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**Export Development Canada
Environmental Policy Review**

**Submission by the Halifax Initiative Coalition
August 26, 2009**

The Halifax Initiative is a coalition of human rights, environmental, faith-based, development and labour organizations. Our objective is to transform the international financial institutions to achieve poverty eradication, environmental sustainability and the full realization of universal human rights.

The Halifax Initiative supports the review of Export Development Canada's Environmental Policy and disclosure practices, and is grateful for the opportunity to provide input to the review process.

1. Project environmental and social standards

a. Compliance

One of the stated objectives for EDC's Environmental Policy review is to "clarify EDC's environmental commitments and environmental review processes."¹ The Halifax Initiative has previously identified the need for enhanced transparency in this area,² including with regard to environmental and social standards, and strongly supports this objective as a review priority.

The Discussion Paper prepared for the review illustrates the need for greater clarity regarding applicable standards. This document refers to project environmental and social standards as "benchmarking standards" and explains that "EDC reviews projects for which EDC is proposing limited or non-recourse Project Financing against the requirements of the IFC Performance Standards."³

However, "benchmarking" and "reviewing" projects do not appear to be synonymous with the imposition of a strict requirement that projects *comply* with the Performance Standards. This impression is supported by a proposed policy shift by EDC that would "require projects being undertaken by all private sector sponsors and project companies to meet the obligations of the IFC Performance Standards."⁴

¹ EDC Environmental Policy Review Discussion Paper. May 28, 2009.

² For example, see the 2008 Halifax Initiative submission to the *Export Development Act* Legislative Review. <http://www.halifaxinitiative.org/updir/LegislativeReview-HalifaxInitiative.pdf>

³ *Supra* note 1 at 8.

⁴ *Ibid.*

However, the precise nature of the proposed policy shift and its universality is called into question later in the Discussion Paper when EDC discusses reporting “the environmental and social standards against which the project has been benchmarked, whether or not the project has met certain aspects of those standards and, in cases *where standards have not been met*, the justification for providing support to the project”⁵ (emphasis added).

A legislative initiative that requires compliance by EDC clients with the Performance Standards is currently before the House of Commons. Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, received second reading on April 22, 2009 and is now being reviewed by the Standing Committee on Foreign Affairs and International Development. The bill requires that EDC makes support to the private sector conditional on compliance with the Performance Standards and obliges the Crown corporation to deny support in cases of non-compliance.

Recommendations:

EDC’s Environmental Review Policy should clearly articulate the Crown corporation’s institutional policy regarding the application of environmental and social standards. The Policy should impose an obligation that private sector clients comply with the Performance Standards, over the life of a project. Derogations from the Performance Standards should be avoided. Moreover, the Environmental Review Policy should contain similar provisions regarding the World Bank Safeguard Policies and EDC’s public clients.

b. Content

As the Halifax Initiative has described elsewhere,⁶ important standards reflecting international best practice are not captured in the Performance Standards and are presumably therefore not applied by Export Development Canada. Principal among these standards is the *broad community support* requirement that was established under the IFC Policy on Social and Environmental Sustainability. This Policy also includes sector-specific requirements that are missing from the Performance Standards. Among other business sectors, the requirements apply to the extractive industries, which are the single greatest recipient of EDC support.

The IFC will soon launch a three-year review of the Performance Standards. The review will address a number of policy and operational challenges associated with the Standards. These challenges concern critical issues such as climate change, consultation with affected communities, disclosure, resettlement, labour issues and human rights, among others. The IFC will consult with stakeholders and assess the need for improvements to the Performance Standards.

Recommendations:

EDC should adopt the *broad community support* and sector-specific requirements established under the IFC Policy on Social and Environmental Sustainability. EDC should commit to adopting any improvements that are made to the Performance Standards through the World Bank review.

⁵ *Ibid.* at 12.

⁶ *Supra* note 2.

2. Community engagement

The Halifax Initiative supports EDC's commitment to clearly articulate its expectations regarding community engagement in its Environmental Policy and Environmental Review Directive. As discussed above, international best practice in this area includes the *broad community support* requirement that was developed by the International Finance Corporation and the provisions of Performance Standard 7, which concerns engagement with indigenous peoples.

The *broad community support* standard is significantly weaker than the *free, prior and informed consent* threshold recognized in the United Nations Declaration on the Rights of Indigenous Peoples and in international jurisprudence.⁷ Moreover, the World Bank Compliance Advisor Ombudsman has expressed concerns regarding a lack of clarity on precisely how the IFC evaluates *broad community support*.⁸ However, despite these limitations, the *broad community support* standard is far more rigorous a threshold than the community consultation process currently assumed by EDC through its adoption of the Performance Standards and Equator Principles.

Recommendations:

At a minimum, EDC should adopt the *broad community support* requirement established under the IFC Policy on Social and Environmental Sustainability. In addition, EDC should require that its clients comply with Performance Standard 7. EDC should commit to adopting any improvements that are made to the Performance Standards regarding community engagement through the World Bank review.

3. Project conditions and monitoring

EDC's Discussion Paper explains that "EDC may identify particular requirements which may need to be incorporated into the loan or insurance documentation. Recommended covenants or conditions vary on a case-by-case basis, depending on the nature of the project and the outcome of the environmental review."⁹ The paper identifies, as an example of such a requirement, a warranty regarding ongoing conformance with international standards.

This process lacks transparency. As discussed above, it's unclear whether private sector clients are required to comply with the Performance Standards and if so, whether this requirement is consistently imposed in the form of a legally-binding obligation. It's also unclear how EDC makes determinations regarding the requirements that are included, on a case-by-case basis, in loan and insurance documentation. Are these requirements designed to ensure compliance with the Performance Standards?

EDC does not disclose information regarding project modification and mitigation requirements, or the results of monitoring activities. Little is known about these processes. In contrast, the US *Export Import Bank Act*, which governs operations at the US Export-Import Bank, mandates "the public disclosure of environmental assessments and supplemental environmental reports required to be submitted to the Bank, including remediation or mitigation plans and procedures, and

⁷ Saramaka People v. Suriname. Inter-American Court of Human Rights. 2007.

⁸ CAO. *Advisory Note: IFC's Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy. Commentary on IFC's Progress Report on the First 18 Months of Application.* December, 2007, p.2. <http://www.cao-ombudsman.org/html-english/documents/CAOPublicStatementIFCperformancestandards121707.pdf>

⁹ *Supra* note 1 at 10.

related monitoring reports”¹⁰ for projects that receive long term support valued at \$10 million or more.

In a recent review of EDC’s Environmental Review Directive,¹¹ the Auditor General of Canada noted that the Equator Principles, to which EDC is a signatory, “require that an independent environmental and/or social expert be appointed, or that the project sponsor retain qualified and experienced external experts to verify its monitoring and reporting information over the life of the loan for all Category A projects and, where appropriate, for Category B projects.” The Auditor General notes that this is not a requirement in EDC’s environmental review processes or procedures.

Recommendations:

EDC’s Environmental Review Policy should clearly articulate the corporation’s policy and processes regarding the development and enforcement of conditions and mitigation measures. The requirement that private sector clients comply with the Performance Standards should be included in all client contracts. The same is true regarding the World Bank Safeguard Policies and EDC’s public clients. EDC should require that independent environmental and social reviews be undertaken to verify client-generated monitoring and reporting information. Subject to legal provisions governing commercial confidentiality, EDC should publicly disclose remediation and mitigation plans and procedures, and related monitoring reports, including those generated by independent experts.

4. Environmental reviews in high-income OECD countries

In its Discussion Paper, EDC explains that it applies host country requirements for projects located in G7 countries. EDC proposes to extend this streamlined review process to projects located in high-income OECD countries. EDC argues that the use of a streamlined process is justified in these countries because their “environmental regulatory requirements are equivalent or higher than international standards, such as those of the World Bank Group.”¹²

Recommendations:

The streamlined review process should be reassessed prior to its renewal for G7 countries and its extension to OECD members. An assessment should be undertaken to ensure that legislation in these countries is as stringent as international standards, including the IFC Policy on Social and Environmental Sustainability and the IFC Performance Standards. This assessment should be made public. The streamlined process should be supplemented with World Bank standards where they are more robust than G7 / OECD domestic legislation. Any such changes should be clearly articulated in the Environmental Review Process.

5. Climate change

The Halifax Initiative supports EDC’s commitment to evaluate the climate change risks associated with proposed projects, to require that clients quantify their emissions and to support the export of goods and services that reduce green house gases (GHG). However, these largely

¹⁰ Export Import Bank Act of 1945, as amended, Subsection 11(a)(1).

¹¹ Office of the Auditor General of Canada. *Environmental Review at Export Development Canada*. June 2009. http://www.oag-bvg.gc.ca/internet/docs/parl_otp_200906_e_32632.pdf

¹² *Supra* note 1 at 10.

evaluative measures are unlikely to reduce the GHG footprint of EDC's portfolio unless they are accompanied with a commitment to preferentially support low risk / low emission goods and services. The US Export Import Bank is currently developing such a policy, which will include enhanced GHG review provisions and incentives to reduce CO₂ emissions. The Ex-Im Bank has also been directed to work within the OECD to promote the adoption of similar policies by all member governments.

Recommendations:

The objective of EDC's climate change policy should be to minimize the GHG emissions associated with its portfolio. EDC should achieve this goal by preferentially supporting low emission exports and investments, and by reducing its support for high GHG emitters. EDC should promote the adoption of an effective, binding climate change policy at the OECD.

6. Disclosure

The EDC Discussion Paper asserts that "EDC proactively makes information publicly available on transactions."¹³ In fact, statutory provisions governing the release of information by EDC include a presumption against disclosure.¹⁴ The effect of these provisions is to indiscriminately characterize all information received by EDC from its clients as confidential. This includes information whose public release would not prejudice EDC clients. The provisions also treat as confidential any internal EDC documentation developed during project assessment, approval and monitoring phases, given that these documents necessarily contain information received from clients.

As a consequence, it remains impossible for the Canadian public and parliamentarians to access information regarding EDC decision-making on project categorization, how EDC assesses the social, environmental and human rights risks associated with projects, the modifications or mitigation measures that EDC requires of clients (as described above), how EDC assesses on-going project compliance, the results of post-approval monitoring activities (as described above) and any sanctions that EDC applies for non-compliance.

The enhancements that are proposed in the Discussion Paper to EDC's Disclosure Policy are unlikely to remedy this problem, as they grant EDC clients discretion regarding the release of information.

Recommendations:

EDC should modify its Disclosure Policy to make client consent for the release of all non-commercially confidential information a condition for EDC backing. This includes information regarding project classification, compliance assessment regarding the Performance Standards / Safeguard Policies, remediation and mitigation plans and procedures, related monitoring reports (including those generated by independent experts), as well as information regarding non-compliance and associated sanctions.

¹³ *Ibid.* at 5.

¹⁴ For further analysis see *Supra* note 2.

7. Human rights

The Discussion Paper mentions EDC's Statement of Commitment on Human Rights, which "defines EDC's current practices in considering human rights issues associated with potential business."¹⁵ It explains that EDC takes guidance on this issue from external commitments signed by the Government of Canada, including the Extractive Industries Transparency Initiative, the Voluntary Principles on Security and Human Rights, OECD Guidelines for Multilateral Enterprises and the OECD Sustainable Lending Practices. It's perplexing that EDC should use these instruments for guidance on human rights when the Government of Canada's most important external commitments in this area are the international human rights treaties to which it is a signatory, and by which EDC, as a state agency, is bound.

EDC's Statement on Human Rights falls far short of the clear, comprehensive human rights policy that is needed to ensure that EDC operations neither facilitate nor ignore human rights abuses by the corporations whose activities it supports.¹⁶ It fails to articulate EDC policy regarding the potential human rights impacts associated with the investments of its prospective clients. The Statement affirms that "[i]nvestment projects may have potentially significant impacts on the human rights of individuals. EDC recognizes that financial institutions must endeavour to assess the potential for adverse human rights outcomes for individuals directly affected by such projects."¹⁷ However, the Statement is silent on the issue of whether and how EDC assesses this potential, what it expects of its clients in the area of human rights and how it ensures that clients meet those expectations, over the life of a project.

The Statement does not articulate a "policy that requires clients to perform adequate due diligence on their potential human rights impacts," which would allow EDC to "flag up where serious human rights concerns would require greater oversight - and possibly indicate where State support should not proceed or continue," as recommended by John Ruggie, the UN Secretary-General's Special Representative on business and human rights.¹⁸

Finally, there is growing recognition that the Performance Standards do not adequately address the issue of human rights. In fact, this issue is likely to receive significant attention during the upcoming World Bank review. The Performance Standards' weakness in this area makes the adoption of an effective human rights policy at EDC all the more pressing.

Recommendations:

EDC should adopt a human rights policy that protects against the interference of human rights by its clients.¹⁹ In order to guarantee access-to-information rights and to promote accountability, the EDC Disclosure Policy should be amended to ensure the timely public release of EDC human rights policies and procedures, as well as project-specific human rights information.

¹⁵ *Supra* note 1 at 5.

¹⁶ For more analysis see *Supra* note 2.

¹⁷ http://www.edc.ca/english/docs/news/2008/mediaroom_14502.htm

¹⁸ *Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprise, John Ruggie.* 7 April 2008. A/HRC/8/5. Paragraph 40.

¹⁹ For more information on the Halifax Initiative's recommendations regarding an effective human rights policy, see *Supra* note 2.