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Wind farm in Mexico: French energy firm EDF disregards indigenous rights

Since 2015, Electricité de France (EDF), the biggest transnational French energy company and a leading producer of electricity worldwide, seeks to build the Gunaa Sicarú wind park on the land of the indigenous Zapotec community Unión Hidalgo through its Mexican subsidiaries. But until now, the indigenous community has not been effectively consulted about the project – a violation of their rights.

Consequently, in October 2020, representatives of Unión Hidalgo, the Mexican human rights organization [ProDESC](#) and the [European Center for Constitutional and Human Rights](#) filed a [civil lawsuit](#) under the 2017 French Duty of Vigilance law (*loi de vigilance*). The aim: to demand the prevention of further violations of the indigenous community's fundamental right to free, prior and informed consent (FPIC), as well as of the serious risks for their physical integrity in relation to EDF's wind park project.

Under French law and international UN and OECD standards, companies have an obligation to respect human rights in their global operations and along their supply chains. This includes human rights violations by subcontractors or suppliers. However, in the case of the Gunaa Sicarú wind park, EDF failed to properly investigate its operations' possible human rights risks and did not implement measures to protect the rights of the indigenous people. EDF should take its responsibilities violating these rights.

Even though the wind park addresses the critical topic of climate change, this should never happen at the expense of human rights. Businesses must respect human rights, including the specific rights of indigenous people, in all of their operations. The participation of other actors in the operation – be it other businesses as subcontractors or even state authorities – do not free them from this responsibility.

The lack of free, prior and informed consent of the indigenous Unión Hidalgo community

In 2015, Eólica de Oaxaca, EDF's Mexican subsidiary, started negotiations on a wind park project with selected individuals from the Unión Hidalgo community, including "landholders committees," which do not represent the entire community. According to Mexican law, Unión Hidalgo's land is communal and all decisions land should be taken by the community assemblies. Eólica de Oaxaca concluded contracts to use the land with Unión Hidalgo individuals who declared themselves "landholders." Such contracts violate Unión Hidalgo's right to FPIC as well as its collective property rights.

In 2017, EDF's Mexican subsidiaries signed energy supply contracts with the Mexican authorities. In June 2017, EDF requested a permit to generate electricity from the Mexican authorities, and signed

a memorandum of understanding with the Oaxaca state government. All of these negotiations occurred without properly consulting the Unión Hidalgo community.

Indigenous peoples have a special historic and cultural connection to their land. At the same time, they have been historically discriminated against, oppressed and denied their rights. This discrimination happens by states, as well as companies.

Mexican and international law guarantee specific rights to indigenous people. At the heart of these rights is the right to exercise their free, prior and informed consent on measures or projects that may affect their lives and traditions. This right arises from indigenous peoples' right to own, use, develop and control the lands, territories and resources they possess. It seeks to dismantle the structural bases of racial discrimination against indigenous peoples, and enforces communities' active and equal participation in shaping projects that are developed on their lands.

Free, prior and informed consent is a fundamental right protected by the International Labour Organization Convention 169. Accordingly, consent must be:

- Free: indigenous consultation must follow the concerned indigenous community's own decision-making procedures in a culturally adequate manner, represented by freely chosen representatives and undertaken in good faith, without any undue influence or pressure.
- Prior: before decisions are made on proposed measures or activities, including during a project's elaboration and planning phase, prior to signing agreements with project developers, and prior to granting exploration licenses, so that indigenous peoples may influence the "ifs" and "hows" of such measures.
- Informed: the affected groups are provided with all the relevant information on the project proposal, its future development, intended benefits and expected damages and risks, in a language understandable to them.

Eólica de Oaxaca presented an environmental impact assessment in 2018 stating that the project could have a negative impact on Unión Hidalgo's ancestral lands and natural resources, which are vital for the community's economic and cultural subsistence. Even then, no one consulted the community.

Finally, community members and NGOs have reported that in some instances, company representatives even offered money, food and other promises to persuade community members to vote in favor of the wind park project. At the same time, the company withheld information on the project, thus influencing the consultation processes. These measures are incompatible with the community's right to FPIC, and escalated divisions and violence within the community.

The Mexican state is obligated to ensure communities are afforded FPIC. However, EDF disregarded its obligations by proceeding with the wind park project without ensuring the correct consultation of the community affected as well as by actively influencing the consultation process. In October 2018, a Mexican Federal Court ordered the Mexican authorities to undertake the consultation process in accordance with the standards established by ILO Convention 169. So far, the decision has not been fully implemented.

Risks for the safety and physical integrity of Unión Hidalgo's human rights defenders

Because of Mexico's failure to implement and enforce the community's right to free, prior and informed consent, and the company's failure to fulfil its Duty of Vigilance obligation to prevent violations of this right, the community has suffered internal division, escalating into violent conflict.

This was provoked, for example, between residents who perceived the promise of jobs and investment favorably, and those who feared environmental degradation and lost access to their lands. The

inadequate and unequal consultation of community members and interferences with their right to FPIC of the Unión Hidalgo thus generated a serious disruption in the community's social fabric.

Shortly after the indigenous consultation on the Gunaa Sicarú project started in 2018, violence against community human rights and land defenders escalated. In 2018 and 2019, human rights organizations in Mexico, including ProDESC and human rights defenders in Oaxaca, as well as FIDH and the World Organization Against Torture, warned about several serious threats against and attacks on Unión Hidalgo human and land rights defenders who were critical of the project. Such threats and attacks took place during consultations, as well as in the public sphere, through stigmatizing and criminalizing speech on social media.

Consequently, in 2018, the Mexican National Human Rights Commission CNDH granted precautionary measures, and asked that the Mexican authorities immediately halt the consultation. The District Court of Oaxaca granted a provisional suspension of the consultation process in May 2018.

Threats, stigmatization and violence against community human rights and land defenders continue today. As the Observatory for the Protection of Human Rights Defenders pointed out in 2019, at least 22 human rights defenders and journalists have been killed in Mexico, and the "State of Oaxaca stands out as one of the States where women and men human rights defenders face greater risks."

Unión Hidalgo's attempts to protect their safety, physical integrity and fundamental rights

The October 2020 civil lawsuit in France against EDF was not Unión Hidalgo's first attempt to stand up for their rights. In 2018, Unión Hidalgo representatives, supported by ProDESC, filed a complaint against EDF with the French National Contact Point, an entity established by the OECD to promote its Guidelines for Multinational Enterprises. However, in 2019, the indigenous consultation moved forward without upholding the community's right to free, prior and informed consent, and violence continued to escalate. The complainants thus abandoned the case, which they considered ineffective.

Therefore, community representatives, ProDESC and ECCHR attempted to hold EDF to account using the French Duty of Vigilance law. Through a formal notification to EDF, they demanded that the company improve its human rights due diligence preventive measures in its Gunaa Sicarú project "vigilance plan."

In 2020, following EDF's formal response that its vigilance plan is sufficient, community representatives, ProDESC and ECCHR decided to file a civil lawsuit in France, based on EDF's violation of the French *loi de vigilance*.

The suit alleges EDF's failure to establish and implement appropriate measures to prevent human rights violations and adverse environmental effects in the course of its Gunaa Sicarú project. By neglecting the Unión Hidalgo community's right to FPIC, the French energy firm might also be jointly responsible for the resulting damages to the community.

In the lawsuit, Unión Hidalgo community members and the NGOs supporting them ask that EDF improve its vigilance plan. Moreover, Unión Hidalgo's human rights and land defenders call on EDF to suspend the Gunaa Sicarú project until serious abuses of their right to free, prior and informed consent, as well as their safety, can be effectively implemented.

EDF's obligation to respect human rights in its global supply chain and operations

Under the French *loi de vigilance*, companies have an obligation to respect human rights in their activities. This includes their subsidiaries, subcontractors and suppliers with whom they have an established commercial relationship.

Based on the concept of corporate human rights due diligence developed by the United Nations Guiding Principles on Business and Human Rights (UNGPs), the French Duty of Vigilance law is based on a preventive mandatory human rights due diligence obligation.

According to these obligations, parent companies subject to the law must establish a vigilance plan that contains reasonable measures to identify risks and prevent their business activities from severely impacting human rights and fundamental freedoms, health and safety of people and the environment. This extends to all activities of the company, the companies it controls directly or indirectly (its subsidiaries) as well as subcontractors and suppliers.

A vigilance plan has to contain the following measures:

- Risk mapping: identifying, analyzing and prioritizing the above-mentioned risks
- A Regular assessment subsidiaries, subcontractors and suppliers' situations
- Tailored actions to mitigate risks and prevent severe impacts
- An alert mechanism in cooperation with trade unions considered to be representative within the company
- A system that monitors implementation and evaluates effectiveness

The law also provides a notice and injunction mechanism by a judge in case of non-compliance (lack of or insufficient vigilance plan or implementation thereof) and civil liability for damages that result from this lack of compliance.

Consequently, when a company is unable to effectively mitigate the risks of human rights violations or for the safety of human rights defenders like in the Gunaa Sicarú project, it should consider cancelling it. Proceeding with a project when serious risks are known, without taking measures to mitigate them, violate EDF's obligations under the according to the *loi de vigilance*.

Therefore, EDF should take immediate measures in its vigilance plan to effectively identify and mitigate these risks. Should it push the project forward in the absence of such mitigation measures, EDF should bear responsibility for the damages arising from these risks.

Mandatory human rights due diligence applies to all type of business activities. While the climate emergency must prompt governments around the world to take radical action, especially in the energy sector, the energy transition can only be legitimate and sustainable if it respects local communities' land, natural resources and fundamental rights.

The UN Special Rapporteur on the Rights of Indigenous Peoples pointed out in his 2018 report that the reforms facilitating the energy transition in Mexico have not sufficiently incorporated indigenous fundamental rights, although the natural resources needed for these projects – including the land on which these wind parks are built – are often located in indigenous territories.

EDF's obligation to prevent FPIC violations is distinct from state responsibility

The right to free, prior and informed consent primarily obliges states to guarantee and implement this right. Corporate responsibilities in relation to indigenous peoples' right to FPIC are independent of, and distinct from state obligations to protect and guarantee this right.

Following a visit to Mexico, the UN Working Group on Business and Human Rights highlighted that “[i]nadequate levels of transparency and consultation with affected communities contribute to [...] distrust, while perceptions of corporate capture are reinforced by cases of harassment and intimidation against those who speak out about human rights abuse related to development projects and business operations.” It therefore recommended that businesses “ensure meaningful consultation with potentially affected individuals and communities, ensuring that they have timely and complete information about proposed projects or changes that may affect them, and accept that such consultation processes might result in a change to the project.”

In Mexico, the actions of EDF's subsidiaries interfered with and severely impeded the local community's right to a meaningful free, prior and informed consultation, and generated an escalation of violence.

Furthermore, according to international standards such as the UNGPs and the OECD Guidelines on Multinational Enterprises, companies' mandatory human rights due diligence obligation exists independently of states' responsibility to implement human rights. In Mexico, while the courts and the National Human Rights Commission have ruled to protect affected communities' rights and ordered that projects be designed and implemented in a manner respectful of human rights, Mexican authorities' implementation of these judicial decisions has been lacking. As a result, when companies operate in contexts where the state fails to guarantee fundamental rights – as is the case Mexico – this does not exonerate them from exercising their human rights due diligence obligations.

The opposite is true: such visible human rights violations, also by the state, have to be included in companies' risk assessments and mitigated with adequate measures.

Additional context: Extractive industries and shrinking space for human rights defenders

Like other land-intensive extractive and energy projects, the development of wind parks in Oaxaca has provoked conflicts in local communities between residents who see the promise of jobs and investment favorably, and those who fear environmental degradation and lost access to their lands. Indigenous consultations, if not done properly, become part of the overall landscape of shrinking space for civil society in the natural resources arena. On the other hand, consultations that are fair, undertaken in goodwill and meaningful provide the necessary civic space – as opposed to violence – to address these social conflicts constructively.

Human rights defenders have an important role to play in securing the rights of affected people: the right to information and consultation are fundamental. As such, human rights defenders must be protected, not stigmatized, as affirmed in the UN Declaration on Human Rights Defenders and elsewhere.

Community voices

Pedro Matus, farm worker: “We are suffering as a result of this consultation process. The company could prevent these violations of our rights as indigenous people and support our community. We would be very grateful if EDF would make sure that, as a French company, it adheres to French standards and laws, and that it does not resort to the corruption that exists in Mexico. I am asking all French citizens to put themselves in our shoes. If they do so, they will see and feel our suffering. Then they can decide whether to support our community. We are asking for nothing more than respect for the rights of indigenous peoples and the environment. We want the community’s will to be respected without any external interference.”

Guadalupe Ramírez, grandmother and human rights defender: “What do I miss the most? The tranquility of my people. I always leave my house with the fear that I will not come back... Fear of what might happen to my children – I have two sons and two daughters. Fear that my children will never again see Unión Hidalgo as I knew it. Everything has already changed. There was a moment when I said to my husband, ‘Why don’t we leave now?’ After having seen so much, having lived through so many threats, my brothers asked me, ‘Lupita, is it worth it? Is it worth living in all this danger?’ My husband never agreed [to leave]. He said, ‘No. I’m from here, so they will have to bury me here. Why should I leave?’ I have learned that it is right to stay. We were born here. Nobody can point a finger at us to say we have done anything wrong.”

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European Center for Constitutional and Human Rights (ECCHR)

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