

Brussels, Tuesday 8 November

Mr. Steve Tvardik
Head, Export Credits Division
Organization for Economic Cooperation and Development
Paris, France

Dear Mr. Tvardik and members of ECG,

Thank you for the opportunity to provide comments on the review of the Revised Recommendation on Common Approaches on the Environment and Officially Supported Export Credits (Common Approaches). Please find below our comments.

Best wishes,
Deborah Lambert-Perez for ECA-Watch

A. Human Rights

The UN independent expert on the effects of foreign debt on the full enjoyment of all human rights, Cephias Lumina, addresses the issue of export credit in his 2011 report to the UN General Assembly.¹ He reminds readers that states have an obligation to ensure that their export credit agencies respect international human rights law, and that the wrongful acts and omissions of export credit agencies, including those concerning human rights, are attributable to their states. Yet, while the legal nexus between states and their export credit agencies is undisputed, ‘a significant number’² of ECA-funded projects continue to cause severe human rights impacts.

Mr. Lumina notes 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

¹ 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).

² *Ibid.* at para 3.

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-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.³

With regard to the international regulation of export credit agencies, Mr. Lumina identifies 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.⁴

ECA-Watch acknowledges the proposed inclusion of a reference to human rights in the latest draft of the Common Approaches. The document states that members should ‘encourage protection and respect for human rights, particularly in situations where the impacts from projects or existing operations pose risks to human rights.’ In addition, the recommendation instructs members to ‘give further consideration to human rights [...] with the aim of reviewing how human rights might be further addressed in relation to the provision of officially supported export credit.’”

These new provisions in the Common Approaches do not address the legal and policy shortcomings identified above by Mr. Lumina, and will neither prevent nor remedy ECA-related human rights abuse. ECA-Watch strongly encourages the ECG to explicitly address the issues raised by Mr. Lumina in the text of the Common Approaches and to adopt his recommendation that “[t]he implementation of the OECD Common Approaches in environmental, social and human rights screening policies of export credit agencies become mandatory.”⁵

B. Non-OECD Standards and the Need for Upward Harmonisation

The Export Credit Group has sought to encourage non-OECD countries to adopt standards for their export credit agencies that are comparable to those of the Common Approaches.

ECA Watch supports the upward harmonization of standards, but notes that there are many areas where the current proposals fall short of the standards now required by China’s Export-Import Bank (Chexim), a major non-OECD financier. An unofficial translation of the Chexim standards is attached.

³ *Ibid.* at para 22.

⁴ *Ibid.* at para 45.

⁵ *Ibid.* at para 54.

To give some examples:

Scope: China Export-Import Bank’s standards apply to *all* projects, whereas the Common Approaches only apply to “officially supported export credits with a repayment term of two years or more”. Any exports of military equipment or agricultural commodities are also excluded from screening in the latest draft Recommendation.

OECD exporters are also excused from assessing projects for their environmental and social impacts when their share of the project is less than SDR 10 million, unless the project is in a sensitive area. No such exemptions exist for Chinese exporters.

Environmental Impact Assessments: The Common Approaches only require Environmental Impact Assessments (EIAs) for projects deemed to be of high impact, whereas China Export-Import requires *every* project to have an EIA.

Compliance with Local Law: China requires compliance with host country *law*ⁱ whereas the Common Approaches currently only require compliance with host country *standards*. We welcome the proposal to change the Common Approaches to include language requiring compliance with local law (“Members should . . . secure confirmation that the project complies with all local legislation”) but note that members would be permitted to derogate from this requirement. No such derogation exists in the Chexim guidelines.

Legal status: the Common Approaches are voluntary and have no legal status in the laws of OECD member states.ⁱⁱ By contrast, as we understand it, China requires by law - albeit with acknowledged problems with enforcement - that, regardless of who funds them, projects should be implemented in accordance with China’s environmental laws and that implementation bodies and their employees should abide by the laws and regulations of both China and the recipient countries.ⁱⁱⁱ

C. Extent to which ECA Watch Concerns have been addressed

ECA Watch made a number of specific proposals for improving the Common Approaches. We have compared the current draft revisions with what would be necessary to make the Common Approaches an adequate tool to assess and avert environmental and human rights impacts and set out the comparison, together with our comments, in tabular form below.

ECA Watch Proposal	OECD Response	Comments
The scope of the Common Approaches must be widened to ensure that all official support provided by ECAs is covered, not only transactions with a repayment term of two years or more.	§ 2: No widening of the scope beyond the two years repayment term. Military exports to be	Entirely unsatisfactory. A wide range of potentially damaging exports is exempt from evaluation, including exports which may involve child labour (e.g. in the case of exports including textiles).

	excluded from screening.	There is also need for clarity as to whether new products being offered by ECAs, such as project bonds, are within the scope of the Common Approaches.
The Common Approaches should require evaluation of supply chains.	§ 38: Suggestion to build a body of experience on due diligence with regard to the supply chain.	Good first step but does not go far enough. Timeline for action should be incorporated.
The implementation of the Common Approaches in environmental, social and human rights screening policies of national ECAs should become mandatory.	No action	Entirely unsatisfactory
Before ECA support is approved, the required standards should have been met in all material respects, and no ECA support should be approved after the supported transaction has actually taken place.	No action	Entirely unsatisfactory
Cases of refinancing (supplementary financing) should be treated as new transactions requiring full screening under the Common Approaches.	§ 12: Allows ECAs in minor part or re-insurance situations to use reviews carried out by other institutions.	Unsatisfactory when OECD's own assessment shows wide variation in procedures used by ECAs and extent to which they currently meet the existing Common Approaches
The Common Approaches should require compliance of ECA beneficiaries with the OECD Guidelines on Multinational Enterprises.	§ 13: Makes reference to the OECD Guidelines and even suggests taking NCP statements into account, but does not require compliance.	Welcome first step, but inadequate.
Members should be required to ensure that projects comply with all relevant international law, agreements and conventions, thereby contributing towards sustainable development.	§ 22: Reference included to compliance with national laws.	Reference to national law is welcome and brings Common Approaches into line with China Exim's policy. The lack of reference to international law is entirely unsatisfactory. ECAs should not be facilitating breaches of international law.
Remove the element of discretion	No action	Entirely unsatisfactory. There

and replace with wording that requires projects to comply in all material respects with the referenced international standards and with all relevant international agreements and conventions.		<p>should be no scope for derogating from the proposed standards or for breaches of local and international law.</p> <p>Current proposal is weaker than China Exim's policy which does not have a similar exemption clause.</p>
Transparency must be significantly improved to include, inter alia, public disclosure of all information on the environmental, social, labour, human rights and developmental impacts of ECA supported transactions; monitoring reports; and investment contracts and revenues associated with ECA supported projects.	§ 34: Proposal to make available to the public the type of information reviewed and the international standards applied.	Proposal is welcome, but it is an extremely marginal step, which is undermined by the proposal not to classify applications relating to existing operations (§8). Without such classification there is no need to disclose information on projects, thus even very environmentally sensible projects considered as "applications relating to existing operations" will not need to be disclosed.
Improved decision-making processes must be developed which will ensure consultation with affected communities and ensure that all stakeholders are involved in decision-making with regard to project design, management and distribution of project benefits.	§ 14: precised language on results of public consultations	<p>Welcome but inadequate.</p> <p>No measures to ensure wider stakeholder participation in decision-making.</p>
The applied standards and mitigation measures must be judiciable by those affected by the projects and exports which ECAs support. A complaints mechanism must also be established by ECAs in order to provide avenues for redress in the event of non-fulfilment on site.	No action	Entirely inadequate
ECAs must respond to the global climate change crisis by phasing out official support to fossil fuel financing and by adhering to the G-20 mandate to phase out fossil fuel subsidies.	No action	Entirely inadequate
Clear exclusions (prohibitions) are	No action	Entirely inadequate

required for specific sensitive ecological zones, sectors and technologies.		
ECAs should include in their due diligence process a specific requirement to assess and prevent adverse human rights impacts while screening and reviewing applications and ongoing projects in line with international human rights standards.	Reference to human rights in the preamble and general principles.	No reference to human rights in sections on screening, review, evaluation, decision and monitoring. Entirely inadequate.
Strengthened monitoring, compliance mechanisms and evaluation requirements need to be included in the Common Approaches to ensure that standards are met on the ground.	§§ 28, 29, 30: More provisions on evaluation, decision and monitoring, including the possibility to take action in case conditions are not met.	Welcome step.
Significant improvements in common implementation procedures are needed to help reduce the existing uneven application on projects.	§ 37: Precised reporting requirements (need for more explanation and justification in case of deviation)	Welcome step
An enhanced peer review process should be instituted whereby members undertake, in participatory processes and on a regular basis, forensic auditing of their peers' compliance with the Common Approaches.	No action	Entirely inadequate
Enhancing financial risk assessment: members should be required to publicly report on their procedures and methodology for achieving and complying with the Common Approaches' stated aim of "enhancing financial risk assessment of new projects and existing operations by taking into account environmental aspects."	No action	Entirely inadequate

We furthermore note that the International Hydropower Association Sustainability Guidelines or Hydropower Sustainability Assessment Protocol are under discussion to be used as benchmarks. We stress that civil society organizations throughout the world working on dam issues consider the Hydropower Sustainability Assessment Protocol (HSAP) as completely inadequate and will strong oppose it as a mere greenwash.

Yours Sincerely

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The Guidelines state:

“Offshore projects of the host country should abide by the requirements of their laws and regulations and obtain corresponding environmental permits”.

ii Britain’s Export Credit Agency, the Export Credits Guarantee Department, states of the Common Approaches: “These International Documents are not binding in EU or UK law . . . “

See:

ECGD, “Guidance to Applicants: Processes and Factors in ECGD Consideration of Applications”, 16 April 2010,

<http://www.ecgd.gov.uk/assets/bispartners/ecgd/files/prods-servs/guidance-on-processes-and-factors.pdf>

iii Global Environmental Institute, “Environmental Policies on China’s Investment Overseas”, China Environmental Science Press, 2011, p.31.