



EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS



TERRE
SOLIDAIRE
Soyons les forces du changement

CASE REPORT

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

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

Consequently, on 13 October 2020 together with representatives of Unión Hidalgo, the Mexico-based human rights organization ProDESC and the European Center for Constitutional and Human Rights filed a legal action under the French *loi de vigilance*. The aim: to demand the prevention of further violations of the community's fundamental rights to free, prior and informed consent as well as of the serious risks for their physical integrity in relation to EDF's wind park project.

Under French law as well as according to international standards by the UN and the OECD, companies have an obligation to respect human rights in their global operations and along the supply chain. This also includes human rights violations through subcontractors or suppliers. However, in the case of the Gunaa Sicarú wind park, EDF failed to properly investigate the possible human rights risks of its operations and did not implement measures to protect the rights of the indigenous people, especially concerning their right to be consulted on the proceedings as guaranteed according to the fundamental right to free, prior and informed consent (FPIC). Therefore, EDF should take its responsibilities for the violations of these rights, according to the French *loi de vigilance* (2017).

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 each 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 Union Hidalgo community

In 2015, Eólica de Oaxaca, the Mexican subsidiary of EDF, started negotiations on a wind park project with selected individuals of the Unión Hidalgo community, including so-called “landholders committees”, which do not represent the entire community. Moreover, despite the fact that according to Mexican law, Unión Hidalgo's land is communal and all decisions on land should be taken by the community assemblies, usufruct contracts have been concluded by EDF's project

2 EMBARGOED UNTIL 13 OCTOBER 2020, 3:30 AM (CEST)/ FREE FOR NEWSPAPERS WITH PUBLISHING DATE 13 OCTOBER 2020

operator with individuals declaring themselves “landholders”. Such contracts are in violation of the right to FPIC of Union Hidalgo, as well the right to collective property of the community.

Shortly after, in 2017, EDF subsidiaries signed energy supply contracts with the Mexican authorities. In June 2017, EDF then requested the Mexican authorities the permit to generate electricity, and signed a memorandum of understanding with the Oaxaca state government. All of these negotiations occurred without properly consulting the Union Hidalgo community as required under international law standards on free, prior and informed consent, a specific right granted to indigenous communities.

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 draws not only from the action of states, but also from companies.

As a result, 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 (FPIC) 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, seeks to dismantle the structural bases of racial discrimination against indigenous peoples and enforces the active and equal participation of communities in shaping the projects to be developed on their lands.

Free, prior and informed consent is a fundamental right protected by the International Labour Organization (ILO) Convention n°169 in particular. According to this, consent on a project must be:

- Free: means that an indigenous consultation must follow 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 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 have the chance to actually influence the “if” and “how” of such measures.
- 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.

Even when in 2017, Eólica de Oaxaca presented an environmental impact assessment 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, 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 these projects, thus biasing consultation processes. Those incentives are not only incompatible with the exercise this right to FPIC, but they also generate the escalation of divisions and violence in the community.

It is the Mexican state’s obligation to ensure the consultation of communities according to FPIC. However, EDF also 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 finally ordered the Mexican

authorities to undertake the consultation process in accordance with the standards established by ILO Convention No. 169. So far, the implementation of this resolution is lacking.

The risks for the safety and physical integrity of Union Hidalgo's human rights defenders

As a result 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.

Conflicts in the local community were provoked, for example between residents who perceived the promise of jobs and investment favorably, and those who fear environmental degradation and loss of access to their lands. The inadequate and unequal consultation of the community members and the interferences with the right to FPIC of the Unión Hidalgo thus generated a serious disturbance of the social fabric in the community.

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

Consequently, in 2018, the Mexican human rights commission CNDH granted precautionary measures and requested 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 human rights and land defenders of the community continue up until 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".

Union Hidalgo's attempts to seek the respect of their safety, physical integrity and fundamental rights

The civil lawsuit in France against EDF was not Unión Hidalgo's first attempt to have their rights recognized. Already in 2018, representatives of the Union Hidalgo community, supported by ProDESC, filed a complaint against the French company EDF before the French National Contact Point, an entity established by the Organization for Economic Cooperation and Development (OECD) to promote its Guidelines for Multinational Enterprises. However, in 2019, the indigenous consultation moved forward in conditions incompatible with the exercise of the right to free, prior and informed consent, and violence kept escalating. The complainants thus abandoned the proceedings, which they considered ineffective.

Therefore, community representatives, ProDESC and ECCHR approached EDF using the French *loi sur le devoir de vigilance*, a mandatory due diligence law. Through a formal notification to EDF, they demanded that the company improve its human rights due diligence preventive measures taken under its "vigilance plan" for the Gunaa Sicarú project.

In 2020, following the formal response by EDF stating that their 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 claim 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 free, prior and informed consent, the French energy firm might also be partly responsible for the resulting damages to the community.

Members of the Unión Hidalgo community and the organizations supporting them in the case therefore ask through this claim EDF to improve its Plan de Vigilancia.

Moreover, Unión Hidalgo's human rights and land defenders ask EDF to suspend its operations with the Gunaa Sicaru project until serious abuses to their right to free, prior and informed consent or to their safety can be effectively prevented.

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 the subsidiaries through which they operate, as well as their 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 Guiding Principles on Business and Human Rights, the *loi de vigilance* is based on a preventive mechanism known as vigilance obligation.

According to these obligations, parent companies subject to the law must establish a vigilance plan which must contain measures of reasonable vigilance designed to identify risks and prevent severe impacts on human rights and fundamental freedoms, health and safety of persons and on the environment in the businesses activities. 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: identification, analysis and prioritization of the above-mentioned risks
- Regular assessment of the situation of subsidiaries, subcontractors or suppliers
- Tailored actions to mitigate risks or prevent severe impacts
- An alert mechanism in cooperation with trade unions considered as representative within the aforementioned company
- A system to monitor implementation measures and evaluate their effectiveness

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

Consequently, when a company is not able to effectively mitigate the risks of human rights violations or risks for the safety of human rights defenders like it is the case in the Gunaa Sicaru project, it should consider cancelling it. Proceeding with the project while serious known risks for the safety of HRDs and FPIC in the community of Unión Hidalgo are not mitigated constitutes a violation of EDF's obligations as according to the *loi de vigilance*.

Therefore, according to its legal obligation under the Loi de Vigilance, EDF should take immediate measures in its Plan de Vigilancia to effectively identify and mitigate these risks. Shall it push the

project further in the absence of such mitigation measures, EDF should bear the responsibility for the damages arising from the risks.

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

In that sense, 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 parks are established - are often located in indigenous territories.

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

The right to free, prior and informed consent obliges the State primarily to guarantee and implement this right. 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.

In its 2017 report, following its visit in 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,”* therefore recommending 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.”*

In Mexico, the actions of EDF's subsidiaries interfered with a meaningful free, prior and informed consultation of the consultation have severely impeded the realization of this right, and generated the escalation of violence in the community.

Furthermore, according to international standards such as the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises, the mandatory human rights due diligence of a company exists independently of the State's obligation to implement human rights. In Mexico, 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. As a result, when companies operate in contexts where the State fails to guarantee fundamental rights – as it is the case Mexico – this failure does not exonerate them from exercising their human rights due diligence obligation.

The opposite is the case: such notorious human rights violations, also by the state, have to be included in the company's risk assessment and have to be mitigated through adequate measures.

Further context: extractive industries and shrinking space of 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 may see the promise of jobs and investment favorably, and those who fear environmental degradation and loss of access to their lands.

Indigenous consultations, if not done properly, have become part of the overall landscape of shrinking space for civil society in the natural resource arena; yet fair, good-will oriented and meaningful consultations provide for the necessary civic space – as opposed to violence - to constructively and fairly address these social conflicts.

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

The voice of the community

Pedro Matus, farm worker: “I understand there is a law in France that requires refraining from corruption as a way to develop a project that all French companies have to follow that law. But EDF has not been complying that law, at least not here in Unión Hidalgo, in my community”

“I see that for a French company to hide, to use corruption without any further consideration, without taking into account the community or the environment, it is a terrible deception...it is terrible having a country with such standards and that a French company it’s violating its own rules”.

“We want that the community’s will is respected without any external interference”.

Guadalupe Ramírez, grandmother, human rights defender: “What do I miss the most, that we do not have anymore? The tranquillity of my people. I always leave my house with the fear that I won't 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 here?’ 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. He said, ‘No. I'm from here, so they will have to bury me here. Why should I leave?’”

“I've learned that it's the right thing [to stay]. We were born here. Nobody can point a finger at us to say we've done anything wrong.”.

**7 EMBARGOED UNTIL 13 OCTOBER 2020, 3:30 AM (CEST)/ FREE FOR NEWSPAPERS
WITH PUBLISHING DATE 13 OCTOBER 2020**

Last updated: September 2020

European Center for Constitutional and Human Rights (ECCHR) e.V.

www.ecchr.eu