

**“Human Rights and Transnational Corporations: Paving the way  
for a legally binding instrument”**

**Side event organised by the  
Permanent Missions of the Republics of Ecuador and South Africa**

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Statement by

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Excellencies, distinguished delegates, ladies and gentlemen

I would like to thank the Permanent Missions of Ecuador and South Africa for inviting me, in my capacity as Independent Expert on foreign debt and human rights, to participate in this important meeting.

I want to begin with three brief points:

- Can we rely on business enterprises to self-regulate in a manner that ensures that their activities do not undermine the enjoyment of human rights? Unfortunately, the experience of self-regulation – infamously manifested in the abuses that led to eruption of the global financial crisis in 2008 – suggests that we cannot.
- The Guiding Principles on Business and Human Rights are an important initiative. The problem in view is that they affirm the idea of self-regulation by business enterprises and, being voluntary, the principles do not impose

sanctions for non-compliance. This explains why business enterprises have enthusiastically embraced them.

- I support the elaboration of a binding international agreement on business and human rights.

My remarks on the desirability or otherwise of a legally binding international instrument on human rights and business enterprises draw on my report to the General Assembly in 2011 (A/66/271) which focused on the adverse effects of export credit agency-supported projects on sustainable development and the realization of human rights in the countries in which such projects are implemented.

Export credit and investment insurance agencies, commonly known as export credit agencies or ECAs, are collectively the major source of public financing for foreign corporate involvement, particularly in large-scale industrial and infrastructure projects in developing countries and emerging economies. In recent years, ECAs have assumed an increasingly significant role in the global economy, particularly in the context of the global financial crisis. A report by the European Network on Debt and Development estimated in 2011 that on average 80 per cent of the debt that least developing countries owe to Governments in the North is a result of export credits.

The secrecy with which most ECAs operate makes it difficult to obtain accurate information on the impact of the projects that they finance. Nonetheless, numerous reports have documented the harmful impact of such projects on human rights and the environment. As I pointed out in my report to the General Assembly, a significant number of the projects supported by ECAs, particularly large dams, oil pipelines, greenhouse gas-emitting coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation schemes, have severe environmental, social and human rights impacts. Human rights violations that have been reported include harassment of ethnic minorities, occupation of indigenous land, forced evictions and resettlement, lack of compensation, destruction of rural livelihoods, denial of access to basic services, violations of labour rights, threats to life and bodily integrity, increased

militarization, State repression, exclusion of women from consultation, restrictions on freedom of expression and association, insufficient participation of and consultation with people affected by the project and restrictions on access to justice.

In addition, export credit agencies often do not have adequate safeguards and due diligence, lack transparency and have been implicated in corruption. Many ECAs have resisted calls to publish information, claiming that they are exempt from transparency requirements owing to the commercial and international sensitivity of their activities and the confidentiality rule that protects them. Indeed, most of them are not obliged to disclose information about the potential adverse social and environmental impact of the projects that they support. Some agencies release the relevant information only after the transaction has been approved and subject to authorization from the client. Regrettably, this situation undermines any attempts to ensure that ECAs provide responsible credit, behave with due diligence and respect human rights and environmental standards.

Export credit agencies play an important role in the global economy. This role entails an additional responsibility for ECAs to conduct their business with transparency, accountability and due diligence and in strict compliance with internationally agreed standards on human rights and environmental issues.

### **The need for a binding international instrument**

The current international regulatory framework for ECA activities is woefully inadequate. It consists of non-binding principles and recommendations adopted by organizations such as the International Union of Credit and Investment Insurers (the Berne Union) and the OECD. The role of the Berne Union is limited to exchanging information on foreign buyers to reduce commercial risk and its guiding principles contain vague references to, inter alia, environmental sensitivity, combating of corruption and promotion of transparency.

On 28 June 2012, the OECD Council adopted revised common approaches for Export Credit Agencies relating to environmental and social due diligence<sup>1</sup>, but these revised guidelines still fail to provide for a consistent definition of social and human rights impacts, and hardly provide guidance on the issue when an application for an export credit should be declined due to environmental, social and human rights concerns.

To compound the problem, Governments rarely exercise due diligence concerning the actions of their national ECAs, nor do they have robust legislation designed to ensure that the activities of their ECAs do not have adverse extraterritorial impacts. Often, the agencies' operational policies and the national laws establishing them hardly include references to human rights standards. Nor do most ECAs have in place clear policies on the prevention of human rights abuses or on due diligence to identify potential harmful effects of projects on human rights and to mitigate them. In response to public advocacy several ECAs have instituted minimum environmental standards for large scale projects over the past years. While some ECAs have incorporated indigenous rights, cultural heritage sites, and forced resettlement into their voluntary 'environmental' guidelines, comprehensive human rights concerns remain unaddressed.

Many ECA home States lack effective provisions and mechanisms to adjudicate claims of human rights abuses resulting from projects backed by such agencies. Pillar III of the Guiding Principles on Business and Human Rights requires however that States set up effective grievance mechanisms to provide a remedy for such harm. In addition, transactions and projects supported by export credit agencies are often protected by confidentiality provisions that prevent their publication among the population and the potentially affected communities, thus undermining the human rights principles of transparency and participation.

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<sup>1</sup> OECD Working Party on Export Credits and Credit Guarantees, Recommendation of the Council on common approaches for officially supported export credits and environmental and social due diligence (the "common approaches") 28 June 2012, TAD/ECG(2012)5, available from: [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=tad/ecg\(2012\)5&doclanguage=en](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=tad/ecg(2012)5&doclanguage=en)

While the State where an export credit agency-backed project is implemented bears primary responsibility for the protection of human rights of the local population, the agencies' home States are responsible for the regulation and supervision of the activities carried out by their national export credit agencies.

The Guiding Principles on Business and Human Rights underscore both the obligation of States to ensure effective regulation of business enterprises including ECAs and enjoin ECAs to exercise due diligence to identify, prevent, mitigate and account for adverse human rights impacts of their activities or as a result of their business relationship. In a similar vein, the Guiding Principles on foreign debt and Human rights, endorsed by the Human Rights Council in June 2012, require lenders, including private and public financial institutions to conduct credible Human Rights Impact Assessments for loans.

I favour a two-pronged strategy to address these issues. First, there is a need to push further for the implementation of the Guiding Principles on business and human rights and those on foreign debt and human rights and to take stock about the progress made in relation to various business sectors, including in the banking and finance sector. It is important to ensure that common sector standards like the OECD common approaches fully reflect existing human rights obligations as they are outlined in the Guiding Principles on business and human rights or in the Guiding Principles on foreign debt and human rights. One important focus should be to call for the adoption of National Action Plans on Business and Human Rights as currently promoted by the Working Group on business and human rights. Such plans should be comprehensive and address issues related to the financial sector and ECAs.

Second, I share the view that a legally binding standard for business and human rights is necessary. Of course many issues need to be carefully considered. They include the issue of enforcement, of the extraterritorial application of human rights norms and the question of its scope of application, for example whether it should apply only to multinational enterprises or cover all businesses enterprises. This should however not prevent us from pushing for better standard setting to ensure that existing protection gaps can be addressed.

Of course resistance from certain sectors in the business community can be anticipated. Many consider the guiding principles as a non-enforceable voluntary standard – although they in reality reflect existing human rights norms, based on international treaties. Some States, in particular traditional home States of TNCs may also be reluctant to push for a legally enforceable treaty on business and human rights, fearing additional obligations for them and business enterprises headquartered in their territories.

In my view, elaborating a legally binding instrument will not necessarily endanger ongoing efforts to implement the existing Guiding principles. Rather, efforts in this regard could motivate business enterprises to demonstrate that they are seriously implementing existing human rights norms as reflected in the Guiding Principles to avoid being faced with stricter legally binding human rights norms. What is important is that international standards – whether in the form of the Guiding Principles or ultimately through a legally binding treaty – should contribute to the effective protection of affected individuals and communities.

Thank you.