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LEX/MS 20 January 2017

Contribution to General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities

Dear Committee,

The International Trade Union Confederation (ITUC) welcomes the opportunity to provide written comments on the draft “General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” prepared by Olivier De Schutter and Zdzislaw Kedzia.

The ITUC represents 181 million workers in 163 countries and greatly appreciates the activities of the Committee on Economic, Social and Cultural Rights (the Committee) in furtherance of workers’ rights, which are protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The current project on state obligations under the ICESCR in the context of business activities is of particular importance to workers frequently experiencing abuses of their fundamental rights by private sector employers. We believe that the role of the state is critical in regulating business conduct to prevent adverse impacts on human and workers’ rights protected by the ICESCR. This General Comment can play an important role in clearly formulating the obligations established under the ICESCR within the context of business activities. Therefore, we hope that our comments on the draft in the following section will be useful for the considerations of the rapporteurs.

 Yours sincerely,

 

 Sharan Burrow, General Secretary

1. Comment: Anti-union-discrimination

Paragraph (10) rightly points out that “discrimination in the exercise of the economic, social and cultural rights is frequently found in private spheres, including […] in workplaces and the labour market.” In this regard, it would be pertinent to elaborate on discriminatory conduct by employers against workers engaging in trade union activities. State parties should protect workers against acts of anti-union discrimination, not only during hiring and dismissal, but also with respect to other prejudicial measures such as downgrading and transfers. In order to safeguard workers against such measures, State parties should adopt legislative measures providing remedies (including reinstatement) and dissuasive sanctions for infractions and ensure procedures are prompt, impartial and considered as such by the parties concerned.

1. Comment: Gender-based violence

Paragraph (11) notes grave concern over the over-representation of women in the informal economy and maintains that state parties should take appropriate steps to improve women’s representation in the labour market. Given that women’s labour force participation rates are stagnating at 26 percentage points lower than those of men we strongly agree with this comment. However, we would also like to draw the attention of the CESCR to gender-based violence at the workplace which particularly affects women who are overrepresented in occupations where workers are more likely to be exposed to violence such as domestic work, health and social care, the garment and textile industry and tea and flower plantations. In fact, 40-50 per cent of women in the European Union have experienced unwanted sexual advances, physical contact or other forms of sexual harassment in the workplace. State parties should therefore adopt legislative measures to prevent, address and redress gender-based violence at the workplace.

1. Comment: Procurement

Paragraph (13)-(16) refer to State Parties’ obligation to respect the rights under the ICESCR and point out that State Parties may be held directly responsible for the action or inaction of business actors. In this regard, we would like to highlight that governments are indeed major economic actors procuring billions in goods and services, often on the lowest possible cost. Unfortunately, this often means that governments procure goods and services from contractors which do not respect human and labour rights. The enormous amounts of money spent on procurement each year mean that governments have in fact the purchasing power to avoid companies that violate human rights for the sake of competition. Using the government’s purchasing power in this way is in line with its duty to protect human rights under the UN Guiding Principle (UNGP) 6. The commentary to the UNGP Principle 6 emphasizes that one of the greatest opportunities to support implementation of the full scope of the UNGP is through government procurement, including the terms of contracts.

1. Employment relationship and living wage

Paragraph (19) enumerates relevant and meaningful measures which could be undertaken by State Parties in order to fulfil their obligation to protect through direct regulation and intervention. We would suggest to add to this list the right to freedom of association as well as legislative and practical measures in order to eliminate informal and precarious employment as these forms of employment make workers more susceptible to exploitative working conditions, including poor wages, poor health and safety standards, inadequate leave entitlements, and gender discrimination.

Furthermore, the paragraph recommends the establishment of minimum wage and fair remuneration practices. We believe that this would not only require State Parties to develop effective minimum wage setting systems advancing living wages covering the needs of workers and their families but also the promote strong collective bargaining institutions. It may be useful here to cross-reference the recent General Comment on Article 7.

To guarantee access to living wages throughout supply chains, it is crucial that State Parties prohibit companies from entering into contracts with suppliers with actual and constructive knowledge that the price paid is insufficient to enable compliance with require minimum wages and benefits. There could be a requirement that the company request and review the numbers not merely rely on ignorance to avoid such regulation. Similarly, all supply chain participants that contribute to the setting of the rate of pay could be held accountable for the violations.

1. Trade and Investment Agreements

We share the concern expressed in paragraph (20) with regards to trade and investment. The UN and several civil society organisations have raised concerns about the impact of trade and investment agreements. Most importantly, investor protections under investment treaties or the investment chapters of trade agreements have been used in the past to threaten the host states’ right to regulate. Further, these agreements often contain Investor-to-State Dispute Settlement (ISDS) clauses, a specific type of dispute settlement in investment treaties which allows the investor, i.e. the foreign corporation, to bypass national courts sue a government in an international arbitral tribunal. Some investors have claimed very large sums of money, including not only for alleged actual losses but for loss of anticipated future profits. These tribunals are often populated by the same investment lawyers who also represent clients before these tribunals and thus have an incentive to create a generous legal environment for investors. These decisions are final and binding. Mention of ISDS in the paper would be useful.

In recent years, the trade agreements negotiated by the US, Canada and the European Union have included labour provisions, though the scope and enforceability differ among them. Outside these three parties, other countries have begun to include labour provisions, though they are generally more promotional in nature. In general, trade agreements have created some leverage, particularly in the US, to urge countries to undertake legal reforms prior to ratification, including reforms related to freedom of association. As a result, trading partners have made important legal reforms, though enforcement of those laws have been lacking. Complaints filed once the trade agreement has entered into force have taken substantial time, years in some cases, to prosecute. Only one case has proceeded to international arbitration, namely a complaint filed by the AFL-CIO and Guatemalan unions against the government of Guatemala under the US-Central America Free Trade Agreement (CAFTA) concerning violations of the right to freedom of association – including the assassination of union leaders. Filed in 2008, an initial report of the arbitration panel is expected in September 2016 – over eight years after the complaint was filed. Labour complaints under US FTAs against Bahrain, Colombia, Colombia, Dominican Republic, Honduras and Peru also remain open. Canada and the EU have not consistently used the FTAs to encourage legal reforms prior to ratification. The EU has not accepted or initiated any complaints against its trade partners under its FTAs. Such mechanisms are ineffective if government refuse to take up claims and seek resolution within a reasonable period of time.

1. Comment: Labour inspection

We welcome the clear and straightforward language with respect to the need of competent inspectorates mentioned in paragraph (21). We would like to present the Committee with further information on our priorities in relation to the question of inspectorates in the area of working conditions. We believe that only adequately staffed, resourced, trained, public labour inspectors working themselves in decent working conditions can effectively ensure that national and international labour legislation and decent work are upheld. It is important that inspectors have an enforcement capacity and are able to impose adequate sanctions on the violator or provide adequate appropriate remedies for the victim.

At the same time, we are concerned about the rapid growth of the private inspection industry in the form of third party audits of company or multi-stakeholder codes. These audits have been revealed to be of highly dubious quality as auditors do not have the time, experience and/or incentive to prepare adequate audits. Factories involved in major industrial disasters were audited and found to be compliant. Private audits also do little to improve the public inspection, instead developing a parallel structure with little connection to the state oversight and enforcement mechanisms. There is little to no accountability to date for these auditing firms when they are negligent in the preparation of their audits. It is important to ensure that labour inspection remains public and is not replaced by private social compliance systems. We would urge the committee to remove the reference to codes of conduct in paragraph (118).

1. Privatization

We share the Committee’s concerns about privatization of public services. In this regard, we bring to your attention the particular role that private equity has played in some countries, particularly the United States, in the provision on essential services, including emergency services such as fire and rescue, ambulance services, etc. The quality of these services have deteriorated dramatically, and individuals often face extraordinary bill for these subpar, and sometime dangerous, services. We refer you to the series of article which appeared in the NY Times on the subject.[[1]](#footnote-1)

1. Extraterritoriality and Global Supply Chains

The draft Comment in a few places does note in passing the problems posed by global supply chains, both with regard to extraterritoriality and remedies. We agree, but think that the lack of adequate governance of global supply chains poses a substantial and growing risk to the exercise of ESCR, and in particular the human rights of workers. Thus, we would suggest a separate paragraph on the issue. This would be particularly welcome given the renewed focus on the issue at the ILO, and the ambition of some constituents on standards setting in this area.

As multinational enterprises seek to cut costs and to maximize profits, this can put considerable pressure on wages and working conditions for workers in Global Supply Chains (GSCs), particularly in labour-intensive sectors. The cost pressures from lead firms mean that employment by local manufacturers is typically insecure. This could mean that employers use of temporary contracted or subcontracts or bogus self-employment schemes to drive down wage costs.[[2]](#footnote-2) Some employers may also source inputs from the informal sector, which is often entirely outside of labour regulation. It is in the informal economy where some of the worst abuses are found, and where migrant workers are often concentrated.[[3]](#footnote-3)

Denial of fundamental rights, including the right to freedom of association, is common, as trade unionism and collective bargaining are perceived as a threat to maintaining costs as low as possible. The international nature of production means that lead firms can also shift production of goods and services easily from one company to another or to companies in even less costly and less regulated countries, putting further pressure on manufacturers and service providers in GSCs to cut costs.[[4]](#footnote-4)

Some multinational enterprises have made commitments to establish long term relationships with core suppliers, to pay an adequate price for the products that will allow the payment of fair wages, long-term contracts, and investment in safe and secure workplace. And, even those companies that have made these commitments have often been slow to implement them.

One of the reasons why the current global production model persists is that local suppliers are unlikely to face accountability because the administrative or judicial processes are too slow, too weak or corrupt – as the draft Comment notes. Equally important, lead firms, which contribute to these violations by means of their sourcing practices and the exit threat should costs (including wage rates) increase, are usually immune from legal accountability. In most cases, there is no legal cause of action or jurisdiction over the enterprise in their home country for the violations which are eventually carried out by the supplier. Even in the case of parent-subsidiary relationships, it can often be difficult to hold parent companies accountable for the bad acts of their subsidiaries which have invested overseas.[[5]](#footnote-5) Thus, when workers seeking to associate and form a union are fired, there is usually no effective remedy at home against the local firm, or abroad against the lead firm which may have contributed to the violation. In the absence of accountability, it is unlikely that this behavior will change.

Recently, legislative initiatives have been pursued to hold lead firms accountable for human rights violations in their supply chains. In France, for example, a bill is pending which would require mandatory due diligence of all French companies of a certain size. It could face liability for the acts of its suppliers if it was demonstrated that the French company failed in its due diligence to address human rights violations in its supply chains. A referendum of a reform to the Swiss Constitution would also impose mandatory due diligence and liability for human rights violations.

1. Transparency

Paragraph (38) recommends State Parties to put in place appropriate monitoring and accountability procedures to ensure effective prevention and enforcement. It means the duty imposed on companies to report on how they take into account human right in their operations. Similarly, we would propose that State Parties should consider obligating companies to disclose workplace locations, including factories, offices, and transport/logistics and freight suppliers. The lack of transparency makes it difficult if not impossible to know where firms source their goods and services from and who is ultimately responsible for exploitative working conditions. Difficulties in establishing a causal link between business operations and workers’ rights violations substantially affect the right to remedy. This becomes an exacerbated challenge for vulnerable workers employed in the informal economy. State Parties should therefore require firms to disclose where exactly its goods and services are being produced/delivered.

1. <http://www.nytimes.com/2016/06/26/business/dealbook/when-you-dial-911-and-wall-street-answers.html> [↑](#footnote-ref-1)
2. ILO, Decent Work in Global Supply Chains ¶ 66-68. [↑](#footnote-ref-2)
3. ILO, Decent Work in Global Supply Chains ¶ 75, 90. [↑](#footnote-ref-3)
4. ILO, Decent Work in Global Supply Chains ¶ 8. [↑](#footnote-ref-4)
5. ILO, Decent Work in Global Supply Chains ¶ 121-22. [↑](#footnote-ref-5)