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SPECIFIC INSTANCE

“EDF and EDF RENEWABLES IN MEXICO”

10 March 2020

Final Statement of the French National Contact Point

The French National Contact Point (NCP) for the implementation of the OECD Guidelines for Multinational Enterprises received a referral on 8 and then on 12 February 2018 from a Mexican non-governmental organisation ProDESC¹ and by two human rights defenders and representatives of the agrarian and indigenous sub-community of Unión Hidalgo of a specific instance concerning the EDF Group and its subsidiary EDF Renewables (former EDF Energies Nouvelles) concerning a project for the construction of a wind farm located in the territory of two municipalities, Unión Hidalgo and La Ventosa, of the district of Juchitan de Zaragoza in the State of Oaxaca in Mexico. The referral concerns only Unión Hidalgo.

The French NCP is a tripartite body for the non-judicial grievance mechanism for the implementation of the OECD Guidelines for Multinational Enterprises. Its purpose is to contribute to solving issues raised to it through its good offices, mediation and conciliation. It shall endeavour to examine issues raised as soon as possible, if possible within 12 months of receipt of the specific instance. It shall publish its decisions on its website.

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¹ Project of Economic, Social and Cultural Rights

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1. Conclusion

The NCP closes the referral. It thanks Parties for their participation in the procedure. It addresses following recommendations to EDF and EDF Renewables:

⇒ **RECOMMENDATION 1:** *The NCP recommends to the EDF Group and to EDF Renewables to adapt their policy of engagement with stakeholders, in particular with regard to indigenous peoples and communities potentially affected by its different projects. In particular, it will be important to make arrangements for engaging with all stakeholders potentially concerned by these projects, particularly with those bearing social and cultural interests. To this end, the NCP invites them to take as a reference questions 8, 9, 10 and 11 of the OECD Due Diligence Guidance for Responsible Business Conduct². The NCP also invites them to take into account annexes on indigenous peoples of the OECD Due Diligence Guidance for meaningful engagement with stakeholders in the extractive sector³, adopted in 2016, and the OECD/FAO Guidance for responsible agricultural supply chains adopted in 2017⁴.*

⇒ **RECOMMENDATION 2:** *In the case at hand, the NCP recommends that the EDF Group to accompany its subsidiary EDF Renewables Mexico with the establishment of a CSR committee composed of external stakeholders and the designation of a person responsible to manage relations with these external stakeholders. This would enabled the Company to have a permanent and transparent framework for dialogue for all wind farm projects EDF Renewables is developing or plans to develop in Mexico, in particular Gunaa Sicarú. This could be done in other countries and in other entities of the Group, in particular in conjunction with the vigilance plan managed by EDF.*

⇒ **RECOMMENDATION 3:** *When projects of the EDF Group raise land-tenure issues linked with indigenous peoples, the NCP recommends to EDF Group and to EDF Renewables to consult various stakeholders. In the case at hand, it recommends to make sure that this issue will be addressed in an appropriate framework in the context of the indigenous consultation in order to prevent future litigation.*

NCPs are not competent to review decisions of administrative authorities. Some of the issues raised by this specific instance do not fall strictly within its jurisdiction. The NCP invites Parties to consult other fora to examine them.

In accordance with Article 32 of its Bylaws, the NCP decides to follow up this specific instance. Given that the Complainants withdrew from the procedure, it called on EDF and on EDF Renewables to keep it

²<https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>

³ see Annex B “Engaging with Indigenous Peoples”, pages 92-98,

[https://www.oecd-ilibrary.org/docserver/9789264252462-](https://www.oecd-ilibrary.org/docserver/9789264252462-en.pdf?expires=1579277567&id=id&accname=oid021721&checksum=4DACB62FA0DBD69E6A5D892C439E431A)

[en.pdf?expires=1579277567&id=id&accname=oid021721&checksum=4DACB62FA0DBD69E6A5D892C439E431A](https://www.oecd-ilibrary.org/docserver/9789264252462-en.pdf?expires=1579277567&id=id&accname=oid021721&checksum=4DACB62FA0DBD69E6A5D892C439E431A)

⁴ see Annex B “Engagement with indigenous peoples”, pages 75-86

https://www.oecd-ilibrary.org/agriculture-and-food/oecd-fao-guidance-for-responsible-agricultural-supply-chains_9789264251052-en

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informed of the progress of the Gunaa Sicarú project and to keep it informed of the follow-up given to those recommendations in six months (September 2020) and then in one year (March 2021).

2. Presentation of the specific instance

The referral concerns the preparation of a 252 MW wind farm project called “Gunaa Sicarú” of the company *Eólica de Oxaca*, a Mexican subsidiary of EDF Renewables Mexico from EDF group in Tehuantepec isthmus region in the south-east of the State of Oaxaca. The wind farm is located in two municipalities of the *Juchitan of Zaragoza* district: *Unión Hidalgo* and *La Ventosa*. The referral concerns only Unión Hidalgo’s community, a municipality of approximately 12 000 inhabitants with a population of more than 90 % of Zapotecs. Zapotecs are among indigenous peoples recognised as such in Mexico⁵.

The specific instance is brought by the Mexican non-governmental organisation *Proyecto de Derechos Económicos, Sociales y Culturales* (“ProDESC”) and by two persons members of the “Agrarian and indigenous sub-community of Unión Hidalgo”, Ms A and Mr B. Ms A and Mr B are human rights defenders of the local indigenous community and of a local community assembly (“*Asamblea de comuneros de Unión Hidalgo*”). The referral states that Mr B was appointed several years ago as the representative of the community assembly and that he is also the “representative of the common goods”. The referral doesn’t specify the number of the members of this assembly. It doesn’t indicate the number of current *comuneros* in Unión Hidalgo. The complainants stress that this community assembly does not need legal recognition to exist and to represent the indigenous community.

According to the referral, the scope of the project would cover parcels that would fall below the community type of land tenure (*tierra comunal*) and not to the land tenure of private property. Reference is also made to ‘community goods’ (“*bienes comunales*”). According to the complainants, the company should have informed and consulted the assembly of the *comuneros* upstream of the project. The complainants consider that the right to information and to the free, prior and informed and consent of the Unión Hidalgo’s indigenous community would not have been respected in the course of EDF Renewables Mexico’s project. According to the referral, EDF and EDF Renewables would not have correctly carried out their due diligence regarding risk of adverse effects on human rights.

The referral referred to the Mexican Constitution and the principle of free, prior and informed consent contained in ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples of 2007⁶.

⁵Indicadores socioeconómicos de los pueblos indígenas de México, 2015 — Comisión nacional para el desarrollo de los pueblos Indígenas (CDI).

⁶The NCP Initial Assessment Statement states that “*The NCP notes that with regard to the rights of indigenous peoples, the referral refers to the Mexican Constitution, on the one hand, and to the free, prior and informed consent principle contained in the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries and in the United Nations Declaration on the Rights of Indigenous Peoples of 2007 - instruments which are destined for States. Mexico, a member of the OECD since 1994 and an adhering country to the OECD Guidelines, ratified ILO Convention No. 169 on 5 September 1990 and adopted the United Nations Declaration on the Rights of Indigenous Peoples of the 13th September 2007*”.

22 countries have ratified ILO Convention No 169, 15 of which are countries in Latin and Central America and the Caribbean and 7 other countries around the world (Denmark, Spain, Fiji, the Netherlands, Nepal, Norway and the Central African Republic).

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In the course of the procedure, the complainants point to a worsening of tensions within the indigenous community between those who already benefit from the project (owners receiving a rent), those who will benefit from it (owners, local economic sectors) and the rest of the population. In June 2018, in a tense local context, in and then in June 2019, the complainants mentioned threats and pressures against human rights defenders, particularly before and at general meetings of the local indigenous consultation organised by the Mexican authorities from the end of 2018 and during 2019. According to them, these incidents would be linked to the Gunaa Sicarú project, which would exacerbate pre-existing tensions, itself linked to other wind projects driven by other companies.

The complainants request (1) the establishment of mediation with the EDF Group, the remediation and establishment of remedial procedures, (2) the respect of the Guidelines, of due diligence and of the principle of free, prior and informed consent of indigenous peoples in all its electrical projects, (3) the suspension of the implementation of the Gunaa Sicarú project, (4) the establishment of modalities of accessibility to the NCP (translations, conference calls, transport) and transparency, (5) the determination of compliance with the Guidelines in the absence of agreement between the Parties.

Contextual background elements:

The region of Tehuantepec Isthmus is a particularly windy area. It includes several wind farms in particular in and near Unión Hidalgo. Several enterprises are present, including EDF Renewables Mexico. New projects would be under consideration. The presence of these wind farms would generate tensions. A “resistance committee” has been set up in the last few years in the Unión Hidalgo, following the installation of a wind farm by another company. Several Mexican organisations defending indigenous people’s rights have been monitoring these developments for several years.

EDF provided the NCP with information on the preparation stages of the Gunaa Sicarú wind project. This elements were shared with the complainants within the framework of the NCP good offices.

The list of recommendations of the Guidelines referred to in the referral is set out in the NCP’s Initial Assessment Statement.

3. Procedure followed by the NCP in accordance with its Bylaws

The French NCP shall endeavour to carry out the initial assessment of a referral within three months of the acknowledgement of receipt and issue a statement explaining its decision. Where this assessment is positive, it shall offer its good offices to the parties and examine the case. The NCP shall endeavour to examine issues raised as soon as possible, if possible within a period of 12 months, following receipt of the request related to a specific instance, it being understood, however, that this period may be extended if circumstances so require, for example if the question is raised in a country which has not adhered to the Guidelines or in the case of parallel proceedings. It then turns to the conclusion of the referral, that is to say, the preparation and publication of a Statement or a Report in the event of an agreement between the parties (Article 35). It may decide to follow up its recommendations. The NCP reserves the right to communicate during the examination of the procedure, subject to confidentiality obligations.

◆ 1st step: Admissibility and Initial Assessment of the referral (February — June 2018)

The French NCP receives the complete file of the specific instance on 12 February 2018 and acknowledges receipt on the same day. It notes that the complainant NGO publishes a press release

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announcing the referral on 12 February 2018⁷. The NCP validates the referral's formal admissibility on 23 February 2018 and starts its initial assessment. It wrote to Parties on 27 February 2018 to inform them. In its letter to the Complainants, it also presents the NCP procedure, asks to clarify certain points and invites them to sign a commitment to respect the confidentiality of the procedure (invitation recalled in March and April 2018). The NCP forwards a copy of the referral to EDF and to EDF Renewables on 27 February 2018. It invites the Group to forward the file to its subsidiaries in Mexico and to respond to it as off now. Upon receipt of the referral, EDF and EDF Renewables indicate their willingness to participate into the dialogue process proposed by the NCP and they send to it confidential first elements of response on 15 March 2018. The NCP contacts the Mexican NCP (see below).

The NCP finalises the initial assessment on 12 April 2018 and endorses its leadership. It accepts the referral and offers its good offices to Parties. It invited them to give a response by mid-May 2018. Complainants accept its good offices on 15 May 2018 and transmit their commitment to respect confidentiality and secrecy of discussions on the same day. EDF and EDF Renewables accept the NCP good offices on 6 June 2018. **The NCP adopts the Initial Evaluation Statement on 12 June 2018 after consultation with Parties and Mexican NCP and then publishes it on its website⁸.** It informs the OECD which adds the case to the NCP database⁹. The Statement states that *"The NCP hopes that it can contribute positively to the resolution of the issues raised by this specific instance by offering the parties a platform for dialogue (see Article 25). During its good offices, the NCP will meet with the parties and offer them mediation. It may seek the advice of competent authorities or experts. It will take into account treaties, laws and regulations applicable in this case and the ongoing concurrent legal proceedings"*.

NCP Initial Assessment Statement, 12 June 2018

◆ Step 2: Good offices of the NCP (June 2018 — July 2019)

The NCP refers to the referral at its monthly meetings between June 2018 and July 2019. Its members discussed various issues raised by Complainants and news items of which it has been informed. The NCP started its good offices on 22 June 2018. Its secretariat shares information between Parties throughout the procedure and it regularly informs them of the steps of the procedure and about NCP's discussions.

In the course of the procedure, Complainants forward letters supplementing their referral or replying to the questions of the NCP (in particular on parallel proceedings, local land tenure system, local community assembly) on 10 May 2018, 22 June 2018, 20 May 2019 and 5 July 2019. Complainants refuse this documents to be sent to the Company. The EDF Group forwards a number of files responding to the referral and to the questions of the NCP on 15 March 2018, 9 April 2018, 29 September 2018, 10 and 21 December 2018, 8 January 2019, 19 March and 12/16 July 2019. All the documents submitted by the Group are sent to Complainants, with the exception of the July 2019 file. Documents received from Parties are written in English and Spanish, which requires the use of Spanish to French translation services supervised by the NCP Secretariat. The NCP notes that a French trade Unión mission comes to Unión Hidalgo in November 2018.

⁷ <http://www.prodesc.org.mx/index.php/es/>

⁸ <https://www.tresor.economie.gouv.fr/Articles/61681f56-2cf6-428f-a22c-6c7ef7d4d8b2/files/a1ebd5fc-c25f-4f44-8605-fdfe463c30ab>

⁹ <http://mneguidelines.oecd.org/database/instances/fr0026.htm>

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NCPs are a platform for dialogue to help the parties resolve their dispute. In the case at hand, the NCP's good offices have in particular led to the organisation of several meetings in five steps:

- **1st time: The NCP interviews each Party separately and proposes them to meet together directly.** It receives ProDESC and one of the two co-complainants of Unión Hidalgo on 22 June 2018. They confirmed their wish to meet with the Group. At the end of the hearing on 22 June 2018, Complainants hand over to the NCP a letter from ProDESC and the NGO “European Center for Constitutional and Human Rights” (ECCHR) asking to include ECCHR as co-complainant to the referral. It receives EDF and EDF Renewables on 4 September 2018. EDF and EDF Renewables agree to meet with Complainants in the context of the referral. These hearings are held at the Ministry of Economic Affairs and Finance in Paris.
- **2nd time: The NCP interviews the NGO ECCHR as an expert for the referral.** On 10 July 2018, the NCP proposes to ProDESC and ECCHR that ECHR act as an expert in the referral as provided for the NCP Bylaws¹⁰. Following several exchanges between the NCP, ProDESC and ECCHR, this proposal is accepted. On 16 October 2018, the NCP proposes to organise ECCHR hearing on 6 November 2018. In view ECCHR availability, it takes place on 10 January 2019 in the form of a video-conference from the Economic Service of the French Embassy in Berlin. The organisation provides the NCP with lessons to be learned from its report “*Tricky Business: Space for Civil Society in Natural Resource Struggles*”¹¹ and its knowledge about free, prior and informed consent of indigenous peoples. On 31 January 2019 and 21 May 2019, ECCHR delivered to the NCP several documents¹² referred to at the hearing. The NCP forwards them to the Group in May 2019.
- **3rd time: The NCP organises a local meeting between Parties.** Its secretariat had a very large number of exchanges with Parties between September 2018 and February 2019 in order to agree on the date and format of their meeting, which was finally fixed on 19 March 2019. The meeting brings together ProDESC, the American subsidiary of EDF Renewables and EDF Renewables Mexico at the Regional Economic Service (SER) of the French Embassy in Mexico, in the presence of NCP Secretary General by videoconference. Parties discuss issues raised by the referral. The NCP takes note of these exchanges. **It issues an Intermediate Statement on 14 May 2019¹³ reporting on actions it has taken so far.**

NCP Intermediate Statement, 14 May 2019

¹⁰ Article 27: “Where the issues raised merit further examination, the NCP shall offer its good offices to help the parties involved to resolve them by providing a forum for dialogue. During its good offices and the examination of the specific instance, the NCP shall consult with these parties and, where appropriate, according to the cases examined, the NCP shall: Seek advice from competent authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and experts; (...)”.

¹¹ <https://www.boell.de/en/2017/12/07/tricky-business>

¹² including reports by the UN Special Rapporteur for the Indigenous Peoples of Mexico, ILO Guide to the Convention No. 169 (‘Indigenous & tribal peoples’ rights in practice, 2009), information on the Mexican process of consultation of indigenous peoples and communities in Mexico and a note on referrals to the NCPs.

¹³ <https://www.tresor.economie.gouv.fr/Articles/61681f56-2cf6-428f-a22c-6c7ef7d4d8b2/files/9fd26bc8-4fc7-4435-99ba-6a2374bd700e>

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- **4th time: The NCP interviews each Party separately again.** Meetings take place on 3 and 5 June 2019 at the Ministry of Economic Affairs and Finance in Paris. On 3 June 2019, ProDESC and Ms A (one of the two co-complainants of the Unión Hidalgo) alert the NCP to the local security situation, express their expectations from the procedure and wish to meet with EDF and EDF Renewables headquarters. On 5 June 2019, the NCP holds hearings with EDF and EDF Renewables as well as the American subsidiary of EDF Renewables (joint by telephone from San Diego, USA), EDF Renewables Mexico and its subsidiary Eólica de Oaxaca to discuss the Group's due diligence and the local procedures related with the project. The NCP takes note of these exchanges on 25 June 2019 and decides to propose a new meeting to Parties.
- **5th time: The NCP organises a meeting between Parties with the presence of Enterprises parent-companies.** The NCP submits its proposal to Parties on 28 June 2019 that EDF promptly accepts. The meeting takes place on 18 July 2019 in the form of a phone-conference between the Regional Economic Service of the French Embassy in Mexico City, the Ministry of Economy and Finance in Paris and EDF in San Diego in the United States. The meeting brings together ProDESC, representing Complainants, EDF, EDF Renewables, EDF Renewables Americas, EDF Renewables Mexico and its subsidiary Eólica de Oaxaca and the NCP represented by the Ministry of Europe and Foreign Affairs and the Secretariat. Discussion focuses on expectations expressed by Complainants on 3 June 2019.

On 18 July 2019, ProDESC and the EDF Group achieve following results:

- EDF's due diligence for the wind farm project Gunaa Sicarú is being assessed by the PCN. ProDESC understands that and awaits for the NCP Statement;
- Complainants wished EDF to send a message to its subsidiary EDF Renewables in Mexico about due diligence. ProDESC thanks EDF for explanations given and agrees that it is not necessary for EDF to send such a message to its subsidiary;
- Complainants wished to obtain information on EDF's role within the indigenous consultation procedure for Gunaa Sicarú project. Parties note that EDF Renewables Mexico participates only in two out of six phases of the indigenous consultation which is carried out by the SENER in accordance with Mexican procedural requirements. Parties note that tensions exist locally and that public security concerns are under the jurisdiction of public authorities, which is outside NCP's mandate;
- Complainants wished to establish a specific channel of dialogue ("*open channel*") between them and EDF. Parties agree that the dialogue initiated by the NCP can continue locally by using usual channels of the Group (offices of EDF Renewables in Mexico) and that it is not necessary to establish a specific dialogue channel.
- In conclusion, ProDESC and the representatives of EDF Group are close to an agreement on expectations expressed by Complainants. The NCP will analyse EDF's due diligence. ProDESC indicates that it has to submit these results to its co-complainants and wishes to continue the discussion with the Company. ProDESC thanks the NCP and awaits its analysis. EDF recalls that all entities in the Group have a responsible business conduct and that they

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must apply the Group's policies. EDF concludes that from now on Parties should discuss locally.

On 24 July 2019, the NCP Secretariat forwards a draft minutes of the meeting of 18 July to Parties. It requests their comments by 19 August 2019. On 26 July 2019, Complainants wrote to the NCP informing it of their withdrawal from the good offices and their withdrawal from the procedure. On 29 July 2019, ProDESC publishes a press release, co-signed by PODER, ECCHR and OECD Watch, announcing and explaining this decision¹⁴. ProDESC co-signs also a statement in the French press criticizing the procedure and the NCP¹⁵.

◆ Step 3: Conclusion of the referral (September 2019 — March 2020)

At its meeting of 3 September 2019, the NCP takes note of the outcome of 18 July 2019 meeting and of Complainants' decision to withdraw from the procedure. It decides to acknowledge receipt of the Complainants' letter of 26 July 2019 and, consequently, to close its good offices and move to the conclusion phase of the referral. It instructs the Secretariat to prepare a final Statement. It also decides to consult the OECD on the arrangements for involving Parties in finalising the final statement, since one of the Parties left the procedure. The NCP inform Parties of its decisions on 4 September 2019 and the Mexican NCP on 5 September 2019.

At its meeting of 14 October 2019, the NCP decides to consult the ILO on the implementation of Convention No 169, the French Embassy in Mexico and the Mexican NCP before finalising its final statement. The NCP consults an ILO expert on 14 November 2019.

On 17 October 2019, the NCP adopts an Intermediate Statement announcing¹⁶ Complainants withdrawal from the procedure. The NCP expresses regret at this situation. It announces the preparation of the final statement. It takes note of the announcement of EDF's formal notice initiated by Complainants under the Law of 27 March 2019 on the duty of vigilance of the parent companies and of its affiliated companies.

NCP Intermediate Statement, 17 October 2019

The NCP adopts a draft final statement on 14 January 2020, and sends it to the Mexican NCP for comments. As Complainants withdrew from the procedure, the NCP transmits the statement to the Parties for their information, while inviting them to share factual and general comments within 10 days. The EDF Group raises request for clarification about entities involved in the case. Complainants thank the NCP for sharing the draft and state their **divergence/disagreement**. The Mexican NCP shares updated information. In the light of the reactions of the Parties and of the Mexican NCP, it amends the text. The NCP hereby adopts this Final Statement on 10 March 2020 by consensus with the exception of two trade unions (CFDT and CGT). It sends the Final Statement to the Parties and to the Mexican NCP

¹⁴ <http://www.prodesc.org.mx/index.php/es/2014-04-21-22-19-14/2014-04-21-23-13-29/695-mexican-ngo-prodesc-and-indigenous-human-rights-defenders-announce-their-withdrawal-from-specific-instance-procedure-before-french-national-contact-point-against-edf-group-and-its-subsidiaries>

¹⁵ <https://www.nouvelobs.com/monde/20191016.OBS19841/champs-d-eoliennes-d-edf-des-populations-mexicaines-denoncent-la-violation-de-leurs-droits-fondamentaux.html>

¹⁶ <https://www.tresor.economie.gouv.fr/Articles/0c29e46e-f77f-4d0a-9809-59af754ca2bc/files/78382f78-17ac-4479-bab9-05198d3f19a6>

The Statement is adopted by the NCP with the exception of a trade union organisation.

Websites: <http://www.pcn-france.fr> & # [NCP France@Trésor-info](mailto:NCP_France@Trésor-info)

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prior to its publication on its website. It informs the OECD in order to update the NCP's specific instances database.

◆ Coordination between the French and the Mexican NCPs in handling the referral

Mexico, an OECD member since 1994 and adhering member of the OECD Guidelines, ratified ILO Convention No 169 on 5 September 1990 and adopted the United Nations Declaration on the Rights of Indigenous Peoples of 13 September 2007.

Complainants only submitted the specific instance to the French NCP. They refused to send the referral and its addenda to the Mexican NCP; this request for confidentiality was respected by the French NCP. However, this position of Complainants has complicated the NCP coordination, which is indeed particularly necessary in the case at hand.

Both NCPs consulted together in March 2018 in order to designate a lead NCP. They noted that the referral concerns exclusively companies being part of a French group and questions that Group's due diligence. They decided that the specific instance will be handled by the French NCP in order to interact with the French Group with the support of Mexican NCP as necessary.

The French NCP has regularly informed its Mexican counterpart of the progress of the procedure without passing on information provided by the Complainants in accordance with their request for confidentiality. The French NCP requested the support of the Mexican NCP on several occasions: press review, explanation of administrative procedures for this type of projects, land tenure issues, indigenous consultation' procedure. It thanks the Mexican NCP who had provided it with information that is particularly useful to understand local context throughout the procedure.

4. Parallel actions and proceedings to the referral as known by the NCP

The action of the French NCP is becoming sensitive due to the simultaneity of several litigations and non-judicial actions and proceedings initiated in Mexico, and then in France, relating to the Gunaa Sicarú project and/or relating to issues raised in the referral. The NCP is not informed about these actions/proceedings; some might still be in progress. Some proceedings might have been lodged by or with the support of the Complainants.

In response to the NCP, the Complainants submitted to it information about some of these proceedings which information they estimated to be confidential. Under their request, these information were therefore not sent to the EDF Group.

◆ Litigation proceedings

In response to NCP's questions, the Complainants informed it in May 2018 of the existence of litigation proceeding's, which they have initiated; they provided further clarifications in June 2018. These claims were filed against certain Mexican administrative decisions related to the project.

In June 2019, the Complainants informed the NCP of the existence of new decisions which would concern the land tenure status of lands to be used for this project and about the need to take the interests of Unión Hidalgo agrarian sub-community represented by the representative of community goods of

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Unión Hidalgo (that is Mr. B, co-complainant of the referral) and his/her alternate into consideration in the indigenous consultation of the project.

In June 2019, Complainants announce to have send a formal notice to the EDF Group under the Act on 27 March 2017 on the duty of vigilance of parent companies and of its affiliated entities in relation with Gunaa Sicarú project, which is subject of the present specific instance.

♦ Human Rights Defender of the Oaxaca People (“DDHPO”)

On 13 June 2018, the Human Rights Defender of the Oaxaca People (DDHPO) issued an early warning on wind power plants in Unión Hidalgo. DDHPO refers to the situation of human rights defenders and the Unión Hidalgo’s Resistance Committee and refers to the “*risk of human rights violations and impossible remediation*” and a “*well-founded fear of clashes and attacks*” in relation with Gunaa Sicarú project.

On 14 June 2019, DDHPO states that it will act as an observer and guarantor of an indigenous consultation procedure for a wind energy project in Unión Hidalgo¹⁷.

♦ Consultation of the indigenous community about Gunaa Sicarú project’s (“Consulta Previa, Libre e Informada”)

Mexico has ratified ILO Convention No 169 on Indigenous and Tribal Peoples in Independent Countries. Article 6.1 of ILO Convention No 169 provides that “*Applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) ;(c)*”. Article 6.2 of ILO Convention No 169 provides that “*The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures*”. The NCP has also taken note of the ILO Guide to Convention 169 drawn up in 2009¹⁸ and the Handbook of February 2013¹⁹.

The 2014 Mexican Law on Electric Power (“LEI”) provides that the bearer of a project orders the realisation of a social impact assessment by a third party (‘EVIS’), which must identify, characterise and analyse social impacts caused by its activities and foresee for corresponding mitigation measures as well as identify cities and indigenous communities affected by the project. Depending on the study conclusions, the Energy Ministry (“SENER”) carries out an indigenous consultation. This is one of the steps in the administrative procedure for an electric energy project such as Gunaa Sicarú.

According to information gathered by the NCP, this indigenous consultation should consist of six phases: definition of stakeholders, definition of the protocol that will frame the implementation of the

¹⁷“Defensoría de la Derechos Humanos, órgano observador y garante en procesos de consulta”, 14-06-2019
<https://www.derechoshumanosoaxaca.org/noticia.php?idnoticia=1009>

¹⁸“Indigenous and Tribal Peoples’ Rights in Practice: A guide to ILO Convention No 169”, 2009
https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang--en/index.htm

¹⁹ Handbook” Understanding the Indigenous and Tribal Peoples Convention”, 19 Fb. 2013
https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/WCMS_205225/lang--en/index.htm

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procedure by the stakeholders and the government (“pre-agreement phase”), information on the project with the involvement of the project developer, deliberation, negotiation of the agreements with the project developer, and supervision of the implementation of the agreement if necessary. The enterprise is involved in only two phases: information and negotiation of agreements.

In the case at hand, EDF Renewables Mexico hands over the EVIS to SENER at the beginning of October 2016. From that moment onwards, the enterprise considers that information and engagement with the indigenous community will be carried out within the official framework of the consultative procedure of the indigenous communities of the Unión Hidalgo and La Ventosa in accordance with the LEI under the aegis of Mexican authorities. EDF Group informed the NCP and Complainants that EDF Renewables Mexico complies with the Mexican procedure for indigenous consultation, which is under SENER jurisdiction and refers to international standards concerning indigenous peoples. The Group states that its subsidiary had called on its Mexican public partners on several occasions to launch the indigenous consultation procedure. It stresses that the procedure had been delayed (see below). In the time laps, it believes that EDF Renewables Mexico cannot launch an extensive information of the local indigenous community and neither engage with all indigenous stakeholders, as these actions must be carried out within the framework of the indigenous consultation procedure which will be conducted by Mexican administration. The Group does not control time limits for carrying out that consultation. The Group explains to the NCP and Complainants that, in accordance with the procedure established by SENER for this indigenous consultation, the Mexican subsidiary would only participate in two phases of this consultation procedure: the phase of “information” of indigenous communities affected by the project at Unión Hidalgo and La Ventosa and the phase of “agreements negotiation” (e.g. restoration of roads, social actions, etc.). According to the Group, *“the texts governing this indigenous consultation would appear to be in line with international standards (ILO, UN) and should make it possible to prepare an accompanying plan for the project”*. The Group informs the NCP and Complainants that it is not desirable to build a project against people’s opinion.

The NCP points out that the Gunaa Sicarú project indigenous consultation is concomitant with the referral to the NCP. It notes that SENER is implementing the procedure called “consulta previa, libre e informativa”, that is to say free, prior and inform consultation. It starts in March 2018. SENER convenes a first meeting of the indigenous consultation in Unión Hidalgo on 11 April 2018. The procedure is provisionally suspended in April and then in May 2018 following a decision by the first district judge of the State of Oaxaca who would believe, according to DDHPO, that material (delays in the reconstruction of the town following earthquakes) and social (risks of internal conflicts due to the proximity of the elections scheduled for July, traditional festivals) appropriate conditions are not met (see DDHPO note). On 22 November 2018, the judge authorises the resumption of the procedure, which would have to take into account international human rights standards.

According to information gathered by the NCP, the General Assembly of Unión Hidalgo indigenous consultation would have designated the stakeholders for that consultation, including its observers, at its meetings of 30 November 2018 and 23 March 2019. It would appear that the General Assembly had denied that NGOs ProDESC, PODER and ECCHR get the status of observer to the consultation. It would appear that the cases of the representative of community goods (Mr B) and of the community assembly (*“Asamblea des comuneros”*) were not mentioned. SENER would have organised several meetings with the indigenous community in Unión Hidalgo in 2019 under the pre-agreement phase for the indigenous community to discuss and adopt the protocol. Those meetings would have been held in public. Complainants criticise the conduct of these local meetings and mention pressures they would

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have suffered without specifying their origin. According to the local press, the consultation protocol would have been adopted in August 2019²⁰. The NCP notes that the information phase of the consultation procedure of the indigenous communities in Unión Hidalgo and in La Ventosa should continue in February 2020.

◆ Other actions in connection with the Gunaa Sicarú project

Local press refers to actions initiated by certain actors, including the Complainants, with the aim to see Unión Hidalgo community assembly (“*Asamblea de comuneros*”) and the representative of community goods be recognized as stakeholders in the consultation, including an “urgent appeal” issued in June 2019 by the Observatory for the Protection of Human Rights Defenders and the FIDH²¹. Local actors published a response.

The NCP was aware of two neutral missions from French Trade Unions which would have travelled to Mexico in November 2018 and February 2019 and would have met with certain Complainants.

5. Analysis of the substance of issues raised about the OECD Guidelines effectiveness

At the end of its good offices and the dialogue built with Parties, the NCP makes a number of findings:

- During the dialogue with the parties, the EDF Group provided information on its responsible enterprise’ policy, its governance, its vigilance plan, EDF Group Global Framework Agreement on the corporate social responsibility, channels for dialogue with stakeholders. It provided information on preparation and approval modalities of projects like Gunaa Sicarú, including follow-up carried out by EDF Renewables and EDF parent-company, including a mission on the ground in November 2018. The Group provided factual and detailed information on Gunaa Sicarú project preparatory stages. This information was passed on to Complainants in the framework of the good offices.
- The PCN notes that Complainants have add access to detailed information on the project’s preparation and on the EDF Group’s functioning. This transparency from the Group responds to information request brought by Complainants in the referral. The NCP considers that this access to information is one of the outcomes of the procedure.
- The NCP notes that its action allowed for a direct dialogue between Parties focusing on issues raised by Complainants in the course of the procedure. It noted that the EDF Group engaged at a high level. It noted that the Group mobilised various entities involved in the preparation of that project: local subsidiary, EDF Renewables Mexico, American subsidiary of

²⁰ ‘Aprueban bases de consulta sobre parque eólico en Unión Hidalgo’, 05-08-2019

<https://www.jornada.com.mx/ultimas/estados/2019/08/05/aprueban-bases-de-consulta-sobre-parque-eolico-en-Unión-hidalgo-6880.html>

²¹ The Observatory for the Protection of Human Rights Defenders is a joint program of the World Organization Against Torture (OMCT) and the FIDH

“Mexico: Threats, accusations and stigmatization against members of the indigenous community of Unión Hidalgo” (Oaxaca), 18-06-2019: <https://www.omct.org/es/human-rights-defenders/urgent-interventions/mexico/2019/06/d25388/>

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EDF Renewables, EDF Renewables, and EDF. The NCP considers this commitment and dialogue are ones of the outcomes of the procedure.

- The NCP notes that the project preparation phase sees the increase of pre-existing intra-community tensions within Unión Hidalgo Zapotec community, which were partly related to other wind farms projects and to tensions about land tenure regime, and would cross two components of the local community. This would involve stakeholders having an interest in supporting the project: landowners, business, and administrations. On the other hand, they would be stakeholders bearing claims for access to information and indigenous peoples consultation, and for the recognition the local indigenous sub-community gathered within the community assembly (“*asamblea des comuneros*”) and represented by the “representative of the community goods” (“*representante des bienes comunales*”, Mr B). These tensions illustrate the complexity of the operational implementation of the indigenous consultation on the one hand, and the challenges of contributing to local sustainable development on the other. The NCP notes that EDF Renewables Mexico believes that it cannot engage with the agrarian and indigenous sub-community outside the official indigenous consultation framework as off the date of submission of the EVIS to SENER in October 2016. It also notes that Complainants would not have contacted the EDF Group and its Mexican subsidiaries before submitting the matter to the NCP. It recalls that Mexican legislation applicable to this case provides that the indigenous consultation is under the responsibility of the local authorities. Thus, in line with international standards, it is not up to the Company to carry out the indigenous consultation.

➔ *The NCP recalls that engagement with stakeholders is one of the key elements of the due diligence (General Principles, Article 14) and that this commitment is particularly useful and necessary when vulnerable populations, communities or indigenous peoples are present. In the case at hand, the EDF Group could have ensured that its Mexican subsidiaries inform and engage with all stakeholders identified by the EVIS in October 2016 before the official launch of the indigenous consultation early in 2018. The NCP considers that as EDF and EDF Renewables have accepted to participate in the dialogue process offered by the NCP in May 2018, this enabled them to inform and to engage with these stakeholders, in parallel with the launch of the public consultation, which is in line with the Guidelines.*

- The NCP notes that in July 2019 the EDF Group invited all Complainants to continue the dialogue in Mexico with its representatives and local teams. The NCP considers this commitment as one of the outcomes of the procedure. This would have allowed for a direct dialogue with Ms A and Mr B who represent Unión Hidalgo’s community assembly / Unión Hidalgo agrarian and indigenous sub-community. However, the NCP notes that the Complainants chose to withdraw from the referral procedure and that afterwards they called into question local representatives of EDF Renewables Mexico.

➔ *This proposal from the EDF Group corresponded to the Guidelines recommendations about engagement [with external stakeholders].*

- The NCP notes that Complainants request setting up a specific dialogue mechanism between EDF Group, ProDESC and its two co-complainants in order to discuss the Group’s due diligence and to negotiate remediation measures. The NCP notes that the EDF Group remained open to dialogue. The NCP notes that the indigenous consultation procedure included a phase of

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‘agreements negotiation’ and that the Group has indicated that it was at that moment that measures to accompany the project will be negotiated.

➔ *The NCP is of the view that at this stage of the project, which is neither authorised nor finalised, the Guidelines do not recommend that such a specific mechanism be put in place between certain stakeholders - ProDESC, Mr A and Ms B from the local indigenous community and the Group. However, the NCP will remain vigilant so that accompanying measures, which will be decided at a later stage, will allow to prevent and mitigate risks of possible negative incidences, and, if necessary, to remedy to possible negative impacts on the local indigenous community affected by the wind farm project.*

- The NCP notes that there are still strong divergences between Parties on the land tenure regime in Unión Hidalgo on lands where the project would be carried out. According to Complainants, such land would fall under the ‘community’ agrarian regime, which, in their view, would imply the convening and the consultation of the local community assembly on the possibility to rent the land to the Company. According to the Company, they were lands covered by the private property regime. Social, legal and historical complexities of this issue are highlighted by the EVIS.

➔ *Issues raised by the referral are multiple. Beyond the complex legal aspect of land tenure in Unión Hidalgo (private / agrarian), these land tenure issues have social, cultural and customary dimensions stemming from the relationship that indigenous peoples maintain with the land. The analysis of the referral raises issues of articulation, if not contradiction, between social, cultural and legal questions. The NCP notes that the Group indicated that it had acted in good faith in conducting diligences on legal aspects in relation with plots ownership (actions carried out towards each alleged owner, verification of plots ownership’s titles and of plots’ legal regime). The NCP considers, however, that the Group could have carried out extended due diligence measures on social, cultural and customary dimensions in relation with Unión Hidalgo indigenous community. In view of complexities outlined here-above, it should have extended these consultations beyond administrative and legal checks by requesting for example institutions or organisations specialised in socio-cultural and customary issues related to land tenure issues of indigenous peoples. This would have enabled it to better identify and prevent these societal risks linked to that project.*

The NCP closes the referral. It thanks Parties for their participation in the procedure.

It addresses three recommendations to EDF and EDF Renewables (see **1. Conclusion**).

NCPs are not competent to review decisions of administrative authorities. Some of the issues raised by this specific instance do not fall strictly within its jurisdiction. The NCP invites Parties to consult other fora to examine them.

In accordance with Article 32 of its Bylaws, the NCP decides to follow up this specific instance. Given that the Complainants withdrew from the procedure, it called on EDF and on EDF Renewables to keep it informed of the progress of the Gunaa Sicarú project and to keep it informed of the follow-up given to those recommendations in six months (September 2020) and then in one year (March 2021).

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