

# Why is Due Diligence crucial for Latin America and the Caribbean?

On 23 February 2022, the European Commission published its proposal for a new European legislation on Corporate Sustainability Due Diligence. The proposal aims to establish accountability and transparency mechanisms that ensure sustainable and responsible business conduct along supply chains. This is a long-awaited step from civil society, given the failure of voluntary measures to comply with human rights obligations and environmental protection. However, the proposal has significant shortcomings that could prevent the directive from having the positive impact that people, the planet, and the climate urgently need.

This text sets out our views on why Due Diligence is important for Latin America and the Caribbean and how to improve the proposal to ensure that the law effectively prevents the negative impacts of European companies on human rights and the environment. It also proposes three specific cases that illustrate the absolute need to implement Due Diligence in Latin America and the Caribbean.

## Europe is present in Latin America through investment and/or trade

The European Union and the Latin American countries share a vision and a political commitment concerning the democratic principles of the rule of law and human rights. This commitment has been formalized on multiple occasions, both in international agreements and political cooperation mechanisms, and underpins the framework of the profound linkages and relations that exist between the two regions.

This political commitment and the narrative around shared values is, however, often subordinated to commercial and investment interests towards the region. Currently, this focus on the importance of the private sector as a differential actor for bi-regional relations is structured around the green and digital transition and in initiatives such as the Global Gateway.

These relations are economically very intense. Thus, the European Union is the third largest trading partner, and the first investor in Latin America and the Caribbean. A significant part of these investments are directed to sectors such as infrastructure, especially in the field of water and electricity, as well as to extractive industries, within the framework of a development model based mainly on the production and marketing of raw materials. These sectors are among those that stand out most for the impacts they cause, both in terms of the environment and human rights.

## Democracy and human rights are the guiding principles and values of Europe

The framework of the relations between the two regions is characterized by the search for legal certainty and protection of investments and trade, embodied in various tools and partnership and cooperation agreements. However, such agreements also include the commitment of the parties to promote human rights and sustainable development as a guiding principle. Thus, the new Communication by the European Commission (22 June 2022) titled *'The power of trade partnerships: together for fair and green economic growth'* underlines that economic growth must go hand in hand with the protection of human rights, decent work, the climate and the environment, in full coherence with the EU's values and priorities. This should not remain mere empty words.

The EU's emphasis on environmental protection and the promotion of a green economy is contradicted in a number of cases by the development of European-owned companies that should apply strict due diligence.

## Hard Law vs Soft Law

Various civil society reports conclude that, to favour foreign corporate investment in Latin America and the Caribbean, legislation on tax and environmental protection issues has been weakened. This is in addition to the weak state capacity to guarantee human rights; the poor performance of democracy; the closure of civil society space; structural inequalities; and the concentration of power in the hands of only a few, which facilitates the phenomenon of "Political Capture" whereby only a few elites benefit from public policies and models of socioeconomic development. It is necessary to promote consensus in which European companies must respect the basic rules of care, environmental protection and guarantee of human rights outside the territory of the European Union. The development of legal frameworks is important, especially since voluntary codes promoted by the business world have failed. Compliance with voluntary guidelines or principles should therefore be improved from "soft law" to "hard law" on business and human rights.

*The European Civil Society Working Group on relations between the European Union, Latin America and the Caribbean -EU-LAC is a platform composed of the EU-LAT Network, CONCORD, the EU-Peru Platform and the ODHACO Network, some of their members like 11 11 11, OXFAM, SOLIDAR, WSM, the Spanish coordination of NGDO, CIDSE, ONCE, Race & Equality, as well as other CSO like Pax Christi international, Alianza 2015, and the Heinrich Böll Foundation, working for many years in the Latin America and the Caribbean countries*

## Global Momentum in Human Rights and Business

It is necessary to understand the diversity of the context at a global level. EU companies must respect international treaties on decent work, human rights and environmental protection. The EU could establish a framework for private investment by large companies, which can become the global standard and the example to be followed by its good practices. In the case of Latin America and the Caribbean, there is a tendency not to comply with prior, free, and informed consultation of indigenous peoples and vulnerable communities, or for it to be seen as an administrative requirement,, which is a clear sign of their lack of respect for cultures and diverse conceptions of development, including the autonomy of peoples and the guarantee of their self-determination.

## Violence in Latin America and the Caribbean

According to a UN report (2019), Latin America and the Caribbean is the most violent region in the world. The American continent accounts for 37% of homicides and almost all of them occur in Latin America, which concentrates only 8% of the world's population. The violence has several roots, but it is also connected with the development of extractive industries and in general with the exploitation of natural resources, affecting neighbouring communities and especially human rights and environmental defenders, as well as the labour force of these companies. Thus, the recent *Global Witness* report <sup>1</sup> also points out that it is the region with the most murders of defenders.

This situation, already well documented in several countries in Latin America and the Caribbean, requires the EU to pay particular attention to the role of its investors in the region, where a Due Diligence Directive would guarantee the protection of defenders. In this regard, the Escazú Agreement, the first regional treaty that contains specific provisions for the promotion and protection of environmental defenders, is a key tool to hold States accountable, protect defenders and the environment. The EU must insist on the ratification of the Agreement by Latin American States.

## The Due Diligence Circle

For these reasons, if the European Union considers Latin America and the Caribbean to be a "strategic ally", it must prioritize the application of rules of prevention, monitoring, consultation, and compensation of the damages caused by certain European investments to populations – in particular to indigenous communities – and to the environment in the continent.

Due diligence should not be regulated as a further requirement in the context of the control of third parties. It must be an articulated effort for companies to contribute to the search for the development and well-being of communities, under the respect of the autonomy and self-determination of the population. This would prevent human rights violations and promote new models of fair investment.

However, a European Due Diligence Agreement cannot be an alternative, but a complement to the negotiation and implementation of the *Binding Treaty on Business and Human Rights* within the United Nations.

### Case 1 – REPSOL Peru

**Context:**<sup>2</sup> On Saturday, January 15, 2022, the tanker "Mare Doricum" (owned by the Italian parent company "La Fratelli d'Amico Armatori S.p.A.") was carrying out the process of discharging Brazilian crude oil, from a Petrobras plant, in the Sea of Ventanilla, assets of the company Repsol Peru B.V (domiciled in the Netherlands; it belongs to the economic group Repsol S.A. whose parent company is in Spain). In that operation, there was a spill of more than 11,900 barrels, severely affecting the human rights of the people living in that area and of the population in general and the environment, including maritime and coastal ecosystems. Given its magnitude and the lack of a timely and efficient response, both from the company and the State – which increases its impacts – it has caused the worst ecological disaster in the regions of Callao and Lima in recent years.



<https://www.excelsior.com.mx/global/repsol-informo-cifra-menor-de-derrame-petrolero-denuncia-peru/1495517>



<https://www.infobae.com/america/peru/2022/01/23/derrame-de-petroleo-gobierno-evalua-demanda-internacional-contra-repsol-tras-desastre-ecologico/>

<sup>1</sup> <https://www.globalwitness.org/en/about-us/annual-report-2021-our-case-change/>

<sup>2</sup> Fountain: Repsol ecocide on the north coast of Peru – Peru Equity Document

**Impact:** Contamination of land, surface and groundwater, and sedimentary pollution leaves farmers and local communities without local food. The impacts amount to about 16 thousand hectares affected, comprising 46 beaches, 2 protected natural areas — the National Reserve System of Islands, Islets and Puntas Guaneras and the Reserved Zone of Ancón. It is estimated that thousands of artisanal fishermen are directly affected. It is also assessed that the heavy metals in crude oil will remain in the ecosystem for many years, rendering fish, molluscs and other marine species unsafe for human consumption, and affecting the entire marine food chain. Permeating the caves and coastlines, that spill is expected to have a strong impact on tourism, and the work and resources of many local working people, some of them working informally.

**Political Responsibility:** Repsol S.A.'s parent company is located in Spain. On the basis of the Maastricht Principles on the Extraterritorial Obligations of States and General Comment No. 24 of the Committee on Economic, Social and Cultural Rights (CESCR), international responsibility can be attributed to the Spanish State for violations of economic, social and cultural rights committed by Spanish companies, such as Repsol, operating in Peru.

Peru also has a Free Trade Agreement with the EU since 2013. In Title IX "Trade and Sustainable Development" of that Treaty, the parties committed themselves to promoting sustainable development in international trade, in particular in environmental matters. Article 271 reads: 'The Parties agree to promote best business practices related to corporate social responsibility'. Spain, as a member of the EU, is a party to this treaty and must fulfill its commitments on business, human rights and the environment in Peru and should ensure that Repsol complies with its responsibilities.<sup>3</sup>

**And why is it important to have a Due Diligence Directive?** In 2017, Spain approved a National Action Plan on Business and Human Rights (PNAEDH) for the period 2017-2021. With the approval of this plan, the Spanish State committed itself to "protect human rights, including against any negative impact that business activity could have on them, and to provide any victims of human rights violations with an effective remedy." The low impact of the PNAEDH to regulate and promote the fulfillment of human rights inside and outside its territory has been evident with the oil spill, caused by Repsol's negligence. It is an example of how companies should NOT operate.

Given the deficient performance of the company and the Peruvian state in dealing with the spill, the Spanish state, in compliance with its extraterritorial human rights obligations, should also have intervened and ensured that the company fulfills its responsibilities, both before and after the spill, and that it adopts measures of reparation, remediation and non-repetition. States such as Peru, with little capacity to enforce their environmental and human rights legislation, are not able to sanction or control European companies operating in Latin America. Therefore, due diligence laws should be promoted in Europe that regulate the conduct of European companies operating in Latin America and to which they attribute extraterritorial human rights and environmental obligations to European States.



<sup>3</sup> <https://www.mipymes.gov.co/mipymes/media/mipymes/Documentos/Titulo-IX-Comercio-y-Desarrollo-Sostenible.pdf>



Source: ANDINA/Jhonel Rodríguez Robles

## Case 2 – Smurfit-Kappa Colombia

**Context:** The European company Smurfit-Kappa and its subsidiary in Colombia (Cartón de Colombia) have a large presence in the department of Cauca, a region of high conflict in the country. By 2021, according to DATA from the OHCHR, the company controls more than 67,000 hectares of land, of which more than 41,500 are monocultures of pine and eucalyptus for the production of cardboard paper. The communities of Cauca have been denouncing the negative impacts of land use and the environment, as well as human rights violations in the framework of the armed conflict, by Smurfit-Kappa and its subsidiary in the country. In August 2022, the Smurfit-Kappa case generated a wake-up call from Mary Lawlor, UN Special Rapporteur on the situation of human rights defenders, warning about the serious threats in Colombia to "defenders who raise concerns about business activities, particularly in industries involving intensive land use." Of particular concern has been the situation of Pedro José Velasco Tumiña, an indigenous defender of the Misak people, who has been receiving death threats for almost a year after his complaints against the company.

**Impact:** The Misak and Nasa indigenous peoples and peasant communities of the Cauca department in Colombia are the main affected communities, who have held protests on lands that ultimately belong to the Irish company Smurfit-Kappa. Indigenous communities assert their right to claim land owned by Smurfit-Kappa in accordance with the United Nations Declaration on the Rights of Indigenous Peoples. There have also been legal proceedings against Smurfit-Kappa and its subsidiaries for taking advantage of the situation of armed conflict and for land grabbing to expand their monocultures. According to local organizations, the purchase of productive land in Cauca for monocultures by the company has generated the cornering of the population, particularly in three municipalities of Cauca (Timbío, Cajibío and Sotará). The company's activities affect access to land and the survival of communities in the territories, with important cultural and environmental implications. There is great concern about the disappearance of water sources and the reduction of river and stream flows due to the planting of monocultures of pines and eucalyptus trees on the banks of water tributaries, a situation that is exacerbated in times of drought or summer. The communities have presented evidence of how the plantations of the Smurfit-Kappa company have been planted without respecting Colombia's environmental regulations, which stipulate that these plantations must not be within 30 meters of rivers, to safeguard natural water dynamics. At the same time, there are also complaints about the indiscriminate use of agrotoxins and fertilizers and the loss of endemic fauna and flora.



Source: [www.cric-colombia.org](http://www.cric-colombia.org)

**Political Responsibility:** The company Smurfit-Kappa has its headquarters in Dublin, Ireland and is a leader in the European corrugated packaging market. The Republic of Ireland, as a member of the European Union, is a party to the 2013 Colombia-EU Free Trade Agreement and must fulfill its commitments on business and human rights and environmental protection.

**And why is it important to have a Due Diligence Directive?** The department of Cauca in Colombia is an area with an active internal armed conflict recognized by the ICRC, where the interest of international companies in mining titles, agro-industrial monocultures and forestry exacerbate violent dynamics and human rights violations. In the particular case of the department of Cauca, the interests of multinationals such as Smurfit-Kappa in the context of armed conflict have led to forced displacement, threats against human rights defenders and the cornering of rural communities in the department. The Colombian judicial system has already established lawsuits against the Smurfit-Kappa company, that the company lacked due diligence when buying land in areas affected by the armed conflict in Cauca. The company has not acted in "good faith without fault" in the purchase of land from victims of the conflict.

### Case 3 – PIM Morelos Integral Project, Mexico

**Context:** The People's Front in Defense of Land and Water FPDTA-MPT is an organization composed of Nahuatl indigenous communities of the States of Morelos, Puebla and Tlaxcala, which since 2012 have been organizing and working for the defense of the territory and the promotion and exercise of their self-determination as indigenous peoples, before the arrival of companies and projects that aim to industrialize their lands. This has resulted in damage and pollution of their territory. Among the projects and industrial companies that have strong economic interests in land use and that generate a dispute for the conservation of the territory and water of the native peoples, are: the Morelos Integral Project (PIM), associated with the US company Macquarie Infrastructure Partners (which bought the gas pipeline from the Spanish companies Elecnor and Enagás in 2022); the French company Saint Gobain; the Association of Entrepreneurs of the Ciudad Textil Industrial Park; Schaeffler Mexico; Driscoll's Mexico; Volkswagen; Audi, among others.

**Impact:** The Morelos Integral Project (PIM) consists of two combined cycle gas thermoelectric plants in Huexca, Morelos; a 160 km gas pipeline that crosses the states of Tlaxcala, Puebla and Morelos; two 12 km aqueducts to transport drinking water and discharge water that will be used by the thermoelectric plant, modifying the composition and flows of the Cuautla River (Morelos); and a 20 km high voltage network. It is estimated that this pipeline affects 29 municipalities and more than 60 communities, with an area of influence of approximately 800,000 people affected. Since its construction in 2012, the project has led to strong conflicts with affected communities in the three states. Many of them have shown their firm opposition to the PIM through assemblies, sit-ins, protests, complaints of human rights violations and even reaching legal measures such as amparos.

The opposition to the PIM is also due to the fact that it is located at the foot of the Popocatepetl volcano. The pipeline crosses evacuation routes of the volcano, putting a multitude of communities at risk in case of eruption of the volcano. It has been warned on different occasions by the National Center for Disaster Prevention (Cenapred) and by the Institute of Geophysics of the National Autonomous University of Mexico (UNAM), as well as independent experts and the communities themselves. The fpdta-MPT's fight is not only against the PIM. Added to this is the Association of Entrepreneurs of the Ciudad Textil Industrial Park, and the transnational companies of the States of Puebla and Morelos (Volkswagen, Nissan and Audi; and the suppliers Saint Gobain and Continental Bridgestone) that widely express support for the Morelos Integral Project and are generating pressure for the

federal government to start operations of the gas pipeline near the Popocatepetl volcano, since these companies would benefit from the transport of natural gas and/or the energy produced. In Santa María Zacatepec, Puebla, the suppliers of the Volkswagen and Audi assembly plants, Ternium, and the Mercatus industrial park, have contributed to the scarcity of water in the communities that, added to the extraction of water by the Bonafont plant, generated on May 29, 2021, a sinkhole of more than 100 meters. The subsidence of land was attributed to the indiscriminate extraction of water. The Bonafont company alone extracted more than one million 600 thousand liters per day, equivalent to the total consumption in a municipality of 18 thousand inhabitants.

**Political Responsibility:** In the face of the struggle of the indigenous peoples, the PIM has been imposed through the state and federal public force which is used to evict the inhabitants of the original communities and, at the same time, has used the Mexican army in Puebla and Morelos to protect the machinery that is building the gas pipeline. As part of their opposition to megaprojects in Morelos, Puebla and Tlaxcala, members of the FPDTA-MPT have been murdered, threatened, attacked, repressed, defamed, harassed and criminalized. There are 26 human rights defenders who have been prosecuted for their work within the framework of the PIM, some of them with arrest warrants. Three people have been illegally detained for their legitimate human rights work, two of whom have spent 10 months in prison. In addition, two community media outlets have been violently shut down. In Morelos, violence against defenders of the land, territory and environment has reached the arrest and torture of a human rights defender for two consecutive days, culminating in the murder of Samir Flores Soberanes, on February 20, 2019, three days before the consultation promoted by the President of the Republic to start the thermoelectric plant in Huexca. This crime still goes unpunished.



Source: Frente de Pueblos Morelos, Puebla, Tlaxcala

**And why is it important to have a Due Diligence Directive?** As in the aforementioned case of Repsol in Peru, in this case the National Plan of Action on Business and Human Rights (PNAEDH) approved in Spain has also been insufficient. However, in this case the responsibility goes even further as the PIM is financed by the FIEM (Fund for the Internationalization of the Company) a fund managed by the Ministry of Industry, Trade and Tourism through the Secretary of State for Trade whose objective is to promote the internationalization of the Spanish company through the financing of its export and investment operations abroad. Neither has the French Law on Due Diligence been sufficient to achieve the assumption of responsibilities. The damage and potential damage to the environment, as well as the serious human rights violations that occurred, would have required an active role on the part of several European States that, despite the fact that the competent authorities were made aware of the situation, has never occurred.

Information: [ue-lac-cs-wg@ googlegroups.com](mailto:ue-lac-cs-wg@googlegroups.com)