



**United Nations Secretary-General's Special Representative  
on business and human rights**

29 September 2010

To the Members of the OECD's Export Credit Group:

Many thanks once again for allowing me to present remarks at your meeting on 23 June 2010. Since then, I have received a number of follow-up inquiries from members of the ECG and the Secretariat and would like to take this opportunity to respond to several issues that have been raised.

At the outset, let me say how much I welcome the positive step that the ECG has taken to establish an informal human rights working group. As I suggested in June, this group could be an important means for building the capacity of ECAs on human rights, particularly by creating the necessary knowledge base and human rights competency, as well as developing tools suitable for ECAs in carrying out human rights due diligence.

In June I also recommended that the ECG (1) explicitly recognize human rights in the Common Approaches as a critical element in the social sustainability of enterprises and markets, coupled with the role of ECAs in fostering the corporate responsibility to respect human rights; (2) conduct human rights due diligence and require such due diligence of clients; and (3) incorporate risk indicators for conflict so ECAs are aware of when heightened due diligence may be required.

In response to questions raised, let me elaborate upon five points:

**(1) Human rights due diligence relates to project and transaction-level human rights**

**impacts:** The relevant provisions of the UN Framework (endorsed by the Human Rights Council), as well as my recommendations for the Common Approaches to require human rights due diligence, address project or transaction-specific adverse human rights impacts. Human rights due diligence is not a tool to judge the human rights performance of countries or regions. It is intended help ECAs and their clients to better manage human rights risks and respect the spirit and principle of human rights within their context of operations. I mentioned in my June remarks that if any ECA believes that its statutory limitations do not allow it to ensure that it does not contribute to adverse human rights impacts abroad through the projects they support, I will be happy to help persuade their parliaments otherwise. Surely none will claim the obverse: that they have the right to contribute to adverse impacts abroad, even if only by willfully ignoring the very possibility that they could do so.

**(2) The importance of referencing existing international human rights standards:**

In June I urged that the revised Common Approaches include an explicit statement regarding human rights and the corporate responsibility to respect them. This forms the first step for moving ECAs in line with international practice. Human rights in this context means, as a baseline, those rights recognized in the International Bill of Human Rights (consisting of the

Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the ILO core conventions. The principles these instruments embody are the foundational elements of the international human rights regime. The instruments do not impose legal obligations on companies directly, but companies can and do infringe on the enjoyment of the rights that these instruments recognize. Moreover, those rights are the benchmarks by which other social actors judge companies' human rights practices. Referencing these standards would not prevent the Common Approaches from highlighting other standards that may be relevant to ECAs and their clients in certain situations, such as those relating to conflict situations or to address populations that are particularly at risk. But the principles of the International Bill of Rights and the ILO core conventions are the authoritative starting point.

**(3) Which rights are relevant to ECAs and the Common Approaches?** My research has documented that companies can affect virtually the entire spectrum of internationally recognized human rights. Therefore, in principle all of them are potentially relevant, and any ex ante limited list of rights is bound to be misleading. However, some rights will be more relevant in some activities, sectors or contexts, and those will be the focus of attention in any given instance. Accordingly, I have suggested that the prudent thing for companies to do is to make sure they haven't missed any rights when they do their due diligence, and the best way to do that is to look to the International Bill of Human Rights and the ILO Core Conventions. Therefore, it could be highly risky for ECAs to cherry-pick a subset of rights for all clients in all situations. The aim is to generate dynamic thinking about potential impacts, not to provide yet another check-the-box exercise.

**(4) The question of leverage:** Some ECAs claim that in many instances they lack leverage. The claim conflates two very different processes. Whether or not an ECA has leverage over a business and its various business partners is irrelevant to the act of carrying out the assessment of potential impacts. Let us say that a very serious and high probability risk is uncovered as a result of an assessment, and that the ECA has relatively little leverage over the parties. Would we conclude that the ECA should go ahead and support the project because it lacks leverage to alter the risk factor? Or would we conclude that more investigation is warranted before taking the risk of supporting a project that has a high probability of contributing to serious human rights harm. ECAs cannot make informed decisions unless they carry out human rights due diligence--irrespective of their leverage for shaping subsequent behaviors. In short, leverage comes into play only in helping the ECA to decide what to do, once the human rights risks of a project have been established.

**(5) Use existing tools and develop additional tools as needed:** In June I noted that the business and human rights agenda addresses business-related human rights risks to individuals and communities, and also 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 clients. I fully support taking practical steps forward, such as utilizing existing tools to make due diligence operational. As an interim step, while the working group adapts and develops further tools, ECAs could use the revised 2011 IFC Performance Standards. In the revised 2011 Standards, an explicit effort has been made to recognize the responsibility to respect and align them more closely with human rights and the UN Framework, although they do not provide the full coverage I have recommended. The important thing is to get started.

**(6) Delay until after June 2011**

There have been questions from some members of the ECG as to whether it is advisable to wait for me to submit my final recommendations to the UN Human Rights Council in order to have

further clarification on what is ECAs should consider with regard to human rights. I do not believe there is any need for delay. My "final report," as requested by the Council, will consist of "Guiding principles for the implementation of the Protect, Respect and Remedy framework." The Guiding Principles will simply reflect a shift from narrative language to declaratory language regarding what states and business should do. They will contain no new elements. Furthermore, the framework as it stands was quite sufficient for the OECD Council of Ministers to reference it in authorizing an update of the OECD Guidelines for Multinational Enterprises, and indicating that a new human rights chapter should be added. There is no reason why this should differ for the OECD ECG. Therefore I strongly encourage the revision of the Common Approaches to move forward without delay.

As a final note, permit me to add that the business community has welcomed my recommendations on due diligence and company-level grievance mechanisms, and many companies have started to announce on their websites and through other means that they are realigning their internal enterprise risk management systems so as to include these elements. The ECG now has the opportunity to bring its policies and practice in line with all other major players in this area.

I wish you luck in your continued deliberations.

With best regards,



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