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WORKING PAPER 40

Social Due Diligence in the Austrian Export Promotion Procedure

Recommendations for implementing the revised OECD "Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence" as adopted on 28 June 2012

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The views expressed in the study are the authors‘ responsibility alone.

Abbreviations

ADA	Austrian Development Agency
CA	Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The 'Common Approaches')
CFR	Charter of Fundamental Rights of the European Union
CSR	Corporate Social Responsibility
Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECA	Export Credit Agency
ECG	The OECD's Export Credit Group
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDC	Export Development Canada
EFIC	Export Finance and Insurance Corporation, Australia
EHS Guidelines	The World Bank Group's Employment, Health and Safety Guidelines
EKF	Eksport Kredit Fonden, Denmark
ESC	European Social Charter
Ex-Im Bank	Export-Import Bank of the United States
ExpGA	Export Guarantees Act 1981
Guiding Principles	UN Guiding Principles on Business and Human Rights
GVC	Global Value Chains
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEG	Independent Evaluation Group
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organization
ISO	International Organization for Standardization
JBIC	Japan Bank for International Cooperation
NCP	National Contact Points
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OeKB	Oesterreichische Kontrollbank
PS	Performance Standards
Safeguards	Safeguard Policies
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Summary

Since 2001, national export credit agencies – in the case of Austria the Oesterreichische Kontrollbank (OeKB) – are obliged to assess the environmental impacts of large projects (especially in the fields of infrastructure, mining and industry) pursuant to the OECD *Common Approaches on the Environment and Export Credits* before granting official export support. In addition to the ecological impacts of these projects that have been severe in some cases, their social impacts have increasingly come to public awareness in recent years. As illustrated by cases such as the Ilisu Dam project that has attracted considerable media attention, such projects can have serious impacts on the situation of workers that are involved in the realization of the project as well as on the local population, for example by large-scale resettlements. Such impacts do not only often cause losses in income and general social welfare but also human rights violations, for example if resettlements are enforced without consultation and adequate compensation, or even by use of disproportionate state force. For the workers affected by the project, non-compliance with safety measures on construction sites can entail health risks and work accidents or the violation of fundamental worker's rights (like the ILO Core Labour Standards), e.g. if trade unions are being constricted or prohibited.

In reaction to these discussions, the OECD on 28 June 2012 adopted the *Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* (CA) which explicitly require a social due diligence in addition to the environmental assessment that has hitherto been provided for. The member states of the *OECD Export Arrangement* were encouraged to present concrete measures for the implementation of the revised *Common Approaches* until the end of 2012.

Given this upcoming implementation, the present study proposes concrete measures for implementing the revised *Common Approaches* in the Austrian export credit system. In doing so, we define the term Social Due Diligence against the background of internationally recognized civil and political as well as economic, social and cultural human rights. The law of state responsibility, which – *inter alia* – regulates the responsibility of states to comply with human rights, serves as the legal basis for the implementation of the social due diligence in the Austrian export credit system. Furthermore we use the *Guiding Principles on Business and Human Rights*, developed by the UN Special Representative John Ruggie and adopted by the UN Human Rights Council in 2011, as a normative frame for operationalizing corporate responsibility for human rights. The *Guiding Principles* are built on three elements: the obligation of states to protect against human rights violations by private actors (including corporations) (*state duty to protect*), the responsibility of private enterprises to respect human rights (*corporate responsibility to respect*), and the states' duty to ensure effective access to remedies (*access to remedy*).

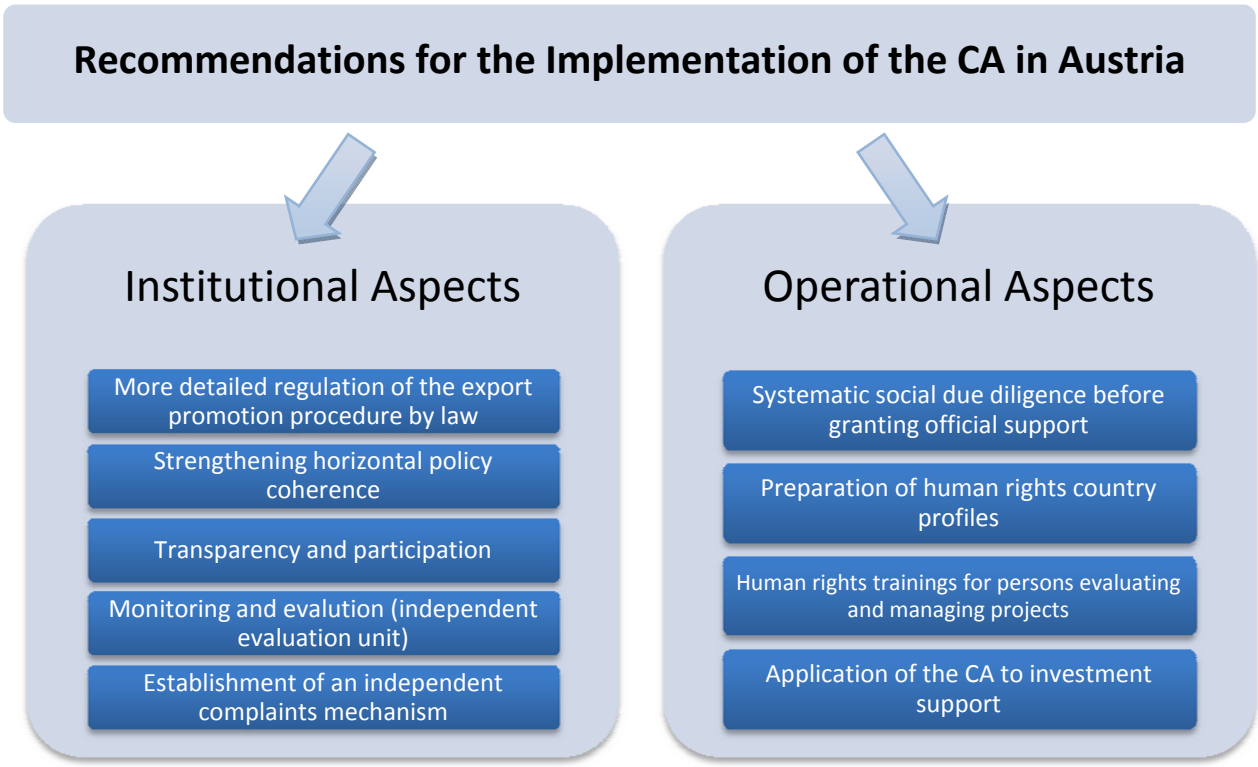
On the basis of this human rights approach the present study formulates options for implementation on two different levels. On the one hand, we suggest institutional reforms. On the other hand, we propose a range of operational measures. Reforming the institutional elements of the Austrian export credit system is necessary to guarantee compliance with basic human rights principles such as transparency, participation and non-discrimination. Our recommendations particularly focus on (i) legislative measures to provide for the material and procedural principles of the export credit system in a transparent way, (ii) guaranteeing coherence with other policy fields, and (iii) the introduction of new independent monitoring/evaluation and complaints mechanisms.

Furthermore, a range of operational measures is necessary to guarantee the appropriate consideration of human rights aspects in the environmental and social due diligence assessment carried out in the export credit procedure. These include the modification of OeKB's questionnaire to include questions concerning (i) the respect for workers rights (ILO

Core Labour Standards), (ii) working conditions, (iii) measures to ensure consultation and participation of the local community as well as the respect for other relevant human rights (e.g. freedom of speech). Moreover, independent monitoring and evaluation procedures as well as ex-post-assessments should be conducted for all Category A projects. These measures shall also contribute to a continuing advancement of the assessment framework.

Moreover, we recommend the preparation of human rights country profiles in order to detect possible problem areas already in the pre-phase of the respective project, as well as human rights training for the persons involved in the evaluation and management of projects.

Finally, we recommend that the assessment procedure is also applied to investment promotion. This would stop the prevailing different treatment of export and investment promotion, a practice which is undesirable from a human rights perspective.



1. Introduction

The question to what extent international economic activities have negatively (or positively) impacted the economy, the environment and society has gained increasing relevance over the last 20 years. This is mainly due to the increasing importance of processes of economic globalization. These essentially operate via two channels: On the one hand, via international trade of goods and services; on the other hand, via international capital flows (in particular foreign direct investments).[1] States are traditionally central players in these processes. However, large, internationally active corporations (multi- or transnational corporations) play an increasingly relevant role. Most industrialized countries aim at promoting the export and internationalization strategies of the corporations registered in their jurisdiction. Therefore, almost all industrialized countries have created and expanded export promotion schemes as early as in the 1960s and 1970s and, a little later, introduced instruments to promote the internationalization of these corporations.[2] These promotional activities typically included foreign direct investments in order to gain new market shares or to outsource production units. In 1976, the OCED adopted the Guidelines for Multinational Enterprises, a code of conduct that contained non-legally binding recommendations for international corporations in fields such as corporate ethics, anti-corruption, competition, taxes and industrial relations. OECD member states have committed themselves to implement the Guidelines and, in order to fulfill this obligation, to set up national contact points (NCP) which function as mediation bodies.

In an effort to regulate the competition among states, i.e. in particular to push back direct subsidies and to harmonize the conditions for competition, the OECD adopted the *Arrangement on Official Export Credits* in 1978. Ever since, this gentlemen's agreement is the framework for national export promotion policies of the OECD member states – and thus also for the Republic of Austria. In 2001, after years of controversial debates about the environmental impacts of large infrastructure projects (particularly those of dams) the *Common Approaches on the Environment and Export Credits* were adopted, which, for the first time, defined common standards for the assessment of environmental impacts of officially supported projects.

In addition to the ecological impacts of large infrastructure, mining or industry projects that have been severe in some cases, their social impacts have increasingly come to public awareness over the last 15 years. In many cases, projects entail the resettlement of many people which often does not only cause losses in income and social welfare but also human rights violations, for example if resettlements are enforced without consultation and adequate compensation, or even by use of disproportionate state force.

In parallel, an intense discussion was taking place about the social impacts of multinational corporations' activities across their entire value chain. In particular industries, such as shoe production or the apparel industry, trade unions and non-governmental organizations (NGOs) pointed to many cases where fundamental workers' rights were disrespected. Based on this evidence, they called for a stronger regulation of international corporate activities in order to ensure respect for basic workers' rights (as embodied in the ILO Core Labour Standards).

These discussions contributed significantly to a process that was initiated by the UN and aimed at defining human rights standards for international economic activities. After broad public consultations, the UN Special Representative John Ruggie, who was appointed in 2005, presented a framework for the corporate responsibility to respect international human rights in 2008. In 2011, the complete *Guiding Principles on Business and Human Rights* were adopted by the UN Human Rights Council.[3] Against this widely accepted normative framework, Ruggie found the consideration of human rights aspects in the OECD Common

[1] In contrast, the border-crossing movement of persons still plays a less prominent role for our purposes. Migration will thus not be covered by the present study.
[2] For an overview of the OECD export promotion regime see OECD 2011.
[3] http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf (2.5.2013).

Approaches as well as in the OECD Guidelines for Multinational Enterprises to be inadequate and called upon the respective OECD bodies to ensure that the protection of human rights becomes more firmly rooted in these regulatory frameworks. He offered concrete advice how this could be achieved.[4]

Against this background, the OECD Guidelines for Multinational Enterprises were modified to include human rights aspects in 2011.[5] Finally, in 2012, the revised OECD Common Approaches were adopted which now explicitly foresee a social due diligence in addition to the environmental due diligence that has hitherto been provided for.[6] OECD member states have been called upon to present concrete suggestions for the implementation of the revised Common Approaches until the end of 2012. Also, member states are required to submit a report about the measures taken to enhance the protection of human rights not later than two years from the date of adoption of the CA. This report then serves as the basis for a review on how the measures taken could be further developed (cf. § 44 of the CA).

Given this obligation to implement the CA the present study aims at developing concrete suggestions for the necessary adjustments of the Austrian export credit system. In doing so, we define the term Social Due Diligence on the basis of internationally recognized civil and political as well as economic, social and cultural human rights (chapter 2). Subsequently, we elaborate on the law of state responsibility which regulates the responsibility of states to comply with human rights and thus serves as the legal basis for the implementation of the social due diligence in the Austrian export credit system (chapters 3 and 4). Chapter 5 gives a brief overview on the consideration of human rights aspects in soft-law instruments of other international organizations (particularly the World Bank). Chapter 6 illustrates the current practice of considering human rights aspects in export credit systems of selected countries. In chapter 7, we discuss the institutional and operational aspects of an implementation of the CA in greater detail and give concrete recommendations. Finally, chapter 8 summarizes the key recommendations.

2. What is Social Due Diligence as defined by the Common Approaches?

In a first step we have to clarify the meaning of the term “Social Due Diligence” as it is used in the revised OECD “Recommendations of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The ‘Common Approaches’)” (CA) of June 28 2012. In this exercise, the text of the CA offers some guidance. “Due diligence” is thus understood to be the process through which member states identify, consider and address the potential environmental and social impacts and risks relating to applications for officially supported export credits as an integral part of their decision-making and risk management systems.[7] Furthermore, according to the demonstrative list of Art 10 point 2 CA, “social impacts” particularly include labour and working conditions, community health, safety, and security, land acquisition and involuntary resettlement, indigenous peoples, cultural heritage and project-related human rights impacts.[8]

However, being general, international recommendations, the CA do not define these terms in greater detail. Moreover, their provisions often contain discretionary clauses which, naturally,

[4] For the OECD Guidelines see http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/45545887.pdf; for the Common Approaches see http://www.rightrespect.org/wp-content/uploads/2010/08/Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010-3.pdf (2.5.2013).

[5] For the 2011 edition of the OECD Guidelines see http://www.oecd.org/daf/inv/mne/48004323.pdf (2.5.2013).

[6] Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The “Common Approaches”), 28 July 2012, see http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=tad/ecg(2012)5&doclanguage=en (2.5.2013).

[7] CA, para 1.

[8] These include, inter alia, forced and child labor as well as life-threatening occupational health and safety situations. Cf. para 10 point 2 of the CA.

leave room for interpretation by member states implementing of the CA. This is especially problematic given the competitive situation on the export service market that is detrimental for any effort to ensure a comprehensive assessment practice.

If the new social due diligence is thus meant not only to serve as a decorative element but as a tool to guarantee **effective reviews** and control, the revised CA must, first, be interpreted extensively and, second, further concretized.

The system of **international human rights** serves as a valuable framework for such an extensive interpretation. As universally valid and legally binding norms, human rights have increasingly found their way into international economic policy instruments in recent years, be it in export promotion schemes[9] or in related fields such as multilateral development financing[10] or Corporate Social Responsibility[11]. A human rights approach to the CA is thus a consequent continuation of an **internationally growing consensus** about the central role human rights play in the economy.

Furthermore, in several paragraphs the CA itself explicitly stress the responsibility of member states to fulfill their human rights obligations.[12] Although the CA do not explicitly speak of a human rights due diligence, but a social due diligence, they are without doubt part of a global trend of making human rights a central reference point for economic policy. Lastly, the term *social* due diligence is in no way an obstacle to the adoption of a human rights perspective; after all, social rights form an integral part of human rights.[13]

The approach taken here thus assumes that the new social due diligence obligation is to be viewed against the background of human rights as a superior legal regime. By applying such an approach the focus is directed towards, first, the state as a duty bearer and, second, to the applicability of basic **human rights principles** such as transparency, participation and non-discrimination.

If one agrees with this view, the logical next question is: which human rights does a social due diligence encompass? Do we think only of social rights as might be inferred from the new name of the CA? Or do civil and political rights like the prohibition of forced labor and the freedom of assembly also form part of the assessment? Does social due diligence possibly even entail general human rights principles like political participation and transparence?

Given these uncertainties it is necessary to clarify the precise content of a social due diligence. It is clear that the principle of indivisibility of human rights is opposed to a merely partial examination. An assessment of export promotion policy in the sense of the human rights approach taken here can thus not be fulfilled by, e.g. a simple protection from forced resettlement if at the same time an investigation into labor rights would be indicated. Rather, the social due diligence assessment must be **extensive, flexible and project-specific**, i.e. consider the circumstances of the specific case.

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9 In addition to the OECD's CA, the EU regulation on export credits of 2011 should be mentioned as it includes a – albeit weak – commitment to human rights. Cf. Regulation (EU) No 1233/2011 recital 4. Furthermore, the Sustainability Impact Assessments commissioned by the EU increasingly consider human rights aspects in recent years. Cf., for example, Ecorys 2012.

10 Cf., for example, the Safeguard Policies of the World Bank (World Bank 2012) as well as the IFC Performance Standards (IFC 2012a) and the EHS Guidelines (IFC 2007). Moreover, we would like to mention the Equator Principles which are a voluntary framework for banks to assess and manage the environmental and social impacts of the projects they finance. Point d of the annex lists human rights as part of the assessment. Cf. http://www.equator-principles.com/resources/equator_principles.pdf (2.5.2013).

11 E.g. the OECD Guidelines for Multinational Enterprises (OECD 2011). Cf. also ISO Standard 26000 concerning social responsibility that also contributed to the consolidation of the human rights discourse in international economic policy by including human rights as one of its core issue. Cf. http://www.iso.org/iso/discovering_iso_26000.pdf (2.5.2013).

12 Cf. the preamble („Recognising that Members have existing obligations to protect human rights […]") as well as para 3 (i) ("Promote coherence between Members' policies regarding […] their human rights policies"), 4 (iv) ("Encourage protection and respect for human rights […]"); 10 point 2 ("Potential social impacts may include […] project-related human rights impacts") and 44 of the CA ("Members shall give further consideration to the issue of human rights including with regard to relevant standards, due diligence tools and other implementation issues […]").

13 See, for example, Nowak 2003: 81ff.

To achieve maximum practical effect, it is however necessary to translate human rights obligations of a state into **feasible standards**. A specific focus as well as a certain standardization of the necessary steps therefore seems unavoidable. On the one hand, it is suggested to require a mandatory social due diligence only for certain, particularly harmful projects (category A of the CA classification)[14]. On the other hand, a **concentration** on certain groups of human rights that have proven to be especially relevant in the context of export promotion in the past seems reasonable. These include:[15]

- **Workers rights**
  - The right to work.[16] It includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses. States are obliged to protect this right and actively contribute to its realization.
  - Right to safe, healthy and just conditions of work.[17]
  - Right to a fair remuneration.[18]
  - Prohibition of child labor.[19]
  - Prohibition of forced labor.[20]
  - Freedom of assembly, including the freedom to form trade unions.[21]
  - Right to collective bargaining.[22]
- **Protection from forced resettlements**, derived from the right to an adequate standard of housing.[23]
- Protection of **private and family life**. This right is particularly relevant with regard to forced resettlements because it protects from arbitrary or unlawful interferences with one's home.[24]
- Right to **freedom of speech**.[25]
- Right to **a fair trial**.[26]
- Rights of **indigenous peoples**.[27]
- **Equality and non-discrimination** (general human rights principles)[28], relevant in particular with regard to employment, remuneration and compensation.
- **Transparency and participation** (general human rights principles)[29] of all persons affected by the project in the home country as well as in the destination country over the whole project cycle.

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14 For a demonstrative list of such projects cf. annex I of the CA.
15 Cf. Can/Seck 2006: 3; McCorquodale/Simons 2007: 612; ECA Watch 2003.
16 Art. 6 ICESCR; Art. 1 ESC.
17 Art. 7 ICESCR; Art. 2, 3 ESC.
18 Art. 4 ESC; ILO Convention n 100.
19 Art. 10/3 ICESCR; Art. 7 ESC; ILO Convention n 138, 182.
20 Art. 4 UDHR; Art. 8/3 ICCPR; Art. 4 ECHR; ILO Conventions n 29, 105.
21 Art. 22 ICCPR; Art. 8 ICESCR; Art. 11 ECHR; Art. 12 CFR; Art. 5, 6 ESC; ILO Convention n 87.
22 Art. 23 UDHR; Art. 6 ESC; Art. 28 CFR; ILO Convention n 98.
23 Art. 25/1 UDHR; Art. 11/1 ICESCR, Art. 17 ICCPR. Resettlements can therefore only take place in exceptional cases, i.e. when they are legally provided for, legitimated by a public interest, carried out proportionally and with full respect of international human rights. Furthermore, full compensation must be provided. These guarantees apply independent of whether the person affected has a legal title or not. Cf. United Nations, Human Rights Council 2007a: 16f, Art. 13ff, 21. Cf. also the General Comment n 7 concerning the right to adequate housing: forced evictions: OHCHR 1997.
24 Art. 12 UDHR; Art. 17 ICCPR; Art. 8 ECHR.
25 Art. 10 ECHR; Art. 19 ICCPR.
26 Art. 8 UDHR; Art. 14 ICCPR; Art. 6 ECHR.
27 UNDRIP; ILO Convention n 169.
28 Acknowledged, inter alia, in Art. 26 ICCPR; Art. 2 ICESCR; Art. 14 ECHR; Art. 21 CFR; Art. 20 ESC; ILO Convention n 111.
29 Acknowledged, inter alia, in Art. 21 UDHR; Art. 25 ICCPR; Art. 14 ICCPR; derived also from the freedom of expression, the freedom to assembly, the freedom of press and the freedom of information (see above).

3. State Responsibility in International Law

Now that we have established the content and the applicable human rights standards foreseen in the new CA we shall turn to the question of *who* should actually be bound by them. More generally, this raises the question of who ensures the respect for human rights with regard to officially supported projects and who can be held responsible in cases where this obligation is violated.

As mentioned earlier, much is gained by adopting a human rights perspective. Most notably, states – as prominently stated by the *UN Guiding Principles on Business and Human Rights* (Guiding Principles)[30], to which the CA are referring to in their preamble – are obliged to protect from human rights violations committed by private actors (**state duty to protect**).[31] This duty is owed to everybody within the territory or under the jurisdiction of a state.[32] It includes all political, legislative and judicial means that serve to prevent, investigate, punish and redress human rights abuses by third parties.[33]

In the case of officially supported export credits, a special **human rights due diligence** is thus not only owed by the enterprise that seeks official support (within its "corporate duty to respect"[34]) but also and primarily, by the state via its national export credit agency (ECA)[35]. The fact that projects could often not be realized without official support brings with it means of influence and control that a state has to use according to its human rights obligations. This typically requires the conduct of an explicit human rights due diligence in the application process. Failure to ensure this due diligence may entail reputational damage as well as financial and political consequences.[36] Furthermore, a state risks **legal consequences** as a violation of its human rights obligations also means a violation of its international obligations.[37]

These international obligations are by definition[38] not only owed to persons residing within the territory of a state but to everyone under the jurisdiction of a state and consequently, under certain circumstances, also **extraterritorially**, i.e. *international*.[39] Therefore, an analysis of the new social due diligence should not only draw on the human rights instruments described above but should also be viewed against the backdrop of the more general international law discussion on extraterritorial jurisdiction. According to this concept, states are responsible for violations of their duty to protect also in extraterritorial space, especially if they fail to effectively regulate the companies registered under their jurisdiction.[40] This view is becoming increasingly accepted among scholars, various UN bodies and civil society actors alike.[41] Doubts remains, however, concerning the question of when a state

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30 United Nations, Human Rights Council 2011a.

31 Cf. United Nations, Human Rights Council 2007b; Kaleck/Saage-Maaß 2008: 41; Augenstein/Kinley 2012: 10. This duty is also acknowledged by the jurisprudence of international human rights courts and UN human rights committees. See, e.g., the decision of the Inter-American Court of Human Rights in the case *Velásquez-Rodríguez v. Honduras*, the European Court of Human Rights in *López Ostra v. Spain* or the African Human Rights Commission in *SERAC v. Nigeria*. Among the UN human rights committees, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination as well as the Committee on the Elimination of Discrimination against Women stressed the state responsibility to protect with regard to the activities of transnational enterprises.

32 United Nations, Human Rights Council 2008: 7, para 18.

33 United Nations, General Assembly 2011: 7, para 18.

34 As the second pillar of the much discussed "protect, respect and remedy" framework that UN Special Representative on business and human rights John Ruggie designed. Cf. United Nations, Human Rights Council 2008.

35 In any case, ECAs can be attributed to the state as they are agents acting in its interest, even if they are set up as separate legal entities. States thus have to provide for the regulation and control of their activities within their responsibility to protect. Cf. United Nations, General Assembly 2011: 14, para 49f; United Nations, Human Rights Council 2008: 12; Ruggie 2010; Can/Seck 2006: 4; Keenan 2008: 2; McCorquodale/Simons 2007: 608. Cf. also United Nations, General Assembly 2011: 8, para 21.

36 United Nations, Human Rights Council 2011a: 9.

37 United Nations, General Assembly 2011: 8, para 23; Kaleck/Saage-Maaß 2008: 42.

38 Skogly/Gibney 2007: 273.

39 McCorquodale/Simons 2007: 619.

40 United Nations, General Assembly 2011: 7, para 20.

41 See Gibney 2011: 144; Gibney/Skogly 2010; United Nations, Human Rights Council 2011c: 7f; De Schutter 2011; United Nations, General Assembly 2011: 7, para 19; United Nations, Human Rights Committee 2004: 4, para 10; Berne Declaration/CCCI/Misereor 2010: 7; Kämpf/Würth 2010: 6f; Skogly 2006; Augenstein/Kinley 2012: 16; Seck 2011: 36f.

exercises jurisdiction or – to put it simply – towards whom the state is responsible in the end. In our view, there are convincing arguments in favor of assuming that a state owes a duty to protect not only towards persons residing within its territory but also towards those persons outside its territory who are directly affected by the state's actions or omissions. After all, acknowledging the **universality of human rights** also requires acknowledging the universal responsibility to respect them.[42]

The claim for such a universal responsibility is supported by yet another branch of international law. If one relies on this route, conceptual controversies that the idea of extraterritorial jurisdiction brings along are mitigated. In the center of such alternative considerations stand the "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (**Draft Articles**) of the UN International Law Commission.[43] They prohibit, inter alia, the aid and assistance of a state in the commission of an internationally wrongful act by another state. According to Art 16 of the Draft Articles, a state is internationally responsible for such aid or assistance if it has knowledge of the circumstances of the internationally wrongful act and the act would be internationally wrongful if committed by that state itself.[44] In contrast to the concept of responsibility through jurisdiction, the Draft Articles, even on a narrow reading, do **not contain any territorial limitations**.[45]

In any case, the state in the sense of Art 16 of the Draft Articles is also responsible for the acts of (semi-) state[46] actors like national **export credit agencies**.[47] Their acts can thus also constitute aid or assistance in the commission of an internationally wrongful act.[48] Therefore, if a national ECA, through export credits or investment guaranties, provides a substantial amount of money for activities of a corporation abroad and the foreign state fails to prevent human rights violations (e.g. the violation of worker's rights) by this corporation, the state providing the export promotion assists in the commission of an internationally wrongful act provided that it owes the same human rights obligations as the foreign state.[49]

This is true with the only limitation being that the human rights violation by the foreign state must be reasonably **foreseeable**, which can be safely assumed if the official support is operated by a national ECA that has conducted a social due diligence assessment before taking the decision to grant official support or that would at least have been obliged to do so according to international standards. Especially with regard to large natural resources or infrastructure projects, where human rights violations are frequent and are also frequently known to the public by NGO reports, it is difficult to think of convincing arguments that would speak against the element of foreseeability.[50] This is even more true in view of the fact that official export support is *typically* granted for investments in countries with instable political conditions and a precarious human rights situation.[51]

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42 Cf. Seck 2011: 36f.

43 Von Bernstorff 2010: 25; Seck 2011: 37ff.

44 Cf. United Nations 2008: para 16. For the application of Art 16 Draft Articles in the context of export promotion see Keenan 2008; Can/Seck 2006.

45 Seck 2010: 37.

46 Cf. Above fn 31.

47 Cf. Art 5 and 8 of the Draft Articles.

48 United Nations, General Assembly 2011: 15, para 51.

49 McCorquodale/Simons 2007: 612, 614f; Keenan 2008: 10; Von Bernstorff 2010: 27.

50 Keenan 2008: 9f; McCorquodale/Simons 2007: 615. The element of knowingly doing something should by no means be mixed up with the element of willfulness. Violations of the responsibility to protect are in most cases not based on deliberate decisions but on "deliberate indifference" (Gibney et al. 1999: 293, cited in Can/Seck 2006: 9).

51 Cf. United Nations, Human Rights Council 2008: 12, para 39; Can/Seck 2006: 2.

4. Delimiting State Responsibility through Social Due Diligence

As we have seen above, legally speaking there are several ways to argue for a responsibility of states for corporate activities also in the extraterritorial sphere. While the concept of extraterritorial jurisdiction in the sense of the "responsibility to protect" is still somewhat in the making, other international law concepts, in particular the prohibition of complicity in the wrongful act of another state according to Art 16 of the Draft Articles, are supported by a broad consensus.[52] In sum, it thus has to be assumed that – if the preconditions of human rights law or international law respectively are fulfilled – states can be made responsible for the acts of private actors.

On the other hand, despite the described responsibility to protect, a state can not be held accountable for every action of a private enterprise that potentially harms human rights. The implied responsibilities would be unlimited. A state thus needs a means to **comply with its obligations** and limit its responsibilities at the same time. This is exactly what a due diligence assessment is meant to achieve.

Now, which obligations does a due diligence bring about? In general, a state has to take all reasonable and effective steps that serve to **prevent, investigate, punish and redress** human rights abuses.[53] The relevant literature which is strongly influenced by the work of the UN Special Representative on business and human rights, John Ruggie,[54] proposes the following obligations[55]:

- Duty to adopt legislation that regulates corporate activities.
- Duty to establish effective control mechanisms.
- Duty to punish human rights abuses by enterprises and to guarantee adequate compensation.

In the area of official export promotion, to comply with these obligations requires in particular to **reform the export credit system**.[56] We propose, first of all, an expansion of the export credit agencies' mandate that, henceforth, shall not only aim at the promotion of national exports but also include a duty to respect human rights.[57] Moreover, the introduction of concrete assessment procedures shall allow ECAs to assess the human rights implications of the projects it supports. Finally, it is recommended to set up effective complaints mechanisms and to guarantee their accessibility for affected persons.[58]

In conclusion, it should be noted that these measures are not only necessary to implement the revised CA but also to **effectively operationalize *current* obligations stemming from human rights law and international law** in general. This operationalization is urgent also for the purpose of securing coherence between foreign policy commitments to human rights and existing policies for granting official support.[59]

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52 Von Bernstorff 2010: 25ff.
53 Cf. Augenstein/Kinley 2012: 14; this due diligence is also provided for in the Draft Articles, cf. Can/Seck 2006: 9.
54 In particular: United Nations, Human Rights Council 2007b.
55 Kaleck/Saage-Maaß 2008: 42f; Keenan 2008: 7; Augenstein/Kinley 2012: 3; Can/Seck 2006: 9ff. For the implementation of these duties in the context of the Austrian export promotion see below chapter 7.
56 Keenan 2008: 7; 14; Seck 2011: 27.
57 United Nations, General Assembly 2011: 15, para 55.
58 See below section 7.1.5..
59 Scheper/Feldt 2010: 76; United Nations, Human Rights Council 2011a: 11.

5. Human Rights Clauses in Other International Instruments

After having discussed the obligations that stem from the revised CA, how they should be addressed and why a human rights perspective is imperative in their interpretation, this chapter aims at briefly outlining the greater context of the new incorporation of human rights into the CA. As mentioned above, the revision of the OECD recommendations for officially supported export credits can not be viewed as an isolated development. Rather, the inclusion of human rights aspects is to be seen against the background of an **international reform discussion** on the role of human rights in a globalized world in which the idea of the nation state as sole bearer of human rights duties is increasingly questioned. Given the reciprocal interrelations between public and private, territorial and global, this idea seems increasingly outdated.[60] Several international instruments have been revised in the light of these developments and integrated human rights aspects in their diverse recommendations and standards.[61] Thereby it is hoped to achieve a more appropriate allocation of human rights responsibilities. Not least due to John Ruggie's initiative, more and more people agree that such efforts must also be made in the field of export promotion.[62] That is how the *explicit* acknowledgment of human rights obligations for states and enterprises in the preamble of the revised CA can be explained.

Implicitly, by referring to the Safeguard Policies of the World Bank (Safeguards)[63] and the Performance Standards (PS)[64] of the International Finance Corporation in Art 20 of the CA, human rights have been an element of the assessment for quite some time. After all, the CA are, as regards their content, not autonomous standards but only a reference to internationally recognized instruments. The latter shall therefore be briefly presented.

The **Safeguard Policies** contain ten guidelines – e.g. for the protection of biological diversity, the respect for cultural sites and the security of dams – that must be considered in the course of the project review. Moreover, with the guidelines concerning indigenous peoples and involuntary resettlement they include topics directly related to human rights. However, in contrast to genuine human rights impact assessments, human rights are not the starting point of the assessment. Rather, the Safeguards only provide for a non-exhaustive consideration of those human rights that are most frequently affected by large projects.[65]

The **Performance Standards** go one step further as they also consider internationally recognized labor standards. Thus, already before their reformulation in 2012, the PS comprised not only environmental but also social standards. Furthermore, they include standards concerning the health and safety of the project communities. When revising the PS in 2012, the authors also considered newer developments in the field of business and human rights.[66] Consequently, the PS now contain the duty of private enterprises to respect human rights, with which they refer to the "International Bill of Human Rights"[67] as well as the ILO Core Labour Standards.[68] Each of the eight PS now comprises comments on the human rights dimension of each area that must be considered in the due diligence assessment carried out by the private company as well as the IFC itself.[69] Finally, with the installation of the IFC Compliance Advisor, an independent body was created that is competent to receive complaints of everybody who claims to be affected by a project.[70]

60 Augenstein/Kinley 2012: 15.
61 See above fn 3-5.
62 Ruggie 2010: 6.
63 World Bank 2012.
64 International Finance Corporation 2012a.
65 Scheper/Feldt 2010: 40.
66 IFC 2012b.
67 The "International Bill of Human Rights" includes the UDHR and the two UN Covenants 1966.
68 IFC 2012b: 5, fn 4.
69 IFC 2012a: 6; IFC 2012b: 5; IFC 2012c: 3.
70 IFC 2012c: 12.

6. Status of Implementation – Selected Examples

Based on evidence from selected countries, the following section explores the question to what extent the trend to include human rights in economic policy instruments described above is reflected in the practice of export promotion of various national systems. This is done with the aim to identify best practice models which can serve as a benchmark for Austria.

According to its own statements, Canada's ECA **Export Development Canada** (EDC) considers human rights as a part of its political risk analysis.[71] However, this assessment seems to be rather superficial in practice.[72] Most notably, it is criticized that the results of the assessment are not publicly available which makes it impossible to verify the methods applied. Moreover, there is no legal obligation to conduct such assessments.[73]

This lack of transparency and regulation seems to be true also for the **Export-Import Bank of the United States** (Ex-Im Bank). Similar to EDC the Ex-Im Bank declares to conduct an evaluation of the human rights situation in the project country. However, the public learns little about this process and its impacts.[74] Although the law regulating the Ex-Im Bank[75] refers to human rights, it does not provide for a systematic human rights impact assessment in the application process nor a publication of other relevant project information.

The practice of evaluation by the **Australian**[76] and the **Japanese**[77] **ECA** seems to be in line with the obligations arising from the CA. Project applicants are obliged to conduct environmental and social impact assessments. The results are published by the Australian EFIC at least 30 days before the final decision is taken.[78] In addition, the Japan Bank for International Cooperation (JBIC) demands that private enterprises inform and consult the affected population during the course of these assessments.[79] However, here too, the lack of an explicit human rights impact assessment (in addition to the environmental and social impact assessment) is criticized.[80]

The assessment procedure of the **Danish ECA** Eksport Kredit Fonden (EKF) seems to be quite similar. Although the agency apparently supports a more substantial consideration of human rights in its financing activities,[81] no explicit human rights impact assessment is required. Instead, assessments are based on the IFC Performance Standards that at least comprise human rights-relevant aspects. Additionally, monitoring during the project is conducted on a case-by-case basis or in the case of project financing.[82] Furthermore, with the "Openness Policy" the agency introduced quite far-reaching transparency criteria in 2010, thereby stressing its responsibility towards the Danish society.[83]

Finally, the establishment of a **complaints mechanism** by the Canadian EDC, the Japanese JBIC[84] and the Australian EFIC[85] should be pointed out. Critics maintain, however, that these

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71 EDC-Website: http://www.edc.ca/en/about-us/corporate-social-responsibility/pages/business-ethics.aspx?cid=red1039 (2.5.2013).
72 Cf. De Schutter et al. 2012: 36.
73 Keenan 2008: 11.
74 Keenan 2008: 12.
75 Export-Import Bank Act of 1945.
76 Export Finance and Insurance Cooperation (EFIC).
77 Japan Bank for International Cooperation (JBIC).
78 Cf. point 2.2.2. of the EFIC Procedure for environmental and social review of transactions http://www.efic.gov.au/CORP-RESPONSIBILITY/ENVR-RESPONSIBILITY/Pages/Procedure.aspx and the FAQ concerning the disclosure policies of the JBIC: http://www.jbic.go.jp/en/faq/guideline/disclosure.html#E-0810-09 (2.5.2013).
79 Scheper/Feldt 2010: 58f.
80 United Nations, Human Rights Council 2011d: 12, para 35. Cf. also Human Rights Law Centre 2011: 15.
81 Cf. http://www.rightrespect.org/2010/08/16/export-credit-agencies-regulation-and-the-state-duty-to-protect/ (2.5.2013).
82 Cf. http://www.ekf.dk/en/about-ekf/CSR-at-EKF/Pages/evaluation-of-sustainability.aspx (2.5.2013).
83 Cf. http://www.ekf.dk/en/about-ekf/CSR-at-EKF/Pages/openness.aspx (2.5.2013).
84 Scheper/Feldt 2010: 62.
85 Cf. http://www.efic.gov.au/about/Pages/Complaints-mechanism.aspx (2.5.2013).

can not be understood as a replacement for an independent judicial body because, in particular, they do not provide any legal remedies for the parties involved.[86]

Thus, in sum there seems to be no national ECA regulation that can serve as a best practice model for Austria without any further qualifications. Rather, it seems reasonable to pick out particular elements of the broad spectrum of different practices that could be relevant for the Austrian context.

7. Options for Implementation in Austria – Recommendations

The content and extent of the obligations that stem from the reviewed CA have already been discussed in the sections above.[87] In sum, one can say that the member states are henceforth obliged to strengthen the protection of and the respect for human rights in their export promotion policies, to assess the human rights implications of the projects they support, to evaluate projects according to the World Bank and IFC Standards respectively and to report back to the Export Credit Group (ECG) of the OECD on the implementation of all these obligations.[88] Yet, it remains to examine how these more or less explicit tasks can be translated into concrete steps. In our view, this question has two dimensions, one institutional and one operational.

From an institutional viewpoint, it has to be clarified how the export promotion system needs to be adapted in order to satisfy the revised version of the CA and which legislative measures are necessary to do so. On the operational level, there is a need to reflect on the concrete procedure of the project assessment as defined by the CA and the methods that should be applied in this process.

7.1. Institutional Aspects

7.1.1. More detailed regulation of the export promotion procedure by law

According to Art 40 CA, member states are responsible to ensure, through appropriate measures, compliance with the CA. Typically, this requires the regulation of the national export promotion procedure by a sovereign act of the state. Our first recommendation is therefore to **regulate by law in greater detail the procedure that the state's authorized agent has to apply**.

The Oesterreichische Kontrollbank (OeKB) is registered as a private company but works, pursuant to § 8a in conjunction with § 5/1 Austrian Export Guarantees Act (ExpGA), as the authorized agent of the state, more precisely: the Ministry of Finance. Therefore, it has the same obligations as the state itself; its actions are directly attributable to the state. Hence, it must be ensured that the OeKB complies with Austria's international obligations. The public interest, being without a doubt the basis for the OeKB's actions, requires public oversight.

Currently, there is no precise legislative regulation of the OeKB's mandate in the Austrian export promotion system; in particular, there is no legislative regulation of the project assessment procedure.[89] § 5/1 ExpGA solely defines the bank-related technical processing of applications for guarantees (i.e. assessment of creditworthiness and application of appropriate standards in technical handling of cases) as the competence of the state's authorized agent. Due to the narrow definition of the state agent's competencies it can be questioned whether this body can even be assigned the task of conducting an environmental and social impact assessment.

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[86] Keenan 2008: 12.
[87] Cf. above chapter 2, in particular the list of the most relevant human rights.
[88] Cf. Art. 4ff and 40 of the CA.
[89] Regarding the competences of the OeKB § 5/1 ExpGA speaks only of the "bank-related handling of applications for guarantees" whereas the "position of the agent of the Federation shall be regulated in detail by an *agreement* between the principal and the agent of the Federation." (emphasis added).

Indeed, however, such an assignment has been in place since 2000 when the authorization contract pursuant to § 5/1 ExpGA in conjunction with § 1002 et seq. of the General Code of Civil Law was concluded.[90] This private contract is not publicly available. In the light of relevant international standards and in particular the CA, where principles like public responsibility, transparency and participation are explicitly required, this is an unsatisfying situation.

In our view it is therefore necessary to **regulate the export promotion procedure in greater detail** by a democratic and publicly documented act. The best option would be to **amend the ExpGA**. This act should (i) include the protection of human rights as one of its objectives, and (ii) determine the guiding principles of the procedure to be applied by the OeKB while explicitly referring to relevant international instruments[91] as well as human rights norms. Furthermore, it should (iii) stipulate an obligation of the state's authorized agent to carry out an extensive due diligence assessment. In case that an amendment of the ExpGA is not possible within a reasonable period of time, **enacting publicly available guidelines** for the conduct of the by the Ministry of Finance could be considered the second best option.

- The regulation of the due diligence assessment should include the **following elements**:[92]
- The definition of the scope of the regulation comparable to II.i) of the CA.
- The definition of international standards (environmental, social and human rights standards), on which basis the environmental and social due diligence has to be carried out.
- A list of the types of projects which cannot be supported because of environmental, social or human rights concerns (e.g. prohibition of supporting delivery of arms).
- A list of specific project information that corporations need to provide in order to allow for the examination of the human rights impacts of their project.
- The requirement to obligatorily and systematically carry out an environmental and social due diligence *before* granting official support (ex ante).
- The definition of the procedure of such due diligence assessments.
- The requirement of monitoring during the project and the definition of relevant indicators.
- The establishment of an independent evaluation body (ex post).
- The definition of effective sanctions mechanisms in the case of non-compliance with the provisions and terms of the contract (e.g. formal reprimand, immediate termination of the contract, future exclusion, penalties).
- Measures to ensure transparency and participation of all stakeholders.
- Establishment of an independent complaints mechanism for persons affected by the project.
- Reporting obligations, e.g. to the Ministry of Finance, the Austrian Parliament, etc..

7.1.2. Strengthening horizontal policy coherence

In addition to the obligation to give effect to the CA as an international agreement by national legislation (vertical coherence), states also have to ensure **consistency** between different strategies of national actors (horizontal policy coherence).[93]

[90] Cf. ETA Umweltmanagement 2010: 3.
[91] Cf. above fn 9-11 and section 5.
[92] Cf. Keenan 2006: 15; Scheper/Feldt 2010: 54; 76f; Can/Seck 2006: 11f; United Nations, General Assembly 2011: 8f, para 24, United Nations, Human Rights Council 2011a: 11.
[93] United Nations, Human Rights Council 2011a: 12.

In the area of export promotion this second form of coherence is particularly relevant with regard to the operations of the Austrian Development Agency (ADA), the Ministry of European and International Affairs and the Ministry of Economy, Family and Youth as well as the Ministry of Finance and the state's authorized agent pursuant to § 5/1 ExpGA. In order to strengthen coherence between the Austrian export promotion policy and the aims of Austrian development policy it would be advisable to include in § 1 ExpGA, i.e. the provision that defines the objectives of the Austrian export promotion policy, a reference to § 1/3 Development Cooperation Act.

7.1.3. Transparency and participation

The CA are clearly based on the principles of transparency and participation – i.e. two major human rights principles.[94] Their implementation thus has to include measures that ensure public control of the export promotion policy as well as a broad participation of society. This requires, in particular, the disclosure of all relevant project information, the consultation with local actors, duties to report to national parliaments and independent monitoring/evaluation of the proposed project as well as the **publication of the results**.[95]

Critics often counter these requirements with the claim that they are irreconcilable with the protection of sensible business data and detrimental for international competitiveness. Thus also in Austria, many documents that are prepared in the field of export promotion remain undisclosed due to these concerns. For example, the quarterly reports on the extent of the liabilities assumed, the payments made and on large projects with substantial ecological impacts which the Ministry of Finance has to submit to the main committee of the parliament pursuant to § 6 ExpGA are not published. *Ex ante*, only some project information on projects of category A are published. Ex-post, i.e. after the decision on granting official support has been taken, some information on projects of categories A and B or projects with a volume of at least € 10 Mio respectively are published under the condition that the project applicant agrees. In addition, an annual report of the advisory board which is installed to review large projects, is published after informing the Ministry of Finance.[96]

In the light of international recommendations that suggest a full disclosure of all information on the environmental, social and human rights impacts of officially supported projects this is not a satisfying solution. It is commonly argued that a lack of transparency and responsibility of ECAs risks that states become complicit in violating human rights by supporting projects that are harmful to the environment or human rights. As (quasi)public entities ECAs have the duty to inform the public about such risks.[97]

The **information and participation of all relevant stakeholders** thus should be ensured **during the whole project cycle**, which starts with the initial consultations, continues with the decision on financing the project and ends with the evaluation of the completed project. The participation of the persons affected by the project can take various forms depending on the concrete stage of the project: information events, workshops, interviews, reporting opportunities, interrogation rights of the parliament, polls, judicial participation procedures etc.. Transparency is achieved by the publication of the results of all these consultation mechanisms. In particular, the following documents should be published:[98]

- Information on the goal, process and scope of the project.
- Study on the initial situation in the project country (baseline study).
- Due diligence assessment of the project, i.e. the assessment of potential impacts.
- Requirements that the project applicant has to fulfill in order to minimize risks.

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94 Cf. Art. 4 v), 16 und 35ff CA.
95 Cf. United Nations, General Assembly 2011: 10f, para 30ff; Scheper/Feldt 2010: 61.
96 Cf. § 6 in conjunction with § 5/2 ExpGA.
97 United Nations, General Assembly 2011: 16, para 55 and 10, para 32.
98 Cf. Keenan 2006: 15; United Nations, General Assembly 2011: 11, para 38.

- Results of the ongoing monitoring.
- Enforcement measures and sanctions taken.
- Results of the final evaluation.

7.1.4. Monitoring / Evaluation

Pursuant to Art 31 CA the member states have to establish adequate monitoring mechanisms which ensure the conformity of the project with the terms of public support. Furthermore, Art 32 CA stipulates ex-post-evaluations that check the implementation of the measures to minimize environmental and social impacts after the project has been completed.

In any case, these documents should be prepared by an independent body. Reports and information that is provided by the project applicant itself should only be taken into consideration complementarily. Likewise, project evaluations and monitoring measures conducted by NGOs can not replace the state's own assessment. Despite their often extensive expertise, the democratic nexus has to be preserved, i.e. granting official support must remain the responsibility of state institutions. The principal decision on project support and control must thus be taken by the state as provider of the support.[99]

In the Austrian context, the competence to conduct ongoing review and evaluation of the export promotion policy could be institutionally placed with an **independent evaluation body** that is connected to the Ministry of Finance. Modeled after the Independent Evaluation Group (IEG)[100] of the World Bank, the manager of this independent evaluation body would directly report to the highest institution of the authority, i.e. the Minister and consequently the main committee of the parliament. It would consist of independent experts that have several years of experience in the area of project evaluation and human rights. Furthermore, it would operate in close cooperation with the Oesterreichische Kontrollbank, the social partners, representatives of the state authorities and the Austrian civil society. On the one hand, by this position in the Austrian system of institutions, the independence of the assessment would be guaranteed; on the other hand it would ensure the use of existing expertise and an efficient information flow as well as secure the democratic nexus mentioned above.

If the independence of the review is to be further enhanced, an evaluation body could also be established analogous to the provisions of the Accreditation Act which is, for example, applied in Austrian product legislation. Here, a private review body would be made competent by state accreditation to carry out assessments and be controlled by the state in regular intervals (every 5 years at minimum).[101]

In any case, commissioning of private consultants on a solely individual job basis like it is common at the EU level, for example in the field of development cooperation, seems problematic. Supposedly, the interest in being hired for follow-up projects endangers the independence of the reviewer.

7.1.5. Establishment of an independent complaints mechanism

On the institutional level we finally recommend the establishment of an **independent complaints mechanism** like it has been established with the Compliance Advisor / Ombudsman of the IFC[102] or, to a somewhat limited extent, in the case of the Australian,

[99] Scheper/Feldt 2010: 60.
[100] Cf. http://ieg.worldbankgroup.org/content/ieg/en/home.html (2.5.2013).
[101] Cf. Holoubek in: Holoubek/Potacs 2002 vol 2: 80ff.
[102] Cf. IFC 2012b: 12 and http://www.cao-ombudsman.org/ (2.5.2013).

Canadian and Japanese ECAs[103].[104] It should be open for persons that are negatively affected by officially supported projects, in particular victims of human rights violations.[105]

The ombudsman's office should in any case be independent from the project applicant. In-house complaints mechanisms should again be only treated as complementary and have to satisfy certain criteria for effectiveness such as accessibility and impartiality, which are specified in greater details in the report of the UN Special Representative on business and human rights.[106]

Furthermore, the ombudsman's office must be independent from state influence. A subjection to directives like in the case of the national contact points of the OECD at the Ministry of Economy, Family and Youth must therefore be made impossible. Also, locating its office within the OeKB building would mean an unduly close relationship of the ombudsman to the project applicants as the latter are the clients of the OeKB.

The ombudsman's office therefore should be established as an independent complaints body that is not bound by any political directives and that is open to every person that feels that his or her rights have been violated. It is also possible to grant the Minister of European and International Affairs and the Minister of Finance a right to complain in order to guarantee objective lawfulness. The ombudsman shall, by own examinations and a procedure that is open to the parties, work towards the mediation between the parties, control the legality of the export promotion procedure (in particular regarding international obligations and the ExpGA that shall be amended accordingly) and give recommendations where applicable. The ombudsman could be financed by the net revenues of the export promotion procedure which have to be paid to the Ministry of Finance on a regular basis. In 2011, these revenues represented the sum of € 139 Mio.[107]

7.2. Operational Aspects

7.2.1. Systematic social due diligence before granting official support

Project Screening

Pursuant to the CA, the project applicant is obliged to provide the information necessary to review the project. This includes, inter alia, a description of the project and its potential environmental and social impacts including possible mitigating measures, a presentation of the international norms and standards that the parties intend to apply, the results of public consultations or other engagement with the local population / civil society actors. In practice, this means that the project applicant needs to provide the national ECA with information and documents in order for it to be able to carry out an assessment of the environmental and social impacts and a classification into the categories A, B or C. In this process, the central instrument of collecting information is a questionnaire. The questionnaire used by the OeKB so far asks, in terms of social impacts, (i) whether resettlement is required, (ii) whether indigenous people are affected, (iii) whether the affected population has been informed and consulted, (iv) whether there are concerns on behalf of the affected population or on behalf of NGOs as well as whether there are any environmental or social advantages emanating from the project.[108] Thus, there is a lack of questions regarding (i) the conditions of work for workers employed in the project (in the home as well as in the host country), (ii) the compliance with workers rights (in particular the following ILO Core Labour Standards: freedom of assembly/right to collective bargaining, elimination of child labor, prohibition of forced labor, non-discrimination) as well as (iii) important other human rights (e.g. freedom of

[103] See above chapter 6.
[104] Cf. Scheper/Feldt 2010: 62.
[105] United Nations, General Assembly 2011: 16, para 55.
[106] Cf. United Nations, Human Rights Council 2011a: 26.
[107] Bundesministerium für Finanzen 2012: 22.
[108] Cf. OeKB general questionnaire on the environment, see http://www.oekb.at/de/osn/seiten/downloadcenter.aspx (2.5.2013).

speech, right to a fair trial and others) of the persons affected by the project. An **integration of these aspects into the questionnaire is advisable**.

Project Classification / Environmental and Social Due Diligence

For projects of Category A, member states have to introduce obligatory environmental and social impact assessments, which have to be provided, however, by the project applicant. In any case these assessments have to be carried out by **professionally qualified bodies that are independent from the project applicant**. For projects of Category B the requirements are lower while for projects of Category C there is no requirement for detailed assessment.

The review of these documents by the export credit agency is guided by the World Bank Safeguard Policies and the IFC Performance Standards (including the EHS Guidelines that these documents refer to).

For the Austrian context Art 24 of the CA is also relevant. This provision recommends an additional review on the basis of other internationally recognized standards, like e.g. more stringent European Union standards.

Moreover, the member states are obliged to ensure compatibility of the project with the applicable laws in the project country.

Project Screening, Decision and Monitoring

After the screening, member states – and for Austria the state's authorized agent – evaluate the available project material and decide on whether the project will be officially supported. At this point further **requirements** can be imposed in order to ensure that possible negative social and human rights impacts are avoided or appropriate measures are taken to mitigate unavoidable negative effects. In this case **appropriate monitoring measures** should be taken. For example, **regular reports on behalf of the project applicants** can be required during the project in order to ensure the compliance with requirements necessary to address the identified environmental and social impacts. In particularly sensible cases, where e.g. the independence and objectivity of the information provided by the project applicant has to be called into question, an **independent monitoring commission** needs to be set up. Experts on social and human rights should be included in the team. This commission has to review the implementation of the project and the compliance with the conditions stipulation in the contract within regular intervals.

As a rule, ***ex-post* reviews** of environmental and social impacts after the completion of the project should be made obligatory for sensible projects. In addition to the assessment of the environmental and social impacts and the compliance with the terms of the contract, it is particularly important to examine whether there are deviances from the ex-ante assessment regarding these impacts and, in this case, which adaptations of the ex-ante assessment tools seem to be fit to achieve more precise assessments in the future. Ex-post assessments need to be carried out by **professionally qualified, independent experts**. The resulting reports should, like the previously prepared environmental and social impacts assessments and the comments of the national export credit agencies, be made public.

One central element that needs to be kept in mind during the review of environmental and social impacts is the preservation of the state's responsibility for the project assessment. While it is generally reasonable to require project applicants to provide information and analysis on the environmental and social impacts of their projects, this information can not replace a systematic review carried out by the ECA itself. Commissioning external consultants is welcome as a complementary support to fulfill the *responsibility to protect*.[109] An enhanced cooperation with specialized human rights institutes is equally appreciated.[110]

[109] Cf. Scheper/Feldt 2010: 69.
[110] Scheper/Feldt 2010: 78.

In the end, however, the due diligence responsibility remains with the ECA – and therefore the state itself.

7.2.2. Preparation of human rights country profiles

For a more effective examination of human rights impacts of specific projects an **institutionalized screening of countries** regarding their human rights situation is recommended. This corresponds to the requirements of the 3R-framework of UN Special Representative John Ruggie.[111] According to this framework states should check three areas in order to comply with their due diligence obligations:

- The situation in the project country.
- The concrete human rights impacts of the project.
- The local and regional context.

While the assessment of the concrete human rights impacts of the project is a core duty of a due diligence assessment, the review of the general situation in the country and of the local and regional context is assessed during the country risk analysis. So far, social and human rights aspects are not part of the political risk analysis. However, precisely the **systematic integration of human rights into a political risk analysis** can give important hints and starting points for a project-related due diligence. The country portfolios of many ECAs list countries with an precarious human rights situation as target countries. In the case of Austria, countries like Russia, China, Kazakhstan and Iran, where human rights violations are frequent are among the top recipient countries. The preparation of human rights country profiles, at least for important Austrian export markets, as part of the political risk analysis of the OeKB could give important hints on which areas (regions, sectors) and which human rights (civil rights, trade union rights etc.) are particularly problematic and on which aspects project-related due diligence should therefore focus.

7.2.3. Human rights trainings for persons evaluating and managing the project

The duty of a state to protect human rights also includes the duty to guarantee its ability to do so effectively and within the current state of the art. The UN Human Rights Council stated in 2011:

"States should ensure that their own agencies are sufficiently competent to provide useful and effective advice. Home States in particular should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors. This is particularly important for embassy commercial and political officers, export credit agencies and other such bodies that engage directly with the private sector. […] States should expand on such efforts as, for example, the training of diplomatic commercial officers in human rights "red flags", encouraging export credit agencies to begin discussing human rights as part of non-financial (social and environmental) risks as well as developing early warning indicators to alert Government agencies and business enterprises to problems."[112]

In this sense, for the area of the Austrian export promotion procedure it should be ensured that **regular human rights trainings** are provided **for all staff concerned in ministries and ECAs**. In addition to current developments in human rights law, also methodological advances in the field of human rights impact assessments should be part of the training.

[111] United Nations, Human Rights Council 2008: 17.
[112] United Nations, Human Rights Council 2011b, para 15.

7.2.4. Application of the CA also to investment guarantees

According to the 2011 report of the advisory board of the export promotion procedure, more than half of Austria's financial commitments are liabilities for Austrian companies' investments abroad. These include participation guarantees (G4) as well as avals guaranteed by the Republic of Austria.[113] For Austrian companies, foreign investments are thus an important instrument of their corporate activities. In the course of the segmentation of production and value-generating processes into global value chains (GVC), it can be observed that there are substantial differences in the different parts of the global value chain regarding social standards and that there are frequent violations of core workers rights. This has also been stressed by the UN Special Representative John Ruggie several times. Against this background, two new elements have been included in the revised OECD Guidelines for Multinational Enterprises in 2011: on the one hand a chapter for the protection of human rights; on the other hand the duty of a human rights due diligence for enterprises across their entire value chain.[114] These recent developments are a clear example for the increasing convergence on the normative framework of protecting human rights in international economic policy. It therefore seems obvious to review the official support for investment in a similar way as conventional export transactions, even though a review of investment support is currently not required by the revised OECD Common Approaches.

The current practice of review by the OeKB follows the *watchful-eye principle* and, in its application sheet for participation guarantees, requires information only for (i) possible environmental impacts, (ii) corruption prevention and (iii) employment effects in the project country and Austria. Furthermore, applicants are required to confirm that they have read the OECD Guidelines for Multinational Corporations and that they would make an effort to comply with them. However, there are no sanctions in case of non-compliance.[115]

Given the importance of investment in the export promotion procedure and the well-known problems that they cause in the social and human rights area, an **analogous application of the Common Approaches to investment support** seems urgent. This would exceed the *watchful-eye principle* currently applied insofar as investment projects classified as Category A would henceforth be then subjected to an obligatory environmental and social impact assessment. Additionally, it would be necessary to examine, pursuant to the OECD Guidelines, if the project entails a shift of production from Austria abroad. In this case it must be ensured that the workers affected or their representatives are informed in time and are given the opportunity to participate (cf. section V.6. of the OECD Guidelines).

The results of such a review need to be published. Additionally, further conditions for obtaining the investment support contract could be imposed. Compliance with any stipulated conditions should be monitored.

Moreover, it is advisable to maintain an ongoing **exchange of information** regarding such projects **with the national contact point** at the Ministry of Economy, Family and Youth. This could, on the one hand, improve the quality of the due diligence review, and on the other hand provide the national contact point with important basic information about the business activities of Austrian companies abroad. In the case of a complaint with the national contact point that is filed against a corporation which has been granted official export or internationalization support, the Ministry of Finance and the OeKB need to be informed about the result of the arbitration process. If severe human rights violations can be proven, the Minister of Finance shall be authorized to take measures. These include a formal reprimand, the termination of the contract or the guarantee, the future exclusion from support or the payment of penalties. Like in the case of human rights violations discovered in the course of the assessment pursuant to the CA, to take these measures is important in order to secure the state's responsibility to respect human rights.

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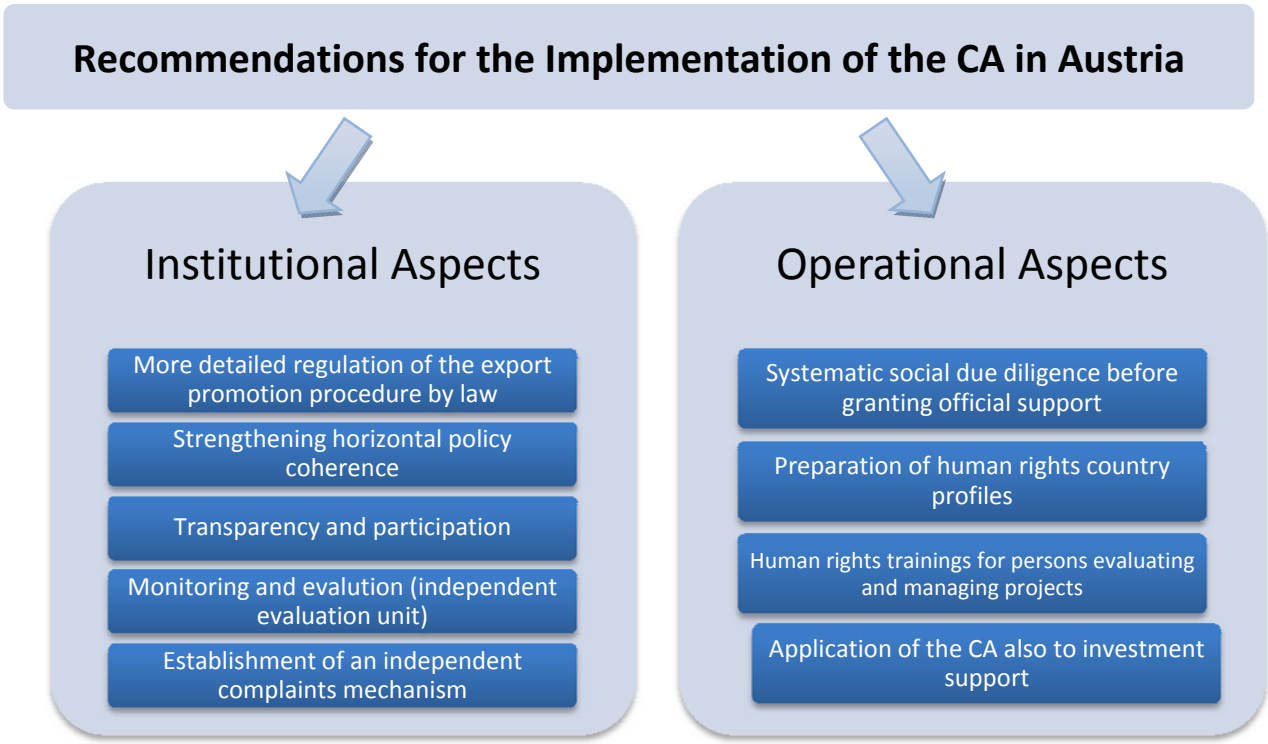
[113] Bundesministerium für Finanzen 2012: 13.
[114] Cf. OECD 2011: 36.
[115] Cf. OeKB's G4 application sheet, http://www.oekb.at/de/exportservice/absichern/exportgarantien/produkte-services/investoren/seiten/default.aspx (2.5.2013).

8. Summary of Recommendations



From a human rights perspective, implementation of the OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence of June 28 2012 rests on two pillars.

On the one hand, a reform of the institutional elements of the Austrian export promotion system is necessary to ensure basic human rights principles such as transparency, participation and non-discrimination. In our recommendations we particularly emphasized the need (i) to regulate by law the basic principles of the export promotion procedure in a transparent and well-documented process, (ii) to ensure coherence between export policy and other policy fields and to (iii) introduce independent monitoring/evaluation- and complaints mechanisms which are currently lacking.

On the other hand, there is a need for a range of operational measures that aim at ensuring that human rights aspects are duly considered in the course of environmental and social impact assessments conducted in the export promotion procedure and at guaranteeing a continuous development of the assessment methods. To this end, it is recommended that the procedure prescribed by the Common Approaches is also analogously applied to investment support.

References

Augenstein, Daniel/Kinley, David (2012): When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations. Legal Studies Research Paper, No. 12/71.

Berne Declaration/CCIC, Canadian Council for International Co-operation/Misereor (2010): Human Rights Impact Assessments for Trade and Investment Agreements. Report of the Expert Seminar, June 23-24, Geneva. http://www.ccic.ca/what_we_do/Report_HRIA-seminar_2010_eng%5B1%5D.pdf (2.5.2013).

Bundesministerium für Finanzen (2012): Bericht der Bundesministerin für Finanzen an den Hauptausschuss des Nationalrates. Tätigkeitsbericht des Beirates gemäß § 6 Ausfuhrförderungsgesetz für das Geschäftsjahr 2011 [April 2012]

Business & Human Rights Resource Centre (2012): Tools & Guidance Portal. http://www.business-humanrights.org/ToolsGuidancePortal/Home (2.5.2013).

Business Leaders Initiative on Human Rights/ United Nations Global Compact Office/Office of the United Nations High Commissioner for Human Rights (2012): Essential Steps for Business to Respect Human Rights Guidance Note. http://www.integrating-humanrights.org/data/fe/file/ES%20final%20for%20web.pdf (2.5.2013).

Can, Özgür/Seck, Sara L. (2006): The Legal Obligations with Respect to Human Rights and Export Credit Agencies. For ECA-Watch, Halifax Initiative Coalition and ESCR-Net. Final Discussion Paper.

De Schutter, Olivier et al. (2012): Human Rights Due Diligence: The Role of States. http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf (2.5.2013).

De Schutter, Olivier (2011): Guidelines for Human Rights-compliant Trade Policy. Interview with Isolda Agazzi, Alliance Sud. http://www.alliancesud.ch/en/policy/trade/guidelines-for-human-rights-compliant-trade-policy (2.5.2013).

ECA Watch (2003): Race to the Bottom, Take II. An Assessment of Sustainable Development Achievements of ECA-Supported Projects Two Years after OECD Common Approaches Rev 6. http://www.eca-watch.org/eca/race_bottom_take2.pdf (2.5.2013).

Ecorys (2012): Trade Sustainability Impact Assessment in support of negotiations of a DCFTA between the EU and Georgia and the Republic of Moldova. http://trade.ec.europa.eu/doclib/docs/2012/july/tradoc_149666.pdf (2.5.2013).

Europäische Union (2011): VO (EU) Nr. 1233/2011 des Europäischen Parlaments und des Rates vom 16. November 2011 über die Anwendung bestimmter Leitlinien auf dem Gebiet der öffentlich unterstützten Exportkredite sowie zur Aufhebung der Beschlüsse 2001/76/EG und 2001/77/EG des Rates.

ETA Umweltmanagement (2010): Evaluierung der österreichischen Exportförderung Ökologische, soziale und ökonomische Auswirkungen auf die Zielländer. Endbericht. Wien. https://www.bmf.gv.at/WipoEUInt/Exportfrderung/EVALUIERUNGDESAUSFU_10910/ETA-Endbericht.pdf (2.5.2013).

Export Development Canada (2012): EDC Statement on Human Rights. http://www.edc.ca/en/about-us/corporate-social-responsibility/pages/business-ethics.aspx?cid=red1039 (2.5.2013).

Gibney, Mark (2011): Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations. In: Global Responsibility to Protect, 3(2), 123-151.

Gibney, Mark/Skogly, Sigrun (Hg.) (2010): Universal Human Rights and Extraterritorial Obligations. Philadelphia.

Holoubek, Michael/Potacs, Michael (Hg.) (2002): Öffentliches Wirtschaftsrecht. Wien/New York.

Human Rights Law Centre (2011): Export Finance and Human Rights in Australia. Submission to the Productivity Commission's Inquiry into the Export Finance and Insurance Corporation. http://www.hrlc.org.au/files/Australias-Export-Credit-Arrangements-HRLC.pdf (2.5.2013).

International Finance Corporation (2012a): Performance Standards. http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES (2.5.2013).

International Finance Corporation (2012b): Sustainability Framework. http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_site/IFC+Sustainability/Sustainability+Framework (2.5.2013).

International Finance Corporation (2012c): Policy on Environmental and Social Sustainability. http://www1.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES (2.5.2013).

International Finance Corporation (2007): Environmental, Health, and Safety General Guidelines. http://www1.ifc.org/wps/wcm/connect/554e8d80488658e4b76af76a6515bb18/Final%2B-%2BGeneral%2BEHS%2BGuidelines.pdf?MOD=AJPERES (2.5.2013).

International Finance Corporation/ Global Compact/ International Business Leaders Forum (2010): Guide to Human Rights Impact Assessment and Management. http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management (2.5.2013).

Kaleck, Wolfgang/Saage-Maaß, Miriam (2008): Transnationale Unternehmen vor Gericht. Über die Gefährdung der Menschenrechte durch europäische Firmen in Lateinamerika. Eine Studie im Auftrag und herausgegeben von der Heinrich-Böll-Stiftung. http://www.boell.de/downloads/TransnationaleUvG-i.pdf (2.5.2013).

Kämpf, Andrea/Würth, Anna (2010): Mehr Menschenrechte in die Entwicklungspolitik! Policy Paper. Deutsches Institut für Menschenrechte. Berlin. http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/policy_paper_15_mehr_menschenrechte_in_die_entwicklungspolitik.pdf (2.5.2013).

Keenan, Karyn (2008): Export Credit Agencies and the International Law of Human Rights. Halifax Initiative Coalition. http://humansecuritygateway.com/documents/HALIFAXIN_exportcreditagenciesandIHLHR.pdf (2.5.2013).

McCorquodale, Robert/Simons, Penelope (2007): Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law. In: The Modern Law Review, 70(4), 598-625.

Nowak, Manfred (2003): Introduction to the International Human Rights Regime. Leiden/Boston.

OECD (2011): Leitsätze für multinationale Unternehmen. http://browse.oecdbookshop.org/oecd/pdfs/free/2011105e.pdf (2.5.2013).

OECD (2011a): Smart Rules for Fair Trade. 50 Years of Export Credits. Paris.

OHCHR (1997): The Right to Adequate Housing (Art. 11.1): Forced Evictions: 20.05.1997. CESCR General Comment 7. Sixteenth Session.

Ruggie, John (2010): Engaging Export Credit Agencies in Respecting Human Rights. OECD Export Credit Group's "Common Approaches" Meeting, Paris, 23. Juni 2010. Remarks by SRSG John Ruggie. http://www.rightrespect.org/wp-content/uploads/2010/08/Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010-3.pdf (2.5.2013).

Scheper, Christian/Feldt, Heidi (2010): Außenwirtschaftsförderung und Menschenrechte. Eine Bestandsaufnahme deutscher Investitions- und Exportkreditdeckungen aus menschenrechtlicher Perspektive. INEF Forschungsreihe Menschenrechte, Unternehmensverantwortung und Nachhaltige Entwicklung 04/2010. http://www.humanrights-business.org/files/aussenwirtschaftsfoerderung_und_menschenrechte.pdf (2.5.2013).

Seck, Sara L. (2010): Conceptualizing the Home State Duty to Protect Human Rights. In: Buhman, Karin/Roseberry, Lynn/Morsing, Mette (Hg.): Corporate Social and Human Righs Responsibilities: Global Legal and Management Perspektives. Basingstoke et al.. http://www.palgrave.com/PDFs/9780230230897.pdf (2.5.2013).

Skogly, Sigrun I. (2006): Beyond National Border: State's Human Rights Obligations in International Cooperation. Antwerp.

Skogly, Sigrun I./Gibney, Mark (2007): Economic Rights and Extraterritorial Obligations. In: Hertel, Shareen/Minkler, Lanse (Hg.): Economic Rights: Conceptual, Measurement, and Policy Issues. Cambridge, 267-283.

United Nations (2008): Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that sesscion (A/56/10). http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (2.5.2013).

United Nations, General Assembly (2011): Report of the independent expert on the effects of foreign debt and other related international financial obligations of State on the full enjoyment of all human rights, particularly economic, social and cultural rights. 66. Sitzung. A/66/271.

United Nations, Human Rights Committee (2004): General Comment No. 31 [80]. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. CCPR/C/21/Rev.1/Add.13.

United Nations, Human Rights Council (2011a): Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/17/31.

United Nations, Human Rights Council (2011b): Business and human rights in conflict-affected regions: challenges and options towards State responses. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/17/32.

United Nations, Human Rights Council (2011c): Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements. Report of the Special Rapporteur on the Right to Food, Olivier de Schutter. Addendum. A/HRC/19/59/Add.5.

United Nations, Human Rights Council (2011d): Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina. Mission to Australia (7-11 February 2011) and Solomon Islands (14-18 February 2011). Addendum. A/HRC/17/37/Add.1.

United Nations, Human Rights Council (2008): Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/8/5.

United Nations, Human Rights Council (2007a): Implementation of General Assembly Resolution 60/251 of 15 March 2006, Entitled "Human Rights Council". Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari. A/HRC/4/18.

United Nations, Human Rights Council (2007b): State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. A/HRC/4/35/Add.1.

Von Bernstorff, Jochen (2010): Die völkerrechtliche Verantwortung für menschenrechtliches Handeln transnationaler Unternehmen. INEF Forschungsreihe Menschenrechte, Unternehmensverantwortung und Nachhaltige Entwicklung 05/2010. http://www.humanrights-business.org/files/voelkerrechtliche_verantwortung_fuer_menschenrechtswidriges_handeln_transnationaler_unternehmen.pdf (2.5.2013).

Weber, Antje (2009): Die rechtliche und politische Dimension von extraterritorialen Staatenpflichten bei Menschenrechtsverstößen durch transnationale Konzerne – Ein Literaturbericht. INEF Forschungsreihe Menschenrechte, Unternehmensverantwortung und Nachhaltige Entwicklung 02/2009. http://www.humanrights-business.org/files/literaturbericht.pdf (2.5.2013).

Weltbank (2012): Safeguard Policies. http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html (2.5.2013).

Judicial Decisions

European Court of Human Rights, decision of 9.12.1994, *López Ostra v. Spanien*, Nr. 16798/90.

Inter-American Court of Human Rights, decision of 29.7.1988, *Velásquez-Rodríguez v. Honduras*.

African Commission on Human and Peoples' Rights, decision of 27.10.2001, *The Social and Economic Rights Action Centre v. Nigeria*, Mitteilung Nr. 155/96.

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