Response to Export Credits Guarantee Department's (ECGD's) "Public Consultation on Proposed Revisions to ECGD's Business Principles and Ancillary Policies"

Joint Response

By

Amnesty International UK

Campaign Against Arms Trade

Jubilee Debt Campaign

Oxfam GB

The Corner House

WWF UK

BACKGROUND AND SUMMARY

1. The Export Credits Guarantee Department [ECGD]'s "Business Principles" (BPs) were introduced in 2000 by the then Secretary of State for Trade and Industry, Stephen Byers, specifically in order to ensure that the ECGD took account of the government's wider policies on human rights, the environment and development, following widespread public concern[1] over the impacts of ECGD's activities abroad.

2. Since the introduction of the Business Principles, a succession of parliamentary inquiries – notably by the then Trade and Industry Select Committee, the International Development Committee and the Environmental Audit Committee – have concluded that ECGD should strengthen its policies on environmental and human rights screening and its anti-bribery measures.

3. In 2008, for example, the Environmental Audit Committee produced a report on the Export Credits Guarantee Department and Sustainable Development. The Committee made a number of critical observations about ECGD's due diligence processes with regard to the sustainable development and environmental impacts of projects supported by ECGD. It recommended that research should be undertaken into how the ECGD's environmental and social due diligence might be strengthened:

> "We recommend that the ECGD commissions an independent study into how its environmental and sustainable development standards could be tightened, including an assessment of how UK Sustainable Development objectives could be effectively reflected in the ECGD's assessment standards" [2]

4. More recently in December 2009, in the Joint Committee on Human Rights report on business and human rights, entitled 'Any of our business?', there was strong criticism of ECGD's human rights assessment procedures. It stated:

> "The ECGD decision-making process has been the subject of criticism by parliamentarians and others for many years. While the introduction of the Business Principles in 2000 has improved the framework for decision making on the human rights impacts of business, it is not clear whether this has had any impact on the decisions of the ECGD. Without increased transparency and openness in the assessment of applications, this impression is likely to endure."

The Committee concluded by recommending:

> "If the Government does not agree that the assessment process should follow more open and accountable procedures, we recommend that the Business Principles should be incorporated into the ECGD's statutory framework**.**"[3]

5. Instead of responding to such recommendations by attempting to improve the implementation of its Business Principles, ECGD has now proposed to dilute them. It plans to "adopt a policy of following OECD agreements related to the environment, sustainable lending and bribery ('ethical policies') and not separately operate and additionally create its own policies which go beyond those agreements"[4]. It also intends to revise the Business Principles and reduce them to "high level statements of aim or intent"[5] as opposed to policy commitments.

6. This submission is a response to ECGD's proposals endorsed by the following non-governmental organizations, either in whole or in respect of the areas relating to their specific remits: Amnesty International UK, Campaign Against Arms Trade, Jubilee Debt Campaign, Oxfam GB, The Corner House, WWF UK [hereafter "the Consultees"]

7. The Consultees believe that if the ECGD adopts its proposals, it will take the Department's practices in a direction that is diametrically opposed to that envisaged by the majority of parliamentary committees that have examined the ECGD in the last two years, with potentially significant negative impacts for those affected by the projects that ECGD supports.

8. The submission covers the impacts of the proposed changes to the ECGD's Business Principles and ancillary policies with respect to:

   - Preliminary indications of support;
   - The exclusion of applications under SDR 10 million or a repayment term under two years from ECGD's due diligence procedures;
   - Areas where the ECGD's current standards and policies are stricter than those in the OECD's Recommendation on Common Approaches on the Environment and Officially Supported Export Credits;[6]
   - The implications of the proposed changes for ECGD's policy on child labour and forced labour;
   - The implications of the proposed changes for ECGD's policy on greenhouse gas accounting;

- The proposed changes to transparency commitments;
- The implications of the proposed changes to ECGD's anti-bribery rules and the risk that the new rules will be abused;
- The assessment of financial risks arising from environmental impacts;

9. The Consultees have reviewed the changes that ECGD is proposing to make to its Business Principles and consider them to be ill-conceived, unjustified, and, in a number of areas, potentially in violation of the UK government's legally-binding international undertakings.

10. The Consultees also contend that ECGD has failed to comply with the Government's Code of Practice on Consultations, in that ECGD has conspicuously failed to conduct an impact assessment of its proposed policy changes. They argue that no decision should be taken on the proposed changes until such an impact assessment has been undertaken and subjected to public consultation.

11. The Consultees' detailed concerns are set out below

PRELIMINARY INDICATIONS OF SUPPORT SHOULD NOT BE BINDING

12. ECGD's current Case Handling Process Information Note clearly states that preliminary indications of support given by ECGD to an exporter are "entirely without commitment".[7]

13. The proposed new "Guide to Applicants" contains no such statement.[8]

14. The Consultees contend that it would be unlawful for ECGD to give a legally-binding commitment of support without ECGD first satisfying itself that the project meets the ECGD's required environmental, social and human rights (ESHR) policies.[9] Any new guidance given to applicants should therefore explicitly state that preliminary indications of support are "entirely without commitment".

THE EXCLUSION OF APPLICATIONS UNDER COMMON APPROACHES THRESHOLD FROM CURRENT DUE DILIGENCE REQUIREMENTS

15. As noted in the ECGD's Consultation paper, ECGD "has historically assessed projects where the UK export value is less than SDR[10]10 million (approximately equivalent to £10 million) or where the repayment term is less than two years".[11]

16. Under the new proposals, such projects would no longer be subject to any form of ESHR assessment or due diligence. [12] [13]

17. ECGD justifies this change in policy on the grounds that:

> "it is HMG's view that it is not right to impose a burden upon UK exporters which is not imposed by the Common Approaches upon exporters of other OECD countries."[14]

18. ECGD fails to mention that ***all*** the UK's major competitors (Germany, USA, France, The Netherlands, Italy, Denmark, Switzerland, Norway, Denmark, Canada, Austria, Australia, Sweden and Japan) within the OECD, currently screen ***all*** applications for support, regardless of their value or their repayment period, for environmental and social impacts (*see* Table 1 below). Where such screening indicates specific environmental impacts, or where the project is in a sensitive area, further assessment is then typically undertaken. Germany's Euler Hermes, for example, assesses projects below the Common Approaches threshold in the case of "deliveries to 'sensitive areas'" and "obvious high environmental or social risks".[15] Some export credit agencies (ECAs) go beyond the Common Approaches: Atradius Dutch State Business (DSB), the Dutch (official) export credit agency, both screens and assesses ***all*** short term credits (other than defence and aerospace exports).[16]

19. Indeed, the official responses to the OECD Export Credit Group's 2009 "Survey on the Environment and Officially Supported Export Credits Projects"[17] reveal that such screening is conducted by three quarters of the ECAs that responded, including such emerging economy ECAs as Turkey's Eximbank and Hungary's Mehib.

20. Only five countries did not conduct such screening. Of these however, one (Finland's Finerva)[18] reserves the discretion to do so if they became aware of "relevant environmental information".

Table 1: Official Responses to OECD Export Credit Working Group, "Survey on the Environment and Officially Supported Export Credits Projects", 2009

ECA	Country	Answer given to survey question 2: "Are all applications screened?"
SERV	Switzerland	Yes
Atradius DSB	Netherlands	Yes
KEIC	Korea	Yes
GIEK	Norway	Yes
EGAP	Czech Republic	Yes
Euler Hermes	Germany	Yes
EKF	Denmark	Yes
COFACE	France	Yes
ECIO	Greece	Yes
Eximbank	Hungary	Yes
Mehib	Hungary	Yes
SACE	Italy	Yes
JEXIM	Japan	Yes
JBIC	Japan	Yes
Turk Eximbank	Turkey	Yes
Exim	USA	Yes
ONDD	Belgium	Yes
EDC	Canada	Yes
OEKB	Austria	Yes
EFIC	Australia	Yes
EximBanka	Slovakia	Yes
EKN	Sweden	Yes
KUKE	Poland	Yes
Finnerva	Finland	No
KEXIM	Korea	No
ODL	Luxembourg	No
COSEC	Portugal	No
ECO	New Zealand	No
ECGD	UK	No
CESCE	Spain	No

Source: OECD Export Credit Working Group, "Survey on the Environment and Officially Supported Export Credits Projects", 2009, http://www.oecd.org/department/0,3355,en_2649_34169_1_1_1_1_1,00.html.

21. In light of the above, the Consultees consider that there are no valid reasons related to protecting the competitiveness of UK exporters, for the ECGD to

abandon its current policy of scrutinising all applications for their ESHR impacts. Indeed, far from levelling the playing field, the ECGD proposal could trigger a 'race to the bottom', with other ECAs seeking to follow suit by lowering their own standards. Such an outcome would seriously disadvantage those UK exporters that have invested resources and management time in instituting policies aimed at improving corporate behaviour and accountability.

22. The Consultees further contend that any decision to implement the proposed changes could seriously undermine the UK's bargaining power within the OECD. Currently, ECGD already exempts the bulk of its business (defense and aerospace) from environmental screening. Were ECGD similarly to exempt short-term credits and credits under SDR10million from scrutiny, it would have little influence on discussions aimed at strengthening the OECD Common Approaches, which would be dominated by the majority (three quarters) of OECD ECAs that rightly subject such applications to screening. The ECGD's stated aim[19] of strengthening the Common Approaches would therefore be undermined. The Consultees note that ECGD does not consider this possibility or the implications for the UK achieving its stated policy goals.

23. The Consultees further contend that ECGD should retain its current policy or, if the proposed changes are adopted, require that <u>all</u> projects be screened, in line with the practice of three quarters of its fellow OECD member ECAs. As a minimum, as proposed by the Export Guarantees Advisory Council,[20] ECGD should retain the discretion to conduct such screening and assessments on all requests for assistance.

LOWERING OF ENVIRONMENTAL, SOCIAL AND HUMAN RIGHTS DUE DILIGENCE STANDARDS

24. ECGD's policies and criteria for assessing the environmental, social and human rights [ESHR] impacts of the projects it is considering for support are currently set out in its Case Impact Analysis Process (CIAP).[21] ECGD proposes that in future the criteria it uses to assess impacts should be limited to the standards set down in the OECD Common Approaches. It justifies this proposed change on the grounds that:

> "The stage has now been reached where the CIAP is not stricter than the Common Approaches as regards the criteria for assessment of ESHR [environmental, social and human rights] impacts." [Emphasis added][22]

25. The ECGD has misdirected itself on this point, which has no basis in fact. Contrary to ECGD's assertion, the CIAP is more stringent than the Common Approaches in a number of important respects.

26. First, the CIAP goes further than the Common Approaches in *requiring*, as a matter of policy, that "all cases supported by ECGD are compatible with its Statement of Business Principles".[23] The reference to the Business Principles significantly enhances the assessment criteria that ECGD must take into account when evaluating the environmental, social and human rights impacts of the projects that ECGD supports. In particular, the Business Principles provide that ECGD will "promote a responsible approach to business and will ensure our activities take into account the Government's international policies, including those on sustainable development, environment, human rights, good governance and trade" (emphasis added).[24] By contrast, the Common Approaches contains no requirement to take account of national human rights, sustainable development, good governance or trade policies. Under the proposed changes, the ECGD would therefore be released from consideration of the UK's wider policy commitments. The ECGD has not demonstrated that it has considered the impacts of this change on the quality of its due diligence for the environmental, social and human rights impacts on those affected by the projects it supports.

27. Second, CIAP requires that the projects supported by ECGD are assessed against a number of human rights criteria, notably with regard to the use of child or bonded labour and the use of armed security guards,[25] and that "all decisions on ECGD support have taken into account Government policies on . . human rights".[26] In sharp contrast, the Common Approaches is entirely silent on the issue of human rights, containing no reference to any human rights treaty or international undertaking or indeed using the words "human rights". Nor are mandatory human rights considerations incorporated into the Common Approaches through the ten World Bank safeguard policies[27] with which OECD export credit agencies are encouraged (not required)[28] to comply

(exemptions being permitted[29]), since none of the ten policies address human rights obligations, focusing entirely on social and environmental impacts.

28. The ten World Bank safeguard standards referenced in the Common Approaches as applying to all projects are those of the World Bank Group's International Bank for Reconstruction and Development (IBRD).[30] Although OECD member states are encouraged to benchmark "private sector limited or non-recourse project finance cases" against the Performance Standards[31] of the International Finance Corporation, one of which addresses Labour and Working Conditions, or against EU standards,[32] or other standards that are stricter than the ten World Bank (IBRD) safeguard policies,[33] it is entirely at the discretion of the participating ECA as to whether or not it does so.

29. The effect of the proposed changes would therefore be to replace a requirement to assess against human rights criteria by the *option* to do so. Again, the ECGD has not demonstrated that it has considered the effects of this on the quality of its due diligence or on those impacted by the projects it supports.

30. Third, the Common Approaches lays down no threshold or test for assessing the compliance of projects with the criteria set out in the ten mandatory World Bank (IBRD) safeguard policies. By contrast, the CIAP states:

> "It is ECGD's policy that projects should comply <u>in all material respects</u> with the relevant safeguard policies, directives and environmental guidelines of the World Bank Group".[Emphasis added][34]

31. The absence of such a materiality test in the Common Approaches has allowed participating ECAs to support projects that do not come close to complying with the ten World Bank (IBRD) safeguard policies, with potentially severe environmental, social and human rights repercussions for those affected. Recently, for example, the German, Swiss and Austrian ECAs approved support for the controversial Ilisu Dam in Turkey, subject to 150 conditions intended to bring the project into line with World Bank standards. Subsequently, the ECAs were forced to withdraw from the project, at considerable cost both in terms of their reputation and in management time and costs, when Turkey failed to comply with the 150 conditions. CIAP's materiality test would have prevented ECGD's involvement in the project on the terms agreed by the participating ECAs.

32. Nonetheless, ECGD proposes to replace its current materiality test "by simply stating a policy of compliance with the [Common Approaches]".[35] This not only reduces the clarity of its previous test – with attendant uncertainties for exporters – but also opens up the significant risk that ECGD will support projects that may indeed comply with the Common Approaches but, as with Ilisu, clearly fail to comply (to any degree) with the required World Bank (IBRD) standards.

33. The latter possibility poses a number of challenges for ECGD, none of which appear to have been considered. They include:

    - ECGD's increased exposure to reputational risk (which would be adversely affected by its involvement in projects that do not materially comply with World Bank standards). This would have a knock-on effect on the UK government's reputation;
    - The potential for management time being expended on projects from which ECGD is eventually forced to withdraw (time which could be better spent on assisting exporters whose projects are in material compliance with the required standards); and
    - The impacts on those affected by projects that do not comply with the required standards or where compliance depends on conditions being fulfilled at some future date.

34. In light of the above, the Consultees contend that ECGD has seriously erred in its judgment that the Common Approaches are as strict as CIAP. Consequently, the justification given by ECGD for its proposed changes to the criteria for assessing ESHR impacts is not only flawed but wholly inadequate.

35. The Consultees therefore recommend that the proposed changes to the CIAP should be rejected and that, if revisions are made, they should strengthen, not weaken, CIAP's assessment criteria.

IMPACTS OF PROPOSED CHANGES ON ECGD'S CURRENT BAN ON HARMFUL CHILD LABOUR AND FORCED LABOUR

36. Until 2003, ECGD had no rules banning child labour. Its stated policy was to allow support for projects where children were exploited, but only under "exceptional circumstances".[36]

37. Support for projects involving bonded and forced labour was also permitted, although ECGD stated that it would be "difficult to imagine circumstances in which ECGD could provide cover to projects which involve forced labour."[37]
38. Following criticism from parliament's Environmental Audit Committee,[38] however, the ECGD adopted an outright ban on "harmful child labour" and forced labour.[39] The new policy was incorporated into ECGD's application forms, which now clearly state:

    - "It is ECGD's policy not to provide support to projects that involve harmful child labour"; [40] and
    - "It is ECGD's policy not to provide support to projects that involve bonded or forced labour."[41]

39. The current rules require that *all* applications (with the exception of those under ECGD's recently introduced Letter of Credit Guarantee Scheme) be screened against the World Bank Group's Policy relating to harmful child and forced labour:[42] support should not be given for projects that fall foul of this policy.[43] A similar ban on harmful child labour and forced labour is enforced by a number of other ECAs, including The Netherland's Atradius DSB,[44] Italy's SACE[45] (which recently turned down a project involving child labour)[46] and Australia's EFIC.[47]
40. The Consultees contend that the proposed changes to ECGD's Business Principles and ancillary policies would have the effect of overturning ECGD's current ban on harmful child labour and forced labour, or, at the very least, seriously undermining its implementation.
41. The effect of the proposed changes would be:

    - **To exclude *all* ECGD support with a repayment period under two years from *any* screening for child and forced labour;**
    - **To exclude *all* ECGD support for projects where the UK export value is less than SDR10 million from *any* screening for child and forced labour;**
    - **To release ECGD from its current commitment to screen projects with repayment periods over two years for child and forced labour;** ECGD currently requires the projects its supports to comply "in all material respects with the relevant *safeguard policies, directives* and *environmental guidelines* of the World Bank Group."[48] Under the

> Common Approaches, the scope is significantly narrower: ECGD would be expected (not required)[49] to screen against the ten safeguard policies of the World Bank, specifically those of the International Bank for Reconstruction and Development (IBRD).[50] The ten safeguard policies referenced by the Common Approaches do not cover child or forced labour and make no mention of the only World Bank policy that does.[51]

42. ECGD could therefore abandon any screening for child and forced labour under the new rules. In effect **the new rules would make any future screening for child and forced labour entirely discretionary**.

43. Under the Common Approaches the ECGD could, if it so chose, screen projects with a repayment period over two years against the Performance Standards of the World Bank's International Finance Corporation (IFC).[52] Unlike the safeguard policies of the World Bank's International Bank for Reconstruction and Development (IBRD), the IFC performance standards cover child and forced labour. However, the Common Approaches only recommends that they be applied to projects being funded through project finance (a means of financing which is on the decline) and only "where appropriate".[53] Their application would thus be entirely discretionary.

44. EU standards could also be applied if the ECGD so chose, but, again, the Common Approaches stipulates that this should only be "where appropriate".[54] No definition is given of "where appropriate".

45. The ECGD would also have the option of going beyond World Bank Group standards[55] but it has signalled that it is unwilling to do so,[56] clearly referencing World Bank Group standards as its ceiling. Moreover, even if it opted to go further, credits of under two years would still be excluded from the new procedures.

46. If the new rules being proposed by ECGD are approved, the effect will be to strip away the protection that ECGD currently provides against the abuse of children and bonded labourers in poorer countries.

47. Many of the projects that ECGD currently screens for labour abuses would be excluded from its future screening processes; and the ECGD's current mandatory procedures could become entirely discretionary.

48. The impacts on the ground for poorer people in the South could be disastrous. To reiterate what parliament said in 2003: there should be no circumstances under which it would be acceptable for ECGD, using taxpayers' money, to support projects that exploit children or employ bonded or forced labour.[57]

49. The Consultees are concerned that a relaxation or abandonment of ECGD's current ban on forced labour breaches the UK's obligation under the European Convention on Human Rights to prevent slavery. The ECGD gives no indication that it has considered this possibility. It should do so, reporting its reasoned conclusions and put them out for consultation.

IMPACTS OF PROPOSED CHANGES ON ECGD'S CURRENT COMMITMENT TO REPORT ON CARBON DIOXIDE EMISSIONS

50. In July 2008, the ECGD committed voluntarily to report on the greenhouse gas emissions arising from the "high and medium impact" projects that it supports.[58]

51. Under the Common Approaches, there is no requirement to undertake such reporting.

52. The Consultees are concerned that the ECGD's commitment will therefore no longer apply under the proposed new policies.

53. The ECGD appears to have given no consideration to this issue. It should do so, reporting back to Consultees on its findings and allowing time for comment before any final decision is taken on the new proposals.

FINANCIAL RISK ASSESSMENT PROPOSALS RUN COUNTER TO COMMON APPROACHES

54. ECGD proposes that the ESHR assessments it will conduct should not include an assessment of the financial risks arising from the potential environmental impacts of a project. Its proposed wording on financial risks in its draft Guidance to Applicants reads:

> "Financial assessment and ESHR impact issues are largely independent: whilst there may be, exceptionally, circumstances where environmental

> issues, for example, impinge on financial risk, the ESHR impact considerations usually operate as a separate test that an application must pass in order for support to be given."[59]

55. Separating the assessment of ESHR impacts from their attendant financial risks runs diametrically counter to the Common Approaches, which clearly states that, in order to achieve its objectives:

> "Members should . . . enhance financial risk assessment of new projects and existing operations by taking into account environmental aspects."[60]

56. The Consultees also note that the World Trade Organisation (WTO)'s Agreement on Subsidies and Countervailing Measures (ASCM), to which the UK is a party,[61] places a legal duty on ECGD to ensure that the premiums it charges are adequate to cover the long-term operating costs and losses of its programmes. This provision includes support programmes for projects with a repayment period under two years or a value under SDR 10 million.

57. The Consultees would therefore contend that ECGD is obliged to ensure that the financial risks attendant on the environmental, social and human rights impacts of <u>all</u> of the project that it supports, regardless of repayment terms or value, are adequately taken into account when pricing its premiums and that this should, as per the Common Approaches, be ensured through the environmental, social and human rights assessment procedures.

PROPOSED REVISIONS TO TRANSPARENCY COMMITMENTS

58. ECGD's Business Principles currently commit ECGD to being "open and honest in all our dealings"[62] and state, with regard to transparency, that

> "ECGD will be as open as possible, whilst respecting legitimate commercial and personal confidentiality".[63]

59. ECGD proposes to abandon this wording on the grounds that:

> "the balance between duties not to disclose documents and duties to disclose them has been struck in the Information Legislation [Freedom of Information Act and Environmental Information Regulations] referred to above. It is therefore inappropriate that ECGD should make separate statements in the Business Principles about the balance that it will attempt to strike between transparency and legitimate commercial or personal confidentiality".[64]

60. The Business Principles would in future give a commitment only to:

> "publish on [ECGD's] website for the benefit of applicants a statement of processes and factors taken into account by it in considering applications".[65]

61. The Consultees are very concerned at the restrictive new wording, which greatly reduces the accountability of ECGD to both parliament and the public. In particular, it removes ECGD's previous commitment to be pro-active in its transparency, releasing, for example, decision notes on controversial projects (such as the Baku-Tbilisi-Ceyhan oil pipeline) over which the public have expressed concerns and, at the request of ECGD, frequently submitted comments in writing. No consideration appears to have been given by ECGD to how the proposed changes would affect such established procedures or to the implications for public accountability.

62. The Consultees contend that ECGD should retain its current proactive commitment to being "open and honest" in its dealings.

63. The Consultees also note that ECGD has recently been criticised by the Information Commissioner for its "cavalier" approach to the freedom of information legislation.[66] If the ECGD wishes to clarify its Business Principles, the Consultees would recommend that it includes a commitment to abide by its legal duties under the UK's freedom of information laws.

PROPOSED REVISIONS TO ECGD'S STANDARDS ON DISCLOSURE OF AGENTS' NAMES: THE RISK OF ABUSE

64. ECGD currently always requests the names of agents used by both the applicants for support and the exporters who would benefit. This goes further than the OECD Recommendation on Bribery and Officially Supported Export Credits, which gives ECAs discretion as to whether or not they request the name of an applicant's agent ("where appropriate").[67]

65. ECGD is proposing to keep its rule for UK applicants and exporters. However, it proposes that the requirement to provide the name of agents be dropped where an applicant is being reinsured by another OECD member ECA. Instead, ECGD would rely on the due diligence of the reinsuring ECA.

66. The possibility of ECGD being able to place reliance on the ECA of another member state, particularly those ECAs whose anti-bribery procedures have been strongly criticised by the OECD's Working Group on Bribery, is a matter of concern. The Consultees note, however, that no consideration has been given by ECGD to ensuring that the due diligence conducted by other ECAs would meet the ECGD's own standards.

67. The proposed exemption to the ECGD's current rules also raises the worrying prospect that exporters will chose to have the main applicant for a contract in an OECD country that does not check on an applicant's agents, thereby circumventing the ECGD's current (stronger) due diligence procedures with regard to the mandatory disclosure of agents' names. No consideration appears to have been given by ECGD to this possibility, which is nonetheless real. Recently, for example, the US Department of Justice in its indictment of Kellogg Brown and Root LLC for bribery in relation to an ECGD-backed project in Nigeria (to which the company pleaded guilty) noted that Kellogg Brown and Root LLC held its interests in the offshore company that channeled the bribes through a UK subsidiary rather than directly "in order to insulate itself" from liability under US law for bribery, in this case of Nigerian government officials.[68] Similar tactics could be used to avoid naming agents

68. In October 2008, the OECD Anti-Bribery Working Group strongly criticized the ECGD in its "Phase 2bis" report into the UK's implementation of its commitments under the OECD Anti-Bribery Convention.[69] The report was prompted by the Serious Fraud Office's December 2006 decision to stop the investigations inquiry into BAE Systems' deals with Saudi Arabia. The report said that the SFO had handed the ECGD evidence of misrepresentations by BAE to the ECGD in connection with the issuance of insurance, but that the ECGD had done nothing about it. The OECD also raised questions about future ECGD support in circumstances where the country receiving the underwritten goods had interfered with criminal law proceedings, as Saudi Arabia had done with the SFO inquiry. Other BAE deals which were investigated by the SFO, including those with Romania and South Africa, were backed by the ECGD.

69. In these circumstances, it is vital that the UK is seen to be strengthening its anti-bribery procedures, rather than watering them down.

70. If the proposed changes go ahead, the Consultees would recommend that a financial limit is placed on the value of the proposed reinsurance arrangements, possibly a £5 million total head contract value, to discourage abuse of the new provisions.

PROPOSED REVISIONS TO SUSTAINABLE LENDING GUIDANCE

71. The need for export lending to be sustainable has been accepted by the ECGD and OECD as a whole. Export credit loans account for large portions of unsustainable developing world debt built up in the past. Today, ECGD is the largest public bearer of developing countries' debt in the UK. The Consultees contend that much of this debt is 'unjust' in the sense that it was detrimental in development and environmental terms. As such the Consultees argue that past debts should be audited to ascertain how many were 'responsibly' lent. The Consultees also argue for a change in the insurance method employed by the ECGD to reflect a fairer balance of responsibilities between lender and borrower.

72. In times of economic crisis, it is especially important that sustainable lending standards are upheld – both because developing world countries face particular problems maintaining debt sustainability and because it is particularly tempting for exporting countries to focus on the positive benefits brought to their own economy through export credits without giving sufficient consideration to the debt implications for the host country. The G20 summit in London in April 2009 affirmed that export credits would be a principal means of re-stimulating the global economy.[70]

73. The OECD 'Principles and guidelines to promote sustainable lending practices in the provision of official export credits to low-income countries' is based on the same set of principles that guides the ECGD's own 'Sustainable lending – guidance for applicants for ECGD support'. However, current ECGD policy gives a detailed description of the assessment process required to ensure sustainable lending, whereas the OECD policy is a much shorter statement of

principles with vague commitments to action. The Consultees are, therefore, concerned that the proposed changes in ECGD's policies will reduce the requirement on the ECGD to undertake a comprehensive sustainability assessment.

74. Where specific assessment is required in both procedures, the OECD document sets a lower requirement than the ECGD's current procedure. For instance, in assessing whether a transaction furthers a sustainable development purpose the ECGD currently requires "sufficient evidence"[71], whereas the OECD only requires ECAs to "seek assurances from government authorities in the buyer country"[72].

75. The Consultees accept that these changes might, in practice, mean little or no change to the ECGD's assessment procedures. Our concern is that the ECGD is no longer mandated to carry out such thorough assessment procedures, which, in turn, means the ECGD cannot be held to account for breaches in such procedures.

FAILURE TO CONDUCT CONSULTATION IN ACCORDANCE WITH CODE OF PRACTICE

76. The Government's Code of Practice on Public Consultations[73] states that "estimates of the costs and benefits of the policy options under consideration should normally form an integral part of consultation exercises"[74] and that "a 'consultation stage Impact Assessment' should normally be published alongside a formal consultation, with questions on its contents included in the body of the consultation exercise".[75] Such an impact assessment "should be carried out for most policy decisions" since "consultation of interested parties on the Impact Assessment . . . can bring greater transparency to the policy making process and should lead to departments having more robust evidence on which to base decisions".[76] The Government also states:

77. "Consideration should also be given to asking questions about which groups or sectors would be affected by the policy in question, and about any groups or

sectors . . . that may be disproportionately affected by the proposals as presented in the consultation document."[77]

78. ECGD has adhered to the Code in previous consultations, including, inter alia, its recent consultation on its proposed Letter of Credit Guarantee Scheme, conducted in May 2009.[78] The ECGD has given no indication that the current consultation will not similarly be conducted in compliance with the Code.

79. The Consultees note that the current consultation documents contain no Impact Assessment of the costs of the proposals. In addition, the ECGD does not appear to have considered the impacts of its proposals on those most affected by its proposed changes - most notably child workers and bonded labourers. Indeed, the consultation documents contain no evidence that impact assessments have been conducted on any ESHR aspects of the proposals.

80. In response to parliamentary questions by Lord Lester as to "what assessment had been made of the impact of the proposed revisions . . . on the protection of social and human rights, including protection against the use of child workers and forced labour abroad", the Minister for Trade and Investment (Lord Davies of Abersoch) did not question the need for such an assessment but responded:

81. "No assessment has been made of the potential impact of [ECGD's proposals] on the protection of social and human rights, including protection against the exploitative use of child workers and the use of forced labour overseas, because ECGD does not know, and cannot estimate, the level of future demand for support for exports falling into the [exempted] category. Without such prior knowledge, ECGD cannot estimate the proportion of those within that category that might have possible environmental and social impacts, including on human rights, or determine the classification between A, B or C impacts and whether such impacts would satisfy international standards as specified in the OECD recommendation on common approaches and, therefore, be eligible in principle for ECGD support."[79]

82. If, as the Minister claims, no such assessment is possible, then the Consultees would contend that the ECGD should not proceed with its proposed changes,

since it is unable to give any assurance that the impacts will be proportionate or justifiable.

83. Contrary to the Minister's assertions, however, the ECGD is in fact well placed to assess the general nature and extent of the impacts that might flow from its proposed policy changes. As already noted, the Dutch ECA Atradius DSB already screens and assesses projects with a repayment period under two years. The ECGD could – and should – request details of such assessments and employ them to gauge the likely extent to which exempted projects might impact the environment and human rights.

84. The Consultees contend that the failure to conduct an impact assessment renders the consultation illegitimate and that the ECGD should not proceed with its proposed changes until such an impact assessment has been undertaken and the public has had an opportunity to comment on it.

3 March 2010

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1 As evidenced, for example, by the July 2000 Memorandum on Minimum Conditions for ECGD Reform, signed by 35 UK non-governmental organizations and parliamentarians; the responses from civil society groups to ECGD's own 1999 Mission and Status Review; and in the related parliamentary inquiries held by the International Development Committee and the Trade and Industry Select Committee.

2 Environmental Audit Committee, ECGD and Sustainable Development, http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmenvaud/929/92902.htm.

3 Joint Committee on Business and Human Rights, "Any of our business? Human rights and the UK private sector?", para 247, http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/511.htm.

4 ECGD, Consultation, Public Consultation on Proposed Revisions to ECGD's Business Principles and Ancillary Policies, para 3 ii, http://www.ecgd.gov.uk/business_principles_consultation_document.pdf. Hereafter: ECGD Consultation.

5 ECGD, Consultation, op.cit 4, para 37,.

6 OECD, "Revised Recommendation on Common Approaches on the Environment and Officially Supported Export Credits", Paris, 2007, http://www.olis.oecd.org/olis/2007doc.nsf/LinkTo/NT00002B8E/$FILE/JT03228987.PDF. Hereafter: Common Approaches.

7 ECGD, Case Handling Process Information Note, page 1, http://www.ecgd.gov.uk/ecgds-case-handling-process-information-note-september-2008.pdf.

The Note states: "indications will say whether the proposed payment/repayment terms are acceptable in principle but do not involve a detailed assessment of the case (and are given entirely without commitment). They carry a reminder that ECGD will need to consider the case in greater detail to satisfy itself on various matters (including environmental and other impacts) before any commitment can be considered."

8 ECGD Consultation, op. cit. 4, Annex C: Draft Guide to Applicants, para 2.

9 For further discussion, see: "Witness Statement of Nicholas Hildyard", WWF UK and Corner House Research vs Secretary for State for Business, Enterprise and Regulatory Reform, August 2007, http://www.thecornerhouse.org.uk/pdf/document/SakLegalNHWit.

10 SDR - Special Drawing Rights – consist of a basket of major currencies.

11 ECGD Consultation, op. cit 4, para 41.

12 ECGD Consultation, op. cit 4, para 41:
"The chief change is that ECGD has historically assessed projects where the UK export value is less than SDR 10m (approximately equivalent to £10m) or where the repayment term is less than two years; under the proposed policy statements, it will not now do so unless and until the Common Approaches is revised to include such projects".

13 ECGD Consultation, op. cit 4, para 5:
"If these proposals were to be implemented, consistent with the relevant OECD agreement, certain exports – those involving credit terms of less than two years or of less than circa £10 million – would no longer be subject to environmental impact due diligence."

14 ECGD Consultation, op. cit 4, para 42.

15 OECD, "Responses to the Survey from Members of the OECD's Working Party on Export Credits and Credit Guarantees regarding their procedures and practices concerning the environment, as at 31 July 2009: Euler Hermes", response to question 14 , available at http://www.oecd.org/dataoecd/43/47/43445559.zip.
Euler-Hermes states: "Transactions with a value below the [Common Approaches] threshold will be reviewed more closely with regard to their environmental effects only if they obviously involve specific environmental risks. This holds particularly true for projects in especially sensitive areas which deserve protection."
Elsewhere, Euler-Hermes further states: "Transactions with a value below the above-mentioned threshold will be reviewed more closely with regard to their environmental effects only if they obviously involve specific environmental risks. This holds particularly true for projects in especially sensitive areas which deserve protection."
See: http://www.agaportal.de/en/aga/nachhaltigkeit/umwelt.html.

16 Atradius DSB, Corporate Social Responsibility, p.7, http://www.atradiusdutchstatebusiness.nl/Images/dsben/MVO%20Broch%20Engels_tcm1009-132870.pdf.

17 OECD, "Responses to the Survey from Members of the OECD's Working Party on Export Credits and Credit Guarantees regarding their procedures and practices concerning the environment, as at 31 July 2009", http://www.oecd.org/document/3/0,3343,en_2649_34181_41888998_1_1_1_37431,00.html.

18 OECD, "Responses to the Survey from Members of the OECD's Working Party on Export Credits and Credit Guarantees regarding their procedures and practices concerning the environment, as at 31 July 2009: Finnerva", response to question 2, available at http://www.oecd.org/dataoecd/43/47/43445559.zip

19 ECGD Consultation, op. cit 4, paras 41-42: "It remains HMG's policy that the Common Approaches should be so revised [in order to require assessment of projects below the Common

Approaches current thresholds]; and HMG will continue to propose to the OECD for that to occur."

20 ECGD Consultation, op. cit 4, para 49: "In regards to ESHR impacts, the Export Guarantees Advisory Council has suggested that, where a project of less than 2 years credit and/or less than SDR10m appears to involve high potential ESHR impacts, ECGD should reserve a discretion to undertake due diligence to satisfy itself that the project meets the relevant international standards."

21 ECGD, Case Impact Analysis Process, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-3-.pdf. Hereafter: CIAP.

22 ECGD Consultation, op. cit 4, para 30.

23 CIAP, op. cit. 20, para 1.1.
"In processing applications for ECGD support, it is ECGD's policy to ensure that all cases supported by ECGD are compatible with its Statement of Business Principles . . ."

24. ECGD, Business Principles, 2000, p.3, http://www.ecgd.gov.uk/ecgdbusprinciples.pdf.

25 CIAP, op. cit. 20, para 5.11.

26 CIAP, op. cit. 20, para 1.1: "In processing applications for ECGD support, it is ECGD's policy to ensure that all decisions on ECGD support have taken into account Government policies on the environment, sustainable development, and human rights."

27 The referenced World Bank standards are those of the International Bank for Reconstruction and Development rather than other branches of the World Bank.

28 Common Approaches, op. cit 5, paras 12 and 13.
The language of para 12 is entirely discretionary ("should" rather than "shall"): "for all projects, Members should benchmark projects . . . against the relevant aspects of all ten World Bank Safeguard Policies".
Para 13 makes the element of discretion explicit: "Projects are also expected to meet the international standards against which they have been benchmarked where these are more stringent than host country standards" (emphasis added).

29 Common Approaches, op. cit 5, para 13:
". . . in exceptional cases, a Member may decide to support a project that does not meet the international standards against which it has been benchmarked, in which case, the Member shall report and justify the standards applied in accordance with paragraph 22".

30 Common Approaches, op. cit 5, footnote 4.
The Common Approaches references the following World Bank safeguard policies: Environmental Assessment (OP 4.01); Natural Habitats (OP 4.04); Pest Management (OP 4.09); Indigenous Peoples (OP 4.10); Physical Cultural Resources (OP 4.11); Involuntary Resettlement (OP 4.12); Forests (OP 4.36); Safety of Dams (OP 4.37); International Waterways (OP 7.50); and Disputed Areas (OP 7.60.)
The World Bank safeguard policies are available at:
http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html

31 Common Approaches, op. cit 5, para 12. The language is entirely discretionary ("should", not "shall", and "where appropriate"): "Members should benchmark projects . . . where appropriate . . . for private sector limited or non-recourse project finance cases, against the relevant aspects of all eight International Finance Corporation Performance Standard."

32 Common Approaches, op. cit 5, para 12. Again, the language is entirely discretionary ("should", not "shall", and "where appropriate"): "Members should benchmark projects . . . where appropriate . . . against any relevant internationally recognised standards, such as European Community standards, that are more stringent than those standards referenced above."

33 Common Approaches, op. cit 5, para 12. Here again, the language is also entirely discretionary ("Members may also benchmark projects against the relevant aspects of any internationally recognised sector specific or issue specific standards that are not addressed by the World Bank Group".

34 CIAP, op. cit. 20, para 2.6.

35 ECGD Consultation, op. cit 4, para 33.

36 ECGD, "Summary of Case Impact Procedures", 2003, Annex 1, Guidance Notes, p.iv. ECGD stated: "In common with most countries around the world, the UK has ratified the United Nations convention on the Rights of the Child and the International Labour Organisation conventions on the abolition of child labour. *There must, therefore be exceptional circumstances for ECGD to provide cover to projects which involve child labour*" (italics added).

37 ECGD, "Summary of Case Impact Procedures", 2003, Annex 1, Guidance Notes, p.iv. On bonded and forced labour, ECGD stated: "In common with most countries around the world, the UK has ratified the International Labour Organisation Conventions on the elimination of forced or compulsory labour. *It is difficult to imagine circumstances in which ECGD could provide cover to projects which involve forced labour*."

38 Environmental Audit Committee, "ECGD and Sustainable Development", 2003, Recommendation 14, http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/689/689.pdf. The Committee stated: "There is no circumstance under which it would be acceptable for ECGD, using taxpayers' money, to support projects which exploit children or employ bonded or forced labour."

39 "Government Response to the Committee's Seventh Report 2002-03 on ECGD and Sustainable Development", Annex 1, available at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/1238/1238.pdf.

40 ECGD, "Summary of Case Impact Procedures", 2007, Annex 1, Guidance Notes, p.iv, http://www.ecgd.gov.uk/impact_questionnaire_april_2007_-_final.doc.

41 ECGD, "Summary of Case Impact Procedures", 2007, Annex 1, Guidance Notes, p.iv, http://www.ecgd.gov.uk/impact_questionnaire_april_2007_-_final.doc.

42 ECGD, "Summary of Case Impact Procedures", 2003, Annex 1, Guidance Notes, p.iv. ECGD states: "The World Bank Group has produced a Policy relating to harmful child and forced labour which is available from the IFC website at: http://www.ifc.org/enviro/enviro/childlabor/child.htm. ECGD uses this policy as the benchmark of good practice for projects involving child labour."

43 In practice, such screening does not always appear to be conducted. Completed Impact Questionnaires obtained through Freedom of Information legislation reveal cases where the questions on social impacts have not been answered – despite ECGD requiring (on paper) that they should be. A case in point is the Impact Questionnaire "completed" by VAI/Siemens for a project in India for which no responses are given to the questions on child labour.

44 CSR brochure Atradius DSB, pages 5-6, http://www.atradiusdutchstatebusiness.nl/Images/dsben/MVO%20Broch%20Engels_tcm1009-132870.pdf.

The review is based on the ILO 'Declaration on Fundamental Principles and Rights at Work' concerning fundamental labour standards and related treaties ratified by the Netherlands. It concerns the prohibition of child labour and forced labour, freedom of association and the right to collective bargaining, and the prohibition of discrimination in the workplace. A well-founded concern that these fundamental labour standards are being or could be violated constitutes grounds for rejecting the application. However, it is acknowledged that local laws and regulations in the country concerned may prevent compliance with the standards.

45 SACE's ethical code states: "Relations with clients and suppliers - SACE pursues the fair, impartial and transparent selection of its suppliers through operational directives included in the appropriate internal procedures and abstains from keeping relations with actors who are members of criminal organisations, including those linked with mafia, or connected with exploitation of child labour or operating in violation of labour rights, nor with actors with aim of terrorism at national and international level."

46 In a recent stakeholder consultation held in Italy, SACE disclosed that it had put on hold a guarantee to an Italian exporter for a project in India after a consultant raised child labour concerns in the context of the overall project during project implementation.

47 EFIC, "Environmental policies", http://www.efic.gov.au/corp-responsibility/envr-responsibility/Pages/default.aspx.
EFIC has adopted the eight IFC Performance Standards as its general benchmarks for environmental and social reviews.

48 CIAP, op.cit. 20, para 2.6, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

49 See footnote 27.

50 Common Approaches, op. cit 5, para 12. bullet one.
"Members should benchmark against host country standards and . . . against the relevant aspects of all ten World Bank Safeguard Policies."

51 The World Bank policy that deals with child and forced labour is the International Finance Corporation's 1998 "Child and Forced Labour Policy Statement". The IFC is the arm of the World Bank that provides loans to the private sector. The IFC policy is available at: http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_ChildLabor/$FILE/ChildForcedLabor.pdf.

52 Common Approaches, op.cit 5, para 12 bullet one and tiret one.
"Members should benchmark projects . . . *where appropriate* . . . for private sector *limited or non-recourse project finance* cases, against the relevant aspects of all eight International Finance Corporation Performance Standards" (emphasis added).

53 Common Approaches, op. cit 5, para 12 bullet one and tiret one.
"Members *should* benchmark projects . . . *where appropriate* . . . for private sector *limited or non-recourse project finance* cases, against the relevant aspects of all eight International Finance Corporation Performance Standards" (emphasis added).
As noted in footnore 27, the language is entirely discretionary ("should" rather than "shall").

54 Common Approaches, op. cit 5, para 12 bullet one and tiret three.
"Members should benchmark projects . . . *where appropriate* . . . against any relevant internationally recognised standards, such as European Community standards, that are more stringent than those standards referenced above".

55 Common Approaches, op. cit 5, para 12 bullet 2.
"In addition, Members may also benchmark projects against the relevant aspects of any internationally recognised sector specific or issue specific standards that are not addressed by the World Bank Group."

56 ECGD references World Bank Group *safeguard policies*, *directives* and *environmental guidelines* as the benchmark with which projects are expected to comply in all material respects. See: ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 2.6, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

57 Environmental Audit Committee, "ECGD and Sustainable Development", 2003, Recommendation 14: "There is no circumstance under which it would be acceptable for ECGD, using taxpayers' money, to support projects which exploit children or employ bonded or forced labour."

58 See: Government response to Environmental Audit Committees Report on ECGD and Sustainable Development, 2008, http://www.publications.parliament.uk/pa/cm200809/cmselect/cmenvaud/283/9780215528971.pdf.

59 ECGD Consultation, op. cit 4, Annex C: Draft Guidance to Applicants, para 4.

60 Common Approaches, op. cit. 5, para 3.

61 R. Box, Department of Business, Innovation and Skills, "Re: Question on UK Law and WTO" , email to Nicholas Hildyard, The Corner House, 16 September 2009.
"The World Trade Organisation (WT0) Agreement on Subsidies and Countervailing Measures (ASCM) is an international treaty to which both the European Community (EC) and the UK are parties. It therefore automatically forms a part of UK law in accordance with constitutional principles and section 1(2) of the European Communities Act 1972. The Commission can enforce its provisions against a Member State in the same way it enforces other aspects of EC law".

62 ECGD, Business Principles, 2000, p.2, http://www.ecgd.gov.uk/ecgdbusprinciples.pdf.

63 ECGD, Business Principles, 2000, "Transparency", http://www.ecgd.gov.uk/ecgdbusprinciples.pdf.

64 ECGD Consultation, op. cit 4, para 35.

65 ECGD Consultation, op. cit 4, Annex E.

66 Information Commissioner, Decision Notice of 28 July 2008.

67 OECD Recommendation on Bribery and Officially Supported Export Credit Agencies, para 1b, http://www.olis.oecd.org/olis/2006doc.nsf/LinkTo/NT00007506/$FILE/JT03219827.PDF.

68 USA vs Kellogg Brown and Root LLC, US District Court, Southern District of Texas, Houston Division, H-09-071, 6 February 2009, paragraph 9.

69 OECD, United Kingdon – Phase 2bis:
Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, October 2008, http://www.oecd.org/dataoecd/23/20/41515077.pdf.

70 Leaders Statement - The Global Plan for Recovery and Reform - London, 2 April 2009: http://www.g20.org/Documents/final-communique.pdf.

71 'Sustainable lending – guidance for applicants for ECGD support', p1, paragraph 3.

72 'Principles and guidelines to promote sustainable lending practices in the provision of official export credits to low-income countries', p2, paragraph 4c.

73 BIS, Code of Practice on Public Consultations, available at http://www.ecgd.gov.uk/annex_d_-_code_of_practice_on_consultation.pdf. Hereafter: Code of Practice

74 Code of Practice, op. cit 73, para 3.3.

75 Code of Practice, op. cit 73,,para 3.3.

76 Code of Practice, op. cit 73, para 3.3.

77 Code of Practice, op. cit 73, para 3.4.

78 ECGD, Public Consultation on The Introduction of a Product Guaranteeing Reimbursement of UK Confirming Banks Under Letter of Credit Arrangements, May 2009, http://www.ecgd.gov.uk/index/public-information/public-consultation.htm.

79 Hansard, 25 January 2010, Column WA298, http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100125w0003.htm.