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Recommended Citation

Lise Johnson, *Addressing Climate Change Mitigation and Adaptation Through Insurance for Overseas Investments: The Example of the U.S. Overseas Private Investment Corporation*, (2012).

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*Addressing Climate Change
Mitigation and Adaptation through
Insurance for Overseas Investments:
The example of the U.S. Overseas
Private Investment Corporation
(OPIC)*

Lise Johnson

May 2012



**TRADE INVESTMENT
& CLIMATE CHANGE**

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Addressing Climate Change Mitigation and Adaptation through Insurance for Overseas Investments: The example of the U.S. Overseas Private Investment Corporation (OPIC)

Lise Johnson

This text benefitted from input and comments from Aaron Cosby, Howard Mann and Nathalie Bernasconi-Osterwalder.

May 2012

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1.0 Introduction

In 2008, the United Nations Framework Convention on Climate Change (UNFCCC) estimated that investments of between US\$540–570 billion in physical assets and other financial flows will be needed to adequately¹ reduce global greenhouse gas (GHG) emissions to combat climate change;² additionally, tens and possibly hundreds of billions of dollars may be necessary to enable countries to adapt to the phenomenon’s challenges.³ Through climate negotiations under the UNFCCC in Copenhagen and Cancun, developed country governments committed to provide developing countries roughly US\$30 billion between 2010 and 2012⁴ and to mobilize approximately US\$100 billion per year by 2020 for climate change activities.⁵ Due to those high costs, and the relatively low sums governments are willing and able to directly provide for mitigation and adaptation, much of that funding for climate change-related efforts will have to come from the private sector.⁶ Timely mobilization of that capital will require coordination between the public and private sector to “scale up, shift and optimize” investment and financial flows contributing to climate change mitigation and adaptation.⁷ Governments must therefore adopt policies and implement tools furthering that coordination.

One target for policy-makers seeking to catalyze and encourage increased private sector funding of emissions reductions and adaptation efforts is foreign direct investment (FDI). Facilitated by increasing liberalization of relevant rules, encouraged by host and home country measures to promote FDI,⁸ and driven by firms’ needs to maintain and

¹ By “adequately” this paper refers to the reduction amount used by the UNFCCC in its cost analysis, which is reducing GHG emissions by 25 per cent below 2000 levels by 2030. This is the minimum estimated to be necessary by the Intergovernmental Panel on Climate Change in its Fourth Assessment Report. (UNFCCC, *Investment and Financial Flows to Address Climate Change: An Update*, FCCC/TP/2008/7 [Nov. 26, 2008], at paras. 16–17, 60.)

² *Id.*

³ *Id.* at para. 6. See also, e.g., Canadian National Roundtable on the Environment and the Economy, *Paying the Price: The Economic Impacts of Climate Change for Canada* (Canada, 2011) which estimated that the costs of climate change could escalate from roughly CAD\$5 billion per year in 2020 to between CAD\$21 billion and CAD\$43 billion per year by the 2050s).

⁴ Copenhagen Accord (Decision 2, CP15, para. 8) (“The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching US\$30 billion for the period 2010–2012 with balanced allocation between adaptation and mitigation.”). See also, *Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (CP17, paras. 120–125) (affirming and calling for further work on implementing those commitments).

⁵ Cancun Agreements (Decision 1, CP16, para. 98) (“[D]eveloped country Parties commit, in the context of meaningful mitigation actions and transparency on implementation, to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing countries”). See also, *Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (CP17, paras. 120–125) (affirming and calling for further work on implementing those commitments).

⁶ See, e.g., OECD, *Financing Climate Change Action* (2011, December), available at <http://www.oecd.org/dataoecd/18/35/49096643.pdf>; World Bank et al., *Mobilising Climate Finance* (2011, October); see also Copenhagen Accord (Decision 2, CP15, para. 8) & Cancun Agreements (Decision 1, CP16, para. 98).

⁷ UNFCCC, *Investment and Financial Flows to Address Climate Change: An Update*, FCCC/TP/2008/7 [Nov. 26, 2008], at para. 18. See also OECD, *Financing Climate Change Action*.

⁸ The world has seen an increased liberalization of rules governing FDI, facilitating cross-border flows of funds. (See, e.g., UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (Geneva, 2008) (hereinafter “UNCTAD, WIR 2008”), at pp. 11–12). Although developed and developing countries both still impose some restrictions on FDI for national security or other domestic policy goals, limiting FDI, for example, in certain sectors and/or by certain investors, in general, governments have over the past several decades been shaping their laws so as to create more favourable climates for foreign investors. *Id.* In addition to opening their domestic markets to FDI, countries are also taking *affirmative* steps to attract increased inflows of foreign funds: They are entering into growing numbers of bilateral and multilateral investment treaties (collectively referred to herein as *international investment agreements* or IIAs) to encourage FDI by granting foreign investors certain substantive and procedural rights beyond those accorded to domestic firms; they are offering foreign investors incentives and subsidies; and they are dedicating increased attention and resources to empowering domestic investment promotion agencies (IPAs) to market their comparative advantages and target certain foreign investors. See, e.g., Edna Sussman, *The Energy Charter Treaty’s Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development*, 14 ILSA J. INT’L & COMP. L., 391, 401–402 (2008); see also UNCTAD, WIR 2008, at p. 8 (“The number of international investment agreements (IIAs) continued to grow, reaching a total of almost 5,600 at the end of 2007. There were 2,608 bilateral investment treaties (BITs), 2,730 double taxation treaties (DTTs) and 254 free trade agreements (FTAs) and economic cooperation arrangements containing investment provisions.”).

enhance their competitiveness in an increasingly globalized world economy, FDI flows have multiplied rapidly over the last several decades, rising from roughly US\$13 billion in 1970 to reach an all-time high of US\$1.97 trillion in 2007, prior to the economic crisis.⁹ Flows hovered around US\$1.24 trillion in 2010, but are expected to rebound to US\$1.9 trillion in 2013.¹⁰ While developed countries received the vast majority of FDI inflows, FDI into developing countries (including least developed countries (LDCs)) reached record highs of US\$500 billion (and US\$13 billion), respectively.¹¹

Through the projects it finances, FDI has contributed to GHG emissions. Multinational enterprises (MNEs), for example, cause emission of GHGs when they manufacture products, fertilize, grow and process agricultural goods, extract and ship raw materials to manufacturing facilities, and transport intermediate and final products to markets; further, MNEs investing in services and infrastructure affect GHG emissions when undertaking such activities as designing and operating energy projects, waste treatment facilities, commercial properties, and transportation networks.¹² Yet in addition to having the potential to exacerbate the scope of the climate change problem, FDI also offers significant and important potential to contribute to mitigating GHG emissions and enabling communities to adapt to the challenges resulting from climate change by, among other things, facilitating the transfer of clean technology.

The current challenge for governments is thus to develop and implement policies to *prevent* FDI from exacerbating the challenges of climate change, and to *maximize* the contributions that vast source of capital makes to providing mitigation and adaptation solutions.¹³ This could mean, for example, developing policies in the energy sector that help channel investment away from projects using fossil fuels and toward those using renewable energy sources. There are myriad policy options available to countries to help them mobilize and harness FDI to achieve those objectives, and to do so while furthering broader sustainable development goals. Broadly, these policies include those that can be enacted unilaterally, or that depend on multilateral action; that are implemented by home countries or host countries; that are based on the provision of incentives or subsidies to encourage certain behavior by private actors, or that impose penalties or mandatory requirements.

Importantly, many of these policies on FDI can perform multiple functions, advancing broader development goals while also helping countries address the challenges of climate change mitigation and adaptation. Many countries have various strategies in place for encouraging their individuals and firms to invest abroad. Driven by an understanding that investment abroad may increase the competitiveness of the home state's businesses, these home states are known to use various policy tools to smooth the road for their investors to establish a foreign presence. Similarly, many states have also devised and implemented strategies for attempting to draw FDI into their territories. Encouraged by the possibility that FDI may bring capital, jobs, and new technologies, and may have broad positive spillover effects in their territories, countries have employed a wide range of tactics, such as providing information about investment opportunities, offering incentives and improving their infrastructure in order to position themselves as attractive places to do business.

⁹ See UNCTAD, (2011) *World Investment Report 2011: Non-Equity Modes of International Production and Development*, at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² These activities are significant sources of GHG emissions. According to the Intergovernmental Panel on Climate Change (IPCC), in 2004, industry accounted for an estimated 19 per cent of GHG emissions, agriculture 14 per cent, transport 13 per cent, and energy supply 26 per cent. Remaining contributors included gases released from land-use change, waste, and residential, commercial and service sectors. Intergovernmental Panel on Climate Change (IPCC), *Assessment Report, Working Group III* (adopted at IPCC Plenary XXVII (Valencia, Spain, Nov. 12-17, 2007), at 27.

¹³ *Mitigation* as used in this paper refers to action to reduce the sources or increase the sinks of GHGs. *Adaptation* refers to action to adapt to the impacts of climate change.

At present, many of these domestic policies to encourage outward or inward FDI do not expressly address matters relating to climate change. But that is changing. Whether driven by considerations of competitiveness, domestic legal or political demands, financing or other commitments under international treaties, or other factors, governments are increasingly integrating climate change-related considerations into their general policies on FDI. This is a vital development, and one worthy of encouragement.

In recognition of the need for prompt and serious action by governments to address the threats and challenges of climate change, and the importance of—and opportunities for—maximizing FDI’s contributions to mitigation and adaptation efforts, this paper describes some of the steps taken by one government entity, the United States Overseas Private Investment Corporation (OPIC), to merge climate change issues with OPIC’s broader aims of promoting outward investment. OPIC has developed its own policies, and drawn on those of other entities such as the International Finance Corporation (IFC), in order to increase and channel FDI to mitigate GHG emissions and promote adaptation.

This paper profiles OPIC to illustrate the connections between government policy, investment and climate change. More importantly, it does so because OPIC may be a useful model for other institutions and agencies that play similar roles in catalyzing FDI.

While not flawless from a strictly climate change perspective, OPIC’s measures nevertheless exemplify strategies policy-makers in other countries and international organizations can refine and employ to maximize synergies between their efforts to promote FDI and address climate change.

Structurally, this paper begins in Part Two by providing a brief overview of OPIC and its activities. In addition to laying a foundation for the section that follows, Part Two’s description of OPIC’s mission and functions can help policy-makers to identify analogous entities or institutions that may similarly be suitable for integration of climate change issues. In Part Three, this paper covers OPIC’s role relative to climate change. It begins by highlighting the overarching connections between the foreign investment that OPIC is meant to catalyze and issues of climate change mitigation and adaptation. It then provides a short background on the development of OPIC’s environmental and climate change-specific policies. Finally, Part Three focuses on the content of OPIC’s current policies relating to climate change, which were publicized in a policy statement it issued in 2010. The paper concludes in Part Four by recapping OPIC’s actions on climate change and suggesting that other international financial institutions—governmental, intergovernmental, and even private—use these policies as a platform upon which to base their own climate change strategies.

2.0 *Background on OPIC and Its Activities*

OPIC is a self-sustaining government corporation established in 1971 under the Foreign Assistance Act, the U.S.’s umbrella legislation governing its foreign assistance policies and programs.¹⁴ It aims to facilitate U.S. private investment in developing countries and emerging markets, complementing rather than replace the private sector in mobilizing capital. It seeks to support projects that the private sector otherwise would not. To fulfill its role of catalyzing U.S. private investment abroad, OPIC provides political risk insurance, investment guarantees, and loans to projects involving significant equity and/or management participation by US businesses. OPIC also provides loans to qualifying privately owned and managed investment funds that make direct equity and equity-related investments in emerging markets.¹⁵ In each fund, OPIC’s financing generally amounts to one-third of the fund’s total capital.

¹⁴ Foreign Assistance Act of 1961, as amended, 22 USC 2151 et seq.

¹⁵ OPIC provides a list of the funds it participates in on its website, www.opic.gov.

Through those means, OPIC supports activities in a variety of sectors. In its 2009 fiscal year, it provided assistance to 117 new projects. Half of the projects were in financial services. Projects in manufacturing and other services each accounted for 13 per cent of the new commitments. Projects in housing and construction, and minerals and energy followed, with each of the two groups representing 8 per cent of OPIC's new projects. The remainder of the projects were in communications (4 per cent), agriculture (2 per cent) and tourism (2 per cent).

A number of other countries have government entities that, like OPIC, provide investment guarantees to encourage individuals and firms to invest overseas. These countries include Australia, Austria, Belgium, Canada, China, France, Germany, Italy, India, Korea, Netherlands, South Africa, Turkey and the United Kingdom. There is also an intergovernmental analogue, the Multilateral Investment Guarantee Agency. Further, OPIC's more general role in leveraging public finance to spur private investment is one that may be relevant to an even broader set of government agencies and institutions worldwide.

3.0 *OPIC and Climate Change*

The connections between climate change and OPIC's role in supporting FDI are pervasive, complex and multi-faceted. They can, however, be grouped under three broad themes.

Theme One: Simply put, private sector funding is needed to meet the vast costs of mitigating and adapting to climate change. Government entities like OPIC that can mobilize, support and direct private sector funding are therefore crucial to closing existing financing gaps.

Theme Two: FDI can both exacerbate and mitigate global climate change. FDI has the potential to increase the extent of global climate change by, for example, funding projects that produce GHG emissions (e.g., construction of a new coal-fired power plant) or remove GHG sinks (e.g., clearing rainforests for agriculture). FDI can also indirectly lead to increased GHG emissions because FDI is seen as a driver of economic growth and development which, in turn, tend to lead to greater energy use, fossil fuel consumption and GHG emissions. On the other hand, because FDI is a key mechanism for enabling the international transfer of technologies, it has the potential to help reduce global GHG emissions by fostering the spread of clean and more efficient practices. FDI in certain projects such as renewable energy generation and efficient transportation networks can help reduce GHG emissions below what they would be under "business as usual" scenarios.

Theme Three: FDI-funded projects that take future climate change impacts into account can help communities, countries, and the investments themselves become less vulnerable to those impacts. FDI-funded projects that ignore future climate change impacts not only risk increasing vulnerability of the host community, but also risk undermining their own financial sustainability.¹⁶ If projections regarding the impacts of climate change are taken into account by foreign investors when making their investment decisions, those decisions can build adaptation concerns and strategies into their investment plans, reducing the investments' exposure to climate-related risks. If, however, potential impacts of climate change on an investment project are not taken into account, the resulting project may be unduly economically and/or physically vulnerable to the effects of climate change; beach hotel development in zones prone to

¹⁶ Simone Gigli & Shardul Agrawala (OECD, 2007). *Stocktaking of Progress on Integrating Adaptation to Climate Change Into Development Co-operation Activities* [hereinafter *Stocktaking on Adaptation*].

sea-level rise and increased storm activity, for example, would be ill-advised. The investors as well as the host country and community may be forced to suffer the consequences.¹⁷

With these three themes in mind, it becomes easy to see how the activities of OPIC supporting investments in energy, minerals, housing, construction, agriculture, tourism, and other sectors can impact and be impacted by climate change. As is described below, OPIC has begun addressing some of those relationships.

3.1 Development of OPIC’s Environmental and Climate Change-Related Policies

3.1.1 General Environmental Policies

As a development corporation created and governed by the Foreign Assistance Act, OPIC is to respect and further the five principle goals of U.S. development cooperation:

- The alleviation of the worst physical manifestation of poverty among the world’s poor majority.
- The promotion of conditions enabling developing countries to achieve self-sustaining economic growth with equitable distribution of benefits.
- The encouragement of development processes in which individual civil and economic rights are respected and enhanced.
- The integration of developing countries into an open and equitable international economic system.
- The promotion of good governance through combating corruption and improving transparency and accountability.¹⁸

Layered on top of that broad guidance are provisions in various laws, executive orders, judicial decisions, and court settlements that further shape OPICs development policies and practices.¹⁹ These guidelines and authorities aim to help ensure OPIC’s assistance benefits host countries, and does not cause unforeseen and/or undue harms to the environment, health, or welfare.

In 1999, OPIC compiled an *Environmental Handbook* to consolidate and explain its implementation of the various directions it had been given and the policies it had adopted using its own discretion that were relevant to its environmental and social performance. OPIC formally issued a revised *Environmental Handbook* in 2004, with many of the changes relating to updated policies on forest management and large dams.²⁰

¹⁷ As Gigli and Agrawala reported in their paper for the OECD, “[i]n a review of the vulnerability of the World Bank project portfolio (sampling projects from FY03 to FY06), it was estimated that 55% of the projects are sensitive to climate risks and roughly 25% are at significant risk.” *Stocktaking on Adaptation*, *supra* note 15, at 26. See also *id.* at 27 (“An OECD analysis of official aid flows ... across all donors into six developing countries indicates that a significant portion of this aid is directed at activities potentially affected by climate risks, including climate change.”); *id.* at 39 (describing a study by the Asian Development Bank finding that “if ‘climate proofing’ is undertaken at the design stage of infrastructure projects, it is possible to avoid most of the damage costs attributable to climate change”).

¹⁸ U.S. Foreign Assistance Act, section 101.

¹⁹ See, e.g., 21 USC 2191(3); 22 USC 2197(m); Executive Order 12114 (44 FR 1957), “Environmental Effects Abroad of Major Federal Actions,” Aug. 31, 1979; Executive Order 13514, “Federal Leadership in Environmental, Energy and Economic Performance,” October 5, 2009.

²⁰ See *Environmental Handbook* (2004).

In 2010, OPIC replaced the 2004 *Environmental Handbook* with a new “Environmental and Social Policy Statement.” The 2010 text incorporates substantial revisions to the previous handbook, strengthening many provisions, codifying commitments and policies on human rights, labour, and climate change, and incorporating the Performance Standards mandated by the IFC.

A fundamental component of OPIC’s environmental and related policies is OPIC’s system of screening and categorizing projects. More specifically, in order to assess and address potential environmental and social impacts, OPIC screens all projects and categorizes them as one of five types (categorically prohibited, A, B, C, or D). Categorically prohibited projects are projects that OPIC will not support.²¹ Projects not categorically barred are identified as Category A, B, C, or D projects, with each category being subject to different requirements regarding documentation, disclosure, consultation, reporting, and monitoring. OPIC classifies the projects based on (1) the proposed project’s potential environmental and social risks, (2) the applicant’s willingness and ability to manage and mitigate those risks, and (3) the potential role(s) of third parties in impacting the risks and outcomes of the project.²²

Category A projects are those that pose the greatest potential adverse environmental and/or social impacts. An appendix to the Statement contains an indicative list of the types of projects falling within this category, including projects emitting high levels of pollutants into the air, water, or soil, and projects that are in locations, industries or sectors plagued with a history of labour and human rights issues.²³ Applicants seeking OPIC support for Category A projects must prepare full environmental and social impact assessments as a condition of receiving OPIC support.²⁴

The Statement explains that “Category B projects are likely to have limited adverse environmental and/or social impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures.”²⁵ The Statement cites “small to medium scale housing developments in urban areas, restaurants, and light manufacturing” as examples of Category B projects.²⁶ These projects remain subject to environmental and social assessment requirements, but are not required to prepare the full environmental and social impact assessments that are mandated for Category A projects.

Category C projects are those that are predicted to have minimal or no adverse environmental and/or social impacts, and may include such projects as investments in financial services and data processing.²⁷

Category D projects represent OPIC’s initial commitments to provide guarantees to financial intermediaries which, in turn, will provide support to projects (deemed “Subprojects”) in Categories A, B, or C.²⁸ The fact that OPIC’s support of Subprojects is channeled through a financial intermediary does not mean, however, that the Subprojects are exempted from the Statement’s guidelines and requirements. OPIC continues to screen all Subprojects and subject them to the “full scope of OPIC’s environmental and social assessment process,” and then provides its prior written

²¹ Environmental and Policy Statement [hereinafter referred to as the “Statement”], Appendix B.

²² *Id.*, section 2.5

²³ *Id.* Appendix A

²⁴ Environmental and social impact assessments identify potential environmental and social impacts, describe and evaluate alternatives and options for avoiding and mitigating those impacts, provide for public review and comment, and facilitate the selection of optimal designs. They are a tool for integrating environmental considerations into the planning phase of projects, and, under state and federal laws, are mandated for certain projects that require government approval and support.

²⁵ Statement, section 2.6.

²⁶ *Id.*, section 2.6.

²⁷ *Id.*, section 2.6.

²⁸ *OPIC Annual Policy Report 2009*, at 14.

consent to support the Subproject. OPIC may, however, delegate its environmental and social review authority to financial intermediaries in certain circumstances. These are when OPIC determines that (1) the financial intermediary's prospective subprojects are all likely to fall into Category C, and (2) the financial intermediary has committed not to invest in (i) categorically prohibited activities, (ii) Category A projects, or (iii) activities with heightened potential to violate labour rights.²⁹

3.1.2 Development of OPIC's Climate Change-Specific Policies

OPIC first formally integrated policies on climate change in 1998. That year, following consultation with stakeholders, it began tracking and reporting the GHG emissions of the power sector projects it supported.³⁰

OPIC's 1999 *Environmental Handbook* contained a section on climate change which described those practices. OPIC explained that it was tracking and disclosing data regarding aggregate annual GHG emissions from its power sector projects and noted that it would expand its efforts to track and report GHG emissions from other projects "to the extent an appropriate framework [was] available."³¹ OPIC also mentioned its other climate change-related efforts. It stated that it would provide customized pricing to projects intended to reduce global GHG emissions, and that it would "continually strive to make its portfolio more climate friendly by proactively seeking renewable energy projects and ... seeking to harmonize its approach to climate change issues with that of other U.S. Government entities." OPIC's 2004 *Environmental Handbook* copied the text from the 1999 version.

In 2002, two non-governmental organizations and a number of cities filed suit against OPIC, alleging that OPIC violated U.S. law by failing to adequately take climate change-related considerations into account in its actions.³² The plaintiffs in that lawsuit, *Friends of the Earth, et al. v. Spinelli, et al.*, argued that OPIC breached its legal duties by not preparing environmental assessments to determine whether its **programs** and the **individual projects** it supported would have significant effects on the human environment in the United States due to their impacts on climate change. The plaintiffs requested the court grant various claims for relief, including an order requiring OPIC to prepare programmatic environmental assessments of its support of energy projects and project-specific environmental assessments for each of its fossil fuel-related projects, including fossil fuel extraction projects and pipelines.

In 2007, while the *Friends of the Earth* lawsuit was pending, OPIC announced a GHG Initiative involving efforts to assess and reduce GHG emissions of projects in its portfolio. OPIC committed:

- To establish a transparent methodology for accounting and reporting of GHG emissions from major emitters; and
- To establish an annual emissions cap for all new GHG emissions in OPIC-supported projects, setting the cap at emissions from projects OPIC committed to in fiscal year 2007. The cap was predicted to reduce emissions from projects in OPIC's lending portfolio by 20 per cent over 10 years.

²⁹ Statement, sections 3.30 & 3.31.

³⁰ See *Environmental Handbook* (2004), at 10.

³¹ *Environmental Handbook* (1999), at 22.

³² *Friends of the Earth, Inc., et al. v. Spinelli, et al.*, Civ. No. 02-4106, N.D. Cal. Greenpeace, Friends of the Earth, and the city of Boulder, Colorado, were the original plaintiffs. California cities of Arcata, Santa Monica and Oakland later joined the suit as plaintiffs.

As part of its GHG initiative, OPIC also committed to promote and scale-up investments in energy efficiency, renewable energy, and clean technology projects.

In 2009, the plaintiffs and OPIC reached a settlement agreement in the *Friends of the Earth* case. The settlement agreement imposed five main obligations on OPIC. First, that OPIC would automatically classify projects emitting more than 100,000 (short) tons (91,000 metric tonnes) of CO₂ equivalents per year as Category A projects requiring environmental and social impact assessments. Second, that OPIC would annually publicly report the GHG emissions from projects in its active portfolio that exceeded that same emissions threshold (i.e., that emitted more than 100,000 (short) tons per year). Third, that for a 10-year period, OPIC would increase its support of projects that used, developed or otherwise promoted the use of renewable energy through one or more specific methods, including establishment of a fund of at least US\$250 million for projects that included renewable energy projects. Fourth, that it would be OPIC policy to reduce the GHG emissions from projects emitting more than 100,000 (short) tons of CO₂ equivalent per year by 20 per cent over 10 years. And fifth, that OPIC would take steps to revise its *Environmental Handbook* to include requirements on energy efficiency.

Later that same year, the U.S. Congress tightened some of those requirements and imposed additional obligations on OPIC. It passed legislation requiring OPIC to issue a report “highlighting its substantial commitment to invest in renewable and other clean energy technologies and plans to significantly reduce greenhouse gas emissions from its portfolio.”³³ It also directed OPIC to implement a “revised climate change mitigation plan to reduce greenhouse gas emissions associated with projects and sub-projects in the agency’s portfolio as of June 30, 2008 by at least 30 percent over a 10-year period and by at least 50 percent over a 15-year period.”³⁴

OPIC addressed those congressional requirements, aspects of the *Friends of the Earth* settlement, and other directives and practices related to climate change and renewable energy in conjunction with the new Environmental and Social Policy Statement (the “Statement”) it issued in 2010.

3.2 The 2010 Statement’s Main Provisions on Climate Change

Section 8 of OPIC’s Statement outlines the scope, objectives and requirements of its policies on climate change and renewable energy. It explains that the provisions in Section 8 apply to “all projects supported through OPIC insurance, reinsurance, direct loans, or investment guaranties, including through financial intermediaries.”³⁵ It is therefore comprehensive in scope, even covering investments made by OPIC through the investment funds it supports.

The Statement identifies four main aims: (1) to reduce the GHG emissions of OPIC-supported projects; (2) to promote energy efficiency and conservation; (3) to promote low and no-carbon fuels and technologies; and (4) to encourage carbon sequestration through land use and forestry practices.³⁶ It then outlines specific policies and requirements relevant to meeting those objectives. The Statement also contains a number of supporting provisions relating to collection and dissemination of information regarding GHG emissions, verification and monitoring of data, and enforcement of the policies.

³³ Consolidated Appropriations Act, 2010, Public Law 111-117, Section 7079(b).

³⁴ *Id.*

³⁵ Section 8.1.

³⁶ Statement, section 8.0.

3.2.1 Reducing Direct GHG Emissions of OPIC-Supported Projects

This first goal identified in the Statement—reducing direct emissions of OPIC-supported projects—aims to prevent OPIC and the projects it supports from exacerbating the climate change challenge. The goal is to be accomplished through provisions governing OPIC and provisions governing its beneficiaries. As is described further below, the provisions governing OPIC restrict its ability to back projects that will have high direct GHG emissions. The provisions governing OPIC’s beneficiaries (i.e., the investors and their OPIC-supported projects) require those beneficiaries to take steps to reduce the direct and indirect emissions caused by their projects.

Turning first to OPIC’s obligations, the Statement explains OPIC will reduce direct emissions associated with OPIC supported projects in OPIC’s “active portfolio” by 30 per cent over a 10-year period and 50 per cent over a 15-year period. The “active portfolio” includes all insurance contracts, and all guaranty and direct loans with an outstanding principal balance. The reductions are to be measured against a 2008 baseline. To set the 2008 baseline of emissions, OPIC uses the sum of “direct emissions” from projects that were in OPIC’s active portfolio as of June 30, 2008 and that had direct emissions of more than 25,000 tonnes of CO₂ equivalent per year. “Direct emissions,” as defined in the Statement, are limited to emissions from sources owned or controlled by the project.³⁷ They therefore do not include emissions such as those associated with off-site production of electricity used by the project.³⁸

This policy is stricter than the 2007 GHG Initiative in both goals and scope. In accordance with the 2009 mandate from Congress, it strengthens the target for reduction from 20 per cent over 10 years to 30 per cent over 10 years and 50 per cent over 15 years. It also covers more projects, dropping the threshold for projects subject to the cap from those emitting 100,000 (short) tons of CO₂ equivalents per year to projects emitting 25,000 metric tonnes of CO₂ equivalents per year.

The reductions are primarily to be achieved through application of an annual emissions cap to all new OPIC-supported projects with direct GHG emissions greater than 25,000 tonnes of CO₂ equivalents per year. OPIC has discretion regarding allocation of the cap.³⁹ Projects captured by the policy and subject to the cap (i.e., projects with direct emissions of more than 25,000 metric tonnes of CO₂ equivalents per year) will likely only include large power plants using fossil fuels for generation, and large factories and facilities with a high number of employees.⁴⁰ Most manufacturing facilities, farms and commercial buildings will not be covered.⁴¹

Notably, no project is categorically excluded from receiving government support based on its projected emissions. Nor is there any specific plan for a phase-out of assistance for high-emissions activities. There is of course an *effective* limit to the extent that such activities could be supported, imposed by the need to lower the overall emissions from the project portfolio. But nothing in the Statement *preemptively* precludes OPIC from funding projects now or in the future that will generate significant GHG emissions such as development of coal-fired power plants, or large-scale livestock projects.⁴²

³⁷ The Statement defines “direct emissions” as “[e]missions from sources that are owned or controlled by a project, including stationary combustion emissions, mobile combustion emissions, process emissions and fugitive emissions” (Statement, Appendix D).

³⁸ As a condition of receiving OPIC support, however, applicants are required to quantify the “significant indirect emissions associated with off-site production of electricity used by the Project” (Statement, section 8.13).

³⁹ Statement, section 8.4.

⁴⁰ Freyr Sverrisson, *Size Thresholds for Greenhouse Gas Regulation: Who Would Be Affected by a 25,000-ton CO₂ Emissions Rule?* (Nicholas Institute, Duke University, September 2009).

⁴¹ *Id.*

⁴² The Statement does specify, however, that if an applicant seeks OPIC support for a coal-fired power plant, OPIC will give preference to proposals in which 85 per cent of GHG emissions from the plant will be captured and sequestered. Statement, section 8.4.

Turning to the roles of OPIC's beneficiaries in reducing the GHG emissions of their OPIC-supported projects, the Statement primarily relies on the IFC's Performance Standards to govern project performance. Particularly relevant here is Performance Standard 3, which is expressly incorporated by the Statement and which requires project proponents to evaluate and implement mitigation measures that are technically and financially feasible and cost effective.⁴³

3.2.2 Promoting Energy Efficiency and Conservation

Like OPIC's first goal, OPIC's second goal of promoting energy efficiency and conservation can also help reduce GHG emissions of OPIC-supported projects. As indicated in the Statement, OPIC seems to place the bulk of the burden to accomplish this objective on its beneficiaries.

The Statement's approach to energy efficiency and conservation has two prongs that can cover both new projects and upgrades to existing facilities and operations. The first prong of OPIC's energy efficiency and conservation strategy is to incorporate the IFC's Performance Standard 3 on Pollution Prevention and Abatement.⁴⁴ Performance Standard 3 currently requires that project proponents:

...implement technically and financially feasible and cost effective measures for improving efficiency in [their] consumption of energy, water, as well as other resources and material inputs. Such measures will integrate the principles of cleaner production into product design and production processes with the objective of conserving raw materials, energy and water.⁴⁵

Performance Standard 3 also contains the mandate that applicants "consider alternatives and implement technically and financially feasible and cost-effective options to reduce project-related GHG emissions during the design and operation of the project."⁴⁶

OPIC's Statement explains that "consistent with Performance Standard 3, Applicants must demonstrate that measures to reduce significant, Project-related Greenhouse Gas emissions were evaluated and that technically and financially feasible and cost effective measures were incorporated into the final design of their Project."⁴⁷ Importantly, this provision's reference to "Project-related emissions" indicates that it encompasses both direct and indirect emissions. Further, although the requirement only expressly applies to cases in which the project-related emissions are "significant," the Statement does not define what is "significant" nor suggest that it is confined to any particular threshold. This provision is therefore arguably a broad requirement for project proponents to identify, evaluate, and implement energy efficiency and conservation measures.

The second prong of OPIC's energy efficiency and conservation strategy targets "energy intensive sectors," which are defined in the Statement as projects in "aluminum, brewing, cement, mining, corn refining, forest products, glass, metal casting, motor vehicle manufacturing, oil and natural gas production, petroleum refining, pharmaceuticals, pulp and paper, steel and iron, thermal power."⁴⁸ Pursuant to the Statement, projects in these sectors need to comply with the following requirements as a condition of OPIC support:

⁴³ Statement, section 8.12.

⁴⁴ *Id.*, section 8.11

⁴⁵ Performance Standard 3, para. 6. The original text contains an internal footnote on the meaning of "cost-effectiveness."

⁴⁶ *Id.*, para. 7.

⁴⁷ Statement, section 8.11.

⁴⁸ *Id.*, Appendix D

[P]rojects in Energy Intensive Sectors ... must meet energy efficiency guidelines and benchmarks established by international organizations, or develop and implement an energy management program to achieve these guidelines and benchmarks within a feasible period of time. Energy management programs should be appropriate to the nature and scale of project operations. The program shall document methods to reduce overall energy usage patterns through reduction in energy losses and improvements in energy conversion efficiency. In some projects, process modifications will be required to achieve guidelines and benchmarks.⁴⁹

These provisions targeting the performance of projects are an important complement to OPIC's obligations under the cap. For one, they are broader in scope, as Performance Standard 3 applies to all new projects irrespective of whether they exceed the annual emissions threshold of 25,000 metric tons of CO₂ equivalents. Moreover, they are deeper, in that they cover both direct and indirect emissions. OPIC's policy on energy intensive sectors helps close an important gap by placing special requirements on those sectors to take steps to improve their efficiency and thereby reduce their indirect emissions.

OPIC's Statement does not contain any firm or specific obligations on OPIC itself to promote investments in energy efficiency and conservation.

3.2.3 Promoting Low- and No-Carbon Fuels and Technologies

The Statement includes promotion of low- and no-carbon fuels and technologies as the third of four identified objectives for its climate change and renewable energy polices. This reaffirms the commitments OPIC had made in its GHG Initiative and the *Friends of the Earth Settlement*. The Statement does not include much else on that rather general goal or policies regarding how the government corporation will further it.

OPIC's annual "Policy Reports" to Congress, budget plans, and press releases, however, are sources that describe OPIC's steps to promote low- and no-carbon development.⁵⁰ Examples of some of these steps include (1) establishing in 2008 a Renewable Energy and Sustainable Energy Finance Group to identify and underwrite renewable energy transactions and other sustainable environmental projects; (2) financing funds designed to invest in clean and renewable energy projects; (3) hosting conferences such as the 2010 conference *Renewable Energy & Clean Technology: Access to Investment Opportunities in Emerging Markets*; (4) prioritizing investments in clean energy projects; and (5) exploring new strategies such as providing insurance for risks associated with carbon credits.⁵¹

3.2.4 Encouraging Carbon Sequestration Through Land Use and Forestry Practices

The Statement identifies encouraging carbon sequestration through land use and forestry as one of its four main objectives but does not provide more specific information on that objective or the policies to be used to accomplish it.

OPIC has, however, apparently pursued initiatives to further this goal. In particular, in November 2011, it entered into a political risk insurance contract with Terra Global Capital, LLC for a project in Cambodia to protect forestland in the country and thereby preserve carbon sinks.⁵²

⁴⁹ Statement, section 8.14.

⁵⁰ These reports, plans, and press releases are available from OPIC's website, at www.opic.gov.

⁵¹ See, e.g., *2010 Annual Report*, at 5; *OPIC Annual Policy Report 2009*, at 17.

⁵² OPIC Press Release, OPIC Signs First Insurance Contract for REDD Carbon Reduction Project (Nov. 9, 2011), Retrieved from <http://www.opic.gov/news/press-releases/2009/pr110911b>.

3.2.5 Assessment and Reporting Requirements

A key component of OPIC's climate change-related policies relates to information gathering and dissemination. The Statement's main relevant provisions address three types of assessment and reporting: assessment and reporting (1) by applicants for OPIC support in environmental and social impact assessments; (2) by potential future and existing OPIC beneficiaries regarding their projects' GHG emissions, steps to reduce those emissions, and issues relating to adaptation; and (3) by OPIC to Congress, host countries, and the general public regarding the GHG emissions of projects OPIC supports and efforts to reduce those emissions.

As noted above, one outcome of the *Friends of the Earth* settlement was that OPIC bound itself to automatically categorize projects with direct emissions of GHGs exceeding 100,000 (short) tons of CO₂ equivalents per year as Category A projects required to prepare full environmental and social impact assessments as a condition of receiving OPIC support.⁵³ The Statement codifies that commitment.⁵⁴

There is also a wide range of projects that do not meet that threshold of direct emissions but that may have important implications for climate change and GHG emissions. Some of these will likewise be classified as Category A projects requiring environmental and social impact assessments. These projects may include large cement manufacturing projects; iron and steel smelting operations; industrial chemical manufacturing; construction of motorways, railways, and airports; installation of pipelines and related facilities for large-scale transport of gas, oil, and chemicals; construction or expansion of dams; exploration and development of on- and off-shore oil and gas reserves; large-scale logging; large-scale tourism and retail development; greenfield housing developments; and large-scale agricultural projects.⁵⁵ Comprehensive environmental and social impact assessments for these types of projects will likely have to take into account direct and indirect GHG emissions associated with the projects and identify and evaluate alternatives for their mitigation.⁵⁶ They will also likely have take into account risks to and impacts on the project caused by climate change.⁵⁷

OPIC publishes the environmental and social impact assessments for all Category A projects on its website at least 60 days before it makes a decision on whether to support the project.⁵⁸ Prior to the decision on approval of Category A projects, OPIC also posts its own summaries of the project (including the project's major environmental and social risks and impacts), comments received regarding the project, and responses to those comments.⁵⁹

⁵³ *Friends of the Earth, et al. v. Spinelli, et al., Settlement Agreement*, Feb. 6, 2009, para. 3.

⁵⁴ Statement, Appendix A.

⁵⁵ *Id.*

⁵⁶ IFC Performance Standard 1, which the Statement incorporates and mandates compliance with, requires, for example, environmental assessments to consider relevant risks and impacts including GHG emissions. In the 2006 version, this is reflected in paragraph 6. In the version effective in 2012, it is reflected in paragraph 7. This paragraph states that the assessment process "will consider all relevant environmental and social risks and impacts of the project, including the issues identified in Performance Standards 2 through 8 ... The risks and impacts identification will consider the emissions of greenhouse gases..." Performance Standards 2 through 8 then identify more specific issues relating to direct and indirect emissions. Performance Standard 3, for example, states in paragraph 8 that "[f]or projects that are expected to or currently produce more than 25,000 tonnes of CO₂ equivalent annually, the client will quantify direct emissions from the facilities owned or controlled within the physical project boundary, as well as indirect emissions associated with the off-site production of energy used by the project." See also Statement, sections 3.7, 3.8, 3.11, 4.2 & 4.8.

⁵⁷ See 2012 Performance Standard 1, para. 7 ("The risks and impacts identification process will take into account ... the relevant risks associated with a changing climate..."). See also Statement, sections 3.7, 3.8, 4.2 & 4.8.

⁵⁸ Statement, section 5.5.

⁵⁹ *Id.*, section 5.6.

Projects that do not fall within Category A also have obligations to assess and report their GHG emissions. First, there is a general requirement that Category B projects seeking OPIC support submit an environmental assessment that, among other topics, estimates the project’s direct GHG emissions and describes any planned mitigation.⁶⁰ Second, projects with direct emissions exceeding 25,000 tonnes of CO₂ equivalents per year must qualify and annually report those direct emissions to OPIC.⁶¹ Third, project applicants whose projects emit more than 25,000 tonnes of CO₂ equivalents per year must also quantify significant indirect emissions associated with off-site production of electricity that is used by the project.⁶²

Renewable fuels projects are subject to further requirements for assessment and review. To qualify as “Renewable Fuels” projects under the policy, the fuels must meet specific criteria relating to their source, use, and lifecycle emissions reductions. An applicant for OPIC support must submit an annual audit by an independent third-party in order to demonstrate its compliance with the criteria.⁶³ The auditor’s certification and a summary of its findings are to be published on OPIC’s website.⁶⁴

Finally, Category B projects, like Category A projects, have to assess whether climate change presents any impacts or risks for the projects.⁶⁵

As noted above, OPIC also has assessment and disclosure obligations. For one, it must track and report the GHG emissions of projects in its active portfolio with direct emissions that exceed 25,000 metric tonnes of CO₂ equivalents per year.⁶⁶ It must also annually report on its investments in renewable energy and energy efficiency projects.⁶⁷ More generally, OPIC must report on its implementation of the Statement to the US Congress, and must make the report available to the public on its website.⁶⁸

OPIC must also notify potential host governments of all proposed Category A projects and any other “environmentally sensitive investment.”⁶⁹ The notification must “identify guidelines and other standards of international organizations relating to ... the environment that are applicable to the Project and, to the maximum extent practicable, any restriction related to public health ... that would apply to the project if it were undertaken in the United States.”⁷⁰ These guidelines, standards and restrictions could potentially include emissions and efficiency standards.

3.2.6 Compliance and Enforcement

The Statement includes provisions addressing consequences for the failure of a project or project sponsor to comply with its environmental and other obligations. The remedy chosen depends on whether the breach was material and whether it is curable. For a material breach, OPIC may require it to be cured. If it is not curable, OPIC can exercise contractual remedies, which can include OPIC’s decision to terminate an insurance contract, accelerate loan repayment, or divest from an OPIC-supported investment fund.⁷¹

⁶⁰ Statement, section 3.13.

⁶¹ *Id.*, section 8.13.

⁶² Statement, section 8.13; see also 2012 Performance Standard 3, para. 8.

⁶³ Statement, section 3.29.

⁶⁴ *Id.*, section 5.10.

⁶⁵ 2012 Performance Standard 1, para. 7.

⁶⁶ Statement, section 8.9.

⁶⁷ *Id.*, section 8.10.

⁶⁸ *Id.*, section 5.12.

⁶⁹ Statement, section 5.11. The phrase “environmentally sensitive investment” is not defined.

⁷⁰ Statement, section 5.11.

⁷¹ *Id.*, sections 6.6 & 6.7.

4.0 Ways Forward

Driven by domestic demands, OPIC has integrated climate change-related concerns and strategies into its broader role of facilitating and promoting outward investment in developing countries. The positive synergies that have since arisen from this merger are easy to recognize: put simply, OPIC can help support domestic firms increase their competitiveness in growing areas of renewable energy, energy efficiency, and other climate-friendly business opportunities; developing countries can benefit from investment in less resource-consumptive, less polluting and more sustainable forms of energy production and industry; OPIC can reduce the risk of investments in its portfolio by requiring project developers to give appropriate consideration to the impacts climate change may have on their investments; and the United States government can use OPIC, and the private investment OPIC catalyzes, to meet its financing commitments under international agreements on climate change.⁷²

OPIC's policies on climate change have not been free of criticism. It has been pointed out that OPIC's Statement lacks firm commitments for dedicating OPIC resources to climate-friendly investments or for phasing out support for investments that only further entrench high-emissions modes of production.⁷³ OPIC has also been criticized for not adequately taking into account the indirect emissions of projects when making decisions on eligibility for OPIC support.⁷⁴ To some extent, these concerns may be addressed at the implementation stage if OPIC is able to reorient itself as an entity that has broadly integrated climate change considerations into its operational framework. Whether that happens, however, may be left too dependent on agency discretion.

Nevertheless, despite its weaknesses from the perspective of climate change solutions, overall, OPIC's Statement represents an important step forward in helping meet mitigation and adaptation challenges, and one which could serve as a useful foundation upon which other institutions and agencies—government and private—can build. To be sure, some analogous institutions, such as the Multilateral Investment Guarantee Agency, have begun to address issues of climate change in their activities through imposing performance standards on projects or providing support for clean energy investments, but do not yet go as far as OPIC in mainstreaming climate change considerations in their strategies.

⁷² See, e.g., U.S. Department of State, *Overview of U.S. Fast Start Climate Financing in Fiscal Years 2010 & 2011*, available at <http://www.state.gov/e/oes/climate/faststart/c48618.htm>.

⁷³ See, OPIC, *OPIC Response to Comments on Draft ESPS*, available at http://www.opic.gov/doing-business/investment/environment/policy_revision.

⁷⁴ *Id.*

Published by the International Institute for Sustainable Development.

International Institute for Sustainable Development

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