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**CONSULTATION BETWEEN CIVIL SOCIETY ORGANISATIONS AND MEMBERS OF THE
OECD WORKING PARTY ON EXPORT CREDITS AND CREDIT GUARANTEES
AND THE PARTICIPANTS TO THE ARRANGEMENT
ON OFFICIALLY SUPPORTED EXPORT CREDITS**

ECA WATCH PROGRESS REPORT AND ISSUES PAPER

ECA WATCH

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ECA Watch Progress Report and Issues Paper

OECD Export Credit Group Consultation Paris, October 3, 2005

I. Introduction

This report outlines the past year's developments concerning major social and environmental issues relating to export finance that are of concern to civil society organizations. The December, 2003 OECD Recommendation on Common Approaches to the Environment has led to changes in the environmental procedures of many, but not all, OECD ECG Members. This certainly constitutes a step in the direction of more responsible lending practices. However, much more still needs to be done to fully implement the Common Approaches. Meanwhile, there has been an acceleration of progress in adopting more rigorous social and environmental standards for commercial lending by leading private commercial banks, as well as enhanced international and European Union attention to transparency, anti-corruption measures, and human rights. In a number of areas the private sector, as well as a few ECAs, have made social and environmental commitments that go considerably beyond the requirements of the December 2003 OECD Recommendation.

ECAs increasingly risk lagging behind evolving good practice of private international lenders, some multilateral development banks and new legal disclosure requirements for EU-based ECAs. Thirty-two private banks—including four in a developing country, Brazil—representing over 80% of global project financing, have subscribed to the Equator Principles, which in many respects are considerably clearer and stronger than the Common Approaches. A number of these banks have made environmental commitments even more rigorous than the Equator Principles. ECAs also lag behind Multilateral Development Banks in most regards. The European Bank for Reconstruction and Development now considers World Commission on Dams criteria for large dam projects, and the Asian Development Bank requires the disclosure of project monitoring reports. Moreover, the European Union Directive 2003/4/EC requires EU Member States to increase public access to environmental information held by “public authorities,” implementing the first pillar of the United Nations Economic Commission for Europe (UNECE) Aarhus Convention. Directive 2003/4/EC entered into force over six months ago, on February 14, 2005, and European ECAs unambiguously fall under the definition of “public authority” under the Directive.

Within the OECD ECAs themselves there are differences in the degree of implementation of the Common Approaches as well as a gap between those OECD ECAs that have committed to standards more rigorous than the Common Approaches (in different respects EFIC, JBIC, U.S. Ex-Im, COFACE, ECGD, etc.) and the rest.. In short, all of these developments over the past fifteen months have led to an increasingly unequal playing field among different ECAs and private banks regarding environmental and social standards. Without more rigorous, mandatory standards, ECAs will operate with greater exposure to environmental and social problems in developing countries, encountering greater portfolio and reputational risk.

There are also differences among ECAs in the implementation of the December 2000 OECD Action Statement on Bribery and evidence that ECAs have continued to back projects plagued by corruption since December 2000, despite the Action Statement. The U.K. originated Commission for Africa's report in March 2005 highlighted the role of ECAs in exacerbating corruption and called for significant improvements in ECA anti-corruption procedures. G8 countries, meanwhile, committed themselves in

July 2005 to, in the words of the final Communiqué of the G8 Heads of State, “strengthening anti-bribery requirements for those applying for export credits and credit guarantees”.

In a number of areas, outlined in greater detail below, concrete opportunities and requirements for ECAs to improve their practices and procedures are imminent in the next months. It is in everyone’s interest that these opportunities are not lost.

For all these reasons, we believe that more frequent consultations between Civil Society Organizations and the ECG over the coming year are essential as ECG Members review the December, 2003 Recommendation on Common Approaches. We note with some concern that, in the June, 2004 consultation with NGOs on the Common Approaches, the then-Chair of the ECG Mike Roberts promised (per the ECG’s June 25, 2004 minutes) to take up the issue of more frequent formal consultations at the fall, 2004 ECG meetings and report back to us. This did not occur, and a subsequent letter to the ECG on behalf of civil society groups from Mr. Robert Thomson (dated February 24, 2005), citing the promise of the ECG Chair, has not been answered.

If the next NGO consultation occurs in October 2006, it will be too late for NGO input to inform meaningfully the outcome of the 2006 review. For this reason we strongly request that the Export Credit Group schedule an NGO consultation specifically on this topic during the early stages of the Common Approaches review, no later than the spring of 2006.

II. Issues of Concern in Reviewing the Common Approaches

In the upcoming review of the Common Approaches there are several areas that we strongly urge ECAs to address with the aim of producing a revised and enhanced agreement on common approaches to environmental and social risk. As noted below, the areas for needed action reflect evolving progress in international good practice for publicly supported private sector finance in the areas of environmental/social standards (to reflect progress made by purely private sector banks, e.g. the Equator Principles and beyond), transparency, project monitoring and compliance, environmental /social standards for large dams, and human rights. A precondition for making progress in these areas is a more open and frequent consultation process between the ECG and civil society organizations. Attached to this report as an appendix are two summary project case studies that illustrate challenges for implementing and strengthening the Common Approaches.

A. Clarifying the Process for Consultation in the 2006 Review of the Common Approaches.

For years NGOs have requested more frequent consultations, and the need is particularly great in view of the timeline for the 2006 ECG review of the Common Approaches. We hope that the ECG in the weeks following this consultation could agree on a more open and frequent consultation process for the coming year.

We would like to note that other OECD policy processes have been much more transparent and have involved more frequent consultations than current practice within the ECG. We would like to cite two examples which we hope will help inform the ECG as it considers the process for the review of the Common Approaches.

The first is the “Mutual Acceptance of Data (MAD)” process that has been undertaken since the 1980s by the Chemicals Division of the OECD Environment Directorate. MAD is a system where OECD member countries and interested non-member countries agree to accept non-clinical safety data from one another, rather than requiring iterative independent national testing, for a very large range of commercial products—chemicals, pesticides, pharmaceuticals, cosmetics, food, feed additives etc. The work of the

OECD in ensuring a transparent, multi-stakeholder process for agreement on common standards for testing and laboratory procedures (the OECD Test Guidelines and Principles Good Laboratory Practice, GLP) for these products has had important trade implications, effectively eliminating what could have been major non-tariff trade barriers in the absence of MAD and GLP.

MAD differs from the Common Approaches in that it has been based not on an OECD Recommendation, but on three legally binding OECD Council Decisions. The MAD process has been characterized as follows by a leading international legal expert:

International mandatory standards are set....All meetings are open to non-state actors (except when GLP inspections are discussed). All documents are unrestricted and free. Decisions rely on the contributions of a large network of non-state experts. The process is supported by industry and civil society groups. Compliance with standards is assured by regular site visits and the effective use of peer pressure. And the system is open to non-OECD countries (indeed, non-member participation is encouraged).¹

The second example is the 2000 revision of the OECD Guidelines for Multinational Enterprises. The same legal authority cited above, James Salzman of Duke University Law School, provides a good summary of the innovations in the process of revising these guidelines:

Reflecting lessons from the MAI experience, the revision process was much more inclusive than ever before. Breaking from tradition, for the first time CIME [the OECD Committee on International Investment and Multinational Enterprises in the Directorate for Financial, Fiscal and Enterprise Affairs, responsible for the development of the Guidelines] created a truly public consultation process, actively seeking input from both outside the OECD and inside (from the Environment Directorate, for example, and from the OECD Working Party on Bribery and Corruption). The Chair of the OECD Working Party on the Review....convened an informal consultation group of TUAC, BIAC, and selected NGOs. Known as the Hague Process, [the Chair] invited these groups to a brainstorming meeting in the Hague with the understanding that the participants spoke in a personal capacity....the Hague Process operated in many respects like a focus group....The OECD posted the [first] draft text of the Guidelines on the web and invited public comments. Comments were sent by businesses, labor unions, environmental groups, academic institutions, individuals, and non-member countries, and these, too, were posted on the web for all to see. A second draft text, influenced by these comments, was posted and subjected to a similar round of public comment.²

These examples show that successful results in the OECD in ensuring policy coherence across complex issues and amongst multiple stakeholders has been linked to broad, frequent, and open consultation.

B. Equator Principles: Evolving Standards for International Good Practice for Private Investment

The Equator Principles, originally adopted by 10 leading international private banks in June, 2003, are now adhered to by 32 private international financial institutions, including four leading Brazilian banks, and the Danish ECA, EKF. Together these institutions account for well over 80% of global project finance

For large project finance of \$50 million and above—which is the threshold of the Equator Principles—the Equator Principles in some respects go considerably beyond the 2003 Common Approaches: e.g. ten IFC

¹ James Salzman, Professor Duke School of Law, “Decentralized Administrative Law in the Organization for Economic Cooperation and Development,” *Law and Contemporary Problems*, Vol. 68, pp. 101—227.

² *Ibid.*, p. 219.

environmental and social Safeguard policies are invoked (including the policy on protection of natural habitats), instead of only three in the Common Approaches; and the World Bank Pollution Prevention and Abatement Handbook is the minimum standard, rather than leaving any ambiguity over ‘flexibility’ in benchmarking among standards of different international entities.

More importantly, in the view of some experts, such as the leading London international law firm Freshfields Bruckhaus Deringer (see “Banking on Responsibility,” <http://www.freshfields.com/practice/environement/publications/en.asp>), the Equator Principles have already become an emerging industry standard in international banking and have launched a “virtuous circle” where a number of leading banks have launched environmental and social assessment policies for their lending that are in important respects considerably more rigorous and broader in scope than either the Equator Principles or the 2003 Common Approaches.

For example, an increasing number of banks apply the Equator Principles more widely than just for large projects above the \$50 million threshold: Banco do Brasil and JP Morgan Chase have reduced the threshold to \$10 million in critical sectors (in the case of JP Morgan, in forestry, mining, oil and gas), and Citigroup and JP Morgan apply the Equator Principles to all corporate finance, equity and underwriting transactions where the use of the proceeds can be ascertained. ABN AMRO applies the Equator Principles to all extractive projects (oil, gas, mining) regardless of cost threshold.

ABN AMRO, Citigroup, HSBC, and JPMorgan Chase all have adopted additional Forest Sector policies. These policies include due diligence measures to ensure that finance will not be provided to companies or projects that collude with or are knowingly engaged in illegal logging, requirements that forest sector clients have an explicit policy of respecting human/indigenous rights (ABN AMRO), and commitments to prefer (HSBC), or require from forest sector clients as part of due diligence (by 2007, JPMorgan Chase), certification by the Forest Stewardship Council or an equivalent internationally accepted certification organization.

Bank of America, BBVA, Citigroup, Credit Suisse, Dresdner Bank, EKF, HSBC, JPMorgan Chase, Rabobank Group, Scotiabank, Standard Charter Bank, and Westpac Bank Bank all have climate/greenhouse gas reduction policies. Bank of America, for example, has set a target of 7% reduction of greenhouse gas emissions from its energy and utility portfolio; the Danish ECA EKN measures sustainability in its portfolio using CO₂ emissions as one of 3 factors and reports emissions from its portfolio of supported projects, including non-power sector projects (e.g., cement plants, water treatment plants etc.).

HSBC, JPMorgan Chase, Bank of America and Citigroup have all declared explicit “no go” areas and zones, where they will not finance projects or activities that pose environmental threats. HSBC recently also adopted a policy concerning financing of water sector investments that explicitly references the World Commission on Dams guidelines for financing of large dams.

The key point is that progress in setting more rigorous environmental standards and procedures in the international private banking sector has been accelerating over the past two years. The 2003 Common Approaches now in important respects not only lag behind leading private banks, but if not revised to reflect this emerging reality risk becoming a drag on private sector efforts to set a higher level playing field for environmental and social risk assessment. We note that it is likely that the Equator Principles themselves will be revised in the coming year—for example to include a broader range of financial activities than large project finance of \$50 million and above—and, as noted above, increasing numbers of private banks have already gone beyond them.

C. Transparency

Regarding public access to information, a new legal and political framework is emerging at the international level. In recent years increased transparency and public participation have been widely acknowledged to improve the quality of decision-making related to the environment--a development which has been reflected in international law through the adoption of the UNECE Aarhus Convention³. At the European Union level, new binding law implementing the 'access to information' pillar of the Convention requires ECAs to share information on the environmental impacts of their operations with the public. In a letter to the European ECA Reform Campaign, the European Commission recently confirmed that all EU-based ECAs are subject to Directive 2003/4/EC and obliged to observe the rules set down therein – whether they are public, semi-public or private.⁴

Importantly, in the context of ECG members' now positioning themselves for the review of the Common Approaches in 2006, the new legal obligations for EU-based ECAs go significantly beyond the requirements of the OECD Common Approaches – both in scope and in liability:

- Access to information under the new Directive **is not limited to information regarding Category A projects** but extends to any kind of environmental information regardless of the classification of a given project. EU Member States should be concerned that the Common Approaches be amended accordingly lest they will find themselves having to disclose more information than their non-EU counterparts.
- The new Directive stipulates that **environmental information be actively disseminated by the public authorities concerned**. The Common Approaches should put in place measures to systematically and pro-actively disclose environmental information.
- --Regarding the possibility of withholding environmental information where disclosure would negatively affect the confidentiality of commercial information, **EU-based ECAs are required to weigh the public interest served by disclosure against the interest served by the refusal**. European ECAs are also now obliged to **give at least partial access to information** contained in the documents in question.
- **Finally, and contrary to the Common Approaches, the Directive 2003/4/EC is hard law**, and non-compliance with its requirements may be subject to judicial review at the national level.

In the interest of a level playing field regarding the disclosure of information by OECD ECAs, members of the ECG therefore have a strong incentive to integrate the Directive's requirements into the Common Approaches during the 2006 review.

ECAs' information disclosure policies also lag behind those of leading banks with regard to the public disclosure of project environmental and social monitoring reports. The Asian Development Bank requires disclosure of these reports, reflecting the fact that the environmental and social impacts at the stage of project construction, operation and decommission can be quite different than what is projected to occur in environmental and social assessment documents. Transparency and accountability must exist throughout

³ 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)

⁴ Correspondence between Judith Neyer, FERN, and D. Grant Lawrence, European Commission, directorate General Environment, Legal Affairs & Governance, July 7, 2005

the life of a project, not just at the stage of environmental impact assessment release prior to project approval.

We therefore believe disclosure should extend to, *inter alia*:

- Contracts and revenues between extractive sector projects and host governments (as is recommended by the World Bank Group);
- Project monitoring and evaluation documents generated by ECAs, project sponsors and consultants concerning environmental, social, and developmental impacts of projects (as is practiced by the Asian Development Bank).

Some OECD governments have already publicly stated that they put a priority on transparency for public authorities, including their ECAs. Sweden further believes that transparency requirements should not be limited to the environmental impacts of specific transactions, but concern the whole functioning of ECAs and the deals that they support. This includes, but is not limited to, transparency measures to prevent and address corruption, including those mentioned below. Representatives of the Swedish government recently stated that they have no problem with public access to this kind of information and believe that the significant differences in the transparency practices of ECG members need to be addressed in the 2006 review of the Common Approaches.⁵

D. Strengthened Project Monitoring and Compliance Mechanisms

The credibility of the Common Approaches, and indeed the ability to ensure a level, fair playing field among ECAs, depends not just on the adoption of standards and guidelines consistent with the Common Approaches, but on verifiable implementation of them in ECA operations. Thus, strengthened project monitoring and compliance mechanisms are essential to ensure implementation of the Common Approaches by individual ECAs.

The first principle for credible compliance is transparency throughout the process, especially prior to final decisions of support and during project monitoring. Second, monitoring should ensure that environmental and social commitments and covenants are respected, focusing on sensitive projects during construction and operation. Third, effective compliance requires credible sanctions and pre-announced legal leverage points (for example, withdrawal of all or part of a guarantee, performance bonds etc.) to bring clients into compliance.

Fourth, to ensure accountability, ECAs need clear, fair procedures or structures to address grievances and claims from external parties. While a grievance mechanism may be used rarely, its existence creates an assurance that an ECA is in fact delivering on its own obligations and mandate. Such mechanisms need to be independent and must clearly state what grievances or claims are considered legitimate. The remedies to be imposed should be clearly defined, and may include monetary penalties; cancellation of ECA loans, guarantees or insurance etc. Two ECAs, the Japan Bank for International Cooperation and Export Development Canada, and U.S. Overseas Private Investment Corporation have recently created ombudsman offices that represent a step in the right direction. The World Bank Group's Inspection Panel and IFC Compliance Advisor/Ombudsman could also serve as models.

Finally, assessing and monitoring the overall development impact of ECA portfolios is important to ascertain the alignment of ECA practices with sustainability. Although ECAs are not development

⁵ Special Meeting between the Council Working Group on Export Credits and NGOs, Brussels, 22 June 2005

agencies, there is a growing number of EU and international agreements that call for coherence in the activities of official ECAs and official development agencies. ECAs are under increasing scrutiny to ensure their activities both are coherent with, and do not undermine, internationally and nationally agreed on goals for sustainable development. Monitoring could take the form of very specialized tracking and reporting, e.g., greenhouse gas accounting, or involve periodic and random samplings of development projects to survey the overall development quality of the ECA's portfolio. All monitoring and reporting should be done in an independent, transparent, and verifiable manner. Once ECAs gain more experience in this area, it would also be useful for them to agree on uniform procedures for tracking and reporting on the development impacts of their activities, including the indicators to be monitored, the methods for measuring those indicators, and the way in which that information is formatted and presented. This would allow ECAs to more readily identify emerging best practice, enable the public to monitor ECAs more easily, and give ECAs a means by which to track their own performance and ensure a level playing field among their peers.

E. Environmental and Social Standards for ECA Financing of Large Dams

The Participants to the Arrangement on Officially Supported export credits have decided to offer preferential export credit terms for large dams, as part of an agreement giving preferential terms to renewable energy and water projects. On October 10/11, the ECG is expected to decide whether additional environmental safeguards are to be required when ECAs help finance these large dam projects.

Large dams are among the most socially and environmentally risky and controversial infrastructure projects that ECAs support. Civil society organizations have long demanded that ECAs take measures to shift their portfolios from heavy support for fossil fuel and large dam projects towards sustainable energy technologies. However, instead of shifting their portfolios away from these high-impact projects, the Participants have decided to include hydropower among the sectors eligible for preferential terms – and are therefore about to allow even more generous financial support than before for one of the highest-risk, most economically and environmentally controversial infrastructure sectors. The hydropower industry is also well established and is not in need of the preferential terms intended for emerging renewable technologies.

While preferential terms for sustainable sources of energy like solar, wind, and geothermal are welcome, the extension of favorable financial terms to hydropower projects may be the most important environmental impact of the new agreement on the global environment – and a negative one. The long record of negative impacts of ECA-supported dams in developing countries indicates that they do not belong in an agreement to incentivize environmental and poverty-alleviation projects and technologies.

Export credit agencies should not allow special terms for large dams to come into effect under the guise of an environmental and poverty-alleviation initiative. They should only support dams in the future under strict conditions adequate to the task, namely the recommendations of the World Commission on Dams. The existing Common Approaches are grossly inadequate to address the risks and impacts typically associated with large dams. Please see the accompanying report “A Trojan Horse for Large Dams: How export credit agencies are offering new subsidies for destructive projects under the guise of environmental protection”, as well as Prof. Thayer Scudder's letter to ECA practitioners: “World Bank Safeguard Policies Are Not Sufficient for Hydropower Projects”, June 14, 2005, <<http://www.irn.org/programs/finance/index.php?id=050621scudder2.html>>.

F. Human Rights

Respect for human rights is central to the stated aims of the majority of OECD governments, and the primary obligation for respecting, protecting and fulfilling human rights falls on the state. At the

international level, the Charter of the United Nations obliges member states to promote “universal respect for and observance of human rights and fundamental freedoms”⁶ and calls on “every organ of society” to do the same. Public authorities acting on behalf of the state are also subject to the obligations of the state. All officially supported ECAs, be they wholly public, public-private partnerships, or wholly privatized, are public authorities subject to human rights obligations. We recall that as noted above in the section on transparency (IIB), the European Commission has already communicated in writing to the European ECA Campaign that all EU ECAs, whether public, semi-public, or privatized—are considered public agencies for purposes of compliance with Directive 2003/4 EC concerning disclosure of environmental information under the Aarhus Convention.

Despite these obligations, the majority of ECAs have yet to develop human rights policies, let alone screen the projects they support for their human rights impacts.⁷ Most ECAs conflate human rights issues with social issues, and take account of human rights only to the extent that specific issues are addressed through the three World Bank/IFC Safeguard Policies referenced in the Common Approaches. Furthermore, in some cases, World Bank policies are being surpassed by Regional Development Banks. For example, the Inter-American Development Bank now has a Draft Operational Policy that gives specific reference to safeguarding “the individual and collective rights of indigenous peoples and their constituents, whether originating in the indigenous juridical systems of each people, in the indigenous legislation issued by States, in other relevant national legislation or in applicable international law.”⁸

Currently only three ECAs give even any reference to human rights (the Swiss ERG, Canada’s EDC and the British ECGD). By comparison, eight major international private sector Banks have human rights policies, six have indigenous peoples policies that enhance their existing commitment under the Equator Principles to the World Bank/IFC indigenous peoples’ policy, and four have labour policies referencing International Labour Organization (ILO) conventions⁹. Some ECAs, such as EDC, take account of human rights through their political risk assessment of countries and projects, but this translates the issue into financial risk, avoiding important human rights risks and impacts that projects entail for communities even when they do not initially pose a financial risk to the project. ECGD is the only ECA to carry out human rights screening as part of its “case impact analysis”.¹⁰ While this is a step in the right direction, the mechanism is not without its shortcomings, and is still far from constituting the type of thorough human rights impact assessments emerging from international best practice.

⁶ *Charter of the United Nations*, 26 June 1945.

⁷ For a comparative review of ECA human rights procedures, see: The Halifax Initiative’s NGO Working Group on EDC, Risk, responsibility and human rights: Taking a rights based approach to trade and project finance, A discussion paper prepared for an expert meeting on human rights, trade and finance, 2004, on-line: http://www.halifaxinitiative.org/index.php/Pub_ECAs_Reports/560

⁸ Inter-American Development Bank, Operational Policy on Indigenous Peoples (Draft), September 2005

⁹ ABN-AMRO (Netherlands), Barclays (UK), HBOS (UK), ING (Netherlands), Rabobank (Netherlands), Société Générale (France), Standard Chartered (UK), WestPac (Australia) all have human rights policies. ABN-AMRO, Bank of America (US), Citibank, HSBC (UK), JP Morgan Chase (US) and WestPac all have indigenous policies. Banco Itau (Brazil), Citibank(US), Standard Chartered (UK), WestPac (Australia) all have labour policies.

¹⁰ Applicants are required to fill in a questionnaire, which includes questions specifically relating to the human rights impacts of the project under consideration. Projects must comply with the six core UN human rights conventions and the eight International Labour Organization “fundamental conventions”, and ECGD expects project sponsors to comply with those that the host country has ratified. Where forced resettlement is involved, a resettlement action plan is required. Projects involving slave labour or child labour have been banned outright

The absence of human rights in the policies and practices of the majority of ECAs is exceedingly worrying given the number of ECA-funded projects associated with significant human rights violations. Arbitrary arrest, use of paramilitary 'security' forces, forced resettlement, disappearances and kidnapping, inadequate consultation and compensation, lack of access to due process, violation of the right to a healthy environment, loss of livelihood and destruction of sacred sites are among some of the documented abuses occurring in ECA-funded projects.¹¹ Two Reports by Amnesty International also detail how host government agreements in the ECA-funded Baku-Tbilisi-Ceyhan and Chad-Cameroon pipelines have essentially privatized human rights, by limiting, modifying or suspending the application of national and international laws and regulations in the project area. The Amnesty reports call on ECAs not to support projects underpinned by legal agreements, that either (1) curtail the host state's ability to fulfill its human rights obligations; or (2) discourage the host state from fulfilling its human rights obligations¹².

There are good existing methodologies for taking account of human rights. The Danish Human Rights and Business Project has developed a Human Rights Compliance Assessment (developed with industry to meet industry's requirement that screening should take no more than 40-hours to complete); International Alert is developing a screening mechanism for project finance in conflict zones; and, Rights & Democracy is developing a human rights impact assessment for affected communities.¹³

ECAs can no longer ignore human rights, and should not support projects that either (1) contradict the home state's human rights, collective rights, labour and environmental obligations under international law, (2) curtail the host state's ability to fulfill these obligations; or (3) discourage the host state from fulfilling its obligations.

III. The Need for Strengthened Anti-Corruption Measures

A. Strengthening the Action Statement on Combating Bribery

On October 10-11, the ECG is due to renegotiate the Action Statement on Combating Bribery in Officially Supported Export Credits. Over the past year the need has become more urgent for ECAs to strengthen the Action Statement. The 2005 UK-originated Commission for Africa specifically pointed to the need for ECAs to go beyond the OECD Action Statement by implementing the recommendations of the October 2003 OECD internal paper on Best Practices to Deter and Combat Bribery in Officially Supported Export Credits.¹⁴ There have been several allegations of corruption in ECA-backed projects since the Statement was adopted in 2000, which suggest that the Action Statement and the survey of ECA anti-corruption procedures are not adequately addressing the problem. The OECD Working Group on Bribery's Phase II reviews have looked in detail at some ECA procedures but not at others. Phase II reviews are an excellent place to monitor implementation of anti-corruption procedures and the Working Group on Bribery's mid-way evaluation should be seized as an opportunity to ensure greater consistency in how ECAs are evaluated during Phase II reviews. There also will be ongoing negotiations in the EU Council Working Group on Export Credits over the coming year which include corruption.

¹¹ See for example ECA-Watch's 2003 report "Race to the Bottom, Take II" www.eca-watch.org/eca/race_bottom_take2.pdf for details

¹² Amnesty International UK, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan Project, 2003*, and Amnesty International UK, *Contracting out of Human Rights – The Chad-Cameroon pipeline project, 2005*.

¹³ For further details of both screening processes, see Halifax Initiative, op. cit. 6. For the Rights & Democracy mechanism, go to <http://www.dd-rd.ca>

¹⁴ <http://www.eca-watch.org/problems/corruption/oecd%20best%20practices%20document%20april%202003.pdf>

The current Action Statement is too vague about the precise measures ECAs should be taking and leaves out several measures that are crucial for combating bribery. The ECG's regular survey of ECA practice also shows that some ECAs are moving ahead of the rest in combating bribery, and there is considerable need for upward harmonization of good practice. As discussed below (Section III. B.), hearings in the U.S. and Italian Senates on corruption in Multilateral Development Bank (MDB) lending have articulated a number of good practice recommendations which are similar to what we recommend be incorporated into the new Action Statement. .

A new Action Statement needs to address several key issues if ECAs are to be effective in combating bribery. These are:

- ***Disclosure of agents and agents' commissions:*** The new Action Statement should commit ECAs to require details on agents' commissions at the application stage of all transactions, including agents' commissions paid by third parties (such as joint venture partners) in relation to the contract to be supported.
- ***Anti-corruption due diligence:*** The new Action Statement should commit ECAs to have effective and robust due diligence procedures that will enable them to identify and act on 'red flags', particularly with regard to agents' commissions.
- ***Withholding support where there is sufficient evidence of bribery:*** The current Action Statement commits ECAs to taking this course of action. However, many ECAs appear to be defining 'sufficient evidence' as a legal judgment of bribery. Given the length of time it takes for bribery allegations to emerge and be prosecuted, this is entirely inadequate. The new Action Statement must come up with an agreed definition of 'sufficient evidence' and 'suspicion', that would commit ECAs to withhold support where there are credible allegations of bribery. The 2005 UK-originated Commission for Africa noted that whether ECAs withhold support for transactions when there are suspicions or evidence of bribery is a key test of whether the OECD Action Statement is working.
- ***Debarment or exclusion from further ECA support:*** The new Action Statement should commit ECAs to debar companies convicted of bribery or corruption from further support for a certain period of time. This would bring ECAs into line with international developments, such as the recent EU Procurement Directive 2004/18/EC, which introduced mandatory exclusion from public contracts for companies convicted of corruption. It would also ensure that ECAs are implementing the 1997 OECD Revised Recommendation that 'public advantages' be denied as a sanction for bribery, as well as the recommendations to individual countries from various reviews by the OECD Working Group on Bribery concerning excluding convicted companies from export credit support.
- ***Disclosure of convictions in application forms:*** The new Action Statement should commit ECAs to ask companies to state at the application form stage whether they or any representatives of their company or any subsidiaries or joint venture partners have been convicted of corruption or bribery. This best practice is already used in several countries and would provide crucial information to ECAs for their due diligence process.
- ***Requiring enhanced protection for 'whistle blowers' who expose or intend to expose corruption in ECAs or ECA clients:*** The Action Statement should commit ECAs to have proper procedures in place to enable both internal and external whistleblowers to report their concerns in confidence and without prejudice to their careers.

- ***Required disclosure of revenues and contracts in the extractive industry sector in line with emerging standards for Multilateral Development Banks as recommended by the World Bank's Extractive Industries Review and the US Senate Foreign Relations Committee:***
The Action Statement should commit ECAs to require applicants for cover to publicly disclose investment contracts between and revenue payments from companies involved in extractive industries and host governments as a condition of cover.

B. Proposed U.S. Anti-Corruption Legislation Regarding U.S. Participation in the Multilateral Development Banks

Building on a series of hearings on corruption in international lending over the past year and a half, the U.S. Senate Foreign Relations Committee has introduced a bill for the “Multilateral Development Bank Reform Act of 2006,” would condition some \$3.7 billion in U.S funding for the multilateral development banks on the Treasury Department promoting a number of far-reaching reforms. It incorporates a number of anti-corruption proposals that have emerged as the cutting edge of international good practice over the past decade and that in some cases embody principles and practices of interest or relevance for ECAs. Similar recommendations were discussed in a hearing on corruption in international public lending held in the Italian Senate Foreign Relations Committee on December 1, 2004.

The bill calls upon the U.S. Treasury to promote in the MDBs strengthened ‘whistle-blower’ protection, and mandatory financial disclosure by MDB employees involved in major lending operations. Since temporary debarment of companies and individuals involved in corrupt practices from future business with the MDBs is one of the most effective penalties for deterring future corruption, Treasury is to promote in the MDBs consistent procedures for *public* debarment for companies found engaged in corrupt practices with regards to MDB loans (now only the World Bank publicly discloses the names of debarred companies); and ensure that a company that is debarred by one MDB is automatically declared ineligible to conduct business with the other MDBs, so-called cross debarment.

We believe the ECAs, as official, publicly supported agencies, serving public policy purposes, should also adopt increased ‘whistle blower protection,’ and debarment of companies found guilty of corrupt practices, particularly when other publicly supported international lending agencies such as the MDBs have already debarred a company

Much greater transparency of business transactions has also been identified as one of the most important remedies against corruption. Thus the MDB anti-corruption reform bill calls for greater disclosure of internal MDB documents in advance of Board approval, for example loan and credit documents, country assistance and sector strategies etc. Extractive Industries (oil, gas, mining, timber) are particularly vulnerable to large scale corruption, and the bill calls for greatly strengthened, transparent, independent revenue management expenditure and audit systems in MDB loans to countries dependent on these industries, including public disclosure of extractive industry revenue contracts. This recommendation echoes some of the measures already advocated by the United Kingdom and other countries in the Extractive Industries Transparency Initiative (EITI).

In renegotiating the Action Statement on Bribery, the ECAs should consider and adopt expanded transparency and public access to documents relating to revenue flows between governments, government agencies, and project sponsors, such production sharing agreements, power purchase agreements etc., with special attention to the corruption prone sectors such as extractive industries and large infrastructure.

IV. Other Issues of Concern: Debt, Military Expenditures, Subsidies

A. Debt and Export Credits

In December 2002 all aid-receiving countries owed a total of US \$368.5 million export credit debt to OECD countries¹⁵. This export credit debt accounted at the time for 34% of the total debt burden of aid receiving developing countries. To many developing countries their persistent ('unsustainable') debt problem is a major obstacle to achieving sustainable development; money spent on servicing is not available for needed development investments. It is for that reason that debt relief for poorer developing nations is again at the top of the international agenda.. ECAs should assume their responsibility on the following issues:

--Cancellation of export credit debt

Developing countries that seek to have their export credit debt restructured have only one venue to request this: the Paris Club, an informal club of 19 creditor countries. The Paris Club lacks transparency, and it is unclear why, and under what conditions, a country may obtain a debt restructuring arrangement. Although ECAs are directly interested parties at the Paris Club, their role is relatively hidden. Even though export credits are not development agencies, but rather serve creditor countries' commercial interests, it is common practice that the cancellation of export credit debt is reported as Official Development Assistance (ODA) under the rules of the OECD Development Assistance Committee (DAC). It is unacceptable that scarce ODA budgets are burdened with the cancellation of the bad debts of ECAs.

Cancellation of ECA debt should not be counted as ODA, nor be counted in any way as part of aid budgets. ECAs themselves should be directly held financially accountable for all cancellation of export credit debt.

--Transparency of debt recuperation activities

It is the core business of officially supported ECAs to promote exports and investments in risky markets. ECAs stimulate private sector activity by assuming risks that the market may not accept. It is therefore logical and expected that payment problems on the side of developing countries do occur. In such cases ECAs are also in charge of recuperating the unpaid debts. However, the debt recuperation activities of ECAs are shrouded in secrecy.

ECAs must disclose more information about and regularly report on their debt recuperation activities.

--Prevention of 'unsustainable' debt levels

The only ECA commitment in this area is an agreement not to provide export credits for unproductive expenditures in Highly Indebted Poor Countries (HIPC), qualified by numerous potential loopholes and exceptions.¹⁶ However, this agreement does not apply to many poor and highly indebted countries that are not on the HIPC list. Many HIPC countries actually have relatively small export credit debts, while several poor non-HIPC developing countries (e.g. Nigeria and Angola) have export credit debt as a relatively high proportion of their total debt.

¹⁵ External Debt Statistics 1998-2002, ISBN 92-64-10621-9, OECD 2004

¹⁶ Art.3, Statement of Principles on Official Export Credit Support to Heavily Indebted Poor Countries (HIPCs).

ECAs must ensure that their transactions in developing countries are consistent with these countries' poverty reduction and debt sustainability strategies, do not have negative impacts on their social and/or economic development, and do not support unproductive expenditures.

B. Export Credits for Military Expenditures

Arms purchases are the ultimate non-productive expenditure. In many OECD countries, military exports account for a large part of the total volume of officially supported export credits, even if such exports are only a small part of these countries' total exports. If one looks, for example, at the Dutch ECA, in the period August 2002 – December 2004 military- and arms- related export credits represented 30% of the value of all ECA supported transactions, while military exports are only 0.2% of all Dutch exports. There is widespread consensus that the arms trade does not in any way contribute to socially responsible, sustainable development.

ECAs should begin negotiations in the OECD to prohibit official export credit support for arms and other military transactions.

C. Export Credits and Subsidies

Article 23 of the Arrangement on Officially Supported Export Credits clearly stipulates: "The Participants shall charge premium, in addition to interest charges, to cover the risk of non-repayment of export credits. The premium rates charged by the Participants shall be risk-based, shall converge and shall not be inadequate to cover long-term operating costs and losses." Similar legal requirements are reflected in other international legal documents, such as the EU-Directive on Medium and Long Term Export Credit Insurance. In contravention of these requirements export credit debt cancellation is often not paid from premium and interest charges, but from official ODA-budgets. Likewise several ECAs receive regular replenishments from government budgets to deal with emerging deficits. In March 2005 the UK Secretary of State for Trade and Industry noted that a recent ECGD study noted that the annual economic cost to the Treasury of ECGD support amounts to some £150 million or US\$271 million per year.¹⁷

Contrary to international agreements, ECAs therefore appear to provide subsidies rather than ensure that their services are paid for from premium and interest charges to their beneficiaries. Such subsidies negatively affect private sector competitors with no access to the services of ECAs, both in OECD and developing countries.

A transparent reporting and arbitration mechanism should be developed to ensure public accountability for compliance with Article 23 of the Arrangement on Officially Supported Export Credits

¹⁷ <http://www.dti.gov.uk/consultations/files/publication-1467.pdf>

Appendix

The Need to Implement and Strengthen the Common Approaches:

Project Specific Examples

A. The Need for Transparency and Other Reforms in Extractive Sector Investment Contracts: Sakhalin II

Located at Sakhalin Island, Russia, the Sakhalin II oil and gas project is said to be the largest integrated oil and gas project ever undertaken. Sakhalin II is presently under consideration for financing of up to US\$5 billion from the Japanese Bank for International Cooperation (JBIC), the U.K. Export Credit Guarantee Department (ECGD), the U.S. Export-Import Bank (Ex-Im Bank), and the European Bank for Reconstruction and Development (EBRD).

Sakhalin II threatens the last 100 Western Gray Whales with extinction and threatens to degrade hundreds of wild salmon runs, leading to a loss of livelihoods in indigenous and other local fishing communities. As a result, the EBRD, Ex-Im Bank, ECGD and JBIC have deemed the Sakhalin II project and its Environmental Impact Assessment to be unfit, freezing consideration of potential financing for nearly three years.

The Sakhalin II project is being implemented on the basis of a Production Sharing Agreement (PSA), an investment contract between the project sponsors and the Russian Government, signed in 1994.¹⁸ The Sakhalin II PSA contains a “stabilization clause” that requires the Russian parties to compensate the project sponsors for any lost profits caused by any changed laws, regulations, and acts of the Russian authorities after December 31, 1993. This clause, among other things, creates a chilling effect on Russia’s willingness and ability to more rigorously enforce or improve environmental and social laws, regulations and policies that might affect Sakhalin II operations. The Sakhalin II PSA also explicitly overrides a Russian government prohibition on the discharge of wastes into the sea.

The U.S., the U.K, and Japan have development assistance programs in Russia that have helped the country to establish, elaborate and enforce its laws and policies, including those aimed at safeguarding environmental and social conditions. By supporting a project that may freeze a country’s ability to enforce or expand those laws, JBIC, ECGD and Ex-Im Bank are supporting efforts of private foreign investors that in practice risk undermining and limiting democratic development in this relatively new democracy.

An increasing number of civil society campaigns and actors, including ECA-Watch, Amnesty International and the Publish What You Pay International coalition, have called for a range of reforms associated with extractive sector investment contracts—of which the Sakhalin II PSA is a prime example. These include the participation of the public in the development of the parameters governing these contracts, the public disclosure of these contracts, and the disclosure of the resulting revenues to host governments. These

¹⁸ Although Royal Dutch/Shell is now the operator of Sakhalin II, at the time of signing of the PSA project partners included Marathon Oil (30%), McDermott (20%), Royal Dutch/Shell (20%) and Mitsubishi Corporation (10%)

reforms would help enable civil society and the public in emerging democracies to monitor their governments and foreign investors, exercise some degree of accountability, and protect the public interest.

B. A Coming Test Case for the Common Approaches: The Inco Goro Nickel Mine in New Caledonia¹⁹

New Caledonia, a French overseas island territory in the Southwestern Pacific, is surrounded by an extraordinary barrier reef --the second largest in the world, after Australia's Great Barrier Reef. In March, 2002, sixty-two of the world's leading coastal and marine scientific experts convened in Hanoi, Vietnam and concluded that the reefs of New Caledonia were of "Outstanding Universal Value" in terms of their biodiversity attributes, placing these reefs at the top of the priority list for World Heritage designation in the Pacific.

The Canadian mining company, Inco²⁰ in a newly-signed partnership with Sumitomo and Mitsui, is proposing construction of a controversial \$1.8 billion open pit nickel-cobalt mining facility in the Goro region of the territory's Southern Province and is seeking ECA funding. Inco plans to operate a sulfuric acid factory utilizing an unproven and risky Pressure Acid Leach (PAL) technology in the midst of protected botanical reserves adjacent to the fragile reef systems proposed for World Heritage Site nomination, without having secured all of the government permits necessary for mine construction and operation, and with plans to violate existing French environmental regulations. In 2004, environmental groups obtained a leaked document from the Medical Workplace Inspector of New Caledonia's Directorate of Labor indicating the presence of a highly carcinogenic form of asbestos at the mine site.²¹ Local civil society organizations report that they have been unable to obtain some of the most basic documents and reports pertaining to the environmental and social impacts of the project. Key documents or parts of documents, including those related to asbestos contamination, continue to be hidden from public view, or are presented years late. Civil society requests for copies of assessments by government agencies are often ignored. The mine has been also been plagued by shut-downs, blockades, and the postponement of public finance.

In 2004, the Southern Province hired mining engineer and former French official, Eugene Trombone, as a public Inquiry Commissioner to examine the proposed Goro Nickel project. Trombone, who had served as government representative on the Board of Directors of the French environmental risk institute, INERIS²²

¹⁹ This summary is based on a number of reports including S. Fried and R. Anex, "Reefs at Risk: Mining and Export Credit Finance in New Caledonia"; S.Fried, "A Done Deal? Inco/Goro Nickel, the Environmental Impact Assessment Process, and Public Finance in Kanaky/New Caledonia: A Brief Examination of INERIS and Park Service Analyses of the Inco/Goro Nickel Mine Environmental Impact Assessment with comments by independent scientists," 2002. For further details see www.environmentaldefense.org/go/knc.

²⁰ Inco has a long track record of environmental violations. In various reports made to the U.S. Securities and Exchange Commission, Inco has admitted to violating Indonesia's pollution regulations through elevated particulate emissions and by releasing nickel, manganese and chromium in its liquid waste effluent. The Canadian government is requiring the company to reduce SO2 emissions by 34% at its Ontario smelter

²¹ Letter from Dr. Jean Hurpin, Inspector of Workplaces, Labor Department, Government of New Caledonia, Republic of France to the President of Goro-Nickel and the General Director of Bechtel-Technip-Hatch. Dr. Hurpin found antigorite asbestos at the Goro Nickel project site and noted that "dust containing antigorite has high carcinogenic and mutagenic qualities. Animal studies have shown that antigorite presents higher carcinogenic and mutagenic risks than that of crocidolite. Crocidolite asbestos, even from very slight exposure, can bring about lung and mesothelioma cancer."

²² INERIS is the French national institute for environmental risk assessment, housed under the French Ministry of Environmental and Sustainable Development.

reported that the company planned SO₂ emissions at levels five times greater than the allowable French limit, NO_x emissions at levels three times greater than the limit²³ and the dumping of manganese into local waters at one hundred times the allowable limit.²⁴ The project's EIA – described by scientists, environmentalists, and government agencies as gravely inadequate, also indicates plans for the release of hexavalent chromium and other toxins into local waters.²⁵

Inco and its new Goro Nickel investment partners, Sumitomo and Mitsui, are currently seeking multiple forms of public finance, re-insurance, guarantees and political risk insurance from export credit agencies and finance ministries around the world, including JBIC, NEXI and the Dutch ECA. (Sumitomo and Mitsui have recently created a Dutch company, Sumic Nickel Netherlands B.V. to purchase 21% of the Inco Goro Nickel shares.) The Goro Nickel operation is also thought to be seeking additional public finance from other European countries and potentially from Australia and Canada.

Given the significant threat to the natural environment, the company's explicit proposed violations of pollution limits, and the lack of transparency regarding environmental and social impacts, it is clear that the proposed Inco/Goro Nickel mining operation represents an excellent test case for the application of the "Common Approaches" agreed to by OECD member export credit agencies.

²³ Eugène Trombone, Commissaire enquêteur, "Rapport, Conclusions et Avis du Commissaire Enquêteur: Enquête Publique relative à l'exploitation d'une usine de traitement de minéral de nickel et de cobalt par la société Goro Nickel SA aux lieux-dits "Goro" et "Prony-Est" sur le territoire des communes de Yate et Mont Dore," August 6, 2004, pg 23; also pg 26 of 47 Annex I. Référence : Arrêté du 20 juin 2002 relatif aux chaudières présentes dans une installation nouvelle ou modifiée d'une puissance supérieure à 20 MWth.

²⁴ Ibid, pg 20, réf: Arrêté du 2 février 1998 relatif aux prélèvements et à la consommation d'eau ainsi qu'aux émissions de toute nature des installations classées pour la protection de l'environnement soumises à autorisation.

²⁵ See S. Fried, "A Done Deal?" (op cit) Scientists found that the EIA contained "unverifiable data," was "systematically favorable to the project," featured unacceptably vague, dangerously insufficient waste storage and disposal plans and that the mine and power plant would yield unacceptable, predictable extinctions of highly endangered species, all supported by public finance.