

## Response to Call for Inputs from UN Working Group on Business and Human Rights: Extractive sector, just transition and human rights

Dear members of the United Nations Working Group on Business and Human Rights,

In response to the recent call for inputs on the application of the UNGPs in the extractive industry within the context of energy transition programs, the [European Center for Constitutional and Human Rights](#) (ECCHR) and the [Proyecto de Derechos Económicos, Sociales y Culturales](#) (ProDESC) would like to draw your attention to the findings of a report recently published by our organisations, in collaboration with CCFD Terre Solidaire.<sup>1</sup>

The report highlights early lessons learned from a case filed by members of Mexican indigenous community Unión Hidalgo against French multinational energy company Electricité de France (EDF), under the French Duty of Vigilance Law (LdV). This case was filed in 2020, and alleges that EDF violated its ‘vigilance obligation’ under the law by failing to adequately identify and prevent the risk of human rights violations resulting from the development of the Gunaa Sicarú wind farm on indigenous land. The rights violations that have been experienced by members of the community – the violation of free, prior and informed consent, and attacks on the physical integrity of human rights defenders – are commonly associated with extractive projects. However, as the report notes, the claimants in this case have faced significant legal and procedural challenges in asserting their rights under the LdV.

These issues also have broader implications beyond the specific French legal context, with regards to the judicial interpretation of the human rights due diligence obligation and indigenous communities’ access to effective remedy regarding business-related human rights abuses in the extractive sector.

### Background to the case<sup>2</sup>

In 2013 the Mexican government opened up its renewable energy market to private foreign investment. Since then, European energy companies have invested billions into wind energy projects in the Isthmus of Tehuantepec. The activities of these companies have been linked to serious human rights abuses included the violation of Indigenous rights to land and territory. In many instances, the construction of wind power installations has also led to violence and attacks against land and human rights defenders opposing the encroachment of private enterprises onto communally-held land without their consent.

In 2015, EDF commenced negotiations to develop the Gunaa Sicarú wind park on the land of Unión Hidalgo. According to Mexican law, this land is collectively held as part of the *comunidad agraria*, which requires that any decision relating to the use of land must be taken a community assembly. Despite this, EDF, operating via its Mexican subsidiary Eólica de Oaxaca, concluded usufruct contracts with private landlords before any prior consultation of the community – in violation of their FPIC rights. Members of the Union Hidalgo community challenged the legality of the wind farm using

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<sup>1</sup> Report is available in English [https://www.ecchr.eu/fileadmin/user\\_upload/ECCHR\\_EDF\\_WEB.pdf](https://www.ecchr.eu/fileadmin/user_upload/ECCHR_EDF_WEB.pdf) and French [https://www.ecchr.eu/fileadmin/user\\_upload/ECCHR\\_EDF\\_FR\\_WEB.pdf](https://www.ecchr.eu/fileadmin/user_upload/ECCHR_EDF_FR_WEB.pdf)

<sup>2</sup> Further details on the facts of the case are available here: [https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CASE\\_RESPORT\\_EDF\\_MEXICO\\_NOV2020.pdf](https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CASE_RESPORT_EDF_MEXICO_NOV2020.pdf)

domestic legal proceedings, which resulted in a consultation process being initiated by the Mexican government in 2018.

In 2018 community representatives filed a complaint against EDF with the French National Contact Point of the OECD. Faced with ongoing violence and threats, the complaint was abandoned. Members of the community therefore decided to pursue legal action against EDF under the LdV, with the support of ProDESC and ECCHR. Following the issuance of a formal notice in 2019, requesting that the company comply with its legal obligations, a civil lawsuit was filed in October 2020. The case argues that EDF's vigilance plan fails to adequately identify, or take appropriate measures to mitigate – the serious risks of violation of the community members' FPIC rights as well as their physical integrity as a result of the project. In February 2021, in light of the imminent risk of irreparable rights violations, a request for interim measures was presented to the French judge stipulating that the project should be suspended until EDF complies with its vigilance obligation. This request was rejected by the civil court in November 2021, on procedural grounds. An appeal against this decision is currently pending before the Paris Court of Appeal, and is expected to be heard in late 2023.

### **Key points of reflection from the report**

- The consultation of Indigenous communities regarding the development of wind power projects in Mexico has consistently fallen short. Of the 28 wind power projects in the Isthmus of Tehuantepec region, consultations have either not taken place or have been deeply flawed, conducted after companies have been granted electricity generation licenses by the government and/or have signed usufruct and lease contracts giving them access to land. When such contracts relate to land collectively held by Indigenous peoples, their negotiation and conclusion before the consent of the community has been sought represent a violation of FPIC.
- When challenged on the legality of usufruct contracts, companies involved in renewable energy projects have argued that the land in question is privately held. In doing so, they have sought to benefit from gaps and inconsistencies in the legal status of lands. In contexts where pre-existing land conflicts are known to exist, effective human rights due diligence requires that companies take reasonable measures to identify the property status of lands in question, and implement measures to prevent the infringement of property rights. These should go beyond judicial and administrative verifications and include consultation with local stakeholders and experts with specific knowledge of the social and cultural context. Failure to do so can have a 'snowball effect' whereby violations of FPIC rights can fuel land-related conflicts and intra-community violence.
- Groups and individuals that stand to financially benefit from extractive projects, such as landowners that have allegedly signed usufruct or lease contracts as well as local suppliers and subcontractors, may resort to using threats and violence against members of the community that oppose these developments or insist on the respect of the FPIC process, in order to ensure that the project goes ahead. The use of 'divide and rule' practices can undermine social cohesion within communities, pitting the supporters of development projects against human rights defenders, and leading to an escalation of violence. Prior to developing or implementing a project corporations have a responsibility to consider, in advance, the likelihood that in the context as a whole its engagement may give rise to social unrest or conflict, and to take steps to prevent or mitigate these impacts throughout the project lifecycle.
- In the extractives industry, corporate activities are likely to involve relationships with businesses and individuals that go beyond a classic buyer-supplier commercial relationship. The importance of gaining access to land to conduct operations means that the consideration

of groups such as landowners – which in the EDF case appear to have been the main perpetrators of violence, intimidation and coercion of human rights defenders, motivated by financial benefits of the project – is essential. Restricting the scope of application (or the ‘vigilance perimeter’) of laws such as the LdV could have significant consequences on their ability to prevent human rights violations and provide access to justice.

- The procedural mechanism of interim relief is a way to avoid further harm caused by a company’s failure to comply with the vigilance obligation, and is particularly important in the context of energy and extractive projects being developed on indigenous lands. However, current experiences in cases filed under the LdV (in both the EDF case and the Total Energies case in relation to the Tilenga and EACOP projects<sup>3</sup>) demonstrate the significant procedural barriers for affected communities in accessing these protective measures.
- Within the LdV in particular, the ambiguity surrounding the scope of human rights protected under the law has created substantial uncertainty in relation to the collective rights of Indigenous peoples that are recognised under international human rights law but not integrated into national legal frameworks (for example, France has not ratified ILO Convention 169). When adjudicating on cases filed under the LdV in the context of extractive projects, in their assessment of compliance with the vigilance obligation French judges will likely have to consider how the activities of corporations may result in severe violations of collective land rights. This requires an understanding of how these rights are protected under international human rights law, as well as within the domestic legal systems of the countries in which corporations operate.
- On the case of the LdV, while it obliges corporations to take into account the context in which the company, or its subsidiaries, suppliers and subcontractors operate, and the actual conditions and potential impacts that these operations may have on individuals and groups, the adoption of a broad interpretation of the monitoring obligation is essential to effectively prevent business-related human rights harms. The Unión Hidalgo case illustrates the gap between regulations and actual practices on the ground by subsidiaries. It also gives examples of phenomena such as the capture of the judiciary in countries with major democratic challenges that should certainly be analysed by due diligence processes.

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<sup>3</sup> See here <https://www.amisdelaerre.org/communique-presse/projets-tilenga-et-eacop-de-total-le-tribunal-judiciaire-de-paris-botte-en-touche/>