

May 4, 2021

James Cruse  
Acting Vice Chairman and First Vice President  
U.S. Export-Import Bank  
811 Vermont Avenue, NW  
Washington, DC 20571

Dear Mr. Cruse:

We are writing to bring to your attention the attached legal opinion on Export Credit Agencies' (ECAs') financing for fossil fuel projects. We believe the opinion is of relevance, particularly given the US Export-Import Bank's continued financing for fossil fuels and in view of President Biden's [Executive Order on Tackling the Climate Crisis at Home and Abroad](#) and [U.S. International Climate Finance Plan](#).

The legal opinion sets out the international law obligations governing the activities of ECAs in connection with the continued financing of fossil fuel-related projects. It was commissioned by Oil Change International (OCI) from Jorge E. Viñuales, a Professor at the University of Cambridge who is a specialist in public international law, climate and energy law and investment law, and Kate Cook, a barrister at Matrix Chambers who is a specialist in matters of public international law, climate change and human rights law.

President Biden's Executive Order on Tackling the Climate Crisis at Home and Abroad and U.S. International Climate Finance Plan are in line with these international obligations. The former requires EXIM to end its support for fossil fuel projects. The latter calls for the US government to "spearhead efforts" to shift financing away from fossil fuel projects. EXIM should put forward its policy to implement this executive order and immediately end all support for fossil fuels as was called for in a [letter signed by nearly 450 groups](#) from all around the world and encourage other OECD export credit agencies to do the same.

### **Context for the legal opinion**

The defining context for the opinion is 1) the continued financing provided by ECAs to fossil fuel-related projects/activities; 2) the widely acknowledged, urgent need for fossil fuel subsidy reform, and, 3) the rapidly reducing window to take action to curb climate change before its most disastrous effects are irreversibly unleashed.

**ECA funding for fossil fuels remains at odds with the Paris Agreement.** The opinion refers to [OCI and Friends of the Earth US research](#) showing that despite the objectives to which countries committed when adopting the Paris Agreement in December 2015, the ECAs from G20 countries provided USD 40.1 billion annually to support fossil fuel activities (coal, oil and gas across the upstream, midstream and downstream sectors) compared to only USD 2.9 billion for clean

energy (solar, wind, geothermal, tidal) between 2016 and 2018. It also highlights that the support for fossil fuels has increased compared to the pre-Paris agreement period (2013-2015). Since regaining authorization in 2019, EXIM has provided billions of dollars to fossil fuel projects, including Mozambique LNG, Pemex, oil and gas equipment in Argentina, and coal equipment and projects throughout the world.

**Fossil fuel subsidies perpetuate the massive production gap.** In addition, the opinion refers to the UNEP Production Gap Report that shows that oil, gas and coal production need to decline by, respectively, 11%, 4% and 3% every year over the next nine years. The report also shows that instead governments are planning to produce 120% more oil, gas and coal. It also highlights research in *Nature* showing that, even in the absence of any new fossil fuel power plant, the carbon budget for the 1.5°C target would be exceeded, and over one half of the carbon budget for 2°C target would be used up if existing fossil-fuel energy infrastructure is operated as historically (adding 658 gigatonnes of CO<sub>2</sub>). If fossil fuel-based power plants under construction, permitted or planned, are effectively operated as historically, that would add between 37-427 gigatonnes of CO<sub>2</sub>, possibly using up almost the entire carbon budget for a 2°C target.

**Avoiding further climate dangers requires urgently phasing-out fossil fuels.** Based on the above, the opinion concludes that *“if the extremely dangerous consequences of climate change are to be averted or, more modestly, their likelihood reduced, there is no room for additional fossil fuel capacity and existing capacity or its emissions must be reduced urgently and proactively.”*

In the light of this context, the opinion goes on to consider the international law framework that applies to ECAs which act on behalf of States or are regulated by them or operate as separate entities. The opinion draws clear conclusions:

1. ECAs do not operate in an international legal vacuum. The conduct of ECAs is directly or indirectly governed by certain international legal obligations because their conduct may be attributed to the State and/or because States may be required under international law to regulate their conduct and/or because ECAs, as such, may be subject to certain international legal obligations.
2. Under customary international law, States are required:
  - a. not to finance new fossil fuel-related projects/activities or increase the financing of existing ones;
  - b. to decrease existing support within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus;

- c. to make proactive efforts to avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget;
  - d. to adopt and proactively implement adequate procedures to assess the carbon footprint of any project to be potentially supported;
  - e. to adopt and proactively implement guidelines concerning the performance of the activities of the relevant ECA in the context of the climate emergency described above.
3. These State obligations under customary international law are confirmed, further specified and/or expanded by the obligations arising in specific normative contexts, including in the areas of international climate change law, international human rights law and certain specific instruments adopted under the aegis of the OECD. The opinion goes on to give detailed consideration to each of these areas.

The core conclusion of the opinion, which is that states are in principle required not to finance new fossil fuel-related projects and activities, applies both to ECA finance and other forms of government-backed support.

**Given the above, we are extremely concerned about EXIM’s continued financing for fossil fuels and we urge you to take steps towards adopting a policy to exclude fossil fuels from EXIM’s financing.** In the present context of a climate emergency, further public investments in fossil fuel projects cannot be justified. Those further investments would push the world beyond 1.5°C and most likely also 2°C of global warming. Bringing the global average temperature rise back down to 1.5°C after overshooting that warming limit--if even possible--would, as highlighted by the Intergovernmental Panel on Climate Change (IPCC), “*require upscaling and deployment of carbon dioxide removal at rates and volumes that might not be achievable given considerable implementation challenges.*” There are no assurances that overshoot can be reversed on a timeline that avoids significant impacts, if at all. As the IPCC has cautioned, carbon dioxide removal technologies are “uncertain and entail clear risks,” remain unproven at scale, face multiple feasibility constraints, and may have significant impacts on “land, energy, water or nutrients.”

**Fossil fuel projects have grave human rights and environmental impacts.** The dangers associated with fossil fuel financing are clear from the experiences of local communities adversely affected by projects EXIM has financed. For instance, EXIM has provided almost \$1 billion to the Sasan coal plant and mine in India where at least 37 people [have died](#). Another example is EXIM’s \$4.7 billion in support to gas development in northern Mozambique that has spurred unspeakable violence despite [EXIM knowing the risks](#). The grave human rights and

environmental impacts of these and the other fossil fuel projects financed by EXIM underscore the importance not only of adopting strong, human rights-compliant social and environmental safeguard policies, but also of ensuring their implementation through robust monitoring, oversight, and accountability mechanisms. And crucially, those impacts underscore the importance of having clear exclusion policies and parameters regarding activities, like fossil fuel production, that should no longer receive taxpayer subsidies in the form of EXIM financing.

**Public finance for fossil fuel projects risks locking in high carbon infrastructure for decades to come.** In addition to breaching EXIM's legal obligations under international law as described above, this would expose EXIM to ongoing litigation risk. We urge you to take this opportunity to develop a policy that puts an immediate halt to support for fossil fuel projects and associated infrastructure, consistent with international law obligations.

In view of the important legal issues set out in the attached opinion and President Biden's recent climate executive order and climate finance plan, we respectfully request a response, within a month from the date of this letter, from EXIM in detail setting out how it plans to comply with the international law obligations set out in the attached opinion, particularly with respect to EXIM's continued financing for fossil fuel projects.

Sincerely,

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