Remarks by SRSG John Ruggie
"Engaging Export Credit Agencies in Respecting Human Rights"
OECD Export Credit Group's "Common Approaches" Meeting
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It is an honor for me to address this meeting of the OECD's Export Credit Group as you consider the important task of revising your Common Approaches. Forgive my mere virtual presence, but I am in New York attending the long-scheduled 10th Anniversary Summit of the UN Global Compact, one of the initiatives I helped create when I was Kofi Annan's Assistant Secretary-General for Strategic Planning. But my colleague, Andrea Shemberg, is there with you to engage in further discussion.

Permit me to say a few words about my ongoing UN mandate on business and human rights: its origins, objectives and current status. Then I will propose what I hope will be seen as constructive suggestions for the future directions of the Common Approaches. But first, some background.

Background

The international recognition of human rights is not new. The Universal Declaration of Human Rights dates back to 1948. But for many years, attention was focused on human rights abuses by States and their agents.

The Business and human rights agenda began to be hotly debated in the 1990s, as a byproduct of that decade's wave of privatization, outsourcing and off-shore production; the fact that extractive and infrastructure companies began to operate in increasingly tough neighborhoods; and because companies that were expanding abroad assumed that getting a legal license to operate from a government, no matter how corrupt and unresponsive it was to the needs of local populations, also provided it with a viable social license to operate.

The worst corporate-related human rights abuses have taken place in areas affected by conflict, or where government otherwise lacks the capacity or will to govern in the public interest—where rule of law tends to score low, and corruption high.

Reputable companies may not commit the worst offenses themselves, but they are sometimes drawn in through third parties connected to their operations, such as security forces or other entities in their value chain, with the company being accused of complicity in acts committed by the third party. In a growing

number of cases such allegations have included crimes against humanity and war crimes. More than fifty cases alleging egregious violations have been brought against companies under the U.S. Alien Tort Statute since the first such case was heard in 1997.

Other instances include forced displacement of populations with no or inadequate compensation, or more generally a lack of due process for land acquisition; labor rights abuses; denial of access to livelihoods; and pollution of the only available sources of drinking water.

This list is not exhaustive: my research shows that companies have impacted just about all internationally recognized human rights, including by interfering in the exercise of classic civil and political rights like freedom of assembly.

At the same time, individuals and communities increasingly are pushing back against such adverse impacts. As a result, stakeholder-related risks to companies have risen rapidly. They include delays and disruptions of operations; problematic relations with local labor markets; higher costs for financing, insurance and security; reduced output; diverted staff time and reputational hits; and possible project cancellation, forcing a company to write off its entire investment and forgo the value of its lost reserves, revenues and profits, which can run into the billions.

Indeed, one global company recently was estimated to have experienced a $6.5 billion “value erosion” over a two year period from such sources—a double digit percentage of its annual profits. This is a lose-lose situation: human rights are adversely impacted and serious financial losses are incurred.

So while it may seem ironic, it is not entirely surprising that companies and business associations have started to complain about how little help companies get from their home governments in identifying and addressing such risks. Companies themselves typically lack adequate information about the types of human rights dilemmas they may encounter on the ground.

Home-governments, from the capital on down to embassies, are fully geared up to promote business abroad, but generally lack the capacity or interest to help companies address the fall-out generated by the very projects those governments support. There is something fundamentally wrong with this picture. And ECAs, as key enablers, need to play a role in correcting it. I’ll return to this momentarily. But first, a brief review of my mandate.

Mandate

The mandate was established in 2005, following a deeply divisive debate triggered by an initiative called the draft Norms on Transnational Corporations and Other Business Enterprises, proposed to the then UN Commission on Human Rights by a subsidiary body. Intended to become a binding instrument, it so intermingled the obligations of states and companies that it would have been impossible to determine with certainty who was responsible for what on the ground.

Business was vehemently opposed, human rights advocacy groups strongly in favor. The Commission declined to adopt the text, and instead requested the UN Secretary-General to appoint a Special Representative on the issue of business and human rights, to move beyond the stalemate. That's how I came onto the scene.

The Framework

Now fast forward three years: in 2008 the newly-established UN Human Rights Council unanimously welcomed a policy framework I proposed for better managing business and human rights challenges. It rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.

The Council also extended my mandate until 2011, asking me to "operationalize" the framework—to produce Guiding Principles for the implementation of what is now called the UN Framework for business and human rights.

Even before the operationalization has been fully concluded, the rapid uptake of the Framework demonstrates its utility—or at least the fact that a vacuum existed in this space that it is helping to fill. A number of countries have already drawn on the Framework in conducting their own policy assessments, including at least four ECAs. Global business associations have endorsed it, and several global companies are adapting their internal control and oversight systems to incorporate it. Civil society actors have employed the Framework in their human rights analytical and advocacy work. And investors are using it in their discussions with companies.

The OECD Investment Committee has invited my involvement in updating the Guidelines for Multinational Enterprises, to better reflect recent

developments in business and human rights; the International Finance Corporation has done the same as it revises its Performance Standards, which are tracked by project finance banks through the Equator Principles; and I provided input for the human rights section of the ISO26000 Social Responsibility Guidance.

This brings me to the role of ECAs. In the remainder of my time, I will try to address some of the obstacles ECAs say they face in considering the human rights impacts of the activities they support, and suggest some ways the ECG might consider moving forward in step with the broader international community.

Implications of the UN Framework for ECAs

As I see it, ECAs potentially are running two risks in relation to human rights. The first is the risk that a client's business activities or relationships contribute to human rights abuse abroad, with the moral, reputational, political and in some cases legal implications this entails for an ECA itself. The second is the financial risk to the project that may result from its adverse impact on the human rights of individuals and communities, which in turn could affect the ECA's own exposure. These risks are inextricably linked. But in the case of many if not most ECAs, they are currently unknown and unmeasured. Why is that the case? Why do you not, as a matter of course, practice human rights due diligence yourselves, and require it of projects you support?

Without claiming to have done an exhaustive survey, I've seen ECAs invoke five different rationales: (1) lack of statutory authority; (2) claims by some that they are commercial entities, and as such have no role in relation to human rights; (3) that the subject of human rights is too big; (4) that the role of ECAs is too small, and their leverage too limited; and (5) that the need to avoid human rights becoming a source of competition among ECAs impedes progress. Let me take up each in turn.

First, some ECAs say they would need statutory authority to incorporate human rights impacts into their work. I am not an expert on the legal charters of all ECAs. But I wonder whether they do, in fact, require new legislation in order to manage the risks that they may be contributing to corporate-related human rights abuse abroad, as well as their own exposure to the financial consequences that may follow. Let me put it this way: I am confident that all ECAs currently have the authority to assess and manage traditional financial risks. But many ECAs simply do not know, and cannot show, that they are adequately identifying and managing human rights issues that may affect those risks. That's what needs fixing.

Moreover, I doubt that there is any Government among the ECG countries that disagrees with the fundamental principle that as ECAs pursue their statutory mission, they should not add to the human rights burdens of individuals and communities in capital importing countries. If I'm wrong, then I am prepared to try to persuade your parliaments.

Second, some ECAs state that they are not public entities—that they function strictly as commercial entities. One could argue that all ECAs operate on the basis of statutes that assign them a public policy role. But let's leave aside the State nexus question, for it matters little to the issue at hand.

As affirmed in UN Human Rights Council resolution 8/7, adopted unanimously in June 2008, all business enterprises have "the responsibility to respect all human rights"—where respect means to act with due diligence to avoid infringing on others' rights. So if your ECA is a commercial entity, this language applies directly to you.

If yours is a public entity, then you can hardly ask less of yourselves than your governments, collectively, have agreed to ask of business. And no public entity should be using public funds or public authority to contribute to human rights harm in other countries—or have to admit that it has no way of knowing whether or not it does.

A third argument is that the issue of human rights is too big and complex, encompassing too many things. In fact, in relation to business, human rights are relatively straightforward. Human rights are about treating people decently. They are at the heart of the social sustainability of enterprises and markets. The total number of internationally recognized rights is not large to begin with. And in practice some rights will be more relevant than others in particular industries and circumstances—for example, resettlement issues in extractives, or the security of the person in conflict zones. Numerous guides exist explaining the meaning of internationally recognized rights in business contexts, including some published by business groups themselves. In short, human rights are no bigger or more complex than the environment was as a policy issue a generation ago, which you now include routinely in your work.

In any case, no one expects ECAs—or business, for that matter—to solve all the world's problems. But both are expected to not make them worse.

Fourth, ECAs frequently say that they are only a small part of the equation, that there are other financial actors providing greater support, or that they are only one player in larger syndicates. If there is one thing I have learned in the course of my mandate, it is this: there is no single silver bullet solution to

business and human rights challenges. There are only many small ones. And if all players that considered themselves to be just one part of the solution were to do nothing, then nothing would ever change. Fortunately, many are doing their part, as the examples I cited earlier show. ECAs, too, can do the same. Besides, collectively you have considerable leverage.

Fifth and finally, there is the level playing field argument. No single ECA wants to get too far our front of others, fearing that this would disadvantage its domestic businesses. But the answer to that surely is the Export Credit Group itself. It is the perfect vehicle to overcome such collective action problems among participating States. That's why it exists. However, the Common Approaches at minimum should reflect current international practices, not lag behind them.

Suggestions for the Common Approaches

In drawing my remarks to a close, and if you haven't already switched channels, allow me to offer a few suggestions for steps you might consider in reviewing the Common Approaches with regard to human rights.

1. Recognize the relevance of human rights. The Common Approaches should clearly acknowledge that human rights are a critical element in the social sustainability of enterprises and markets, and explicitly recognize ECAs' role in fostering the corporate responsibility to respect human rights.

2. Build ECA capacity on human rights. Incorporating human rights into the work of ECAs requires them to have capacity that not all of them posses at this time. So perhaps the OECD should consider creating a human rights working group with two functions: to develop tools suitable for ECAs in carrying out human rights due diligence; and to help build the necessary knowledge base and competency of ECAs. Such a group would benefit from drawing on the expertise of human rights practitioners and multilateral financial institutions like the IFC, EBRD and EIB—and, of course, colleagues from the OECD itself.

3. Conduct and require due diligence. The business and human rights agenda addresses business-related human rights risks to individuals and communities, as well as stakeholder-driven financial, operational and reputational risks to business itself. The appropriate response by ECAs to managing both sets of risk is to require human rights due diligence—of themselves and, wherever their access allows, of project sponsors. As an interim measure until these processes are developed,

the Common Approaches could consider following the 2010 IFC Performance Standards, which no longer cover merely project finance.

4. Incorporate risk of conflict indicators into the Common Approaches. Particular attention needs to be paid to the possibility that ECA clients may get drawn into egregious human rights violations where a project operates in or near conflict-affected areas. This requires what the OECD Risk-Awareness Tool calls "heightened due diligence," and it should include assessments of whether the project itself might contribute to, exacerbate, facilitate or encourage the conflict. In such situations, the Common Approaches could consider the use of escrow accounts on the project income stream to maintain ongoing leverage after the supported funds have been drawn down, and thus limit ECA exposure.

I know that my suggestions leave important practical questions unanswered. My colleagues and I would be pleased to work with you to help answer them. The first and most fundamental step is the urgent need for you to integrate the corporate responsibility to respect human rights into the Common Approaches. Export Credit Agencies must not be laggards where so much is at stake—for individuals, communities, businesses, and ECAs themselves.

Thank you, and best wishes for a successful meeting.

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