Corporate Duty of Vigilance and Environment

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Some Lessons Drawn from the EDF and the TotalEnergies Cases

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On February 23, 2023, French bank BNP Paribas was sued before the civil tribunal in Paris for having allegedly breached its environmental duty of vigilance. In particular, deficiencies in the vigilance plan related to the allocation fundraising activities are criticized. If the current plan provides a progressive reduction in the funding of projects that emit greenhouse gases – with the aim of carbon neutrality by 2050 – BNP Paribas still intends to finance projects which contribute to this phenomenon. The point, however, is that a limitation of global warming below 1.5° calls for an immediate stop in the exploitation of new fossil energy deposits.

This climate litigation, involving a French bank for the first time, could increase the liability of financial protagonists in the fight against climate change if it succeeded. Nevertheless, one may doubt that the case against BNP Paribas will prove to be successful, as previous ones – which had been introduced under the 2017 law of vigilance (LdV) – are all either pending or unsuccessful.

The LdV: Inbetween hope and uncertainty?

When it was adopted, this unprecedented law created hope for NGOs to end the impunity of the big companies, despite legal uncertainties with regard to its application. First, it should be underlined that the law requires companies to establish a vigilance plan including “reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the activities of the company and of those companies it controls” (French Commerce Code, article L.225-102-4). For this purpose, the plan mainly consists of a risk mapping covering company activities, but also subsidiaries companies and subcontractors or suppliers.

In practice, this requirement is only partially fulfilled, the risk mapping being often substantially incomplete and the lack of administrative authority to guide companies reinforcing this issue. Finally, the compliance of corporate duty of vigilance is ensured by courts, with specific legal proceedings to obtain an injunction or to seek one company’s liability. Accordingly, only case law will provide further details about those qualitative requirements which must be fulfilled by the vigilance plan.

Early difficulties to identify what companies are subject to this obligation as well as issues of jurisdiction have prevented the adoption of a final judicial decision under this law. In fact, if companies, which have 5.000 employees in France or 10.000 worldwide, normally have to comply with the law, it is difficult to identify which companies fulfill this criterion, considering the opacity of their activities. Moreover, there was a doubt between the jurisdiction of civil courts (wished by the NGOs) and commercial courts (wished by the companies). Admittedly, the inventory of vigilance plans realized by NGO Sherpa and CCFD – Terre Solidaire, as well as the attribution of jurisdiction to the civil tribunal in Paris by a 2021 act of Parliament, should have overcome these issues.

However, much uncertainty remains because of the duration of judicial process, and one may wonder what position will be adopted by French courts about the LdV. An investigation into previous vigilance cases (i.e. against Total ad EDF) may be enlightening in that respect.

TotalEnergies: the first company challenged under the LdV

Although Total is one of the main fossil fuel producers in the world, its first vigilance plan established in 2018 failed to address climate risks related to its own activities. After several requests were made on this point, the following plans have integrated climate change issue, considering nevertheless that "climate change is a global risk for the planet and results from various human actions such as energy consumption". Thus, the company seems to limit its liability, and this is further confirmed by the fact that its carbon footprint doesn't take into account the consumption of energy products sold by the company, which still results in much greenhouse gas being produced (scope 3). Yet, it accounts for almost 90% of its carbon footprint (see on this point the paper in french, by Paul Mougeolle). Accordingly, the company considered in its 2022 vigilance plan that the 2021 carbon footprint was only of 37 Mt CO2e – i.e. less than 0.1% of total emissions worldwide.

In view of the shortcomings of its own vigilance plan, Total was the first company which was sued on the grounds of an alleged failure to comply with its duty of vigilance. It actually occurred twice in a row: On June 19, 2019, Total was sued for the deficiencies in its climate plan (the *Total-climate* case). Then, on June 24, 2019, Total was sued again for breaching human rights in Uganda in the framework of the *Tilenga* project (the *Total-Ouganda* case).

Total-climate case: what does liability mean for big oil companies in the fight against climate change?

The Total-climate case was initiated jointly by environmental organizations and French local authorities. It is noteworthy that in 2022, they were also joined by the City of New York. The applicants requested the court to order Total to modify its vigilance plan in order to incorporate IPCC data about risks linked to climate change, and to implement an action

plan for the reduction of every emission of greenhouse gas by the company (scope 1, 2 and 3), in a way which takes due account of the objective of limiting global warming to 1.5°C.

At first sight, it seemed that Total had taken such concerns into account in the 2022 vigilance plan, as the aim of carbon neutrality by 2050 was expressly mentioned. Nevertheless, the sole direct and indirect emissions were reported – which only counts for 10% of its actual carbon footprint (scopes 1 and 2) – as Total claimed it would continue to sell fossil fuels as long as there is a demand for it (scope 3). Consequently, the investments in new hydrocarbon deposits are expected to continue to increase over the next decade – and only then, it would start to decrease.

Are companies to be blamed if our economic system remains dependent on fossil fuels? For the time being, judicial procedures focused on the question which court should have jurisdiction, rather than making a decision on the merits. In view of the long duration of this judicial procedure, the applicants asked the judge on February 10, 2023, to order the multinational company to take provisional measures such as the suspension of new oil and gas projects. Such a request may remind of the Total-Uganda case, which got marooned in procedural issues. Nevertheless, an interim order was made on February 28th, 2023.

Total-Uganda: the failure of the first trial

In light of the systemic nature of the Total-Climate case, the perspective of a success is uncertain. The Total-Uganda case seems more promising, as the human rights of local communities are directly at stake. In fact, the mega-project (including Tilenga for the oil exploitation and EACOP for the pipeline) resulted in thousands of people being displaced. Yet, such risks were not expressly mentioned in Total's 2018 vigilance plan. As result, this plan didn't include reasonable vigilance measures to mitigate or prevent these risks.

Several Ugandan organizations, which were supported by the association "Friends of the Earth France", gave formal notice to Total under the LdV, to request the company to adapt its vigilance plan, so that such risks be taken into consideration. In their claim sent on June 24, 2019, the lack of compensations for persons affected by the project was criticized. In the absence of a satisfactory response by Total, the applicants filed a civil lawsuit in the French courts on October 23, 2019. Asking an interim order, they were expecting a prompt decision. But reversely, the jurisdiction issue significantly slowed the procedure down. In the end, the merits of the case was decided more than three years after being initiated with an interim decision of inadmissibility.

Several lessons can be learnt from this procedure. Firstly, the shortcoming in the French legislation clearly appeared – i.e. there was a significant lack of clarity, as the sole publication of "reasonable vigilance measures" was required, while the purpose of LdV was described by the judge as "monumental". The powers of the interim relief judges were therefore reduced. In fact, only the absence of a plan, its scanty or manifestly illegal nature, could result in injunctions being given. Secondly, the evolution in the demands of

applicants – which initially focused on human rights and then extended to climate and environmental impact – resulted in the case being ruled inadmissible. In the future cases, it will be necessary to have a strong justification for the formal notices which are given.

Besides the fact that according to the civil tribunal in Paris, it is an essential piece for implementation of the LdV, it should be noted that TotalEnergies vigilance plan has evolved about the human rights issue affected by the project. As of today, human rights issues have received consideration. So, the legal proceedings appear like a deterrent to enforce the duty of vigilance. Such conclusion seems to be valid in the light of the EDF case.

EDF-Mexico: corporate duty of vigilance and state due diligence

In 2016, a project of a wind farm – named Gunaa Sicaru –was developed by the public company EDF on pieces of land possessed by an indigenous community (Union Hidalgo) in Mexico. The applicants, who were supported by the NGO ProDESC, introduced several actions against this project, due to the alleged disrespect for the free, previous and informed consent (FPIC) right of the community.

A first complaint was filed in 2017 against the Mexican State, who must warrant such a right according to the Constitution and ILO Convention No. 169.

Another case was filed in 2018 to the French national contact point in order to provide a mediation between the company and the community, and therefore to ensure compliance with the OECD guidelines for Multinational Enterprises.

Finally, a civil lawsuit was filed in 2020 before a civil tribunal in Paris, under the alleged violation by EDF duty of vigilance (after a formal notice was served on October 3, 2019). As EDF is a public company, an action against the French State could be contemplated.

A suit based on the violation of a corporate duty of vigilance therefore constitutes an additional procedure which eventually ended in June 2022, as the Mexican authorities decided to cancel the contracts signed with EDF. Nevertheless, like in the Total-Uganda case, critics against the vigilance plan of EDF resulted in several amendments being made, so that rights of indigenous people are given due attention. Consequently, on November 30, 2021, requests made by applicants to seek an interim order suspending the wind farm project were rejected by the civil tribunal in Paris. The evolutions in the vigilance plan over the past few years may be the reason why this decision was made.

A decision on merits would have been desirable to control the implementation of human rights commitment. Moreover, this case raises the question of adequacy between the purpose of ecological transition by companies and the requirement to protect indigenous peoples rights. So it's kind of a "just transition litigation" involving the corporate duty of vigilance, especially about environment protection and struggle against climate change on the one hand; and the State's duty to protect indigenous peoples rights on the other.

A law which yet must prove it works

6 years later, the LdV has partially seemed to work. The first cases nevertheless provided an opportunity to appreciate the deterrent effect on companies, which reacted by amending their vigilance plan, where they were subject to formal notice. But the lack of a proper judicial decisions on merits doesn't allow to identify the qualitative requirements expected by the French courts about implementation of corporate duty of vigilance. The current debates about the adoption of a European directive on corporate sustainability due diligence could provide further precisions. One may wonder, however, if we can afford waiting any longer in light of the climate emergency.

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