



VIGILANCE SWITCHED OFF

**HUMAN RIGHTS VIOLATIONS IN MEXICO: WHAT
ARE THE RESPONSIBILITIES OF EDF AND THE APE?**

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ACRONYMS

APE	Agence des participations de l'État (State shareholding agency)
BPI	Banque publique d'investissement (Public investment bank)
CSR	Corporate social responsibility
ECCHR	European Center for Constitutional and Human Rights
EDF	Électricité de France
FIDH	International Federation for Human Rights
FPIC	Free, prior and informed consent
ILC	United Nations International Law Commission
IACHR	Inter-American Commission on Human Rights
ILO	International Labour Organisation
NCP	OECD National Contact Point
OECD	Organisation for Economic Cooperation and Development
OMCT	World Organisation Against Torture
PLFR	Projet de loi de finances rectificative (Amending finance bill)
ProDESC	Proyecto de Derechos Económicos, Sociales y Culturales (Project for economic, social and cultural rights)
WTO	World Trade Organization

EXECUTIVE SUMMARY

Mexico, Paris, Berlin,
10 June 2021

On 13 October 2020, human rights defenders from the community of Unión Hidalgo (Mexico), the Mexican organizations ProDESC and ECCHR filed a civil lawsuit against French energy firm Électricité de France (EDF) for breach of its duty of vigilance.

The reason for this lawsuit? A wind power project planned by EDF in the Isthmus of Tehuantepec, in the southern Mexican state of Oaxaca. The industrial and intensive exploitation of natural resources in this region, which is home to a majority of indigenous peoples¹, has generated violent social conflicts and human rights abuses in the local communities. This is the territory where EDF plans to build an industrial-scale wind farm – the Gunaá Sicarú project – without respecting the right of indigenous peoples to free, prior and informed consent (FPIC), as established under the Mexican constitution and international law.

The lawsuit is the latest in a series of warnings issued since 2015 by the Binnizá -Zapotec community of Unión Hidalgo and various organizations promoting international solidarity and human rights². This legal intervention seeks to call on EDF respect the fundamental rights of the Unión Hidalgo community and prevent the escalation of death threats and physical attacks against human rights defenders in the context of its Gunaá Sicarú project.

In this report, CCFD-Terre Solidaire, ECCHR and ProDESC highlight the breaches of the duty of vigilance and international human rights law resulting from EDF's Gunaá Sicarú project, as well as the role that EDF and its majority shareholder, the Agence des participations de l'État (APE). More broadly, this report highlights a culpable negligence of the French State, whose passivity has fuelled the violations in Unión Hidalgo.

Indeed, while in the case of Unión Hidalgo the community and the organizations consider that EDF is not complying with its duty of vigilance – i.e. its obligation to respect human rights in its activities – it appears that EDF's majority shareholder – the APE – and the French State also fail in respecting their obligations under international law. At the core of international human rights law is the obligation of States to respect and guarantee the human rights deriving from their international commitments, including through the obligation of due diligence in the course of extra-territorial business activities of companies established under their jurisdiction. Moreover, States' negative interferences or, conversely, passivity in situations where companies under their control generate harmful impacts on human rights may be violating their human rights obligations. The United Nations and the OECD have also established a series of standards relating to publically owned companies' specific responsibility to ensure that they prevent human rights abuses and serious environmental damage resulting from their activities.

These are obligations established under international law that the French State, the APE and EDF can no longer ignore. The protection of indigenous peoples' fundamental rights and the physical integrity of human rights and land defenders of Unión Hidalgo are at stake. The realization of human rights demands an international public policy that guarantees an ecological and a solidarity-based transition of our economy.

Alejandra Ancheita - ProDESC,
Sylvie Bukhari-de Pontual - CCFD-Terre Solidaire,
Miriam Saage-Maasz - ECCHR

¹ The state of Oaxaca comprises 570 municipalities, of which 418 are governed by indigenous communities that have their own systems of political representation. These communities include five indigenous peoples. The Ben'Zaa (Zapotec) and the Ikoote (Huave) are the most numerous, having inhabited the region for almost 3000 years.

² These include ProDESC, ECCHR, CCFD-Terre Solidaire, Sherpa, Friends of the Earth France, FIDH and OMCT.

01

**EDF IN MEXICO:
FROM BREACHES OF
THE DUTY OF VIGILANCE
TO THE BLINDNESS OF
THE FRENCH AUTHORITIES**

Since 2015, the public energy company Électricité de France (EDF) has been developing its plans to build the Gunaá Sicarú wind farm on the lands of the Zapotec indigenous community of Unión Hidalgo with the help of its local Mexican subsidiaries.

While the project is expected to require an investment of almost USD 350 million to guarantee the installation of 115 wind turbines, so far the indigenous community of Unión Hidalgo has not actually been consulted, which is a violation of their rights as defined under the Mexican constitution and international law.

As a result, on 13 October 2020, representatives of Unión Hidalgo together with the Mexican human rights organisation Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC) and the European Center for Constitutional and Human Rights (ECCHR), supported by a wide range of French civil society organisations including CCFD-Terre Solidaire, Sherpa and Friends of the Earth France, began legal proceedings against EDF under the French law on the duty of vigilance. EDF is one of the largest firms in the French energy sector and one of the world's leading electricity producers. The aim is to ensure that EDF's vigilance plan effectively prevents any further violations of the indigenous community's right to free, prior and informed consent (FPIC) in the context of the Gunaá Sicarú project, and to demand that EDF suspend its project as long as there continues to be a serious risk of attacks against the safety and physical well-being of human rights defenders in Unión Hidalgo³.

The aim is to ensure that EDF's vigilance plan effectively prevents any further violations of the indigenous community's right to free, prior and informed consent (FPIC) in the context of the Gunaá Sicarú project, and to demand that EDF suspend its project as long as there continues to be a serious risk of attacks against the safety and physical well-being of human rights defenders in Unión Hidalgo.



This civil lawsuit highlights the French government's multiple failures to ensure compliance with the duty of vigilance incumbent upon large French firms. Equally worryingly, it shows the public authorities' failure to ensure that this duty of vigilance is effectively implemented, as established under the *French law of 27 March 2017 on the duty of vigilance of parent companies and contracting companies* within the companies in which it invests and over which it has control. Indeed, the legal action that EDF is facing follows 1) multiple legal proceedings initiated in Mexico, and 2) various attempts by ProDESC and human rights defenders from Unión Hidalgo to contact and enter into dialogue with the French authorities, 3) which until today haven't received a satisfactory answer.

3 ECCHR, ProDESC and CCFD-Terre Solidaire, "Wind farm in Mexico: French energy firm EDF disregards indigenous rights", Case Report, October 2020, p. 1.

1. A wind farm at the expense of indigenous peoples' rights



The Isthmus of Tehuantepec, in the state of Oaxaca, Mexico, is known for its strong and constant winds. The state of Oaxaca is also home to a large indigenous population, which has preserved its language and traditions while continuing to identify closely with the land. Such is the case of Unión Hidalgo, a municipality of approximately 12,000 inhabitants, 90% of whom are Binnizá -Zapotec people.

— Wind farms in the town of La Venta, on the road towards Unión Hidalgo —

In Mexico, as early as the 2000s, a political and legislative reform for the development of the so-called “green” energy sector was put in place, announcing the transformation of “unproductive lands”. In 2013 the Mexican market opened up to private investment for the production of renewable energy. Since then, a large number of global leaders in the wind energy sector have established

themselves in the region, implementing numerous industrial-scale wind energy projects⁴. By 2019, the Isthmus had more than 1,600 turbines spread across 39 wind farms. More than half of the 9 million megawatts of wind-powered electricity generated each year in the state of Oaxaca is produced in the municipality of Unión Hidalgo alone, involving intensive land use.⁵

⁴ Bommier, S., “Sur la contribution du devoir de vigilance au concept des communs ainsi que l’affaire Union Hidalgo c. EDF (Mexique)”, in: Les entreprises et les communs, Conférences et colloques, *La Revue des Droits de l’Homme*, no. 19, 2021, pp 9- 10.

⁵ Online database : “The Wind Power, Bases de datos Parques eólicos México”, 2020, available at https://www.thewindpower.net/store_country_es.php?id_zone=36, see also “Impacts and affects of the wind-energy projects in the Tehuantepec Isthmus, available at: <https://www.sipaz.org/in-focus-impacts-and-affects-of-the-wind-energy-projects-in-the-tehuantepec-isthmus/?lang=en>

THE INDIGENOUS COMMUNITY OF UNIÓN HIDALGO

The community of Unión Hidalgo is located in the Isthmus of Tehuantepec, in the Mexican state of Oaxaca. Oaxaca is the second poorest state in Mexico.

In accordance with the Mexican constitution⁶, International Labour Organisation Convention 169⁷ and the UN Declaration on the Rights of Indigenous Peoples⁸, the indigenous agrarian community of Unión Hidalgo self-identifies as a Zapotec indigenous community. As such, it has preserved its political and social organisation, dress, language, festivities and beliefs. The community has established its own identity, characterised by a shared culture, a strong attachment to the land and its natural resources, and an economy based around agriculture and fishing.

However, Unión Hidalgo reflects the marked social contrasts seen throughout the Isthmus of Tehuantepec. For example, 39.2% of its population do not have access to healthcare services and 14.59% are illiterate. 54.4% live in poverty⁹.

Given that the rights of indigenous peoples are rooted in the essentially collective organisation of their societies around their territory, in Unión Hidalgo the political structures, decision-making processes and social organisation are based on regular community assemblies to discuss matters of general interest and issues affecting municipal life.

Around 75% of the 9.5 million hectares that make up the state of Oaxaca is communal or agricultural property subject to the Mexican Agrarian Law¹⁰. Under this law, the use of communal lands or

the conclusion of contracts allowing third parties to use or enjoy such lands are decisions that must be taken collectively, through the general assembly¹¹.

Like other indigenous communities living in the Isthmus of Tehuantepec, the community of Unión Hidalgo does not receive any percentage of the electricity generated on its lands by the existing wind farms, and continues to pay for the electricity it consumes. Some households do not have access to electricity.

Human rights and land defenders in the Unión Hidalgo community are mobilising to demand that the wind industry be developed in such a way that respects their traditions and cultures, enabling local communities to benefit from this industry, in a perspective of a globalised but solidarity-based economy.

39,2%
of the population
do not have access
to healthcare
services

14,59%
are illiterate

54,4%
live in poverty

6 **Article 2** – “The Mexican Nation is unique and indivisible. The nation is multicultural, based originally on its indigenous peoples, described as descendants of those inhabiting the country before colonization and that preserve their own social, economic, cultural and political institutions, or some of them. Indigenous people’s right to self-determination shall be subjected to the Constitution in order to guarantee national unity. Consciousness of indigenous identity will be the fundamental criteria to determine to whom apply the provisions on indigenous people”. [Political constitution of the United States of Mexico](#), 1917.

7 **Article 1** – “This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.” ILO, [Convention 169 on Indigenous and Tribal Peoples](#), 1989

8 **Article 3** – “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” [United Nations Declaration on the rights of indigenous peoples](#), 2007.

9 National Council for the Evaluation of Social Development Policy (CONEVAL), [Annual report on the situation of poverty and the social divide 2020](#), Oaxaca, Unión Hidalgo, 2020.

10 The lands of the community of Unión Hidalgo were officially designated as communal and agrarian lands in a Mexican presidential decree of 13 July 1964, which is still in force today.

11 **Article 23 of the Mexican Agrarian Law** – “The Assembly shall meet at least once every six months or more frequently if its rules or practice so provide. The following matters shall be within the exclusive competence of the assembly: [...] V. The approval of contracts and agreements for the use or enjoyment by third parties of land in common use [...] X. The delimitation, allocation and destination of common use land and its land use regime [...]”



From across the ocean, EDF has corrupted the hearts of our people. We have no more space to grow. They promised jobs to our youth, but we have only witnessed the deaths of human rights defenders. On behalf of my community, I say we do not want a project that kills us, that divides us, that deprives us of our future. We want to live with nature, with the plants, the water, the wind.

Rosalba Martínez, member of the Assembly of indigenous women for human rights in Unión Hidalgo.

The development of sustainable energy sources, including wind power, is broadly welcomed around the globe. However, as research conducted by the Business & Human Rights Resource Centre has shown, the renewable energy sector is not without its own human rights and environmental scandals¹². In Mexico, particularly in the state of Oaxaca, projects involving the intensive exploitation of natural resources – such as wind – come at a high price for local communities and are widely criticised for the serious conflicts and land grabbing they spark, the lack of economic benefits for local populations, and the systematic human rights violations that result. On this point, the Former UN Special Rapporteur on the rights of indigenous peoples notes that she is *“particularly concerned over the rapid increase in such projects, commonly funded through international and bilateral investment agreements, as the financial gains primarily benefit foreign investors who have little or no regard for the rights of local indigenous communities and environmental protection. All too often, these projects leave affected indigenous peoples further marginalized and entrenched in poverty as their natural resources are destroyed.*

” Furthermore, the legal construct of projects funded through investment agreements is generally designed to exclude possibilities for affected communities to seek remedies and redress¹³.”

It all began in 2016, when the indigenous community of Unión Hidalgo realised that EDF – which already operated three wind farms in the Isthmus of Tehuantepec – had begun administrative and commercial procedures through EDF Renewables Mexico (a subsidiary of EDF) and Eólica de Oaxaca (the project promoter for EDF in Unión Hidalgo) to launch a new wind project called Gunaá Sicarú: applying for operating permits and tax exemptions; carrying out an environmental impact assessment; signing a partnership with the Mexican Federal Electricity Commission; entering into negotiations with members of the Unión Hidalgo community for the lease of land, etc. This discovery was particularly surprising to local residents because these steps were being taken before the Mexican government had even begun a consultation process with the community, and therefore without having duly informed and consulted the indigenous population of Unión Hidalgo, in accordance with the constitutional principles and the Mexican and international legal standards regarding the FPIC of indigenous peoples.

According to information obtained by the community, the Gunaá Sicarú project would comprise 115 wind turbines¹⁴, 89 of which would be located in the municipality of Unión Hidalgo. The Gunaá Sicarú project has a vast land footprint: 5,000 hectares, almost half the size of Paris. When completed, the wind farm was expected to cover one third of the territory of Unión Hidalgo.

12 On this issue, see the online portal focusing on the renewable energies sector on the website of the [Business & Human Rights Resource Center](#).

13 A/HRC/39/17, [Report of the Special Rapporteur on the rights of indigenous peoples](#), 10 August 2018, p. 9.

14 Illustrating the lack of precise information about the project that would enable the Unión Hidalgo community to exercise its right to FPIC, the number of wind turbines planned on the Gunaá Sicarú project differs according to the documents provided by the company and its Mexican subsidiaries. In the printed presentation provided to the community as part of the indigenous consultation, EDF refers to the wind farm as consisting of 62 turbines, while the electricity generation permit mentions 96 turbines and the social impact assessment of the project cites 115.

FREE, PRIOR AND INFORMED CONSENT (FPIC)

FPIC is a long-established human rights standard and a key principle of international law that informs jurisprudence concerning indigenous peoples¹⁵. It is a specific right of indigenous peoples recognised in:

→ ILO Convention 169 on Indigenous and Tribal Peoples, 1989¹⁶;

→ Convention on Biological Diversity, 1992¹⁷;

→ UN Declaration on the Rights of Indigenous Peoples, 2007¹⁸.

FPIC enables indigenous peoples to participate in designing, implementing and monitoring projects and decisions that are likely to have an impact on their culture, traditions and social and political structures. It also allows them to give or withhold their consent to projects

that may affect them or their lands, territories and natural resources.

The right to FPIC was created to counterbalance the historical discrimination against indigenous peoples that was originally caused by colonisation. It is derived from the right of peoples to self-determination and the right to be free from racial discrimination.

More specifically, the essential elements of FPIC can be summarised as follows¹⁹:

* **"FREE" CONSENT:** The consultation process should take place in a respectful context, i.e. free from intimidation, coercion or manipulation, in a spirit of trust and good faith between parties. Representative institutions should be freely chosen and should be able to control the

process and be involved in the logistics of the consultation.

* **"PRIOR" CONSENT:** This means before decisions are made on any proposed action, including the development and planning phase of a project, before agreements are signed with project promoters, and before exploration permits are granted, so that indigenous peoples have a real chance to decide whether and how such actions are taken.

* **"INFORMED" CONSENT:** The information provided must be sufficient both in quantity and quality; it must be objective, accurate and clear, and presented in a language understood by the communities in question. The information should cover the nature, scale, pace, reversibility and scope of the project.

On 8 February 2018, two representatives of the Unión Hidalgo community and the ProDESC association filed a complaint with the National Contact Point (NCP) of the Organisation for Economic Cooperation and Development (OECD) in Paris.

Faced with these clear violations of their right to FPIC, and while EDF subsidiaries continued to apply for administrative permits, the members of the community in Unión Hidalgo mobilised to ensure that their rights would be safeguarded, with the support of the Mexican association ProDESC.

Throughout 2017, therefore, human rights and land defenders from Unión Hidalgo filed legal actions with the Mexican authorities in order to:

- * **obtain protective measures** as a precaution against physical threats and attacks;
- * **demand access to information** about the Gunaá Sicarú project;
- * **condemn the violation of Mexican and international law** with regard to FPIC for the indigenous peoples of Unión Hidalgo;
- * **invalidate the permits** granted by the Mexican authorities in violation of their right to FPIC.

Concurrently, on 8 February 2018 two representatives of the Unión Hidalgo community and the ProDESC association filed a complaint with the National Contact Point (NCP) of the Organisation for Economic Cooperation and Development (OECD)²⁰ in Paris. In this action,

¹⁵ See, for example, the judgment of the InterAmerican Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* of 27 June 2012, Series C, No. 245.

¹⁶ ILO, *Convention 169 on Indigenous and Tribal Peoples*, 1989. Ratified by Mexico in 1990.

¹⁷ United Nations, *Convention on Biological Diversity*, 1992. Ratified by Mexico in 1993, by France in 1994.

¹⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, 2007. Signed by Mexico and France.

¹⁹ ECCHR, "*Civil society space in renewable energy projects: A case study of the Unión Hidalgo community in Mexico*", Policy paper, 2020, p. 7

²⁰ The NCP is a non-judicial dispute resolution mechanism created by the OECD. Each member State is responsible for establishing an NCP that provides a mediation service.

the complainants denounced the proven risks of violations of the right to FPIC that the indigenous community of Unión Hidalgo enjoys with regard to the Gunaá Sicarú project. The complainants accused EDF and its subsidiary EDF Renewables of violating the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. In its complaint, the community states:

“ii) In December 2016, people unknown to our community began to carry out charitable acts in our village. These acts included painting a school, donating to football clubs, and other acts that in no way addressed our community’s real needs. When they carried out these acts, the strangers identified themselves as representatives of the wind energy company EDF. They announced that they wanted to install a wind farm on our territory, and that they wanted the support of those who had benefitted from their charity. By April 2017, it became much clearer that they were seeking support for the installation of the wind farm.”



I am afraid of what might happen to my children. I have two sons and two granddaughters. I fear that my children will never again see Unión Hidalgo as I knew it. Everything has already changed. There is no more peace, no more tranquillity.

Guadalupe Ramirez, member of the Unión Hidalgo community;

In this context, the Mexican authorities began a consultation process in April 2018. The beginning of the consultation process and the legal action taken by the community marked an escalation of violence and attacks against the land and human rights defenders of Unión Hidalgo. They have been subjected to a campaign of criminalisation on the radio and on social networks by supporters of the Gunaá Sicarú project. Many of them have received death threats to dissuade them from taking part in the consultation process and one of the women community leaders was involved in a suspicious car accident in May 2018. Another member was the victim of an attempted kidnapping in January 2019, followed by direct death threats shortly before a public consultation on the Gunaá Sicarú project.

As a result, in April 2018, at the community’s request, Mexico’s National Human Rights Commission granted protective measures and called for an immediate halt to the consultations. At the same time, ProDESC also reported multiple irregularities in the implementation of the consultation process and was granted a suspension by the Mexican courts. In November 2018, due to the human rights violations perpetrated, a Mexican Federal Court ordered a consultation that must be carried out in accordance with the international standards defined under ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples.

Other warnings and protective measures have been issued by State human rights organisations. On 13 June 2018, the Human Rights Office in Oaxaca (DDHPO) issued an “early warning” regarding Unión Hidalgo and, in particular, EDF’s Gunaá Sicarú wind power project. Furthermore, in June 2019, the International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT) issued an international Urgent Appeal reporting multiple failures in the consultation process and calling for the protection of human rights defenders in Unión Hidalgo.

It is clear that EDF’s Gunaá Sicarú project and the actions of its Mexican subsidiaries have contributed to the escalation of violence in the community of Unión Hidalgo throughout this period: testimonies from human rights defenders in Unión Hidalgo state that EDF’s subsidiaries have been interacting individually with community members, offering them benefits or pressuring them to persuade the community to consent to the wind project. This interference has taken place outside the established channels for transparent and collective consultation with the community, in accordance with their right to FPIC²¹.

On this issue, Michel Forst, the Former UN Special Rapporteur on the situation of human rights defenders, highlighted in his 2018 report on Mexico:

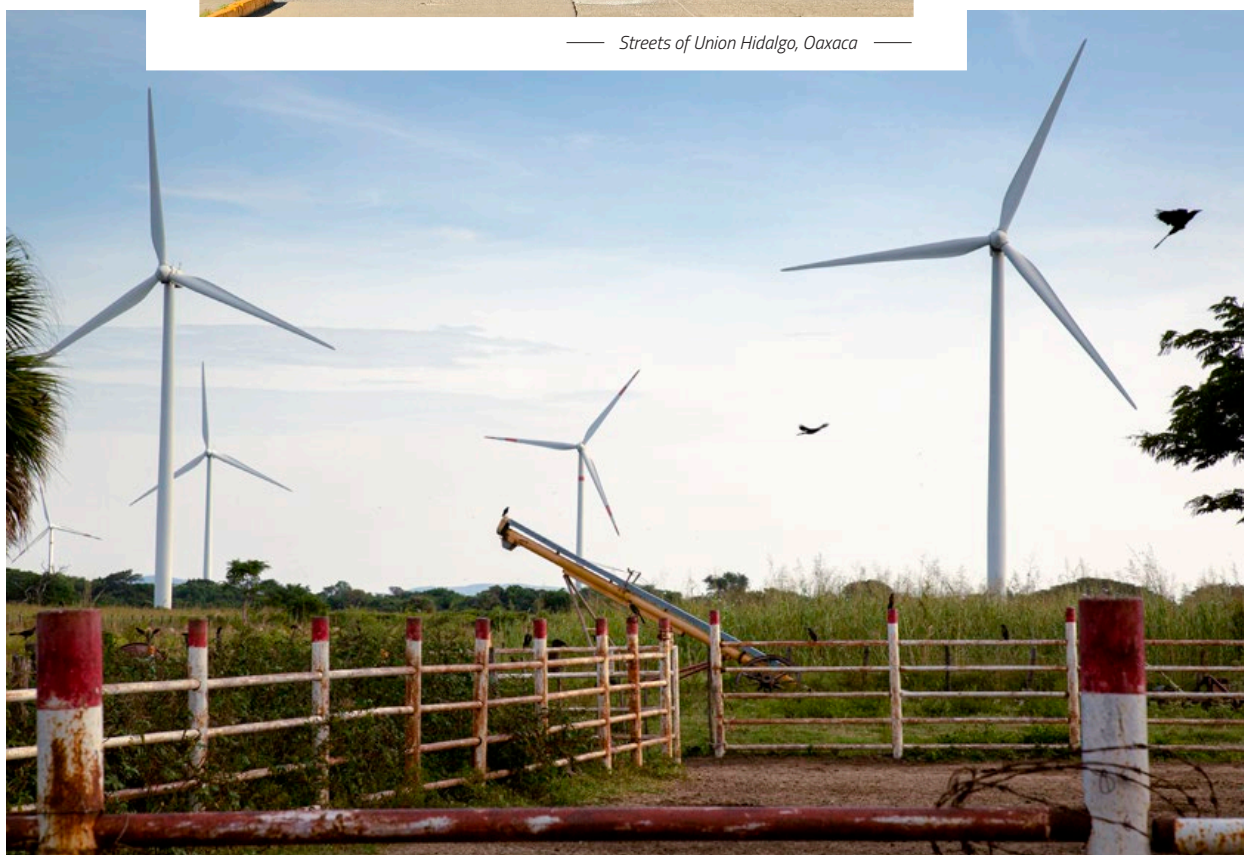
21 The witness accounts and evidence were submitted to the judicial tribunal Paris as part of the legal proceedings against EDF by the associations ProDESC and ECCHR.

"Human rights defenders from indigenous or rural communities point to the deliberate use of divide and rule tactics 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 communities²²."

In France, the OECD NCP proceedings stalled and came to an end due to lack of substantial progress. Having achieved just one meeting with representatives of the EDF parent company in a year and a half of mediation, and faced with increasing tensions and threats against human rights defenders in Unión Hidalgo, ProDESC and community representatives withdraw from the OECD NCP process at the end of July 2019²³.



— Streets of Unión Hidalgo, Oaxaca —

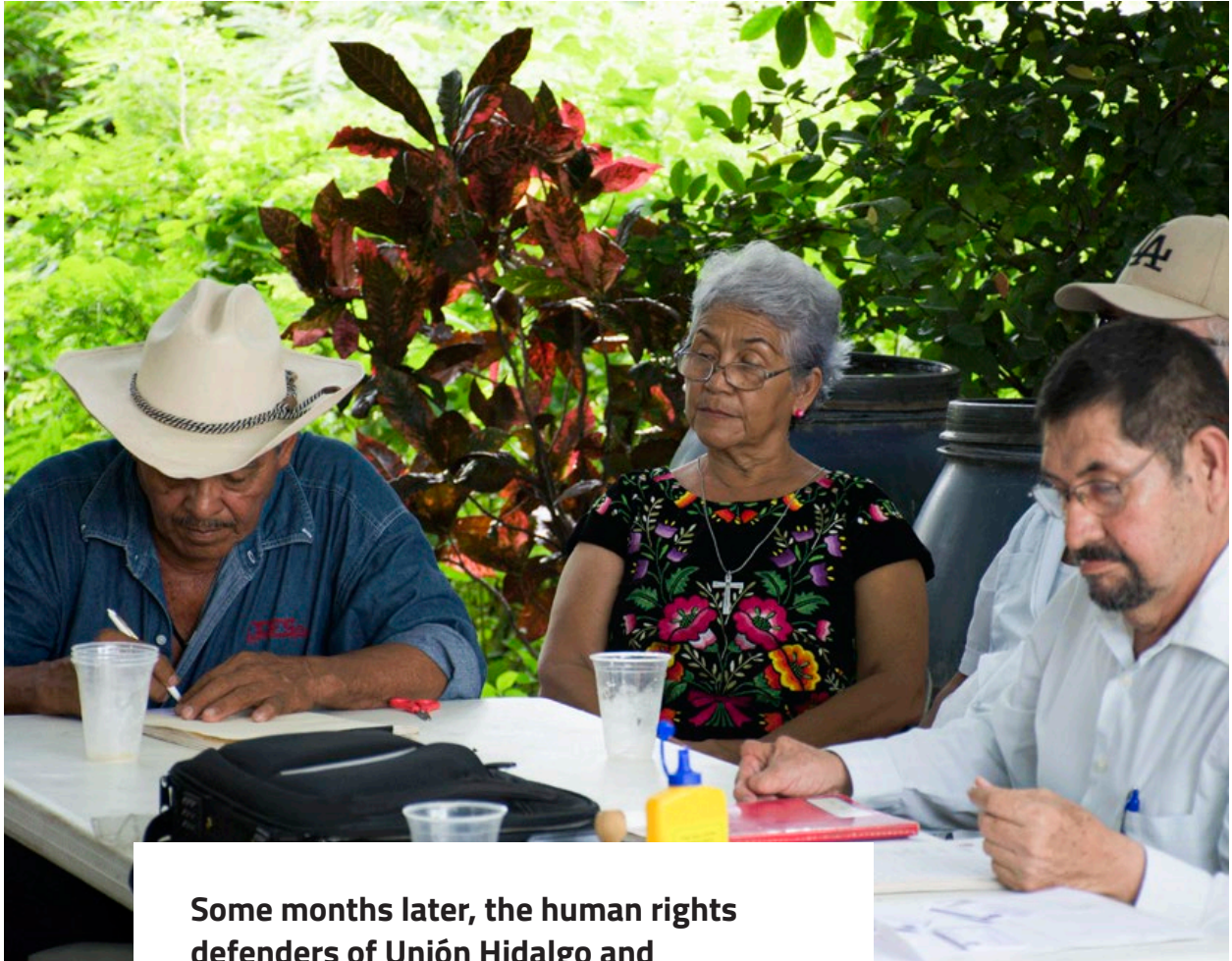


— View of the wind turbines from the house of Guadalupe Ramirez in Unión Hidalgo, Oaxaca —

22 A/HRC/37/51/Add.2, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Mexico, 2018, §47, p. 10.

23 Opinion, "Champs d'éoliennes d'EDF : des populations mexicaines dénoncent la violation de leurs droits fondamentaux", *Le Nouvel Obs*, 16 October 2019.

2. Using the French justice system to uphold the rights of indigenous peoples in Mexico



Some months later, the human rights defenders of Unión Hidalgo and ProDESC, with the support of the German organisation ECCHR, resorted to the law on the duty of vigilance to assert their rights in the face of violations committed by EDF through its Mexican subsidiaries.

— Assembly of comuneros & comuneras of Union Hidalgo, Oaxaca —

Adopted in France in March 2017 following a four-year legislative marathon, the *law on the duty of vigilance of parent companies and contracting companies*, known as the duty of vigilance law ("*loi sur le devoir de vigilance*") imposes a duty of vigilance on large French business enterprises²⁴ with regard to their activities and those of their subsidiaries,

suppliers and subcontractors. These companies are obliged to draw up, publish and effectively implement a vigilance plan to identify, prevent and remedy all the risks they pose to fundamental freedoms, human health and safety, human rights and the environment throughout the world.

²⁴ This means companies registered in France with over 5000 employees in France and/or over 10,000 employees worldwide. See <https://plan-vigilance.org> for the full list of companies subject to the law, as drawn up by CCFD-Terre Solidaire and Sherpa.

THE DUTY OF VIGILANCE: A LAW AND MECHANISMS OF ACCOUNTABILITY TO ENSURE RESPECT FOR HUMAN RIGHTS AND THE ENVIRONMENT

The law on duty of vigilance is established on two pillars: the prevention of human rights violations and serious environmental damage, and remedy through the civil liability of the company if these violations or damages occur.

1 - To prevent human rights abuses, any person with an interest in taking action may formally request that the company modify its vigilance

plan and practices in order to address the risk of violations. If this mechanism of formal notice does not produce the intended effects, the person can then file a civil lawsuit against the company so that a civil court can potentially force the company to modify its vigilance plan and implementation, thereby effectively preventing the risks identified by the complainants.

2 - If human rights violations or serious environmental damage are identified in a company's value chain, the people affected can also take their case to a civil court in order to claim damages and remedy commensurate with the harm suffered.

Asserting the rights guaranteed under this pioneering international law, ProDESC, ECCHR and the defenders of Unión Hidalgo have issued EDF with a formal notice in order to force the company to respond to the warnings issued by the human rights defenders of the Unión Hidalgo community and to prevent human rights violations in their territory. In their letter of formal notice, the complainants remind EDF of its responsibilities, as the company appears determined to carry out its project even though the indigenous peoples' right to FPIC is not guaranteed and "*human rights defenders from Unión Hidalgo have been stigmatised, harassed, threatened and publicly criminalised by supporters of the project*"²⁵.

These threats are significant in a country where indigenous communities have historically been subjected to structural discrimination by public authorities, in the context of increasing corporate capture²⁶.

This is of particular concern in a region that has been plagued by repeated acts of community violence and murders of indigenous land and environmental defenders. According to official figures issued by the Mexican government, 27 environmental defenders were threatened and 10 killed in various environmental conflicts between January and May 2020²⁷. In this region specifically, on 21 June 2020, 15 people were murdered in one of the communities near Unión Hidalgo in the context of tensions caused by conflicting economic interests, including wind power²⁸.

25 ProDesc, ECCHR, representatives of the Unión Hidalgo community, *Formal notice under Law No. 2017/399 on the duty of vigilance of parent companies and contracting companies*, 26 September 2019. See the [Article](#) published on the website of the Business & Human Rights Resource Centre on 2 October 2019.

26 Corporate capture is defined as "*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.*" These means include: community manipulation, economic diplomacy, judicial interference, legislative and policy interference, privatizing public security services, and revolving door practices." ESCR-Net, [Manifestations of corporate capture](#), 10 October 2017. With regard to the specific case of EDF in Mexico, see ProDESC, [Energías renovables y capture corporativa del Estado: el caso de Electricité de France en el Istmo de Tehuantepec, Oaxaca](#), November 2018.

27 Mayolo, H., [Defensores ambientales y territoriales](#), Mexican Government, 4 September 2020.

28 Ferri, P., "[Todas las violencias de México en la matanza de San Mateo del Mar](#)", *El País*, 26 June 2020.



A REGION PLAGUED BY VIOLENCE IN THE CONTEXT OF ELITE CAPTURE

The UN Rapporteur on the situation of human rights defenders, Mary Lawlor, also noted in her recent report of 24 December 2020 that Latin America remains the most dangerous region in which to exercise the right to defend human rights. Mexico has the highest number of killings, along with Honduras, Brazil and Colombia.

– has recorded the highest number of attacks against environmental, land and territory defenders in recent years²⁹.

Globally, according to data from the Business and Human Rights Information Centre, 604 attacks on people working on business-related human rights issues were recorded in 2020. More than a third of these cases were related to the lack of consultation or failure to obtain the FPIC of the communities affected, and almost half of the attacks

occurred during peaceful protests against business activities.

Furthermore, according to Mexican economists interviewed in the *Nouvel Obs* in 2014, torture, arbitrary imprisonment and murder in relation to wind farms “are very real and would justify halting investments and holding a major national debate on the integration of indigenous peoples in the sphere of development, without it being imposed on them by killing them³⁰.”

On 13 October 2020, the community representatives, ProDESC and ECCHR filed a civil lawsuit against EDF in Paris on the basis of the law on the duty of vigilance so as to prevent any future serious violations of their rights, and to demand that EDF comply with its duty of vigilance.

Specifically, the state of Oaxaca – where the Gunaá Sicarú project would be developed

Despite the seriousness of the facts reported, EDF has dismissed these allegations and, in a letter dated 20 December 2019, stated that “EDF’s 2018 vigilance plan fully meets the requirements of the law of 27 March 2017 on the duty of vigilance” and that “the prevention and mitigation measures included in the Group’s vigilance plan have been effectively made known”. EDF has hidden behind its vigilance plan and its sustainable development policy while remaining silent about the irregularities, violence and intimidation suffered by local populations on the front line of this energy transition that is being imposed on them.

Thus, after several attempts by the community and the human rights defenders of Unión Hidalgo to engage EDF in an out-of-court dialogue in order to ensure respect for their physical well-being and fundamental rights, on 13 October 2020 the community representatives, ProDESC and ECCHR filed a civil lawsuit

against EDF in Paris on the basis of the law on the duty of vigilance so as to prevent any future serious violations of their rights, and to demand that EDF comply with its duty of vigilance.

In their summons, the complainants condemned the fact that EDF’s vigilance plan for the year 2020 clearly failed to adequately identify the serious risks of violation of the indigenous peoples’ right to FPIC and of the physical well-being of the communities affected by the project. The complainants argued that, in its current form, the vigilance plan contains only a fragmented and non-specific identification of risks, with no appropriate measures to prevent possible violations resulting from its project.

The issue at stake in this legal action relates to the very essence of the law on duty of vigilance, as well as to the demands made by the community of Unión Hidalgo since 2015: they are calling for the Gunaá Sicarú project to be suspended while EDF’s vigilance plan does

29 Centro Mexicano de Derecho Ambiental, *Informe sobre la situación de las personas defensoras de los derechos humanos ambientales*, Mexico, March 2020, p. 17.

30 Statement given during an interview with French newspaper *Le Nouvel Obs* on 2 October 2014, “*Révoltes et morts suspects autour des champs d’éoliennes mexicains*”.

not effectively prevent violations of the indigenous peoples' right to FPIC and of the physical well-being of human rights defenders, in the context of its Gunaá Sicarú project.

Using the French justice system to respond to EDF's lack of vigilance in Mexico is an implicit indication of the public authorities' failures and the lack of will on the part of the French government to ensure that human rights

are respected by French companies, particularly in cases where the French State is the majority shareholder. Indeed, throughout these judicial and extra-judicial proceedings in Mexico and France, the French State was warned that the rights of the Unión Hidalgo community were at risk of being violated by EDF, and yet the public authorities have not intervened to force EDF to change its practices in Unión Hidalgo.

3. The failings of the French authorities

On 20 December 2017, while legal proceedings were underway in the Mexican courts, ProDESC began drawing the first connections linking Unión Hidalgo with EDF and the French State: the association contacted the economic services of the French embassy in Mexico and requested a direct dialogue between the directors of EDF in Paris and the representatives of the Zapotec community of Unión Hidalgo in order to alert the directors of EDF to the violations of Mexican constitutional law and international legal standards in relation to its Gunaá Sicarú project and the actions of its Mexican subsidiaries.

The contact established with the French embassy shows that human rights defenders and ProDESC had confidence in the French public authorities to ensure that the State-owned company EDF would respect international and Mexican constitutional law.

Noting the failure of this first attempt at contact, two human rights defenders from Unión Hidalgo and ProDESC officially referred the matter to the OECD NCP in Paris in February 2018 in order to benefit from the support of this extra-judicial public mediation body to resolve the conflict that was developing³¹.

The OECD NCP in France forms the core of the public mechanism set up by France at the start of the 2000s to promote good governance and respect for human rights and the environment among French companies. Chaired and administered by the Directorate General of the Treasury, the NCP is tripartite and includes six trade unions, the Movement of the Enterprises of France (MEDEF), and five public ministries (the Ministry of the Economy, Finance and Recovery; the Ministry of Solidarity and Health; the Ministry of Labour, Employment and Integration; the Ministry of Europe and Foreign Affairs; and the Ministry of Ecological Transition).

31 Bommier, S., "Sur la contribution du devoir de vigilance au concept des communs ainsi que l'affaire Union Hidalgo c. EDF (Mexique)", *op. cit.*, p. 11.



We are suffering on account of this consultation process. The company could prevent these violations of our rights and support our community. We would like EDF to ensure that, as a French company, it respects French standards and laws and does not give in to the corruption that exists in Mexico. I ask all French citizens to put themselves in our position. If they do so, they will see and feel our suffering. We are only asking for the rights of indigenous peoples and the environment to be respected.

Pedro Matus, an agricultural worker.

From that point on, the entire State apparatus was given formal notice of the EDF case in Mexico and informed in detail of the development of the situation in Unión Hidalgo. The NCP's final report on the EDF case, published on 10 March 2020, corroborated the involvement of the French public authorities throughout the proceedings. Indeed, the report referred to the direct involvement of multiple administrations:

“ ■ On 16 October 2018, the NCP proposed to organise the ECCHR hearing on 6 November 2018. Taking into account ECCHR's lack of availability, it took place on 10 January 2019 in the form of a video conference given from the Economic Service of the French Embassy in Berlin. [...].

■ The NCP organised a local meeting between the parties. ProDESC, the US subsidiary of EDF Renewables and EDF Renewables Mexico met at the Regional Economic Service (SER) of the French embassy in Mexico City, in the presence of the NCP Secretary General via video link. [...].

■ The NCP organised a meeting between the parties in the presence of the companies' directors. The NCP sent its proposal to the parties on 28 June 2019, which EDF promptly accepted. The meeting took place on 18 July 2019 in the form of a conference call between the Regional Economic Service (SER) of the French Embassy in Mexico City, the Ministry of Economy and Finance in Paris, and EDF in San Diego, USA. The meeting brought together ProDESC, representing the complainants, EDF, EDF Renewables, EDF Renewables Americas, EDF Renewables Mexico and its subsidiary Eólica de Oaxaca, as well as the NCP represented by the Ministry of Europe and Foreign Affairs and the

Secretariat. The discussion focused on the expectations stated by the complainants on 3 June 2019.

■ At its meeting on 14 October 2019, the NCP decided to consult the ILO on the implementation of Convention No. 169, the French embassy in Mexico and the Mexican NCP before preparing its final report³².”

The entire State apparatus was given formal notice of the EDF case in Mexico and informed in detail of the development of the situation in Unión Hidalgo.

When the representatives of Unión Hidalgo and ProDESC withdrew from the NCP proceedings in late July 2019, the French State was therefore not only aware of the situation in Unión Hidalgo and the allegations made by Mexican associations and human rights defenders against EDF, but also of the power relations and strategy being used by the company in Mexico, and in Unión Hidalgo in particular, via its subsidiaries EDF Renewables, EDF Renewables America, EDF Renewables Mexico and Eólica de Oaxaca.

The French State's silence in the months that followed – particularly after ProDESC, ECCHR and Unión Hidalgo's human rights defenders had issued EDF with a formal notice and spoken on the issue in the press – raises questions about the political will of the French State and its ministries to enforce the obligations relating to the duty of vigilance that French companies must uphold, and, in particular, those French companies in which it invests and over which it has control.

The Agence des Participations de l'État (APE), as EDF's majority shareholder, bears a particular responsibility within the French public authorities for the failings observed at Unión Hidalgo.

32 OECD NCP France, *Circonstance spécifique "EDF & EDF Renewables au Mexique"*, Final report, 10 March 2020, pp. 6-8.

02

**L'AGENCE DES
PARTICIPATIONS DE
L'ÉTAT: THE STATE
SHAREHOLDER'S
FAILURE TO SET AN
EXAMPLE**

The French State holds 83.6% of EDF's capital, with a shareholder commitment of around 21 billion euros. This represents no less than 40% of the portfolio held by the APE³³ – the public agency that manages the French State's public shareholding strategy as a "shareholder entity".

Today, two institutions share the function of public shareholder in a complementary way: the APE and the Banque Publique d'Investissement (BPI France).

THE APE IN NUMBERS³⁴

Le principal actionnaire public français

55 people
A very small administration in charge of a huge portfolio

85 companies
of which **11 are listed**

The largest French public shareholder

A portfolio estimated at **84,5 billion euros**

The energy industry represents **53,3 %** of the **listed market capitalisation**

- Aeronautics/defence: 26,1 %
- Infrastructure and air transport: 9,2 %
- Telecommunications: 7,3 %
- Financial services: 2,2%
- Automotive industry: 1,9 %

Power of appointment within the framework of corporate governance: discretionary powers exercised in appointing nearly **730 directors** currently sitting on the boards of the companies in its portfolio, of whom 310 represent or were recommended by the State; also recommended 90 influential figures to public companies.

Specific missions on behalf of the State

the APE monitors the companies in its portfolio, while "participating in interministerial work and supplying staff and ministers [through] 28 directors and investment managers, mostly civil servants³⁵"

As a result of an eventful history of nationalisations and privatisations, the legitimacy of the French State as shareholder is now based on a vision of the government as an institution that strives to create economic value and defend strategic interests. As such, the French State is a shareholder in numerous companies, appointing directors and participating in the management of some of the largest French companies. This policy was summarised as follows by the Ministry of Economy and Finance in its "Guidelines for the State Shareholder", published in 2014:

"The State must have the capacity to intervene in equity, on a majority or minority basis, in commercial companies that may be listed or not: the State acts as a wise investor with a strategic vision, an appreciation of risks, and a capacity to intervene or anticipate that are specific to it³⁶."

Today, two institutions share the function of public shareholder in a complementary way: the APE and the Banque Publique d'Investissement (BPI France). Whereas BPI France "favours minority shareholdings in small and medium-sized enterprises and mid-cap companies with a view to exiting at the end of a stage of their development, their international growth or their consolidation"³⁷, the APE favours "both a majority shareholding and a shareholding with a potentially very long investment horizon in the enterprises in which [it] is present³⁸."

³³ APE, *Rapport d'activité 2019-2020*, 2020, pp. 30-31.

³⁴ APE, *Rapport d'activité 2019-2020*, op. cit.

³⁵ Court of Audit, *L'État actionnaire*. Thematic public report, January 2017, p. 230.

³⁶ APE, *Lignes directrices pour l'État actionnaire*, 2014, p. 1.

³⁷ *ibid.*, p. 2.

³⁸ *ibid.*

1) In an increasingly financialised economy, and in order to adapt to the liberalisation of markets and to the EU's growing control of public financing arrangements, the French State has sought – via the APE and BPI France – to renew and sustain the legal framework of the State shareholder in order to retain a certain level of control over national strategic assets. While public enterprises controlled by the State are duty-bound to set an example of respect for human rights, the legal action brought against EDF in Mexico shows that the APE fails to take into account the requirements imposed by international

law and the law on the duty of vigilance when managing the companies in its portfolio. 2) The APE hides behind a discourse that cannot mask the lack of means or will to implement a responsible public shareholding policy, particularly with regard to the duty of vigilance in relation to human rights and the environment. 3) The latest example of this refusal to make public ownership conditional on social and environmental requirements could be found in the debates on economic recovery projects in the spring and summer of 2020.



— Consultation Session for EDF's Gunna Sicarú Wind Project in Union Hidalgo, Oaxaca —



— Union Hidalgo's human rights defenders and Assembly of comuneros & comuneras —

1. A brief history of the APE: from the Directorate General of the Treasury to the Minister of the Economy, Finance and Recovery

On 2 March 2003, Francis Mer – Minister of Economic Affairs, Finance and Industry in Jean-Pierre Raffarin’s government, a former investment banker and former CEO of steel giant Arcelor – announced the creation of the APE. This announcement came after two reports had been published on the effectiveness of the shareholder State: the first – known as the Douste-Blazy Report – was drafted by a parliamentary commission; while the second – the Barbier de La Serre Report – was produced by business figures led by Francis Mer.

These two reports were presented as a response to the financial problems of two large public companies: EDF and France Télécom. These two large groups had been jeopardised by strategies focused on mergers and acquisitions and debt management implemented at the time in response to the EU’s policy of opening up the energy and telecommunications markets to competition. In that context, the Douste-Blazy and Barbier de La Serre reports, which both backed the theory of the weak State shareholder³⁹, paved the way for a so-called “normalisation” strategy, with a focus on the boards of directors as a place from which to control and define the strategy of these major groups by creating a State agency dedicated to the role of public shareholder⁴⁰.

The APE was finally established by decree on 9 September 2004. It took the form of a national remit service (*service à compétence nationale*) attached to the Directorate General of the Treasury. In France, these services form a hybrid category of administrative service positioned between the central administration

and the decentralised administration. They carry out operational tasks throughout the national territory (management functions, technical or developmental studies, activities of production of goods and provision of services, etc.). A national remit service may thus be attached to a minister (in which case it is established by decree in the Council of State), or to a director of a central administration, a head of department or a deputy director (in which case it is established by ministerial order). The APE, as a dedicated public service, therefore has the specific mandate of public shareholder:

“The APE was created as a national remit service in 2004 in response to the need for a State that embodied the role of shareholder and promoter of its own financial interests, which was distinct from the functions of regulator, tax collector, sectoral supervisor or purchaser that the State exercises elsewhere⁴¹.”

In 2011, the governance of the APE changed: the Agency became an independent body, freed from the control previously exercised

39 The weaknesses highlighted were: State control that was both too meticulous in day-to-day management and too weak in strategic decisions; a lack of professionalism; confusion between the roles of regulator, shareholder and State client; and, finally, strong managerialism in public companies.

40 Coutant, H., “The State as a holding company? The rise of the Agence des Participations de l’État in the French industrial policy”, *Society for the Advancement of Socio-Economics*, Chicago, USA, July 2014, p. 3.

41 APE, *Rapport d’activité 2019-2020*, op.cit, p. 10.

by the Treasury, and was placed under the direct supervision of the Minister of the Economy and Finance. As pointed out in a 2017 report by the Court of Audit:

"The APE's mission was expanded in 2010 to include industrial, economic and social issues. Its Director General became the State shareholding commissioner, positioned directly under the Minister for the Economy (and no longer under the Director General of the Treasury). The State wished to 'place an industrial vision of shareholdings at the forefront [...] while respecting its financial interests and the corporate purpose of the shareholdings.' The commissioner 'drives the State's shareholding policy in its economic, industrial and social aspects'⁴²."

This autonomy enjoyed by the APE and the official recognition of a specific mandate combining "economic, industrial and social" issues under the direct control of the Minister is accompanied by the publication of an annual report on the State shareholder, which is sent to French parliamentarians on the first Tuesday of October every year. The stated aim is clear: *"to improve the quality and regularity of the information provided by the State*

This lack of democratic debate over the APE's role is regularly pointed out.

shareholder, both to Parliament and to the citizens⁴³." However, far from constituting the basis for a parliamentary debate on the role of the State shareholder, this report is provided as

just one of many informative annexes to the finance bill debated by parliament in the autumn.

This lack of democratic debate over the APE's role is regularly pointed out. As early as 2008, the Court of Audit criticised its *"vague strategic line⁴⁴"*. It was not until the agency celebrated its ten-year anniversary that it finally adopted guidelines in 2014:

"When it was created, the APE was not given a policy on intervention. This was meant to be established by a State shareholder interministerial committee, which never met⁴⁵."

This observation is beyond dispute, and reflects an institution driven by a perspective that combines financial profitability and the defence of strategic interests, and for which declarations of "exemplarity" and "corporate social responsibility" seem to be little more than a communication exercise, without any effective application in practice.

2. The APE: between opacity and communication effects

Published in 2014, the APE's guidelines highlight four intervention objectives:



→ **OBJECTIVE No. 1** - sovereignty
The State should have a sufficient level of control in enterprises of a structurally strategic nature, such as nuclear and defence-related activities;

→ **OBJECTIVE No. 2** - infrastructure and large public service operators
The State may ensure the existence of "resilient operators" to meet the country's basic needs: public infrastructure, large public service operators, new networks or services;

⁴² Court of Audit, *L'État actionnaire*, op. cit., p. 77.

⁴³ Website of the Ministry of the Economy, Finance and Recovery, APE, "Le rapport de l'État actionnaire". Consulted on 07/04/2021.

⁴⁴ Court of Audit, *L'État actionnaire*, op. cit., p. 77.

⁴⁵ *ibid.*, p. 77.

→ **OBJECTIVE No. 3** - strategic sectors and subsidiaries

The State may choose to support the development and consolidation of national enterprises, particularly in sectors and industries that are vital for national economic growth;

→ **OBJECTIVE No. 4** - rescue

The State reserves the right to intervene through rescue measures, within the framework established by EU law, when the collapse of an enterprise would present a proven systemic risk^{46,7}

The same document also mentions six criteria considered decisive for the success and growth of the enterprises in its portfolio, to which the State, as a shareholder, must pay particular attention:

- *The quality of managers and replacement management processes;*
- *The quality and consistency of the strategy;*
- *The quality of the accounts and financial structure;*
- *The quality of the directors and respect for the principles of good governance;*
- *The example set by the business enterprise in terms of the values to which the State is particularly attached;*
- *The strong regional presence of its nerve centres⁴⁷.*

These elements appear to define a clear strategy for the APE: to ensure the financial stability of the companies in its portfolio in order to guarantee strategic interests, major infrastructures and public services, as well as sectors and industries that are vital for national economic growth. The brief reference made to *"the example set by the enterprise in terms of the values to which the State is particularly attached"* is questionable, particularly given that these *"four intervention objectives"* and *"six criteria considered decisive"* do not mention issues relating to climate change, environmental protection, health, safety or respect for human rights. This is especially true given that a *"warning"* on the first page of these guidelines supports the theory of an

institution reluctant to accept the shareholder ramifications of its stated commitments to exemplarity: *"These guidelines should not be interpreted as leading the State to mechanically adjust the level of its shareholdings in the short term⁴⁸."*

Conversely, the APE's institutional communication regularly emphasises that the State shareholder drives *"priorities"* – in terms of social, societal and environmental responsibility within the companies in its portfolio – along four axes: integrating CSR into their strategy, reducing the carbon footprint of their activities, strengthening their conduct as a responsible employer and striving to have a positive societal impact.

In its 2019-2020 activity report, the APE established the integration of CSR as a *"priority"*⁴⁹, while its website expresses concern for *"exemplarity in terms of remuneration, equality, and social and environmental responsibility⁵⁰."* The APE's public communication also mentions a *"CSR Charter"*, which it puts forward as a reference point. In the APE's 2019 activity report, Martin Vial, the State shareholding commissioner since August 2015 and director of EDF on behalf of the French government since September 2015, states the following with regard to the social and environmental responsibility of the companies in the APE's portfolio:

"This has become a new priority and a 'new frontier' for the APE. Companies must now fully integrate their objectives for social, societal and environmental responsibility into their strategy. The companies that perform best in the long term are those that have best integrated CSR into their activities. Within our portfolio, these developments are unevenly implemented. We therefore want to raise all our portfolio companies to the very best level in this area by means of the 'CSR Charter', which I signed in October 2018. As part of this, we have launched a comprehensive assessment of the carbon footprint of the companies in our portfolio in order to support and stimulate them in their ambitions for the energy

46 *ibid.*, p. 78.

47 APE, *Lignes directrices pour l'État actionnaire*, op. cit., p. 2.

48 *ibid.*, p. 1.

49 APE, *Rapport d'activité 2019-2020*, op. cit., p. 22.

50 Website of the Ministry of the Economy, Finance and Recovery, APE, *"Notre mission, notre doctrine"*. Consulted on 09/04/2021.

*transition and the integration of those ambitions into their strategies*⁵¹."

On paper, the government therefore appears to have committed itself to exercising firm control, through the APE, in order to promote social and environmental responsibility within the companies in which they invest.

However, despite these statements of intent, the APE's CSR policy and the transparency required to evaluate its implementation are nowhere to be found:

- * No trace of this "CSR Charter" on the APE website.
- * No mention in the reports submitted to members of parliament of the Agency's method of monitoring the human rights and environmental issues of the companies in which it appoints directors.

The Court of Audit report published in 2017 also highlighted this lack of effective consideration by the APE for issues relating to corporate responsibility.

- * No mention in the reports submitted to members of parliament or on the APE website of how it is monitoring the effectiveness of the measures taken in relation to the objectives announced as part of the Charter.

- * No reference to the Agency's strategy for bringing the issue of duty of vigilance to the attention of the boards of directors

of these companies and for ensuring that the companies in its portfolio effectively implement a vigilance process that complies with the legal obligations established under the 2017 law.

- * No information detailing the type of shareholding the APE has within its portfolio companies, nor the specific rights attached to those shares. No public component enabling a concrete assessment of the specific powers and competences that the APE can exercise over its portfolio companies. It is vital to clarify these issues, however, as it would help to determine the precise scope of the APE's obligations towards the companies in which it invests, and subsequently its potential liability for human rights violations.

The Court of Audit report published in 2017 also highlighted this lack of effective consideration by the APE for issues relating to corporate responsibility. Furthermore, it called on the State to fully integrate social and environmental sustainability issues into its shareholding practices and strategies:

*"The anticipation and control of risks must be strengthened, particularly for companies that are exclusively or predominantly State-owned. In order for shareholders to fully incorporate this aspect into their strategic dialogue with management, greater transparency should be required and an analysis should be published in the State shareholder annual report, detailing the risk factors involved in its portfolio. The modernisation of management tools is a precondition for improving the performance of the State shareholder's duties, whether it be the introduction of a scoreboard for monitoring shareholdings, a cross-cutting tool for regularly measuring the major risks attached to the portfolio, or for measuring its performance according to criteria to be defined, which are no longer strictly financial, but which include the social and environmental sustainability of their development, and which are extended to unlisted companies*⁵²."

The emphasis placed by the APE on "setting an example" and its "CSR Charter" therefore appears to be an attempt to compensate, through a strategy of institutional communication, for the opacity it maintains with regard to implementing the law on the duty of vigilance and issues relating to human rights and the environment within the boards of directors it attends. In any case, APE's majority shareholding in the EDF Group necessarily reflects its considerable influence on the Group. As will be discussed later in this report, this influence and the fact that the APE comes under the supervision of the Ministry of Economy and Finance means that the French State can be held responsible for violating its positive obligation to respect human rights under international conventions ratified by France.

⁵¹ APE, *Rapport d'activité 2018-2019*, 2019, p. 7.

⁵² *Court of Audit, L'État actionnaire*, op. cit., p. 232.

However, it should be noted that calls for transparency and democratic debate on the means used by the APE to exercise that responsibility and set examples have been

rejected outright by the French government, as was observed during the preparation of the recovery plans following the COVID-19 crisis.

3. Post-COVID-19 recovery plan: a missed opportunity to review the APE's mandate

Recent government statements indicate that the APE's lack of transparency on human rights and environmental issues is not caused solely by negligence in an institution driven by the desire to defend the "nation's strategic interests". On the contrary, the refusal of the government and the APE to impose social and environmental conditions on its financing is the result of a constant, deliberate and accepted policy to curtail any debate on the responsibility of the State as a shareholder.

This is illustrated by the discussions held in the spring and summer of 2020 on the second and third amending finance bills (known as PLFR2 and PLFR3). In April 2020, in the middle of the COVID-19 lockdown and a major economic crisis, the government proposed to grant 20 billion euros of credit, via the APE, to a number of large companies in difficulty (Air France, Renault, Vallourec, etc.). Ahead of the parliamentary debates, many associations were sounding the alarm about the fact that *"no conditions for reducing the environmental footprint (greenhouse gases, use of natural resources) have been concretely established for the potential payment of this public aid by the APE"*⁵³.

In this context, Bérangère Abba, then a member of the majority parliament, submitted an amendment to the bill, co-signed by all the deputies of the La République en March (LREM) group and supported by the government, stating that *"the APE shall ensure that these companies integrate fully and in an exemplary manner the objectives of social, societal and environmental responsibility into their strategy, in particular with regard to the fight against climate change"*⁵⁴. In light of the serious shortcomings of the APE's CSR Guidelines and Charter described above, this amendment shows a blatant lack of political will on the part of the Ministry of Economy and Finance and the APE. Indeed, as civil society organisations have highlighted, this amendment *"in fact proposes to change nothing, because the companies in question already have CSR policies that serve mainly to greenwash their activities and are not legally binding in the slightest"*⁵⁵.

53 Alemagna, L. and Schaub, C., "L'État fera-t-il un chèque de 20 milliards aux entreprises polluantes sans contreparties?", *Libération*, 17 April 2020.

54 Abba, B. et al., *Amendement n°433, Projet de loi de finances rectificative n° 2820 pour 2020*, National Assembly, 16 April 2020.

55 Alemagna, L. and Schaub, C., "L'État fera-t-il un chèque de 20 milliards aux entreprises polluantes sans contreparties?", *op. cit.* See, also, the communiqué de presse du CCFD-Terre Solidaire.

The State's refusal to use its shareholder leverage to force the companies in its portfolio to change their practices and business models through conditions enshrined in the law on duty of vigilance was repeated in the PLFR3.

This situation has also been condemned by many opposition deputies, such as Matthieu Orphelin, who denounced it as "greenwashing". He continued, "[*This amendment*] does not place any obligations on companies. It is up to politicians and national regulations to provide direction⁵⁶"

The State's refusal to use its shareholder leverage to force the companies in its portfolio to change their practices and business models through conditions enshrined in the law on duty of vigilance was repeated in the PLFR3, in a parliamentary amendment inspired by CCFD-Terre Solidaire and Sherpa concerning the transparency of companies with regard to the publication of their vigilance plan.

Indeed, the law on the duty of vigilance requires all large business enterprises to publish a plan detailing the risks of human rights and environmental violations, and the sanctions put in place to prevent such violations. However, in a study published for the update of the duty of vigilance tracking system, CCFD-Terre Solidaire and Sherpa noted in June 2020 that of the 265 companies listed as being subject to the duty of vigilance law, more than 60 had not published a vigilance plan, despite the legal obligation

incumbent on them. An amendment tabled by various parliamentary opposition groups then proposed to make any further government aid conditional on firms' compliance with this obligation to publish a plan with the aim of increasing transparency in the implementation of the duty of vigilance. This simple condition, which aimed to ensure that no company operating unlawfully could benefit from State aid, was also rejected by the government and the parliamentary majority. Olivia Grégoire, then a member of the parliamentary majority, thus abandoned, on behalf of her group, any ambition of the French State to set an example on human rights and environmental issues, citing the "absurdity" of imposing unilateral conditions on companies:

"We must be cautious yet determined when dealing with the subject of eco-conditionality. [...] Ultimately, on such an important issue, we cannot have a revolution in one country alone. Europe has been telling us for years that it is going to move forward; it is in the process of doing so and it is developing its proposals. We only have to wait six months! [...] We must get things moving without descending into absurdity. It would be madness to inject billions with no trade-off; but it would be equally absurd to introduce trade-offs that would lessen the effect of those billions⁵⁷."

AN INSTITUTION STRUGGLING TO INFLUENCE THE BOARDS OF DIRECTORS

"The monitoring of such a complex portfolio would require a greater number of managers with sufficient experience so that, as recommended in the Barbier de La Serre report, the State shareholder could hold discussions with company

managers 'as equals,' particularly within the boards of directors. The short time spent in office and the high turnover of staff create fragility, particularly in terms of the influence the APE wants to have among companies and within governing

bodies. This contrasts with the practices observed in private investment companies, where executives remain in office for longer periods, which facilitates good relations with companies⁵⁸."

56 Alemagna, L. and Schaub, C., "*L'État fera-t-il un chèque de 20 milliards aux entreprises polluantes sans contreparties ?*", *op. cit.*

57 National Assembly, *Compte-rendu intégral, Projet de loi de finances rectificative pour 2020, session of Thursday 9 July 2020.*

58 Court of Audit, *L'État actionnaire, op. cit.*, p. 230.

These debates on the amending finance bills for 2020 thus illustrate the successive failures of the French government and the APE to set the concrete examples of which they boast in their communications. Public shareholding policy, based on a vision of the strategic State, has never provided a coherent, transparent and concrete framework to ensure that companies receiving government financing respect human rights and the environment around

the world. In this sense, the French State is refusing to take on the responsibility of a responsible investor despite the fact that an entire body of law establishes the responsibility of the French State as a public investor.

The successive failures of the French government and the APE to set the concrete examples of which they boast in their communications.

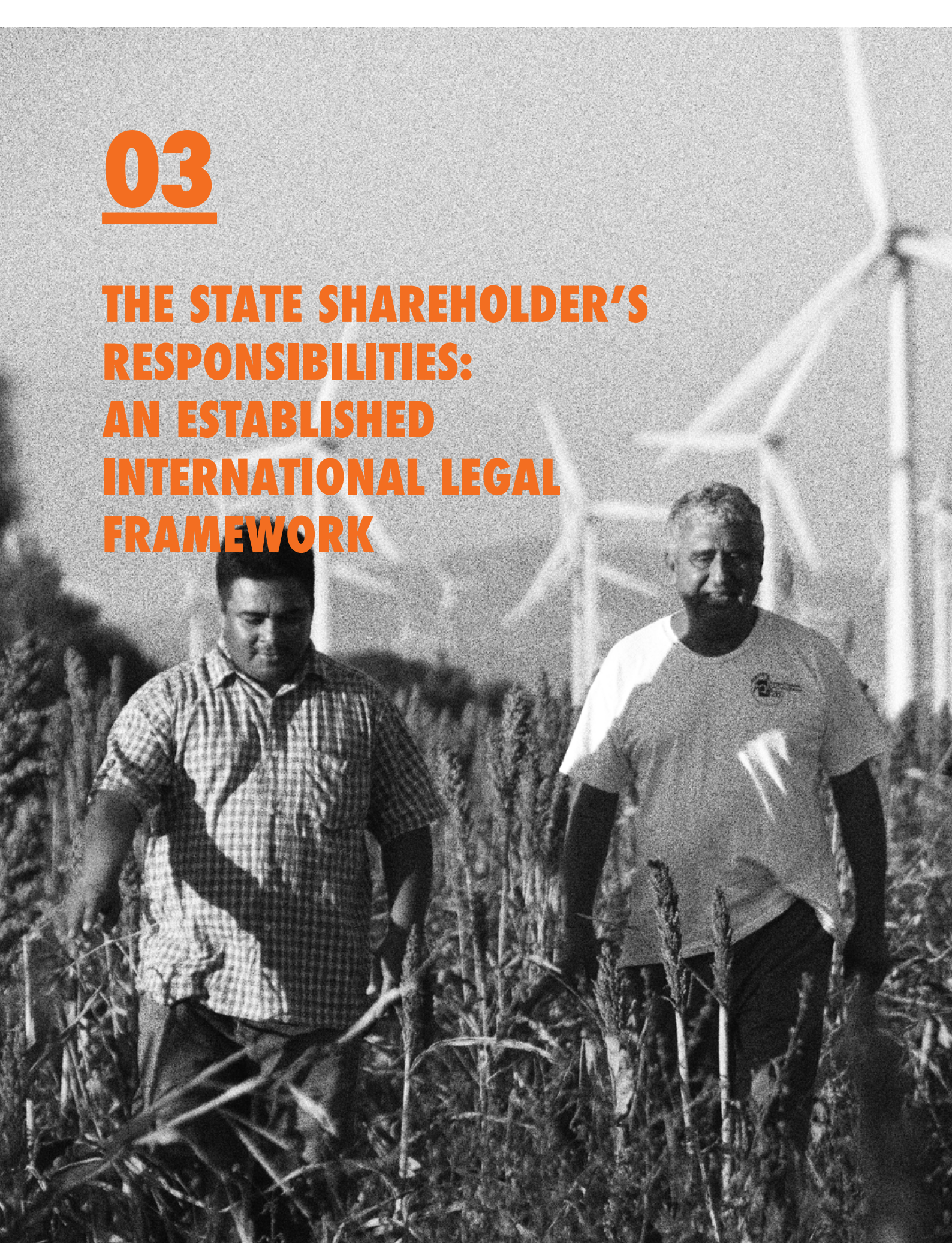
The failure of the public authorities to effectively monitor and publicly account for EDF's actions in Unión Hidalgo is therefore not only a moral and political failure, it is also a violation of international law.



— Assembly of comuneros & comuneras of Union Hidalgo, Oaxaca —

03

THE STATE SHAREHOLDER'S RESPONSIBILITIES: AN ESTABLISHED INTERNATIONAL LEGAL FRAMEWORK



By defining and enforcing international trade rules, or by engaging in economic diplomacy, States play a key role in supporting and facilitating the overseas expansion of companies established within their territory.

States have repeatedly recognised and established under international law their own responsibility to protect, respect and remedy any extraterritorial violations of human rights resulting from their activities or those of their citizens.

For example, some activities such as the arms trade and the wind energy sector require export or operating licences⁵⁹. States can also facilitate the development of economic activities through export credit insurance. Finally, as is the case with the APE, States can have a more direct influence on companies by taking a direct stake in their capital or even by sitting on their boards of directors.

Like private companies, public companies and administrations can therefore have a negative impact on human rights. However, "*political responsibility*⁶⁰" for human rights violations or serious environmental damage resulting from corporate activity is often limited to the establishment of a legal and regulatory framework that sets limits on corporate profit-seeking. This is evidenced by the reluctance of the French government and members of the parliamentary majority, when drafting the *planning bill on solidarity-based development and the fight against global inequalities*, to recognise the legal responsibility of public actors in possible extraterritorial human rights or environmental violations committed by private actors⁶¹.

Through the adoption of UN, EU and OECD covenants, conventions, treaties and recommendations, States have repeatedly recognised and established under international law their own responsibility to protect, respect and remedy any extraterritorial violations of human rights resulting from their activities or those of their citizens.

Through these international instruments, States have the obligation to respect and guarantee the human rights of persons within their territories, as well as to adapt their legal systems and enforce these rights without discrimination. On the one hand, the obligation to respect human rights requires that the State and its agents do not violate these rights, either directly or indirectly, by any action or omission. On the other hand, the obligation to guarantee human rights requires the State to take the necessary steps to ensure that all persons under its jurisdiction are able to exercise and enjoy those rights.

The Maastricht Principles, adopted in 2011, elaborate on these obligations to respect and guarantee human rights in their extraterritorial dimension.

59 The operation of a wind farm in France is regulated and requires various administrative permits issued by the State, including an electricity production licence and a construction permit. Since *ruling No. 2017-80 of 27 January 2017*, which entered into force on 1 March 2017, they are subject to "environmental authorisation".

60 Petitjean, O., *Devoir de vigilance. Une victoire contre l'impunité des multinationales*, 2019, p. 41.

61 On this point, see the amendments regarding the duty of vigilance of public actors tabled by various parliamentary groups during the debates in the Foreign Affairs Committee and in the Assembly relating to the *law on orientation and programming for development and solidarity policies and the fight against global inequalities*. Particularly amendments 418, 484, 520 (adopted), and 40, 388, 193, 194, 598 (rejected).

THE MAASTRICHT PRINCIPLES: THE BASIS FOR THE EXTRATERRITORIAL RESPONSIBILITY TO RESPECT, PROTECT AND FULFIL ECONOMIC, SOCIAL AND CULTURAL RIGHTS

On 28 September 2011, a group of experts in international law adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

The Principles were created in response to the observation that the lack of extraterritorial obligations of States was the "missing link" for achieving the universality of human rights. In particular, the Preamble notes that "*The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. The advent of economic globalization in particular, has meant that*

*States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world*⁶²."

The principles aim to address the shortcomings of, inter alia, "*the lack of human rights regulation and accountability of transnational corporations*⁶³" and "*the ineffective application of human rights law to investment and trade laws, policies and disputes*⁶⁴".

The Maastricht Principles define the scope of extraterritorial obligations of States, including "*obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of*

*human rights outside of that State's territory*⁶⁵".

As part of customary law on extraterritorial obligations of States, the Maastricht Principles were a crucial starting point for developing and evaluating General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights. **Under these principles, States are required to respect human rights deriving from their international commitments and in particular the Covenant, as well as protect them and guarantee their implementation.**

Having established the cornerstone of the extraterritorial responsibility of States, it is still necessary to define its scope, methods and limits. What means should a State have at its disposal to ensure that its activities as a public investor in private companies comply with its international obligations to protect human rights? To what extent can human rights violations by State-owned enterprises constitute a breach of the State's obligation to respect or protect those rights under international law?

The international legal standards in force, which will be examined below, are unequivocal: the French state, both in its sovereignty and as an investor, is subject to rigorous obligations to protect and respect human rights.

Thus, the responsibility of the French State in the case of EDF in Mexico seems clear on two counts:

- ✦ extraterritorial violations of international human rights law were carried out by EDF, of which the State is the majority shareholder through the APE;
- ✦ non-compliance with the State's international human rights commitments in the face of extraterritorial violations committed by a private actor under its jurisdiction and control.

⁶² Consortium ETO, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, January 2013, Preamble, p. 5.

⁶³ *ibid.*, Introduction, p. 3.

⁶⁴ *ibid.*

⁶⁵ *ibid.*, Principle 8, p. 6.

1. Corporate accountability for human rights violations by State-owned companies

All companies, whether public or private, have a responsibility to respect human rights and the environment in all their activities. (a) Both the United Nations and the OECD have established a set of standards for corporate responsibility. (b) These international standards also apply to financial actors, and in particular to publicly owned companies.

a. The general framework for corporate accountability with regard to human rights is the United Nations Guiding Principles on Business and Human Rights

In 2011, after six years of work by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights.

Considered a landmark text in international law, it introduced the notion of human rights vigilance, which has since become the benchmark for corporate responsibility issues. The Guiding Principles define these issues under three complementary pillars:

- * States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises;
- * The corporate responsibility to respect human rights;
- * The need to ensure access to effective remedies, so that any affected person or group can access redress.

With regard to the responsibility of business enterprises to respect human rights, **Principle 13** requires companies to:

"(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts⁶⁶."

This is followed by a series of principles that detail this responsibility, which has been taken up and incorporated into French law within the framework of the law on the duty of vigilance.

Among these principles, it is specified that the content of a human rights vigilance process depends on the size, sector and operational context of the business enterprise. Specifically, Principle 7 states that heightened vigilance should be applied to operations in conflict-affected areas, where there is an increased risk of gross human rights abuses⁶⁷. Similarly, these principles call on companies to pay particular attention to vulnerable individuals and groups, who are often more severely affected by the negative impacts of business activities⁶⁸. In this sense, too, Principle 23 and its commentary state that particular attention should be paid to local conditions that may prevent a company from fully respecting human rights, such as where national laws are in conflict with international standards.

66 United Nations, *Guiding Principles on Business and Human Rights*, 2011, Principle 13, pp. 14-15.

67 Principle 7 underlines the increased risk of gross human rights abuses in conflict-affected areas and the support that States should provide under such circumstances, while Principle 23 draws attention to the risk of complicity in gross human rights abuses and the need to treat this risk as a legal compliance issue.

68 United Nations, *Guiding Principles on Business and Human Rights*, *op. cit.*, Principle 12 and commentaries, pp. 13-14.

THE UN GUIDING PRINCIPLES AND “HEIGHTENED” VIGILANCE IN HIGH-RISK CONTEXTS

Corporate vigilance is a concept specific to the governance of private economic actors, enshrined in French law under the law on the duty of vigilance of March 2017. The UN Guiding Principles define this vigilance by referring to the “due diligence” that companies must implement when starting a new activity or business relationship in order to prevent the risks of negative impacts on human rights from the initial developmental stage of a project and the conclusion of contracts or agreements related to the development of an activity.

Principles 17 to 21 more specifically describe the vigilance process that business enterprises should follow

when evaluating the negative impact of their activities on human rights.

Similarly, in its 2019 report on business and human rights, the Inter-American Commission of Human Rights (IACHR) stated that “Generally, the IACHR and its REDESCA reiterate their serious concern over the situation of human rights defenders, and particularly those who defend the environment in the context of corporate activities, by being a target for diverse kinds of attacks throughout the continent. In this regard, they recall that the States are the first ones responsible for ensuring that violations against human rights defenders are prevented, identified, and punished. It is

urgent that the States, and businesses themselves, including investment and financing institutions, implement effective actions that stop the growing forms of aggression, criminalization, and surveillance against these individuals, and impunity, in the framework of corporate activities.”⁶⁹

The UN Guiding Principles and their significance for financial actors has been explicitly recognised in several initiatives, e.g. in the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence⁷⁰, and the Principles for Responsible Investment established in 2006⁷¹.

b. State-owned companies: the State shareholder’s responsibility

All companies, whether public or private, have a responsibility to respect human rights and the environment in all their activities.

Investors and shareholders can play a major role in preventing, mitigating, and remedying the negative human rights impacts of their activities. Investors have the ability to influence the ways in which the companies in their portfolio address and respect human rights. As a result, banks, investors and

private financial institutions must effectively implement vigilance procedures, as described in the Guiding Principles above, or as required under French law, where applicable, to avoid causing or contributing to negative impacts through their operations, investments, products or banking services.

However, beyond the responsibility of private companies and investors to exercise human rights vigilance in all their operations, international standards – such as the OECD Guidelines, the UN Guiding Principles and the work of the UN Human Rights Council Working Group on the issue of human rights

69 IACHR, *Business and Human Rights: the Inter-American Standards*, 2019, §327, p. 176.

70 *Recommendation C(2016)38*, adopted on 28/06/2012. Consulted on 14/04/2021.

71 These were produced by a working group of international experts and finance directors, under the auspices of UNEP-Fi – a unit within the United Nations Environment Programme that aims to foster the adoption of environmental best practice by finance professionals – and the Global Compact.

and transnational corporations and other business enterprises – place special emphasis on the responsibility of the State shareholder. According to these standards, where the State or one of its agencies – such as the APE – exercises shareholder control over private companies, the State has a distinct and complementary responsibility to ensure that those companies exercise their vigilance in compliance with their obligations.

The principle of State shareholder responsibility was asserted in 2016 by the UN Human Rights Council Working Group on the issue of

human rights and transnational corporations and other business enterprises in the following terms:

"All business enterprises, whether they are State-owned or fully private, have the responsibility to respect human rights. This responsibility is distinct but complementary to the State duty to protect against human rights abuses by business enterprises. This duty requires States to take additional steps to protect against abuses by the enterprises they own or control"⁷².

INVESTOR-STATE RESPONSIBILITY: SUPPORT FOR FOSSIL FUELS IN MOZAMBIQUE

In 2010 and 2013, large gas reserves were discovered in northern Mozambique. At the expense of human rights and the environment (worsening climate disruption, population displacement, militarisation of the area) the French State then provided financial support for gas exploitation projects led by French multinationals through its public investment banks.

Bpifrance Assurance Export, a subsidiary of the French public investment bank Bpifrance, contributed over half a billion euros (EUR 528.21 million) to help develop the Coral South offshore gas project led by the oil and gas company TechnipFMC by means of an export guarantee. Since 1 January 2017, Bpifrance has

been managing public export guarantees "in the name of, on behalf of, and under the control of the State". Friends of the Earth clarifies: "Through this financial mechanism, the State acts as a guarantor for the banks that have granted loans to operators. This is tantamount to providing the commercial banks with transaction insurance cover, which is highly significant for a politically and economically risky country such as Mozambique. Without the support of export credit agencies, such as Bpifrance Assurance Export, which acts on behalf of the French State, the major gas companies would find it immensely difficult to raise private finance for their very costly and risky projects in Mozambique"⁷³. It is the French Ministry of the Economy that

provides this guarantee: "The guarantee issued for Coral South FLNG in the fourth quarter of 2017 was thus approved by Bruno Le Maire"⁷⁴.

In their report *De l'eldorado gazier au chaos*, published in June 2020, Friends of the Earth condemned the financial aid that was evidence of the French government's strong political support for gas exploration off the coast of Mozambique, and called on the government "and its export credit agency (Bpifrance Assurance Export) [to] terminate the export guarantee granted for Coral South FLNG"⁷⁵. On this point, the former director of Bpifrance Assurance Export said, "Our priority is not human rights or the environment; our priority is jobs in France"⁷⁶.

⁷² United Nations Human Rights Council (Thirty-second session), *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises – Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, A/HRC/32/45, 2016, §88, p. 20.

⁷³ Andrzejewski, C., "Soutien aux énergies fossiles : l'hypocrisie de la France au Mozambique", *Bastamag*, 17 June 2020.

⁷⁴ *ibid.*

⁷⁵ Friends of the Earth France, *De l'eldorado gazier au chaos*, June 2020, p. 55.

⁷⁶ *ibid.*, p. 28.

The OECD Guidelines with regard to State-owned enterprises.

The OECD Guidelines on Corporate Governance of State-Owned Enterprises provide recommendations to States on how governments should approach their role as shareholder. As an internationally recognised standard on the responsibility of the State shareholder, these Guidelines on Corporate Governance of State-Owned Enterprises are unequivocal:

"The state should act as an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness⁷⁷."

Similarly, the OECD Guidelines for Multinational Enterprises, established in 1976 and revised regularly since, are a non-binding set of standards that apply to OECD member States, including France. They contain the same idea as that developed in the UN Guidelines: the increased level of due diligence that the State must show towards public enterprises:

"State-owned multinational enterprises are subject to the same recommendations as privately-owned enterprises, but public scrutiny is often magnified when a State is the final owner⁷⁸."

Finally, the Investment Policy Framework, initially developed in 2006 and revised in 2015, aims to mobilise private investment to foster economic growth and sustainable development. It also aims to promote the implementation of the Sustainable Development Goals. Based on international best practice, the OECD Framework provides guidelines in 12 critical areas for creating a favourable investment environment. The State shareholder's duty to set an example is also emphasised:

Principle 4 focuses in detail on the responsibility of the State shareholder, by establishing its specific accountability.

"Governments can enable RBC in several ways: [...] Exemplifying – acting responsibly in the context of the government's role as an economic actor⁷⁹."

The UN Guidelines and the State shareholder

The UN Guiding Principles on Business and Human Rights also specifically set out the State's responsibility to: adopt and enforce regulatory and political measures to clearly define the obligations of business enterprises to respect human rights; investigate; guarantee access to remedies; and punish and redress such abuse through effective policies, legislation, regulations and adjudication.⁸⁰

Within this framework, Principle 4 focuses in detail on the responsibility of the State shareholder, by establishing its specific accountability:

"States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence⁸¹."

The commentary that follows this Article goes on to clarify that the State's degree of control and influence over a State-owned company, particularly through public funding mechanisms, links any violation by the enterprise to a violation of the State's obligations under international law. It specifies that *"the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights⁸²."*

77 OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, 2015, p. 18.

78 OECD, *OECD Guidelines for Multinational Enterprises*, 2011, p. 22, §10.

79 OECD, *Policy Framework for Investment*, 2015, p. 76.

80 United Nations, *Guiding Principles on Business and Human Rights*, *op. cit.*, Principle 1, p. 3.

81 United Nations, *Guiding Principles on Business and Human Rights*, *op. cit.*, Principle 4, p. 6.

82 *ibid.*, p. 7.

This is a decisive factor in ensuring that the State shareholder cannot shift responsibility onto its companies when they are involved in activities and legal proceedings that call into

question their compliance with legal obligations of vigilance and respect for fundamental rights.

PRINCIPLE 4 OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The commentary that follows Principle 4 of the UN Guiding Principles on Business and Human Rights is particularly enlightening:

"States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or tax-

payer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State⁸³."

UN Human Rights Council Working Group on the issue of human rights and transnational corporations and other business enterprises

The issue of respect for fundamental rights by State-owned enterprises has also been the subject of various studies by the UN Working Group on Business and Human Rights. Back in 2016, the Working Group deplored the fact that:

"Although the picture is mixed, with a number of State-owned enterprises having made commitments on human rights, allegations of human rights abuses by such enterprises in their home countries and in their operations abroad have been documented, including labour-related abuses, environmental damage, land rights violations and intimidation and defamation of human rights defenders⁸⁴."

⁸³ *ibid.*

⁸⁴ United Nations Human Rights Council (Thirty-second session), *Report of the Working Group on the issue of human rights and transnational corporations and other businesses*, *op. cit.*, §16, p. 6.

Since then, the Working Group has issued multiple recommendations to make effective the need for State investment institutions to take effective and rigorous due diligence measures with regard to State-owned companies.

In 2016, the Working Group of the UN Human Rights Council established a set of recommendations for institutions responsible for State shareholding⁸⁵ and recommended that States should, inter alia,

*"comprehensively review whether and to what extent they are meeting their international human rights obligations through the business activities of the enterprises that they own or control, at home and abroad"*⁸⁶.

Then, in 2018, in view of the apathy and reluctance of States to implement these recommendations and to take proper account of their duty of vigilance in order to ensure

respect for human rights, the Working Group recommended that States should, inter alia, establish conditions prior to making any public investment:

*"States should require businesses to demonstrate an awareness of and commitment to the Guiding Principles as a prerequisite for receiving State support and benefits relating to trade and export promotion"*⁸⁷.

In the case of EDF and its activities in Mexico, it is therefore clear that both EDF as a private company and the APE as the majority State shareholder are failing in their respective obligations. In the case of EDF this means ensuring that human rights abuses do not result from their activities or those of the subsidiaries and companies they control in Unión Hidalgo; in the case of the APE, this means ensuring that the companies in its portfolio do not breach their duty of vigilance.



⁸⁵ In order to "Lead by example and to do their utmost to ensure that the enterprises under their ownership or control fully respect human rights", the Working Group highlights, inter alia, the need for States to clearly state their expectations of the companies it monitors; to put in place monitoring and follow-up mechanisms; to establish clear requirements for vigilance and transparency; to ensure effective remedies. UN Human Rights Council (Thirty-second session), *ibid.*

⁸⁶ United Nations Human Rights Council (Thirty-second session), *ibid.*, §96, p. 21.

⁸⁷ United Nations Human Rights Council (Thirty-eighth session), *Report of the Working Group on the issue of human rights and transnational corporations and other businesses*, A/HRC/38/48, 2018, §99, p. 19.

2. The State's extraterritorial responsibility with regard to human rights abuses by private actors

In order to develop their business activities beyond their State of origin, companies set up subsidiaries or work with suppliers or business partners in third States.

This raises the question of how to determine the accountability of the State of origin to ensure that human rights are respected in relation to the actions of those entities domiciled outside its territory, but over which the companies under its own jurisdiction exercise some control.

There are numerous legal standards that make it possible to establish State obligations on this issue. Firstly, States are bound by the international conventions they have ratified. (a) They therefore have a positive obligation not only to protect, respect and promote human rights, but also to remedy any infringement or violation of these rights, including when this violation is extraterritorial and

results from the activity of a private company located on its territory. (b) Customary international law then clarifies the scope of this positive obligation by specifying what is incumbent on States when they exercise a certain degree of control or influence over these companies.

States are bound by the international conventions they have ratified.

These sources of customary international law, as well as the State's obligations asserted by the aforementioned standards for State-owned enterprises, reveal that the French State, through the APE, bears some responsibility for the failures and actions of the EDF Group that resulted in the human rights violations of the Unión Hidalgo community in Mexico.

LIFTING PATENTS ON COVID-19 VACCINES: STATE ACCOUNTABILITY AT STAKE IN THE WORLD TRADE ORGANIZATION (WTO)

At the beginning of March 2021, one year after the start of the COVID-19 pandemic, various universities, research centres and pharmaceutical companies had successfully developed vaccines that would immunise the world's population against the coronavirus.

When the pandemic first started, many heads of State advocated for these vaccines to be made quickly available to the entire global population. In May 2020, the President of the French Republic, Emmanuel Macron, declared that "the future vaccine will be a unique global public good for the 21st century".

One year on, however, the situation is quite different: rivalry between States has reached a peak, with the richest countries having monopolised the majority of available doses. Faced with unprecedented challenges regarding financing and production capacity, various States and non-governmental

organisations are calling for the lifting of patent protections on vaccines that provide immunity against COVID-19 in order to facilitate the production and distribution of these vaccines at affordable prices.

A provision is envisaged by the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which was voted on by WTO member States on 10-11 March 2021.

However, despite their public commitments, the OECD member countries (EU Member States, USA, Canada, Australia, Japan) are blocking the waiver in order to protect the profits of pharmaceutical companies in the midst of a pandemic.

On 12 March 2021, the UN Committee on Economic, Social and Cultural Rights adopted a resolution concerning the duty of States, under their extraterritorial

In June 2017, the UN Committee on Economic, Social and Cultural Rights issued General Comment No. 24 on States' obligations.

obligations, to use their WTO voting rights to lift patent restrictions on COVID-19 vaccines. Its conclusions were unequivocal on the extraterritorial responsibility of States to prioritise human rights over the economic interests of business enterprises under their jurisdiction:

"States parties have a duty to prevent intellectual property and patent legal regimes from undermining the enjoyment of economic, social and cultural rights [...] the intellectual property regime should be interpreted and implemented in a manner supportive of the duty of States "to protect public health" [...] States parties have an extraterritorial obligation to take the necessary measures

*to ensure that business entities domiciled in their territory and/or under their jurisdiction do not violate economic, social and cultural rights abroad. Therefore States should take all necessary measures to ensure that such business entities do not invoke intellectual property law, either in their own territory or abroad, in a manner that is inconsistent with the right of every person to access a safe and effective vaccine against COVID-19. [...] In that context, the Committee strongly recommends that States support the proposals of this temporary waiver, including by using their voting rights within WTO."*⁸⁸

In the context of the COVID-19 pandemic, this resolution shows the responsibility of States to give priority to human rights over economic considerations relating to the intellectual property regime and/or the financial interests of business enterprises domiciled in their territory.

a. The States' extraterritorial obligation to respect its international commitments with regard to human rights

"He who can but does not prevent, sins". This 17th-century proverb reflects what the principle of due diligence expresses in the 21st century with regard to sovereign States: intervene whenever they know and can in order to prevent acts that violate the rights of third parties.

Therefore, when States can take action to sway companies to respect human rights, either through legal or policy interventions, they must enforce the appropriate measures⁸⁹.

In June 2017, the UN Committee on Economic, Social and Cultural Rights issued General Comment No. 24 on States' obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities⁹⁰.

⁸⁸ United Nations Committee on Economic, Social and Cultural Rights, *Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property*, 12 March 2021.

⁸⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, §33, p. 12.

⁹⁰ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017.

First of all, the general comment defines business activities as "*all activities of business entities, whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure*"⁹¹. The general comment goes on to highlight the positive obligations of States arising from their responsibility to "protect" human rights, in that they are "*required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction*"⁹².

In order to clarify the scope of situations in which a State may be considered to be failing in its duty, the International Covenant on Economic, Social and Cultural Rights specifies the use of due diligence. As will be explained below, the interpretation of the Covenant and its accompanying commentaries indicates that a home State may have a positive extraterritorial obligation to protect human rights. This positive obligation is based on the exercise of due diligence in relation to the activities of companies located on its territory and their foreign subsidiaries. This State-specific duty is separate from the duty of vigilance applicable to companies, and it includes, but is not

limited to, the obligation for the home State to adopt domestic regulations requiring human rights impact assessments, subsequent mitigation of those impacts, and the provision of remedy in the home State's justice system⁹³.

The implementation of due diligence allows for the assessment in concreto of a State's compliance with its extraterritorial obligations in economic activities under its jurisdiction or over which it exercises some control.

In its November 2019 report on business and human rights, the IACHR describes the positive responsibility of States, separate from and complementary to that of business, as follows: "*Bearing in mind that the States, in order to fulfill their obligations to guarantee human rights, must establish the legal and regulatory framework in which private entities can carry out their activities and operations according to the industry and type of particular risk to human rights, the IACHR and its REDESCA understands that businesses do not operate in a vacuum that is beyond State control. Therefore, depending on voluntary corporate compliance is not sufficient, nor is it compatible, with the protection of human rights under the applicable international, and particularly inter-American, standards*"⁹⁴.

THE CONCEPT OF STATE "DUE DILIGENCE" AS DISTINCT FROM AND COMPLEMENTARY TO CORPORATE DUTY OF VIGILANCE ON THE ISSUE OF HUMAN RIGHTS: CONSTRUCTIVE KNOWLEDGE

Due diligence is a distinct concept from corporate duty of vigilance, and describes a specific dimension of certain international obligations of States. These obligations impose a duty of vigilant conduct on States, aimed at preventing the violation of its international obligations through its activities, or those of private persons under its

jurisdiction or over which it exercises some control. Due diligence obligations arise from specific obligations of States, whether established in an international convention or by custom.

In the *Velasquez Rodriguez v. Honduras* judgment of the Inter-American Court of Human Rights in 1988, the

Court confirmed that "*An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the*

91 *ibid.*, §3, p. 2.

92 i.e. Business enterprises established under national law or whose registered office, central administration or principal place of business is located in their territory. *ibid.*, §26, p. 9.

93 McCorquodale, R. and Simons, P., "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", *op. cit.*, pp. 598-625.

94 IACHR, *Business and Human Rights: Inter-American Standards*, *op. cit.*, §192, p. 111.

violation or to respond to it as required by the [Inter-American] Convention."

The duty of vigilance is a duty of conduct, the content of which varies depending on the circumstances of each situation. Thus, several factors of variability are taken into account by judges when they have to decide whether or not a State has complied with its duty of vigilance.

One of these factors is a State's reasonable knowledge of any conduct that causes it to violate its international obligations. Thus, in the

Tehran hostage case, the International Court of Justice held Iran responsible after concluding on 24 May 1980 that the Iranian authorities "were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part".

Beyond the obligation to act when the situation leaves no reasonable doubt regarding the State's awareness of a situation, due diligence applicable to States is based on the question of constructive knowledge⁹⁵: should the State have known? More to the

point, should the State have tried to find out? In the Corfu Channel case in 1949, the International Court of Justice stated that "a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal".

The due diligence of States is thus driven by the objective of preventing human rights abuses, through an obligation in which States are expected to exercise heightened vigilance and foresight of the risks generated by their activities. In this sense, general comment No. 24 of the International Covenant on Economic, Social and Cultural Rights recalls that, "States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused"⁹⁶.

To date, and given the chronology of events outlined above with regard to the links established between Unión Hidalgo, the French embassy in Mexico, the OECD NCP in Paris and the French courts since 2017, it is impossible to assert that the French State, represented within EDF by the APE, was unaware that EDF's activities in Mexico were a source of human rights violations. In any case, the position of the French State as a majority shareholder and investor in EDF subjects it to the obligation to develop its knowledge and respond to the risks of human rights abuses by means of the tools prescribed by the law on the duty of vigilance and by the standards of due diligence for public actors.

⁹⁵ On this point, see the article by McCorquodale, R. and Simons, P., "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", *op. cit.*

⁹⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, *op. cit.*, §18, p. 6.

THE ITALIAN GOVERNMENT'S RESPONSIBILITY FOR ARMS EXPORTS TO SAUDI ARABIA AND THE UNITED ARAB EMIRATES, AND HUMAN RIGHTS VIOLATIONS IN YEMEN

When a State or public authority responsible for the export of military equipment is deciding whether or not to issue an export licence, it must ensure that there is no significant risk that the arms exported could be used to commit or facilitate violations of international humanitarian law or human rights law.

On 8 October 2016, an air strike allegedly carried out by the Saudi-led military coalition hit the village of Deir Al-Hajāri in northwestern Yemen. A family of six lost their lives, including a pregnant mother and her four children. At the site of the airstrike, bomb remnants were found as well as a suspension lug manufactured by the company RWM Italia S.p.A. The latter's export of

these materials had been authorised by the body in charge of arms exports within the Italian government (UAMA) while the conflict was raging in Yemen.

In April 2018, ECCHR and its Italian and Yemeni partners called for an investigation into the criminal responsibility of the Italian authorities and the company's directors for complicity in negligent killing and abuse of authority. The organisations argued that in view of the numerous UN expert reports on Yemen and European Parliamentary Resolutions documenting the systematic violations committed by Saudi Arabia and the United Arab Emirates in Yemen, the Italian exporting authorities could

not reasonably be unaware that its exports to those countries carried a significant risk of enabling gross violations.

On 24 February 2021, an Italian judge ordered the case against the Italian authorities to be continued, stating that *"the State can and must, on the one hand, preserve employment levels and, on the other, respect its obligations under national and international norms"*⁹⁷.

This statement by the Italian judge testifies to the obligations of States and their governments to refrain, through their actions, including those justified by the promotion of economic interests, from causing human rights abuses on their territory or abroad.

However, beyond this principle of extraterritorial responsibility of States under their obligation to show due diligence and constructive knowledge, **State responsibility can also be engaged by virtue of the control or influence that the State exercises over certain business enterprises. This is the case when the State is a majority shareholder in a company through its public administration, the APE.**

b. The State's extraterritorial obligations when a company acts under its instructions, management or control

Given the direct and growing interference of States in the development of certain economic sectors, international law allows some of these situations of control, instruction or direction of a State over a company to be classed as creating an obligation for the State not to associate itself with illegal actions committed by a company thus controlled (the so-called "negative" obligation), as well as an obligation to take the necessary steps

⁹⁷ See the [article](#) (in Italian) by the disarmament organisation Rete Pace e Disarmo, which analyses the ruling of 24 February 2021.

to prevent such actions in violation of human rights or its international commitments (the so-called “positive” obligation). Thus, when the State fails to respect these obligations deriving from its implicit or explicit support, its international responsibility may be engaged.

The United Nations International Law Commission (ILC)

In 2001, the ILC, following a process involving consultation with State parties to the Commission, adopted a series of articles on the responsibility of States for internationally wrongful acts⁹⁸.

The ILC establishes that extraterritorial responsibility of States in relation to companies is possible in two specific cases:

→ Where a State authorises a company to exercise elements of public authority, as the APE does⁹⁹;

→ Where a company acts under the instructions, direction or control of a State¹⁰⁰.

The Commission specifies that, in the second case, making the conduct of a company imputable to the State will depend on the control exercised by the government over the company’s extraterritorial activities:

*“The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence. In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves ‘governmental activity.’”*¹⁰¹

With regard to the notion of “instructions, direction or control” that may engage State responsibility for acts committed by a third company, the ILC specifies that the State must have directed or controlled the operation of which the unlawful conduct forms an integral part¹⁰². The criteria “instructions”, “directions” and “control” are alternatives. It is enough to establish that just one of them applies:

*“where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored”*¹⁰³.

General comment No. 24 of the International Covenant on Economic, Social and Cultural Rights

In 2017, the UN Committee on Economic, Social and Cultural Rights adopted general comment No. 24, quoted above. Under the impetus of the Maastricht Principles, which, in Principle 12 on the attribution of State responsibility for the conduct of non-State actors provides that such responsibility extends to “acts and omissions of non-State actors acting on the instructions or under the direction or control of the State”¹⁰⁴, the UN Committee recalled that State parties to the Covenant can be held directly responsible for corporate action or inaction in three cases:

“1. if the entity concerned is in fact acting on that State party’s instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts;

98 Although the work of the ILC does not translate into binding instruments of law, it is a key source and authority for the development of customary international law. As such, the articles adopted by the ILC through a process of consultation with State parties to the Commission have been quoted by the International Court of Justice in its jurisprudence. *Home State Responsibility For Extraterritorial Human Rights Violations Committed By Non-State Actors*, University of Oslo, Faculty of Law, 2010, pp. 3-4.

99 **Article 5.** – Conduct of persons or entities exercising elements of government control. “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. ILC, *Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)*, General Assembly, Official Records, Fifty-fifth session, Supplement No. 10 (A/56/10), United Nations, p. 26.

100 **Article 8.** – Conduct directed or controlled by the State. “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” *ibid.*

101 ILC, *Report of the International Law Commission on the work of its fifty-third session (23 April-1st June and 2 July-10 August 2001)*, *op. cit.*, §2, p. 47.

102 “The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.” *ibid.*, §3, p. 47.

103 *ibid.*, §7 and 8, p.48.

104 Consortium ETO, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, *op. cit.*, Principle 12, p. 7.

2. when a business entity is empowered under the State party's legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities;

3. if and to the extent that the State party acknowledges and adopts the conduct as its own.¹⁰⁵"

The Inter-American Commission on Human Rights

In its aforementioned report, the IACHR also states that "For the IACHR and its REDESCA, the stronger the degree of state influence over the enjoyment of human rights outside its territory,

the stricter the analysis of its duties to respect and guarantee. Thus, for example, on one side of the spectrum we place a business that acts under the State's instructions or exercises attributes of public power outside the territory of said State; and on the other, we place a private business with transnational activities and operations whose only relationship and proximity with the home State is its place of domicile. In the first case, both the State's duty to guarantee and to respect human rights may be compromised, while in the second situation it is feasible to evaluate the state obligations to ensure human rights, for example by regulating said businesses' behaviors or, if applicable, by preventing and investigating the transnational corporate actions linked to violations or abuses of human rights, in accordance with the limits of international law¹⁰⁶."



— Wind turbines on the land and territory of Union Hidalgo, Oaxaca —

105 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, op. cit., §11, p. 4.

106 IACHR, *Business and Human Rights: Inter-American Standards*, op. cit., §167, p. 98.

This dive into the body of international human rights law draws attention to various sources of responsibility both for the EDF Group as a private entity, and for the French State as a debtor of a positive obligation to respect and guarantee the rights enshrined in the international conventions it has ratified, including extraterritorially. Customary international law thus dictates positive obligations of conduct for the French State in relation to the activities of private entities under its jurisdiction. These obligations are largely reinforced by the control and influence that the French State exercises over the EDF Group, through the APE, as the majority shareholder with 83% of the firm's capital.



RECOMMENDATIONS

RECOMMENDATIONS TO THE EDF GROUP

- > Adopt a transparency policy on projects' investors, including the Gunaá Sicarú project.
- > Suspend the Gunaá Sicarú project as long as EDF's vigilance plan and its proper implementation do not effectively prevent the risks of human rights abuses in the Unión Hidalgo community. In accordance with its duty of vigilance, this entails:
 - * Publishing a vigilance plan that identifies, maps and prioritises the risks of serious violations of human rights and safety resulting from its activities in Mexico, and details adequate measures to effectively prevent future abuses and a report on the proper implementation of such measures.
 - * Effectively implement adequate measures, as defined in the plan, to effectively prevent the risks of violations of the physical well-being and freedom of expression of human rights defenders, FPIC, and collective ownership of the lands of the indigenous population of Unión Hidalgo.
- > Ensure, in accordance with international standards on FPIC, that consultation with indigenous communities on EDF's projects is carried out through representatives freely chosen by the community, and through mechanisms and procedures independently defined by the community, in good faith, without undue influence or pressure, and in a culturally appropriate and respectful manner.
- > Ensure the implementation of measures including the termination of the commercial or contractual relationship causing a risk of serious breaches of fundamental rights or the health, safety, physical well-being or the environment, between the Group and its suppliers, subcontractors, and business partners in the context of its projects.
- > Suspend its projects when the risks for human rights defenders or the risk of serious violations of fundamental rights cannot be effectively mitigated.
- > Respect its duty of vigilance, whose basis for interpretation is found in the UN Guiding Principles and the OECD Guidelines on Multinational Enterprises, as well as international human rights standards, including the ILO Convention 169 on Indigenous Peoples and the UN Declaration on the Rights of Indigenous Peoples.

In accordance with its obligations under international law, take the necessary steps to ensure that the EDF Group complies with those laws by legal or political means, including with regard to the duty of vigilance incumbent on private companies:

- Determine whether the EDF Group's vigilance plan complies with the obligations established under the law on the duty of vigilance and international standards of vigilance, in particular whether the planned measures and the means assigned to their implementation effectively prevent human rights abuses in indigenous communities impacted by its projects.
- Determine whether the EDF Group's vigilance plan exercises heightened vigilance in response to the increased risk of negative impacts on the human rights of local communities and the physical well-being of defenders of human rights and indigenous territories, in the context of the development of its wind energy activities in Mexico.
- Determine the extent to which the Group's vigilance allows for the disengagement of business partners in Mexico whose actions violate the human rights or safety of local communities.
- Demand that the EDF Group suspend the Gunaá Sicarú project until the Group's detailed vigilance measures are effectively implemented to prevent risks to the indigenous communities, and in particular the Gunaá Sicarú project.

Increase transparency measures

- Publish the CSR Charter and ensure its implementation.
- Publish the criteria for nominating State-appointed corporate officers, and the job descriptions and mandates that the APE entrusts to them within these companies.

Adopt, publish and effectively implement a due diligence policy

- Revise the "Lignes directrices pour l'État actionnaire" by convening an interministerial committee to ensure that they are consistent with standards for the protection of human rights and the environment established under international law, including due diligence standards.
- Publish the positions held by the State on boards of directors and report on the means implemented to ensure compliance with and effective application of the duty of vigilance by companies in its portfolio.
- Adopt, publish and implement conditions related to the duty of vigilance for its portfolio companies, laying down the criteria for investment and/or divestment.
- Apply the OECD Guidelines on Corporate Governance of State-Owned Enterprises, published in 2015.
- Invest in sufficient human resources and adequate cross-disciplinary expertise to ensure that companies in the APE's portfolio respect human rights and the environment.

RECOMMENDATIONS TO FRENCH PARLIAMENTARIANS

Establish under French law and strengthen the duty of vigilance for public and private actors in the protection of human rights and the environment.

In the framework of their external action, French public actors who have an impact abroad, as well as private actors who contribute to that impact, have an obligation to prevent violations of human rights and fundamental freedoms, the health and safety of individuals and the environment, resulting from the activities of public entities and companies they control, directly or indirectly, as well as from the activities of subcontractors, suppliers or beneficiaries with whom an established relationship is maintained. The responsibility of public and private actors who have an impact abroad, under the conditions defined above, is engaged and requires them to remedy the damage that compliance with their obligations could have prevented. A presumption of liability exists for legal when they do not demonstrate that they have taken all the necessary and reasonable measures within their power to prevent or avoid damage or a certain risk of damage to human rights and fundamental freedoms, human health and safety, and the environment in the course of their activities, those of their subsidiaries, partners, beneficiaries or subcontractors.

Strengthen parliamentary oversight by establishing two special rapporteur positions in the Senate and the National Assembly:

→ A role of special rapporteur on the implementation of the State's duty of vigilance with regard to the protection of human rights and the environment. This position, attached to the Foreign Affairs Committee, would be given the task of analysing and reporting to the national representation on the means implemented to ensure that the State's actions are consistent with standards relating to the protection of human rights and the environment established under international law.

→ A role of special rapporteur on the implementation of the State shareholder's duty of vigilance. This position, attached to the Economic Affairs Committee, would entail the task of studying and reporting to the national representation on the means implemented by the State to ensure compliance with and effective application of the duty of vigilance by the companies in its portfolio with regard to the protection of human rights and the environment.

RECOMMENDATIONS TO THE GOVERNMENT

For EDF:

Ensure that Unión Hidalgo has effective access to justice and prevention of its damage in France.

Ensure that EDF halts activities that violate the economic, social and cultural rights ratified by France.

Generally:

→ Make constructive proposals and progress to develop national, European and international legal frameworks in order to establish corporate duty of vigilance and ensure effective access to justice in accordance with corporate civil and/or criminal liability for any affected person or community.

→ Push for the adoption of ambitious European legislation on the duty of vigilance that takes into account the recommendations put forward by French and European civil society.

→ Show proactive and constructive support for the UN treaty on multinationals and human rights currently under negotiation, and work within the EU to foster European compliance with and ambitious contribution to these negotiations.

→ Ratify ILO Convention 169 on the protection of the rights of indigenous peoples, in particular their right to FPIC.

RESOURCES

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* **United Nations**

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* **OCDE**

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* **OCDE**

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* **OCDE**

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The French law on the duty of vigilance is the fruit of a long struggle by civil society to protect human rights and the environment and to hold corporations legally accountable for their actions. This struggle is also taking place on a European and global level: the EU is studying the possibility of adopting a directive on the duty of vigilance, and negotiations are underway at the United Nations to establish an international treaty on transnational corporations and human rights. In the light of this, we call on the French public authorities to shoulder their responsibilities by enforcing this law and fostering the adoption of similar binding standards both in Europe and worldwide. CCFD-Terre Solidaire is a well-established actor for change in over 60 countries and takes action against all forms of injustice. We work to ensure that all human beings' fundamental rights are respected: to have enough to eat, to earn a living with dignity, to live in a healthy environment, to choose where to lead their lives. In Mexico, CCFD-Terre Solidaire supports the efforts of local civil societies – in particular farming and indigenous organisations, women and young people – to “rebuild” governance from the ground up, at local level, using the strategy of helping people to defend and develop their own rights. Our commitment to greater justice and solidarity originates in the social teaching of the Catholic Church. Through our individual and collective action, we propose and support political and grassroots solutions.



The European Centre for Constitutional and Human Rights (ECCHR) is a German non-profit organisation established in 2007. The ECCHR develops and supports strategic litigation before various ordinary, regional and international human rights courts to hold State and non-State actors accountable for violating the rights of the most vulnerable individuals or communities. ECCHR's business and human rights department assists people affected by human rights abuses perpetrated by multinationals during their operations abroad. Since 2015 ECCHR has been working alongside its Mexican partner ProDESC on the Unión Hidalgo situation, providing expert advice on the duty of vigilance to which multinational companies are subject. In this capacity, ECCHR played an expert role in the complaint filed by ProDESC and a member of the Unión Hidalgo community with the OECD NCP in France regarding the Gunaá Sicarú project. The ECCHR is a complainant in the civil action filed jointly with the community of Unión Hidalgo and ProDESC on 13 October 2020 against EDF.



The Economic, Social and Cultural Rights Project - ProDESC (Spanish acronym) is a feminist organization with a transnational scope and an intersectional vision of human rights defense, founded in 2005 by lawyer and defender Alejandra Ancheita. With the implementation of the integral defense method, designed along a series of strategic lines, the ProDESC team defends and accompanies community and collective processes, addressing three fundamental rights: the right to land, territory and natural resources, human labour rights and the right to defend human rights. Since 2011, ProDESC has comprehensively accompanied communities in the region of the Isthmus of Tehuantepec in the search for justice and respect for their human rights as rural and indigenous peoples. Since 2013, the community members of Unión Hidalgo, in collaboration with ProDESC, have begun a legal defense of their rights from the dispossession of their territory by the wind industry, the imposition of projects by multinational companies, and the persecution of community defenders. Recently, this defense has taken on an unprecedented transnational dimension in Latin America.