

**AMNESTY  
INTERNATIONAL**



**Review of the Revised Recommendation on Common Approaches on the  
Environment and Officially Supported Export Credits**

**Submission of Amnesty International**  
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## **INTRODUCTION**

This document is a submission by Amnesty International to the review of the Revised Recommendation on Common Approaches on the Environment and Officially Supported Export Credits (Common Approaches). The approach followed in this paper draws on the framework outlined by the UN Special Representative of the Secretary-General on business and human rights, Professor John Ruggie, which looks both at the State's duty to protect against human rights abuses by business and the responsibility of business actors to respect human rights. Amnesty International is calling for a human rights due diligence framework to be built into the operations of ECAs and their client companies – in particular by integrating human rights into the impact assessment process currently laid out in the Common Approaches.

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Export Credit Agencies (ECAs) are set up by governments for the purpose of providing insurance and credit services to corporations from their country that seek to do business abroad. ECAs support a range of commercial transactions, including major commercial projects. This submission focuses primarily on the project context, but many of the issues raised and recommendations made are also relevant to all other transactions supported by ECAs.

The commercial projects that ECAs support often face substantial risks in relation to their potential impact on human rights. ECAs support projects in environments that are considered high risk – both from a commercial and political perspective. The political risks against which ECAs insure companies include civil war, social unrest, political coup or sudden change in government - contexts often associated with increased risks to human rights. ECAs also frequently support industries of a particularly invasive nature, such as oil, gas and mining, which are often associated with environmental damage and human rights harm.<sup>1</sup>

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<sup>1</sup> The BERNE Union (the international union of credit and investment insurers) confirmed that one of the reasons why ECAs were able to deliver "excellent results" in 2007-2009 is their major involvement in large oil and gas, as well as mining and other natural resources projects. The Berne Union, 2008 Yearbook, page 12.

Numerous credible reports have documented adverse human rights impacts as a result of ECA-supported projects. Amongst the abuses reported are incidents of violence, forced displacement of people, violations of the rights of Indigenous people and denial of access to basic services.<sup>2</sup> For example, in the case of the Chad-Cameroon Pipeline, which received ECA support, affected communities were exposed to serious health risks from dust pollution, stagnant water, oil flares and toxic waste.<sup>3</sup> Consultation processes with affected communities – which included Indigenous peoples – were also reported to have been inadequate and to have left people exposed to human rights violations.<sup>4</sup> Despite such reports, and the risks associated with many projects that apply for ECA support, most governments do not require ECAs to consider the human rights impacts of the projects and commercial activities that they support. Almost no ECA has in place adequate due diligence measures that would enable the ECA to identify potential negative human right impacts of projects and therefore act to prevent or mitigate harm to human rights.

While the primary responsibility for the protection of human rights lies with the state where a company or project operates, a failure of that state to protect rights does not mean ECAs and their home states have no responsibility in cases where a project, to which they have provided support, leads to human rights abuses. The failure of ECA home states to make sure their ECAs take reasonable action to become aware of and prevent commercial activities that they support abroad from leading to human rights harm puts ECA home states at risk of effectively supporting abuses in other countries. The failure to take adequate and reasonable steps to prevent decisions and actions taken within the state's jurisdiction from leading to abuses beyond the state's jurisdiction may, in some cases, represent a breach of the state's international legal obligations. At the very least such 'foreign policy incoherence' undermines the professed commitments of many OECD states to promotion of human rights globally and achievement of the Millennium Development Goals.

Human right bodies are increasingly recognising that human rights obligations can extend beyond borders in certain circumstances.<sup>5</sup> The Committee on Economic, Social and Cultural Rights (ICESCR), for instance, has confirmed that states have a legal obligation to respect economic, social and cultural rights beyond their borders, which means that they may not take action that has the effect of undermining economic, social and cultural rights beyond their borders.<sup>6</sup> This would include refraining from supporting business projects that would undermine economic, social and cultural rights in other countries.

### *Due diligence for human rights*

In the context of human rights the concept of due diligence describes the steps that must be taken to become aware of, prevent and address adverse human rights impacts. While the content and scope of due diligence may differ depending on context, the principles of due diligence are well understood. Governments carry out due diligence in relation to a range of decisions and actions that have impacts both within their jurisdiction and beyond it.

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<sup>2</sup> For detailed examples of cases receiving ECA support which resulted in human rights abuses check the ECA-Watch report, *A race to the bottom: creating risk, generating debt, and guaranteeing environmental destruction*, March 1999, [http://www.eca-watch.org/eca/race\\_bottom.pdf](http://www.eca-watch.org/eca/race_bottom.pdf); *Race to the Bottom: take two*, 2003, [http://www.eca-watch.org/eca/race\\_bottom\\_take2.pdf](http://www.eca-watch.org/eca/race_bottom_take2.pdf).

<sup>3</sup> Horta, Korinna, et al. *The Chad-Cameroon Oil & Pipeline Project: A Project Non-completion Report*. Environmental Defence, Center for Environment and Development, and Chadian Association for the Promotion and Defence of Human Rights. April 2007. [http://www.forestpeoples.org/documents/africa/chad\\_cameroon\\_proj\\_report\\_apr07\\_eng.pdf](http://www.forestpeoples.org/documents/africa/chad_cameroon_proj_report_apr07_eng.pdf)

<sup>4</sup> See note 3

<sup>5</sup> The UN Human Rights Committee has clarified that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." Human Rights Committee, General Comment no. 31, 26 May 2004, para 2. Similar conclusions have been drawn by national, regional and international Courts. For more information see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971; International Court Of Justice, Reports Of Judgments, Advisory Opinions And Orders, Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory, Advisory Opinion Of 9 July 2004. From the European Court of Human Rights see judgments *Soering v UK*; From the International American Court of Human Rights see *The Coard case* and *Armando Alejandro Jr. and Others v Cuba* ("Brothers to the Rescue").

<sup>6</sup> See United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 12 (The right to Adequate Food), para 36-37, General Comment No. 14 (The Right to the Highest Attainable Standard of Health), para. 39 and General Comment No. 15 (The Right to Water), para. 31-34, contained in 'Note by the Secretariat: Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

For example, due diligence principles are reflected in the approach taken by ECAs and the Common Approaches to the environmental impacts of ECA-supported projects. The Common Approaches recognise that ECAs have a responsibility to ensure that they are not supporting commercial activity that would harm the environment in another country. Many ECAs expect that projects for which they provide support will adhere to accepted international standards in relation to environmental impact. However, despite the existence of international human rights standards ECAs and the Common Approaches make little or no attempt to ensure that projects and commercial action they support do not cause or contribute to breaches of these standards.

In other contexts the OECD has recognised the need to align policies and activities of member states that have impacts beyond their jurisdictions with human rights standards. For example, the OECD has recognised the importance of improving development assistance by taking human rights standards into account. The OECD Development Assistance Committee has developed principles for promoting and integrating human rights into development processes, and has recommended that donor countries should, inter alia, respect human rights principles in their policies and programming.<sup>7</sup> While ECAs do not provide international cooperation and assistance, their operations have clear impacts abroad.

### **Box 1: The Ilisu Dam Case**

The decision in July 2009 by the governments of Austria, Germany and Switzerland to withdraw ECA support to the Ilisu Dam in Turkey was welcomed by Amnesty International. The process established in this case demonstrates that human rights due diligence by ECAs is workable.

When the three ECAs granted their support, a committee of independent experts was set up to evaluate and monitor the implementation of an agreement between the governments of Switzerland, Germany and Austria and the Turkish government on the impacts of the dam, including the social and environmental impacts. The agreement required the Turkish government to put in place mitigating measures, adequate compensation and a comprehensive scheme for the resettlement of affected communities. In July 2009, following repeated breaches of this agreement, the governments of Germany, Switzerland and Austria withdrew support to companies involved in the project.

**The Common Approaches should build on this useful example which focused on social and environmental impacts and make recommendations to help states establish measures to ensure that human rights standards are also monitored and enforced.**

## **Establish a human rights framework for the Common Approaches**

A robust due diligence framework is necessary to ensure that ECAs do not provide support to commercial activity that causes or contributes to human rights violations. This section outlines recommendations on how the Common Approaches could provide guidance to ECAs to establish a human rights due diligence framework. The main issues covered are: a clear requirement for all ECAs to prevent harm to human rights and exercise due diligence; basic elements of a human rights due diligence process; transparency and disclosure of information; accountability.

### **1. Clear and specific policy on preventing harm to human rights**

States should ensure that commercial activity that they support via ECAs does not result in harm to human rights in other countries. However, national legislation establishing ECAs rarely includes

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<sup>7</sup> OECD-DAC, 'Action-Oriented Policy Paper on Human Rights and Development' (2007) OECD Doc DDC/DAC (2007) 5/FINAL.

any reference to human rights, and almost no ECA has any reference to human rights standards in their operational policies. This is a deficit that the Common Approaches should address.

The Common Approaches reference a range of standards but make no reference to international human rights standards. The Common Approaches recommend that projects are benchmarked against host country standards, relevant aspects of all ten World Bank Safeguard Policies and - for private sector funding - all eight IFC Performance Standards. Member states can then choose to apply “any relevant internationally recognised standards” that are more stringent, such as those from the European Community or sector-specific standard. The standards currently referenced within the Common Approaches do not address human rights consistently, or adequately. The IFC Performance Standards, for example, contain provisions aimed at avoiding some negative social impacts of projects, such as involuntary resettlement and negative impacts on community health; however, these provisions are not adequate to comprehensively address all the human rights, which may be affected by projects. There is also inadequate attention within the Common Approaches to gender issues, the rights of Indigenous peoples and the impacts of projects can have on vulnerable or marginalized groups. All of these issues should be addressed in a human rights framework.

The absence of any reference to human rights standards within a Common Approaches framework is conspicuous and should be rectified in the current review. The Common Approaches should recommend that ECA-backed projects are assessed against international human rights standards, with a clear view to preventing projects from causing or contributing to human rights abuses. Each ECA should have in place a clear policy on prevention of harm to human rights and the exercise of due diligence to this end.

All transactions and projects supported by ECAs should be informed by such human rights policy. In this respect the Common Approaches must be amended to remove the element of discretion in deciding which standards should apply to each transaction.<sup>8</sup> Moreover the scope of the Common Approaches must be widened to ensure that all official support provided by ECAs is covered, not only transactions with a repayment term of two years or more.<sup>9</sup> Unless these changes are made, a substantial part of ECA supported transactions will in practice be exempted from any screening requirement or will be allowed to fall below international standards.

## **Box 2: The corporate responsibility to respect human rights**

When a government fails to protect people’s human rights against harm by non-state actors, this amounts to a violation under international law. However, the fact of government failure to protect rights does not absolve the non-state actor from responsibility for their actions and the impact of them on human rights.

The emerging consensus on corporate responsibility for human rights is that companies should – as a minimum – respect all human rights. This is the position articulated by Professor John Ruggie, the UN Special Representative of the Secretary-General (UN SRSG) on the issue of human rights and transnational corporations and other business enterprises, in his 2008 report to the Human Rights Council.

**The Common Approaches should be aligned with the increasing consensus at the international level that companies must operate in line with their responsibility to respect all human rights.**

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<sup>8</sup> According to paragraph 13, section IV of the Common Approaches “in exceptional cases, a member may decide to support a project that does not meet the international standards against which it has been benchmarked”.

<sup>9</sup> Currently the Common Approaches only apply to officially supported export credits with a repayment term of two years or more (Common Approaches, section I, paragraph 1).

## 2. Adequate processes to assess potential human rights impact

Establishing a clear requirement for ECAs to exercise adequate due diligence to ensure that the projects to which they provide support do not cause or contribute to human rights abuses is a vital foundational step. The Common Approaches review should also establish some specific guidance on human rights due diligence policies and processes. The following should be considered as key elements of any human rights due diligence process for ECAs.

### (a) Initial impact assessment

ECAs should undertake preliminary assessment of the human rights context of any project before granting support. All ECAs have to carry out a process of classifying projects according to their different likelihood of impact, and a preliminary human rights impact assessment could inform this classification and subsequent review of projects.<sup>10</sup> The preliminary impact assessment should identify individuals or communities likely to be affected by the proposed project, any major concerns as a result of proposed activities and collect the proposed responses of the state and the commercial operators of the project. The preliminary human rights impact assessment should be conducted in an open and transparent manner involving consultation with those likely to be affected by the commercial activity. Equality and non-discrimination should be ensured throughout the impact assessment process. Everyone whose rights are affected by the project should be enabled to participate in the impact assessment process and proactive steps should be taken to ensure that people are not excluded, with specific attention paid to the participation of women and of marginalised groups. The initial impact assessment should be made public in the home state of the ECA as well as the host state of the project or commercial activity.

### (b) Ongoing monitoring

Ongoing monitoring of the human rights context and impacts of a project and action to address problems identified are vital components of effective due diligence. Without this due diligence becomes a box ticking exercise, lacking credibility or value. ECAs should establish a clear system for monitoring projects, with specific reference to the human rights risks that have been identified in the impact assessment process, as well being able to identify new risks that may emerge as projects develop. While some monitoring can be based on receipt of information from the client company, ECAs should have a system for assessing reports from clients as well as conducting independent verification exercises where appropriate. For example, in cases of heightened risk or where community complaints are received ECAs should have in place a means to independently assess the situation.

### (c) A complaints or grievance mechanism

ECAs should have in place a system or mechanism to become aware of community grievances. The aim of the grievance mechanisms should be to provide affected communities with an avenue to voice and solve the problems linked to a project, but should also be one of the tools the ECA can use to monitor project implementation and impact.

The grievance system or mechanism may vary from project to project, and could be operated cooperatively and jointly with other ECAs and institutions, but must be based on core principles of accessibility, independence from the commercial project and clear, fair and non-discriminatory processes.

### (d) Engagement with the project host state

All ECAs should have clear policies for engagement with the host state on issues of human rights. The Illisu Dam case (see box 1) provides one example of how this might work. However, different contexts would require different approaches.

### (e) Establishing core requirements for all ECA clients - What ECAs should require of companies that they support:

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<sup>10</sup> According to section II, paragraph 6 of the Common Approaches, applying projects can be classified in three categories. Category A – projects with potential to have significant adverse environmental impact. Category B – projects whose environmental impacts are less adverse than category A projects. Category C – projects likely to have minimal or no adverse impacts.

A key element of ECA due diligence is ensuring that the companies to which they provide support are committed to respecting human rights and that they carry out adequate due diligence. ECAs should have in place policies and measures to proactively ensure that robust human rights due diligence is undertaken by their clients. The responsibilities and commitments of clients in relation to prevention of negative human rights impacts should be clarified within the contractual agreements with the ECA. The core requirements for companies applying for state support could include:

- **Human rights policies**

Companies seeking state support should be required to have in place a human rights policy in line with international human rights standards, and systems to ensure that corporate operations do not result in harm to or abuse of human rights. Clients should be able to demonstrate that their policy is integrated into its management systems and is implemented and monitored with adequate resources throughout the company.

- **Requiring client companies to act within a human rights due diligence framework**

ECAs should require companies to exercise due diligence in relation to the project or commercial activity for which support is granted. This is additional to the ECA's own due diligence. This requirement is critical to ensure that companies operate in line with the responsibility to respect rights (see box 2). To achieve this, the contractual obligation between the ECA and the client should specify the steps that a company should take in order to discharge its responsibility to respect human rights.

- **Requiring clients to conduct a full human rights impact assessment**

Assessment of human rights impact is at least as critical as assessment of environmental impact, and such assessment is increasingly seen as vital for business. Environmental and social impact assessments are not sufficient to identify, assess or address the range of human rights impacts a project is likely to have. This point was expressly recognised by the UN Special Representative on business and human rights, who has stated that, "While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis."

A core element of client due diligence should include carrying out a full impact assessment – in particular for projects that are categorised as having significant adverse human rights impacts. This would be in addition to the initial assessment carried out by the ECA as part of its own due diligence. This assessment should involve: the provision of information on all aspects of the project to people likely to be affected, in a manner and within a time frame that ensures the information is accessible and useful; participation of the affected communities or individuals; disclosure, in accessible form, of the outcomes of the assessment, including a process to allow people to query and challenge the assessment. The impact assessment process should ensure that identification of impact includes careful attention to the fundamental human rights principles of equality and non-discrimination. For example, impact assessments should include a gender analysis throughout, ensuring that any specific and disproportional impacts on women in affected communities are assessed.

As a result of the impact assessment an Action Plan should be devised in consultation with affected communities to prevent harm to human rights. Such Action Plans should be submitted to the ECA as a precondition before support to the client is approved.

**Currently the Common Approaches require that client companies carry out an Environmental Impact Assessment to be submitted to the ECA before support is granted. ECAs should also require human rights impact assessments.**

- **Engagement with affected communities and individuals**

All companies receiving ECA support should present a clear explanation of how affected communities will have access to information and be consulted on decisions and activities that are likely to affect their human rights throughout the project's lifespan. Again, careful attention should be paid to the principles of equality and non-discrimination, including ensuring engagement processes pays adequate attention to gender dynamics and potentially marginalized groups. In cases where indigenous people are likely to be affected in the context of supported transactions, given the special relationship Indigenous peoples have with their ancestral lands, international human rights standards would require that their informed consent be obtained prior to any developments on their lands. In addition to this, an independent monitoring of the consultation process should also be put in place.

The individual company would not necessarily be required to carry out all of these actions itself, but to demonstrate how the project will do so through cooperating with other corporate actors involved.

Projects should also have in place grievance mechanism to allow affected communities to raise issues with and make complaints to the company; such mechanisms can be established by the project overall, rather than an individual company. Grievance mechanisms can play a useful role in the early identification and resolution of problems. However, they should never be viewed as a substitute for access to judicial processes and justice for those whose rights are violated.

### **3. The importance of information and transparency**

Transparency and access to information are vital for the full and meaningful participation of individuals and communities in decision-making processes that are likely to affect their rights. Amnesty International and many other organisations and institutions have documented how greater transparency and access to information have helped people to hold their governments to account, prevent human rights abuses and tackle corruption, particularly in the context of economic activity and commercial projects. The Common Approaches currently make some reference to these issues, but the recommendations are vague and guidance is limited. Information and transparency are important to how ECAs operate, how commercial projects operate and to any meaningful due diligence process.

Despite the importance of access to information and transparency, at present ECA processes are relatively opaque and requirements in respect of information disclosure are weak. The review of the Common Approaches should address these issues.

As institutions that use public monies to support commercial activities ECAs should operate in an open and transparent manner. Any limitations on disclosure of information should be clearly defined and narrowly drawn. While some information may legitimately be considered confidential, ECAs frequently take the approach that they will not disclose data unless required to by law.

Currently the Common Approaches recommend that ECAs disclose information on projects which have been identified as "Category A" (including the project's name, location and EIA) at least 30 days before the decision for support is made. The Common Approaches should recommend that ECAs disclose relevant information on *all* prospective and ongoing projects (both category A and B). This should include: project name, location and information on those seeking support; any document or study carried out by the ECA or the clients on the operation and potential impact of the project, including but not limited to impact assessments. ECAs should ensure that information on projects applying for and in receipt of ECA support is made public, both in the home state of the ECA and the project host state. Information should be made accessible to potentially affected communities. It is vital that communities likely to be affected have access to information before any decisions are taken.

ECAs should also require that clients make all relevant information available and accessible to the communities that are likely to be affected. At present the Common Approaches only suggest that the relevant information "be made publicly available". There is no reference to ensuring that

information is not only made *available* but also made *accessible* in a timely manner and in formats that can be easily understood by people likely to be affected by supported projects.

Within a context where multiple companies or financial institutions are involved in a project, ECAs should – directly or via their clients – seek all necessary assurances on transparency and access to information from the host state authorities and/or commercial operators of any business project they support, as appropriate, where their client is not in a position to guarantee such disclosure itself.

Reliability and impartiality of information is also very important – both for the ECA due diligence process and for affected communities. At present the Common Approaches recommend that most of the information on the environmental and social impacts be provided to the ECA *solely* by the client. While corporate actors do have a responsibility to assess the impacts of their operations, ECAs must take a proactive role to ensure assessment of the human rights impact of proposed commercial activities. Prospective clients have a vested interest in obtaining ECA support, and allowing the client to have substantial control over the compilation of most of the information on which ECAs rely raises concerns about the independence and reliability of the information provided.

#### **4. Accountability**

Due diligence is vital to help prevent harm to and abuse of human rights. However, for due diligence to be effective there must be in place mechanisms to hold actors to account for failure to exercise adequate due diligence. Without effective accountability measures, due diligence may not move beyond vague commitments or box ticking exercises. In the context of ECAs there are two levels of accountability that need to be considered:

- the accountability of companies that receive ECA support
- the accountability of the ECA

##### **Accountability of companies that receive ECA support**

While the responsibility for preventing violations of human rights, and taking appropriate steps to hold those responsible accountable, rests with the state, ECAs can and should take appropriate action when clients breach their obligations in relation to the human rights impact of project. ECAs should have in place a process to address situations where clients do not implement adequate or agreed due diligence measures, as well as situations where there are credible allegations of human rights abuses associated with the operations of the client company or the project as a whole. Grievance mechanisms (described above) and other systems that would enable the ECA to become aware of problems should be put in place.

Accountability systems, which could include cooperation with other ECAs, should ensure that credible allegations are assessed, that steps are taken to address the problem, and that in cases of serious problems or failure or inability to address problems, ECA support is withdrawn. This should be clarified in the contractual agreements between the ECA and their clients. ECAs should also have in place a mechanism to prevent companies that have been found to be involved in human rights abuses from receiving further ECA support.

At present the Common Approaches are not clear on the extent to which ECAs should either monitor their clients once support has been granted or how to hold them accountable in cases where agreed standards and measures to prevent negative impacts on human rights are not implemented. The Common Approaches do refer to the potential for ECAs to monitor projects. However, few ECAs put in place monitoring mechanisms. As noted above monitoring and processes for independent verification – at least in some cases – are core components of due diligence.

##### **Accountability of ECAs**

ECAs should be held accountable for the way in which the Common Approaches are being implemented. Since their creation in 2003 the credibility of the Common Approaches has been

undermined by the inconsistencies in their implementation and highly variable records on compliance by OECD member states and ECAs.

Member states would benefit from more concrete guidance on how to ensure appropriate scrutiny and oversight of ECAs. Existing accountability mechanisms at the national level could play a role in oversight of ECAs and their compliance with the Common Approaches. For example, parliamentary or congressional oversight processes could be set up. National “auditor” bodies that play a role in controlling public finances could also potentially play an oversight role. The Common Approaches should encourage member states to make use of existing processes at the national level or to establish new processes if necessary – including by building these requirements in legislation establishing the ECA. Public reporting by ECAs against set criteria should be required.

Chapter VI of the Common Approaches deals with the issue of reporting and monitoring how member states are implementing the instruments. However, the text is weak and unclear, calling on member states only to put in place appropriate mechanisms and measures to ensure compliance with the Common Approaches.

### **Box 3: Improving national policy coherence**

In February 2009 the US Ex-Im Bank and the Overseas Private Investment Corporation (OPIC - the United States’ public investment insurance agency) committed to review their environmental policies. This decision was taken in the context of a settlement reached in relation to a lawsuit against OPIC, which alleged that \$32 billion in financing and insurance had been given for oil fields, pipelines and coal-fired power plants without assessing their contribution to global warming, or their impact on the environment – as required under the National Environmental Policy Act.<sup>11</sup>

It is important to bring ECA policies into line with the commitments of States on human rights, the environment and poverty reduction globally. Cases such as the one described above are increasingly emerging as civil society groups and legal processes examine the impacts of the lack of policy coherence across different state institutions.

The review of the Common Approaches should recommend that an enhanced peer review process is instituted whereby members undertake in participatory processes and on a regular basis forensic auditing of their peer's compliance with the Common Approaches.

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<sup>11</sup> <http://www.ens-newswire.com/ens/feb2009/2009-02-07-091.asp>