



2B rue Jules Ferry, 93100 Montreuil, France
Tel. +33 (0)1 48 51 18 90, Fax +33 1 48 51 95 12
Email : facilitator@eca-watch.org

Monitoring and implementing environmental and social mitigation measures

Briefing paper for the Revision of the Common Approaches – August 2006

Prepared by Friends of the Earth France for ECA Watch

Brief overview:

The Common Approaches provide a framework in order to minimize the negative impacts of ECA backed projects on people and their environment. While these mitigation and compensation measures have not proven sufficient to address the harms caused by the projects, they represent the current basic tool identified by the Recommendation.

However, ECAs lack substantial monitoring tools and transparency provisions when dealing with the implementation of environmental and social measures in the field. Setting up standards is not enough. The Common Approaches must ensure that the environmental and social provisions do not remain pure theory and are actually implemented and monitored after approval. Additionally, ECAs should be sharing the results of this environmental and social follow up of the projects they support.

To have an actual impact on the ground, the Common Approaches must be revised and refined to integrate concrete elements with respect to implementation and monitoring.

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Introduction

Environmental standards are used to assess whether a project complies with predefined requirements, thus providing the ECA with tools to decide if it should back a project or not.

If the environmental and social requirements/standards are not initially respected in a project submitted to an ECA, the ECA will:

- Either refuse backing for it
- Or back it with conditions to be complied with before approval or AFTER approval. (See Recommendation, article 13)

This paper deals with the post approval situation, i.e., when a project is approved under the condition that specific measures will address the adverse effects of the project on people and their environment. In other words, the project is identified as unsustainable or untenable from an environmental and social perspective unless it meets strict conditions¹ that must be fulfilled during project implementation.

Article 13. Members should evaluate the information resulting from screening and review, decide whether to request further information, decline or provide official support and, if support is to be provided, whether this should involve conditions to fulfil prior to, or after the final commitment for official support, e.g. mitigation measures, covenants, monitoring requirements.

It is crucial to make sure that the conditions mentioned in Article 13 are actually implemented during the project life to make it a more “acceptable” project. Unless those mitigation/implementation measures are strictly complied with ex-post, the whole ex-ante environmental overview procedure becomes useless.

However, the current Common Approaches lack standards that ensure the implementation of such measures which can raise the environmental and social quality of a project. Even though the monitoring issue is formally mentioned in the text, it is dealt with in a very evasive way:

Article 14. Members should ensure that procedures are in place to monitor, as appropriate, the implementation of projects, to ensure compliance with the conditions of their official support. In the case of non-compliance with the conditions of official support by applicants, the Member should take any action that it deems appropriate in order to restore compliance, in accordance with the terms of the contract for official support.

If we look at other articles of the Recommendation, no detailed provision specifies how ECAs should comply with such a broad statement on implementation and follow-up.

Up to now, many ECAs remain totally opaque about what precisely is done to avoid major harm to the environment. NGOs and affected communities are not really involved in the design of the mitigation/compensation/environmental measures before approval of the project, and after approval, they get very poor or no information regarding implementation of the commitments.

The Common Approaches revision is an opportunity to include stronger standards that would help improve the current situation.

¹ Annex II. Environmental Management Plan describes mitigation, monitoring and institutional measures to be taken during construction and operation to eliminate adverse impacts, offset them, or reduce them to acceptable levels; Article 9 of the text states: The scope of an environmental review for a Category B project may vary from project to project. The review should examine the project's potential negative and positive environmental impacts, including measures to prevent, minimise, mitigate, or compensate for adverse impacts and improve environmental performance.

Important Note:

The survey conducted in 2005 by the OECD on Members' procedures and practices² provides interesting information on respective ECAs tools. However, this document cannot be considered a response to the various problems raised in this paper³ for several reasons:

- The issues dealt with by the survey do not cover the whole range of issues raised in this paper on compliance and monitoring
- The information provided in the survey remain insufficiently detailed compared to our demands
- The information provided in the survey cannot replace the need for Members to clarify all this information through their own public policy documents available to the broad public (which represents the core demand throughout this paper)
- The information provided in the survey demonstrates that Members have no common level playing field on issues of compliance and monitoring. The Common approaches are therefore not an adequate tool to develop common requirements regarding monitoring and compliance.
- The information provided in the survey demonstrates that many issues are often dealt with on a case-by-case basis, which confirms the need for clearer rules set out in advance providing detailed information on how projects are monitored, that would apply to all projects belonging to the same category.

² OECD, Export credits and the environment: review of responses to the revised survey on members' procedures and practices regarding officially supported export credits and the environment, 6 April 2005 .

³ In reference to OECD-civil society dialogue, May 2006. In reaction to the compliance and monitoring issues raised by NGOs, ECG has responded that the survey provided answers to several points raised on compliance. Although the survey brings useful information, it does not solve the problems treated in this paper.

Section I - The need for a Policy that ensures transparent and inclusive design of environmental and social measures

The whole process for the final decision on best suited measures to avoid environmental harms remains opaque and does not provide “third parties” with sufficient space to feed into the process, especially when dealing with projects that are not in category A and therefore not covered by ex-ante transparency. We therefore believe that the measures reflect the point of view of the exporter and fail to reflect affected groups and environmental NGOs' views.

As regards the decision making process for those mitigation, compensation and follow up measures, many questions remain unanswered, such as: how is the decision taken? who decides within the ECA? who may submit proposals?

One of the problems when dealing with Category A projects is that the exporters themselves make the proposal and not the ECA, as the mitigation/compensation measures are included in a specific chapter of the Environmental Impact Assessment (EIA). After this initial proposal by the company, we need to learn more about the role played by the ECA's in the process: Does it suggest additional/alternative measures in most cases? Does it conduct any field work and how does it decide whether field work is needed or not depending on the project? Or is it a desk study based on the report made by the exporter? Is it based on other material such as public consultations results?

The process might be different, depending on the ECA and on the category of the project. All ECAs and all EIAs should provide information on the process and the stages that lead to final identification of best suited environmental and social mitigation measures and explain how the different parties are involved in the process depending on the project category. .

While the sponsor/company seems to be pretty much involved and powerful in the process of selection of mitigation/compensation measures, there seems to be very weak participation of other main stakeholders, i.e., the affected communities, especially in the case of category B projects, where NGOs have no formal basis for submitting proposals and reacting to the suggested measures to criticize them, or for that matter, of judging whether a B project should really be an A project. From a general perspective, ECAs lack procedures that would allow real debate on whether those measures adequately address the negative impacts of the project.

Brief overview of the situation in various ECAs

The implementation of the Common Approaches has not brought substantial changes with regards to the openness of decision making process with respect to mitigation measures.

Many ECAs do not provide an adequate, well defined framework for consulting with NGOs or affected groups on the ground *after* issuance of the EIA, to know whether those groups agree with the environmental and social measures set up to limit the negative impact of the project. The amount of time given for the review remains completely insufficient. And in the case of category B projects, there is no attempt by the ECAs to address the problems caused by the project through a participatory process. Only the exporter and the ECA have input to the selection and mitigation process, and NGOs are only informed of the project *after* approval.

Clear understanding of the process:

We know approximately what standards or safeguards are triggered to decide what the weaknesses of a project are.

Except in the case of specific information requested by NGOs, many ECAs do not post general policy information on their websites, explaining by whom and how the ECA decides which measures are best suited to reduce the negative environmental or social impact of a project. In most cases, it is difficult to understand from outside how the ECA decides which environmental and social measures should condition a project. What we know mainly concerns category A projects, as one section of the EIA is supposed to be dedicated to the environmental and social measures designed by the client to reduce the negative impact. But what happens after this initial proposal from the client itself remains quite opaque for a majority of ECAs. We therefore see two options: either the ECA is not the party deciding on appropriate measures and it only approves proposals made by the client, or the ECA plays an active role in the selection of best suited mitigation measures. In this case, we lack information on the internal decision making process within the ECA.

In France for example, Coface does not clearly explain how the decisions related to the mitigation/compensation measures are taken, nor does Germany publish information on the decision making process in Euler-Hermes related to the selection of mitigation measures.

The situation varies from one ECA to another, and we can see that the UK process seems a bit more readable. Our understanding is that the conditions are proposed by the BPU (Business Principles Unit), which writes a report (that remains confidential) to the Underwriting Committee (whose minutes also remain confidential). The latter needs to approve the proposed conditions.

Those are examples, reflecting the large majority of ECAs that do not provide information on the various steps and protagonists of this decision making process.

Consultation of interested groups in the decision making process:

Most of the ECAs do not actively invite NGOs to give an input in the selection of the most appropriate measures to reduce the impact of the project on the ground, especially for category B projects. However, in the case of category A projects, NGOs are sometimes able to spontaneously submit concrete criticisms on the project and subsequent recommendations to solve the problems, thanks to the ex-ante publication of the EIA.

However, three concerns remain:

- Such a contribution from the NGOs is not an initiative from the ECAs in most cases, and is not included in a formal process. There is therefore no guarantee that the contribution is duly taken into consideration⁴. Up to now, there have been very few cases where the ECA final decision reflects our recommendations.
- The timelines available for submitting comments in the case of category A projects remain too short.
- The ex-ante period for submitting comments is limited to category A projects. We therefore have no such open space in the case of category B projects.

In Germany, the publishing of category A projects mostly takes place just before the final decision when there is very little space for influence left. For highly controversial projects, the critique of the project and proposals to improve it can be presented earlier, but it is unclear whether these recommendations are concretely taken into consideration. Neither do affected groups have a word to say in the selection of compensation and mitigation measures, except for the “consultation process” that *might* take place during the EIA itself. This means that once the EIA is completed, the groups on the ground are not consulted on the measures that are approved by the ECA to reduce the negative impacts of the project on the ground.

⁴ Except in some cases such as the UK, where ECGD can be challenged in court if the input is being ignored.

In France, Coface has never held any consultation allowing NGOs to submit comments on the measures and rather decides on its own.

Here again, the situation varies depending on the country. In the case of the UK, NGOs seem to be allowed to submit comments during this decision making process and have evidence that their remarks have been taken into consideration. Additionally, the affected groups on the ground are consulted directly in some cases by the BPU (who propose the set of conditions). Affected groups can also comment on the EIA and the resettlement action plan.

Section II – The need for a Policy that ensures transparent and planned monitoring of environmental and social measures

Once a project is approved, there are no public monitoring plans and conditions or any other information that would explicitly say what tools or procedures are used by the ECA to check whether or how the conditions put on the project are implemented. Very basic questions such as who is in charge of the monitoring of the environmental and social aspects of the project within the ECA remain unanswered.

What monitoring?

While the Recommendation on the Common Approaches mentions such a duty, and while the ECAs themselves assert that they do monitor the environmental and social aspects of the projects, the ECAs do not explain how they intend to monitor and do not seem to prepare any monitoring plan in advance for each project.

This raises very basic questions such as:

- Who is in charge of this monitoring?
- Does the ECA lead its own environmental and social assessment of the project? In that case, is the review conducted by the employees of the ECA or is the task delegated to external consultants?
- If the ECA relies on an assessment conducted by other actors, how does it make sure that there is no conflict of interest? For example if the exporter or the buyer is the one who provides the assessment report, or if the “independent” consultant is paid by the company. In the case of BTC, the funders place a good deal of emphasis on the monitoring done by the Social and Resettlement Action Plan (SRAP) Panel.⁵ As acknowledged by the UK’s Export Credits Guarantee Department (ECGD), however, the SRAP Expert Panel was set up by BTC Co.⁶ It is also noteworthy that BTC Co can block the release of environmental and social monitoring reports should it disagree with their findings⁷ and that the findings of the SRAP are only made

⁵ . See for example: ECGD, “BPU Review of the Baku-Tbilisi-Ceyhan Pipeline Project”, London, 2003, released to The Corner House under access to information request 13 December 2005, p.35. The review states with respect to concerns raised over consultation on the Resettlement Action Plan in Turkey: “These allegations are refuted by the SRAP Expert Panel who report contains the conclusion that ‘land acquisition activities in Turkey were observed to be carried out in compliance with the Resettlement Action Plan, applicable Turkish laws and World Bank Group Policies.’ This latter includes OD 4.30”.

⁶ . See ECGD, “BPU Review of the Baku-Tbilisi-Ceyhan Pipeline Project”, London, 2003, released to The Corner House under access to information request in December 2005, p.29: “BTC Co, with the encouragement of the Lender Group, has constituted an Expert Panel to monitor the implementation of the RAP – the Social and Resettlement Action Plan (SRAP) Expert Panel.”

⁷ . BTC Environmental and Social Documentation as agreed at Financial Closure, February 2004, Environmental and Social Action Plan, Annex K: Scope of Environmental Consultant Verification Visits During Construction, p.4, http://www.caspiandevlopmentandexport.com/Files/BTC/English/ESAP/ESAP/Content/Annex_K.pdf. “If as a result of the monitoring, (i) the Consultant or the Senior External Finance Parties believe that BTC Co. is in material non-compliance with the ESAP, applicable Environmental Laws or Applicable Lender Environmental and Social Policies and Guidelines, (ii) BTC Co. disagrees with that finding, and (iii) the disagreement cannot be resolved within the 10 working days comment period, then the Consultant’s report will not be publicly released until the disagreement is resolved to the satisfaction of all parties. BTC Co or the Lenders may request that the disagreement be resolved through international arbitration in accordance with the provisions of the Common Terms Agreement for the BTC

public after they have been presented to the BTC board.⁸ In addition, the SRAP's terms of reference specifically state that its main role is *not* to identify areas of compliance and non-compliance but rather to provide practical guidance and troubleshooting advice.⁹ As such, it is questionable whether it should be considered a source of definitive judgement on compliance.

- If the ECA relies on an E&S assessment conducted by another financier of the project, such as a private bank or an international financial institution such as the World Bank, does it require any conditions such as independence of the auditors?

- When are the monitoring steps agreed upon within the ECA?

The preparation of a monitoring programme seems to be an important phase to ensure serious control of the project after approval. At this point, it is unclear when and how ECAs deal with this. A first important step to improve the monitoring is therefore to publish when and who decides how the monitoring activity will be implemented.

- What are the tools and conditions which will ensure good quality of the monitoring?

The ECA should set up in advance the main issues and information that need to be addressed by an environmental and social assessment or by a management plan. This would be a good opportunity to identify the conditions of such assessment: goals, duration of the field work, human resources dedicated to this work, active participation of affected people and NGOs, dates and timelines for conducting E&S assessments, criteria that will determine whether a project no longer needs E&S assessments.

What solutions exist when the conditions and mitigating measures are not effective?

Another weakness is the lack of serious evaluation to establish whether the chosen measures did actually fulfil the goal and contribute to addressing the harms caused by the project.

ECAs should not assume that the primary chosen measures cannot fail. If the assessment of the environmental and social conditions of the project leads to the conclusion that the measures are not adapted or that the impact of the project has been under-estimated, there should be an alternative plan to address the harms caused by the project.

Brief overview of the situation in various ECAs

The implementation of the Common Approaches has not managed to improve the quality and transparency of project monitoring. Most ECAs rely on other actors for the monitoring reports, which means that there is no real commitment on the part of the ECA to check by its own means that the project actually complies with the original conditions under which they have supported it. This confirms the need for ECAs to publish a clear monitoring policy that would explain why, how, by whom, and when the monitoring activity is conducted.

8 . Project financing.”
BTC Environmental and Social Documentation as agreed at Financial Closure, February 2004, Environmental and Social Action Plan, Annex L: SRAP Terms of Reference, Table 5.1 – Summary of SRAP Monitoring Reports for BTC/SCP, External Social and Resettlement Action Plan (SRAP) Monitoring Report, Column 3, p.12,
http://www.caspiandevlopmentandexport.com/Files/BTC/English/ESAP/ESAP/Content/Annex_L.pdf . “Full findings to be made available publicly after presentation to the BTC Co. Board.”

9 . BTC Environmental and Social Documentation as agreed at Financial Closure, February 2004, Environmental and Social Action Plan, Annex L: SRAP Terms of Reference, p.5,
http://www.caspiandevlopmentandexport.com/Files/BTC/English/ESAP/ESAP/Content/Annex_L.pdf . “A management consensus was reached that the RAP monitoring process should be set up to provide practical guidance and troubleshooting advice to the project’s monitoring teams as to how to solve problems that arise during the land acquisition and reinstatement process rather than simply to identify areas of compliance and non-compliance.”

Monitoring policy: Some Examples

In Belgium, there does not seem to be any policy that clearly states how the ECA monitors the environmental and social aspects of projects after approval. It is a rather weak case-by-case approach. In France, Coface does not have a monitoring policy, or at least, does not make it public. It is very difficult to get any understanding of when and how a project is monitored. In the Netherlands, the E&S policy only states how a project is screened before approval, but makes no reference to monitoring activities after approval. What we know is that the clients are required to inform the ECA of any changes in the project and its impacts.

The German ECA has no published policy for the monitoring of environmental and social aspects. However, Euler Hermes provides minimum information in its “guiding principles” that are made public. Whenever a guarantee has been issued under specific environmental and social conditions, Hermes can oblige the exporter to hand in regular monitoring reports on compliance with those conditions. These conditions can be specified in the guaranteeing contract. However, Euler Hermes refers to the German portion and possible influence it takes into consideration before deciding about monitoring requirements. As well it does not publish further regulations specific to the issue of monitoring, e.g. why, how, by who, and when the monitoring activity is conducted.

In the UK, a reference to monitoring is made within the procedures of ECGD, in the Case Impact Analysis Process: “Where the exporter or project developer has agreed to meet certain standards, this will usually be reflected by specific covenants being inserted in the financing arrangements, as the case allows. *A system for monitoring and reporting on compliance with these covenants may also be required*” (emphasis added). As the procedure is a public document, we therefore learn that there is a possibility to have monitoring requirements. But those few statements cannot replace a clear monitoring policy, as the following provisions: “a system for monitoring” and “may be required” are far too insufficient, vague and based on a case-by-case approach.

Even though some ECAs do now informally set up the post approval monitoring as a norm, at least for high impact projects, it remains unclear in the wording of their policies. It would be important to have the various ECAs publishing more information on what is the “*system*” that ensures the monitoring of the projects they back, detailing the steps that are taken along the whole process (when starting, when and why ending, who, how, tools, goals etc.). This would allow a better understanding of the work done by the ECAs and it would also ensure a transparent and formal framework that would be set up in advance and would apply to all projects that have social and environmental impacts.

Quality of the monitoring ensured by the policy:

A monitoring policy should not only inform affected communities and third parties about the process of ensuring compliance with the conditions imposed. It is also an opportunity to set up clear standards such as: requirements for field visits, issuance of E&S reports at precise steps on each monitored project, conditions of independence of those responsible for the monitoring, information release etc.

Very few ECAs seem to have clearly stated standards or terms of reference: In Belgium, as no public policy is dedicated to the monitoring activity, we believe there are no clear standards to ensure good quality of the monitoring activity. No information is provided on whether Euler Hermes has specific terms of reference to guide them in the monitoring exercise. The same problem applies to the UK, as the requirements ensuring the quality of a monitoring are not compiled in any (known) general framework document. Our understanding is that the ECGD can

mention such conditions inside the covenants of the financial arrangements on a case-by-case basis.

It is obvious that the absence of public monitoring policy documents prevents ECAs from sharing common terms of reference to ensure the effectiveness of their monitoring commitments and thus level the playing field with respect to post approval costs.

Monitoring plans:

Each approved project should have its own monitoring plan. Such a document would constitute a helpful tool to allow NGOs and affected communities to progressively follow the steps taken by the ECA during the project life to check implementation of the environmental and social measures.

However, we have hardly ever heard about ECAs producing before (or even after) a formal “monitoring plan” document mentioning explicitly concrete monitoring steps. The Belgian ECA does not have, or make public, any monitoring plan, neither before nor after approval of a project, and would rather rely on the client to publish monitoring reports when possible. On the Dutch side, there is no information on the existence of such a document, which means that even in the event such a document would exist, it is not accessible to the public. The German and the French ECAs do not seem to release any monitoring plan in advance or after approval. In the UK, the BPU prepares a “written report of the case impacts, along with any recommendations for covenants and monitoring”.

Section III – Enabling and enforcing actual implementation of environmental and social measures

The terms, contracts, covenants under which ECAs stipulate their conditions for support should be made available, together with detailed information on how the sponsor has the capacity to implement such measures, and the expected sanctions and mitigation measures if conditions are not met. But prior to this, the ECA should provide clear and complete information on the expected environmental and social standards to be met and the measures taken to ensure they are.

Availability of an ex post list of mitigation measures:

It is most important that once a project is approved, the ECAs make available a formal document in which all the environmental and social measures are listed that are set up as firm conditions of the guarantee. This kind of information is sometimes very difficult to get, and when accessible, seems to be classified under different types of documents, which creates confusion.

In most cases the measures would be found in the Environmental management plan or in other documents referring to the management plan and other provisions. But this information is mainly limited to category A projects.

For the purpose of clarity, what is needed is a document that would list all the conditions without just referring to various other documents, and that would be posted on the website for each project without a need for formal request.

Additionally, there needs to be such a document for category B projects. As an example, Coface releases some information on the mitigation measures on an ex-post basis. It is not comprehensive information since it provides a maximum of ten lines per project, but it gives an idea of what is required in the field to enhance the environmental and social quality of the

project. This information is published through a quarterly on-line document listing all projects backed by Coface, but is not sufficient to allow a timely and independent verification that compliance with conditions is properly monitored.

Even though some ECAs have sometimes released information for specific projects, this does not replace the need for a clear policy where ECAs would commit to make available such a document through their website for all the projects they back.

In other words, there needs to be a single document providing all available information on the environmental and social conditions accompanying funding. The availability of such a document should not be based upon a request for information from NGOs or the affected communities, but rather be automatically ensured through publication on the website of the ECA involved in the project.

Information on the status of those measures:

The following statements are based on the fact that there is a lack of information on how each ECA formally integrates the environmental and social measures into the contractual documents with the exporter, since these documents are not being published.

However, the very little information we do have causes us to believe that environmental and social conditions are not adequately treated as formal and legally binding conditions through real contractual obligations. If the ECAs consider that environmental and social conditions are as binding as the financial provisions, then they should clarify the legal status of the environmental and social conditions accompanying the guarantee. If it is not included in a contractual document, then we need to know which document the ECA and the exporter refer to when they deal with mitigation measures.

NGOs face a lack of transparency when it comes to contractual issues, as it touches commercial confidentiality. To illustrate the ignorance and lack of clarity on this issue, we can compare the Belgian situation, where it seems that the environmental and social conditions would be included in the contractual documents; the Netherlands where NGOs do not have clear understanding of how the mitigation measures are dealt with from a formal perspective because the ECA does not clarify this in its policies; France, where there is no clear information on whether the measures are integrated or not in any contractual document; or Germany, where the possibility of having mitigation measures included in the contractual document is mentioned in the guiding principles, but the contracts are never published. Our understanding is that in the UK, the conditions are included in the contractual documents at least for category A projects.

Facing the lack of compliance :

ECAs sometimes informally explain that they lack control over the companies involved in the project once a project has been approved, that they have no tools to compel compliance with mitigation and compensation measures and that they lack means for pressing non-compliant companies which are in violation of their contractual obligations (assuming of course there are any).

What this means concretely is that the ECA often asks for commitments from the exporter while not having the power to ensure compliance with such conditions.

This is in total contradiction with the current requirements of the Recommendation on the Common Approaches. How can the ECAs get committed for environmental and social sustainability while they do not set up tools to control implementation of their commitments?

☒ A **condition** must remain a condition:

Article 13. Members should (decide...) if support is to be provided, whether this should involve conditions to fulfil prior to, or after the final commitment for official support, e.g. mitigation measures, covenants, monitoring requirements.

The main problem with the current situation in ECAs is that the mitigation/compensation measures are not seriously dealt with as “conditions”, since non compliance does not always block/suspend the backing of the project.

The fact that those conditions are to be implemented **after approval** is the reason sometimes invoked by some ECAs to justify their inability to have any control over them being implemented. This argument is not acceptable. If the condition set up before approval was a payment condition (for example), we believe the ECA would find many ways of pressing to have the condition complied with, even after approval, and even if the condition is to be fulfilled by the buyer and not the direct contractor (the exporter). The fact that these are environmental and social measures and are not always taken seriously seems to be the real reason why the lack of implementation remains unchallenged.

There should be means of pressure and legal constraints imposed by ECAs when backing a project that is potentially harmful to the environment and to the affected communities. The ECA could include a clause in the contract with the exporter insisting that the latter write a clause into the contract signed with the sub-contractor and/or buyers. The non compliance of the buyer should lead to penalties in favour of the exporter. The ECA could then take penalties against the exporter, with whom it has a direct contractual relationship and means of pressure.

Other tools could be useful to ensure compliance with the conditions set up for backing the project, but the absence of contractual relations between the ECA and the final buyer cannot not be a valid argument.

Another tool which the OECD could put in place, that has already been mentioned, , is a blacklist system to register all the buyers that have violated the environmental and social conditions that they committed to in a project, thus denying them future export credits backed by OECD country ECAs.

☒ Restoring compliance?

Article 14. (...) In the case of non-compliance with the conditions of official support by applicants, the Member should take any action that it deems appropriate in order to restore compliance, in accordance with the terms of the contract for official support.

The Recommendation is not very informative about what actions could or should be taken to have the project comply with the terms of the contract for official support. It should therefore provide more detailed information on the various paths that will be used to ensure such implementation.

One solution would be for ECAs to clearly state in their policies that they apply sanctions/penalties against the client in the case of non compliance, explain what kind of sanctions are applied, and clarify that those sanctions will be systematically included in the contractual documents¹⁰.

¹⁰ For example, in the BTC contract, the risk of penalty is mentioned in the contract, including suspension of the loans if the non compliance is not corrected in a certain number of days.

If no compliance mechanism or sanction procedures are organized, the environmental and social measures required by the ECA become nothing but weak requests instead of contractual conditions. In such a case, it is not right to talk about “conditions of official support”, but rather about a voluntary approach by the companies, which has proven many times to be completely inadequate.

🔗 Effective sanctions in case of non compliance?

ECAs should make public what is in their power and procedures as a response when a client fails to comply with conditions. Here again, many of us lack information about what is concretely done by an ECA to address the non compliance and insist that the client actually implement the environmental and social conditions.

In a majority of cases, we could assume that ECAs might be taking sanctions, but there is no clear information on what procedures are followed when facing non compliance, and what kind of sanctions can be taken. ECAs should shift from a case-by-case approach to clear statements in their monitoring and compliance policies to provide the public with a clear understanding of their practices relating to sanctions.

Concrete and interesting information comes from the BTC case, where the violation of the contract requires remedial action from the client within 90 days (or an extra 90 days if the company is diligently engaged in actions reasonably designed to remedy non compliance). This example demonstrates that ECAs such as ECGD, Coface, Ex-Im, SACE or Hermes (all involved in BTC) can set up concrete sanctions in the contractual documents. However, all ECAs should make clear at their policy level that they systematically include sanctions in all projects that require environmental and social conditions.

Additionally, they should provide general information on what procedures are followed when facing non compliance (not in specific contracts but rather in their policies), and provide information on the range of sanctions that can be taken.

Section IV – Sharing monitoring results as a means of ensuring accountability

The implementation of the Common Approaches did not bring any mechanisms or processes which could increase the ECAs accountability efforts.

We lack information on the outcomes of monitoring activities, although basic information on project implementation would be easy to make public at least through the release of environmental and social assessment reports supposedly conducted by ECAs for each project. It is most important to have the ECAs conducting such assessments for each project, on an annual basis, explaining how the mitigation measures have reached their goals, and if not, what needs to be done to improve the situation.

The results of monitoring and any adjustments to the project design should be shared with the affected communities and stakeholders as a means of ensuring accountability

Brief overview of the situation in various ECAs

Outcomes of the monitoring activity:

When a project is a large one involving various international financial actors, one of the ECAs inclinations is to use other organizations' reports. This raises three main concerns:

- We cannot be satisfied with the monitoring report if it comes from institutions whose tools and standards are not considered as most appropriate to ensure environmental and social sustainability of the projects.
- It leaves unresolved the case of projects where there is no wider group of financial actors. In such a case, does it mean that there will be no monitoring at all?
- It leaves unresolved the case of projects where no monitoring activity is required under other institutions standards

As examples, it seems that the Belgian ECA does not produce its own reports and rather relies on the client to publish monitoring reports; in the UK the environmental and social reports seem to be prepared by the lenders' group rather than the ECA on its own; if EulerHermes produces any E&S reports, it is not available to German NGOs; in France it seems that Coface has its own detailed E&S assessment reports, but its effectiveness cannot be evaluated since they remain confidential and only available to the Coface Board, and not to the French taxpayers who provide the funds. In the Nam Theun II project, Coface did not release comprehensive information, but decided, because of high controversy around this project, to issue a two page statement on the results of the E&S assessment report, which is completely inadequate for a project of this size affecting tens of thousands of Laotians.

We believe that whenever an ECA commits to ensure environmental and social conditions are met, it must use its own and adequate means to implement this commitment, including by ensuring independent monitoring work and reports, and not relying entirely on other reports based on other standards and terms of reference. One of the main questions with regard to this is: how can a report conducted by one organization be checking the full and adequate implementation of conditions set up by another institution through specific terms of reference, expectations and contractual documents?

Availability of the E&S assessment reports:

We believe the efforts made by ECAs to ensure better environmental and social sustainability of the projects would be strengthened if NGOs and the affected communities were able to have access to information during the implementation phase of the project. This would allow NGOs and the affected communities to submit comments and recommendations and help the ECA avoid major mistakes.

Up to now, very little information is made available by the ECAs after approval of the project. In the Netherlands for example, no information on any kind of assessment report is released to the public. In the UK, the only E&S reports are the ones available through the lenders' group, but the technical reports remain unreleased except when requested through specific freedom of information regulations. In France, Coface does not make public any E&S assessment report, as those are internal documents directed solely to their Board and not to the larger public; which is in our view contradictory to the wider process among ECAs that aims at strengthening transparency. In Germany as well, there is no publication available for NGOs or the public.

Need for greater transparency

Public access to information such as EIAs becomes useless when the public cannot access information regarding implementation of the environmental and social conditions of the project.

The ECAs often argue that several documents cannot be made available either on the grounds of commercial confidentiality, or because property rights related to the documents, belonging to other actors, leave the ECA unable to force publication. This argument is not acceptable, since the ECA is the one that commits to publish environmental and social information. If necessary, the ECA should get the agreement for free use of all environmental documents as a condition before approval of a project, for instance through a clause in the contract with the exporter. The exporter also has the power to negotiate such a clause in the contract with the buyer.

Another element must be taken into consideration, specific to EU based ECAs. The recent implementation of European Directive on Public Access to Information on Environment in the various EU member states considerably broadened the scope of information available to the public. This regulation, as it is now binding law, does not leave much choice for EU based ECAs, who will have to release environmental information when required by affected or interested groups. This new situation might cause an unlevel playing field amongst OECD Member ECAs. This is why the OECD should broaden those new transparency obligations through the Recommendation to non EU ECAs.

Ensuring accountability of the ECA

By offering official support to a project, the ECA must be considered an active stakeholder and must be seen as approving the project as well as its implementation.

If the ECA has no means to ensure that implementation will comply with original plans, then it should not provide support. If it supports anyway, then the ECA must be held accountable for any failures of projects, and must be identified among other actors as responsible and liable for damages caused to people, their communities and their environment.

Up to now, most OECD ECAs have not set up any mechanisms to learn from their mistakes or to determine the consequences when compliance is not reached, although sometimes reports may be required by other governmental agencies. Though in Germany the economic ministry responsible for the actions of Euler Hermes sometimes has to report to Parliamentary Committees, it has no formal accountability mechanism. The French ECA has no accountability mechanism and has no procedure available to affected people who wish to bring a claim for harm caused by a project. It is the same situation in Belgium, the Netherlands and the UK (although a judicial review may be possible when projects approved are decisions made by a public body).

Only two ECAs, in Canada and Japan, have set up a kind of ombudsman procedure that allows claimants to bring a case before the ECA. Those mechanisms have several weaknesses and will definitely not address all the harms caused by the projects, but they do ensure at least a “basic level” of accountability and minimum communication between the ECA and people affected by the projects.

Accountability mechanisms should be generalized among ECAs and strengthened. They would open additional opportunities for checking on how or if the ECA complies with its own standards and commitments in the projects it backs in the field. In fact, the very process of those accountability mechanisms aims at addressing how the ECA has been applying its own standards or has been ignoring or violating them. If there has been a violation, the compliance

body issues recommendations on how to address the negative impact of the project and to comply with original commitments.

With respect to the alleged incapability of ECAs to enforce compliance with the environmental and social conditions in a project, such a process seems crucial to put pressure on the ECA and have it avoid backing projects for which they know, in advance, that they will not be respecting the agreed conditions.

Addressing the problems - Recommendations

Section I – There is a need for a Policy that ensures transparent and inclusive design of environmental and social measures:

- Each ECA should prepare a general document explaining how it conducts the decision making process for the mitigation/compensation measures for all projects (who, when, steps, parties consulted, final decision-makers).
- Each ECA should make public this information on its mitigation/compensation measures and decision making process (who, when, steps, parties consulted, final decision-makers).
- The decision making process for selecting the compensation measures should be open to affected people and NGOs and allow them to submit their comments on the measures before a final decision is taken.
- This means that whenever there is an EIA, right after the NGOs have submitted comments following the ex-ante publication of the EIA, the ECA should open a second comment period that starts when the ECA reacts to the inputs from NGOs and before the ECA sets up the final list of environmental and social measures that will be the official conditions for support.
- The mitigation measures should be dissociated from the EIA, unless the EIA is conducted by an independent body that has no conflict of interest.
- The mitigation/compensation measures should be compiled and formalized in one document for each project before approval.
- This document should be available to the public before approval of the measures and before final project approval, so that interested groups can feed into the decision-making process.
- To be formalized and taken duly into consideration after approval for support of the project by the ECA, the mitigation measures should be integrated into the contract with the exporter, and a clause should require the exporter to insert a clause into its contract with the buyer and any sub-contractors.

Section II – There is a need for a Policy that ensures transparent and planned monitoring of environmental and social measures

- ECAs should have a clear monitoring policy. They should make public all the efforts that will be developed to ensure monitoring of the project. such a policy would make sure that the ECAs do not have weak case by case approaches, and would, in advance, make clear what is the general procedure that applies to all projects.
- ECAs should make this monitoring policy public. They should make public the process and tools that will ensure monitoring of the project. This is crucial to make clear to everyone the general procedures that apply to all projects.
- ECAs should prepare, before approval of a project, or right after approval, a monitoring plan covering the next three years; very concrete and articulated around clear timelines, explaining all the tools and steps that will ensure monitoring by the ECA itself, including the field trip components, dates and duration, the release of reports, the goal and content of any assessment or evaluation reports.
- ECAs should make this monitoring plan public, with clear timelines, presenting all the tools and steps that will ensure monitoring by the ECA itself, including the field trip components, dates and duration, the release of reports, the goal and content of any assessment report.

- For each project backed, ECAs should prepare a report on an annual basis, explaining how the mitigation/compensation measures helped to improve the environmental and social quality of the project, if indeed they reached that goal.
- The E&S assessment report should be based on information collected and verified by the ECA itself, through on-site missions, and should not be a document prepared by other actors with potential conflict of interest, such as the client.
- The E&S assessment report should include a section reproducing the remarks and recommendations expressed by affected groups on the ground.

Section III - Enabling and enforcing actual implementation of environmental and social measures

- The whole range of mitigation/compensation measures for a project and the expected outcomes for each of them should be made publicly accessible as soon as determined by the ECA, before the decision to support a project is made (ex-ante transparency).
- This obligation should apply to all three A/B/C categories, and not only A category, through the release of the Environmental management plan which is included in the EIA. Projects that do not require an EIA should at least provide a document detailing the mitigation/compensation measures that are planned/required.
- The whole range of mitigation/compensation measures and the expected outcomes should be compiled in one document, and published on the ECA's website.
- The mitigation measures should be included formally in the contract or in any additional contractual documents.
- Sanctions should be the normal outcome if a contractual commitment made by the exporter has been breached.
- The contract should have a clause that clearly defines penalties or any other sanction in the case of non-compliance with the initial terms of the support relating to environmental or social conditions of a project.
- When the ECA, for any technical reason, is not able to ensure compliance through contractual commitments, it must reject the application for support.

Section IV - Sharing monitoring results as a means of ensuring accountability

- The ECA should regularly publish all updated information it receives on the implementation process and problems encountered.
- At the very least, the ECA should make public its environmental and social assessment reports, with comprehensive information on the actual implementation of the measures, their positive impact but also any weaknesses. The assessment should explain how the mitigation/compensation measures helped to improve the environmental and social quality of the project, if they reached their goal.
- The report should include and make public a section with remarks and recommendations expressed by affected groups on the ground.
- Legal constraints should no longer be invoked as a hurdle preventing the release of environmental information. All ECAs should include clauses in the convention/contract signed with exporters to require free use and release of all environmental documents required by the ECA.