

THE EXPORT CREDIT RENAISSANCE: CHALLENGES FOR ECOLOGICALLY SUSTAINABLE DEVELOPMENT IN THE GLOBAL ECONOMIC CRISIS

SCOTT HICKIE*

In the midst of the global economic crisis and the collapse of private international finance,¹ export credit is finding renewed relevance² as a fundamental component of the global economic recovery package.³ Reaffirming a commitment against protectionism, the G20⁴ has pledged approximately \$250 billion⁵ to be delivered through export credit agencies ('ECAs') and multilateral development banks ('MDBs')⁶ to support trade.⁷ With protectionism and trade barriers an untenable vehicle for supporting vulnerable domestic industries,

* Policy Advisor to Ian Cohen MLC and Jubilee Australia. Scott is currently a post graduate student at the Macquarie University Centre of Environmental Law ('MUCEL').

1 World Bank. *Global Development Finance: The Role of International Banking, Review, Analysis and Outlook* (2008) 2; Hidehiro Konno, *Steering the Course in 2009* (2009) Berne Union 7 <[http://www.berneunion.org.uk/pdf/Berneper cent20Unionper cent20Yearbookper cent202009.pdf](http://www.berneunion.org.uk/pdf/Berneper%20Unionper%20Yearbookper%202009.pdf)> at 24 August 2009.

2 Export credit involvement in international markets had subsided from 2000 onwards with the private sector taking up the majority of the short term insurance portfolio: James Harmon et al, *Diverging Paths: What Future for Export Credit Agencies in Development Finance?* (2005) World Resources Institute 10 <http://pdf.wri.org/iff_ea.pdf> at 24 August 2009. See also Organisation for Economic Co-operation and Development ('OECD'), *Participants to the Arrangement on Officially Supported Export Credits: Export Credits and the Financial Crisis* (2008) <[http://www.oecd.org/olis/2008doc.nsf/ENGREFCORPLOOK/NT0000602E/\\$FILE/JT03257141.PDF](http://www.oecd.org/olis/2008doc.nsf/ENGREFCORPLOOK/NT0000602E/$FILE/JT03257141.PDF)> at 24 August 2009.

3 Bruce Rich, *Foreclosing the Future: Coal, Climate and Public International Finance* (2009) Environmental Defence Fund 2 <http://www.edf.org/documents/9593_coal-plants-report.pdf> at 24 August 2009. Rich states:

The global recession, with the accompanying collapse of much private international finance, promises to enhance the influence of the already powerful Bank and Fund. Moreover, in an effort to stimulate trade and development, the international community is preparing to greatly increase the resources of both MDBs like the World Bank and ECAs to stimulate the economies of developing nations.

4 Prior to the Group of 20 ('G20') Agreement, the United Kingdom House of Commons had already introduced the Industry and Exports (Financial Support) Bill 2009 (UK) that significantly expands the power of the United Kingdom's official ECA, the Export Credit Guarantee Department ('ECGD'), to retrospectively finance existing projects: Industry and Exports (Financial Support) Bill 2009 cl 2.

5 As a percentage of the total US\$1.1 trillion G20 economic stimulus package, delivery of financing through ECAs and MDBs represents just under 25per cent: G20, *The Global Plan for Recovery and Reform* (2009) <<http://www.g20.org/Documents/final-communique.pdf>> at 24 August 2009 cl 5.

6 See generally Handl Gunther, *Multilateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy* (2001).

7 G20, above n 5, cl 22.

export credit may become an option for national governments to revitalise their domestic industries and economies concurrently with the stimulation of international trade.⁸

While there is no such thing as a typical export credit agency,⁹ ECAs have historically operated as nationalised corporations providing bilateral insurance, guarantees or loans for the export of domestic goods and services.¹⁰ ECAs promote their domestic economies in overseas markets by providing financial products and assistance to exporters who cannot secure private commercial finance or insurance.¹¹

Narratives on the expanding power of transnational corporations ('TNCs') in international trade systems have often overlooked ECAs,¹² the 'unsung giants'¹³ and the 'financial lubricant'¹⁴ of the international finance market. As finance institutions, they have a pivotal role in global export systems, providing over 80 per cent of foreign direct investment ('FDI') in developing countries¹⁵ and supporting over US\$1.5 trillion in global export business in 2008.¹⁶

ECAs occupy a unique place within the global economic system as organs of sovereign nations.¹⁷ On the exterior, they display all the hallmarks of a private multinational financier, operating under a similar international framework as TNCs. Beneath the surface, however, their legal nature, constitution and mandate draw an important demarcation between ECAs and other international finance market players.

8 There are limitations on Member nations using ECA financing: *Agreement on Subsidies and Countervailing Measures* (1999) 1867 UNTS 14 arts 1, 14, annex I.

9 ECAs' corporate structure varies from wholly owned state corporations to public/private ownership entities. For further details on ECA structures see Harmon, above n 2, 8.

10 For further details on private and public ECAs operating in each country see Berne Union, *Members of the Berne Union* (2009) <http://www.berneunion.org.uk/bu_profiles.htm> at 24 August 2009; Export Development Canada, *Export Credit Agencies* (2009) <http://www.edc.ca/english/relatedwebsites_eca.htm> at 24 August 2009.

11 The International Monetary Fund ('IMF') defines ECAs as 'an agency in a creditor country that provides insurance, guarantees, or loans for the export of goods and services': IMF, *External Debt Statistics: Guide for Compilers and Users* (2003) app III, Glossary <<http://stats.oecd.org/glossary/detail.asp?ID=5944>> at 24 August 2009.

12 Cf John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (2008) Human Rights Council [39]–[41] <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> at 24 August 2009.

13 Delio Gianturco, *Export Credit Agencies: The Unsung Giants of International Trade and Finance* (2001) 1. According to Gianturco, in 2001, ECAs supported over US\$800 billion a year in international exports.

14 Andrew Moravcsik, 'Disciplining Trade Finance: The OECD Export Credit Arrangement' (1989) 43(1) *International Organization* 173, 176.

15 Jeff Smith, *EFIC Environmental Policy Review Submission*, Environmental Defender's Office New South Wales (2003) <http://www.edo.org.au/edonsw/site/policy/efic_draft_env_policy.php> at 24 August 2009.

16 See Kimberly Wiehl, 'Turning 75 in 2009' (2009) *Berne Union Yearbook* 11 <<http://www.berneunion.org.uk/pdf/Berneper cent20Unionper cent20Yearbookper cent202009.pdf>> at 24 August 2009. See also Janet West, 'Facilitating Export Credits' (2009) *Berne Union Yearbook* 34, 34–5.

17 It is noted that there may be exceptions to this situation where an ECA has been privatised or is subject to a public/private partnership structure: Karyn Keenan, *Export Credit Agencies and the International Law of Human Rights* (2008) Halifax Initiative <http://www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf> at 24 August 2009.

Considering the primary focus on home state market stimulus inherent in ECA mandates, there is a question as to whether the delivery of economic stimulus through ECAs will equitably meet the economic, institutional and infrastructure development requirements of developing and emerging market nations. ECAs and MDBs may have a capacity to catalyse international trade but the question is whether using ECAs to deliver international trade stimulus will encourage the type of trade that addresses multidimensional policy challenges of poverty alleviation, climate change adaptation and ecologically sustainable development.¹⁸

Termed the 'New Great Game', an increasing proliferation of strategic, 'energy security resonant' ECA supported projects and geo-politically motivated investment¹⁹ is also driving the resurging relevance of ECAs.²⁰ Conceptualising ECA contribution to international trade through the paradigm of state sponsored, geo-political natural resource procurement raises the potential that an ECA-financed recovery will exacerbate existing levels of developing nation indebtedness, perpetuate existing asymmetries in economic development and prejudice climate change mitigation objectives. Delivery of this new wave of ECA financing without addressing climate change mitigation and adaptation, ecosystem depletion, food and energy security will translate to a lost opportunity in building economic and ecological system resilience for a carbon constrained world. In the worst case scenario, ECA financing without appropriate safeguards will encourage a development pathway that incurs a disproportionate ecological debt outstripping economic advancement.

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- 18 Australia's definition of ecologically sustainable development is expressed as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'. See Council of Australian Governments ('COAG'), *National Strategy for Ecologically Sustainable Development* (1992) <<http://www.environment.gov.au/esd/national/nsesd/strategy/intro.html#WIESD>> at 24 August 2009. See also *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A.
- 19 See generally Fergus Hanson, *Policy Brief—China: Stumbling through the Pacific* (2009) Lowy Institute for International Policy <<http://www.lowyinstitute.org/Publication.asp?pid=1084>> at 24 August 2009. Although relating to the official development aid context, the paper does demonstrate geo-political investment drivers in the Pacific region that could be equally applicable to ECA investment.
- 20 Two key Export Finance and Insurance Corporation ('EFIC') economists have termed strategic support for natural resources acquisition regardless of the economic cost the 'New Great Game': Roger Donnelly and Benjamin Ford, *Into Africa: How the Resource Boom is Making Sub-Saharan Africa more important to Australia* Lowy Institute (2008) 22 <<http://www.lowyinstitute.org/Publication.asp?pid=870>> at 24 August 2009. However, one of the authors recently made a speech countering that the New Great Game had reduced in intensity: Roger Donnelly, 'Australian resource investment in Africa following the commodity price reversal' (Speech delivered at the Australia Africa Business Council, Sydney, 26 March 2009) <<http://www.efic.gov.au/country/speeches-papers/2009speechesandpapers/Pages/20thjuly2009.aspx>> at 13 September 2009. It is important to note that the authors identify China as a key nation participating in the New Great Game and that China's Export-Import Bank is speculated to be the world's largest IFI by 2010 with US\$40 billion in loans and guarantees: Environmental Defence and International Rivers Network, *International Civil Society Recommendations Regarding China's Exim Bank's Environmental Policy on International Good Practice* (2006) <[http://www.internationalrivers.org/files/Internationalper cent20Civilper cent20Societyper cent20Recommendationsper cent20Regardingper cent20Chinaper cent20Eximper cent20Bank.doc](http://www.internationalrivers.org/files/Internationalper%20Civilper%20Societyper%20Recommendationsper%20Regardingper%20Chinaper%20Eximper%20Bank.doc)> at 20 August 2009.

The precedents for such a failure in responsible financing are well documented.²¹ Over the last decade, critical development theory,²² postcolonial theory²³ and an increased understanding of resource rich, development poor societal structures²⁴ have broadly challenged the benevolence of international finance institutions ('IFIs') such as ECAs. No longer is the dominant ECA narrative of delivering a symbiotic mechanism for expanding sovereign export markets and market liberalism concurrently with the economic and social advancement of developing nations left unquestioned.²⁵ Instead, international exposure of environmentally and socially controversial ECA projects has painted ECAs as treading where private insurers and financiers fear to tread²⁶ – operating high-risk projects in vulnerable socio-economic and political contexts.²⁷

Civil Society Organisations ('CSO') and national governments²⁸ have become increasingly concerned about ECAs' role in both the historical proliferation of unsustainable sovereign debt accrued by developing nations in Sub-Saharan Africa,²⁹ South East Asia and Latin America³⁰ and the adverse

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- 21 ECA-Watch, *Race to the Bottom Take II: An Assessment of Sustainable Development achievements of ECA Supported Projects two years after OECD Common Approaches Rev 6* (2003) 9–63 <http://www.eca-watch.org/eca/race_bottom_take2.pdf> at 24 August 2009.
 - 22 Denis O'Hearn, 'Tigers and Transnational Corporations: Pathways from the Periphery' in Ronald Munck and Denis O'Hearn (eds), *Critical Development Theory: Contributions to a New Paradigm* (2005) 113, 116.
 - 23 For a discussion on postcolonial theory in the context of International Finance Institutions (IFIs) see Beth Lyon, 'Discourse in Development: A Post-Colonial Theory "Agenda" for the UN Committee on Economic, Social and Cultural Rights' (2002) 10(3) *American University Journal of Gender, Social Policy, and the Law* 535, 558.
 - 24 See generally Richard Routledge, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993).
 - 25 Owen Lynch, Nadia Martinez and Scott Pasternack, 'Environmental Protection in the Developing World: A Look at the Responsibility of State and Non-State Actors' (2004) 15(3) *Fordham Environmental Law Review* 459. See particularly Martinez's discussion on North/South investment flows and drivers in Latin America and development platforms at 469–73.
 - 26 Cf Justin Lin, *Why Coal* (2009) <<http://blogs.worldbank.org/climatechange/why-coal>> at 24 August 2009. World Bank's Chief Economist Justin Lin presents an argument that coal fired power plants will be built with or without ECA and MDB support. Rich challenges this: Bruce Rich *Foreclosing the Future: Coal, Climate and Public International Finance – Summary* (2009) Environmental Defence Fund 9 <<http://www.edf.org/article.cfm?contentID=9539>> at 24 August 2009.
 - 27 See Roger Moody, *The Risks We Run, Mining, Communities and Political Risk Insurance* (2005).
 - 28 In 2006 the Norwegian Government cancelled US\$80 million in illegitimate debts accrued by five countries: Egypt, Ecuador, Peru, Jamaica and Sierra Leone in relation to the Norwegian Guarantee Institute for Exports Credits Ship Export Campaign dating back to the years 1976 to 1980. See European Network on Debt and Development ('EURODAD'): European Network on Debt and Development, *Norway makes Ground-breaking Decision to Cancel Illegitimate Debt* (2006) <<http://www.eurodad.org/aid/article.aspx?id=114&item=302>> at 25 August 2009.
 - 29 See Rachel Ordu, 'Debt and the Realization of Economic and Social Rights in Sub-Saharan Africa: Beyond Debt Relief to Solutions in the Common Interest' (2008) 3 *Intercultural Human Rights Law Review* 229, 231–2.
 - 30 See Jill Fisch and Caroline Gentile, 'Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring' (2004) 53 *Emory Law Journal* 1043, 1051 for a history of South American debt legacy. In relation to South East Asia, Indonesia and Philippines continue to have large sovereign debt liabilities. Both countries sought rescheduling of loan maturities with creditors such as EFIC during the Paris Club negotiations.

environmental outcomes of ECA supported development in the developing and emerging market nation context.³¹ ECA supported projects including China's Three Gorges Dam,³² Russia's Sakhalin II Oil and Gas project,³³ the Chad-Cameroon oil development³⁴ and West Seno I–II Oil and Gas Fields Projects in Indonesia³⁵ highlight that without appropriate safeguards, ECAs may not pursue the design and implementation of ecologically sustainable projects.³⁶

Attempts to address the adverse environmental outcomes of ECA supported projects have seen the adoption of new environmental guidelines.³⁷ While these new frameworks have improved environmental and social impact assessment of ECA projects, they may have limited resilience in responding to expanding policy challenges of biodiversity loss,³⁸ climate change,³⁹ water scarcity, poverty alleviation and achievement of Millennium Development Goal targets⁴⁰ when balanced against domestic export profit motives. Without legal, institutional and governance reforms to ECA activities through stronger integration of Multilateral

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- 31 Servicing sovereign debt at unsustainable levels has been shown to divert GDP income expenditure away from domestic health and education. The lack of an international bankruptcy or insolvency regime exacerbates continuing indebtedness: Ordu, above n 29, 238.
- 32 ECA-Watch, *China Case Study: Three Gorges Dam* (2003) <http://www.eca-watch.org/problems/asia_pacific/china/racetothetbottom_chinacase_1999.html> at 25 August 2009.
- 33 Pacific Environment and Friends of the Earth, 'Extractive Sector Projects Financed by Export Credit Agencies – the need for foreign investment contract and revenue reform' (2006) Pacific Environment <http://www.pacificenvironment.org/downloads/Theper cent20Needper cent20forper cent20Foreignper cent20Investmentper cent20Contractper cent20per cent20Revenueper cent20Reformper cent20atper cent20ECAsper cent20_final_.pdf> at 13 September 2009. See also Julia LeMense Huff, 'Using the Tools We Have: An Integrated Approach to Protect the Sea of Okhotsk' (2003) 20 *Pace Environmental Law Review* 693, 703–4.
- 34 See *Friends of the Earth v Robert Mosbacher Jr. (Overseas Private Investment Corp. and the Export-Import Bank)* (Unreported, United States District Court for the Northern District of California, White J, 30 March 2007) 10 s 3(a): 'The Chad-Cameroon Pipeline Project ('Chad-Cameroon Project') involves 'a 1,070 km pipeline' from Doba, Chad to Kribi, Cameroon. It is part of a larger project, which involves the development of oil fields in Chad and offshore oil-loading facilities located off the Cameroon coastline, known as the Chad/Cameroon Petroleum Development and Pipeline Project.'
- 35 Ibid 13 s 3(d) (White J).
- 36 See Berne Declaration et al, *A Race to the Bottom: Creating Risk, Generating Debt and Guaranteeing Environmental Destruction: A Compilation of Export Credit & Investment Insurance Agency Case Studies* (1999) <http://www.eca-watch.org/eca/race_bottom.pdf> at 25 August 2009.
- 37 Trade and Agricultural Directorate (Trade Committee), *Revised Council Recommendation on Common Approaches on Environment and Officially Supported Export Credit* (2007) Organisation for Economic Cooperation and Development <[http://www.ois.oecd.org/olis/2007doc.nsf/LinkTo/NT00002B8E/\\$FILE/JT03228987.PDF](http://www.ois.oecd.org/olis/2007doc.nsf/LinkTo/NT00002B8E/$FILE/JT03228987.PDF)> at 25 August 2009.
- 38 See Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* (2005) <<http://www.millenniumassessment.org/documents/document.356.aspx.pdf>> at 25 August 2009 generally for data on global biodiversity loss.
- 39 Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* (2007) <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf> at 25 August 2009.
- 40 Don Melnick et al, *Environment and Human Wellbeing: a Practical Strategy* (2005) UN Millennium Project xvi <http://www.unmillenniumproject.org/reports/tf_environment.htm> at 25 August 2009. See also Millennium Project, *Millennium Development Goals, Targets and Indicators* <<http://www.unmillenniumproject.org/goals/gti.htm>> at 25 August 2009.

Environmental Agreement ('MEA')⁴¹ obligations and principles, ECA financing will not achieve an ecologically sustainable, global economic recovery.

Australia's official 'government owned' ECA, the Export Finance Insurance Corporation ('EFIC'), is not immune from these challenges to sustainable development.⁴² Having a stake in the environmental and social catastrophe of the Ok Tedi Mine, Bougainville Copper, Pogera Gold Mines⁴³ and Lihir Gold Mines⁴⁴ in Papua New Guinea, EFIC has witnessed first hand the danger of supporting projects without appropriate environmental and social impact controls. In addition to the direct environmental and social impacts, a number of projects have left a significant legacy of potentially unsustainable sovereign debt.⁴⁵ Over the last decade EFIC has continued to provide facilities, including political risk insurance ('PRI') and loans to extractive industry projects in developing countries.⁴⁶

This paper examines the legal framework under which ECAs, specifically Australia's Export Finance and Insurance Corporation, operate and evaluates the potential for ECA project financing to satisfy ecologically sustainable development objectives. While there are many components to responsible ECA

41 See, eg, *United Nations Framework Convention on Climate Change* ('UNFCCC'), opened for signature May 1992, 1771 UNTS 107 (entered into force 21 March 1994); *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); *United Nations Convention to Combat Desertification* ('UNCCD'), opened for signature 14 October 1994, 33 ILM 1328 (entered into force 26 December 1996); *Convention on Migratory Species of Wild Animals* ('CMS'), opened for signature June 1979, 19 ILM 15 (entered into force 1 November 1983); *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES'), opened for signature 3 March 1973, 12 ILM 1085 (entered into force 1 July 1971); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 28 ILM 656 (entered into force 5 May 1992).

42 It is acknowledged that EFIC, in terms of financial exposure and scale of investment capabilities, is not as influential or active as ECAs such as Ex-Im Bank or OPIC (United States), Export Development Canada (Canada), JBIC (Japan), Export Credit Guarantee Department (ECGD, UK), Hermes (Germany) and COFACE (France). However, EFIC is identified as an ECA with continued involvement in large scale extractive industry projects: Moody, above n 27, 18.

43 AidWatch and Mineral Policy Institute, *Putting the Ethic in EFIC* (1999) <<http://users.nlc.net.au/mpi/rr/docs/efic.pdf>> at 25 August 2009 22–5. Project specific EFIC exposure included: Bougainville Copper (A\$80m guarantee), Ok Tedi Gold (A\$224m direct loan), Porgera Gold (A\$160m direct loan) and Lihir Gold (A\$250m political risk insurance).

44 Moody, above n 27, 201–2. EFIC provided Lihir Gold with political risk insurance of US\$250 million: see Mineral Policy Institutes, *Lihir Gold Mine* <http://users.nlc.net.au/mpi/std/lihir_in_depth.html> at 25 August 2009.

45 A number of developing nations and emerging markets have sovereign debt obligations owing to EFIC. For example as at 30 April 2009 Indonesia owed A\$958 million, Philippines owed A\$140 million, Sri Lanka owed A\$80 million: see Commonwealth, *Parliamentary Debates*, Senate, 12 May 2009, 4613 (Bob Brown).

46 EFIC has supported a number of extractive industry projects since 2000: Sepon Copper and Gold Mine in Laos PDR, Lumwana Copper Project in Zambia, Gold Ridge Mine in Solomon Islands, Kenmare Moma Mining in North-East Mozambique and Kwale Titanium Minerals Project in Kenya.

project financing, including human rights compliance,⁴⁷ anti-corporation and bribery measures⁴⁸ and royalty and profit reporting,⁴⁹ this paper focuses on mechanisms that safeguard ecologically sustainable development objectives. In examining the sufficiency of existing legal frameworks to protect against adverse environmental outcomes or enhance sustainable development outcomes, the paper will challenge the compatibility of finance and banking institution environmental performance standards such as the International Finance Corporation ('IFC') Performance Standards with the assumption of home state obligations under international law. These issues will be explored by focusing on the regulatory architecture of EFIC, illustrating broader thematic narratives about the role of ECAs in the global economic system, deficiencies in the configuration of ECA environmental safeguards and potential avenues of reform. By identifying divergent standards and principles under different legal regimes, we can consider whether other regulatory options would be more effective in delivering ecologically sustainable development outcomes.

The first section of this paper introduces Australia's ECA, the Export Finance and Insurance Corporation. This part examines EFIC's structure, governance and legislative framework. In traversing these issues, the part focuses on the legal nexus between the federal government and EFIC and questions whether EFIC is a multinational corporation or an appendage of the federal government. Considering the state/ECA nexus will provide a necessary foundation for evaluating alternative frameworks for regulation of environmental and human rights in EFIC project support. Section two outlines the key provisions of EFIC's Environmental Policy, tracing its regulatory components. Part II questions whether EFIC's legal characterisation is consistent with the principles, processes and frameworks adopted in EFIC's Environmental Policy. The appropriateness of banking institution norms – including International Finance Corporation Performance Standards and the Organisation for Economic Co-operation and Development ('OECD') Common Approaches – as the basis for EFIC's Environmental Policy is reviewed. The paper concludes with the mapping of key areas for potential reform to EFIC and its environmental management of supported projects. Reforms proposed in this section are geared to enhancing transparency in project finance and securing financing practices that comply with state obligations under international law.

47 Specific IFC Performance Standards that focus on first generation human rights include Performance Standard 2: Labor and Working Conditions, Performance Standard 4: Community Health, Safety and Security, Performance Standard 5: Land Acquisition and Involuntary Resettlement, Performance Standard 7: Indigenous Peoples and Performance Standard 8: Cultural Heritage.

48 Working Party on Export Credits and Credit Guarantees, *OECD Council Recommendation on Bribery and Officially Supported Export Credits*, OECD (2006) <<http://www.efic.gov.au/attachments/db/efi/197.pdf>> at 25 August 2009.

49 Extractive Industries Transparency Initiative, *Extractive Industries Transparency Initiative Principles and Criteria* (2003) <<http://eitransparency.org/eiti/principles>> at 25 August 2009. See also IMF, *Guide on Resource Revenue Transparency* (2005) <<https://www.imf.org/external/pubs/ft/grrt/eng/060705.pdf>> at 25 August 2009.

I EXPORT FINANCE AND INSURANCE CORPORATION: ORGAN OF THE STATE OR PRIVATE INTERNATIONAL FINANCE INSTITUTION?

A Organisational Structure

Established in 1957,⁵⁰ EFIC is Australia's wholly 'government owned' official ECA.⁵¹ EFIC is a statutory corporation⁵² and a separate legal entity from executive government.⁵³ EFIC's mandate under the *Export Finance and Insurance Act 1991* (Cth) ('*EFIC Act*') is to expand Australia's international export trading capacity and facilitate export opportunities for Australian businesses by providing insurance and financial services.⁵⁴ Prior to the market turbulence of 2009, EFIC supported A\$2.2 billion in exports and overseas investment through facilities totaling A\$365 million in the 2007–08 financial year.⁵⁵ EFIC operates as a 'last stop' for Australian exporters or businesses attempting to penetrate overseas markets. EFIC provides financial services and products such as loans or guarantees to importers of Australian exports,⁵⁶ export insurance to Australian exporters,⁵⁷ political risk insurance and bonds to secure export contracts.⁵⁸

A core component of the EFIC mandate is the rectification of a perceived market failure whereby private finance and insurance providers are not willing or

50 Australia's ECA has operated under a number of different statutory frameworks: see *Export Finance and Insurance Corporation Act 1974* (Cth). In 1986 the Act was repealed and EFIC was integrated into the institutional structure of Austrade from 1986 and 1991: see *Export Finance and Insurance Corporation (Transitional Provisions and Consequential Amendments) Act 1991* (Cth) for details of transfer of EFIC responsibilities.

51 As a Commonwealth statutory authority EFIC complies with s 9 of the *Commonwealth Authorities and Companies Act 1997* (Cth) by producing an annual report in compliance with the Act and relevant regulations. Important to note is that EFIC operations reported in the EFIC Annual Report are reported under s 9 (Commonwealth authority), not s 34 (Commonwealth company). See also Export Finance and Insurance Corporation, *EFIC Annual Report 2008* (2008)

<<http://www.efic.gov.au/attachments/db/efi/228.pdf>> at 25 August 2009 2. In terms of ministerial responsibility, EFIC falls under the Department of Foreign Affairs and Trade ('DFAT'). Previously EFIC had fallen under the Department of Industry, Technology and Commerce ('DITAC').

52 *Export Finance and Insurance Corporation Act 1991* (Cth) s 6. For a discussion of corporate structuring and governance in government departments and agencies see John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) Australian Department of Finance and Deregulation 4, 33, 34, 38 <<http://www.finance.gov.au/financial-framework/governance/docs/Uhrig-Report.pdf>> at 25 August 2009.

53 Ministerial oversight and direction of EFIC are provided for under *Export Finance and Insurance Corporation Act 1974* (Cth) s 9. For a broader discussion on ministerial directions and statutory corporations see Christos Mantziaris, 'Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?' (1998) 26(2) *Federal Law Review* 309, 309.

54 *Export Finance and Insurance Corporation Act 1974* (Cth) s 7(1)(a). See also EFIC, *Annual Report*, above n 51, 13. From 1990–2000, 10–15 per cent of Australian exports were underwritten and supported by EFIC.

55 Ibid EFIC, *Annual Report*, 3.

56 *Export Finance and Insurance Corporation Act 1974* (Cth) s 23.

57 *Export Finance and Insurance Corporation Act 1974* (Cth) ss 14–15, 20–2.

58 EFIC, *Annual Report*, above n 51, 14–15.

do not have the technical capacity to quantify the dollar value of the Australian national interest in expansion of Australian export industries. Nor do they have a direct interest in the diplomatic and geopolitical objectives running concurrently alongside ECA operations. While EFIC does not have an aid mandate, its prior administration of the Development Import Finance Facility Loan ('DIFF') facilities⁵⁹ and its presence in developing nations and Heavily Indebted Poor Countries ('HIPC') mean EFIC continues to make decisions that have great social and environmental consequences for nations playing host to EFIC clients.

EFIC financial services are managed under two EFIC accounts:⁶⁰ the Commercial Account⁶¹ and the National Interest Account ('NIA').⁶² The Commercial Account is primarily administered and operated by the EFIC Board, which annually provide the federal government with a dividend from EFIC profits.⁶³ The Commercial Account is guaranteed by a A\$200 million dollar callable credit facility provided from the Consolidated Revenue Fund.⁶⁴ Day-to-day administration of the NIA is assumed by EFIC, but the Minister for Trade retains a broad ministerial power to direct the EFIC Board in relation to national interest transactions.⁶⁵ Profit from the NIA is attributable to the Australian Government⁶⁶ and any loss EFIC incurred from NIA facilities⁶⁷ is underwritten

59 *Export Finance and Insurance Corporation Act 1974* (Cth) s 66A. Development Import Finance Facility ('DIFF') loans were mixed credit and aid facilities entered into under the *Australian Trade Commission Act 1985* (Cth) or the *Export Finance and Insurance Corporation Act 1974* (Cth). For a description of projects, rescheduling and exposures see Commonwealth, *Parliamentary Debates*, Senate, 12 May 2009, 4971 (Stephen Conroy, Minister for Broadband, Communications and the Digital Economy). Sixty-six per cent of all debt owing on the National Interest Account ('NIA') is classified as DIFF Scheme debt.

60 Note there are instances where facilities are shared between the two accounts: Australian Export Finance and Insurance Corporation, *Annual Report 2008* (2008) 28

<<http://www.efic.gov.au/attachments/db/efi/228.pdf>> at 26 August 2009.

61 *Export Finance and Insurance Corporation Act 1974* (Cth) Pt 4. The Commonwealth Department of Finance and Deregulation information card on bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth) makes a distinction between the NIA and Commercial Account as operated by EFIC. The NIA is considered as part of the General Government Sector (GGS) while the Commercial Account operations are Public Financial Corporations (PFC). See Department of Finance and Deregulation, *Chart of 91 Bodies under the Commonwealth Authorities and Companies Act 1997* (Cth) (2009) Commonwealth of Australia

<<http://www.finance.gov.au/publications/flipchart/docs/FMACACFlipchart.pdf>> at 26 August 2009.

62 *Export Finance and Insurance Corporation Act 1974* (Cth) pt 5.

63 *Export Finance and Insurance Corporation Act 1974* (Cth) s 55.

64 *Export Finance and Insurance Corporation Act 1974* (Cth) s 54. Note that the EFIC Board is required to include as equity the A\$200 million of callable capital.

65 *Export Finance and Insurance Corporation Act 1974* (Cth) ss 26, 27, 29. The nature of these transactions is that they are beyond the commercial parameters in terms of risk and the minister is required to evaluate whether such transactions are in the national interest. An example of NIA facility would be the national interest cover extended to the Australian Wheat Board (AWB) exports to Iraq up until 1990. See, Senate Rural and Regional Affairs and Transport References Committee, *Iraqi Wheat Debt – Repayments for Wheat Growers* (2005) <http://www.aph.gov.au/Senate/committee/rrat_ctte/completed_inquiries/2004-07/wheat_debt/report/index.htm> at 26 August 2009 for broader history of debt restructuring and EFIC support of AWB wheat exports. See also Anna Gelper, 'Odious, Not Debt' (2007) 70 *Law and Contemporary Problems* 81, 89 for a discussion on Iraq and odious debt.

66 EFIC, *Annual Report*, above n 51, 15.

by the government.⁶⁸ Some facilities may be split or shared over both the commercial account and national interest account where the financial exposure would compromise the viability of EFIC capital reserves.⁶⁹ Spreading facilities across the two accounts is often used by EFIC for high risk Category A projects whereby the risk profile is high or a level of official government support or endorsement is helpful to the overall transaction. Ministerial and EFIC interaction is facilitated through the exchange of the Minister's Statement of Expectation and EFIC's Statement of Intent whereby the Minister provides EFIC with a broad policy outline for EFIC operations on an annual basis.

As a statutory authority underwritten by Commonwealth funds, EFIC provides partial disclosure of its commercial dealings in its annual reports. However, more comprehensive disclosure is restricted under the *Freedom of Information Act 1982* (Cth) ('FOI'), whereby all documents in relation to anything done by EFIC under Part 4 (Insurance and Financial Service Products) or Part 5 (NIA Transactions) of the *EFIC Act* are exempt from disclosure.⁷⁰ In addition to a range of other FOI exemptions,⁷¹ this provision places an in-depth understanding of EFIC operations beyond the reach of citizens and taxpayers that financially support EFIC.⁷² Exempting documentation pertaining to ministerial directions for the NIA made under section 29 of the *EFIC Act* limits oversight into ministerial decisions that can only be made if the Minister is of the opinion that it is in the national interest.⁷³ The exemption translates to a situation whereby an executive decision requires subjective consideration, yet no information on the nature of the decision can be disclosed.⁷⁴ In light of the G20 commitment to channel trade stimulus through ECAs, there is anticipation that the Minister will

67 *Export Finance and Insurance Corporation Act 1974* (Cth) s 62. See also *Export Finance and Insurance Corporation Amendment Act 1997* (Cth) and the insertion of s 66A; and Second Reading Speech, *Export Finance and Insurance Corporation Amendment Bill 1997* (Cth), House of Representatives, 26 February 1997 (John Moore, Minister for Industry, Science and Tourism).

68 This is separate to the A\$200 million callable credit facility established under s 54 of the *Export Finance and Insurance Corporation Act 1974* (Cth).

69 In addition to the responsible corporate management required of EFIC, World Trade Organisation rules require that ECAs not run at a deficit or be unviable without government assistance. This would restrict the amount payable by the Commonwealth to EFIC as a subsidy under s 67 of the *Export Finance and Insurance Corporation Act 1974* (Cth).

70 Section 7(2) of the *Freedom of Information Act 1982* (Cth) exempts certain departments and bodies from the operation of the Act in relation to documents identified in sch 2, pt II, div 1 of the Act. This provision states that the exemption applies to the 'Export Finance and Insurance Corporation, in relation to documents concerning anything done by it under Part 4 or 5 of the *Export Finance and Insurance Corporation Act 1991*'.

71 EFIC also relies upon ss 33, 39, 43 of the *Freedom of Information Act 1982* (Cth) to exempt a range of loan documentation and project verification.

72 Jubilee Australia, a civil society organisation, has made four FOI applications to EFIC to allow the Australian public to audit existing debt obligations. All applications are currently before the Administrative Appeals Tribunal.

73 *Export Finance and Insurance Corporation Act 1974* (Cth) s 29(4).

74 A number of contentious NIA facilities have highlighted the important need for disclosure. During Indonesia's conflict with East Timor through the 1990s, EFIC extend facilities totaling A\$8 million to the Indonesia Government in 1999, to allow for the purchase Australian Defense Force equipment: AidWatch, above n 43, 8.

increase the use of the NIA for Australia to fulfill its G20 commitment in this respect. Accompanying this increased usage is a need for heightened transparency.

B Legal Characterisation and Governance

Consideration of EFIC's organisational structure reveals a number of intricacies that cloud an exact characterisation of its legal nature. Multiple characterisations of EFIC by the Department of Finance and Deregulation result from the management of both the Commercial and National Interest accounts, making pinpointing corporate or agency attributes difficult. Splitting EFIC facilities across both accounts demonstrates the potential collision of different rules and principles. These tensions between EFIC as a 'commercial corporation' with a public mandate for export stimulation and as a government agency with considerable Ministerial oversight are a central theme in evaluating EFIC governance. Is the nexus between the government and EFIC proximate enough for EFIC to be considered an organ of the Commonwealth?

EFIC organisational governance is a hybrid of board autonomy and ministerial intervention. The legislative intent is stated as an intention to charge the federal government with policy oversight and assign the Board with administration of EFIC.⁷⁵ Section 9 of the *EFIC Act* appears to be an attempt to balance ministerial direction and board autonomy. While the section does limit ministerial direction to only those sections of the Act where it is expressly provided for by the Act, section 9(2) does allow the minister to provide written directions to EFIC with respect to the performance of its functions if the minister is satisfied that it is desirable in the public interest. It could be submitted that section 9 is attempting to retain a level of ministerial intervention in EFIC decisions without establishing a general requirement that decisions made by the EFIC Board to enter into commercial account transactions need ministerial direction.⁷⁶ One interpretation of section 9 is that it preserves EFIC Board decision making powers over commercial account facilities, however a narrower interpretation could suggest that section 9(5) only prohibits directions that transfer EFIC Board decision making powers to the minister and there is no prohibition on the minister making a direction to guide EFIC Board decisions.⁷⁷

Government intervention and control in EFIC board prerogatives is evident in the Paris Club negotiated rescheduling of mixed aid and credit Development

75 Second Reading Speech, Export Finance and Insurance Corporation Bill 1991 (Cth), Senate, 8 October 1991 (Bob McMullan):

The Government's control over EFIC will be limited to broad policy oversight. This will mainly occur through the corporate planning process and will include financial targets and accountability for results. Day to day control will rest with the EFIC Board and the Corporation's management.

76 *Export Finance and Insurance Corporation Act 1974* (Cth) s 9(5). The minister cannot issue a direction that establishes a requirement of ministerial approval for entry into a particular facility or transfers to the minister a power to determine the signing of a particular contract.

77 These alternate interpretations make a distinction between ministerial directions that transfer decision making power to the minister and ministerial directions that request EFIC to exercise decision making power in a certain way.

Import Finance Facility loan facilities⁷⁸ extended to Indonesia and the cancellation of debts incurred under National Interest Account facilities relating to Australian Wheat Board contracts in Iraq.⁷⁹ The Paris Club rescheduling and cancellation of Heavily Indebted Poor Countries' sovereign debt⁸⁰ to bolster the capacity of developing nations to fulfill key objectives of the UN Millennium Development Goals⁸¹ highlight the underlying dominant role of the government in managing the way in which EFIC undertakes its mandate.

Applying a structural analysis⁸² it is evident that the federal government is the sole shareholder or beneficiary of EFIC.⁸³ The guarantee of A\$200 million in callable credit and annual dividends paid to the government would support this characterisation. If the federal government is construed as a mere shareholder or beneficiary of EFIC, EFIC could be characterised as an autonomous multinational corporation that does not inherit international law obligations assumed by its sovereign nation beneficiaries or shareholders.⁸⁴ This characterisation is problematic in that even though the EFIC Board may exercise a degree of management independence, state ownership combined with substantial ministerial oversight would indicate, structurally, EFIC is an organ of the federal government. Export Development Canada, Belgium's Delcredere/Decroir and EFIC are all examples of ECAs with full government ownership, independent board management and ministerial oversight.

In acknowledging that EFIC is a 'Commonwealth authority'⁸⁵ – by complying with reporting obligations under the Commonwealth Authorities and Companies Act 1997 (Cth) and section 516A of the *Environment Protection and*

78 See generally Club de Paris, *Welcome* (2009) <<http://www.clubdeparis.org/en/>> at 26 August 2009. Specifically in relation to Australian rescheduling of DIFF loans to Indonesia see Club de Paris, *Indonesia* (2009) <<http://www.clubdeparis.org/sections/pays/indonesie/viewLanguage/en>> at 26 August 2009. See also EFIC, *Annual Report*, above n 51, 10, which explains EFIC exposures in both the Commercial and NIA accounts that have been rescheduled in line with Paris Club agreements.

79 EFIC, *Annual Report 2007* (2007) 22 <<http://www.efic.gov.au/attachments/db/efi/228.pdf>> at 26 August 2009. Note that the AWB contracts were entered into between 1987 and 1992 and were not related to United Nations Oil-for-Food programme.

80 See generally Fisch and Gentile, above n 30.

81 Goal 8 (provisions 8.10–8.12) in relation to debt sustainability are particularly relevant. See Melnick et al, above n 40, xvii.

82 See Özgür Can and Sara Seck, *The Legal Obligations with Respect to Human Rights and Export Credit Agencies* (2006) Halifax Initiative <<http://www.halifaxinitiative.org/updir/ECAHRlegalFINAL.pdf>> at 26 August 2009.

83 See Paul Redmond, *Companies and Securities Law: Commentary and Materials* (3rd ed, 2000) 144 discussing *Salomon v Salomon & Co Ltd* [1897] AC 22.

84 This does not rule out legal concepts such as aiding and abetting environmental damage or human rights abuses. See Roger Alford 'Arbitrating Human Rights' (2008) 83 *Notre Dame Law Review* 505.

85 EFIC acknowledges that the Board is obligated to submit annual reports under s 9 of the *Commonwealth Authorities and Companies Act 1997* (Cth) and that s 9 only requires annual reports from directors of 'Commonwealth companies'.

Biodiversity Conservation Act 1999 (Cth) ('EPBC Act')⁸⁶ – we have an indication that Commonwealth ownership and control of EFIC are undisputed. Internationally, in supporting the characterisation of ECAs as organs of the states, the Legal Affairs and Governance unit of the European Commission has stated in relation to Directive 2003/4/EC that

there are many different types of export credit agencies, whether or not belonging to the public administration, qualify as public authorities within the meaning of Directive 2003/4/EC and are obliged to observe the rules laid down in that directive.

Including ECAs within the definition of public authorities under the Aarhus Convention is significant because it highlights their public functions in relation to the environment. This interpretation clearly focuses on the functional, as opposed to the structural, elements of the state/ECA relationship and emphasises the public objectives and mandates of ECAs over the government ownership and ministerial oversight. While there is limitation on ministerial intervention in day-to-day decisions of the EFIC Board, the attributes of EFIC governance and structure indicate a structural relationship whereby EFIC is an organ of the Commonwealth.

If there are doubts about this characterisation, particularly in relation to the commercial account, applying a functional analysis shows EFIC's mandate is to advance the collective interests in export industry development and job creation interests of the state. Utilising a functional analysis allows a consideration beyond the structural components of the ECA/state relationship and looks more broadly at ECA function. The recent Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises ('Ruggie Report')⁸⁷ highlighted the importance of ECAs flagging potential human rights impacts prior to states making decisions about project financing and support. At paragraph 40 the Report states:

On policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight – and possibly indicate where State support should not proceed or continue.

The Ruggie Report does not explicitly talk about state liability and ECA project financing but it does highlight the exercise of state prerogatives to support or not support projects considered by ECAs. The implicit assumption of the Ruggie recommendation is that, taking account of the nexus between ECAs and the state, ECAs should be operating under the same human rights framework as

86 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') is the Australian Government's central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places': see generally Australian Department of the Environment, Water, Heritage and the Arts, *About the EPBC Act* (2009) <<http://www.environment.gov.au/epbc/about/index.html>> at 26 August 2009.

87 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (2008) Human Rights Council [39]–[41] <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> at 26 August 2009.

the state. Resolution of the ECA/state relationship and the obligation of state agencies to comply with the home state international obligation can be partially resolved with reference to the *Articles on the Responsibility of States for Internationally Wrongful Acts*⁸⁸ ('*State Responsibility Articles*') as adopted by the International Law Commission, which embody a significant proportion of customary international law on state responsibility. The *State Responsibility Articles* outline general principles whereby contravention of international law or obligations by organs of states can be attributed to the state.⁸⁹ In determining what actions are attributable to the state, article 4 of the *State Responsibility Articles* states:

[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State.⁹⁰

Similarly, article 5 captures entities that may not meet the standard established in article 4, but are 'empowered by the law of that State to exercise elements of the governmental authority'. Even if a government authority is not classified as an organ of the state,⁹¹ article eight has the implication that action of persons or groups shall be considered an act of the state 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

The *State Responsibility Articles* provide a framework for considering the attribution of EFIC 'actions' to the Commonwealth government and attribution of ECA activities to home states generally. Where the applicability of the *State Responsibility Articles* to ECA transactions is potentially incompatible is in relation to characterising financial support for domestic exporter companies – who contravene international law – as a wrongful act of state. Put another way, is a company supported by political risk insurance from EFIC an organ of the state whose actions are attributable to the state?

88 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UN Doc A/56/10, corrected by UN Doc A/56/49(Vol. I)/Corr.4. See also Daniel Bodansky and John Crook, 'Symposium: The ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 *American Journal of International Law* 773, 790 cited in Can and Seck, above n 82.

89 Article 2 of the ILC Framework sets out the elements of 'internationally wrongful act of a State as a breach of an international obligation of the State that is attributable under international law. Note that the draft articles do not supercede more specific provisions for state responsibility under certain international instruments: Keenan, above n 17, 4.

90 The foundations for the principles in art 4 were established in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62, 87.

91 It should be noted that the process of classification is not undertaken by the state itself. While the relationship between the state and an entity under internal law is relevant, internal law does not perform the task of classification: James Crawford, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> at 26 August 2009 42.

Suggestions have been made that article 16⁹² of the *State Responsibility Articles* could apply to ECA financing of domestic companies where the company contravenes international law.⁹³ Specifically, the International Law Commission ('ILC') commentaries on article 16 state the article could apply

where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly *providing an essential facility or financing the activity* in question.⁹⁴ [Emphasis added]

In order for the factual elements of ECA transactions to fall within the scope of article 16, an argument would need to be made that ECA financial support to a domestic exporting company constituted aiding and assisting a host state to violate international obligations of the host state. Taking a broad interpretation of article 16 it could be suggested that a host state who approved a project under domestic environmental and planning laws – that would otherwise be contrary to international obligations – is aided and assisted by ECA project finance where commercial market providers would not have provided finance.⁹⁵ A narrow interpretation of article 16 would restrict its application to factual circumstances whereby one state directly provided finance or facilities to a host state that assisted in the violation of international obligations by that host state. Narrowly considering article 16 means it would be necessary to consider whether ECA finance is aiding a home state corporation or whether such financing could be construed more broadly as aiding another state to carry out violations of international law.⁹⁶ It remains uncertain as to whether a novel application of article 16 to ECA transactions and finance support could be accommodated under the article.

Where the *State Responsibility Articles* provide an insufficient framework, breaches of international law by ECA support corporations may also be resolved through compliance mechanisms under specific MEAs. In the context of the Lihir Gold Mine – who held PRI from EFIC – Greenpeace International referred the dumping of waste rock at sea by the Lihir Gold Mine operators in Papua New Guinea to the International Maritime Organisation alleging breaches of the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and*

92 A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that State.

93 See Keenan, above n 17, 7 citing Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *Modern Law Review* 598–625.

94 James Crawford, above n 91, 66.

95 In addition art 16 also requires that the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so: Ibid.

96 The use of stabilisation clauses in investment agreements may alter the potential applicability of art 16 because investment is tied to regulatory control to be exercised by the home state: Keenan, above n 17, 8.

Other Matter ('the London Convention').⁹⁷ In the action requested of the contracting parties to the Convention, requests were made for information about EFIC's compliance and due diligence in relation to the mine. EFIC financial support that aids or assists a supported corporation to breach international law abroad could similarly be referred to relevant compliance mechanisms under various MEAs.

Recourse to address international law breaches by ECA supported and financed corporations are limited and have not been actively utilised. Instead, the focus on responsible financing has resulted in calls to reform ECA due diligence and environmental assessment to pre-emptively avert ECA support of projects that breach international environmental law. If state responsibility for EFIC actions and financing is accepted⁹⁸ and EFIC financing can be interpreted as aiding and assisting breaches of international law, the secondary question becomes: what is the appropriate state apparatus to secure EFIC compliance with state international law obligations? Why have official ECAs adopted frameworks based upon international finance institutional norms as opposed to home state international law obligations? Presently, EFIC's Environmental Policy is the core framework for managing project impacts and the following section presents a detailed examination of the policy elements, while reflecting on the implication of legal characterisation discussed in this section.

II ENVIRONMENTAL POLICY IN EFIC DUE DILIGENCE AND PROJECT FINANCING

Having considered EFIC's legal characterisation, this section examines both the international framework for environmental regulation of ECA financing and the structure of EFIC's Environmental Policy. Characterisation aids the identification of an appropriate framework for environmental regulation and safeguards necessary to secure ecologically sustainable development. The current framework for regulation of environmental impacts of ECA financing decisions reflects a conceptualisation of ECAs as commercial financial institutions as opposed to organs of the State or development consent authorities. Proponents for the maintenance of the existing ECA regulation framework may argue that other project participants and stakeholders, including host states, are more appropriately positioned to undertake environmental assessment and evaluation of projects. Project host countries will have domestic requirements and laws regulating the development and construction of projects. Project host countries are sovereign countries and have the sovereign right to exploit their own

97 See International Maritime Organisation, *Interpretation of the London Convention 1972: Sea Dumping of Wastes from the Mining Industry: the Case of the Lihir Gold Mine: Papua New Guinea* (2002) <<http://www.sjofartsverket.se/upload/4945/24-8.pdf>> at 26 August 2009.

98 It is noted that the discussion here has focused on attribution and not issues of extraterritoriality. For a fuller discussion of extraterritoriality see Can and Seck, above n 82.

resources pursuant to their own environmental and development policies.⁹⁹ In respecting this fundamental principle of international law it may be argued that ECAs should not duplicate environmental assessment reviews undertaken by project host states. These positions advocate a normative framework for regulation of ECAs to be based upon reducing alleged regulatory duplication rather than formulating regulatory frameworks to be consistent with broader legal obligations and legal structures.

The unique context of ECAs in the international finance market arises whereby private investors and insurers are unwilling to provide the required capital or insurance. In this sense, where the capital markets in host and home states and globally will not absorb risk on commercial terms, ECAs can be characterised as absorbing potentially uneconomical risk, raising the question of whether ECAs are addressing a 'real' market failure or deploying a strategic mechanism to achieve state diplomatic objectives. ECA financing carries strong geo-political dimensions and while the national interest objectives of ECA home states may align with the domestic host state environmental assessments, the convergence of these interests does not equate with sustainable ECA project support and international obligations. In many cases, especially in relation to PRI facilities, commitment of capital or insurance via ECAs becomes the dominant determinant in project assessment.

It is against this social, political and economic context that the ECA regulatory framework as applying to EFIC is considered. EFIC may not substitute for the host country planning and development consent authorities, but they must ensure a level of due diligence in sensitive development contexts that aligns with Australia's international obligations. Beyond securing an appropriate framework for regulation of ECAs that does 'no harm', there is an opportunity to consider how we design frameworks that leverage the development opportunities of ECAs to amplify a broader fulfilment of international obligations such as technology transfer, capacity building and benefit sharing.

Prior to 2000 there were no common environmental or social standards that ECAs needed to apply to supported projects and transactions. In 2000, EFIC adopted an Environmental Policy in response to significant international consensus¹⁰⁰ and the development of the Recommendation on Common Approaches on Environment and Officially Supported Export Credits ('OECD Common Approaches').¹⁰¹ Since the adoption of EFIC's Environmental Policy,

99 See *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 3; *Rio Declaration on Environment and Development* (1992) A/CONF.151/26 (Vol. I) Principle 2. The OECD Common Approaches also adopt a similar statement in the preamble: OECD, *Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits* (2007) <[http://www.oilis.oecd.org/olis/2007doc.nsf/LinkTo/NT00002B8E/\\$FILE/JT03228987.PDF](http://www.oilis.oecd.org/olis/2007doc.nsf/LinkTo/NT00002B8E/$FILE/JT03228987.PDF)> at 26 August 2009 2: 'Recognising the sovereign right of buyers' countries to make decisions regarding projects within their jurisdictions'.

100 ECA Watch, *Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies* (2000) <www.eca-watch.org/goals/jakartadec.html> at 26 August 2009.

101 OECD, *Revised Council Recommendation*, above n 99, art 18.

EFIC has made a number of amendments, refined the use of performance benchmarks¹⁰² and adopted the *Equator Principles*.¹⁰³ The proceeding section provides an overview of the global and domestic elements of EFIC's Environmental Policy and the environmental regulation framework under which EFIC operates.

A OECD Common Approaches

In response to pressure from CSO campaigns and a desire by exporting countries for a level playing field in ECA market participation,¹⁰⁴ the OECD Common Approaches¹⁰⁵ were adopted by agencies belonging to the OECD.¹⁰⁶ The first objective stated in the OECD Common Approaches is to

'[p]romote *coherence between policies* regarding officially supported export credits and policies for the protection of the environment, including relevant international agreements and conventions, thereby *contributing towards sustainable development*'.¹⁰⁷ [Emphasis added]

This objective highlights the perception of OECD Members and the Export Credit Working Group that, without policy coherence between ECAs, competition pressures will trigger a 'race to the bottom' and compromise achievement of sustainable development. Policy coherence may ensure competition pressures do not ignite a race to the bottom and degrade environmental assessment provisions but policy coherence, in and of itself, will not advance ecologically sustainable development. Strong normative frameworks backed by international consensus are required for a proactive achievement of sustainable development. Sustainable development is not achieved by simply avoiding 'race to the bottom' scenarios. The focus on policy coherence to achieve sustainable development reflects the underlying discourse of the OECD Common Approaches as a competition framework as opposed to an environmental standards instrument.

102 In 2005 EFIC undertook a review of its Environment Policy: EFIC, *Environmental Policy Review* (2009) <http://www.efic.gov.au/static/efi/environment/environ_policyreview.htm> at 26 August 2009. In addition to the changes made by the 2005 review EFIC has also adopted the 2007 revised OECD Common Approaches and now use the IFC Performance Standards instead of the IFC Safeguard Policies: Angus Armour, *Environment Policy* (2007) <<http://www.efic.gov.au/about/governance/corp-responsibility/environmentpolicy/Pages/environmentpolicy.aspx#content>> at 16 September 2009.

103 EFIC, 'EFIC adopts the Equator Principles' (Press Release, 3 March 2009) <<http://www.efic.gov.au/news/2009mediareleases/Pages/mediarelease3march2009.aspx>> at 16 September 2009.

104 See OECD, *Revised Council Recommendation*, above n 99, art 2.

105 Note that the OECD Common Approaches were revised in 2007.

106 It should be noted that there are a number of ancillary agreements that interact with the OECD Common Approaches: Trade and Agriculture Directorate: Participants to the Arrangement on Officially Supported Export Credits, *Arrangements on Officially Supported Export Credits* (2008) OECD <[http://www.oilis.oecd.org/oilis/2008doc.nsf/ENGREFCORPLOOK/NT00007A1E/\\$FILE/JT03257627.PDF](http://www.oilis.oecd.org/oilis/2008doc.nsf/ENGREFCORPLOOK/NT00007A1E/$FILE/JT03257627.PDF)> at 26 August 2009.

107 See OECD, *Revised Council Recommendation*, above n 99, art 2.

Under the OECD Common Approaches, projects seeking ECA financing are subject to an environmental screening process.¹⁰⁸ Projects are assigned a particular category to indicate the level of environmental impact assessment required.¹⁰⁹ Those projects that have the potential for significant adverse environmental impacts extending beyond the boundaries of the project are assigned a rating of Category A.¹¹⁰ If a project's environment impacts are considered site specific and reversible it falls within Category B,¹¹¹ while Category C projects are classified as having minimal or no environmental impact.¹¹² The purpose of the screening process is to establish the level of ECA environmental impact assessment required before financing decisions can be made.¹¹³ For Category A, the OECD principles advise¹¹⁴ Member ECAs to undertake an Environmental Impact Assessment,¹¹⁵ and to benchmark the project against IFC Performance Standards,¹¹⁶ Regional Development Bank Standards¹¹⁷ or any other internationally recognised standards more stringent than those already mentioned. The general principle is that in order for an ECA to support a project all benchmarks must be satisfied. However, article 13 of the OECD Common Approaches does allow ECAs, in exceptional circumstances, to support a project that does not achieve the required benchmarks.¹¹⁸ Category A projects also must provide for community consultation processes before project support can be issued. For Category B projects, ECAs retain a degree of discretion to formulate a review process on a project by project basis,¹¹⁹ and Category C requires no further assessment.¹²⁰

One of the deficiencies with environmental screening is the lack of transparency and consistency in assigning a project a Category A or Category B classification. The only forum for evaluating project characterisation is under the

108 Ibid arts 4–7.

109 See OECD, *Revised Council Recommendation*, above n 99, art 6.

110 For a list of projects falling within Categories A–C, see OECD, *Revised Council Recommendation*, above n 99, art 6 and annex 1.

111 Ibid.

112 Ibid.

113 For the procedural processes involved in EFIC's screening process see PricewaterhouseCoopers, *EFIC's Environment Policy Review: Assessment of Compliance Matters* (2004) 17 <<http://www.efic.gov.au/attachments/db/efi/69.pdf>> at 26 August 2009.

114 See OECD, *Revised Council Recommendation*, above n 99, art 9.

115 For details of what should be included in the EIA and associated documents see ibid art 8 and annex II.

116 Ibid art 12. The International Finance Corporation's Performance Standards are: Social and Environmental Assessment and Management System; Labor and Working Conditions; Pollution Prevention and Abatement; Community Health, Safety and Security; Land Acquisition and Involuntary Resettlement, Biodiversity Conservation and Sustainable Natural Resource Management; Indigenous Peoples; and Cultural Heritage. The project must also comply with the Host Countries laws under article 13.

117 For example where a MDB such as the Asian Development Bank is involved in financing a project, an ECA can apply MDB specific safeguard policies: see Asian Development Bank, *Safeguards* (2009) <<http://www.adb.org/safeguards/default.asp>> at 26 August 2009.

118 Where a project is supported that does not satisfy performance standard benchmarking, the ECA is required to report and explain this under OECD, *Revised Council Recommendation*, above n 99, art 22.

119 Ibid art 10.

120 Ibid art 11.

new peer review mechanisms. Articles 19–22 of the OECD Common Approaches collectively require Member ECAs to report to the OECD Working Party on Export Credit and Credit Guarantees ('ECG') information pertaining to Category A and B on an annual basis.¹²¹ The Members of the ECG Working Group recently agreed to increase ECA survey reporting and Category A and B facilities for the purpose of peer review and public reporting of reviews of ECA surveys.¹²² It is unclear whether the new agreement on peer review will disclose more information than is already disclosed domestically as the ECG accords a level of deference to members to determine issues of confidentiality. Monitoring of projects post approval and official support has also been demonstrated to be a weak point of the OECD Common Approaches. Article 14 of the OECD Common Approaches requires member ECAs to monitor compliance with conditions of official support and terms of the contract. Due to disclosure restrictions it is not possible to examine how ECAs manage contractual terms and covenants, monitor compliance with covenants or even have the organisational capacity to track performance.

The OECD Common Approaches should not be considered as a substantive regime for regulation of ECAs. It is a platform focused on creating common adherence to basic institutional procedures to engender market participation equality and a level playing field for MDBs and ECAs. Without this framework different ECAs competing and operating in the same financial market would be subject to different obligations and EIA processes dependant upon what treaties and covenants the home state nation had signed, ratified and incorporated. Common regulatory norms assist project management where a multitude of financiers are supporting one project. Fragmented and compartmentalised financing for large-scale mining or infrastructure projects can mean discrete elements of the project are assessed by different ECAs rather than the full life cycle of the project.

Where the OECD Common Approaches are deficient is in the discretionary, non-binding and aspirational language. Sustainable development cannot be achieved by establishing a lowest common dominator for ECA operations. In this respect the OECD Common Approaches provide no substantial provision to secure or encourage sustainable development, instead relying upon IFC Performance Standards, regional development bank or MDB standards and European Community standards as substantive guidelines and rules on

121 See Working Party on Export Credits and Credit Guarantees, *Export Credits and the Environment: Information on Category A and Category B Projects Reported for 2007* (2009) OECD <[http://www.oilis.oecd.org/olis/2008doc.nsf/ENGREFCORPLOOK/NT00007FFE/\\$FILE/JT03261668.PDF](http://www.oilis.oecd.org/olis/2008doc.nsf/ENGREFCORPLOOK/NT00007FFE/$FILE/JT03261668.PDF)> at 26 August 2009; Working Party on Export Credits and Credit Guarantees, *Export Credits and the Environment: 2008 Review of Members' Responses to the Survey on the Environment and Officially Supported Export Credits* (2009) OECD <[http://www.oilis.oecd.org/olis/2008doc.nsf/ENGREFCORPLOOK/NT0000B11E/\\$FILE/JT03266005.PDF](http://www.oilis.oecd.org/olis/2008doc.nsf/ENGREFCORPLOOK/NT0000B11E/$FILE/JT03266005.PDF)> at 26 August 2009.

122 Working Party on Export Credits and Credit Guarantees, *Peer Review: Export Credits* (2008) OECD <[http://www.oilis.oecd.org/olis/2008doc.nsf/LinkTo/NT0000783E/\\$FILE/JT03256427.PDF](http://www.oilis.oecd.org/olis/2008doc.nsf/LinkTo/NT0000783E/$FILE/JT03256427.PDF)> at 26 August 2009.

environmental management and protection. However, article 13 allows ECA support of a project that does not satisfy these benchmark standards as long as the OECD Member explains the reason for extending support, withstanding project deficiencies.

B International Finance Corporation Performance Standards

Adopting IFC Performance Standards benchmarking¹²³ – which are applied by IFC to ensure it satisfies its development mandate and focus – into the OECD Common Approaches for official ECA supported projects highlights the implicit acknowledgement that ECA projects have development implications that cannot necessarily be severed from export development mandates. The recently reviewed IFC Performance Standards are used as the primary benchmark by member countries.¹²⁴ Subsequent to the 2006 review, the IFC has adopted eight performance standards with which client organisations are mandated to satisfy. These include:¹²⁵ Social and Environmental Assessment and Management System (PS1), Labour and Working conditions (PS2), Pollution Prevention and Abatement (PS3), Community Health, Safety and Security (PS4), Land Acquisition and Involuntary Resettlement (PS5), Biodiversity Conservation and Sustainable Natural Resource Management (PS6), Indigenous Peoples (PS7) and Cultural Heritage (PS8). In addition to the Performance Standards, IFC provides Guidance Notes¹²⁶ on the Performance Standards and the IFC Environmental, Health and Safety Guidelines¹²⁷ that outline general and industry specific technical performance standards and project requirements.¹²⁸

Development of environmental and social standards in the form of voluntary principles, such as the *Equator Principles* or the IFC Performance Standards have provided a stop-gap measure to address ‘international governance black holes’ in relation to private IFIs and TNCs. For banking and investment institutions engaging in global financing, industrial or infrastructure projects, the

123 See OECD, *Revised Council Recommendation*, above n 99, art 12.1.

124 Prior to the 2006, the 10 safeguard standards of the World Bank Group were used: see Export Finance and Insurance Corporation, *EFIC Environment Policy* (2009)

<<http://www.efic.gov.au/static/efi/environment/environdstd.htm>> at 26 August 2009.

125 See International Finance Corporation, *Performance Standards* (2009)

<<http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>> at 26 August 2009.

126 See International Finance Corporation, *Guidance Notes* (2007)

<<http://www.ifc.org/ifcext/sustainability.nsf/Content/GuidanceNotes>> at 26 August 2009. See also Steven Herz et al, *The International Finance Corporation's Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations?* (2008) Oxfam Australia <<http://www.oxfam.org.au/campaigns/mining/docs/IFC-PS-Equator-Principles-and-Human-Rights.pdf>> at 26 August 2009.

127 See International Finance Corporation, *Environmental, Health and Safety Guidelines* (2007)

<<http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvironmentalGuidelines>> at 26 August 2009. The IFC EHS Guidelines are based upon the World Bank Group's Pollution Prevention and Abatement Handbook ('PPAH').

128 The key difference between the Performance Standards and Guidance Notes is that they do not mandate singular normative standards, but instead outline alternative compliance pathways and are established as a guide not a mandate.

State-centric focus of international law has often neglected their pervasive global activities. ECAs, due to their nature, should not fall between the cracks in international law in the same way TNCs do. Inextricably connected with the issue of legal characterisation of EFIC and ECAs generally is the implementation of environmental policies that gravitate towards the dominance of banking institution environment performance standards. This raises the question as to why ECAs have a predilection for institutional environmental management and protection regimes over MEAs and international law generally. One reason for ECAs utilising institutional frameworks is derived from competition issues. ECA preference for institutional frameworks such as IFC Performance Standards could be interpreted as a rebuke of ECA liabilities under international law and a way for states to circumvent international obligations by using an ECA proxy to capitalise on non-compliance with international law.

The implication of applying institutional standards to ECAs is that there are points of divergence between IFC Performance Standards and broader MEA obligations that translate to project designs falling short in terms of sustainable development outcomes.¹²⁹ Criticisms have been made that the Performance Standards are vague in nature, lacking substantive rights and obligations.¹³⁰ Created for an institution specific purpose and application, they lack direct synchronicity with international environmental law and are not based upon democratically formed international consensus. Some of these criticisms are evident when comparing Performance Standards to Multilateral Environmental Agreements ('MEAs'). Performance Standard 3 (Pollution Prevention and Abatement) and Performance Standard 6 (Biodiversity Conservation and Sustainable Natural Resource Management) provide the most relevant comparison to MEAs.¹³¹

Performance Standard 3, clause 4 states 'the client will avoid the release of pollutants or, when avoidance is not feasible, minimize or control the intensity or load of their release'. Further, clause 5 states:

During the design, construction, operation and decommissioning of the project (the project lifecycle) the client will consider ambient conditions and apply pollution prevention and control technologies and practices (techniques) that are best suited to avoid or, where avoidance is not feasible, *minimize or reduce adverse impacts on human health and the environment* while remaining technically and *financially feasible and cost-effective* (emphasis added).

129 Natasha Affoder, 'Cachet not Cash: Another Sort of World Bank Group Borrowing' (2006) 14(2)–(3) *Michigan State Journal of International Law* 141, 143, 158–9.

130 See Steven Herz et al, International Finance Corporation, *Guidance Notes* (2007) <<http://www.ifc.org/ifcext/sustainability.nsf/Content/GuidanceNotes>> at 26 August 2009. See also Steven Herz, *Respecting Human Rights*, above n 126, for further investigation into the capacity of the Performance Standards to provide 'a robust framework for meeting their responsibility to respect or remedy human rights'.

131 While not directly related to environmental rights and management, Performance Standard 4 (Community Health, Safety and Security) cl 8, 9 (Environmental and Natural Resource Issues) are also relevant when comparing Performance Standards with MEAs.

Within the objective is an implicit assumption that the project development will proceed, as long as there is a level of mitigation. Satisfaction of the performance standard is achieved not by protecting human health but by implementing cost effective mitigation technology. This is contrary to pollution or emission standards formulated on the basis of human health standards. In comparison, article 2 of the 1979 *Geneva Convention on Long-range Transboundary Air Pollution* ('LRTAP')¹³² states 'the Contracting Parties ... are determined to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution.'

The Performance Standards also fail to integrate standards adopted in protocols in force under *LRTAP*.¹³³

Clauses 10 and 11 of Performance Standard 3 require finance clients to 'promote the reduction of greenhouse gas emissions in a manner appropriate to the nature and scale of project' and 'evaluate technically and financially feasible and cost-effective options to reduce or offset project-related [Green House Gas ('GHG')] emissions'. These requirements place no real substantive obligations on finance clients to reduce, offset or account for GHG if the project is in a non-annex B country while the *United Nations Framework Convention Climate Change* requires nations to promote technological transfer.¹³⁴

Performance Standard 6 requires from finance clients a number of actions in relation to natural and critical habitat and Legally Protected Areas.¹³⁵ The general tenor of the requirements is that degradation or depletion of ecosystem functions and biodiversity should be subject to 'qualified mitigation' and discretionary offsetting.¹³⁶ In comparison article 8(c)–(f) of the *Convention on Biological Diversity* ('CBD') requires strong proactive measures to enhance ecosystem services and conservation of biological diversity. In relation to control of alien or feral animal species, clause 12 of the Performance Standard requires that the project proponent not intentionally introduce any new alien species whereas article 8(h) of the *CBD* requires outright prevention. Of most significance, Performance Standard 6 does not incorporate principles of capacity building, technical and scientific exchange and beneficial access to technology contained

132 Opened for signature 13 November 1979, 18 ILM 1442 (entered into force 16 March 1983).

133 See United Nations Economic Commission for Europe, *Protocols for the Convention* (2009) <http://www.unece.org/env/lrtap/status/lrtap_s.htm> at 26 August 2009.

134 UNFCCC, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) arts 4(1)(c), 4(5).

135 International Finance Corporation, *Performance Standard 6 Biodiversity Conservation and Sustainable Natural Resource Management* (2006) cl 7–11 <[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_PS6/\\$FILE/P S_6_BiodivConservation.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_PS6/$FILE/P S_6_BiodivConservation.pdf)> at 13 September 2009.

136 The exception to this is cl 11 in relation to Legally Protected Areas, which states clients will: 'Implement additional programs, as appropriate, to promote and enhance the conservation aims of the protected area'. Conditions and caveats such as 'as appropriate' are used in international instruments to recognise different capacities and historical inequities in economic development. It is questionable whether the same language is appropriate in the context of IFIs.

in articles 16–18 of the *CBD* that are fundamental to economic and social development of project hosts.

These divergences in standards and principles only scratch the surface of the differences between institutional standards and international law. Part of the divergence can be attributed to the respective focus of each regime – nation state and IFI. In some respects broader obligations are more appropriately implemented at a nation state level as opposed to individual institution level. However, the principle remains that ECAs are characterised as organs of state and should be adopting the relevant international law.

C EFIC Environmental Policy

The OECD Common Approaches and the IFC Performance Standards provide the foundation for EFIC's Environmental Policy. From an organisational perspective, EFIC's assenting to the OECD Common Approaches and the IFC Performance Standards ensures that EFIC operates on a level playing field and is not disadvantaged by adoption of more stringent standards. On further analysis, however, the international framework foundations are not necessarily compatible with policy components from domestic law sources, having the implication that EFIC's Environmental Policy contains a number of tensions and inconsistencies. These competing policy tensions are set out in clause 2.3 of the Environmental Policy where EFIC states it is guided by its export trade mandate,¹³⁷ ESD reporting requirements under the *EPBC Act* and client commercial outcomes.¹³⁸ The following section evaluates how the different components of EFIC's Environmental Policy interact and how the Policy aims to achieve the objective of mitigating environmental and social impacts.

1 *Ecologically Sustainable Development Reporting*

Reporting on implementation of ESD principles is an important component of environmental management for Commonwealth Authorities. Principles of ESD including conservation of biological diversity, intergenerational equity, adherence to the precautionary principle and inclusion of valuation, pricing and incentive mechanisms in environmental management are cornerstone principles of Australia's domestic environmental legislation.¹³⁹ Clause 2.2 of the EFIC Environment Policy commits EFIC, in line with legislative requirements, to report how its activities accord with the principles of ESD. The recent EFIC Annual Report 2008¹⁴⁰ does not contain any reference to Ecologically

137 *Export Finance and Insurance Corporation Act 1974* (Cth) s 7.

138 EFIC, *Environmental Policy* (2009) <<http://www.efic.gov.au/static/efi/environment/environdstd.htm>> at 26 August 2009 cl 2.3.

139 See Department of the Environment, Water, Heritage and the Arts, *Ecologically Sustainable Development* (2009) <<http://www.environment.gov.au/esd/index.html>> at 26 August 2009.

140 See *EFIC Annual Report*, above n 51, app 5.

Sustainable Development or use the term ESD.¹⁴¹ This may be due to the fact that the *EPBC Act* places EFIC decisions outside of the *EPBC Act* framework¹⁴² with the implication that supported project impacts are not a part of EFIC's activities that require reporting under ESD reports. Such an interpretation would appear contrary to the language of section 516A(6)(a) of the *EPBC Act*, which requires 'a report on how the activities of, and the *administration (if any) of legislation by*' (emphasis added) EFIC accords with principles of ESD. The administration of legislation – the *EFIC Act* – includes providing facilities under the Commercial and National Interest Account and the environmental impacts of EFIC supported projects should be reported.

A review of EFIC ESD reporting would indicate that EFIC is of the view that reporting on the utilisation of the screening processes established under OECD Common Approaches equates with satisfactory ESD reporting. EFIC does not report on GHG emissions for projects, project water usage, air emissions, maintenance of cultural or heritage sites, or biodiversity impacts – to name just a few potential ESD indicators. Without proper reporting on ESD indicators, which allows for the attribution of value to environmental externalities, the true cost-benefit analysis for EFIC projects cannot be evaluated. ESD is not a central component of EFIC's Environmental Policy, nor is it consistently and adequately represented in the banking institution environmental performance standards. The absence of ESD principles creates an Environmental Policy that has no mechanism to maintain or improve biodiversity values, has no consistent and systematic instrument of evaluation to define unsustainable project development as inappropriate, and no real means to apply the precautionary principle.

2 *Having Regard to International Obligations*

Concurrent with the application of the IFC Performance Standards, EFIC also has a duty to take into account Australia's obligations under international agreements.¹⁴³ The duty is expressed as a requirement for EFIC to 'have regard to Australia's obligations under international agreements'. The language adopted in section 8 of the *EFIC Act*, in relation to EFIC's duties, indicates that the obligations of the Australian Government are not the obligations of EFIC and do not directly bind the EFIC Board.

EFIC Environment Policy requires EFIC to 'have regard to', as opposed to 'comply with',¹⁴⁴ international agreements and laws. EFIC appraises the terminology 'must have regard to' Australia's obligations under treaties,

141 Interestingly, the Minister for Trade stated that EFIC has complied with s 516A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Commonwealth, Senate, *Parliamentary Debates*, 14 May 2009, 2980 (John Faulkner, Special Minister of State).

142 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2003, 228666 (David Kemp, Minister for the Environment and Heritage). See also *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524(3)(c).

143 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 8(2)(b)(iii).

144 The use of terminology such as 'comply with' may render the IFC Performance Safeguards less relevant as the focus would be on compliance with international instruments.

covenants and agreements as adequate on the basis that 'EFIC [in its] role as a third-party financier [has] only limited ability to influence most transactions'.

The implication of this clause in the policy and section in the legislation is that EFIC does not secure full compliance with international law. A duty to 'have regard' may amount to no more than a procedural process whereby EFIC reviews 67 international treaties containing 30 obligations and makes a subjective assessment about compliance balanced against other economic or legal policy considerations. As Australia has more than 30 substantive obligations under international instruments, benchmarking compliance with international obligations would not exhaustively consider all Australia's international obligations with broader aspirational and policy orientated obligations compared with more traditional, substantive obligations not having recognition in EFIC due diligence.

Moreover, the terminology 'have regard to' may technically allow breaches of international law as long as EFIC seeks mitigation measures – in EFIC's opinion this offsets or ameliorates a breach of international law. This is consistent with EFIC's stated approach to the requirements of section 8(2)(b)(iii).¹⁴⁵ The duty is further undermined by the saving clause in the *EFIC Act* that upholds the validity of an EFIC transaction even in the event of contravention of the *EFIC Act*.¹⁴⁶ This section poses a considerable restriction on domestic judicial review of EFIC transactions that may contravene international environmental law or in which EFIC did not have regard to Australia's international obligations.

III PATHWAYS TO ENHANCING ENVIRONMENTAL RESILIENCE IN EFIC SUPPORTED PROJECTS

With the resurging relevance of ECAs come the narratives for ECA reform or elimination.¹⁴⁷ Are ECAs relics of an age of unabashed economic protectionism deployed for strategic geo-political ends, without regard for genuine social advancement and require immediate termination? Or can progressive reforms transform ECAs to aid sustainable development, assist climate change mitigation and assist in the fulfilment of MDGs? Clouding this proposition are a number of policy challenges including the 'New Great Game' of strategic resource procurement, broadening awareness of legal liability and corporate social responsibility issues for TNCs, development/aid policy coherence and regional security, all redefining the parameters within which ECAs such as EFIC operate. One important consideration is that ECAs remain an important and unique platform for international trade.

145 See PriceWaterhouseCoopers, *EFIC's Environment Policy Review: Assessment of Compliance Matters* (2004) 26 <<http://www.efic.gov.au/attachments/db/efi/69.pdf>> at 26 August 2009.

146 *Export Finance and Insurance Corporation Act 1974* (Cth) s 89(2).

147 Harmon et al, above n 2, vii, 7.

A reformist pathway must directly balance domestic export industry development objectives¹⁴⁸ of ECAs with ecologically sustainable development objectives.¹⁴⁹ Infusing EFIC with sustainable development objectives could magnify actions to achieve obligations relating to technology transfer,¹⁵⁰ capacity building and benefit sharing¹⁵¹ assumed by the Commonwealth Government in key MEAs. Leveraging EFIC's international trade platform may provide a complementary avenue for the Australian Government to satisfy international obligations in relation to technology transfer without solely relying upon financing mechanisms associated with individual MEAs. While this may be a significant departure from the historically parochial export profit motives, such reform may be necessary for the continued relevance, adaptability and responsiveness of EFIC. EFIC could be a significant vehicle for the delivery of responsible and sustainable development projects, enhancing regional prosperity.

Achieving this scale of reform and reconfiguration of EFIC to satisfy both export industry and technology transfer objectives would represent a tectonic policy shift requiring considerable institutional reorientation and legislative reform. If such a reform pathway is untenable or politically unachievable, a range of reforms to public consultation and disclosure, project evaluation procedure and institutional accountability could be adopted to enhance the environmental and development resilience of EFIC supported projects.¹⁵²

EFIC public disclosure of Category A projects reflects a commitment, with both legal and non-legal aspects, to provide domestic stakeholders an opportunity to comment on project documentation.¹⁵³ Participation in EFIC project decisions is a necessary requirement as the agency applies taxpayer funds for insurance,

148 In the case of EFIC this could be achieved legislatively, though not politically or culturally, by amending ss 7 and 8 of the *Export Finance and Insurance Corporation Act 1974* (Cth).

149 See EFIC, above n 138, cl 1.4: 'The OECD acknowledges that the primary role of ECAs is to promote trade in a competitive environment, whereas development agencies (for example AusAID) focus on development assistance.' The clause represents EFIC's position that it cannot manage dual objectives of trade stimulation and development outcomes.

150 See *Rio Declaration on Environment and Development* (1992) A/CONF.151/26 (vol I) Principle 9: 'States should cooperate to strengthen endogenous capacity-building for sustainable development ... through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies.' See also Division for Sustainable Development, *Agenda 21*, UN Department of Economic and Social Affairs ch 34 <<http://www.un.org/esa/dsd/agenda21/>> at 26 August 2009; *United Nations Framework Convention on Climate Change*, opened for signature May 1992, 1771 UNTS 107 (entered into force 21 March 1994), arts 4.1h, 4.3-4.5, 4.7. See also *Kyoto Protocol to the United Nations Framework on Climate Change*, open for signature 4 June 1992, 37 ILM 22 (entered into force 16 February 2005), art 10(c); Intergovernmental Panel on Climate Change, *Methodological and Technological Issues in Technology Transfer* (2001) United Nations Environmental Programme <http://www.grida.no/publications/other/ipcc_sr/?src=/Climate/ipcc/tectran/037.htm> at 26 August 2009.

151 See *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 16 in the context of biotechnology and technology relevant to conservation of biodiversity.

152 Similar suggestions for ECA reform have been made in relation to Canada's ECA, Export Development Canada: Halifax Initiative, *Submission on the Export Development Act: Legislative Review* (2008) <<http://www.halifaxinitiative.org/updir/LegislativeReview-HalifaxInitiative.pdf>> at 26 August 2009.

153 EFIC, above n 138, cl 5.1, 5.2.

bonds and guarantees. The same principle would justify the disclosure requirements under the *International Monetary Agreements Act 1947* (Cth) ('*IMA Act*') for loans or currency swaps made by the Australian Government pursuant to the Asian Development Bank, World Bank or International Monetary Fund programs.¹⁵⁴ In comparison, the requirements for ministerial disclosure under the *EFIC Act* only require gazettal of basic particulars and no statement as to the national interest reasons for extending EFIC products.¹⁵⁵ While the size of loans and currency swaps under the *IMA Act* justify a robust disclosure and consultation process, including committee investigation, EFIC facilities can be considerable and should require some level of national interest statement.

EFIC has adopted in its Environmental Policy a number of provisions for disclosure of Category A project Environmental Assessments, although there is no provision for EFIC to publicly or privately respond to public comments on Category A projects. One of the more problematic elements of EFIC disclosure is that while EFIC commits to the disclosure of an Environmental Assessment for 30 days, there is no requirement of Action Plans¹⁵⁶ disclosure.¹⁵⁷ An environmental assessment produced by a project proponent in compliance with host country environmental planning laws may not contain the relevant Action Plans required under each IFC Performance Standard therefore making IFC Performance Standard benchmarking, as undertaken by EFIC in compliance with their Environmental Policy, difficult.

Further down the project assessment process, there is no provision for EFIC to publicly explain its decision making process whereby the EFIC Board or a delegated authority provides a public explanation of how the project satisfies IFC Performance Standards or complies with Australia's international obligation. A fuller consultation and justification process whereby satisfaction of performance standards is explained and evaluated is the cornerstone of environmental assessment and planning and accords with principles of natural justice.¹⁵⁸ Without a process that requires EFIC to publicly justify project support, stakeholders are not informed of the substantive basis on which insurance or

154 Section 8D of the Act requires public release and tabling of a national interest statement in relation to a loan or currency swap pursuant to a World Bank, IMF or Asian Development Bank Program under s 8C or 8CA. Further s 8F requires the national interest statement to be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade.

155 See *Export Finance and Insurance Corporation Act 1974* (Cth) s 30.

156 All IFC Performance Standards generally require Action Plans to show compliance with Performance Standards: International Finance Corporation, *Performance Standards* (2009) Performance Standard 1, cl 16 <<http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>> at 26 August 2009.

157 It should be noted that EFIC have on one occasion, disclosed Actions Plans subsequent to an Environmental Assessment in relation to the Gold Ridge Mine, Solomon Islands Category A Project.

158 One project potentially involving both IFC and EFIC is the Gold Ridge Mine in the Solomon Islands. On the IFC website, the IFC has provided preliminary benchmarking of the project against IFC Performance Standards: see International Finance Corporation, *Gold Ridge Environmental and Social Review Summary* (2009) <<http://www.ifc.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/365e908c932892c1852575bb00710842?opendocument>> at 26 August 2009. In comparison, beyond the 30 days of disclosure, EFIC does not list any project documentation.

loans are being extended and decisions can be perceived as arbitrary. Project support justification is as fundamental to transparency as the judicial notion of a right to reasons for a judgment is to natural justice.

The divergence between EFIC and IFC in terms of publicly benchmarking Category A projects against IFC Performance Standards could be based upon the IFC's development mandate and EFIC's strong commercial export orientation. Differentiation in mandates and nuances in different regulatory regimes aside, it is an anomaly in international governance whereby a nationalised finance and insurance corporation operating under the international law obligations of the home nation state applies a considerably a less rigorous process than a multilateral development bank.

Lack of transparency and access to information continues post-approval of EFIC facilities for Category A projects. Failure to disclose key positive and restrictive covenants directly related to performance standards and the overall environmental integrity of a project means there is no demonstration by EFIC that IFC Performance Standards are being actively achieved. Covenants contained in financial products such as PRI help secure environmental performance, and compliance with covenants is an important performance indicator. Due to EFIC's limited project monitoring capacity, project covenant monitoring and benchmarking with performance indicators is fundamental. Environmental covenants in EFIC contracts should not be exempt from disclosure under the *FOI Act* and EFIC needs to make provision for dissemination of the conditions, both to home state stakeholders and project affected communities. Key performance indicators for each supported Category A project should be published and annual reporting of covenant compliance benchmarked against the indicators should be available on EFIC's website.

Disclosure and access to information deficiencies existing across the project and facility assessment process are further exacerbated by broad exemptions in Australia's *FOI Act*.¹⁵⁹ All documents concerning anything done by EFIC under Part 4 or 5 of the *EFIC Act* are exempt from disclosure.¹⁶⁰ Judicial consideration of the ambit of the exemption may narrow EFIC's interpretation¹⁶¹ of the exemption, however previous decisions on section 7(2) exemptions tend to indicate the exemption is broadly applied.¹⁶² The OECD Recommendation of the

159 *Freedom of Information Act 1982* (Cth) sch 2, pt II, div 1. EFIC has relied upon this exemption to deny a range of Freedom of Information requests, but one of the most relevant request related to an application for documents created under s 29 of the *Export Finance and Insurance Corporation Act 1974* (Cth) – Ministerial Directions on the NIA. Non-disclosure of NIA transactions is another area where concealment of information compromises the ability of the Australian public to understand full nature of supported projects.

160 See s 7(2) *Freedom of Information Act 1982* (Cth). In addition to this broad exemption, ss 33(1)(a)(iii), 33(1)(b) and 43(1)(c)(i) are also applicable.

161 See also *Freedom of Information Act 1982* (Cth) s 3; *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64.

162 *Australian Broadcasting Corporation v University of Technology, Sydney* (2006) 154 FCR 209.

Council on Environmental Information – C(98)/67,¹⁶³ which could be characterised as an OECD version of the Aarhus Convention¹⁶⁴ principles, recommends that

[m]ember countries take all necessary actions within the framework of their national laws to increase the availability to the public of environmental information held by public authorities.

In invoking exemptions in Australia's *Freedom of Information Act* to EFIC documentation, it could be suggested that certain documentation produced and authored by EFIC is protected from disclosure contrary to the spirit of the OECD Recommendations.

EFIC should consider adopting a presumption of disclosure and reverse the presumption of commercial in confidence for project documentation in line with policies adopted by the IFC¹⁶⁵ and other international ECAs. Such amendments to the EFIC Environmental Policy or amendments to the restrictive provisions in *FOI Act* could facilitate more comprehensive environmental reporting and achievement of key environmental democracy principles.¹⁶⁶

Another facet of environmental reporting and disclosure that could provide an avenue of reform is ESD reporting. EFIC has historically included its ESD reporting in its annual reports, commenting generally on domestic organisational operations and providing a brief overview of supported projects.¹⁶⁷ While Commonwealth Corporation standards of ESD reporting vary as 'ESD Reporting Guidelines' produced by Environment Australia (2003)¹⁶⁸ are only a guide,¹⁶⁹ there is a significant lack of substance and detail in EFIC's ESD reporting to enable a evaluation of ESD principles as applied by EFIC. EFIC does not draw upon substantive project environmental indicators such as biodiversity impacts, GHG emissions, air pollution, water and natural resource management to actively demonstrate and report on ESD principles.

EFIC may argue that providing Australian exporters with EFIC finance products and facilities is a governmental authorisation under the *EFIC Act*, which

163 OECD, *Recommendation of the Council on Environmental Information* (1998) <<http://www.rec.org/e-aarhus/files/legal1998.pdf>> at 26 August 2009.

164 See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 19 April 1999, 38 ILM 517 (entered into force 30 October 2001).

165 See International Finance Corporation, *Disclosure Policy*, (2006) cl 8, 9 <http://www.ifc.org/ifcext/disclosure.nsf/Content/Disclosure_Policy> at 26 August 2009.

166 Numerous international instruments make prescriptions about access to environmental decisions and rights of review: *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature April 1999, 38 ILM 517 art 4(1) (entered into force 30 October 2001). See also *Rio Declaration on Environment and Development* (1992) A/CONF.151/26 (Vol. I) principle 10; OECD, *Recommendation of the Council on Environmental Information* (C98/67) (1998) <[http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(98\)67](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)67)> at 26 August 2009.

167 See EFIC, *Annual Report*, above n 51, 52.

168 In order to make an appropriate assessment as to the level of reporting compliance a Commonwealth Auditor-General performance audit of EFIC Annual Reports would be preferable.

169 Commonwealth, *Parliamentary Debates*, Senate, 14 May 2009, 2980 (John Faulkner, Special Minister of State).

means project support is not an 'action' under the *EPBC Act 1999* (Cth).¹⁷⁰ It may be further argued that as project support is not an 'action' then it does not have to be reported under section 516A of the *EPBC Act*. However, section 516A makes no specific mention of actions and refers more generally to 'activities' of a commonwealth agency requiring reporting. One of the inherent difficulties with ESD reporting for EFIC is that the principles embodying ESD,¹⁷¹ precautionary principle, biodiversity conservation, intergenerational equity and internalisation of environmental externalities do not have a specific voice in EFIC's Environmental Policy.¹⁷² The anomaly is that EFIC is required to report on compliance with principles, specifically contained in section 3A of the *EPBC Act*, yet its financing decisions are based upon operating protocols and benchmarks of the International Finance Corporation and the *Equator Principles*. This discrepancy is part of the larger disjuncture between the principles of the EFIC Environmental Policy and principles of ESD under the *EPBC Act*.

Regardless of the regime directing EFIC action, environmental reporting in compliance with section 516A should include a quantification of GHG and other air pollutant emissions derived from EFIC supported projects, outline threatened species mitigation measures, water management, heritage and cultural site protections, biodiversity impact statement on native vegetation clearing, and natural resource management implications of projects.¹⁷³ Reports have shown that EFIC supported fossil fuel projects between 1993 and 2004 resulted in the emission of approximately 339 metric tons of carbon dioxide equivalent.¹⁷⁴ The same report also highlighted that the ratio of support for fossil fuel projects against renewable projects was 100:1.¹⁷⁵ On a global scale reports have highlighted that since 1994, ECAs and MDBs have financed 88 new and expanded coal fired power plants with a yearly GHG emission level of 781 metric tons of carbon dioxide equivalent per year.¹⁷⁶

These reports demonstrate two important points. First, key performance indicators and data on environmental performance are necessary to evaluate EFIC's implementation of ESD principles. Second, taking account of the considerable GHG output from ECA supported projects, there may be further consideration of whether impacts of overseas projects may have transboundary impacts flowing back to the home state. The question of whether EFIC project

170 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524(3).

171 See Council of Australian Government (COAG), *National Strategy for Ecologically Sustainable Development* (1992). <<http://www.environment.gov.au/esd/national/nsesd/strategy/intro.html#WIESD>> at 26 August 2009.

172 CI 2.2 of EFIC, above n 138, does refer to a requirement to report on ESD.

173 This is not a conclusive list, but non-negotiable criteria and factors that should be reported on.

174 See Mineral Policy Institute and AidWatch, '100:1. The Australian Export Credit Agency – EFIC's gamble with climate' (2004). For comparison Australia's 2008 national greenhouse gas output was 553 Mt CO₂ eq see Department of Climate Change, *National Greenhouse Gas Inventory 2007* (2009) <<http://www.climatechange.gov.au/inventory/2007/index.html>> at 26 August 2009.

175 Ibid, Mineral Policy Institute and AidWatch, 'EFIC's gamble'.

176 See Bruce Rich, *Foreclosing the Future: Coal, Climate and Public International Finance – Summary* (2009) Environmental Defence Fund 1 <<http://www.edf.org/article.cfm?contentID=9539>> at 24 August 2009.

support triggers a requirement for approval under the *EPBC Act* should be a matter of fact and causation. Recent litigation in the United States against American ECAs considered the question of whether the ECAs had to undertake Environmental Assessments under *National Environmental Policy Act* ('*NEPA Act*') due to the transboundary impact of GHG emissions on the US domestic environment. Settlement of that case will see US ECAs, OPIC and Ex-Im more comprehensively report supported project GHG emissions and commit to reduce supported project emissions. The litigation raises the proposition that triggers for initiating domestic environmental approvals can occur within a regional context based on regional and domestic impacts.

While the most significant reforms should be addressed towards remedying transparency and accountability deficiencies, there are three important reforms necessary to strengthen review mechanisms. An amended EFIC Environmental Policy should be contained in the *EFIC Act* and outline a procedural framework for applying EFIC's Environmental Policy. Provision should be made for judicial review of NIA decisions.¹⁷⁷ One of the core problems with EFIC in terms of accountability is the failure to adopt procedures and protocols for evaluating a project against EFIC's Environmental Policy. There is no legislative framework for project evaluation and the Environmental Policy is not referenced in the *EFIC Act*. The implication is that after the initial project screening and categorisation, it is not clear how the Environmental Policy is applied and on what basis EFIC will provide financial and insurance products.

Finally, the most important reform is the amendment of section 8(2)(b)(iii) of the *EFIC Act* to require compliance with, rather than procedural consideration of, Australia's international obligations. EFIC is an organ of the state attributed with Australia's international obligations. It is not in a position to abrogate or selectively pick and choose international obligations applicable to a particular export product or project. As with previous recommendations, EFIC should be required to explain and demonstrate publicly how compliance with Australia's international obligations is achieved. There should a clear onus on EFIC to report on what measures it has taken to comply with Australia's international obligations and if a project could be evaluated as breaching international law.

IV CONCLUSION

The Global Financial Crisis has sharply focused international attention on the need to build robust financial regulatory systems and to potentially pursue structural reform to international finance institutions. Considering ECAs alongside MDBs will be delivering one quarter of the US\$1.1 trillion G20 stimulus package, it is pertinent that we examine the capacity of ECAs to deliver

¹⁷⁷ Currently s 89 of the *Export Finance and Insurance Corporation Act 1974* (Cth) would prevent judicial challenge to an EFIC transaction that argued the transaction was entered into in breach of the Act or was not within EFIC powers.

economic development in conjunction with provisions for climate change adaptation, energy and food security and poverty alleviation. ECAs have the potential to be strategically important vehicles for the delivery of policy objectives committed to under MEAs that are often neglected and overlooked. This potential has been overlooked because of competition pressures driving ECAs to apply frameworks that are not entirely compatible with these broader MEA obligations and policy objectives. Adopting a reform pathway that enhances due diligence, refines mandates and encourages transparency is fundamental to reconfiguring ECAs to deliver ecologically sustainable development.