

Joint Committee on Human Rights
Inquiry into Business and Human Rights
Memorandum from The Corner House

INTRODUCTION

1. The Corner House is a not-for-profit research and advocacy group, focusing on human rights, environment and development.
2. Over the past ten years, The Corner House has closely monitored the human rights impacts of overseas projects that are operated or financed by UK multinationals, UK government agencies, commercial banks, investment funds and, more recently, the “shadow banking” sector.¹ A particular focus of our work has been the support given to UK multinationals by the UK Export Credits Guarantee Department (ECGD).²
3. **The Corner House is firmly of the view: (i) that decisions taken in the UK, whether by government or business, should not adversely impact the human rights of others, whether those others are in the UK or abroad; and (ii) that the UK government has a responsibility to ensure that the appropriate laws and policies are in place to give practical effect to that principle and to hold those who breach it to account.**
4. The Corner House welcomes the Joint Committee’s current inquiry and is grateful for the opportunity to comment on the issues that the Committee has chosen to examine. This submission focuses on Part 1 of the Committee’s Call for Evidence, namely “The Duty of the State to Protect Human Rights”, with particular reference to the policies and practices of the UK Export Credits Guarantee Department (ECGD).

1. For a discussion of the role of the “shadow banking system” in financing projects involving human rights abuses, *see*: Hildyard, N., “A (Crumbling) Wall of Money: Financial bricolage, derivatives and power”, The Corner House, October 2008, <http://www.thecornerhouse.org.uk/pdf/briefing/39wallmoney.pdf>.

2. For example, The Corner House has participated in nine field missions to assess the social and environmental impacts of a number of projects for which ECGD support has been sought and undertaken in-depth research into a number of ECGD-backed projects that have been tainted by allegations of bribery.

THE EXPORT CREDITS GUARANTEE DEPARTMENT (ECGD)

5. The ECGD is the UK's export credit agency.³ It derives its functions and powers from the Export and Investment Guarantees Act 1991.⁴ Its primary function is to facilitate the export of goods and services by providing companies with guarantees, credits and insurance. In carrying out its functions, the ECGD makes use of a variety of different financial instruments including different forms of credit and insurance. Many of the exports supported by ECGD would not go ahead without an official credit guarantee.
6. According to the ECGD's 2007-08 accounts, the value of guarantees and insurance policies issued by the Department was £1.83 billion.
7. Although the ECGD is subject to a ministerial requirement to operate at "no net cost to the taxpayer",⁵ the UK government is ultimately liable for any losses that cannot be covered by the premiums charged to the ECGD's client businesses or by debt recovery. In 2005, the UK admitted that the annual cost of the ECGD to the taxpayer is an annual £150 million.⁶
8. The Corner House believes that that where companies receive publicly-backed finance, as is the case with support from ECGD, they should be subject to legally-binding conditions that require compliance with the UK's international human rights obligations, and that these conditions should have extraterritorial scope.
9. As a public agency supporting UK exporters, the ECGD should therefore give practical effect to the UK's acknowledged obligation "to promote . . . the universal respect for, and observance of the human rights and fundamental freedoms for all"⁷ and the government's stated aim of putting human rights at

3. Export credit agencies are public, quasi-public or private agencies that provide loans, guarantees, credits and insurance to private corporations from their home country to assist them doing business overseas. Such support is particularly requested in relation to projects in the developing world because of the perceived financial and political risks involved in such projects and would be more expensive if obtained through the private sector. Where the ECA is public or quasi-public, the loans are backed by the agency's national government.

4. Under the Export and Investment Guarantees Act 1991, the ECGD, acting on behalf of the Secretary of State for Business, Enterprise and Regulatory Reform, is required to "facilitat[e], directly or indirectly" the supply of British exports.

5. National Audit Office, ECGD and Sustainable Development, 2008, para 9, http://www.nao.org.uk/publications/0708_ECGD_and_sustainability.pdf

6. Secretary of State for Trade and Industry/ Chief Secretary to Treasury, "Estimating the economic cost of ECGD", 16 March 2005, <http://www.berr.gov.uk/files/file16384.pdf>

7. Foreign and Commonwealth Office, "Promoting Human Rights, Good Governance and Democracy, <http://www.fco.gov.uk/en/fco-in-action/conflict/human-rights/>, accessed 7 April 2009: "As a member of the United Nations it is our obligation to promote: 'the universal respect for, and observance of the human rights and fundamental freedoms for

“at heart of foreign policy.”⁸

10. ECGD has provided guarantees and other support for a range of projects and programmes that have involved allegations of human rights abuses, including the export of Hawk jets to Indonesia,⁹ oil pipelines such as BP’s Baku-Tbilisi-Ceyhan project in the Caspian region,¹⁰ dams such as Muella in Lesotho¹¹ and power plants such as Dabhol in India.¹² The ECGD has also supported arms sales to countries with authoritarian governments and poor human rights records, such as Saudi Arabia.¹³
11. In 2000, in response to public and parliamentary pressure, the ECGD adopted a new mission statement¹⁴ and accompanying set of “Business Principles”.¹⁵ These committed ECGD to ensuring that “its activities accord with other Government objectives, including those on sustainable development, human rights, good governance and trade.”¹⁶
12. The ECGD has since introduced **procedures** and **policies** to give effect to this undertaking.

Procedures

13. All civil, non-aerospace exports and guarantees are now screened by ECGD for their environmental and social impacts. Under the screening procedures, ECGD

all, without distinction as to race, sex, language or religion”. See also: Foreign and Commonwealth Office, “The Obligation to Promote Human Rights”, <http://collections.europarchive.org/tna/20080205132101/http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302591752>, accessed 7 April 2009: “The duty not to intervene in matters within the domestic jurisdiction of other States is a recognised principle of international law, reflected in Article 2(7) of the UN Charter. However, Articles 55 and 56 of the Charter set out the obligations of all UN Members to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’. This obligation was expressly recognised at the Vienna World Conference, which declared that: ‘The promotion and protection of all human rights is a legitimate concern of the international community’. The UK Government strongly supports this view. It is for countries to decide whether to accede to legally binding international human rights instruments. But failing to accede cannot exempt a country from international attention and criticism.”

8. Foreign and Commonwealth Office, “Human Rights”, accessed 7 April 2009, <http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/servlet/Front%3fpagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302591712>.
9. Gilby, N., “Arms Exports to Indonesia”, Campaign Against Arms Trade, <http://www.caat.org.uk/publications/countries/indonesia-1099.php>.
10. The 1,760 kilometre-long Baku-Tbilisi-Ceyhan (BTC) oil pipeline runs from Baku in Azerbaijan, through Tbilisi in Georgia to a new marine terminal at Ceyhan on Turkey’s Mediterranean coast. The aim of the project is to carry up to 1 million barrels of oil per day from the Caspian Sea to the Mediterranean. For details of human rights and other concerns, see: Baku Ceyhan Campaign, <http://www.baku.org.uk/>.
11. The Muela Hydropower Project (ECGD support: £16 million) is part of the Lesotho Highlands Water Project, which resulted in the forced resettlement of 27,000 people, the shooting of striking construction workers, proven corruption and major environmental impacts. See: Pottinger, L., “Police Kill Striking Workers in Leostho”, World Rivers River, September 1996, <http://internationalrivers.org/files/WRR.V11.N4.pdf>; International Rivers, “Lesotho Water Project”, <http://internationalrivers.org/en/africa/lesotho-water-project>.
12. Human Rights Watch, “The Enron Corporation: Corporate Complicity in Human Rights Violations”, 1999, <http://www.hrw.org/legacy/reports/1999/enron/>.
13. Campaign Against Arms Trade, “Saudi Arabia”, <http://www.caat.org.uk/issues/saudi-arabia.php>.
14. ECGD, Mission, <http://www.ecgd.gov.uk/index/about-ecgd/mission-and-objectives.htm>.
15. ECGD, Business Principles, <http://www.ecgd.gov.uk/ecgds-business-principles.pdf>.
16. ECGD, Mission Statement, <http://www.ecgd.gov.uk/index/aboutecgd/ecgdmissionandobjectives.htm>.

considers the following human rights concerns:

- Possible impacts arising from involuntary resettlement, compulsory land acquisition, impacts on minority or vulnerable groups, the use of child or bonded labour, and the use of armed security guards;¹⁷
 - Whether or not support for overseas projects “might breach any international obligations or policies of the UK government”,¹⁸
 - Whether or not the host country has ratified “the six core UN Human Rights treaties¹⁹ and eight International Labour Organisation fundamental conventions²⁰” in order to “identify those with which the project should comply”,^{21 22}
 - Whether or not the benefits of the project (including employment opportunities for local people) will be open to all, regardless of “race, religion, gender, social grouping etc”.²³
14. Defence sales are not screened at all by ECGD for human rights impacts. However, ECGD requires that any necessary export licences are obtained as a pre-condition of cover.²⁴

Policies

15. ECGD has no dedicated human rights policies.
16. It has, however, made a number of commitments that pertain to human rights. For example:
- It is now ECGD policy that “projects should comply in all material respects with the relevant safeguard policies, directives and

17. ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 5.11, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

18. ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 5.13, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

19. See Annex 5 of FCO Human Rights Annual Report 2003: www.fco.gov.uk/Files/kfile/Annexes.0.pdf

20. See: www.ilo.org/ilolex/english/newratframeE.htm.

21. ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 5.18, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

22. Where applicable, the European Convention on Human Rights is also taken into account. See: ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, footnote 10, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

23. ECGD, Impact Questionnaire, 2007, question 9, http://www.ecgd.gov.uk/impact_questionnaire_april_2007_-_final.doc.

24. ECGD, Business Principles Unit, Case Handling Process Information Note, September 2008, p.5, <http://www.ecgd.gov.uk/ecgds-case-handling-process-information-note-september-2008.pdf>.

environmental guidelines of the World Bank Group.”²⁵ ²⁶ These cover a number of areas encompassing human rights considerations – projects involving involuntary resettlement, for example, must have an accompanying Resettlement Action Plan.

- ECGD has introduced a policy “not to provide support to projects that involve harmful child labour . . . bonded or forced labour.”²⁷ (Until as recently as 2004, the ECGD was prepared to consider such projects in “exceptional circumstances”).²⁸

CONCERNS OVER ECGD’S POLICIES AND PROCEDURES

17. On paper, the ECGD’s procedures and policies on human rights go far beyond those adopted by many other export credit agencies. However, in practice, the policies lack teeth and their implementation is weak. As the Chair of the Trade and Industry Committee remarked in 2004: “at times there is a tendency towards carelessness or a lack of attention in some respects, certainly to human rights”.²⁹
18. The Corner House shares this concern. In particular, it would draw the Committee’s attention to the following weakness of the ECGD’s policies and procedures:

ECGD’s human rights policies are considered a secondary duty

19. ECGD views its Business Principles and stated policies on human rights as entirely “secondary” (its wording)³⁰ to the fulfillment of what the Department

25. ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 2.6, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

26. These guidelines include: the ten "Safeguard Policies" operated by the Bank's International Bank for Reconstruction and Development (IBRD); and the recently introduced Performance Standards operated by the International Finance Corporation (IFC), the private sector arm of the World Bank. See: www.worldbank.org/safeguards; <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards>.

27. ECGD, Impact Questionnaire, 2007, p.iv, http://www.ecgd.gov.uk/impact_questionnaire_april_2007_-_final.doc

28. Previously, the ECGD allowed for such projects under exceptional circumstances. In its April 2003 Guidance Notes for its Impact Analysis Procedures, for example, it stated: “There must be exceptional circumstances for ECGD to provide cover to projects which involve child labour”. A similar derogation was applied to the ILO Convention on Forced Labour, although the ECGD states that “it is difficult to imagine circumstances in which the ECGD could provide cover to projects which involve forced labour.”

29. Trade and Industry Committee, “Export Credits Guarantee Department”, 11 May 2004, Q499. The quote is taken from an uncorrected transcript of evidence and its use is subject to the following caveat: “Neither witnesses nor Members have had the opportunity to correct the record. The transcript is not yet an approved formal record of these proceedings”.

30. ECGD, Sustainable Development Action Plan 2007, http://www.ecgd.gov.uk/sdap_final_2007-3.pdf. Para 10: “ECGD also has certain *secondary* duties set for it by Ministers. These include compliance with its Statement of Business Principles . . .” (emphasis added).

views as its primary purpose: the facilitation of UK exports.^{31 32}

20. The consequences of this ordering of priorities are evident at every level of the ECGD's decision-making. For example, the ECGD recently relaxed its rules so that it could still support UK exporters even where up to 85 per cent of the content of the goods covered had been manufactured outside of the UK.³³ The Corner House and others raised concerns that this could lead to the UK facilitating labour abuses abroad, particularly where UK exporters were taking advantage of cheap labour in developing countries.³⁴ However, the ECGD has declined to adopt new rules to ensure against labour abuses in the supply chains used by UK exporters. No action will be taken unless agreement can be reached internationally with other export credit agencies.³⁵ **As a result, the ECGD now has a policy that (on paper) prohibits the use of child, bonded or forced labour in *projects* but turns a blind eye to its potential use in the manufacture of the *exported goods*.** The Corner House believes that unilateral action could and should have been taken by the UK in order to fulfill the UK's international obligation to respect and promote human rights.
21. **The Corner House believes that ECGD's founding Act should be amended to ensure that the ECGD's duty to facilitate exports is subject to a duty to uphold the UK's international human rights obligations.**

ECGD's policies and procedures are discretionary

22. Although ECGD's human rights policies appear to be unequivocal ("It is ECGD policy that . . .), ECGD has reserved wide powers to derogate from them, thus seriously weakening their effectiveness. Categorical policy statements (for example, that all projects should comply with World Bank safeguard policies) are hedged by other statements allowing ECGD to exercise wide discretion in their application (for example, that its procedures as laid down in its 'Case

31. The ECGD's statutory powers derive from the Export and Investment Guarantees Act 1991, under which the Department, acting on behalf of the Secretary of State for Business, Enterprise and Regulatory Reform, is required to "facilitating, directly or indirectly" the supply of British exports.

32. It is perhaps of note that the ECGD does not even mention sustainable development objectives as part of its statement of aims on the Department's home web page. The ECGD's aim is stated as being "to help UK exporters of capital equipment and project-related goods and services win business and complete overseas contracts with confidence. See: ECGD, "Welcome to ECGD", <http://www.ecgd.gov.uk/>.

33. ECGD, "Consultation on changes to ECGD's policy support for foreign content", June 2006, http://www.ecgd.gov.uk/foreign_content_consultation_pdf.pdf.

34. The Corner House et al, Submission to ECGD Consultation on Foreign Content, 2006, http://www.ecgd.gov.uk/revised_cornerhouse--att364533.pdf.

35. ECGD, Public Consultation on ECGD Support for Foreign Content, March 2009, <http://www.ecgd.gov.uk/ecgd-support-for-foreign-content-supply-chain-2009-03-10.pdf>.

Impact Analysis Process' paper are "not a statement of what will be done in every case"³⁶). In the example of BP's Baku-Tbilisi-Ceyhan oil pipeline,³⁷ for which ECGD provided cover of £81,703,893, The Corner House and other non-governmental organization found evidence of 83 breaches of the World Bank guidelines, many of them related to human rights abuses.³⁸

- 23. The Corner House believes that the application of ECGD's human rights policies should be mandatory and that derogations should be permitted only in very limited circumstances and must be publicly justified.**

Limited extra-territorial application

24. ECGD has adopted a number of policies that make its support to companies conditional upon their giving undertakings relating to their actions *outside* of the UK. An example is its anti-bribery policy, which requires companies to give a signed undertaking that they have not paid bribes in the UK or elsewhere to obtain the contracts that ECGD would underwrite.
25. However, apart from its policy on child, bonded and forced labour, the ECGD has declined to require similar extraterritorial undertakings on human rights.
26. Although it assesses a project's compliance with the UK's policies on human rights, it does not condition support on companies adhering to those policies. It merely identifies where there may be gaps in compliance.
27. Such conditions as it does apply amount to little more than a requirement that companies comply with host country legislation on human rights. For example, the requirement that companies observe the six core UN Human Rights treaties and eight International Labour Organisation fundamental conventions only applies *where these have been ratified by the host government*: it does not apply to projects in countries where the treaties and conventions have not been ratified. India, where ECGD is currently considering a High Impact project, is a

36. ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 2.1, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf

37. The 1,760 kilometre-long Baku-Tbilisi-Ceyhan (BTC) oil pipeline runs from Baku in Azerbaijan, through Tbilisi in Georgia to a new marine terminal at Ceyhan on Turkey's Mediterranean coast. The aim of the project is to carry up to 1 million barrels of oil per day from the Caspian Sea to the Mediterranean.

38. See: The Corner House et al., "Review of the Environmental Impact Assessment for the Turkish section of the Baku-Tbilisi-Ceyhan oil pipeline", 8 October 2003, http://www.bakuceyhan.org.uk/eia_review.htm.

case in point.³⁹

28. The Corner House believes that the ECGD should condition its support for companies on their undertaking to comply with those human rights conventions to which the UK is a party.

29. The Corner House accepts that the extent to which the UK has a duty under international human rights law to regulate the extra-territorial activities of UK businesses is contested, not least by the UK government. However, it notes the recent report to the UN General Assembly of the Special Representative on Human Rights and Business, in which he states:

“The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met. Within those parameters, some treaty bodies encourage home States to take steps to prevent abuse abroad by corporations within their jurisdiction”.⁴⁰

30. The Corner House believes that one such test of reasonableness would be whether or not a government is making taxpayer-backed finance available to companies to support their activities abroad.

Limited due diligence

31. NGOs have also questioned the thoroughness of the ECGD’s due diligence on human rights and that of the Foreign Office, on which the ECGD relies for advice.⁴¹

32. There is also concern that the focus of the ECGD’s due diligence is too limited. For example, there is no requirement to assess the extent to which freedom of

39. ECGD’s due diligence on child labour in project in India is of concern. In 2005-06, it gave support for an export to a steel mill in India operated by Jindal Vijayanagar Steel Ltd, a company which has been accused of using raw materials derived from mines where child labour is alleged to be employed. Although the charge has been denied by the company, The Corner House believes that the ECGD’s absolute ban on the use of child labour should have triggered enhanced due diligence. The completed screening form for the project, however, gives no indication that ECGD was even aware of the allegations. Indeed, ECGD appears to approved the project despite key questions in the impact questionnaire for the project being left unanswered by the applicant, including those relating to resettlement and whether or not the project would “cause, require, bring about or stimulate” child labour. The completed forms, which were released under Freedom Of Information legislation, are available on request from The Corner House.

40. Para 15, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

41. See, for example: “Correspondence between the Foreign and Commonwealth Office and the Kurdish Human Rights Project and the Corner House: Letter from the Kurdish Human Rights Project and the Corner House - quality of human rights advice supplied by FCO to ECGD on BTC pipeline project”, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374we08.htm>.

expression is guaranteed in the host country and thus the extent to which affected communities might face repression should they raise concerns over the project. This is of concern given allegations of intimidation (or worse) of those who have challenged a number of projects that ECGD has backed. In the case of BP's Baku-Tbilisi-Ceyhan oil pipeline, those seeking to uphold the rights of villagers affected by the Turkish section of the pipeline have been accused of being "traitors to their country" and of supporting the outlawed PKK Kurdish guerilla movement.⁴² Ferhat Kaya, a human rights defender who was working to assist affected communities in the Ardahan region of Turkey, was also subject to arbitrary arrest and alleged mistreatment by the police for his work in assisting villagers obtain proper compensation or redress for grievances arising from the expropriation of their land.⁴³

33. The reliance on the World Bank Group's safeguard policies as the primary benchmark for assessing human rights impacts is also problematic. Although, as noted, the World Bank safeguard policies cover a number of areas that involve human rights considerations, they do not explicitly require adherence to binding international human rights conventions.
34. The Corner House believes that the ECGD should be required to screen fully all applications for their potential human rights impacts and that an independent Human Rights Impact Assessment should be mandatory for "High Impact" projects. Projects that do not meet the UK's international human rights obligations should be excluded from ECGD support. Such screening would require the human rights context of a project to be taken into account.
35. The Corner House notes that a range of specific human rights screening procedures are already available and could easily be adopted by ECGD. Examples include the Danish Human Rights and Business Project's Human Rights Compliance Assessment (developed with industry to meet industry's requirement that screening should take no more than 40 hours to complete), the

42. See: "Baku-Tbilisi-Ceyhan oil pipeline: Human Rights, Social and Environmental Impacts – Turkey Section", Final Report of Fourth Fact Finding Mission, September 2004, http://www.baku.org.uk/publications/turkey_ffm_2004.pdf, in particular "Section 6: Human Rights abuses and intimidation"; "International Fact Finding Mission: Baku-Tbilisi-Ceyhan pipeline – Turkey Section", http://www.baku.org.uk/publications/Tu_FFMI.pdf, in particular, "Section 1: BTC, Security and Human Rights".

43. Ferhat Kaya, "Witness Statement", reproduced at pages 45-52 in "Baku-Tbilisi-Ceyhan oil pipeline: Human Rights, Social and Environmental Impacts – Turkey Section", Final Report of Fourth Fact Finding Mission, September 2004, http://www.baku.org.uk/publications/turkey_ffm_2004.pdf.

Norwegian development agency (NORAD)'s Human Rights Impact Assessment, and Rights & Democracy's human rights impact assessment⁴⁴ currently being developed in collaboration with affected communities.

Lack of grievance mechanisms

36. The ECGD has no grievance mechanism through which those affected by the projects it supports could seek redress. By contrast, a number of other export credit agencies, such as Canada's Export Development Corporation, have introduced ombudsman or other grievance mechanisms. The Corner House would recommend that the ECGD does the same.
37. The Corner House believes that ECGD should also be accountable in law to those impacted by the projects and exports it facilitates. The Corner House would therefore urge the amendment of ECGD's founding Act to include a 'Duty of Care' clause with regard to the human rights of those affected by ECGD-supported projects.

CONCLUSION

38. The Corner House believes that the UK's duty to promote and respect human rights should be given full effect through conditions placed on the use of taxpayer-backed finance to support UK industry in its activities abroad, notably through the ECGD.
39. The ECGD's current policies and procedures on human rights are inadequate. Parliament should consider amending the ECGD's founding Act to ensure that UK support for exporters is conditional on protecting and not infringing human rights.

The Corner House
May 2009

44. For further details, see: <http://www.dd-rd.ca/site/publications/index.php?subsection=catalogue&lang=en&id=2094>; and http://www.dd-rd.ca/site/PDF/publications/Getting-it-right_HRIA.pdf.