which all three have insufficiently attended. In order to maximize impact in the developing world and to serve the human development norms that are at the core of each agency's mission, OPIC, MIGA, and IFC must focus more directly on priority sectors in priority regions, and work much more directly to help foreign direct investors to do good while doing well.

