

Civil society space in renewable energy projects

A case study of the Unión Hidalgo community in Mexico

POLICY PAPER

SUMMARY

This policy paper examines the case of the Gunaa Sicarú wind park project of the French corporate group Électricité de France (EDF) in the territories of the indigenous Zapotec community of Unión Hidalgo in Oaxaca, Mexico. As a result of the Mexican state's failure to implement and enforce the community's right to free, prior and informed consent, and the company's failure to fulfil its obligation to respect this right, the community has suffered internal divisions and escalating, even violent, conflict.

Accordingly, this paper analyzes the community's strategies to enforce their right to free, prior and informed consent through legal and semi-legal means directed at the state and company.

It concludes that reliance on non-binding standards is insufficient to enforce corporate respect for human rights. It also develops specific guidance on how corporate responsibilities in relation to the right to free, prior and informed consent exist independent of and distinct from state obligations to protect and guarantee this right.

In relation to the state, it concludes that as long as the state fails to fully comply with its obligation to implement and enforce the right to free, prior and informed consent, civil society action at the national and international levels is needed to accomplish such enforcement. Both states and corporations bear key responsibility to promote and protect space for civil society to undertake the peaceful, legal and political action needed to enforce basic human rights.

The European Center for Constitutional and Human Rights (ECCHR), through expertise and consultation, supports the Unión Hidalgo community and the Mexican organization ProDESC in their efforts to enforce indigenous rights and defend civil society spaces.

THE CASE OF UNIÓN HIDALGO

Wind and other "green" energy projects are increasingly attractive investment opportunities for both states and corporate actors. In recent years, legal reforms have opened up Mexico's energy sector to private investment. After declaring energy development to be in the public interest, the state began to prioritize land use for it over other activities, such as agriculture. Like other land-intensive extractive and energy projects, the development of wind parks is prone to provoke conflicts with local communities. This has certainly been the case for the Unión Hidalgo indigenous community in Oaxaca, Mexico. Projects involving the exploitation of natural resources are often criticized for not benefitting local communities beyond the construction

phase, for example, with energy, regular revenue or sustainable jobs. Moreover, they often negatively impact natural flora and fauna, and frequently fall short in respecting communities' rights to land use, and free, prior and informed consent. Indeed, such projects often provoke divisions within communities: while some residents may see the promise of jobs and investment favorably, others may fear environmental degradation and loss of access to their lands. These divisions can cut through villages and even families, and can lead to threats towards and intimidation of project critics. In past cases, companies have been denounced for persuading community members to spy on project opponents. In Mexico, community members and NGOs report that in some cases, company representatives have offered money, food and other promises to persuade land holders to sell or lease their land, and to vote in favor of a project.

When companies offer incentives for community members to accept their project proposals or publicly denounce critics as not representing the community, they play an active role in dividing communities.¹ When only some community members benefit from job offers, scholarships or other incentives in exchange for their support of a project, this conduct—one of several manifestations of corporate capture²—escalates community conflicts. Such “persuasive” or stigmatizing interventions make it impossible to hold consultations free from undue influence. In fact, as Carolijn Terwindt and Christian Schliemann state in their 2017 study *Tricky Business*, “such pressures on civil society in the natural resource arena are not an isolated development, but part of a larger, seemingly global trend to cut back civic space.”³ After a recent visit to Mexico, the UN Special Rapporteur on the rights of indigenous peoples pointed out that

[t]he current situation of indigenous peoples in Mexico shows that there is a significant gap between the legal, political and institutional reality and the country's international commitments. This gap continues to widen, especially as a result of the development model that was launched as part of the energy reform and has a major impact on indigenous territories. Sustainable development requires a human rights-based approach.⁴

The Unión Hidalgo community is located in the Istmo de Tehuantepec region of the Mexican state of Oaxaca. Due to its geomorphological and climate conditions, this region has attracted investments by numerous transnational wind energy projects, all of which count on financial and political support from the Mexican government for this low CO₂-emission industry. The French company

EDF—through its local subsidiaries EDF EN México and Eólica de Oaxaca—is seeking to develop a Gunaa Sicarú wind park in Unión Hidalgo. As investigations by the human rights organization ProDESC have revealed, Eólica de Oaxaca started negotiations in 2015. In 2016, it signed contracts related to supplying energy and presented a social impact evaluation to the authorities. In 2017, it signed a memorandum of understanding with the state government of Oaxaca and received its first permit to generate electrical energy. All of this occurred without the company or relevant government authorities ever informing or consulting the Unión Hidalgo community.

Unión Hidalgo land is communal, meaning that leasing decisions have to be made in community assemblies, not by individual land holders.⁵ As soon as the community learned of EDF's plans, they, accompanied by ProDESC, initiated various *amparo* petitions (a legal tool to protect fundamental rights),⁶ requesting access to information and questioning the development permit given to EDF for the wind park for failing to respect the indigenous community's right to free, prior and informed consent. However, the project was pushed forward before a court could decide on the *amparo* petitions. Hence, in February 2018, the community filed a complaint against the French company EDF with the French National Contact Point (NCP), an entity established by the Organization for Economic Cooperation and Development (OECD) to promote its Guidelines for Multinational Enterprises. The complaint accused EDF of not carrying out a proper human rights due diligence process, therefore failing to ensure that the Gunaa Sicarú wind park project did not violate human rights, including

¹ Carolijn Terwindt and Christian Schliemann (2017): *Tricky Business: Space for Civil Society in Natural Resource Struggles*, Heinrich-Böll-Stiftung/ECCHR (eds.), pp. 100f., 108.

² “Corporate capture refers to the means by which an economic elite undermine the realization of human rights and the environment by exerting undue influence over domestic and international decision-makers and public institutions” (www.escri-net.org/corporateaccountability/corporatecapture/manifestations/).

³ Terwindt and Schliemann (2017), p. 11.

⁴ A/HRC/39/17/Add.2, para 93.

⁵ Terwindt and Schliemann (2017), p. 49.

⁶ This constitutional recourse is designed as a mechanism that allows individuals and legal persons to challenge acts and resolutions of public authorities (including administrative, judicial and legislative acts), for being contrary to the fundamental rights contained in the Constitution, (www.oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e200).

the community's right to free, prior and informed consent. The Unión Hidalgo community explained how it experienced outside interference in relation to the planned development of the wind park in this complaint:

- i. Since 2016, aliens to our community have been invading our lands located at the border between La Venta and the *ejido* of Niltepec. A group of *comuneros* went to investigate the reasons why they were invading our land, but instead of finding out why, we were attacked and threatened by those who claimed to own our land. Faced with this situation, we went to report what was happening to the municipal authorities. According to the people who attacked us, the lands were to be leased to unspecified wind energy companies.
- ii. Since December 2016, aliens to our community began carrying out charitable acts within our village. Such acts included the painting of a school, soccer team donations and other acts that in no way addressed the true needs of our community. While carrying out these acts, these aliens made themselves known as representing the wind energy enterprise EDF. They advertised that they wanted to install a wind park in our territory and that they wanted the support of those who had gained something from their charity. As early as April 2017, it became much more explicit that these people were seeking support for the installation of the wind farm. In that month, they visited the community's high school and promised to construct a water well for the school and give our young students two herds of cattle at their graduation in exchange for allowing the installation of the windfarm.⁷

In March 2018, the Mexican energy authority (SENER) approved EDF's social impact evaluation, and in April 2018, started the consultation period for the Gunaa Sicarú project. Upon petition by the community, the National Human Rights Commission (CNDH) of Mexico granted precautionary measures and requested that SENER immediately halt the consultation. Also, in April 2018, the District Court of Oaxaca granted a provisional suspension of the consultation process, which was confirmed by the same court in May 2018. In October 2018, the Mexican Federal Court ordered the authorities to undertake the consultation process in accordance with the standards established by ILO Convention No. 169. This was a landmark achievement in the field of the right to consultation, as the court in effect goes beyond national legislation to bring domestic law in accordance with binding international standards.

Meanwhile, in Unión Hidalgo, conflicts escalated to such an extent that the Observatory for the Protection of Human Rights Defenders issued an international Urgent Appeal in June 2018 calling for the protection of members of the community's Resistance Committee and the Communal Assembly.⁸ Conflict began to escalate after the consultation meetings began in April 2018, starting with a social media and radio campaigns to stigmatize critics of the wind park project. The campaign painted project critics as "enemies of development" and "anti-wind-energy activists." It publicized their personal information and incited community members to dissuade them of their opposition. Direct threats against the physical integrity of these project critics and their families followed. On 8 May 2018, an outspoken project critic suffered a dangerous (allegedly intentional) car accident. According to the Urgent Appeal, the police did not investigate, and repeatedly failed to implement precautionary protection measures for the person in question, as ordered by the Human Rights Ombuds Office of Oaxaca. At the same time, several *amparo* petitions initiated in 2017 remained unresolved. In March 2018, Oaxaca's Human Rights Ombuds Office recorded several observations during a pre-consultation assembly that contradicted the conditions of a "free" consultation. Incidents targeting the physical security of project opponents continued to intensify. In January 2019, a member of the Resistance Committee suffered an attempted abduction. In April 2019, the same person received a direct death threat shortly before the next assembly was to be held, while another person received a direct threat not to attend the assembly.

This context of division in Unión Hidalgo and the risks faced by land rights defenders was exacerbated by EDF's attempts to attract project supporters with incentives. As recalled by the UN Special Rapporteur on the situation of human rights defenders in his 2018 report on Mexico: "[h]uman rights defenders from indigenous or rural communities point to the deliberate use of divide and rule tactics

⁷ Specific instance complaint against the EDF Group, its Mexican subsidiaries Eólica de Oaxaca submitted to the French OECD National Contact Point by ProDESC and agrarian and representatives from the Zapotec community of Unión Hidalgo in Oaxaca on 8 February 2018.

⁸ Observatory for the Protection of Human Rights Defenders, a joint program of the World Organization Against Torture (OMCT) and FIDH, MEX 007/0619/ OBS 051, 18 June 2019, (www.fidh.org/es/temas/defensores-de-derechos-humanos/mexico-ataques-contramiembros-de-la-comunidad-indigena-de-union).

by the authorities and companies in order to achieve the approval of large-scale projects. The divisions caused by these projects have profound and negative effects on the strong culture of consensus and collective solidarity in affected communities.”⁹ The company has shown an interest in pushing its project through, but has not shown the same interest in preventing negative human rights impacts, particularly related to the Unión Hidalgo community and its right to free, prior and informed consent. Full, prior information about the project was not shared with the entire affected community, which is a precondition for meaningful consultation. Moreover, as long as the security situation does not fully improve, the necessary conditions for a consultation free from pressure and undue interference remain impossible.

In summary, the role of the state in this case is problematic because it is, at best, ambivalent and, at worst, knowingly negligent. The Mexican state has an obligation to protect and guarantee the community’s human right to free, prior and informed consent—as per ratification of ILO Convention No. 169 on the Rights of Indigenous and Tribal Peoples—which includes protection against interventions by third-party private actors. At the same time, the state has an interest to promote energy supply and, in particular, to encourage low CO₂-emission energy production. The state must pursue this interest in a manner compatible with human rights, if not with an overt human rights-based approach. However, in reality, the Mexican state seems to treat human rights and energy politics as opposed interests, manifesting in ambivalent legal positions. While the courts and the National Human Rights Commission have ruled to protect the rights of affected communities 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. Meanwhile, legislation and executive action have worked to enable the Gunaa Sicarú and other wind park projects to move forward, at the expense of indigenous rights.

COMPANY OBLIGATIONS

Ensuring the affected population’s right to free, prior and informed consent is primarily the state’s duty, based on domestic and international law. States should therefore take the lead in consultation processes, but often their inaction pushes companies into assuming a protagonist role.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) outline the responsibilities of all companies, no matter how big or small, and no

matter where they operate, to respect all human rights. This includes the indigenous right to free, prior and informed consent. In locations where domestic legal standards fall short of internationally recognized human rights standards, companies, while respecting their obligations to comply with local laws, should operate according to the higher human rights standards. This means that a corporation’s responsibility to respect human rights extends beyond compliance with national laws and regulations.¹⁰

Article 2 of the Mexican constitution recognizes the right of indigenous and comparable communities to consult on development projects. While a number of national laws incorporate this right to consultation, they either fail to explicitly elaborate the content of the right, or fall short in comparison to international standards for indigenous peoples’ right to free, prior and informed consent, as established in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), ILO Convention No. 169 and the jurisprudence of the Inter-American Court of Human Rights and UN special procedures. Yet, the Mexican constitution establishes that all international human rights to which Mexico has subscribed form part of the constitutional bloc of rights, and should, hence, be fully incorporated into the national legal system, and applied by way of human rights-conforming interpretation (*principio pro persona*).¹¹ These standards set out strict criteria for consultation and free, prior and informed consent:

- **Free** means following the concerned indigenous community’s own decision-making procedures in a culturally adequate manner, represented by freely chosen representatives, undertaken in good faith, without any undue influence or pressure.
- **Prior** means before decisions are taken on any proposed measures, 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 have the chance to actually influence the “if” and “how” of such measures.

⁹ A/HRC/37/51/Add.2, para. 47.

¹⁰ “The corporate responsibility to respect human rights—An interpretive guide”, UNOHCHR, 2012, p. 77.

¹¹ Art. 1 and 133 of the Mexican constitution; see further: CDI, Protocolo para la implementación de consultas a pueblos y comunidades indígenas de conformidad con estándares del Convenio 169 de la Organización Internacional de Trabajo sobre Pueblos Indígenas y Tribales en Países Independientes, 2019, pp. 13–15.

- Informed means that 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. A concrete list with details of the information required can be found in the ILO Implementation Guide for Convention No. 169.
- Consent is required, according to the jurisprudence of the Inter-American Human Rights bodies, for large-scale projects that affect indigenous territories or resources, particularly those planned to occur on indigenous territory or which could have a major impact on or affect the integrity of the territory and its natural resources.¹²

The UN Special Rapporteur on the rights of indigenous peoples highlights in her 2018 report that legislative and constitutional reforms in Mexico relating to the energy and hydrocarbon sectors have not duly incorporated these indigenous rights standards, despite the fact that natural resources needed for such projects—including land for wind parks—are often located in indigenous territories.¹³ A year earlier, in 2017, the UN Working Group on Business and Human Rights visited the country, highlighting in its report that “[i]nadequate levels of transparency and consultation with affected communities contribute to such 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.”¹⁴ It recommended that businesses, among other things, “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*” (emphasis added).¹⁵

As Terwindt and Schliemann put it, “[m]any companies have come to see consultations as being a beneficial form of political insurance—a cost of doing business justified by the expectation that they reduce project risks.”¹⁶ However, such self-interested company involvement in consultations presents risks. Current consultation formats often fail to provide communities with adequate information at the earliest stage possible, or fail to safeguard them from undue influence, including threats and attacks. Excluding community members and restricting civil society space during consultations can catalyze destructive dynamics in which community divisions, the defamation of leaders and NGOs, and public protests can escalate into violent confrontations.

In his 2018 report on Mexico, the UN Special Rapporteur on the situation of human rights defenders observed “the link between social conflicts and the failure to duly consult with indigenous peoples,” describing how “in many instances, consultations were mere formalities in the context of projects that had already been rolled out.”¹⁷ Thus, in practice, consultations have become part of the overall landscape of shrinking space for civil society in the natural resource arena.¹⁸

Corporate responsibilities in relation to indigenous peoples’ right to free, prior and informed consent exist independent of, and are distinct from, state obligations to protect and guarantee this right. The UN Special Rapporteur notes that

[a]ny company involved in a project or projects that might affect indigenous communities should promote prior and meaningful consultations with them; refrain from taking actions that can affect these consultations, including actions that can contribute to the division of communities; and offer all the relevant information on the projects concerned to the affected people in an accessible and culturally appropriate way.¹⁹

Businesses can comply with corporate human rights responsibilities by creating a high-level policy statement that they implement with human rights due diligence, complemented by an effective remediation system (UNGP principles 15–22). Human rights due diligence is a risk management system consisting of four stages: (1) conducting a human rights risk analysis, (2) acting upon the findings, (3) tracking the effect of those actions, and (4) communicating about this process. To apply this system to the case in question, particularly with a view to respecting the right to free, prior and informed consent, companies should take the following action in the context of their activities and those of their subsidiaries:

¹² Corte IADH, Caso del Pueblo Saramaka vs. Surinam, Serie C no 172, and Serie C no. 185; see also Art. 16 of ILO Convention No. 169; Art. 10, 29 UNDRIP; UN Special Rapporteur on Indigenous Peoples’ Rights, Report on Extractive industries and indigenous peoples (2013), A/HRC/24/41, para. 27.

¹³ A/HRC/39/17/Add.2, para. 11.

¹⁴ A/HRC/35/32/Add.2, para. 102.

¹⁵ Ibid, para. 109 (f).

¹⁶ Terwindt and Schliemann (2017), p. 100.

¹⁷ A/HRC/37/51/Add.2, para. 69.

¹⁸ Terwindt and Schliemann (2017), p. 94.

¹⁹ A/HRC/37/51/Add.2, para. 99, (net.org/corporateaccountability/corporatecapture/manifestations).

At the level of human rights risk analysis, companies, like EDF in the Gunaa Sicarú project, would need to verify if indigenous groups are present in a territory they plan on developing a project. Then companies would have to become familiar with applicable domestic and international human rights standards. Such an analysis would show that free, prior and informed consent is a fundamental right of all indigenous groups, which in Mexico, applies to the full extent established in UNDRIP, ILO Convention No. 169, and the standing jurisprudence of the Inter-American Court of Human Rights and UN special procedures. A thorough analysis would also show that Mexico's energy sector regulations do not adequately incorporate these standards. This constitutes a specific risk for the company, as Mexico's domestic energy project procedures, such as those relating to social impact evaluations, permits, licenses and negotiating agreements, are not designed to be human rights compliant. Hence, companies would have to undertake special efforts to avoid negative human rights impacts in the course of these procedures.

At the level of taking action upon these findings, companies must be cautious to ensure they do not replace the state's role in initiating consultations. Instead, companies that identify gaps in a state's human rights protection standards, and hence identify a risk that human rights violations may occur, should use their leverage towards the state in order to prevent such risks. Companies should encourage and support the state in the execution of its obligations to guarantee free, prior and informed consent. At the same time, companies must abstain from actions that could endanger the realization of this right. Concretely, this means companies must:

- Not move forward with a project as long as free, prior and informed consultations have not concluded and, where applicable, consent has been achieved; consultations should happen at the planning stage, before explorations are undertaken and before agreements are negotiated and permits solicited (“prior”);
- Only communicate with the community through the community's freely chosen representatives, in good faith, without exerting any undue influence or pressure, in a culturally adequate and respectful manner (“free”);
- Not unduly influence opinion-building by offering incentives and benefits selectively to supporters of their project; hire community members as “liaisons,” which exposes them to potential conflicts of interest; lobby community members outside the community's

designated communication channels; or, of course, directly or indirectly stigmatize or instigate defamatory speech against project critics (“free”);

- Provide full information about both the benefits and risks of a proposed project, including, among other things, the publication of environmental and social impact evaluations (“informed”);²⁰
- Accept that consultation processes might result in changes to the project (meaningful consultation) or, where consent is required, such as when a project is large-scale and affects the integrity of indigenous territory or resources, that the project might even be vetoed (“consent”).

At the level of tracking responses to such actions, companies should engage with the affected communities through their freely chosen representatives and organized local civil society exclusively in order to verify the impacts of their measures and discuss necessary adjustments. They should pay particular attention to whether community members take part in the consultation process under conditions free from violence and undue influence.

At the level of communication, companies should report its human rights due diligence efforts to the affected population, as well as publicly in cases of serious human rights impacts, including risk analysis and tracking specific project results.

ENFORCEMENT STRATEGIES

The Unión Hidalgo community, supported by the human rights organization ProDESC, has pursued a number of rights enforcement strategies at the national and international level with mixed results:

At the international level, the standards for free, prior and informed consent are clearly set out in international treaties and jurisprudence. Mexico's National Commission for the Development of Indigenous Peoples recognized this in its protocol for the implementation of consultations. However, after consulting with ProDESC and other civil society organizations, international bodies concluded that Mexico's energy sector legal reforms do not sufficiently consider implications of indigenous peoples' rights. The government and relevant authorities that implement consultations must

²⁰ For a full list of elements that should be contained in such information, see ILO, *Indigenous & Tribal Peoples' Rights in Practice, A Guide to ILO Convention No. 169 (2009)*, p. 63.

therefore interpret and apply national laws in accordance with existing international standards. Where concrete risks and violations of indigenous rights can be identified, as in the case of EDF's Gunaa Sicarú wind park project in Unión Hidalgo, the state must act immediately.

At the national level, the courts and Mexico's National Human Rights Commission have recognized this situation and instructed authorities to suspend the project and conduct consultations in accordance with international standards. Close monitoring and follow-up will be crucial to ensure that the authorities adequately implement the decision and that EDF respect it.

Finally, the community has brought the situation to the company's attention directly through the special mechanism offered by the French National Contact Point for the OECD Guidelines on Multinational Enterprises. This proceeding was initiated in parallel to legal proceedings in Mexico directed at state responsibilities, but does not contravene the OECD guidelines' prohibition on parallel proceedings or its good faith principle, given that the issues to be resolved by the Mexican justice system are of a separate legal nature, directed at a different actor—the state—concerning binding legal rights that the community is entitled to defend. The human rights responsibilities of companies, and the OECD specific instance mechanism as a tool to enforce them, stand independent of and distinct from the community's rights and legal procedures in relation to the Mexican state.

In July 2019, however, the complainants chose to stop the proceeding before the French National Contact Point, 17 months after initiating it. They claimed the procedure was opaque, unpredictable and inequitable, as well as unduly strict in its confidentiality requirements. Above all, they believed that no substantial progress had been achieved, nor seemed imminent for the issues at stake, namely EDF's alleged violation of the community's right to free, prior and informed consent. The specific instance procedure under the OECD Guidelines for Multinational Enterprises depends on the good faith and political will of all parties, including the National Contact Point itself, to resolve the dispute. The disappointing development of the procedure in this case is representative of the narrow margin of success in the majority of specific instance procedures before National Contact Points in most countries.²¹ This suggests that reliance on goodwill rather than legally binding parameters is an unconvincing model to enforce corporate respect of human rights. Once more, the usefulness of the OECD complaint procedure is seriously called into question.

FUTURE PROSPECTS

The above findings show that further actions and strategies are needed to support the full enforcement of the Unión Hidalgo community's right to free, prior and informed consent and civil society activities in the case of EDF's Gunaa Sicarú wind park project.

Mexico's 2011 constitutional reform elevating international indigenous rights to constitutional status provides the basis for the UN mechanisms' evaluations of and recommendations for better protection of indigenous rights in extractive and energy projects in Mexico. While Mexico's courts have reaffirmed the constitutional status of such rights, as in the October 2018 Mexican Federal Court judgement ordering consultations to be carried out in compliance with the standards established in ILO Convention No. 169, these court orders have yet to be enforced. Consultations in Unión Hidalgo continue in an environment of increasing tension and pressure. Meanwhile, the company has yet to take tangible steps towards showing that it accepts its responsibilities in relation to the right to free, prior and informed consent. It has yet to demonstrate that it understands its role in creating risks and breaching this right, and it has yet to take action to remedy the urgent escalation of conflict in the community. In this instance, the quasi-judicial procedure available under the OECD Guidelines, which relies on the willingness of all parties involved, has not helped improve the company's understanding of the issues at stake or its conduct in relation to the affected population.

Hence, further civil society activities are needed to improve prospects for the full enforcement of the Unión Hidalgo community's right to free, prior and informed consent. Regarding the Mexican state's compliance with its human rights obligations, public monitoring of the implementation of the October 2018 judgement will be critical. ProDESC will continue attending the assemblies of the indigenous consultations in Unión Hidalgo to document the levels of (non-)compliance with the court's instructions and relay its results back to the court, making use of available legal remedies where necessary. The organization will continue its long-term strategy of fostering the development of critical civil society spaces by strengthening the

²¹ OECD Watch, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct* (2015), (www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf).

work of Unión Hidalgo’s Resistance Committee, which has been involved in the defense of the community’s land, territory and natural resources. At a structural level, ProDESC will address the gaps in domestic legal procedures for energy projects. In particular, it aims to reform the domestic regulation of Social Impact Evaluations to harmonize it with international standards for free, prior and informed consent. A legal challenge to the current regulation, initiated by ProDESC and currently pending in Oaxaca City Court, could, if ruled in favor, set a legal precedent in Mexico regarding the legality of these evaluations for all energy sector projects.

Regarding the company’s responsibility to respect human rights, France—the home country of the EDF corporate group developing the Gunaa Sicarú wind park project—is the first jurisdiction worldwide to offer a legal cause of action when companies breach their human rights responsibilities. The French Corporate Duty of Vigilance Law (2017) establishes that all major France-based companies should assess and address the adverse human rights impacts of its activities on people and the environment by publishing an annual, publicly accessible “vigilance plan.” Where damage occurs as a result of an insufficient vigilance plan, companies must provide reparations. Two months after the OECD procedure against EDF ended inconclusively, ProDESC and ECCHR formally notified the EDF Group in France that activities carried out in their Gunaa Sicarú wind park project in Unión Hidalgo do not comply with their vigilance plan, which neither sufficiently identifies nor envisages measures to mitigate the risks of human rights violations posed by its activities to indigenous communities. Under the French Corporate Duty of Vigilance Law, the EDF Group has 90 days to provide guarantees of improvement to their vigilance plan or adopt measures to mitigate the current human rights violations caused in the course of developing the Gunaa Sicarú wind park project. If the company fails to do this, civil society groups will consider further legal action under the Corporate Duty of Vigilance Law. Given the law is new, such a case has a high potential to set a precedent defining the legally-binding responsibilities of companies in relation to the right to free, prior and informed consent.

CONCLUSIONS

This analysis seeks to evaluate civil society efforts to enforce human rights by using (quasi-)judicial mechanisms in the case of EDF’s Gunaa Sicarú wind park project in Unión Hidalgo. As defending human rights is an inherently long-term, multi-level effort, its conclusions are preliminary.

Overall, this case shows how large-scale (renewable) energy projects can present complex situations with transnational dimensions and multiple conflicting interests that threaten civil society space to engage in and critique potential projects. The right to free, prior and informed consent is a fundamental right of indigenous groups. Companies can meaningfully engage communities in developing rights-responsive energy projects. Where states and companies fail to see this right as an opportunity, and fail to duly protect and respect it, affected communities should seek legal enforcement through action at the national, international and transnational levels. Such legal action has a high potential to inform and reinforce the ever tighter-knit fabric that upholds the human rights of affected communities. At the same time, peaceful legal and political struggles to enforce these rights in different venues in and of themselves (re)produce the civil society space needed for such critical action and engagement, and must be promoted and safeguarded.

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