



**Submission to the
UN Working Group on Human Rights and Transnational Corporations and
Other Business Enterprises**

December 8, 2011

ECA-Watch¹ is an international civil society network formed in 2000 to promote enhanced transparency and accountability regarding the operations of export credit agencies.

In recent years, the UN Human Rights Council has focused attention on the important link between public financial institutions and human rights. As a consequence, there is now greater awareness that the state duty to protect human rights contemplates the operations of state institutions, including export credit agencies. Despite this clarity, export credit agencies continue to finance exports and investments that are associated with human rights abuse. More work is needed to guide state action in this area. ECA-Watch urges the Working Group to further the Human Rights Council's initiative in this area, and welcomes the opportunity for collaboration in this regard.

Export credit agencies (ECAs) are public entities that provide corporations with government-backed loans, guarantees, credits and insurance to support exports and foreign investments. ECAs are largely focused on facilitating domestic commerce in lesser developed countries and emerging economies, under conditions of significant political and financial risk.

ECAs are an extremely important source of finance and insurance for the private sector. In 2005,² member nations of the Organisation for Economic Co-operation and Development (OECD) provided the private sector with US\$125 billion in

¹ www.eca-watch.org

² The OECD ceased to publish data on ECA budgets in 2005.

credits, insurance, guarantees and interest support.³ Export credit agencies in a number of emerging economies have also become important purveyors of such services. Moreover, the influence of export credit agencies has grown significantly in response to the global economic crisis, as states have expanded these institutions' mandates, budgets and borrowing power.

The human rights impacts of ECA-supported exports and investments can be severe. Export credit agencies have facilitated corporate activity that is associated with the forced displacement of local populations, paramilitary and police repression, workplace injuries, state-sponsored intimidation and censorship, exposure to environmental contaminants and biological pathogens, and the destruction of sacred cultural sites, among other adverse human rights impacts.⁴

The United Nations

The UN Special Representative on business and human rights addressed the issue of export credit throughout his mandate. Mr. Ruggie drew attention to the need for government agencies to uphold the state duty to protect human rights. He revealed that few ECAs explicitly consider human rights in their operations.⁵ Mr. Ruggie argued that states should take steps to protect against human rights abuse by business enterprises that receive substantial support and services from state agencies such as export credit agencies.

Mr. Ruggie explained:

³ <http://www.oecd.org/dataoecd/30/35/37931024.pdf>

⁴ See, for example:

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*. September 2003.

www.eca-watch.org/eca/race_bottom_take2.pdf

The Corner House, et al. *A Trojan Horse for Large Dams: How export credit agencies are offering new subsidies for destructive projects under the guise of environmental protection*. September 2005.

www.thecornerhouse.org.uk/pdf/document/Trojan.pdf

⁵ U.N. Human Rights Council, 8th Session. *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. 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 enterprises, John Ruggie*. 7 April 2008 (A/HRC/8/5).

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.⁶

Mr. Ruggie recommended that states “encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises for projects receiving their support.”⁷

In his 2011 annual report⁸ to the General Assembly, Mr. Cephias Lumina, the UN Independent Expert on the effects of foreign debt on the full enjoyment of all human rights, confirmed that effective human rights due diligence is not being carried out with regard to export credit operations.

Mr. Lumina noted that:

Governments rarely exercise due diligence concerning the actions of their national export credit agencies. Indeed, the agencies’ operational policies and the national laws establishing them typically never include reference to human rights standards. Neither do export credit agencies have in place a clear policy on the prevention of human rights abuses or on due diligence to identify potential harmful effects of projects on human rights and to mitigate them. Many export credit agencies’ home States also lack effective mechanisms to adjudicate claims of human rights abuses resulting from projects backed by such agencies. Moreover, impact assessments of human rights violations of export credit agency-

⁶ U.N. Human Rights Council, 17th Session. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. 21 March 2011 (A/HRC/17/31) at 9.

⁷ *Ibid.* at 10.

⁸ U.N. General Assembly, 66th Session. *Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*. 5 August 2011 (A/66/271).

backed operations are rarely undertaken. In addition, all transactions and projects supported by export credit agencies are often protected by confidentiality provisions that prevent their publication among the population and the potentially affected communities, thus undermining the human rights principles of transparency and participation.⁹

Consequently, Mr. Lumina explained, ‘a significant number’¹⁰ of ECA-funded projects continue to cause severe human rights impacts.

In his 2010 report, Special Representative Ruggie suggested that the OECD Common Approaches could provide guidance to member states on human rights due diligence requirements.¹¹ The *Common Approaches to the Environment and Officially Supported Export Credits* is a non-binding OECD recommendation.

However, in his annual report, Mr. Lumina identified the following drawbacks with the Common Approaches:

First, they are a non-binding recommendation. Second, they contain a derogation clause (article 13) that allows member export credit agencies, should they so decide, to opt out of applying any standards at all, provided they report and justify this to the Export Credit Group. Third, the Common Approaches currently apply only to officially supported export credits with a repayment term of two years or more.¹²

The Common Approaches are currently under revision and it seems likely that a reference to human rights will be included in the text for the first time. However, a preliminary draft of the revised text does not provide the human rights due diligence guidance sought by Mr. Ruggie. Moreover, any inclusion of human rights in this voluntary instrument will not address the legal and policy shortcomings described above by Mr. Lumina, and will neither prevent nor remedy ECA-related human rights abuse. Finally, a number of emerging economies that

⁹ *Ibid.* at para 22.

¹⁰ *Ibid.* at para 3.

¹¹ U.N. Human Rights Council, 14th Session. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework.* 9 April 2010 (A/HRC/14/27).

¹² *Supra* note 8 at para 45.

have export credit agencies do not participate in the OECD and are therefore beyond the reach of the Common Approaches.

The Need for Further Work

States have yet to heed the call from the Human Rights Council to ensure that their export credit agencies adopt effective human rights policies, including provisions for human rights due diligence. The OECD has also failed to demonstrate leadership in this regard. However, both Special Representative Ruggie and Independent Expert Lumina have made important contributions, placing the issue of export credit and human rights squarely on the international agenda. ECA-Watch urges the Working Group to further the Council's work on this important issue by promoting and facilitating the development of further guidance on export credit and human rights for states. ECA-Watch is keen to contribute to such efforts.