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ECAs and the Licence to Finance

Consultation, Participation and the OECD's Recommendation on Common Approaches

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CONTENTS

1. From Consultation to Consent: The Emerging International Consensus
2. The Institutional Response
3. ECAs, Consultation and Participation: The Common Approaches
4. Current ECA Practice
5. The Common Approaches Review: Recommendations for Action
6. Recommendations for ECAs

SUMMARY

Since 2003, the Export Credit Agencies of the Organisation for Economic Co-Operation and Development (OECD) have been bound by the "Recommendation on Common Approaches on Environment and Officially Supported Export Credits". The Recommendation seeks to promote "coherence" between the activities of ECAs and the international obligations of national governments and to "promote good environmental practice". Currently the Common Approaches fail to achieve these objectives. Its requirements on "consultation", "participation" and community support for the projects that ECAs finance trail far behind other international financial institutions, and fall a long way short of international good practice. The current review of the OECD's Recommendation on Common Approaches presents an opportunity to address the deficiencies in current ECA policy and to bring their procedures into line with best international practice, which increasingly recognises affected communities and indigenous peoples as rights holders, whose consent for projects and programmes that directly affect their lives and livelihoods must be obtained through negotiated, legally-binding agreements.

“Good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, *respect for human rights and the participation of all citizens in the decisions that affect their lives.*”

We the Peoples: The Role of a United Nations in the 21st Century,
Kofi Annan, United Nations, 2000.

“**Consult:** v. Seek information or advice from; take counsel; take into consideration, take advice.”

Pocket Oxford Dictionary

Background

In December 2003, the OECD’s Export Credits Group adopted a “Recommendation on Common Approaches on Environment and Officially Supported Export Credits”. Two years earlier, a Draft of the Recommendation (known as Rev 6)¹ had been unilaterally adopted by all OECD countries with the exception of Turkey and the USA.

The Common Approaches commit the OECD’s Export Credit Agencies (ECAs) to a minimum set of procedures for screening applications for export credit support and are aimed, *inter alia*, at:

- “promoting coherence” between the activities of ECAs and the international obligations of national governments on environmental protection²; and
- “[promoting] good environmental practice”³.

In addition, the ECAs agreed to ensure that projects with potential environmental impacts would comply with host country law or, where these are more stringent, the relevant international standards against which it is recommended that projects be benchmarked.⁴ Should an ECA apply lower standards, it must report and justify the decision.⁵

The Recommendation on Common Approaches will be reviewed in 2006 by the OECD Export Credit Group. This paper outlines international best practice with respect to consultation, participation and community support and assesses the extent to which the Common Approaches –

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1. OECD, Trade Directorate, Working Party on Export Credits and Credit Guarantees, “Recommendation on Common Approaches on Environment and Officially Supported Export Credits”, December 2003, hereafter “Common Approaches”. The OECD Council amended the recommendation on 24 January 2005, following a request made by the ECG at its November 2004 meeting. *See:* OECD, Trade Directorate, Working Party on Export Credits and Credit Guarantees, “Updated Recommendation on Common Approaches on Environment and Officially Supported Export Credits”, TD/ECG (2005) 3, available from <http://www.oecd.org>; also OECD, Draft Recommendation on Common Approaches on Environment and Officially Supported Export Credits: Revision 6, Unclassified TD/ECG(2000)11/REV6, 2001, www.oecd.org/pdf/M00023000/M00023467.pdf. Whilst the USA and Turkey were unable to support the implementation of the draft Recommendation, the other Working Party members agreed unanimously that they would implement the provisions of the Recommendation with effect from 1 January 2002 (see ECGD, “UK at the heart of ground-breaking Environmental Agreement for exports”, Press Release, 3 December 2001)
 2. Common Approaches, op.cit.1, para.1 (ii): “The general objectives of this Recommendation are to: Promote coherence between policies regarding officially supported export credits and policies for the protection of the environment, including relevant international agreements and conventions, thereby contributing towards sustainable development.” Rev 6 has the same wording at Para 1.ii.2.
 3. OECD, Common Approaches, op.cit.1, para.1 (ii): “Promote good environmental practice and consistent processes for projects benefiting from officially supported export credits, with a view to achieving a high level of environmental protection.” Rev 6 has the same wording at para. 1.ii.2
 4. OECD, Common Approaches, op.cit.1, para. 12.2: “Projects should, in all cases, comply with the standards of the host country and when the relevant international standards against which the project has been benchmarked are more stringent these standards would be applied.” Rev 6 required only compliance with host standards (para 15) but also stipulated that ECAs should provide justification where they deemed it “appropriate to apply standards that are below international standards”.
 5. OECD, Common Approaches, op.cit. 1, para.19 (“Members shall report to the ECG *ex-post* on an annual basis, in accordance with Annexes III.A and III.B, projects classified in Categories A and B respectively, for which a final commitment has been issued during the year of reporting”).

and ECA practice – meet such best practice standards. It concludes that the record to date strongly suggests that:

- ECAs have adopted a minimalist approach to the Common Approaches’ requirements on consultation and substantially failed to implement the requirements on participation;
- Far from narrowing the gap between ECA activities and the international environmental obligations of national governments, the minimalist approach to consultation has taken ECAs in the opposite direction;
- Consequently, the Common Approaches has not led to the promotion of “good environmental practice”; and
- The Common Approaches requires substantial revision if ECAs are to be brought within the ambit of institutions whose policies meet internationally acceptable procedures on infrastructure development.

From Consultation to Consent: The Emerging International Consensus

Since the mid-1980s, “consultation” and “participation” have become key words in development discourse. Increasingly, it is recognised by governments and the private sector alike that infrastructure and other development projects that do not have the active support of those most directly affected are likely to fail in their development goals, generating social conflict, undermining livelihoods and leaving the poor poorer. For the companies and financial backers involved, such failure translates into political, reputational and financial risk, denying companies their “licence to operate” and funders their “licence to finance”.

Meaningful and informed participation by indigenous peoples and local communities in decision-making is a human right, which lies at the heart of effective democracy and sustainable development. This right is also embedded in a range of international agreements and statements – from the 1992 Rio Declaration on Environment and Development to the 2002 Johannesburg Plan of Action (*see Annex 1 for details*) – to which many governments, including all members of the European Union and of the Organisation for Economic Co-Operation and Development (OECD), are now committed.

Critically, international best practice has moved beyond token consultation with those likely to be affected by development decisions to encompass more inclusive participatory processes that involve locally-affected groups not just in planning a project, but also in its implementation, management, monitoring and evaluation.⁶ The emerging international consensus, embodied in best practice guidelines and, in the case of indigenous peoples⁷, in international law, is that affected communities should be recognized as rights holders, whose consent for projects and

6. Colchester, M., *Dams, Indigenous People and vulnerable ethnic minorities*, Thematic Review 1.2 prepared as an input to the World Commission on Dams, Cape Town, <http://www.dams.org>

7. As ‘Peoples’, indigenous peoples have collective rights that are distinct from the rights that individuals enjoy under the law. These rights include the right to self-determination. See: United Nations, Economic and Social Council, Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, “Legal Commentary on the Concept of Free, Prior and Informed Consent”, E/CN.4/Sub.2/A.C.4/2005/2/21 June 2005, available from http://www.tebtebba.org/tebtebba_files/ipr/ECN.4Sub.2AC.420052.pdf. For discussion of the implications for Export Credit Agencies, see: Forest Peoples Programme, “Briefing on Indigenous Peoples and Private Sector Project Financing – The International Finance Corporation, the Equator Principles Banks and Export Credit Agencies”, May 2006.

programmes that directly affect their lives and livelihoods must be obtained through negotiated, legally-binding agreements in which communities are able to secure outcomes that are acceptable to them.

2. The Institutional Response

Most development agencies and multilateral development banks have now elaborated policies to promote the involvement of civil society in one form or another in project planning and implementation.⁸ Almost all recognize that some form of agreement is required with indigenous peoples if they are to be adversely affected by a proposed project.⁹ Likewise, many private sector companies now recognise the value of consultation to their business operations.¹⁰

Amongst the multilateral development banks, for example, the **World Bank** has introduced a range of social and environmental safeguard policies, many of which require project developers to consult with affected communities and to encourage their participation. For instance, indigenous peoples' informed participation and 'broad community support' is required for all projects pursuant to the World Bank's Operational Policy 4.10 on Indigenous Peoples.¹¹ Most recently, in February 2006, the Bank's private sector arm, the **International Finance Corporation**, adopted a new "Social and Environmental Sustainability" policy that requires the IFC to ensure that projects with significant adverse impacts have "broad community support".¹² The IFC also adopted a new set of "performance standards", the guidance notes for which stress the need for a participatory approach to environmental assessment and to resettlement planning. For projects that may affect indigenous peoples' traditional lands or involve either physical or economic displacement, the IFC requires that its clients enter into and successfully conclude "good faith" negotiations.¹³ According to the IFC, documentation indicating a successful

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8. The United Nations Development Assistance Framework, adopted by 18 UN Agencies, views participation in decision-making as a right. It states: "[S]upporting policies and legislation that protect and promote the rights of local communities to participate in the processes are essential . . . ensuring full participation of all groups in the development process are priorities." (For further details, see: The United Nations Development Assistance Framework, <http://www.un.org/in/undaf.htm>, p.10). The commitment to consultation and participation has been mainstreamed by many agencies at both national and international level. Within the UN Food and Agricultural Agency (FAO), participation is now viewed as a prerequisite for successful project implementation. Similarly, the OECD's Development Assistance Committee's *Good Practice for Environmental Impact Assessment of Development Projects* (pp.12 and 13) states: "The participation of both men and women in the population affected (target groups as well as other affected groups) should be sought . . .The participation of non-governmental organisations in the recipient country should be encouraged".
 9. See, inter alia, *UNDP and Indigenous Peoples: A Policy of Engagement*, 2001, paras. 26-30; Inter-American Development Bank, *Operational Policy 710 on Involuntary Resettlement* (1998), Section IV, para. 4. For a review of UN system bodies with regard to indigenous peoples' and consent, see, Permanent Forum on Indigenous Issues, *Inter-agency Support Group on Indigenous Issues Report on Free Prior and Informed Consent* Advanced Version*, 3rd Session, 2004, at para.1. Available at: <http://www.un.org/esa/socdev/pfii/documents/other%20docs/Doc%20Report%20on%20FPIC.htm>
 10. Regrettably, as further explored in Section 5, this recognition is often primarily motivated by a desire to contain, if not defuse, opposition to projects or investments, rather than to obtain the communities active support.
 11. World Bank, Indigenous Peoples, Operational Policy 4.10, adopted July 2005.
 12. International Finance Corporation, Policy on Environmental and Social Sustainability, <http://www.ifc.org/ifcext/enviro.nsf/Content/SustainabilityPolicy>. Broad community support is defined in the accompanying guidance notes as "a collection of expression[s] by the affected communities, through individuals and/or their recognized representatives, in support of the project. There may be broad community support even if some individuals or groups object to the project" (Guidance Note 19, available from: <http://www.ifc.org/ifcext/enviro.nsf/Content/GuidanceNotes>). It should be stressed that the requirement to obtain broad community support is not included in the IFC Performance Standards and therefore does not impose any obligations on the project developer. The obligation is on the IFC to verify that such support exists. No independent verification is required. For discussion, see: Forest Peoples Programme, "Briefing on Indigenous Peoples and Private Sector Project Financing – The International Finance Corporation, the Equator Principles Banks and Export Credit Agencies", May 2006.
 13. International Finance Corporation, Performance Standard 7, paragraphs 13,14,15, available from <http://www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards>. The non-binding Guidance Note for the Performance Standard (Guidance Note 19) stipulates that, before presenting such a project to its Board for approval, the IFC must determine that: the client's community engagement has involved free, prior and informed consultation; this process has enabled indigenous peoples' informed participation; and this process has led to broad community support for the project. For discussion, see: Forest Peoples Programme, "Briefing on Indigenous Peoples and Private Sector Project Financing – The International Finance Corporation, the Equator Principles Banks and Export Credit Agencies", May 2006.

outcome to negotiations includes: “a memorandum of understanding, a letter of intent, a joint statement of principles, and written agreements”.¹⁴

In the same vein, the European Union Council of Ministers’ 1998 Resolution entitled, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* provides that “indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas.”¹⁵ According to the European Commission, “The Resolution reflects the high degree of consensus within the EU about the need to build partnerships with indigenous communities, and to integrate concern for these communities into all relevant policies and programmes of the Union.”¹⁶ Additionally, in October 2003, the European Council and Commission approved, as part of the *Second Northern Dimension Action Plan*, the following language: “Strengthened attention to be paid by all Northern Dimension partners to indigenous interests in relation to economic activities, and in particular extractive industry, with a view to protecting inherited rights of self-determination, land rights and cultural rights of indigenous peoples of the region.”¹⁷ The right to consent is implicit in, and fundamental, to the exercise of right to self-determination.

Many industry groups have also have moved far beyond mere consultation as the floor requirement for good practice. Within the **hydropower sector**, for example,

- The **International Commission on Large Dams (ICOLD)**, an industry grouping, requires that “all projects have to be planned, implemented and operated with the *clear consent* of the public concerned.”¹⁸
- The **International Energy Agency (IEA)’s Hydropower Agreement**, drawn up in conjunction with industry under the aegis of the OECD,¹⁹ emphasises participatory decision-making as a key requirement and states: “Minimising [the adverse social impacts on vulnerable minority groups] requires that local communities be willing partners in the development of a hydropower project . . . [I]t also requires that local communities be given sufficient lead time to assimilate or think through the consequences of such a project and to define on a consensual basis the conditions in which they would be prepared to proceed with the proposed development.”²⁰
- The **World Commission on Dams’ (WCD’s)** strategic priorities, also drawn up through a multistakeholder process involving industry, specifically aim to ensure that dams enjoy *demonstrable public acceptance* and, in the case of indigenous communities, *free prior informed consent*, through transparent, participatory decision-making processes. Contrary to assertions by the World Bank, this recommendation would not give veto rights to individuals: “Where independent review and mediation fail to foster an agreement,

14. International Finance Corporation, Guidance Note 7: Indigenous Peoples, G25,

[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_GuidanceNote_7/\\$FILE/GuidanceNote7.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_GuidanceNote_7/$FILE/GuidanceNote7.pdf).

15. European Union, Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998).

16. European Commission, Report from the Commission to the Council, *Review of progress of working with indigenous peoples*. Brussels, 11.6.2002 COM(2002) 291, at 18.

17. European Union, *Second Northern Dimension Action Plan 2004-06*, 18 October 2003. Available at:

http://europa.eu.int/comm/external_relations/north_dim/ndap/ap2.htm

18. International Commission on Large Dams (ICOLD), *Position Paper on Dams and Environment*, 1997, p.13, <http://www.icold-cigb.org/chartean.html>

19. International Energy Agency Implementing Hydropower Agreement for Hydropower Technologies and Programmes, *Hydropower and The Environment – Present Context and Guidelines*, Annexe III, Volume 2 Main report. <http://www.ieahydro.org/Environment/HyA3S5V2.pdf>. The study was conducted over a five-year period by government regulatory organizations, research organizations, and utilities in six member countries (Canada, Finland, Japan, Norway, Spain and Sweden), while 112 international experts from 16 different countries participated in meetings and workshops.

20. Ibid, p.103.

alternative options should be considered or the project should go to arbitration . . . Where a settlement does not emerge, the State will act as the final arbitrator, subject to judicial review."²¹

Outside of the hydro sector, there is also a growing consensus on the need for projects to enjoy demonstrable public acceptance, in order both to respect human rights and to ensure that project sponsors secure their “social licence to operate”. The World Bank’s recent Extractive Industries Review,²² for example, recommended that all projects should be premised on “free, prior, informed consent”. Similarly, the International Council on Mining and Metals, an industry group incorporating the world’s largest mining companies, is in the process of adopting a ‘Position Statement’ on indigenous peoples. The most recent draft includes a commitment to: “Developing relationships with Indigenous Peoples based on their identified interests and the project impacts, which may include: Seeking consent for activities. . . . [And] [n]egotiating agreements, such as for access and benefit sharing, participation, land use etc., to specify the processes, roles and outcomes which form the basis of a relationship.”²³

Within the **banking sector**, some 41 large commercial banks (whose portfolios collectively represent 90% of global project finance) are now poised to adopt the new International Finance Corporation performance standards for project finance developments – and thus commit themselves to the IFC requirements for participation, consultation, good faith and successfully concluded negotiation in the case of indigenous peoples. Banks also reflect these standards in their individual policies. For instance, **JPMorganChase** has stated that it “prefers” only to finance projects in indigenous areas “where free, prior informed consultation results in support of the project by the affected indigenous peoples”.²⁴ For such projects, the project sponsor or borrower (as appropriate) will have to demonstrate that the indigenous peoples have had the opportunity to engage in informed participation and collective decision-making; the information provided is in a culturally appropriate manner at each stage of the project preparation, implementation and operation; the indigenous communities have been given adequate time to study the information; the communities have access to a grievance mechanism; consultation approaches relied on existing customary institutions; and that major indigenous land claims have been addressed. **HSBC** has similarly stated that it will proceed with high impact (“Category A”) and higher-risk Category B projects only where free, prior and informed consultation has taken place with affected groups and in the case of financing for palm oil plantations, with the free, prior and informed consent of affected communities and indigenous peoples. For freshwater infrastructure projects, HSBC will not provide “facilities and other forms of financial assistance, including any involvement in debt and equity capital markets activities and advisory roles” for dams that fail to conform with the World Commission on Dams (WCD) framework.²⁵ The WCD framework requires that projects have demonstrable public acceptance and, in the case of indigenous peoples, free prior informed consent. Rabobank has adopted the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which require indigenous peoples’ consent for projects affecting customary lands.

21. World Commission on Dams, *Dams and Development: A New Framework for Decision Making*, Earthscan, 2000, pp.210 and 281.

22. World Bank, *Striking a Better Balance*, Final Report of Extractive Industries Review, December 2003, <http://www.eireview.org/>

23. International Council on Metals and Mining, *Draft Position Statement on Mining and Indigenous Peoples’ Issues*, March 2006, p.2, <http://www.icmm.com/newsdetail.php?rcd=84>

24. JPChaseMorgan, Environmental Policy, <http://www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indig>

25. HSBC, “Freshwater Infrastructure Sector Guideline”, http://a248.e.akamai.net/7/248/3622/dcb5640e22fa57/www.img.ghq.hsbc.com/public/groupsite/assets/csr/freshwater_infrastructure_guideline.pdf.

3. ECAs, Consultation and Participation: The Common Approaches

Despite being the world's largest public providers of finance for development – disbursing sums that dwarf those provided by the major multilateral development banks – Export Credit Agencies as a body trail far behind other international financial institutions, including the private sector banks, in their policies on consultation, participation, community support and indigenous peoples' consent for the projects they finance. Even the most progressive national ECAs have still to move beyond requiring that affected communities be consulted to requiring participation, negotiation and free, prior and informed consent.

Within the OECD, ECAs are now bound by the OECD Export Credits Group's 2003 "Recommendation on Common Approaches on Environment and Officially Supported Export Credits".²⁶ The Recommendation, which is under review, currently commits the ECAs to a minimum set of procedures for screening applications for export credit support. Although agreed some ten years after the 1992 Rio Declaration and a year after the 2002 Johannesburg Plan of Action, the Recommendation does not even mention "consultation" or "participation".

The Common Approaches place no obligation on national ECAs to consult with national stakeholders on their policies or on the impacts of the projects they help to finance – nor do they contain any wording encouraging them to do so. The only requirement is that the Export Credit Group as a body should "exchange views on a regular basis with appropriate stakeholders on the operations of [the] Recommendation".²⁷ Those who have been invited to attend such meetings will attest that the stakeholders are expected to talk, whilst the ECA representatives (with a minority of notable exceptions) merely listen, and, in some cases, sleep – hardly an "exchange" of views.

Whilst the Common Approaches does not require that ECAs themselves consult with affected communities, it stipulates that Category A projects²⁸ should have an Environmental Impact Assessment.²⁹ An Annex provides a list of issues that the EIA should address, including includes a requirement to provide a "record of consultation meetings, including consultations for obtaining the informed views of the affected people, local non-governmental organisations and regulatory agencies".³⁰ However, it is the project developer, rather than the ECA, which is required to undertake the consulting: the ECA is only required to check that consultation has taken place. No guidance is given within the Common Approaches – or minimum standards set – for evaluating the quality of the consultation. Moreover, the requirement is restricted to "consultation" and does not extend to ensuring participation or proof of community support.

For projects that involve resettlement or which impact on indigenous peoples or cultural property, the Common Approaches further requires that ECAs "benchmark" the projects against the relevant World Bank safeguard policies (OP/BP 4.12 and OD 4.30, OD 4.20, and OP 4.11).³¹ All

26. OECD, Common Approaches, op. cit.1.

27. OECD, Common Approaches, op. cit.1, "V. Exchange and Disclosure of Information, para.16".

28. Category A projects are defined as those having "the potential to have significant adverse environmental impacts", see OECD, Common Approaches, op. cit.1, "III. Environment Review", para 6.

29. OECD, Common Approaches, op. cit.1, "III. Environment Review", para. 8: "For a Category A project, Members should require an EIA".

30. OECD, Common Approaches, op. cit.1, "Annexe II: Environmental Impact Assessment Report", p.11.

31. OECD, Common Approaches, op. cit.1, para. 12.1: "When undertaking environmental reviews, Members should benchmark projects against host country standards, against one or more relevant environmental standards and guidelines published by the World Bank Group, the European Bank for Reconstruction and Development, the Asian Development Bank, the African Development Bank and the Inter-American Development Bank and against the safeguard policies published by the World Bank Group". Footnote 2, p.4 specifies the World Bank standards: "These are the safeguard policies relating to involuntary resettlement (OP/BP 4.1.2 and OD 4.30), indigenous peoples (OD 4.20) and cultural property (OP 4.11)".

three of the referenced World Bank standards require consultation; that on resettlement also encourages, but does not require, participation³²; and only one, that on Indigenous peoples, requires both consultation and participation.^{33 34 35} But all the referenced policies are now outdated, having been replaced by the Bank by newer versions. Moreover, despite an apparent requirement to ensure project compliance with the referenced standards,³⁶ the Common Approaches contains a “let out” clause that permits ECAs to derogate from the requirement provided that they (confidentially) report the derogation to the secretariat of the Export Credit Group.³⁷ There is thus no mandatory, legally binding requirement under the Common Approaches for communities in ECA-backed projects even to be consulted, let alone for such projects to meet the international standards now employed by the vast majority of multilateral financial institutions and private sector international financial institutions.

4. Current ECA Practice

The extent to which OECD ECAs have embraced consultation and participation is patchy. Whilst a few ECAs have gone beyond the requirements of the Common Approaches – JBIC, for instance, requires that “Efforts must be made to obtain the consent of indigenous peoples after they have been fully informed”³⁸ – most have adopted a minimalist approach to their implementation.

At the national level, the more progressive ECAs have instituted procedures to consult on policy issues and attest to their value in building consensus, improving policy and enhancing due diligence procedures. Even amongst this group, however, non-governmental organisations have had to push hard to ensure that consultations are even handed and are not restricted merely to meetings with industry groups. Nonetheless, there are signs of progress: a number of European Union ECAs have now invited NGOs to consult on the upcoming review of the Common Approaches, the first time that this has occurred in many cases.

At the project level, some ECAs have similarly moved beyond the requirements of the Common Approaches. In the case of “high risk” projects, for example, many ECAs are increasingly undertaking their own “ground truthing” field trips, visiting local communities, albeit as part of field missions organised in conjunction with the project sponsors. Most welcome of all, a number of ECAs have now signalled their willingness to plan such missions in consultation with local and international NGOs, a development that is likely to expose the ECAs to more critical voices than they would hear on a mission solely organised by the project sponsor.

Generally, however, ECAs have taken a more passive role – consulting with NGOs only when NGOs themselves raise concerns. A more proactive approach, with ECAs seeking out the views

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32. World Bank, OP 4.12 Involuntary Resettlement, para 4.12, para. 2b, 19: “Displaced persons should be meaningfully consulted and have opportunities to participate in planning and implementing resettlement programmes.”
 33. World Bank, Indigenous Peoples, OP 4.20, para 8: “The Bank’s policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the informed participation of the indigenous people themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches and appropriate early use of experienced specialists are core activities for any *project that affects indigenous peoples and their rights to natural and economic resources.*”
 34. World Bank, Indigenous Peoples, OD 4.20, para 14a: “The key step in project design is the preparation of a culturally appropriate development plan based on full consideration of the options preferred by the indigenous people affected by the project.”
 35. World Bank, Indigenous Peoples, OD 4.20, para. 15 (d): “Mechanisms should be devised and maintained for participation by indigenous people in decision making throughout project planning, implementation and evaluation.”
 36. OECD, Common Approaches, op. cit.1, para. 12.2, read in conjunction with para 12.1 and footnote 2 :“Projects should, in all cases, comply with the standards of the host country and when the relevant international standards against which the project has been benchmarked are more stringent these standards would be applied.”
 37. OECD, Common Approaches, op. cit.1, para. 19 (“Members shall report to the ECG *ex-post* on an annual basis, in accordance with Annexes III.A and III.B, projects classified in Categories A and B respectively, for which a final commitment has been issued during the year of reporting”).
 38. Japan Bank for International Cooperation, *JBIC Guidelines for Confirmation of Environmental and Social Considerations*, p.15.

of affected communities and concerned NGOs, would not only move ECAs closer to international best practice but would also signal a genuine commitment on the part of ECAs to consultation as a right rather than merely a means of containing reputational risk.

The passivity of ECAs is also reflected in the willingness of many to rely almost exclusively on the consultation documentation generated by the **project developers** as a means of assessing compliance with the required World Bank standards.³⁹ ECAs argue that because they enter projects late in the project cycle, long after the required consultations with affected communities should have taken place, it would be unreasonable for them to require their own round of consultations. There is some justification for this view. But the highly politicized and self-serving approach to consultation often taken by project developers makes it critical that ECAs be required to undertake genuinely independent assessment of the claims. Documents released under US Freedom of Information legislation, for example, reveal that, in the case of BP's Baku-Tbilisi-Ceyhan (BTC) oil pipeline project – supported by Britain's ECGD, France's Coface, Germany's Hermes, Italy's SACE and US Ex-Im – BP specifically excluded any groups that it considered “polarizers” (that is, critics) from its consultations. Such groups included CEE Bankwatch and the Georgian Greens, two of the main NGOs in Georgia working with communities affected by the pipeline. A presentation made by BP to the lenders groups for the project states: “No need to engage actively – this would only legitimize their case. But by all means engage opportunistically”⁴⁰ (see Annex 2).

In the view of NGOs, such deliberate skewing of consultation to suit the project developer's interests can only serve to render any claims made in the Environmental and Social Assessments and other project documents as to the comprehensiveness and outcomes of consultation at best unreliable, at worse deliberately misleading. Regrettably, in the BTC case, BP's approach was not challenged by any of the ECAs involved in the project.

Freedom of Information requests have also confirmed what NGOs have long asserted: namely that the politically-driven nature of many ECA-backed projects, combined with the wide discretion that ECAs have in implementing their stated guidelines, has led to a Procrustean approach to the selection of standards. In the BTC case, the ECAs argued that the World Bank's Indigenous Peoples' policy did not apply to the project, despite the policy clearly and unambiguously covering affected ethnic minorities such as the Alevi, Çerkez and Kurds.⁴¹ In a briefing prepared by the UK's Department of Trade and Investment for a meeting between the British Prime Minister and Lord Browne of BP, the ECGD is quoted as stating: “ECGD understands the pragmatic need to avoid identifying any group as an ‘indigenous peoples’ . . .”⁴² The quote strongly suggests that the thrust of the ECGD's environmental screening was directed at finding reasons to exempt the project from the World Bank's Indigenous Peoples' policy rather than neutrally assessing whether compliance was required.

Finally, it should be noted that ECAs themselves have an interest in a more proactive, independent approach to consultation. Due diligence can be improved only by supplementing the information supplied by the companies seeking credits or obtained from local embassies (whose

39. Although ECAs now regularly use consultants to verify claims made by project developers in “high risk” projects, the project developers generally pay for such consultants. Genuinely independent assessments are the exception, if indeed they have occurred at all.

40. “Environmental and Social Impact Assessment Programme Update”, Presentation Notes, 14 pages, F2003-00348, Undated, Released to National Security Archive by US Department of Energy, 4 June 2004, available from <http://www.freedominfo.org/ifti/iftifoia/BTC/35.pdf>

41. For further details, see Corner House et al, *Review of the BTC EIA and RAP (Turkey section): Ethnic Minorities*, 2002, <http://ifiwatchnet.org/doc/btcch8.pdf>.

42. ECGD, “Annex H: Status of key Business Principles issues at 1 May 2003”, quoted at p.23 in “Sep 2004 Browne (BP) meeting PM briefing and feedback.doc”, briefing appended to UK Trade and Investment, email 9 September 2004, names of correspondents withheld, released under Freedom of Information request submitted by Friends of the Earth (England, Wales and Northern Ireland), January 2006.

staff have often been involved in promoting the contracts for which ECA support is being sought) with information gathered directly from local NGOs and affected communities. A single telephone call to local Philippine groups, for example, would have revealed that a bridge-building programme recently supported by ECGD had no development benefits and was allegedly a politically driven pork-barrel operation. Many of the bridges, built for a two-lane highway, connected to single track dirt roads; some led to nowhere (*see* picture p.10).⁴³



ECGD-backed Philippine Bridge Building Programme. A single telephone call would have revealed that many of the bridges, built for a two-lane highway, connected to single track dirt roads; some led to nowhere. (Source: Sinag Ng Bayan Foundation Inc., “Complaint to Office of the Ombudsman, Republic of The Philippines”, August 2005)

5. The Common Approaches Review: Recommendations for Action

One of the major stated objectives of the Common Approaches Recommendation is to promote “coherence” between ECA policy and “policies for the protection of the environment, including relevant international agreements and conventions, thereby contributing towards sustainable development.”⁴⁴ Currently, the Recommendation falls far short of this objective: not only is it incoherent internally in its requirements on consultation and participation, but also such requirements as it stipulates do not begin to approach current best practice or even the policies of OECD governments as reflected in the international agreements and statements to which they are signatories.

Non-Governmental Organisations fully understand that the involvement of ECAs in projects frequently comes at a late stage in project development: a requirement for ECAs themselves to undertake their own round of consultation with affected communities might therefore be inappropriate. Nonetheless, if the adverse impacts of ECA-backed projects are to be avoided in the future, it is imperative that ECA support be conditioned on international good practice.

The current review of the Recommendation offers ECAs an opportunity to rise to this challenge. In particular, ECAWatch would stress the need for ECA-backed projects to have broad community support. Such a requirement need not add to the bureaucratic burden on ECAs. On the contrary, requiring project developers to provide evidence of “broad community support” in

43. Sinag Ng Bayan Foundation Inc., “Sinag Ng Bayan Foundation Inc vs Former Secretary Florante Soriquez et al.”, Complaint to Office of the Ombudsman, Republic of The Philippines, August 2005. *See*: “Sinag ng Bayan files complaint vs. Soriquez et al.”, <http://www.sinag.net/articles/SBvsSoriquez.htm>

44. Common Approaches, op. cit.1, “General Principles, 1 (ii) Objectives (2)”.

the form of negotiated agreements with the affected communities would both strengthen and streamline ECA due diligence procedures. By providing hard evidence of community support for a project, such agreements – where freely obtained and properly informed – would not only remove a large element of risk from the project, but would also provide an easily verifiable tool for assessing whether or not the participatory processes required by international best practice had been observed to the satisfaction of those most directly affected.

ECAs that are party to the OECD Arrangement⁴⁵ have already recognized the value of the guidelines set out by the World Commission on Dams with respect to large hydro projects.⁴⁶ Such guidelines require that projects should enjoy “demonstrable public acceptance” and, in the case of indigenous peoples, “free prior informed consent”.

ECAWatch recommends that the Export Credit Group should build on this initiative and adopt language in any revision of the Common Approaches that requires ECAs to:

- Ensure that affected communities have been consulted and fully informed of the impacts of projects, and have been actively involved in decision-making on environmental assessment and mitigation and resettlement planning.
- Ensure that consultation is participatory, iterative, and initiated early in the planning phase.
- At a minimum, undertake public consultation both at the time of scoping (identification of issues for the environmental and social assessment, action plans, resettlement plans), and at the time when draft assessments and action plans are released.
- Require that all projects with major social and environmental impacts have demonstrable public acceptance / broad community support, as evidenced by, for example, negotiated agreements with the communities’ representatives. Community representatives should be identified via existing, locally common systems of political representation and should be seen as legitimate spokespeople by community members.
- In the case of indigenous peoples, adopt a specific policy instrument that ensures that indigenous peoples’ rights shall be fully respected and that ensures that project proponents seek and obtain their free, prior informed consent through their freely identified representatives and with respect for their traditions and customs.

In addition, ECAWatch recommends that:

1. ECAs should undertake, and make public, independent written assessments of the consultations and negotiated agreements with affected communities carried out by project developers.
2. At the national level, ECAs should introduce procedures for consulting with stakeholders, including indigenous organizations and their representatives, nationally, on major policy issues and make public the results of such consultations.

45. The OECD summarises the Arrangement as follows: “The Arrangement is a ‘Gentlemen’s Agreement’ amongst its Participants who represent most OECD Member Governments. The Arrangement sets forth the most generous export credit terms and conditions that may be supported by its Participants”. See: http://www.oecd.org/department/0,2688,en_2649_34171_1_1_1_1_1,00.html

46. Participants to the Export Credit Arrangement, “Environmental Reviews: Export credits for hydropower projects”, 16 November 2005.

Annex 1

Governmental Commitments on Consultation and Participation

The value of consultation and participation has been recognized by governments the world over and is now endorsed in a range of international agreements or statements that commit their signatories to moving beyond consultation in project implementation to the active participation of affected communities in decision-making. Such agreements include:

- **The Rio Declaration on Environment and Development (1992)**

Principle 10

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities . . . and the opportunity to participate in decision-making processes.”⁴⁷

Principle 20

“Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.”⁴⁸

Principle 22

“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”⁴⁹

- **Agenda 21 (1992)**

“One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.”⁵⁰

- **The Johannesburg Plan of Action (2002)**

“All countries should also promote public participation, including through measures that provide access to information regarding legislation, regulations, activities, policies and programmes. They should also foster full public participation in sustainable development policy formulation and implementation. Women should be able to participate fully and equally in policy formulation and decision-making.”⁵¹

- **The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of the United Nations Economic Commission for Europe (UNECE) (1998)**

47. UN General Assembly, Rio Declaration on Environment and Development, 12 August 1992, A/Conf.151/26 (vol.1), Principal 10, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

48. UN General Assembly, Rio Declaration on Environment and Development, 12 August 1992, A/Conf.151/26 (vol.1), Principal 20, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

49. UN General Assembly, Rio Declaration on Environment and Development, 12 August 1992, A/Conf.151/26 (vol.1), Principal 21, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

50. United Nations, Agenda 21, para 23.2, <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter23.htm>

51. The Johannesburg Plan of Action, Article XI. Institutional framework for sustainable development, para 164, http://www.un.org/esa/sustdev/sdissues/decision_making/decision_decisions.htm

Article 1: Objective

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

Article 3.2: General Provisions

“Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.”

Article 6.8: Public Participation in Decisions on Specific Activities

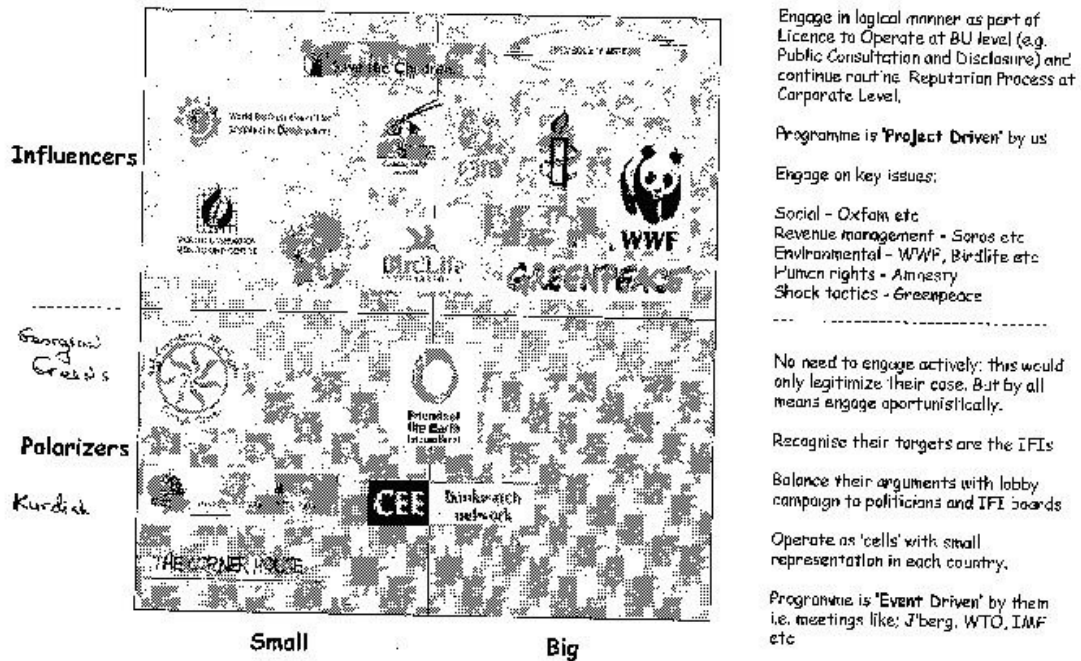
“Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.”

Article 7: Public Participation Concerning Plans, Programmes and Policies relating to the Environment

“Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.”⁵²

Annex 2: BP’s Approach to “Consultation” on BTC Pipeline

Global NGO Framework



See Appendices for detailed analysis of NGOs involved

52. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, <http://www.unece.org/env/pp/treatytext.htm>