A large, rusted metal pipe lies on the ground in a rural landscape. The pipe is the central focus, with its interior showing significant rust and discoloration. The background features a dry, brownish field, a line of trees, and distant mountains under a clear blue sky. The overall scene suggests a state of neglect or abandonment.

STILL EXPORTING DESTRUCTION

**A civil society assessment of Export Credit
Agencies' compliance with EU Regulation
(PE-CONS 46/11)**

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Acronyms

ASCM	Agreement on Subsidies and Countervailing Measures
INTA	International Trade Committee of the European Parliament
CSR	Corporate Social Responsibility
DfID	UK Department for International Development
DG	Directorate-General
EC	European Commission
ECA	Export Credit Agency
ECHR	European Convention on Human Rights
EEAS	European External Action Service
EP	European Parliament
IFC	International Finance Corporation, member of the World Bank.
MSJ	Dutch Ministry of Security and Justice
OECD	Organisation for Economic Co-operation and Development
PCD	Policy Coherence for Development
MW	Megawatt
WTO	World Trade Organisation



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Cover: Baku-Tiblisi-Ceyhan oil pipeline.

Photo: Hannah Ellis

Introduction

Article 21 of the Lisbon Treaty, requires Member States of the European Union (EU), when acting abroad, to adhere to the EU's provisions on external action: *“democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”* In December 2011 the *Regulation approving the incorporation of the revised text of the Organisation for Economic Co-operation and Development (OECD) arrangement on officially supported export credits into EU law*,¹ known as the Export Credit Agency (ECA) Regulation, was adopted. As a consequence, in August 2012, for the first time, Member States sent an annual report on their ECAs' activities to the European Commission (EC). Based on the information provided, the EC is obliged to inform the European Parliament (EP) as to whether or not ECAs have complied with EU objectives and obligations, including the external action provisions.² On 26 February 2013, the EC submitted its Annual Report on ECAs to the INTA and Trade Policy Committees of the Council in the form of a draft working document. In April 2013 the EC published its report.

ECA Watch has prepared this 'shadow report'—with the support of other civil society groups—in order to assess current ECA practice in relation to issues such as transparency, public accountability and more generally, their compliance with the EU's objectives on external action. It is based on ECAs' own annual public reports, questionnaires sent to ECAs,³ and freedom of information requests. The report starts by giving some background information regarding ECAs and how they are regulated. It analyses ECAs' answers to ECA Watch's questionnaires, and highlights a couple of case studies to illustrate our concerns. It analyses the annual reports that Member States sent to the EC and highlights points that should be investigated further by the EC. It concludes by indicating options for the EC, the Council and EP to improve the regulatory framework for EU ECAs.

1 <http://register.consilium.europa.eu/pdf/en/11/pe00/pe00046.en11.pdf>

2 See Box 3

3 See Annex 1

ECAs and why they need to be scrutinised

Export Credit Agencies, commonly known as ECAs, are agencies that provide loans, guarantees and insurance to companies seeking to do business overseas. They can be private, semi-private or run and backed by governments. The provisions of the Lisbon Treaty apply to public, government-backed ECAs⁴ which provide support for exports in markets that are considered too risky (commercially or politically) for conventional private financing. ECAs are part of broader government mechanisms for trade and investment promotion.

For providing their financial services, ECAs charge premiums and/or interest from clients. The premiums charged by ECAs are usually lower than those of commercial players for comparable risks. The majority of ECAs provide insurance and other services for medium-term (from two to five years) and long-term (five to ten years and above), transactions which are usually associated with large projects. Although the OECD argues that the contribution of public ECAs to underwriting the aggregate financing of world trade is relatively small, it confirms that *“official support plays an increasingly important role in individual transactions and for projects in developing countries where the availability of official support is decisive in allowing the project and the related exports to be realized.”*⁵ ⁶ ECAs thus exert a powerful leveraging effect. When providing export credit guarantees they lower the risk of private lending and consequently, they have emerged as one of the leading players in project finance, particularly for large infrastruc-

tural (such as power plants) and industrial projects, which are risky, highly capital-intensive and have long gestation periods. ECAs are therefore used to support the expansion of specific industry sectors by providing easier access to commercial financing and insurance.

The main problems associated with export credits include the exacerbation of heavily indebted countries' debt problems,⁷ negative impacts on human rights,⁸ and support to projects that increase greenhouse gas emissions. (See Box 1).

The global credit crisis reasserted the position of public ECAs as dominant players in the trade finance markets, as they have stepped in to fill the huge gap left by the private sector. Some public ECAs have reported an increase of new commitments in their portfolios of between 30 and 272 per cent.⁹ Within the EU as well, many Member States have also increased the financial capacity of their official ECA.¹⁰ It is therefore vital that ECAs are subject to consistent and effective scrutiny and control.

4 The focus of the paper is only on public ones, some of which are managed privately but guaranteed by the State.

5 Steve Tvardek, Head of the OECD Export Credits Division, OECD, quoted in Berne Union, Berne Union Yearbook 2012, www.berneunion.org/pdf/Berne%20Union%20Yearbook%202012.pdf#

6 The 51 members of the Berne Union (an international association for the public and private export credit and investment insurance industries) covered over \$1.5 trillion-worth of business in 2008. With regards to medium and long-term export credit insurance, the combined exposure of the 51 members of the Berne Union was close to US\$600 billion at the end of 2010, or about four per cent of world export trade in that year. However, these figures include both private and public sources of finance.

7 Most debt statistics indicate that it fluctuates between 30-40 per cent of the total official public sector debt. This is far more than the amount of debt generated by the World Bank, other multilateral development banks and the International Monetary Fund combined.

8 Civil society has documented adverse human rights impacts as a result of ECA-supported projects: violence; forced displacement of people; violations of the rights of indigenous peoples; and denial of access to basic services. See for instance the Baku-Tbilisi-Ceyhan pipeline case <http://www.thecornerhouse.org.uk/resource/bp-violating-human-rights-rules-says-uk-government>.

9 See FERN's publication: 'The changing landscape of ECAs in the context of the global financial crisis', Kavaljit Singh, March 2010. www.fern.org/changinglandscape COSEC commitments in 2011 had an increase of nearly 73 per cent with respect to 2010. see: www.cosec.pt/docs/Cosec_ReC_2011_English.pdf. ECA-Watch analysis questions even the high figure of 73 per cent. In 2010 new commitments were €269.4 million, and in 2011 they were €1,002 million — a rise of 272 per cent.

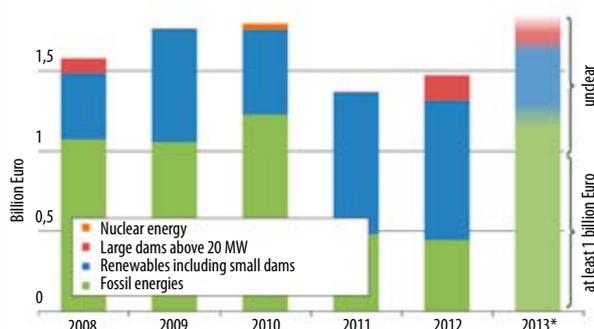
10 Ten Member States have provided their ECAs with increased insurance /guarantee capacity of a total €36 billion — an average increase of 35 per cent.

Box 1: ECAs and climate change

Collectively, ECAs provide some of the largest sources of public financing and guarantees for fossil fuel projects in the world, a sum that is estimated to rival or exceed financing for these activities by all multilateral finance institutions combined. Recent examples of ECA fossil fuel financing include US Ex-Im Bank's support for the 3,960 Megawatt (MW) Sasan ultra-mega coal power project in India; and the German ECA Euler Hermes, the French ECA COFACE, and potentially Ex-Im Bank's guarantee for the financing of the 4,800 MW Kusile coal power project in South Africa. Sasan and Kusile will be among the world's largest coal power projects, emitting a combined total of 56.9 million tonnes of carbon dioxide (CO₂) annually, plus extensive pollution to local water and air. The UK ECA, UKEF, has underwritten a US\$52 million loan in 2005 taken out by the Brazilian state-run energy company, Petrobras, for an offshore oil production platform operating in the Atlantic Ocean in nearly 2000 metres of water. The Brazilian offshore oil and gas reservoirs are considered to be among the most hazardous in the world to access, and UKEF confirmed that it had never undertaken any assessment of the risks of a blow-out, whether the platform's safety valves were adequate, or of it had a strong enough emergency response plan. It claimed that it was not under any duty to do so.¹¹

Public ECA support of fossil fuels undermines the efforts of their parent national governments to provide credible climate finance contributions in the context of the fight against climate change.

Hermes guarantees in the energy sector 2008-2012



* The numbers for 2013 aren't known apart from an expected guarantee for the lignite coal plant Ptolemeida V in Greece. For 2008-2012 all guarantees in the energy sector of each year are included. The graph differs between small and large dams above 20 MW, since large dams usually cause severe social and ecological problems and can't be counted as sustainable energy. Source: (data 2008-2012) Ministry of economics 2013

Recommendations

- ECA Watch welcome the new regulation (PE-CONS 46/11) on export credits (ECA Regulation) adopted in December 2011 which refers for the first time to the obligation of Europe's export credit agencies (ECAs) to comply with the EU's general provisions on external action. It is an important first step towards strengthening the transparency and accountability of ECA activities abroad.
- The EC argues in its report that *"it is difficult to define a precise benchmark for measuring compliance in EU law"*¹² but goes on to claim that such compliance is evident through *"a clear general willingness on the side of the Member States to apply policies to their export credit programs, whose objectives are in line with the general language of Articles 3 and 21."* This is a deeply flawed approach which sets a dangerous precedent for monitoring compliance with and enforcement of Article 21 within the EU. Instead the approach should be to check that ECAs have policies *in place* that are *effective* for ensuring that the ECA's activities accord with EU objectives.
- ECA Watch believe the EC is not currently in a position to adequately assess ECA obligations, since it has yet to undertake an analysis of the gaps between current ECA due diligence policies and the objectives of the EU. The EC should be more candid about this in its report to the EP, acknowledging that it cannot assess ECA compliance with EU objectives and obligations based on the information Member States have provided.

11 Conversation with the Times consultant

12 All quotes are extracted from the Commission's report available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/annualreview_reg1233_/annualreview_reg1233_en.pdf.

How are ECAs regulated?

At its simplest, public ECA support is a taxpayer-backed subsidy to help companies invest and export overseas. In order to address the potential for such subsidies to distort international trade, an interlocking framework of regulation and legislation has been established through the OECD, the World Trade Organisation (WTO), and the EU, in an attempt to maintain a 'level playing field' amongst producers, and rationalise and discipline export credits.

Two agreements establish the global legal framework for official ECAs: the Arrangement on Officially Supported Export Credits ('the Arrangement') (a non-binding 'gentlemen's agreement' negotiated within the OECD); and the WTO's Agreement on Subsidies and Countervailing Measures (ASCM), (which is mandatory for signatory countries). The WTO Agreement regulates the use of subsidies and describes the measures countries may take to counter the effect of subsidies. Most export credits are considered to be allowed subsidies as long as they respect conditions set out by the Arrangement. The Arrangement sets the export credit terms and conditions that may be supported by its Participants¹³ (eg minimum interest rates, risk fees and maximum repayment terms), and is regularly reviewed by its Participants. In 1978, the EU incorporated the Arrangement for the first time into Community law by a Council Decision. Subsequent revisions and amendments to the Arrangement have similarly been incorporated into EU law through European Council decisions, although there has often been a time lag between the revisions being adopted by the OECD and their adoption by the Council. The Arrangement¹⁴ is therefore legally binding for EU Member States.

Box 2: The Common Approaches

At the OECD level, there are a number of non-binding guidelines on the environment, including the 'Common Approaches', which were adopted for the first time in 2003 and have been reviewed and revised several times since then.

In June 2012 some minimal and incomplete references to social and human rights language were included.¹⁵ These guidelines are not legally binding for either the OECD participants or the Member States, and fail to explicitly require ECAs and their clients to make a clear and unambiguous commitment to respect human rights and establish adequate human rights due diligence processes. According to Amnesty International they "*do not use robust enough standards to guarantee that operations or projects supported by ECAs do not negatively impact on human rights.*"¹⁶

Moreover the Common Approaches have failed to prevent ECAs from backing a range of egregious projects — such as the Baku–Tbilisi–Ceyhan oil pipeline which Amnesty International accused of creating a 'human rights-free corridor' across the Caucasus through a series of agreements which put corporate profit ahead of improved environmental laws in participating countries. The Nigeria Liquefied Natural Gas Plus project in Nigeria is another destructive project which is implemented with the support of a number of European ECAs in a joint venture that paid massive bribes to Nigerian civil servants.

13 The Participants are the 'owners' of the Arrangement on Officially Supported Export Credits, they negotiate and implement it. The current Participants are Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland and the United States.

14 The latest draft Arrangement has still to be incorporated into EU. It is the 2005 version that is therefore binding.

15 Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence

16 See www.amnesty.org/en/library/asset/IOR10/001/2012/en/26e27ee3-72c3-48e2-b70a-6690ab434204/ior100012012en.pdf



BP has consistently promoted the BTC pipeline as 'world class' in its approach to human rights. This was proven false in 2011 when the UK Government ruled that BP failed to investigate and respond to complaints that Turkish security forces guarding the pipeline had been intimidating local people. Financers of this project included ECAs from UK, Germany, France and Italy.

Photo: Hannah Ellis

When the Lisbon Treaty entered into force the EP became co-legislator with the Council on trade matters, including export credits. As a result, when the EC made a new proposal for transposing the Arrangement into EU law through a new Regulation, the European Council and the International Trade Committee of the European Parliament (INTA) were included in the negotiations, with the EP proposing the inclusion of transparency and accountability requirements. The ECA Regulation clearly refers to Article 21 of the Lisbon Treaty and the EU's external action in Paragraph Four of its Preamble requiring Member States — and thus their respective ECAs to “*comply with the Union's general provisions on external action, such as consolidating democracy, respect for human rights and policy coherence for development, and the fight against climate change, when establishing, developing and implementing their national export credit systems and when carrying out their supervision of officially supported export credit activities.*” (See Box 3).

Box 3: EU's external action provisions and Article 21 of the Lisbon Treaty

The Union's external actions refer to the principles, objectives and conduct of the EU's action on the international scene.

Since the entry into force of the Lisbon Treaty on 1 December 2009, the **European External Action Service** was established by a Council decision establishing its organisation and functioning. It is placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy ('High Representative'). This decision sets out that in accordance with Article 21 “*the Union will ensure consistency between the different areas of its external action and between those areas and its other policies. The Council and the Commission, assisted by the High Representative, will ensure that consistency and will cooperate to that effect.*”¹⁷

Article 21 of the Lisbon Treaty, requires Member States of the EU, when acting abroad, to adhere to the EU's provisions on external action: “*democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*” In addition, Member States are obliged to act in a manner that will “*consolidate and support democracy, the rule of law, human rights and the principles of international law ... foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty*” and “*help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.*”

17 See article 3 of the Decision, www.eeas.europa.eu/background/docs/eeas_decision_en.pdf and article 21 of the Consolidated version of the Lisbon Treaty <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF>

Coherence between the ECA Regulation and EU human rights obligations

Human rights are embedded in international law and are legally binding commitments made under the United Nations system and the framework of the Council of Europe and the EU.

A recent EC-commissioned study by Edinburgh University looked at the applicability of current EU human rights and the environment legislation to EU-based companies when they operate outside the EU and concluded that: *“European human rights and environmental law imposes significant duties on the European Union and the EU Member States to protect human rights and the environment in relation to European corporations operating outside the European Union. These duties encompass procedural measures to ensure inclusive, informed and transparent decision making, substantive measures to regulate and control corporate activities relevant to human rights and environmental protection outside the European Union, and enforcement measures to investigate, punish and redress violations when they occur. Under some legal regimes, such as the European Convention on Human Rights (ECHR), failure to comply with these duties can make States directly liable for corporate violations of human rights and environmental law.”*¹⁸

Furthermore, the European Council of Foreign Affairs, in cooperation with the EC, has made it a priority to ensure the EU’s external action is coherent across the range of instruments and EU policies. In June 2012, the Council adopted a Strategic Framework and Action Plan on Human Rights and Democracy.¹⁹ This is the first time that the EU has presented a strategy on human rights with a wide-ranging action plan. It applies to all state bodies—including ECAs—and sets out principles, objectives and priorities,

in order to improve the effectiveness and consistency of EU policy as a whole in the next ten years. It also anchors a commitment to partnership with civil society. It was approved by the European Council and now guides EU action. The European Commission and Member States are jointly responsible for the implementation of the EU Action Plan on Human Rights and Democracy. As set out in Annex 2, the Action Plan contains a number of commitments that are relevant to human rights due diligence in respect of export credit support by Member States. (See Box 4).

The key messages of the Strategic Framework are the need to mainstream human rights throughout EU policy as well as in all EU external policies, to promote universality of human rights, and to pursue coherent objectives. Another commitment of the Action Plan is that the EU should report on its progress in meeting its annual report’s objectives on human rights and democracy in the world.



The Turkwel Gorge Hydroelectric Dam, known as the ‘Whitest of White Elephants’ between 12 and 68 per cent of Kenya’s debt to the UK comes from loans for this dam which was also supported with loans from the French government.

18 Daniel Augenstein, Study of the legal framework on human rights and the environment applicable to European enterprises operating outside of the European Union, University of Edinburgh/ European Commission, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/101025_ec_study_final_report-exec_summary_en.pdf

19 www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

This should give the opportunity for all stakeholders in EU policy, including civil society, to assess the impact of EU action and contribute to defining future priorities.

Box 4: ECAs and human rights due diligence

There are several elements in the EU legislation that outline the need for ECAs to implement human rights diligence.

With regards to corporate social responsibility, the EC published a Communication [1] in October 2011 outlining the expectation that all enterprises should respect human rights as defined in the UN Guiding Principles on Business and Human Rights.

The EC's Communication invited Member States to develop national action plans for implementing the Guiding Principles. Principle four outlines that ***"States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."***

There is also the 'Communication on the strategy for the effective implementation of the Charter of Fundamental Rights by the European Union'²⁰ in which the EC confirmed that the Charter²¹ applies to its external action. Indeed, the European External Action Service (EEAS) gave a presentation at the INTA's exchange of view²² on 21 March 2013 which suggested that the EU should develop a methodology based on the EU Charter to assess ECAs' compliance with EU human rights objectives.

Recommendations

- ECA Watch has drafted a proposal,²³ including reporting requirements, which would allow civil society, the EP, and the EC to obtain better oversight of ECA activities. We would invite the EC and the Member States to consider adopting our proposed 'reporting grid' when reporting under the Regulation in 2013 and the following years.
- Currently, EU ECAs claim that they achieve compliance with EU objectives through adherence to a voluntary set of due diligence guidelines under the OECD known as *the Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* (Common Approaches) (See Box 2). Members of ECA Watch note that the Common Approaches are nothing more than a gentleman's agreement and as such are wholly inadequate for complying with EU objectives, not least because they fail to adequately address human rights objectives. Indeed, in the case of UK Export Finance (UKEF), Britain's ECA, the decision to abandon bespoke national standards for assessing the social and environmental impacts of projects in favour of the Common Approaches has led to *reduced* scrutiny of human rights, in particular child labour issues.

The EC concedes that the Lisbon Treaty provisions 'could' serve as a 'background' against which to evaluate the policies applied to export credit transactions. ECA Watch believes that, instead of using the Common Approaches as a benchmark for EU ECA compliance with EU objectives, the EC should benchmark against EU-legislated and endorsed standards. These would include EU environmental Directives and Regulations, the EU Consensus on Development, the Charter of Fundamental Rights, and the Strategic Framework and Action Plan on Human Rights and Democracy. Such a framework would reflect EU policy objectives better than the 'gentleman's agreement' drawn up by the OECD, and, equally important, would fit more easily into any future framework for evaluating compliance in other areas where Member States are bound by the external action provisions of the Lisbon Treaty.

20 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF>

21 The Charter of Fundamental Rights enshrines certain political, social, and economic rights for EU citizens and residents. It entered into force with the Lisbon Treaty. Under the Charter, the European Union must act and legislate consistently according to the Charter. The Charter applies to the Institutions of the European Union, and the member states when they are implementing EU law.

22 As part of the co decision procedure, the rapporteur organises exchange of views in the Committee to present its work and discuss with other members the content of the file

23 See annex 3

ECAs' reporting requirements under the new regulation

Annex 1 of the ECA Regulation sets out the elements that Member States have to address in their annual report to the EC. These include assets and liabilities, claims paid and recoveries, new commitments, exposures, and premium charges. It requires Member States to report on any activities where contingent liabilities might arise.

Moreover, Member States are asked to describe how environmental risks, which can carry other relevant risks, are taken into account in their ECA's activities. Based on the information received, the EC produced its first annual review for the EP. Unfortunately, its evaluation of ECAs' compliance with EU objectives and obligations is very weak.

To ensure consistency in the reports submitted by Member States; the EC and the Council agreed on a reporting grid.²⁴ The grid includes questions on: (1) the presentation of Member State policies on export credits, "including all information that can help the Commission in carrying out its evaluation regarding the compliance of the Export Credit Agencies with EU objectives and obligations"; and (2) Member State implementation of the OECD guidelines on environment, human rights, anti-bribery and sustainable lending.

Significantly, the Commission notes in its reporting grid that reporting on (1) is "to ensure that it is not forgotten that the Regulation's official reference is to EU objectives and obligations." However, Member States are only asked to confirm whether they apply the OECD guidelines — no information on the specific procedures or/and any EU standards they use, is requested. This is of serious concern because, as detailed below, the OECD guidelines fall short of the EU objectives and obligations.



Civil society organisation handing out publications outside the OECD Headquarters in Paris.

Box 5

Under the ECA Regulation, the European Commission has an obligation to assess ECAs' compliance. However ECA Watch found inconsistencies in Member States' annual reports sent to the EC, compared to the information provided in their public annual reports. Our analysis shows that the EC has not complied with its obligations and should have made this exact analysis and required Member States clarifications. Below we present the case of the Netherlands:

In section III.1 of its annual report, the Netherlands provides information on policies related to the environment. It states that it applies the OECD Common Approaches, but fails to report to the EC that it is supporting two Category A (Cat A) projects outside of the Common Approaches for which little



24 See Annex 1



or no environmental information has been made public. These projects are:

- Crude Oil Expansion Project, Iraq (three applications)
- Expansion of Das Island, UAE/Abu Dhabi (one application)

In section III.3, the Netherlands reports that it is doing its utmost to avoid becoming involved in transactions in which bribery has taken place. The EC should take note of the many concerns that the OECD has in this regard. Indeed, in its report²⁵ on the Netherlands' implementation of the Anti-Bribery Convention, the OECD notes that *"there is no systematic approach whereby [Dutch ECA Atradius Dutch State Business (Atradius DSB)] consult the MSJ²⁶ database of convictions"* and recommends *"that the Netherlands promote the use of this database more widely ... to allow for more thorough due diligence, as well as effective and efficient application of exclusion rules, where appropriate."*

In section IV.A, financial data is provided. There is no reference to the sources of these figures. For example, in the checklist an amount of €15.3 million of claims paid is mentioned, while the Annual Review 2011 of Atradius DSB states an amount of €19 million for the same item.²⁷ Reporting should be more transparent about figures used, to allow for public control.

In section VI.A a total of 10 Cat A projects are mentioned with a total value of €413 million although the transaction overview²⁸ shows 17 Cat A projects with a total insured amount of €434 million. In section VI.B a total of three Cat B projects are mentioned with a value of €346 million. However the transaction overview²⁹ shows four Cat B projects with a total insured amount of €417 million. As different figures are disclosed in different reports provided by Atradius DSB, the EC should ask for clarification.

Recommendations

- ECA Watch has highlighted a number of areas where the Common Approaches fail to secure EU objectives as expressed through agreed EU policies. ECA Watch is calling on both the EC and the EP to do a more thorough 'gap analysis'. The creation of such a framework should be completed as a part of a structural multistakeholder dialogue at the EU level including Member States, ECAs and civil society.
- In February 2013, the INTA committee in charge of export credit matters launched the process to produce its 'own initiative report' based on the EC's draft report. Eventually, on the 2 July, the EP voted overwhelmingly to support the INTA's response to the Commission's first annual report on Member States' ECA activities. The EP response calls on Member States to monitor and report on the existence, outcome and effectiveness of due diligence procedures for screening export credits. It also agrees that specific attention should be given to their potential impact on human rights, and calls on the EC and the European Council to develop a methodology for meaningful reporting on compliance of Article 21 (see Box 3) of the Lisbon Treaty. ECA Watch calls on the EC to respond accordingly to the EP own initiative report.

25 see: <http://www.oecd.org/daf/briberyininternationalbusiness/NetherlandsPhase3ReportEn.pdf>

26 The Dutch Ministry of Security and Justice

27 see: <http://global.atradius.com/corporate/aboutus/annualreportspage.html>

28 http://www.atradiusdutchstatebusiness.nl/Images/EKVpolissen_2011_tcm1008-141084.pdf

29 idem

Civil society analysis of EU and ECA activities in 2011

In order to make this shadow report, ECA Watch prepared a questionnaire³⁰ which was sent with national civil society support to 17 Member States³¹ and their ECAs.

Responses to the questionnaire varied widely:

- In Germany, the questionnaire led to parliamentary questions being asked;
- The Netherlands, Spain, Poland, Hungary, Sweden and Germany filled in all the questionnaire;
- The Austrian ECA did not answer some of the questions claiming non-applicability of the environmental information law;
- Bulgaria, Romania and Denmark sent general answers; and
- The Portuguese ECA COSEC argued that it did not reply to the questionnaire because some of the questions were “*beyond the applicable scope of the Regulation and have not been thoroughly discussed and harmonised within the OECD ECG [export credit group]*”. They did not however specify which questions they believe “*go beyond the applicable scope of the Regulation*”, nor answer the rest of the questionnaire.

A request for information was made to UKEF, which declined to answer any of the questions, arguing (erroneously) that much of the information sought was in the public domain and that it would be ‘premature’ to respond to our questions until the reports of all Member States had been submitted to the EC³². COFACE and the French Ministry of Finance did not answer despite several reminders. SACE from Italy replied that answering should

be a duty of the government and only outlined that it was “*carrying out an environmental and social impact assessment of its transaction according to the Common Approaches’ scope and standards*”.

Bottom of the table were Greece, Slovenia and Latvia who did not even respond to repeated requests for the name of a contact to whom to send the questionnaire.

Beyond the difficulty obtaining answers to our questions, our analysis raises the following main concerns: (1) the answers given were vague; (2) there is a lack of transparency; (3) the EU’s objective of consolidating democracy is being undermined; (4) the EU’s objective of respect for human rights is being undermined; (5) there is a lack of policy coherence for development; and (6) there is a lack of policy coherence with regards to the fight against climate change. We also outline two overarching issues; (7) the problem of implementation; and (8) the mentioning of the OECD Common Approaches as the baseline for proving ECAs compliance with the EU’s external action provisions.

Vague answers

Most responses from ECAs were so general or weak that it is hard to analyse them or come up with any helpful conclusions. Examples of general statements in ECA responses include:

- Importance is attached to the environmental, social and developmental impacts of a project when deciding whether an export transaction is eligible for support. (Germany)³³;
- Some elements in the project review are strongly related to democracy. (Netherlands)³⁴;

30 Annex 3

31 Austria, Bulgaria, Denmark, France, Germany, Greece, Hungary, Latvia, Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, Romania, UK

32 After we requested on July 2012 an internal review of UKEF’s decision not to provide us with the information sought, UKEF sent us an answer one year later (5 July 2013). It indicates that it has no procedures or policies in place to assess the human rights impacts, the impacts on poverty, or the contribution to democracy of their export credits and guarantees.

33 Does Euler Hermes apply principles that prevent guarantees being granted for projects that do not contribute to sustainable development?

34 Does Atradius review the export credits and guarantees that it supports for their impacts on poverty

- The Federal Government attaches great importance to human rights aspects. (Germany)³⁵;
- Impacts on climate change are taken into account during the review of application. (Netherlands)³⁶;
- In practice, projects are regularly benchmarked against EU standards. (Netherlands)³⁷;
- Our policy and business procedures comply with UN principles (Denmark regarding their human right assessment);
- Concerning the EU's general provisions ... EKF strives to meet these general provisions in our daily work (Denmark regarding their compliance with the European Union's provisions on Member States' external action).



Workers near Sasan Power Project, Singrauli, India. Sasan and Kusile will be among the world's largest coal power projects, emitting a combined total of 56.9 million tonnes of carbon dioxide (CO₂) annually, plus extensive pollution to local water and air. (See Box 1 on page 5)

Photo: Joe Athialy

Lack of transparency

The ECAs were hesitant to discuss their reviews of specific projects, due to claimed 'protection of commercial interests'. As a consequence, little or no information was disclosed about the steps taken in response to social and environmental screening procedures. If ECAs are clear that they do not offer support to companies that receive negative assessments, this could promote stronger environmental and social due diligence amongst European companies looking for official export credit support. Unfortunately, no independent external evaluation or monitoring reports are publicly available.

The Aarhus Convention on access to public information, public participation in decision making, and access to justice in environmental matters has been incorporated into EU law, and binds EU institutions and bodies, as well as Member State public authorities. It empowers NGOs to scrutinise decisions of EU institutions and Member State public authorities with regards to the activities of EU corporations operating outside the EU. The EC's Environment Directorate-General (DG Environment) has also confirmed that the Convention applies to ECAs.³⁸ Despite this, in July 2012, when ECA Watch members in Germany asked for details of guarantees, they were informed that the information requested needed the consent of exporters and banks, which fiercely oppose the disclosure. As of July 2013 no information had been disclosed. In several Member States, industry has been trying to obstruct our requests for information; this is one of the reasons why more far reaching transparency requirements are needed.

Undermining democracy

One of the objectives of EU external action is to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. To this end, the Council adopted an EU Agenda for action on Democracy Support in EU external relations.³⁹

35 Does Euler Hermes check applications for guarantees in terms of their human rights impact? If so, what instruments does it use and what criteria does it apply to assess the human rights impact of guarantees?

36 What procedures — if any — does Atradius have in place for assessing the climate change impacts of the export credits and guarantees that it supports?

37 Has Atradius ever benchmarked any ECA-supported project against EU standards where appropriate (as recommended by the Common Approaches)

38 Letter from DG Environment, Legal Affairs Unit, to FERN, 7 July 2005, concluding "Export Credit Agencies, whether or not belonging to the public administration, qualify as public authorities within the meaning of Directive 2003/4/EC and are obliged to observe the rules laid down in that Directive." Note that this remains a non-legally binding interpretation since only the European Court of Justice can give a binding interpretation of Community law.

39 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/111250.pdf

Undermining human rights

Member States were asked to confirm that they applied the human-rights-related aspects of the Common Approaches to their 2011 activities. This is problematic as the 2011 version of the Common Approaches contained no reference to human rights and did not require any screening for human rights impacts beyond forced resettlement (it was only in June 2012 that the Common Approaches introduced some limited references to human rights). It is therefore untenable for the EC to report that ECAs by simply following the Common Approaches, without additional and specific human rights due diligence measures, were in compliance with the requirements of Article 21 for the period covered by the EC's first report to the EP.

Moreover, the EC is in no position to assess whether the latest version of the Common Approaches brings ECAs into compliance, since no comparative analysis exists between the minimal human rights screening standards and procedures in the 2012 Common Approaches and the EU objectives on human rights, including the Charter of Fundamental Rights of the EU. A thorough gap analysis is needed, and our own analysis, suggests that wide gaps exist between the two.

The Common Approaches' treatment of human rights is extremely limited and, in answer to our series of questions on their procedures for assessing impacts on human rights, no Member States referred to the Charter of Fundamental Rights of the EU as a benchmark. Hungary was the only Member State to be clear that in the 2011 reporting period they *"did not have any procedures on the subject matter"*. In its response, Austria stated that *"applications for export guarantees are as a principle only roughly checked against possible human rights impacts"*. In its report to the EC, Germany acknowledges that the Common Approaches are indeed insufficient to properly address human rights concerns.⁴⁰ This is particularly worrying given the recent commitment by the Council and the EU External Action Service on the new Strategic framework and action plan on human rights. (See Case Study 1).

Case study 1: ECA-backed export businesses and human rights controversies in Belarus

Not only do ECAs not always comply with EU objectives, sometimes they actively undermine them. For instance, at the end of June 2012, the exposure of Italy's ECA SACE to Belarus was €155 million, a significant part of which was guaranteeing the lending of two state-controlled banks in Belarus (OAO ASB Belarusbank, and OAO Belvnesheconombank) who are financing contracts benefiting Italian exporters. In September 2012 SACE decided to allocate another volume of guarantees for deals with Belarus to the tune of €50 million.⁴¹

By regularly guaranteeing exports to Belarus, the Italian ECA contravenes the wide set of EU sanctions



The Belarus government has cracked down on opposition leaders and movements and doesn't uphold the right to freedom of assembly and association.

Photo: Wikimedia commons (Zachary Harden)



⁴⁰ "The German policy assesses any project-related Human Rights aspect before granting cover, if there is information or if there is reason to believe that Human Rights are violated by the project, even if they are not addressed by the Common Approaches."

⁴¹ Belarusian Telegraph Agency, Italian export credit agency delegation visiting Belarus, 25.10.2012: <http://news.belta.by/en/news/econom?id=697116>



and restrictive measures that have been in place since 2007 due to concern about human rights in Belarus.⁴² The fact that state-owned financial intermediaries from Belarus directly benefit from foreign ECA cover is an evident example of the lack of policy coherence between ECA operations and EU fundamental objectives and external action goals, such as the promotion and consolidation of democracy in Third Countries. In particular, SACE does not perform any human-rights and democracy-promotion due diligence before taking decisions about specific operations in the country. Furthermore the country risk assessment, which guides the definition of premiums for ECA cover, is based on wider political and macro-economic stability issues, often conflicting with the protection and promotion of human rights and democratic freedoms in the country. Despite this, Belarus is still given the highest country risk ranking according to OECD rules, thus increasing costs of ECA guarantees.⁴³

In particular, the executive summary of SACE's country risk profile states: *"Political risk. Main risks for the leadership of Lukashenko and political stability are linked to the deterioration of the economic situation and relationship with Russia, on which the country depends economically, commercially and financially."*⁴⁴ In this context the 'political violence' risk — which indirectly might reflect some broader human-right-protection-related issues — is rated 51/100, much lower than any credit and regulatory risk (on average above 68/100). In short, according to SACE officials' words: *"High risk does not mean not to be able to operate, premiums ... are higher, but we go ahead."*⁴⁵

Lack of coherence for development

On 25 October 2012, the EP adopted a resolution calling for several measures to improve Policy Coherence for Development (PCD) within EU policies. It *"welcomes the eight areas of action for the years 2011–2014 chosen by the Commission in its proposal for a new policy on corporate social responsibility (CSR); underlines the importance of binding CSR obligations and of encouraging employers to apply social standards which are more ambitious than current statutory provisions, including the possibility to develop and obtain a designation such as a social label; calls on the Commission to support the Member States in carefully monitoring the implementation, and ensuring the legal enforcement, of these obligations, and insists that the upcoming initiative on CSR reflects the obligations towards PCD and moves towards binding CSR standards."* The resolution expresses the view that EU trade and investment policies need to be subjected to binding standards in areas such as human rights, and environmental and social issues.⁴⁶ In many Member States, the standards applied to development policies are not yet applied to their export credit policies.⁴⁷ The call to improve PCD within EU policies should be read as an encouragement to subject export credit policies to development policy standards. (See case study 2)

42 Council of the European Union: Council conclusions on Belarus, 3191st Foreign Affairs Council meeting, Luxembourg, 15 October 2012, European Union — Restrictive measures (sanctions) in force (Article 215 TFEU); (Regulations based on Article 215 TFEU and Decisions adopted in the framework of the Common Foreign and Security Policy); European Commission, update 01.10.2012: chapter on Belarus, page 6-11

43 <http://www.sace.it/countryrisk/RiskWF.aspx?Language=2&MapId=85>

44 Idem

45 Linkiesta, Michele Sasso, Gli interessi dell'Italia nella Bielorussia di Lukashenko, 5 maggio 2011, <http://www.linkiesta.it/gli-interessi-dell-italia-nella-bielorussia-lukashenko>

46 European Parliament resolution of 25 October 2012 on the EU 2011 Report on Policy Coherence for Development (2012/2063(INI))

47 In Germany a new human rights policy of the Development Ministry applies to German ODA. While the policy speaks about policy coherence which would mean that it should be relevant for Hermes guarantees, the Ministry of Economic Affairs — in charge of the guarantees — shows little appetite to apply the policy for Hermes guarantees.

Case study 2: Far from sustainable development: the case of Simest of Italy

Simest, the Italian Overseas Business Company, is a joint stock company, whose primary aim is to promote foreign investment by Italian companies. Simest's main shareholder is Cassa Depositi e Prestiti (CDP), a publicly controlled financial institution 70 per cent of whose shares are owned by the Ministry of Economy and Finance and 30 per cent by a large group of banking foundations. CDP owns 76 per cent of Simest shares. The remaining 24 per cent is owned by the major Italian banks and other companies and business associations.

The Italian Economic Development Ministry reported to the EC that Simest is regarded as one of the two Italian ECAs (together with SACE). According to the Italian government, Simest complies with the Common Approaches. Simest is also a member of the association of European Development Finance Institutions (EDFI) *“operating in developing and reforming economies, mandated by their government to... help reduce poverty and improve people's lives; contribute to achieving the Millennium Development*



Palo Viejo in Guatemala

Photo: Caterina Amicucci/Re:Common



Goals”⁴⁸ This is particularly striking given that Simest has no poverty reduction objective in either its statutes or the Italian law establishing it.⁴⁹ As is shown below however, Simest does not comply with EU development goals under Article 21 of the Lisbon Treaty.

Simest is supporting the Italian energy utility Enel GreenPower in the creation and management of a new hydroelectric plant in the Department of Quiché, in Guatemala, on the river Cotzal and its three tributaries. The total investment is €185 million. Through a Venture Capital fund, Simest has acquired six per cent of the Guatemalan company Renovables de Guatemala, which will operate the plant for a financial commitment of around €10 million. The investment is controversial because the plant is built inside a huge estate of about 14,000 hectares, which covers most of the municipalities of San Juan Cotzal and Uspantán. The estate occupies an entire valley, whose land has been progressively taken from the communities for 100 years. It began in 1902, when Pedro Brol, a contractor of Italian origin, began to ‘accumulate’ land. During the violent conflicts in the 1980s in Guatemala, the Brol family actively participated in the repression of the population and, taking advantage of the ensuing chaos, continued to take land from the communities. Today, the estate has 14,000 hectares cultivated mainly with coffee, which is then sold to Starbucks. La Finca, where the power plant is being built with the support of Simest, has incorporated the communities of El Pinal, Sajubal, Tzivanay and Pamaxan, which, for more than a century have been living in a state of semi-slavery.⁵⁰ In early 2011, the local population peacefully protested against the project, but were heavily intimidated and repressed by police forces.⁵¹

Nevertheless, according to publicly available information, Simest has not reviewed ongoing impacts associated with its investment in Guatemala. On the contrary, with a focus on renewable resources that have not yet been used in Latin America, Massimo D’Aiuto, CEO and Managing Director of Simest has recently stated that *“It’s against this background that we are thinking with Enel Green Power about large-scale projects in the area.”*⁵²



48 www.edfi.be

49 www.simest.it

50 See “Il caso Palo Viejo in Guatemala. La diga della discordia nelle terre dei Maya” Re:Common, Italy, July 2012

51 <http://www.recommon.org/il-caso-palo-viejo-in-guatemala/>

52 <http://www.greenews.info/idee/simest-20100617/>



Massimo D’Aiuto has also stated that the company will focus more on energy production, trying to take advantage of, among other things, opportunities offered by biomass production and biofuels in Latin America, mostly Brazil. Biofuel production remains highly controversial, given its dubious environmental and developmental impacts. The EC is aware of concerns as it has recently tabled a proposal to put a cap on crop-based biofuels in order to control the quantity of crops which will be used for fuel.⁵³

In speaking about PCD it is also important to note that export credit debts constitute the largest component of developing country sovereign external debt. Eurodad research revealed that almost 80 per cent of poor countries’ debts to European governments come from export credit guarantees, which are in most cases driven by commercial, not development-related objectives.⁵⁴ Despite this, when developing country debts are cancelled, ECAs are compensated for their losses, using Official Development Assistance (ODA). As a result, huge amounts of money are being transferred from aid budgets to boost the coffers of ECAs, draining away resources much needed for poverty eradication. Between 2004 and 2005, global ODA increased by almost 70 per cent, largely as a result of the cancellation of export credit debts, most of it — US\$19 billion — benefiting Iraq and Nigeria.⁵⁵ Since all ECAs are required to write off their costs and losses against income from interest and premiums, and thus break-even in the long run, the common practice of writing off export credit debt at the expense of ODA accounts violates policy commitments towards PCD. (See Case Study 3).

53 <http://euobserver.com/economic/117901>

54 Eurodad, 2011: Exporting goods or exporting debts? Export Credit Agencies and the roots of developing country debt. http://eurodad.org/uploadedfiles/whats_new/reports/exporting%20goods%20or%20exporting%20debts_final%20for%20print.pdf

55 Aid architecture: an overview of the main trends in official development assistance flows; World Bank, 2007, p. 2.

Case study 3: How ECAs create debts and shrink aid budgets: the example of Sudan

Sudan, one of the biggest debtors of European ECAs, is scheduled to be the subject of an export credit debt cancellation that draws substantial money away from aid. Sudan’s external debt stock is estimated at US\$43.7 billion,⁵⁶ of which about 70 per cent is owed to other governments.⁵⁷ Although detailed data is difficult to obtain, it is estimated that the majority of Sudan’s external debt was created by export credit guarantees.

Most of Sudan’s debt is made up of interest accumulated since 1984 when the country stopped servicing its debts. The creditors are charging exceptionally high interest rates of 10 per cent or more. The interests and penalties accrued over the years constitute well over 80 per cent of the total external debt stock.⁵⁸

Sudan and South Sudan are still negotiating how to split the national debt. If governments of the Paris Club of creditors⁵⁹ decide to eventually cancel these non-performing debts which are based on arbitrary high interest rates, the aid budgets of the creditor countries will once again be used to cover losses incurred by their national ECAs. In practice this may lead to budget cuts for other poverty reduction programmes.

Sudan’s debt to the UK: Despite claiming for many years that the origins of loans were unknown, UKEF has recently published data on the original amount of debts owed to them by developing countries. This data shows that the original debt owed by Sudan is US\$208 million, 55 per cent of which comes from export loans for vehicle spare parts and industrial plants and machinery.⁶⁰ The UK is charging interest



56 Sudan, 2012 Article IV Consultation, IMF Country Report No. 12/298, November 2012

57 The remaining balance is almost equally divided between multilateral and commercial creditors. IDA and IMF, 2010: Sudan Joint World Bank/IMF 2009 Debt Sustainability Analysis, <http://www.imf.org/external/pubs/ft/dsa/pdf/dsacr10256.pdf>

58 According to the Norwegian Ministry of Foreign Affairs at a meeting with Norwegian NGOs, September 2011

59 The Paris club is an informal group of creditor nations that negotiate payment problems faced by debtor nations. The main conditions debtor nations have to meet are that they have a current economic reform program with the International Monetary Fund (IMF) supported by a conditional arrangement.

60 UK Export Finance’s sovereign debt data, 2012. <https://www.gov.uk/government/publications/sovereign-debt-data--2>



The UK is claiming Sudan owes £650 million for a debt which may have been as small as £55 million in 1984.

rates of about 10 to 12 per cent annually, which results in significant increases of this debt. The debt owed to UKEF by Sudan currently stands at around US\$1 billion.⁶¹

The UK's Department for International Development (DfID) confirmed that if Britain writes off the debt owed by Sudan, this money will be accounted for as aid. Eurodad has calculated that if the UK cancelled the debt owed by Sudan in 2014, the debt relief would total \$1.18 billion (£740 million), inflating the UK aid budget by seven per cent. This means that significant amounts of money will be shifted away from real aid, and used instead to boost the UK's export industry. The same would apply to other western countries, like Denmark, to which Sudan owes huge debts as a result of export credit guarantees.

The cancellation of Sudan's unsustainable and unjust debts is much needed, however, the aim of debt cancellation should be to free up public resources for essential services and development rather than to subsidise the export industries of rich countries.

The fight against climate change

ECAs are not required to have procedures to ensure they respect the EU's climate policy objectives. They usually only assess the climate risks of projects according to the general requirements under the Common Approaches or the World Bank's International Finance Corporation's (IFC) Performance Standards. In cases where the OECD's sector understanding on Climate Change Mitigation and Water Projects is considered applicable, extra beneficial terms are granted, but again specific information on how such an assessment is made is not disclosed.

"OeKB⁶² has no formal, standardised procedure to assess project applications under the Austrian Export Promotion Law concerning their climate impacts." The external provision of fighting climate change has not reached the policies of ECAs, which support climate-destructive exports through guarantees. For example, the 2011 Euler Hermes' Category A project list includes two coal-fired power plants of 1,320 MW in India and 1,200 MW in Vietnam, despite the fact that the combustion of coal results in more CO₂ emissions than any other fossil fuel. One of Euler Hermes biggest clients is Airbus, whose production of airplanes is increasing the number of air travellers with devastating effects on the climate.

Problems of implementation

Even though ECAs claim they are following the Common Approaches, there are numerous examples where, in practice, their due diligence on social and environmental issues falls far short of what is required of them. A recent example, which is worth recording in some depth, is a dredging project in Brazil, supported by Atradius DSB. (See Case Study 4).

61 Submission to the All Party Parliamentary Group Inquiry into UK Export Finance, Annex D, <http://appgicr.files.wordpress.com/2012/07/ukef.docx>

62 Oesterreichische Kontrollbank AG, Austria's ECA.

Case study 4: Problems with implementation the environmental effects of dredging in Brazil

From 12-18 August 2012, the Dutch NGO Both ENDS visited the Suape sea port, some 40 km south of the city of Recife in north-eastern Brazil. The report⁶³ of this trip reviews the potential social and environmental impacts of dredging activities for an entry channel and harbour basin for the construction of the Promar shipyard.

This project is implemented by the Dutch dredging company Van Oord with export credit insurance from Atradius DSB. Van Oord has been involved in dredging activities in Suape since 1995. In addition to the dredging project for Promar, early 2012, Van Oord also received export credit insurance on behalf of the Dutch government for the deepening of the outer access channel for Suape port.

The report describes the clearly dramatic impacts of the dredging activities taking place in the Suape



Atlantic goliath grouper, recognized as a critically endangered species by the IUCN, allegedly died as a consequence of the dredging works of Van Oord
Photo <http://www.anda.jor.br/16/04/2013/peixe-da-especie-mero-e-encontrado-morto-na-praia-de-suape-em-pernambuco>



area, such as the loss of livelihoods for local fishing communities, the destruction of coral reefs and forests, and forced evictions. These impacts add to other problems related to the rapid industrialisation of the Suape harbour region, such as violence, sexual exploitation and the disruption of the social fabric.

The dredging project for the Promar shipyard suffers from a lack of transparency, particularly vis-à-vis the local communities. The limited public information on the project and the testimonies of people living in the Suape area do not suggest fundamental improvements in comparison to earlier dredging activities in the region. Thus an important conclusion of this report is that Atradius DSB did not consider social and environmental concerns in its decision-making process, despite its obligations to do so under the CSR policy that the Dutch government formulated for the export credit facility. The findings in this report also suggest that Van Oord may be in non-compliance with various aspects of the OECD Guidelines for multinational enterprises.

The report recommends a full public and participatory review of the project. Atradius DSB and Van Oord should consider setting up a complaint facility to serve as a starting point for a structural dialogue with local stakeholders to help improve the sustainable development agenda in the Suape region. Much more transparency would be required by Atradius DSB and Van Oord to allow for constructive multi-stakeholder dialogues that may help to solve many of the pressing social and environmental problems. Dutch stakeholders in the Suape harbour should consider promoting the setting up of an independent and permanent social and environmental monitor.



63 For the report, see: http://www.bothends.org/uploaded_files/document/130222_Report_Suape.pdf

The Common Approaches: ‘Open Sesame’?

ECAs cite their adherence to the Common Approaches as evidence of their compliance with the EU’s objectives and obligations.

The German government answered that their adherence to the Common Approaches and their social, ecological and development due diligence assures that they meet the external action provisions. Asked explicitly about fighting poverty and promoting democracy, they argue that their assessments assure that a project is sustainable and thus fights poverty and promotes democracy.

When asked about Portugal’s compliance with EU objectives and obligations with regard to officially supported export credits, the person responsible for Export Credits in the Ministry of Finance simply replied that Portugal will carefully try to comply with the Common Approaches.

However, the Common Approaches are an inappropriate benchmark for assessing compliance with the EU’s external action provisions. (See Box 6).

Box 6: Gaps between the OECD Common Approaches and EU obligations

1. The Common Approaches do not reflect the EU’s environmental and human rights objectives, as embodied in EU environmental directives and human rights undertakings. For example, the Common Approaches do not require a strategic environmental impact assessment (a key requirement of EU environmental assessments). Their treatment of human rights is extremely limited: there is no requirement to assess projects against the rights guaranteed under the Charter of the United Nations (which, by contrast, is specifically named in Article 21 of the Lisbon Treaty).

2. The Common Approaches are not legally binding, have no status in EU law and, moreover, contain a clause (article 28) that permits ECAs to derogate from the Common Approaches’ provisions and from any other standards in their entirety. No such derogations from the external action provisions are permitted under the Lisbon Treaty. It is worth mentioning that both these drawbacks have been



pointed out by Cephias Lumina, the UN independent expert on the effects of foreign debt on the full enjoyment of all human rights, who addressed the issue of export credits in his 2011 report to the UN General Assembly.

3. The social and environmental review required by the Common Approaches usually only focuses on projects. The ECA Regulation however requires ECAs to report on some country-level issues, such as the promotion of democracy or the eradication of poverty. Some ECAs indicated that such country-level issues are considered outside the scope of the reviews to be performed by an ECA.⁶⁴

4. The main set of standards through which the 2012 Common Approaches seeks to address human rights — namely the IFC⁶⁵ Performance Standards do not require compliance with (or even mention) the UN Declaration on Human Rights or the UN Declaration on the Rights of Indigenous Peoples. Furthermore the IFC does not require human rights impact assessments, merely indicating in a footnote that the client may wish to undertake human rights due diligence in limited, high-risk circumstances.

5. The Common Approaches do not foresee any kind of complaint mechanism or remedy in cases of non-compliance or human rights violations, although this is a crucial element in the UN Guiding Principles.

64 In a letter to Both ENDS, Atradius DSB wrote on 22 May 2012: “Two general remarks should be kept in mind for an accurate overview of the application of EU Regulation No 1233/2011: The environmental and social review performed by Atradius DSB focuses on projects. Some of your questions also apply to general country-level issues. These issues are outside the scope of Atradius DSB’s review.”

65 International Finance Corporation, member of the World Bank Group

Civil society's response to the European Commission's report

The EC screened the reports of the Member States and produced its review in the form of a 'Commission Staff Working Document' which was sent by DG Trade to the INTA committee on 14 December 2012. The EC's report was not made public until 19 April 2013. ECA Watch has the following concerns:

- The process has been unacceptable, both for the EP and for civil society. The EP's rapporteur drafted and presented its own initiative report before the EC had published any official assessment of ECA's compliance with the ECA Regulation.
- The report states that it is difficult to define a set of benchmarks against which ECAs' compliance with the EU's external action goals could be measured. ECA Watch agrees with the EC's recommendation that the Lisbon Treaty provisions *"could serve as a background against which to evaluate the policies applied to export credit transactions"*.
- ECA Watch believes that by highlighting *"a clear general willingness on the side of the Member States to apply policies to their export credit programs, whose objectives are in line with the general language of Articles 3 and 21"* the EC wrongly suggests that this willingness is sufficient. Although ECA Watch agrees that setting policy objectives in line with Article 21 is a necessary precondition for compliance, they do not constitute compliance by themselves. The EC needs to show proof that it leads to compliance by assessing the effectiveness of the policies that are in place. The cases studies highlighted in this report show how ineffective these policies presently are.

Conclusion

This first year of implementation was crucial to achieve the aims of the ECA Regulation and begin a process to improve the transparency, accountability and actions of ECAs. For this to work, ECAs need to fulfil both the spirit and the legal requirements of the ECA Regulation. They must allow full public oversight — both from Parliaments and from civil society — and ensure detailed monitoring of their activities. Whilst some ECAs are obviously taking the requirements seriously and are interacting well with civil society, others have shown themselves to be trying to stick to old-fashioned secrecy. It is clear from past experience that this secrecy will be hiding some very damaging projects.

This report provides just a few of the many examples of destructive projects still being supported by EU ECAs despite the ECA Regulation. Only when environmentally and socially destructive projects actually lose government-backed ECA support will we know that the ECA Regulation is living up to its promise.

Annex 1

Reporting Grid

Reporting country information

- Reporting Country
- Submission Date
- Reporting Institution (Government Department, ECA)

Reporting country legal and policy information

- Mandate/Legal status of ECA
- Officially-supported export credit programs (in the sense of Article 5 of the OECD Arrangement) during reporting period
- Annual reports available on the reporting year

Information on the reporting Member State's Export Credit policies

- General presentation of the reporting Member States' policies on export credits, including all information that can help the Commission in carrying out its evaluation regarding the ECA's compliance with EU objectives and obligations⁶⁶ (in the sense of Article 3, Annex 1 of EU Regulation 1233/2011)
- Special information on the following policies:
 - 1) **Environment:**
 - a) Do you apply the OECD Recommendation on Common Approaches to the Environment and Officially Supported Export Credits?
 - b) Any other relevant information?
 - 2) **Human Rights:**
 - a) Do you apply the Human-Rights related aspects of the Recommendation on Common Approaches, on Officially Supported Export Credits and Environmental and Social Due Diligence?

- b) Any other relevant information?

3) **Anti-Bribery measures:**

- a) Do you apply the OECD Recommendation on Bribery and Officially Supported Export Credits?
- b) Any other relevant information?

4) **Sustainable Lending Practices:**

- a) Do you apply the OECD Principles and Guidelines to Promote Sustainable Lending Practices in the Provision of Official Export Credits to Low Income Countries?
- b) Any other relevant information?

5) **Other policies**

Annual Activity Report data

- Explanatory note:

"Member States shall report, in accordance with their national legislative framework, on assets and liabilities, claims paid and recoveries, new commitments, exposures and premium charges." From Regulation 1233/2011, Annex 1.

Member States that have more than one ECA should do one single integrated report (reporting obligation is on the Member State as such, not the ECA). Where a Member State offers at the same time different types of products (pure cover and direct lending), the reporting under chapter IV should however differentiate.

A) If official support is provided in the form of export credit guarantee or insurance ('pure cover') in the sense of Article 5a1) OECD Arrangement:⁶⁷

- Overview of assets
- Overview of liabilities
- Aggregate nominal risk exposure
 - 1 January 2011
 - 31 December 2011

⁶⁶ This is a very important addition as it must not be forgotten that the Regulation's official reference is to 'EU objectives and obligations'

⁶⁷ Member States not using EUR should report the figures in their national currency and in EUR

- a) nominal risk exposure under insurance policies issued
 - 1 January 2011
 - 31 December 2011
- b) nominal risk exposure under promises and notices of cover
 - 1 January 2011
 - 31 December 2011
- **Premium Income**
- **Recoveries**
- **Claims paid**
- B) In case official support is provided in the form of Official Financing Support in the sense of Article 5a2) OECD Arrangement:**
 - **Overview of assets**
 - **Overview of liabilities:**
 - a) nominal value of officially supported loan portfolio
 - 1 January 2011
 - 31 December 2011
 - 1 January 2011
 - 31 December 2011
 - b) total value of off balance commitments
 - 1 January 2011
 - 31 December 2011
 - **Interest received**
 - **Annual profit/loss**

Contingent liabilities

- **Where contingent liabilities might arise from officially supported export credit activities, those activities shall be reported**

Evaluation and incorporation of environmental risks

- **Environmental risks:**
 - a) Number/exposure of transactions Category A
 - b) Number/exposure of transactions Category B
- **How are environmental risks, which can carry other relevant risks, taken into account in the officially supported export credit activities?**

Annex 2

Relevant elements of the Framework on Human Rights and Democracy

Certain elements of the Strategic Framework and Action Plan on Human Rights and Democracy relate directly to the ECA Regulation. For instance, the need for civil society organisations to be involved in discussions about an appropriate framework to assess ECAs' compliance with both the Regulation and reporting standards.

Relevant elements include:

Outcome I. Human Rights and democracy throughout EU policy

1. Incorporate human rights in all Impact Assessment
2. Genuine partnership with civil society, including at the local level
 - (c) Consolidate consultations with civil society, notably on policy initiatives and dialogues on human rights

Outcome III. Pursuing coherent policy objectives

8. Achieving greater policy coherence
 - (c) Ensure that EU policy documents contain appropriate references to relevant UN and Council of Europe human rights instruments, as well as the EU Charter of Fundamental Rights

Outcome IV. Human rights in all EU external policies

11. Make trade work in a way that helps Human Rights
 - (c) Ensure that EU investment policy takes into account the principles and objectives of the Union's external action, including on Human Rights
 - (e) Ensure that the current review of Council Common Position 2008/944/CFSP on Arms Exports takes account of human rights and International Humanitarian Law
15. Ensure promotion of human rights in the external dimension of employment and social policy: Promotion of universal ratification and implementation of the four ILO core labour standards:

the ban on child labour, the ban on forced labour, non-discrimination and freedom of association and collective bargaining

Outcome V. Implementing EU priorities on human rights

24. Freedom of expression online and offline
 - (d) Include human rights violations as one of the reasons following which non-listed items may be subject to export restrictions by Member States
25. Implementation of the UN Guiding Principles on Business and Human Rights
 - (a) Ensure implementation of the Commission Communication on Corporate Social Responsibility, in particular by developing and disseminating human rights guidance for three business sectors (ICT; oil and gas; employment and recruitment agencies), and for small and medium-sized enterprises (2013 by Commission)
 - (b) Publish a report on EU priorities for the effective implementation of the UN Guiding Principles (end 2012 by Commission)
 - (c) Develop national plans for EU Member States on implementation of the UN Guiding Principles (2013 by MS)

Outcome VI. Working with bilateral partners

- 31: Impact on the ground through tailor-made approaches
 - (c) Ensure that the human rights country strategies are effectively mainstreamed by the EEAS, Commission and Member States.

Annex 3

Civil society proposed Grid for an ECA annual reporting

I. Reporting country information

1. Reporting Country
2. Submission Date
3. Reporting Institution (ECA)
4. Responsible Government Department (if different from 3)

II. Reporting country legal and policy information

5. National law(s) defining mandate of ECA
6. Legal status of ECA
7. Guiding policies of ECA as of the beginning of the reporting year
8. Changes of (7) introduced during the reporting year
9. Names of officially supported export credit, insurance and/or guarantee facilities as of the beginning of the reporting year
10. Changes in (9) during the reporting year
11. Names of products other than in (9) offered by ECA during the reporting year
12. Countries off-cover as of the beginning of the reporting year
13. Changes in (12) during reporting year
14. Policy evaluations
15. Policy documents available in reporting year
16. Disclosure of (aggregate) data on transactions
17. Annual reports available on reporting year
18. Other policy developments the EC should know about

III. Accommodation of the general provisions on external action of the EU by the reporting country

19. Policy and procedure for assessing compliance of export credit support with EU external action goals of consolidating democracy, contributing to peace and security, and sustainable development
20. Policy and procedure, such as due diligence procedure, for assessing compliance of export credit support with EU external action goals of

solidarity and mutual respect among peoples, open/fair trade, eradication of poverty, and the protection of human rights, in particular the rights of the child.

21. Policy and procedure for assessing compliance of export credit support with EU external action goals of strict observance and development of international law, including respect for the principles of the UN Charter.
22. Policy and procedure for assessing compliance of export credit support with the goal of fighting climate change



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