



EXPERT WORKSHOP – EXPORT CREDITS AND SUSTAINABLE DEVELOPMENT
3rd-4th September 2003, Chatham House, 10 St James's Square London, SW1Y 4LE

Full workshop notes

1. Introduction

A broad introduction to the Export Credit Agency (ECA) debate was given by the first three speakers: James Harmon, Former Chairman and President of the Export-Import Bank of the United States; Birgitta Nygren, current Chair of the OECD Export Credit Group (ECG) and Nicholas Hildyard of The Cornerhouse NGO.

It was recognised that historically there had been a failure of communication between ECAs and their governments and critics, and that this had resulted in less understanding or progress than may have been possible.

The central role that ECAs play in facilitating international investment was recognised, including guaranteeing a high percentage of the vital foreign direct investment that helps poor countries to develop. In the light of this role, it was asserted that ECAs have the potential and, some felt, a duty, to ensure that such investment contributes to, and does not negatively impact on, sustainable development.

The presentation from the OECD ECG detailed the development of the ECG 'Common Approaches on Export Credits and the Environment' over the past seven years, and the impact that these developments have had on broader debates about ECAs' social and environmental responsibilities. It also detailed ECG consultation with key members of the international financial community such as the World Bank, IFC, IBRD and UNEP.

Currently all members of the OECD ECG screen, classify and monitor projects that they support according to the standards set out in these Common Approaches; however, these standards are considered to be fundamentally lacking by the NGO community as detailed below. Despite these perceived weaknesses, barriers to further development of the Common Approaches were significant, and the group was informed that most ECAs saw 'more problems than advantages' in agreeing these standards. Initial concerns were that ECAs did not have the appropriate skills available in-house to fulfil new analytical roles and that the costs of environmental screening and review would be prohibitive, particularly for smaller agencies.

In contrast to the reticence noted, the speaker felt that ECAs had moved forward faster and with more ready commitment on the issues of bribery and 'Heavily Indebted Poor Countries' (HIPC). It was felt that this reflected the relative simplicity of these issues compared with the inherent tensions of the 'sustainable development' concept.

NGO concerns were noted by the speaker and it was acknowledged that the issue of transparency and openness has been one of the most controversial. Reticence towards such

transparency on the part of many ECAs was acknowledged and the extended ECG internal negotiations on the topic were detailed.

Nick Hildyard of the Cornerhouse NGO gave a highly critical account of current ECA and ECG policy, asserting that in 2000 ECAs were collectively responsible for providing a total of \$500 billion in guarantees and insurance to companies operating in developing countries, the majority of which was in sectors with significant social and environmental impacts such as mining and infrastructural projects.

The role of ECA support in leveraging private sector funding for large, potentially damaging projects was noted, as well as the political support provided to companies when they are challenged in their host country. ECA support for the arms trade was also detailed. The UK ECA (ECGD), for example, having guaranteed a sizable trade in a variety of military products with Iraq, Indonesia, Saudi Arabia and Turkey over the last 20 years.

In the light of the size and sensitivity of ECA undertakings reported, the speaker was concerned that almost all national ECAs operated without adhering to any binding standards relating only to environmental or social impacts.

A history of the campaign to reform ECA policy followed, including calls from the G8 Environment Ministers and a range of NGOs. Key elements of the NGO reform agenda include the adoption of:

- *Clear pre-conditions for ECA involvement in projects, including ensuring that affected communities and other interested parties are adequately and freely informed and consulted prior to a decision for ECA support being approved;*
- *Binding environmental, human rights and development standards consistent with best practice and procedure and the obligations set out in international instruments;*
- *Transparent and accountable procedures, including the timely disclosure prior to project approval of all project-related information that is relevant to informing the public as to project risks;*
- *Rules to ensure that companies are supported only if they have mechanisms in place to enforce the highest standards of corporate social responsibility;*
- *Policies aimed at building a sustainable energy portfolio, including the phasing out of support for fossil fuel and unsustainable energy technologies;*
- *Strict due diligence procedures to eliminate support for projects that involve corruption, including the imposition of sanctions where there is convincing evidence of bribery, and exclusion from support when a company is debarred by other international or national institutions;*
- *An end to support for arms sales, including for the construction of military bases;*
- *Categorical exclusion and prohibition lists, proscribing support for specified activities that are detrimental to sustainable development or for projects that would impact on environmentally-sensitive areas.*

Progress under the Common Approaches was criticised as inadequate and flawed for its lack of transparency and accountability. It was also claimed that some traditionally more progressive ECAs had used the discretionary nature of the Common Approaches to

backslide on previous standards – despite initial claims that any agreement among ECG members would encourage the development of stronger measures over time.

2. Policy Coherence

The next session covered the idea of promoting policy coherence – ensuring that the policies governing ECA operations and those of other national and supranational organisations working in the field of sustainable development are not in conflict. In this session current strategies and best practice were covered as well as the possibility of modifying ECA remits in order to attain better national and international coherence where necessary.

Mark Radka of UNEP gave a detailed presentation taking in the potential for policy coherence with national environmental commitments made under international conventions on climate change, desertification and biodiversity. The speaker suggested that the successful achievement of each commitment noted would involve the transfer of environmentally sound technology to developing countries. ECA support would be vital to the facilitation of such trade, and thus the role of ECAs in implementation of national commitments of this sort were thought to be fundamental. However, neither the role nor responsibilities of ECAs under such agreements have been explicitly stated.

For example, national signatories to the UN Framework Convention on Climate Change, which include all OECD members, have committed themselves to the following agreement: 'The developed country Parties ... shall take **all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies** and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.' It was felt that such 'practicable steps' must include an analysis of the role and responsibilities of export credits in facilitating this transfer and access.

Similarly the conventions on desertification and biodiversity include national commitments to promoting and facilitating environmentally sound technology transfer, particularly renewable energy technology in the case of the former.

Export credit agencies were therefore called upon to undertake the following actions:

- Make a clear commitment to integrating global environmental issues into their mainstream business;
- Develop and intensify links with other agencies working in the sustainable development field;
- Strengthen analytical capacity;
- Harmonise reporting with other ECAs;
- Establish special programmes to show leadership in the field;
- Integrate environment issues into sectoral efforts.

In order to improve coherence ECAs were encouraged to make linkages between business and sustainable development impacts in a wide range of sectors including: energy, forestry, transport, water and waste management, tourism, fisheries and agriculture.

In the face of such a challenge, ECA representatives felt that they were often compromised in their environmental efforts by remits that were purely or overwhelmingly focused on improving their national balance of trade. There was also a feeling that the move from environmental pressure to a wider sustainable development remit was troublesome, particularly the common practical tension between 'environmentalism' and 'development' in implementation.

The example of the ECGD decision-making system was given in some detail, covering the impact analysis strategy, the application of relevant host nation and international standards and the 'sensitive case mechanism', which uses a multi-sectoral approach to deal with decisions in cases with a potential for high environmental impact. More details on this system and such cases are available at www.ecgd.gov.uk.

The structural and operational differences between ECAs and international agencies and development banks were highlighted. Mainly these differences were seen to centre on the relatively distant relationship between ECAs and the projects and companies supported by them.

On the subject of coherence between individual ECAs, the impact of the Common Approaches were again recognised, and moves towards standards were noted, although it was acknowledged that progress could have been faster. Informal attempts to improve coherence were also detailed, including networking and the sharing of sectoral information and expertise in specific cases.

Positive steps that ECAs could take were identified by an ECA representative. These included:

- Identifying common indicators and methodologies to judge sustainable development impacts;
- A clear commitment by ECAs to an agreed set of standards for their business;
- The extension of the Common Approaches to cover more of their business;
- Efforts to include such standards in the design phase of projects;
- A closer working relationship with financial institutions that are leaders in their field such as the banks that have signed up to the Equator Principles.

Overall it was proposed that individual ECAs should seek to ensure that there is coherence between their work and the work done by other departments working on sustainable development. This will help ensure that their work reinforces that of other departments within their governments. Strong linkages with other departments would also give ECAs access to the support that they will need in order to address complex sustainable development issues.

It was further proposed that the OECD ECG and national governments should seek to ensure that the standards used by ECAs are coherent with other relevant international standards, and with international law to avoid the inefficient over-proliferation of standards.

3. Transparency

The highly controversial issue of transparency was then taken up by the meeting. The increasing historical demand for transparency was described, starting in 1997 with the signing of the OECD Anti Bribery Convention. It was noted that while such demands were once the sole preserve of NGOs, recent accounting scandals such as Enron in 2002 had widened the reformist constituency to include many shareholders and governments.

The current disclosure and redress mechanisms of ECAs were discussed, and felt to be lacking by some participants, with full disclosure of projects rare, standards for public consultation weak and the right of appeal against decisions not properly facilitated or upheld. Common Approaches attempts to deal with this issue were felt to be compromised by weak 'discretionary' language and the significant lack of agreement on what information should be considered commercially confidential.

Action on the issue was called for, and particularly critical were:

- The public provision of clear disaggregated statistics on ECA activities;
- Full project disclosure;
- A clear agreed definition of commercial confidentiality;
- Meaningful external input to the development of the Common Approaches over time.

Promising approaches to a more acceptable level of transparency were highlighted by NGO members of the group. These included the ratification of the Aarhus Convention, stressing as it does civil society access to information, decision-making and justice on environmental issues, and freedom of information legislation. Internationally, new Multilateral Development Banks policies and private sector commitments such as the Equator Principles were also recognized as positive developments.

Efforts by the Japan Bank for International Cooperation (JBIC) in the field of transparency illustrated some unilateral progress on the issue. A set of guidelines has recently been issued covering the publication of environmental and social concerns, project disclosure and performance measurements.

The new guidelines include efforts to minimise impacts from the earliest possible point in project design, improve dialogues with host countries, allow transparent and accountable access to the decision making process and publicise review and monitoring procedures. In order for the guidelines to remain credible, an independent group of 'Examiners' has been established to investigate and verify JBIC compliance and ensure a neutral and transparent procedure for complaints.

Overall in this session it was recognised that 'timely' transparency has a crucial role to play in ensuring that ECAs comply with the sustainable development standards to which they work and that OECD members should seek to negotiate agreement on the ex-ante disclosure of consideration of projects and/or EIAs. As a first step, disclosure of support for limited and non-recourse project finance cases could be negotiated. It was felt that approaches for taking into account commercial confidentiality, in duly justified cases, should be developed. As a minimum, disclosure policies should start with project finance. And finally that the OECD group should work to develop minimum guidelines for public consultation on EIAs and Individual ECAs should develop detailed information disclosure policies, which must include clear and transparent guidelines for deciding what information is commercially sensitive. When information is withheld for this reason, explanations should be provided.

In general it was acknowledged that ECAs should aim to ensure that their disclosure and transparency standards and practices should be at least as strong, if not stronger, than those in the private sector.

4. Bribery and Corruption

Closely linked to the issue of transparency is that of corruption, and the session on this issue began with a detailed look at research undertaken by the Global Unions Anti-Corruption Network under the title of UNICORN (United against Corruption). The aim of the project was to analyse and discuss the interaction of ECA activities with the overall public policy objective of combating 'supply-side' corruption. The study took in the impacts of the OECD Anti-Bribery Convention and ECA Action Statement on Bribery and Officially Supported Export Credits, as well as current ECA strategies for removing support for corrupt businesses.

The Convention requires signatories to enact national legislation to criminalise the act of bribing a foreign public official and explicitly take measures to deter, detect and sanction bribery in international business transactions that benefit from official export credit support. The OECD ECA Action Statement maintains that combating bribery is a priority issue, requires ECAs to inform their business partners about legal consequences and invites them to make no-bribery declarations and refuse support or payment in cases where evidence of bribery is clear.

A number of key ECA actions were judged against these commitments, and it was found that apparent policy-level progress on the issue was rather mixed in practice.

Full details of the study are available at <http://www.againstcorruption.org>; however, key proposals for practical progress included that all ECAs must meet the minimum standards set out for them in the Action Statement, a system for securing compliance of ECAs should be developed and, as soon as possible, the Action Statement should be extended in scope to incorporate unilateral national best practice among progressive ECAs.

German approaches were detailed by environmental specialist Thomas Wohlwill of the Hermes Kredit ECA. Following the OECD agreement in 1997, a criminal law was passed in Germany, outlawing the corruption of foreign officials. As a result, any export contract that has been concluded by means of illegal payment does not qualify for cover in Germany, and all applications for cover must be accompanied by a legal statement that no such payments have been made. The system is monitored by two directors who are in contact with a range of interested stakeholders. The progress has been acknowledged by Transparency International; however, it was noted that no cases have been brought under the legislation since its implementation.

The impacts of the recent OECD Action Statement on Bribery and Officially Supported Export Credits was covered in the next detailed presentation by Susan Hawley of the Cornerhouse NGO.

One of the first prosecutions of a multinational company for bribery of a developing country public official was taking place in Lesotho during this meeting. Bribes were paid to win contracts on the Lesotho Highlands Water Project in the early 1990s. Two companies had already been convicted and the official in question had received a 15-year jail sentence. Nine companies were involved in the project and received ECA support, with 85% of the foreign finance for the first phase underwritten by ECAs. Since the majority of ECAs currently include cover for commission payments and agency fees it was felt highly likely that at least some of the bribes paid had been underwritten by public money from the countries involved – France, Germany, Italy and the UK. Support was given despite the fact that many of the companies had been involved in previous projects that were notorious for corruption, that the public official in question being suspended on suspicion in 1994 and that irregularities in the tender process, noted by the European Commission and African Development Bank, appear to show the payment of bribes.

The evidence in the case described dated from the 1990s – prior to the Action Statement – but it was suggested by the speaker that many of the conditions which allowed the bribery to occur have not been significantly altered by the ECG's efforts.

The question of companies with poor track records on bribery has not been addressed by the Action Statement: there is no requirement on ECAs to screen for such histories nor to share what information they have on companies. The possibility of acting on suspicion of bribery has also been rejected, although EXIM in the US undertake additional due diligence on such suspicion on a unilateral basis. Finally the question of commission payments has not been tackled adequately, leaving 11 ECAs still failing to require details of such expenses.

In summary in this session participants agreed that the OECD Convention on Bribery has created a legal requirement for ECAs to prevent bribery. The ECG has responded to this requirement by agreeing an action statement which, *inter alia*, commits ECAs to impose sanctions on companies that bribe.

It was suggested that a recent OECD survey of bribery policies show that many ECAs are currently not using the sanctions that are available to them in this area and that many of them do not address the issue of commissions (through which most bribery is channelled).

It was proposed that:

- ECAs should seek to work with other relevant departments and agencies (including internationally) to develop approaches that will help them pro-actively identify and sanction cases of bribery.
- A list of companies previously convicted of bribery should be developed (either by NGOs or governments) to help ECAs identify likely offenders.
- Policy should be changed where necessary to ensure that ECAs are mandated to implement minimum standards for oversight of commissions.

5. Developing Country Debt

The issue of developing country debt was then addressed, using the Dutch ECA as a case study. ECAs are responsible for a significant proportion of outstanding sovereign debts owed by developing countries as a result, in many cases, of loans deemed 'illegitimate' by civil society. These can be private business debts that have been defaulted on historically and converted to sovereign debt by ECAs that covered them or loans for unproductive goods such as arms.

Primarily the Dutch ECA saw its role to be protecting against the development of new 'illegitimate' debts rather than addressing historic problems. In order to ensure that any new debts were legitimate, efforts had been made to develop a set of sustainable development criteria for lending; however these were primarily focused on the possibility of political risks, with the primary criteria for judgements continuing to be made on whether a project would be likely to repay its debt.

The discussion moved on from the specifics of the Dutch policy to wider procedures for dealing with countries that have HIPC status (for more information see <http://www.worldbank.org/hipc/>). With this new policy of sovereign debt forgiveness, it has become apparent that ECAs may not have the solution of last resort of converting unpaid business debts to sovereign debt in order to ensure that money can be reclaimed. In this case it was asserted that perhaps ECAs would be better to move away from the sort of 'illegitimate' business that does not induce financial benefits in the countries in which they are supporting business – such as arms deals – towards 'better' judgements about the long term sustainability of the loans and insurances that they make. Policies on various key HIPC countries such as Vietnam and Gambia were discussed, with most project judgements being made on a case-by-case basis. Other related policy approaches noted included the recent ECGD decision to refuse support for projects that will not encourage economic development in HIPC countries.

The negative implications of HIPC status were then discussed in some detail. It was noted that it severely restricts a country's access to international finance, and as such makes the involvement of responsible ECAs even more important. However the option of applying for HIPC status still applies in the event that all debt is deemed 'legitimate' and there are

concerns among some ECAs that a country might take the option of re-applying for HIPC status to clear legitimate debts in the future. ECAs also felt that decisions in such crucial cases could be more easily made if the IMF was more transparent about its advice to poor countries on the issue of debt forgiveness.

A discussion of recent developments in this field was undertaken, and it was asserted that many criticisms of ECAs on the grounds of debt creation were based on old procedures. It was felt by some ECA representatives that recent policy developments should address many of the NGO concerns voiced, and that the often described negative impacts of onerous debt repayment by developing countries did not recognise that many countries were not, in fact, paying their debts back at the rate proposed.

The question of what role ECAs should or could play in the light of the development of new sustainable business principles was addressed. It was felt that only public sector finance could provide the support required for long term approaches to economic development in unstable countries, and that as such there was a clear role for ECAs to facilitate such approaches.

Overall in this session it was acknowledged that ECAs have in the past played a major role in creating unsustainable developing country debt burdens. It was suggested that this issue is being addressed by the Enhanced HIPC initiative and the discussions taking place on the 'Evian Approach'.

Looking forward, and based on current individual ECA best practice, it was proposed that ECAs should implement the OECD agreement on non-productive investments in HIPC countries, that the OECD and national governments should consider extending this approach to all developing countries, that, where ECAs do back projects in developing countries, these should be structured in such a way as to ensure that risk is not passed on to host country governments and that the importance of strongly monitoring the implementation of offset agreements should be emphasised.

It was proposed that a more forward-looking approach to odious or illegitimate debts should be developed, including incentives for better consideration of risks by exporters themselves and a set of policies relating to a broader group of 'poor' countries consistent with their national Poverty Reduction Strategy Papers (PRSPs) and the achievement of Millennium Development Goals (MDGs).

6. Ensuring Environmental Due Diligence

Environmental diligence was an area that had received more attention from the progressive ECA community than many others on the day's agenda. As such there was a higher incidence of agreement among all participants, who felt that progress had been made, while noting that the problems had not all been solved. It was also agreed that recent unilateral shifts of policy in several ECAs had changed the dynamics within the OECD ECG and increased the possibility of reaching full consensus on progress on this issue.

An overview of the current debate highlighted sticking points in negotiations. The first controversial issue to be recognised was that of 'benchmarking'. Unlike in many other fields, the concept of benchmarking in ECA policy allows for a range of different sets of standards to be used without disclosure of which specific set a decision has been based upon. This approach has been questioned, as there are fears that an ECA could choose to use the set of standards that would reach the most favourable outcome for any given project. It has been suggested that a single set of standards would promote a fairer business environment as well as satisfying concerns about transparency.

The relationship between international standards and those of investor and host countries was also covered in the discussion. It was noted that host country standards should provide a clear baseline for all projects; however there was concern that an ECA might find itself legally responsible for compliance in the field. It was also noted that the legal relationship between an investor country with such standards and international standards could be contentious, particularly under the auspices of international agreements such as Agenda 21 which commits developed countries not to force their environmental standards on to developing nations via trade policy.

The possibility of using recognised World Bank standards was discussed; however, it was felt that these were operationally lacking and did not fit the wide range of roles that ECAs played in different projects. It was also noted that World Bank standards were likely to be subject to development relatively soon. However, the strength of private sector support for the standards led to ECA concern that a more rigorous approach would engender criticism from the business community.

The possibility of developing independent standards that would, ideally, reflect the wide range of services offered by ECAs globally, was discussed and there was some disagreement between participants. Some felt that it was best for the community to come together behind one set of standards, avoiding duplication, and work to improve and expand them where necessary. Others felt that no current standards were appropriate either in breadth or credibility on key environmental and social issues and that a new rigorous and specific set were needed.

A second range of questions arose over the issue of where in a project cycle to apply standards. It was noted that not only were ECAs often excluded from the project design stage, but that they were also regularly limited to supporting one element of a wider project made up by a consortium of companies from different countries. Two anecdotal examples were given to demonstrate the importance of these questions. A specific ECA was supporting the export of switchboards for a power generator. The ECA had to decide whether they should make an environmental assessment of a whole hydro-dam project for which the switches had been sourced or just the implications of the specific export at hand - switches. A second example of a Chinese nuclear plant was highlighted. The German ECA, Hermes, approved the export of Siemens safety equipment to the project on the grounds that without it, the project would be likely to go ahead with less reliable Russian technology. Thus the export was considered to be 'environmentally sound'. This brings up both resource issues for ECAs and wider questions about ensuring that the best technology available be used in controversial projects. It was proposed that such questions made it impossible for national groups to make such assessments – and suggested that a supranational body would be much better placed to judge ethically complex projects or those put together by consortia.

The French ECA, COFACE, was highlighted as a case study as a result of its relatively progressive work on environmental due diligence. The key achievements in the area included a dedicated in-house environmental team and the development and implementation of specific environmental guidelines in three key sectoral areas (thermal power, large dams, oil and gas). Efforts had been made to develop these guidelines transparently and in consultation with civil society.

Further challenges recognised by COFACE include the need to 'level the playing field' on environmental standards between ECAs through OECD ECG negotiations and the promotion of policy coherence, and the importance of encouraging host governments and other project sponsors to make environmental issues a higher priority. However, it was noted that ECAs work in a highly competitive area, often facing serious pressure for quick decisions from exporters and host governments.

NGO concerns that the OECD ECG was not making the necessary efforts to move forward on the issue of environmental standards was expressed. It was proposed that an informal group be created to look specifically at possibilities for progress and that in order for such a group to be credible, its membership could include civil society representatives. OECD representatives were keen to point out that the OECD does not have an independent remit to be proactive on such matters, and as such its ability to act is based solely upon requests from its member states.

Throughout the session it was proposed that the ECG should seek to negotiate a common set of minimum environmental standards. The majority of participants felt that these should be based on the World Bank standards as these have broad coverage of issues and are commonly accepted. This would also help to ensure coherence internationally (including with the private sector Equator Principles) and avoid the inefficiencies that can be caused when the same project is required to prove its compliance with a range of standards for different organisations. The development of analytical tools for environmental decision-making was also proposed – particularly one which could take into account the different individual elements of any project supported by a specific ECA.

It was also suggested that ECAs should improve and refine their minimum standards by drawing on other (e.g. more sectorally specific) standards and/or international agreements and should seek to work with other stakeholders concerned with the environmental impact of projects, e.g. host governments, sponsors etc. to share information and increase efficiency. OECD member countries should also consider broadening the scope of the Common Approaches to include wider aspects of sustainable development than currently covered. It may be desirable to include other parts of the OECD and other stakeholders in this process.

It was finally noted that the importance of ‘ground truthing’ of Environmental Impact Assessments must be emphasised in all discussions of this sort.

7. Accountability and Governance

The general trend towards accountability in both private and public sector finance was noted, and efforts by development banks towards recognised accountability mechanisms were detailed. The trend was thought to be driven in the main by the concerns of NGOs and affected communities. The ideal is that such mechanisms be independent, accessible and stable over the long term. Two types of accountability mechanism were discussed: ombudsman systems and compliance panels, and the importance of civil society or ‘citizen-based’ mechanisms was emphasised.

The lack of accountability in OECD negotiations was a key cause for concern among many participants. It was felt that such an organisational culture was unlikely to help individual ECAs towards developing more accountable operational procedures.

A detailed presentation on the case of Canada's ECA, EDC, was given. The political accountability structure was explored, including EDC's relationship with relevant government ministries and legislation. An overview of EDC's CSR programme was also provided, of which its proactive compliance policy is a central part. Other elements include the development of a disclosure policy, an environmental review directive, a code of business ethics and a code of conduct. Details can be found on EDC's website at www.edc.ca.

The strength of the remit of the Canadian compliance office was commended by those present, and it was felt that accountability must be enhanced by such operationally independent powers. However there were some who felt that clearer policies and standards

would allow individual stakeholders to hold their national ECA to account through the courts or political procedures rather than through an 'intermediary' Compliance Officer who may be seen as biased.

Overall, it was suggested that accountability mechanisms have a key role to play in ensuring compliance with agreed standards, engaging communities in affected areas, providing solutions to specific problems that are not fully addressed by formal standards, providing advice to ECAs, professionalizing complaints procedures, encouraging complainants to work within formal policy frameworks and strengthening the influence of environmental and social officers within ECAs.

It was further proposed that:

- All ECAs should develop independent compliance mechanisms.
- The OECD ECG should consider negotiating minimum agreed standards for ECA compliance mechanisms. Others felt that minimum standards and transparency regimes were sufficient to facilitate stakeholder review of compliance.
- Consideration should be given to how ECA activities can learn from the precedent created by the OECD Guidelines for Multinational Enterprises National Contact Points.
- Smaller ECAs should consider developing joint compliance mechanisms.

8. The international and national legal framework

Finally the question of the relationship between international and national legal frameworks was taken up by the group. The first presentation raised the question of whether ECAs should be bound by international law, and whether their status as public or private entities could be made clear under such law. Related to such questions is the issue of jurisdiction: whether the most appropriate legal framework should be that which is in place in the source of the capital being invested, or in the place in which such investment has its immediate impact. These questions were noted to be particularly complex under international law such as the European Convention on Human Rights, to which many ECA's Governments are national signatories, and which has a strong extra-territorial element.

The issue of 'Host Government Agreements' was raised, a practice by which investing companies can sign direct agreements with host governments to circumnavigate national or international law that is not favourable to their business.

The example of the Baku-Tbilisi-Ceyhan oil pipeline was outlined. It was asserted that the company involved, BP, has negotiated an agreement that exempts it from any obligation under host nation law that contravenes its operational agreement for the lifespan of the project. This, for example, would prevent future administrations from improving social or environmental standards on the project over the next 40 years. Such agreements often include compensatory clauses committing host governments to pay out in any case where the profitability of the project is compromised by domestic legal progress. It is also alleged that there is a clause in the BTC project agreement relating to stopping the project for reasons of safety threats. Such a threat must be judged by the company to have occurred, and that judgement is based on non-specific 'prevailing standards'. BP is, in this case, charged with bilaterally negotiating vague, unaccountable environmental and social agreements to replace specific, relatively accountable national and international law that should be applied in this case.

The second case study raised was that of the Chad-Cameroon Pipeline. A local NGO representative was critical of the way in which business relating to the pipeline, and supported by ECA credits, was conducted. He felt that there were key factors that made

business in the context particularly risky for ECA supporters: that both countries involved had poor or non-existent human rights and environmental standards and rule of law, that according to all indices, corruption was a significant problem in both countries and that, historically, it is not possible to find a single example of oil development in Africa alleviating poverty, but rather it has tended to increase the incidence of corruption and abuse. Despite this context the project went ahead with World Bank and ECA support and was supported by a host government agreement that effectively sidestepped legal and parliamentary processes in either country and removed the pipeline from the jurisdiction of any international environmental or social treaties that the host countries might sign for the lifetime of the project. Some efforts were reported to have been made to create ad hoc legal mechanisms to protect citizens rights, but they apparently lack effective compliance mechanisms.

Three key proposals for developed country ECAs were put forward based on the latter case study: that ECAs must recognise that they support the majority of investment in African states, and, as such, that they are setting de facto regulatory standards through precedents; that international redress systems, open to civil society in host countries, are absolutely vital in cases where host country legal redress is not accessible to all; that developed country ECAs, along with governments and private sector, must recognise that while they publicly espouse progress in developing countries, their actions can easily work to undermine what little progress has been made.

ECAs supporting the Chad-Cameroon pipeline were keen to ensure the group that they were working to engage positively with the project sponsors and that contracts were now being renegotiated to include compliance with EU standards; however it was felt that this change of heart had only occurred in the face of sustained NGO pressure and that mechanisms to mitigate against such abuses of power should be established for all projects. Legal experts present also felt that the un-transparent approach to various national and international standards would make it impossible to build a clear legal case against the project sponsors or supporting ECAs.

Summary and conclusions

In summary, it was noted that, rather than considering sustainable development concerns a threat or additional constraint on their business, ECAs would be better served by bringing these values into their core activities in order to reduce the risks facing ECA-backed investments and transactions in developing countries.

At present there is a significant variation in the ways in which different ECAs seek to manage the impact of their activities on sustainable development. There is also frequently a lack of coherence between a government's stated sustainable development policies and objectives, and the policies and objectives of its ECA. This potentially causes competitive disadvantages for those countries that have more stringent standards and processes, and creates the risk that unsustainable projects may receive ECA support from countries with lower standards. A level playing field is therefore highly desirable.

The OECD ECG has played a key role in stimulating the introduction of environmental standards, particularly through the Common Approaches. However, the impact of this agreement has been limited both by the fact that it gives countries discretion over which standards to use in evaluating projects (and whether to allow deviations from those standards) and in the exclusive environmental focus. The Common Approaches are due to be renegotiated in Autumn 2003, which creates the opportunity for them to be strengthened and widened to include other sustainable development related issues.

However, the OECD will only be able to make progress if governments are willing to change policy at the national level. The work done by ECAs was shown to be highly political, and in many cases policy change will need to be initiated or endorsed at a high level. Policy change will also need to be understood and endorsed by the wide range of government departments which have an interest in the work done by ECAs. NGOs have a key role to play in promoting such change.

Strengthening and broadening the work done by ECAs on sustainable development presents significant challenges. Many sustainable development issues are extremely complex, and require expertise and information that may not be available within ECAs. Broadening the scope of the OECD Common Approaches may also make negotiating agreement more challenging.

The structure and working practices of ECAs vary widely from country to country. This needs to be taken into account in developing proposals for OECD-wide action.

Some form of best or good practice is currently being implemented by one or more ECA on all of the issues that were discussed at the workshop. While a one-size-fits all approach is unlikely to work on any of these issues, the fact that action has already been taken by some ECAs suggests that progress should be feasible for all.

Most of the current approaches discussed at the workshop aim to prevent unsustainable outcomes. Proactive approaches on these issues from progressive ECAs were called for.



Expert Workshop:

EXPORT CREDIT AGENCIES AND SUSTAINABLE DEVELOPMENT 3rd and 4th September 2003, Royal Institute of International Affairs, UK

Chair's Summary

The following document summarises the key points that were raised during the discussion at this expert-level multistakeholder workshop. Participants in the workshop included representatives of Governments, NGOs and Financial Institutions. The workshop was held under the Chatham House Rule, which means that all comments made were non-attributable.

General points:

- Export Credit Agencies (ECAs) play a central role in facilitating international investment, and guarantee a high percentage of Foreign Direct Investment in developing countries.
- ECAs have the potential to play a key role in ensuring that such investment contributes to, and does not negatively impact on, sustainable development.
- Addressing sustainable development issues also has the potential to play a significant role in reducing the risk of ECA-backed investments and transactions.
- At present there is a significant variation between the ways in which different ECAs seek to manage the impact of their activities on sustainable development. There is also frequently a lack of coherence between a government's stated sustainable development policies and objectives, and the policies and objectives of its ECA. This potentially causes competitive disadvantages for those countries that have more stringent standards and processes, and creates the risk that unsustainable projects may receive ECA support from countries with lower standards. A level playing field is therefore highly desirable.
- The OECD Export Credit Group has played a key role in stimulating the introduction of environmental standards, particularly through the OECD Draft Recommendation on Common Approaches on the Environment and Officially Supported Export Credits. However, the impact of this agreement has been limited both by the fact that it gives countries discretion over which standards to use in evaluating projects (and whether to allow deviations from those standards) and in its focus on environmental standards. The Common Approaches are due to be renegotiated in Autumn 2003, which creates the opportunity for them to be strengthened and widened to include other sustainable development issues.
- However, the OECD will only be able to make progress if governments are willing to change policy at the national level. The work done by ECAs can be very political, and in many cases policy change will need to be initiated or endorsed at a high level by politicians. Policy change will also need to be understood and endorsed by the wide range of departments who have an interest in the work done by ECAs. NGOs have a key role to play in promoting such change.

- Strengthening and broadening the work done by ECAs on sustainable development presents significant challenges. Many sustainable development issues are extremely complex, and require expertise and information that may not be available within ECAs. Broadening the scope of the OECD Common Approaches may also make negotiating agreement more challenging.
- The structure and working practices of ECAs vary widely from country to country. This needs to be taken into account in developing proposals for OECD wide action.
- Some form of best or good practice is currently being implemented by one or more ECA on all of the issues that were discussed at the workshop. While a one-size-fits all approach is unlikely to work on any of these issues, the fact that action has already been taken by some ECAs on each issue suggests that progress should be feasible for all.
- Most of the current approaches discussed at the workshop aim to prevent unsustainable outcomes. Action by ECAs to proactively support sustainable projects is less common.

Proposals

Specific proposals for action to strengthen ECAs contributions to sustainable development proposed during the workshop included:

General:

- The development of further approaches to target ECA support in ways that will make positive contributions to sustainable development (e.g. by providing support to sustainable projects, renewable energy projects etc).

Coherence:

It was proposed that:

- Individual ECAs should seek to ensure that there is coherence between their work and the work done by other government departments working on sustainable development. This will help ensure that their work reinforces that of other departments. Strong linkages with other departments will also give ECAs access to the support that they will need in order to address complex sustainable development issues.
- The OECD ECG and national governments should seek to ensure that the standards used by ECAs are coherent with other relevant international standards and with international law. This will help avoid the inefficient over-proliferation of standards. Compliance with host government laws should also be required by all ECAs.

Transparency

It was proposed that:

- (Timely) transparency has a crucial role to play in ensuring that ECAs comply with the sustainable development standards that they are working to.

- OECD members should seek to negotiate agreement on the ex-ante disclosure of consideration of projects and/or Environmental Impact Assessments (EIAs). As a first step, disclosure of support for limited and non-recourse project finance cases could be negotiated.
- Approaches for taking into account commercial confidentiality, in duly justified cases, should also be developed.
- The OECD should work to develop minimum guidelines for public consultation on EIAs.
- Individual ECAs should develop detailed information disclosure policies. These should include clear and transparent guidelines for deciding what information is commercially sensitive. When information is withheld for this reason explanations should be provided.
- ECAs should aim to ensure that their disclosure and transparency standards and practices should be at least as strong, if not stronger, than those in the private sector.

Bribery and corruption

Participants agreed that the OECD Convention on Bribery has created a legal requirement for ECAs to prevent bribery. The ECG has responded to this requirement by agreeing an action statement that *inter alia* commits ECAs to impose sanctions on companies that bribe.

It was suggested that the recent OECD survey of bribery shows that many ECAs are currently not using the sanctions that are available to them in this area and that many of them do not address the issue of commissions (through which most bribery is channelled).

It was proposed that:

- ECAs should seek to work with other relevant departments and agencies (including internationally) to develop approaches that will help them pro-actively identify and sanction cases of bribery.
- A list of companies previously convicted of bribery should be developed (either by NGOs or governments) to help ECAs identify likely offenders.
- Policy should be changed where necessary to ensure that ECAs are mandated to implement minimum standards for oversight of commissions.

Debt

It was acknowledged that ECAs have in the past played a major role in creating unsustainable developing country debt burdens. It was suggested that this issue is being addressed by the Enhanced HIPC initiative and the discussions taking place on the 'Evian Approach'.

Looking forward, and based on best practice currently being implemented by some countries, it was proposed that:

- ECAs should implement the OECD agreement on 'non productive investments in HIPC countries'.
- The OECD and national governments should consider extending this approach to all developing countries. This might start with 'IDA Only' countries.
- Where ECAs do back projects in developing countries, these should be structured in such a way as to ensure that risk is not passed on to host country governments.
- ECAs should ensure that all projects given support in countries with interim or existing Poverty Reduction Strategy Papers (PRSPs) are consistent with such strategies.
- The implementation of offset agreements should be closely monitored by all ECAs involved in such agreements.
- A more forward-looking approach to avoiding 'odious debts' should be developed.
- Incentives should be created to encourage exporters to improve their own consideration of risks.
- The definition of productive expenditure could be limited to projects that would directly or indirectly reduce poverty, thereby contributing to the achievement of the MDGs.

Environmental due diligence

It was agreed that recent shifts of policy in several ECAs has changed the dynamics within the ECG and increased the possibility of reaching full consensus on this issue.

It was proposed that:

- In revising the 'Common Approaches' the OECD ECG should seek to negotiate a common set of minimum environmental standards. Many participants felt that these should be based on the World Bank standards (both the PPAH and safeguarding policies), as these have broad coverage of issues and are commonly accepted. This would also help to ensure coherence internationally (including with the private sector Equator Principles) and avoid the inefficiencies that can be caused when the same project is required to prove its compliance with a range of standards.
- Individual ECAs should also seek to improve and refine any minimum standards agreed at the OECD by drawing on other (e.g. more sectorally specific) standards and/or international agreements.
- ECAs should seek to work with other stakeholders concerned with the environmental impact of projects, e.g. host governments, sponsors etc. to share information and increase efficiency e.g. of EIAs.
- The importance of 'ground truthing' of EIAs was emphasised.
- OECD member countries should consider broadening the scope of the Common Approaches to include wider aspects of sustainable development than are currently

covered. It may be desirable to include other parts of the OECD and other stakeholders in this process.

Accountability

It was suggested that accountability mechanisms have a key role to play in:

- Ensuring compliance with agreed standards;
- Engaging communities in affected areas;
- Providing solutions to specific problems that are not fully addressed by formal standards;
- Providing advice to ECAs;
- Professionalizing complaints procedures, and encouraging complainants to work within formal policy frameworks;
- Strengthening the influence of environmental and social officers within ECAs.

Two types of accountability mechanism were discussed: ombudsman systems and compliance panels.

It was proposed that:

- All ECAs should develop independent compliance mechanisms.
- The OECD ECG should consider negotiating minimum agreed standards for ECA compliance mechanisms. Others felt that minimum standards and transparency regimes were sufficient to facilitate stakeholder review of compliance.
- The OECD ECG should consider what lessons can be drawn about compliance mechanisms from the precedent created by the OECD Guidelines for Multinational Enterprises National Contact Points.
- Smaller ECAs should consider developing joint compliance mechanisms.

National and international legal frameworks

It was suggested that:

- ECAs should use their leverage to improve environmental and social standards in countries with weak governance frameworks.
- In particular ECAs should where possible use their leverage to ensure that project-specific legal regimes negotiated by project sponsors do not undermine international and host country law and that they do protect the rights of redress of citizens.
- OECD member states should consider the long-term impacts of site-specific project agreements on international law and host-country governance.