

Export Credit Agencies and the International Law of Human Rights



**Karyn Keenan
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January, 2008

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Canadian NGOs formed the Halifax Initiative Coalition in December 1994 to ensure that fundamental reform of the international financial institutions (IFIs), namely the World Bank and the International Monetary Fund, was high on the agenda of the Group of Seven's (G7) Halifax Summit. In 1999, the Halifax Initiative launched a campaign to compel Export Development Canada, the Canadian export credit agency, to take better account of environmental and human rights issues. The Halifax Initiative is the Canadian member of an international network of civil society organizations, Export Credit Agency Watch (ECA-Watch), which seeks to reform the practices of export credit agencies. Today the Halifax Initiative is a coalition of 20 development, environment, faith-based, human rights and labour groups. It is the Canadian presence for public interest research and education on the IFIs.

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This paper examines international human rights law and officially-supported export credit agencies. It argues that under international law, specifically the principles of ‘state responsibility,’ the acts and omissions of export credit agencies are attributable to their states. States are therefore responsible under international law for the operations of their export credit agencies, including any ‘wrongful acts’ that these agencies may commit. Such wrongful acts may include violations of the state’s international human rights obligations. The paper argues that state obligations under international law are not currently being met in the provision of officially-supported export credit and investment insurance services. Moreover, the paper argues that through the operations of their export credit agencies, home states can be found complicit in the human rights violations of host governments. Finally, the paper provides recommendations for home states in the area of officially-supported export credit agencies and international human rights.

Export credit agencies

Export credit agencies (ECAs) are public entities that provide domestic corporations with government-backed loans, guarantees, credits and insurance to support exports and foreign investments. ECAs largely focus on facilitating 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. The Organisation for Economic Co-operation and Development (OECD) reports that in 2005, ECAs in OECD member nations provided US\$125 billion in credits, insurance, guarantees and interest support.¹ Export credit agencies in a number of emerging economies have also become significant purveyors of such services. For example, at current growth rates, China’s Export-Import Bank is anticipated to become the world’s largest public international financial institution by 2010, with an annual budget of over \$40 billion in loans and guarantees.²

The human rights impacts of ECA-supported exports and investments can be severe.

¹ www.oecd.org/dataoecd/30/35/37931024.pdf

² Environmental Defense and International Rivers Network. *International Civil Society Recommendations Regarding China Exim Bank’s Environmental Policy Based on International Good Practice*. September 2007.

www.internationalrivers.org/en/china/chinas-global-role/civil-society-recommendations-regarding-china-exim-banks-environmental-poli

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.³

Export credit agencies as state entities

While both public and private entities offer corporations loans, guarantees, credits and insurance, this paper is concerned exclusively with the role of public agencies in the provision of such services. The central focus is on the relationship between states' international human rights obligations and the operations of officially-supported export credit agencies.

Although there is considerable variance in the organization and operation of export credit agencies, an analysis of their structure and function reveals a clear legal nexus to the state.⁴ The structural test focuses on ECA ownership and control. Those ECAs that are established as state agencies or departments are most clearly public authorities. Others, which are established as wholly-owned state corporations, may be managed independently but are ultimately controlled by the state. For example, Export Development Canada, a crown corporation, is explicitly identified as an agent of Her Majesty in right of Canada.⁵ Still other ECAs, which are consortia of private and/or public companies, are controlled by the state in a variety of ways, including through the authorization, funding and regulation of their operations.

The functional test examines the mandate of export credit agencies and distinguishes it from that of non-state entities. While the purpose of ECAs is to promote and facilitate the trade and investment interests of their home states, private providers of export and investment support operate on a purely commercial basis.

Finally, the nexus between ECAs and their home states is made further evident through ECA participation in inter-governmental fora such as the OECD. Membership in the OECD working party on export credit and credit guarantees (ECG) is restricted to officially-supported export credit agencies.

³ 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

⁴ See Özgür Can and Sara L. Seck. *The Legal Obligations with Respect to Human Rights and Export Credit Agencies*. Prepared for ECA-Watch, the Halifax Initiative Coalition and ESCR-Net. July 2006.

www.halifaxinitiative.org/updir/ECAHRlegalFINAL.pdf

⁵ Export Development Act R.S., 1985, c. E-20, s.1; 2001, c.33, s.2 (F).

ECAs and state responsibility under international law

The International Law Commission (ILC) was established in 1947 as a permanent body by the United Nations General Assembly. The Commission is mandated to promote the progressive development of international law and its codification.⁶ In 2001 the ILC adopted its Articles on the Responsibility of States for Internationally Wrongful Acts.⁷ The Articles are largely a codification of customary international law.⁸ They define the conditions under which states are legally responsible for breaches of their international obligations, referred to as ‘wrongful acts.’ These rules of ‘state responsibility’ also dictate when states are responsible under international law for the actions and omissions of their organs and agents. In this respect, the Articles provide useful guidance on when states may be legally responsible for the operations of their export credit agencies.

The Articles establish that any violation of international law that is committed by a state organ, or by any person or entity that is empowered by the law of the state to exercise elements of governmental authority, will be attributable to the state. The latter can include public corporations, public agencies and private companies.⁹

This means that the wrongful actions and omissions of those ECAs that are organs of the state, including state departments, agencies and corporations, are attributable to the state under international law. The same can be said of those ECAs that are not organs of the state, but that are empowered to undertake their functions by the state. In other words, states are responsible under international law for the wrongful acts that are committed by their export credit agencies.

International human rights law and the acts of third parties

International human rights law imposes obligations on states to respect, protect and fulfil human rights.¹⁰ This includes the obligation to take measures to regulate and adjudicate the actions of non-state actors that violate the human rights of individuals within the state’s territory.¹¹ McCorquodale and Simons explain that these actions are “part of the state’s obligation to exercise due diligence to protect the human rights of all persons in a state’s territory.”¹²

The United Nations treaty bodies have been delegated the task of interpreting the core

⁶ www.un.org/law/ilc/index.htm

⁷ www.untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

⁸ See Robert McCorquodale and Penelope Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 (4) MLR 598-625.

⁹ *Supra* note 7, Articles 4 and 5. See also *supra* note 4 at 7.

¹⁰ Committee on Economic, Social and Cultural Rights. General Comment No 12 on the Right to Food, E/C.12/1999/5.

¹¹ *Velásquez Rodríguez v Honduras*, (1989) 28 ILM 294.

¹² *Supra* note 8 at 618.

human rights treaties. Most of the treaty bodies have indicated that state parties to the treaties have a duty to protect against corporate abuse affecting individuals within a state's jurisdiction. They have stated that the obligation to effectively regulate and adjudicate corporate activity with respect to human rights includes the adoption of legislation to safeguard the rights of individuals. The treaty bodies have recommended that states provide adequate resources for the effective enforcement of all regulatory measures and have identified the need for states to ensure independent monitoring of third party compliance, even prior to allegations of abuse. Further, the treaty bodies have recommended that once a complaint is made, including those complaints concerning corporations, that states investigate and adjudicate the complaint, punish third parties who interfere with the enjoyment of human rights and provide effective remedies to the victims.¹³

A recent study examines the treaty bodies' commentaries regarding the state duty to protect against corporate human rights abuse.¹⁴ It reveals that submissions received by the treaty bodies regarding the failure by states to prevent abuse are more often associated with certain types of corporate activity than others. These include the operations of the mining, extractive, logging, agricultural and manufacturing sectors. In discussing these activities, the treaty bodies have expressed particular concern regarding the impact of major resource extraction and infrastructure projects on the rights of indigenous peoples and other affected communities.¹⁵ The treaty bodies have emphasized the role that states should play in protecting against such impacts. Among other measures, the treaty bodies have recommended that states adopt legislation to ensure equitable revenue distribution,¹⁶ that monitoring bodies undertake environmental impact assessments before the issuance of operating licences,¹⁷ and that rules and procedures be established to ensure that projects do not begin without the free and informed consent of affected communities, particularly indigenous people.¹⁸

Export credit agencies support commercial activity abroad. It is therefore important to consider whether a state's duty to protect under international human rights law is breached when it fails to take positive steps to prevent, punish, investigate and redress abuse by corporate actors against individuals outside its territory. It is argued here that states have an obligation to exercise this due diligence beyond their territories, particularly where the state knows of the likelihood of abuse and has sufficient influence

¹³ *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties*. Prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. 12 February 2007. A/HRC/4/35/Add.1

www.reports-and-materials.org/State-Responsibilities-to-Regulate-Corporate-Activities-under-UN-Core-Treaties-12-Feb-2007.pdf

¹⁴ *Ibid.*

¹⁵ Such as the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of all Forms of Racial Discrimination and the Committee on the Elimination of all Forms of Discrimination against Women. *Ibid.* at 13.

¹⁶ Such as the Committee on the Elimination of all Forms of Racial Discrimination. *Ibid.* at 16.

¹⁷ The Committee on the Elimination of all Forms of Racial Discrimination. *Ibid.* at 14.

¹⁸ The Committee on the Elimination of all Forms of Racial Discrimination. *Ibid.* at 16.

to protect against the harm. McCorquodale and Simons explain:

A state may be responsible for a violation of an international human rights treaty obligation where ‘acts of their authorities, whether performed within or outside national boundaries ... produce effects outside their own territory’ and for the ‘extraterritorial consequences of its intra-territorial decisions.’¹⁹

The Committee on the Elimination of all Forms of Racial Discrimination has addressed this issue with regard to the overseas operations of transnational mining companies that are registered in Canada. The Committee called on Canada to:

...take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable.²⁰

With regard to human rights treaties that concern economic, social and cultural rights, Coomans and Kamminga argue that:

... the drafters ... specifically envisaged extraterritorial obligations. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights obliges state parties ‘to take steps individually and through international assistance and co-operation’ with a view to achieving the full realisation of the rights recognized in the Covenant. (...) The key question under this Covenant therefore is not whether parties have extraterritorial obligations but what is the precise nature and content of those obligations.²¹

In General Comment 15, the Committee on Economic, Social and Cultural Rights provides guidance on the nature and content of these obligations with respect to the right to water:

Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.²²

¹⁹ *Supra* note 8 at 618.

²⁰ CERD/C/CAN/CO/18, paragraph 17.

²¹ Fons Coomans and Menno T. Kamminga, ‘Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties,’ in Coomans and Kamminga eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp – Oxford: Intersentia, 2004) at 2.

²² E/C.12/2002/11, paragraph 33.

ECAs and international law

As discussed above, the ILC Articles on the Responsibility of States for Internationally Wrongful Acts identify the conditions under which states are legally responsible for breaches of their international obligations. As McCorquodale and Simons explain,²³ these rules of ‘state responsibility’ are applicable to the area of international human rights law, among others. This means that the rules determine those situations in which state responsibility arises for breaches of international obligations, including international human rights obligations. The applicability of the Articles to human rights law is set out in the Articles themselves and in the ILC Commentaries. Moreover, human rights treaty bodies have applied the law of state responsibility in their consideration of human rights matters when deciding whether certain acts may be attributable to a state.

The discussion above also makes clear that under the rules of ‘state responsibility,’ the acts and omissions of export credit agencies are attributable to the state, even in cases where such agencies are separate legal entities. States must ensure that they do not violate their international legal obligations through the operations of their export credit agencies, including in the area of human rights law. This means that the state duty to protect against human rights abuse by third parties extends to the operations of export credit agencies. In addition, states have a general duty under international law to neither use nor permit the use of their territory so as to cause harm to the territory of another state.²⁴ States therefore have international law obligations to ensure that ECA operations neither facilitate nor ignore human rights abuses by the corporations whose activities they support.

These state responsibilities are particularly important when one considers that many of the commercial sectors discussed by the treaty bodies receive significant support from export credit agencies. For example, Export Development Canada provided more support in 2006 for extractive companies than any other commercial sector.²⁵ Not surprisingly, many of the human rights complaints associated with ECA-supported projects concern mines, pipelines and dams.²⁶

²³ *Supra* note 8 at 601.

²⁴ McCorquodale and Simons (*ibid.* at 617) explain:

“Under international law each state has a general duty not to act in such away as to cause harm outside its territory. This includes actions causing transboundary environmental impacts where the state ought to have had control over the activities that led to these impacts. There is growing support for the view that ‘[w]here a state knows that its national’s activities will cause, or are causing, harm to other states or peoples, it is consistent with this [general] duty that it should prevent such harm’, where the state can, in fact, control the impugned activities.”

²⁵ Over CDN\$15 billion. See Export Development Canada. *Annual Report 2006: Anticipating the Needs of a Trading Nation*. www.edc.ca/english/docs/2006_annualreport_e.pdf

²⁶ 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

Halifax Initiative Canadian Mining Map

www.halifaxinitiative.org/index.php/miningmap

As described above, the treaty bodies identify a number of essential elements in the fulfillment of the state duty to protect. This commentary is instructive on the question of how states can ensure that they do not violate their international law obligations through the operations of their ECAs. States should develop and enforce legislation that requires their ECAs to adopt human rights policies and practices that are consistent with their human rights obligations. States should ensure that their ECAs employ independent monitoring mechanisms to assess client compliance with human rights policies. Moreover, states should establish meaningful investigative and adjudicatory mechanisms to address allegations of human rights abuse on the part of ECA clients, and should make remedies available to the victims of human rights abuse.

State complicity in the commission of human rights violations

Under the ILC Articles,²⁷ a state can be found internationally responsible if it is complicit in the wrongful acts of another state. Article 16 states that:

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.

McCorquodale and Simons provide this analysis:

According to the ILC, examples of situations where a state would be responsible for aiding and assisting, include ‘knowingly providing an essential facility or financing the activity in question . . . or assisting in the destruction of property belonging to nationals of a third country’. In each case the assisting state must be aware that it is aiding or assisting in the commission of an internationally unlawful act, it must provide such aid or assistance in order to facilitate the act in question, and the act must constitute an internationally wrongful act if committed by the assisting state.²⁸

These authors argue that under Article 16, the provision of ECA services to a domestic corporation to support its investment in a foreign state could constitute aiding and assisting an internationally wrongful act. This could occur in circumstances where ECA support is essential to the corporation’s investment in the foreign country and where the foreign state permits the corporation to operate in such a way that the state breaches its international human rights obligations. Because the acts of an ECA are attributable to the home state, as described above, the latter could be found to be aiding and assisting the

²⁷ *Supra* note 7.

²⁸ *Supra* note 8 at 611.

host state's internationally wrongful act.

McCorquodale and Simons²⁹ provide several examples. The first involves the provision of military aid that includes chemical weapons. It has been argued that governments that provide such aid are complicit in any human rights abuses that result from the use of these weapons.³⁰

The authors further illustrate the Article 16 principle of complicity with two ECA-supported projects: the Baku-Tbilisi-Ceyhan (BTC) and Chad-Cameroon pipelines. Both projects are governed by investment agreements that were negotiated between the corporate investors and the host governments. The purpose of such agreements is to establish a predictable investment climate by fixing the regulatory provisions that will apply for the life of the project. Through "stabilization clauses," investment agreements set the standards (environmental, social, human rights, tax, customs, etc.) that will govern the development and operation of the project. Investment agreements usually exempt corporations from regulatory provisions that are enacted by a state subsequent to the adoption of the agreement or provide that corporations will be compensated in the event that additional regulatory requirements are established. Investment agreements routinely set regulatory conditions that are highly advantageous to the corporation(s) involved.

The agreements that govern the BTC and Chad-Cameroon pipelines are no exception. They restrict the host states' ability to regulate the projects by limiting the application of certain regulatory provisions including, for example, certain labour standards. The agreements then dissuade the participating governments from modifying the regulatory regime by assigning them liability for any regulatory changes that adversely affect the economic equilibrium of the project. Moreover, the agreements empower the corporate signatories to seek compensation from the signing governments through binding arbitration when regulatory provisions are applied, even when their purpose is to protect human rights. The agreements establish significant disincentives for the host states regarding the fulfilment of their international human rights obligations.

Those states whose export credit agencies provided support for these projects could have international responsibility for any ensuing human rights violations. The investment agreements, which would have been reviewed by the ECAs as part of their due diligence processes, make it unlikely that the host governments will fully discharge their international human rights duties. This, coupled with the frequent occurrence of human rights abuse in the development and operation of oil pipelines in developing countries, makes the incidence of such abuse highly foreseeable. In such circumstances, it seems clear that home states would have knowledge of the circumstances of any internationally wrongful acts.

Even in those cases where host governments do not contractually bind themselves from discharging their international human rights obligations, some ECA home states can

²⁹ *Ibid.*

³⁰ *Ibid.*, this argument was made by Iran regarding military assistance that was provided to Iraq, by the UK, during the Iran-Iraq war.

arguably be found to have knowledge of the circumstances of internationally wrongful acts that are associated with the projects that they support. A number of ECAs report that they evaluate both the human rights conditions in the host state and the potential human rights impacts of proposed projects as part of their project due diligence process.³¹ Such assessments, if done credibly, would provide ECAs with knowledge regarding the human rights records of host governments and private sector clients, as well as the potential for the project in question to result in human rights abuse. When reasonably foreseeable human rights violations occur, the home state that has provided ECA support to the project would arguably have constructive knowledge of the circumstances of the internationally wrongful acts.

For example, it is not uncommon for extractive investments and large infrastructure projects to require the relocation of entire communities. Some local populations oppose relocation and are moved against their will. These relocations can involve the use of armed forces including the police and/or military, as well as private security companies. An ECA could support such a project in a country where the police and military have poor human rights records. In the event that public officers commit human rights abuses during the relocation, it is highly likely that the host state, as the party responsible for their activities, would be in violation of its human rights obligations. One could argue that if local opposition to relocation was reasonably foreseeable, as it would be by means of a credible ECA due diligence process, and given that the police / military's behaviour was similarly foreseeable, that the home government, through its ECA, had knowledge of the circumstances of the internationally wrongful act. Arguably, this knowledge, together with the provision of ECA financing, would make the home state complicit in the wrongful act of the host state. This assumes that the home state is bound by the human rights provision that was breached by the host state.

In the same scenario, if human rights abuse was committed during the relocation by the private security forces hired by the ECA client, and the host state failed to take reasonable measures to protect against the occurrence of such abuse, the host state would likely be in violation of its human rights obligations and the home state could be found to be complicit. This would require that the host government's wrongful act was reasonably foreseeable. Foreseeability would depend on the host state's laws, policies and procedures, as well as its track record in applying these instruments in the prevention of human rights abuse. However, the mere fact that a client felt it necessary to use private security forces to safeguard its installations should alert the ECA to the need for heightened due diligence regarding issues related to security, conflict and the rule of law. If, through its due diligence process, the ECA knew that its client and the host government lacked effective policies and oversight mechanisms regarding the use of force by private security providers, one could argue that the human rights abuse was reasonably foreseeable. This conclusion would be especially difficult to refute in circumstances where the security company and the host government had poor human rights records. The home state, through its ECA, would arguably have knowledge of the

³¹ For example, Export Development Canada. See letter dated July 16, 2007 from Rosemarie Boyle, Vice-President, Corporate Communications and External Relations, EDC to Karyn Keenan, Program Officer, Halifax Initiative Coalition. www.halifaxinitiative.org/index.php/projects_correspond/1039

circumstances of the wrongful act and could be found to be complicit in the host state's failure to fulfil its duty to protect.

Article 16 provides a powerful rationale for the adoption of robust human rights due diligence processes by export credit agencies. In order to minimize the possibility that they will violate their human rights obligations through the operations of their ECAs, either directly or through their complicity in the human rights violations of other states, governments should ensure that their ECAs employ rigorous human rights due diligence processes. Ignoring human rights is a risky alternative. The issue of transnational corporations and human rights has attracted international attention and is the subject of debate in diverse fora. Information is readily available regarding the human rights situation in most countries, as well as the potential human rights impacts associated with many ECA-supported projects. This means that even those export credit agencies that do not examine such information could be found to have constructive knowledge of relevant human rights considerations. In the case of OECD export credit agencies, social and environmental due diligence processes currently consider information that is related to the issue of human rights. Given these circumstances, it is difficult to persuasively argue, except in rare cases, that the risk of human rights abuse associated with transnational corporate operations is unforeseeable.

Finally, McCorquodale and Simons argue that home states may be found internationally responsible when they aid or assist a national corporation, as opposed to a host state, in the commission of an extraterritorial human rights violation. They explain:

While the ILC's Articles deal only with the responsibility of states, they do not exclude the possibility of other actors invoking responsibility or incurring responsibility. It is now established that individuals can incur international responsibility for a growing number of international crimes. Moreover, it has been convincingly argued that corporations and other business entities have obligations under international law not to commit international crimes and therefore can incur international responsibility for complicity in, and commission of, acts that constitute international crimes.³²

In other words, if a state aids or assists a corporation by providing it with an essential facility or finance through its ECA, and the corporation commits an international crime, the home state could be found to be complicit in the crime under international law. The state must have knowledge of the circumstances of the crime. However, as discussed above, ECA project due diligence processes arguably provide ECAs with constructive knowledge of such circumstances.³³

³² *Supra* note 8 at 613.

³³ For more discussion regarding the applicability of international criminal law to corporations see: Anita Ramasastry and Robert C. Thompson. *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*. FAFO. 2006.

www.fafon.org/pub/rapp/536/index.htm

Andrew Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations' in L. Bomann-Larsen and O. Wiggen (eds), *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (Tokyo: United National University Press, 2004) 50-81.

Do ECAs measure up?

When we revisit the elements of the state duty to protect and the international obligation not to harm others, which requires due diligence, it becomes clear that home states are failing to fulfil these obligations in the provision of official export credits and investment insurance. These international law obligations include the requirement that states effectively regulate corporate activity with respect to human rights, among other means, through the adoption of legislation. However, home states generally lack legislation establishing a clear mandate for their ECAs to protect against the interference of human rights by third parties. As mentioned above, some ECAs report that they undertake human rights assessments as part of their project due diligence process. Unfortunately, scant information is available about these assessments. It is unclear exactly how they are undertaken, against which human rights standards projects are assessed, and whether project modifications are required to bring clients into compliance. Some ECAs claim to monitor the human rights performance of their clients but little is known about these efforts, including whether they involve independent experts. The results of these activities are not published. Finally, many ECA home states lack effective mechanisms to adjudicate claims of human rights abuse associated with the projects that are supported by their ECAs and have not taken steps to secure ready access for non-nationals to their judicial systems.

Canada provides an illustrative example. Canada lacks legislative provisions regarding human rights and its export credit agency, Export Development Canada (EDC). There is no mention of human rights in either the statute or the regulations that govern EDC operations.³⁴ Export Development Canada reports that it applies a human rights assessment process as part of its due diligence. This process employs “policy-level guidance” from the Government of Canada with respect to Canada’s international obligations and includes country-level political risk assessments.³⁵ For those projects “in markets where there are known human rights sensitivities,” EDC undertakes a more detailed human rights assessment.³⁶ Unfortunately, the details of this human rights assessment process, which EDC refers to as its “proprietary methodology,”³⁷ are not public, nor are the results of project-specific human rights assessments. This lack of transparency makes it impossible to assess the effectiveness of EDC’s methodology, as applied by its employees. The crown corporation reports that “monitoring human rights is an ongoing function at EDC.”³⁸ However, it is not known whether this monitoring function is undertaken at the project level and if so, whether it involves independent experts. The results of human rights monitoring activities are not published.

Similar observations can be made about the Export-Import Bank of the United States (Ex-

³⁴ *Supra* note 5.

³⁵ See letter dated November 5, 2007 from Rosemarie Boyle, Vice-President, Corporate Communications and External Relations, EDC to Karyn Keenan, Program Officer, Halifax Initiative Coalition. www.halifaxinitiative.org/index.php/projects_correspond/1068

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ www.edc.ca/english/social_csr.htm#Human_Rights

Im Bank). While the legislation³⁹ that governs Ex-Im Bank operations does mention human rights, it does not instruct the Bank to establish policies and procedures to consistently protect against the interference of human rights by third parties. Instead, the statute establishes a series of extraordinary circumstances under which credit applications received by the Export-Import Bank may be denied on human rights grounds.⁴⁰ An application may be refused at the discretion of the President of the United States, when such an action would be in the national interest and would importantly advance United States human rights policy. Like EDC, Ex-Im Bank reports that it reviews the human rights situation of host countries and that it assesses human rights impacts as part of its due diligence process.⁴¹ However, little information is publicly available about these processes and their application to specific projects.

Finally, while EDC is one of few export credit agencies that has established a complaints mechanism,⁴² this internal officer is no substitute for an independent adjudicative body and cannot provide victims with appropriate remedies. In 1998, a law suit was initiated in Canada on behalf of indigenous people who claimed to suffer human rights violations when the Omai mine in Guyana caused a major environmental disaster. The Canadian company that developed the mine received political risk insurance from Export Development Canada. The Canadian court that received the plaintiff's case refused to consider it, arguing that Guyana was the appropriate venue for the suit. The court was not persuaded by expert testimony regarding the unwillingness and incapacity of the Guyanese judiciary to provide the victims with a fair trial.⁴³ A subsequent case brought before a Guyanese court was also dismissed, leaving the victims without recourse.⁴⁴ The Government of Canada has taken no action to remedy this judicial lacuna.

Through their export credit agencies, states currently impose social and environmental requirements on their private sector clients. For example, members of the OECD have collectively agreed to apply the International Finance Corporation's (IFC) Performance Standards within their export credit agencies.⁴⁵ In addition, through their adoption of the Equator Principles, two ECAs⁴⁶ have made a commitment to ensure that their clients comply with the IFC Performance Standards.⁴⁷ In addition to environmental and social standards, these IFC standards reference specific international human rights norms. States have clearly demonstrated their willingness to regulate the overseas activities of

³⁹ The Export Import Bank Act of 1945, as amended.

⁴⁰ *Ibid.*, subsection 2(b)(1)(B).

⁴¹ Export-Import Bank of the United States. *Report to the U.S. Congress on Export Credit Competition and the Export-Import Bank of the United States. For the Period January 1, 2006 through December 31, 2006.* June 2007. www.exim.gov/about/reports/compet/documents/2006CompetitivenessReport.pdf

⁴² Compliance Officer, see www.edc.ca/english/compliance.htm

⁴³ See Scott, Craig and Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation," in C. Joerges, P. Sand and G. Teubner, eds., *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 287-319.

⁴⁴ www.secinfo.com/d14X74.vu4.c.htm#1stPage

⁴⁵ Recommendation on Common Approaches on Environment and Officially Supported Export Credits. www.oecd.org/dataoecd/26/33/21684464.pdf

⁴⁶ Export Development Canada and Eksport Kredit Fonden of Denmark.

⁴⁷ www.equator-principles.com

their ECA clients, including in the area of human rights. It is therefore difficult to imagine a persuasive argument against state action to ensure that ECA clients respect all human rights in their operations.

States must do more to discharge their human rights obligations under international human rights law when they provide corporations with support through their export credit agencies. As discussed above, failure to do so could result in state responsibility, under international law, for the human rights violations associated with their ECA clients' operations.

Developments in Canada

Increasingly, states are being called upon to make the changes described above. Canada is a case in point. In 2005, a subcommittee of the Parliamentary Standing Committee on Foreign Affairs and International Trade (SCFAIT) held hearings on the activities of Canadian mining companies in developing countries. SCFAIT, which includes parliamentarians from all political parties that are represented in the legislature, subsequently released its fourteenth report⁴⁸ to the Government of Canada. The report identifies a number of recommendations aimed at improving the social and environmental responsibility of Canadian companies. Among other recommended actions, the members of the Standing Committee urged the government to:

Put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards. Measures in this area must include making Canadian government support – such as export and project financing and services offered by Canadian missions abroad – conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments.⁴⁹

SCFAIT also recommended that the Government of Canada establish a process involving industry associations, non-governmental organizations and experts, aimed at improving programs and policies in this area. In 2006/7, a comprehensive consultation process was carried out by the government on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries.⁵⁰ Among other issues, this groundbreaking roundtable process examined the role of the state in facilitating the overseas investments of Canadian extractive companies. The consultations culminated with the release of a final report⁵¹ that contains a series of policy reform recommendations for the Government

⁴⁸ www.cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=8979&Lang=1&SourceId=178650

⁴⁹ *Ibid.*, paragraph 2.

⁵⁰ http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.aspx

⁵¹ National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries. Advisory Group Report. March 29, 2007.
<http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20-%20March%202007.pdf>

of Canada. The consensus-based report was prepared by a multi-stakeholder Advisory Group that included representatives from industry, labour, academia, civil society and responsible investors. Since its release, the report has been publicly endorsed by a national mining industry association and by a broad coalition of civil society organizations.

The final report includes specific recommendations regarding Canada's export credit agency that aim to strengthen its due diligence processes and improve the corporate social responsibility performance of its clients. Recommendation 3.4.2.1⁵² calls on Export Development Canada to apply a set of Canadian corporate social responsibility standards in the development of its policies, practices and in the assessment of proposed projects. This standard set, which is outlined elsewhere in the report, includes the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and references related instruments that have been adopted by Canada. The recommendation urges EDC to apply a compliance management process to make companies more aware of human rights considerations and to bring non-compliant companies into compliance. The report instructs EDC to include a provision in its client contracts stating that serious non-compliance with the standards will lead to the withdrawal of EDC services.

Finally, Recommendation 2.3.2.3⁵³ calls on EDC to improve its disclosure policy by publicly releasing, among other information: project assessments undertaken during due diligence; modifications and mitigation measures required by EDC; and project monitoring and evaluation documents generated by EDC, project proponents and consultants throughout project implementation.

Recommendations

States with export credit agencies can adopt a number of mechanisms, several of which have received broad endorsement in Canada, to fulfill their international human rights obligations and to avoid international responsibility for human rights violations in the provision of export credit and investment support to the private sector.

States should adopt legislation that mandates their ECAs to protect against the interference of human rights by third parties. States should then enforce this legislation by ensuring that any human rights policies and practices that are adopted by their ECAs are effective in achieving this legislated mandate and that they are consistently applied by their ECAs. It is important that this requirement be legislated, both to ensure ECA compliance and to guarantee that states fulfil their international law obligations, as described above.⁵⁴ In addition, states should dedicate sufficient human and financial

⁵² *Ibid.* at 48.

⁵³ *Ibid.* at 19.

⁵⁴ For a critique of ECA regulatory provisions that are not statutorily-based, see Sara L. Seck, "Strengthening Environmental Assessment of Canadian Supported Mining Ventures in Developing Countries" (2001) 11 J. Env. L. & Prac. 1.

resources to ensure that these tasks are effectively carried out. States should establish independent investigative and adjudicative procedures to address allegations concerning ECAs and third party interference with human rights, and should provide effective remedies to victims in cases of human rights abuse.

The human rights policies of export credit agencies should identify and clearly explain:

- the human rights standards to which clients must conform
- performance indicators
- those forms of trade and investment support that are not offered by the ECA on the basis of human rights concerns
- specific information that clients are required to provide regarding the human rights impacts of proposed projects
- the ECA procedure for assessing human rights impacts
- the ECA procedure for assessing the human rights context in the host state
- the ECA procedure for including human rights considerations in decision-making processes regarding the provision of support
- the ECA procedure for monitoring compliance with human rights standards during all stages of a project and beyond
- sanctions for non-compliance, such as withdrawal of the ECA service

In order to guarantee access-to-information rights and to promote accountability, ECAs should adopt disclosure policies that ensure the timely release of information to the public. This includes disclosure of the ECA's human rights policies and procedures, as well as the following project-specific information:

- human rights impact assessments
- host state human rights assessments
- information provided by the client regarding the potential human rights impacts of the proposed project
- how human rights considerations were included in the decision-making process regarding the provision of support
- mitigation measures required of a client
- the results of human rights monitoring activities
- any reports generated by the client regarding compliance with the human rights policy
- findings of non-compliance
- enforcement measures taken and sanctions applied

It is in the interest of corporations to provide export credit agencies with information

regarding the potential human rights impacts of their projects. This information allows ECAs to more accurately assess the human rights risks associated with their operations. Only then can ECAs work with corporations to design project modifications that will minimize that risk. In those cases where the risk of human rights violations remains unacceptably high, ECAs can provide corporations with guidance regarding more significant project redesign. In this way, the relationship between a corporation and an export credit agency can significantly reduce the former's exposure to reputation risk and costly litigation, among other undesired outcomes.

As part of their due diligence processes, ECAs should work with other state departments and agencies to ensure that they have updated, accurate information regarding the human rights context of the host state.⁵⁵ Moreover, to promote policy coherence across government departments, export credit agencies should maintain open dialogue with other policy-makers regarding their activities and operations.

Finally, states and their ECAs should be aware of the potential impact of host government agreements on human rights. ECAs should carefully review the host government agreements associated with any projects for which they are considering support. To minimize the possibility of becoming complicit in the human rights violations of host states, home states should avoid the provision of public support to those projects where host government agreements restrict the ability of the host government to fulfil its human rights obligations.

⁵⁵ For example, the U.S. Export-Import Bank reports that it undertakes consultations with the U.S. State Department (*supra* note 41 at 115).