



**Submission to the UN Committee on Economic, Social and Cultural Rights
regarding the draft General Comment on “State Obligations under the
International Covenant on Economic, Social and Cultural Rights in the Context of
Business Activities”**

ECA Watch¹ welcomes the opportunity to contribute written comments to the Committee on Economic, Social and Cultural Rights on its draft General Comment on “State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” (“draft General Comment”).

As a general observation, ECA Watch welcomes the Committee’s draft General Comment, especially the reaffirmation of states’ extraterritorial human rights obligations and the need to ensure policy coherence as part of states’ obligations, including through more “direct regulation and intervention” whenever necessary.

ECA Watch’s comments focus on the state-business nexus, and more particularly on export-credit agencies (ECAs). ECA Watch believes the General Comment provides an important opportunity to address states’ obligations to ensure that ECAs do not become complicit in human rights violations.

1. Context

Export credit agencies (ECAs) are public entities that provide corporations with government-backed loans, guarantees, credits and insurance to support exports and foreign investments. ECAs are largely focused on facilitating domestic commerce in lesser developed countries and emerging economies, under conditions of significant political and financial risk. ECAs are an important source of finance and insurance for the private sector. These agencies’ influence grew significantly in the wake of the global economic crisis, as states expanded their mandates, budgets and borrowing power.

Despite states’ human rights obligations and their widespread endorsement of the UN Guiding Principles on Business and Human Rights, ECAs continue to support investments with severe human rights impacts.² There is very little disclosure regarding

¹ ECA Watch is an international network of non-governmental organisations. ECA-Watch campaigns for the reform of export-credit agencies (ECAs), calling for greater transparency, accountability, and respect for environmental and human rights. Online : ECA Watch <www.eca-watch.org>

² Halifax Initiative, Both Ends, CounterCurrent, Fórum Suape and Ríos Vivos, *Export Credit Agencies and Human Rights: Failure to Protect* (Halifax Initiative, Both Ends, CounterCurrent, Fórum Suape and Ríos Vivos, 2015), online: Above Ground <<http://www.aboveground.ngo/recent-works/export-credit-agencies-and-human-rights-failure-to-protect/>> [Failure to Protect]. See also Above Ground, “EDC support to oil companies accused of abuses in Colombia questioned”, (23 September 2016), online: Above Ground

human rights due diligence measures taken by export-credit agencies prior to financing projects and there are currently no legal frameworks in place requiring ECAs to ensure respect for human rights throughout their operations. In addition, states lack meaningful avenues, whether judicial or non-judicial, to provide the victims of publicly-financed human rights abuse with remedy.³ OECD states rely on the OECD Common Approaches for ECAs (Common Approaches) to provide export credit agencies with guidance on human rights.⁴ Despite their recent revision, the Common Approaches suffer from significant debilities: they are voluntary, they don't require ECAs to operate in compliance with international human rights obligations and they fail to provide adequate guidance on how to do so effectively.

2- Export-credit agencies as public entities

The draft General Comment addresses ECAs under the obligation to fulfill (paragraphs 25-26) when discussing state "facilitating measures", which comprise a range of economic and fiscal policy tools and incentives. The draft limits its analysis to how public finance can help create an "enabling environment for business actors to respect ESCR". The comment fails to address how public finance can and does contribute to human rights violations. ECA Watch recommends the Committee to include explicit references to ECAs in the draft General Comment with regard to states' obligations to respect and protect.

States are responsible under international law for the operations of their export credit agencies, including any "wrongful acts" that these agencies may commit. Under the international rules of 'state responsibility', the acts and omissions of state institutions, such as export credit agencies, are attributable to the state, even in cases where such agencies are separate legal entities. States must ensure that they do not violate their international legal obligations through the operations of their agencies, including in the area of human rights law.

ECA Watch encourages the Committee to explicitly reaffirm that states have international law obligations to ensure that ECAs neither facilitate nor ignore human rights abuses by the corporations whose activities they support.⁵ In line with concluding

<<http://aboveground.ngo/edc-support-to-oil-companies-accused-of-abuses-in-colombia-questioned/>>, Asaf Shalev, The Guardian, "How Obama's climate change legacy is weakened by US investment in dirty fuel", (30 November 2016), online: The Guardian <<https://www.theguardian.com/environment/2016/nov/30/us-fossil-fuel-investment-obama-climate-change-legacy>>

³ Failure to Protect, *supra* note 2.

⁴ Organisation for Economic Co-operation and Development, OECD Council, "Revised text for the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches")", TAD/ECG(2016)3, (6 April 2016).

⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, online: Refworld <<http://www.refworld.org/docid/3ddb8f804.html>> Discussed in Karyn Keenan, "Export Credit Agencies and the International Law of Human Rights", (Ottawa: Halifax Initiative, January 2008), online: Halifax Initiative

observations made by the Committee with regard to other forms of public support, such as official development assistance⁶ and public pension funds,⁷ ECAs should not provide support to projects that have resulted in – or that are at risk of causing - violations of economic, social and cultural rights in the recipient country.

To this end, ECA Watch invites the Committee to consider providing further guidance on how states can discharge their obligations in the context of ECA operations. States should enforce measures requiring ECAs to adopt transparent human rights policies and to undertake mandatory human rights due diligence prior to providing financial and other forms of support, whether directly or through an intermediary. Due diligence measures should include the conduct and public disclosure of human rights impact assessments. ECAs should include human rights clauses in commercial contracts.⁸ To ensure effective prevention, states should put in place legal mechanisms that establish an explicit duty of care on the part of export credit agencies and other public institutions towards the individuals and communities whose human rights are affected by their clients' operations. Finally, as part of the duty to protect, states should ensure that those individuals and communities whose human rights are violated by publicly-supported activities have access to effective mechanisms to seek remedies, including in the state where public agencies are based.⁹

3- The obligation to fulfill and ECAs

As far as the obligation to fulfill is concerned, ECA Watch believes that the current draft can lead to confusion and would recommend that it be reframed.

The draft General Comment refers to economic and fiscal policies and incentives as tools to encourage companies to respect human rights and to ensure "the proper functioning of markets". ECA Watch believes these tools will not present an appropriate mechanism for encouraging companies to respect human rights unless states ensure business activities respect human rights through adequate disclosure, oversight, sanction and access to remedies for those whose rights have been violated. ECA Watch would encourage the Committee to explore ways in which the state "duty to facilitate" can be reframed using a rights-based approach. This would include a focus on empowering rights-holders to ensure that economic and fiscal policy tools are provided in a way that is consistent with human rights and which does not obstruct another state from complying with its obligations under the Covenant.

To that end, there is a range of measures the Committee could recommend that states adopt, guided by the general human rights principles of participation, transparency and

< <http://www.halifaxinitiative.org/content/export-credit-agencies-and-international-law-human-rights-january-1-2008>>

⁶ UN CESCR, "Concluding observations on the fourth periodic report of Austria", E/C.12/AUT/CO/4 (29 November 2013), at para.11. [UN CESCR Austria]

⁷ UN CESCR, "Concluding observations on the fifth periodic report of Norway", E/C.12/NOR/CO/5, 29 November 2013, at para.6.

⁸ UN CESCR Austria, *supra* note 6, at para.11.

⁹ *Ibid.*

access to information. Such measures could include facilitating access to information for rights-holders about export-credit agencies and other public institutions' obligations and operations, as well as providing rights-holders with information concerning avenues for redress.

For further information, please contact:

Geneviève Paul

Above Ground

gpaul@aboveground.ngo