The Jus Semper Global Alliance

In Pursuit of the People and Planet Paradigm

Sustainable Human Development

January 2024 BRIEF ON TRUE DEMOCRACY AND CAPITALISM

Due diligence, a mandatory standard devoid of content

The regulation approved by the European Parliament in June could give a green light to human rights violations committed by transnational corporations

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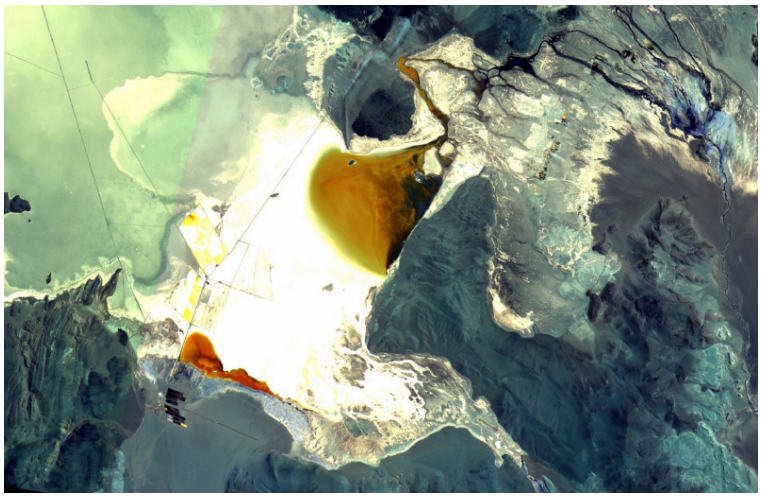
The European Union's priorities for the immediate future are clearly defined: to promote new trade and investment treaties to gain access to the natural goods essential for the development of green and digital capitalism and to continue with the armouring of fortress Europe by externalising borders. This is demonstrated by the three agreements signed by the EU in recent days: on the one hand, with Chile and Argentina, to secure the supply of critical raw materials such as lithium and copper, leaving aside eco-social conflicts; on the other, with Tunisia, to continue outsourcing migration policing to third countries and abandoning migrants in the desert.



Lithium mining at the Salar del Hombre Muerto (Argentina). / Coordenação-Geral de Observação da Terra/INPE

The EU's "progressive" agenda is to shield the interests of large corporations and, at the same time, provide pseudo-regulation on the effects of their operations that lacks real effectiveness. This is where the European directive on due diligence comes into play, which is presented as an instrument to force European transnationals to comply with human rights in their business around the world. This regulation, after three years in the pipeline, was approved by the European Parliament on 1 June.

This is the end of the road for a regulation announced in 2020 by the European Commissioner for Justice. The following year, the European Parliament approved a first proposal for a directive, known as the Wolters report, after the name of the Socialist rapporteur in charge of drafting it. In 2022, after softening the content of the text, the European Commission sent the regulation to the corresponding committees to receive different amendments. Now, once the European Parliament has endorsed it, all that remains is the final negotiation in the trilogues (meetings of the European Parliament, the Commission and the Council) for the final enactment of this regulation, which will then have to be transposed into the national legislations of the Member States.

In our view, the adopted text has many more negative than positive aspects.

The main trade unions, parties and progressive NGOs have almost unanimously supported the directive. The Greens consider it a "great success" and, according to Manon Aubry MEP, chair of The Left, "it is a huge victory against the impunity of multinationals". In our view, however, the adopted text - with a legal framework built around the notion of due diligence - has many more negative than positive aspects. We consider that contrary to what might appear to be the case, it is a legal sophistication that does not mean progress in the establishment of effective mechanisms for the control of large corporations. In question-answer format, here are our arguments.

What does this legislation oblige?

The due diligence directive obliges companies to have risk plans in which they identify and remedy abuses throughout their value chain. That is, to have a preventive and corrective action plan for potential socio-environmental damage. However, these plans have too many holes to be effective because they barely include general issues, and there is no specific mandatory content that they must incorporate.

It is true that the directive establishes that European institutions and international bodies with expertise in due diligence will have to publish guidelines on how companies should formulate the plans. What happens is that this type of guidelines, at least those generated by the OECD, are not mandatory; they are guidelines. So, it will be up to the companies themselves (or the auditors they subcontract) to make the periodic evaluations of their action plans. It does state that each state will have to designate an independent authority to supervise compliance with the directive, but it will do so on the basis of the reports drawn up and evaluated by the company or by an auditor contracted for this purpose.

Penalties and civil liability will apply when socio-environmental impacts caused by the absence or failures of risk plans are found to exist. If these plans are prepared, published, updated and evaluated, the company cannot be held liable for damage that has occurred. In addition, the directive provides a number of safeguards for the application of penalties, which offer a wide margin for evading liability. According to the rules, the company's efforts to implement corrective measures and the investments made will be taken into account.

There is no global space with the capacity to judge international economic and ecological crimes committed by these companies.

To defend their rights, large corporations have recourse to national courts and international arbitration, with maximum enforceability and justiciability. But there is no global space with the capacity to judge international economic and ecological crimes committed by these same companies. The directive makes no reference to the criminal liability of natural persons (managers) and legal entities (companies) for human rights violations. And it

does not even consider the urgency of promoting public inspection, leaving practically everything to private audits. Continuing the line initiated with the Paris Agreement, it is a step forward in binding rules... emptied of content.

Is it at least a first step?

A regulation based on the principle of due diligence is a far cry from what most social organisations and campaigns against corporate power have been demanding for the last two decades. It does not promote the fulfilment of direct obligations for transnationals, nor does it encourage a public centre with social participation to monitor offshore business activities, much less a court that could prosecute companies and those responsible for their human rights abuses. Taking a cue from ongoing UN debates on this issue, due diligence standards have much more to do with the Guiding Principles than with the 2014 resolution, which agreed on the need to promote an international legally binding instrument on business and human rights.

The directive points to the creation of national due diligence assistance services that can be referred to existing bodies, such as the National Contact Points. These bodies depend on the OECD, which, as seen in the case of the Spanish state with the Basque company CAF in the territories occupied by Israel, is characterised by its ineffectiveness in protecting human rights in the face of corporate power. On the other hand, the reversal of the burden of proof is not incorporated so that the individuals and communities making the complaints can face up to their claims, given their vulnerability and lack of resources.

But is this a necessary but insufficient step forward? The truth is that it is far from clear because the "lesser evil" could become a regulatory brake on other advances in effective control mechanisms. We have seen it before with the Global Compact, the Ruggie framework and the National Action Plan on business and human rights: what promised to be an initial impulse with which to take many more steps, in the end, never went beyond that. And in the meantime, any possibility of promoting other, more robust regulatory mechanisms has been blocked.

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What might change?

Beyond the grandiloquent speeches about "the end of corporate impunity", this regulation will not be able to change the usual modus operandi of large companies significantly. Would the cases of Repsol in Peru, Inditex in Morocco, and CAF in Palestine have been any different if this regulation had been available earlier? We fear not. In fact, it could rather serve to give a green light to the human rights violations committed by transnationals. While they continue with their severe socio-ecological impacts, they will be able to argue that they are complying with the law by presenting their action plans.

Moreover, taking due diligence as valid can weaken other standards, from the UN treaty to the regulation of critical raw materials - the role of the European Union in both issues is currently under discussion - instead of requiring extractive companies to comply with international human rights law, they will be urged to have prevention mechanisms in place.

This is a directive that is unlikely to be able to cope with global corporate law and whose implementation, according to the provisions, will be on a downward path. The single market clause, which is to ensure

harmonisation and a level playing field in all EU states, will result in a slow and minimal pace of implementation. This slowdown is in addition to the long implementation period of up to five years for companies with more than 250 employees and a turnover of between 40 and 150 million euros.

Why oppose due diligence?

The fundamental axis on which international trade relations are articulated is regulatory asymmetry. The "rights" of transnational corporations are strongly protected through the lex mercatoria, a global legal system with which they shield their businesses and contracts. Their obligations to comply with human rights, on the other hand, are referred back to national legislation (previously deregulated), to international human rights law (manifestly fragile), to "social responsibility" (voluntary and unenforceable) and now to due diligence, a mechanism based on risk prevention that does not go beyond the framework of unilateralism and corporate self-regulation.

While there are no effective instruments at the global level to control the social, economic, labour, environmental and cultural impacts of transnational economic activities, the legal architecture of impunity is reinforced: the declared objective of this six-month Spanish presidency of the Council of the European Union is to complete the negotiation of the agreement with Mercosur and sign the renewal of the trade agreements with Chile and Mexico. "This is the EU's way of doing business", said Ursula Von der Leyen after signing the agreements to guarantee access to critical minerals in the Southern Cone. The certainty and speed with which these pro-business pacts have been pushed through has nothing to do with the indeterminacy and procrastination surrounding the obligations of European transnationals.

The European Commission is considering creating unregulated spaces for rapid experimentation in energy and digital innovation.

In fact, regulations and policies are currently being drafted at the European level - such as the zero-emissions industry law, the law on critical raw materials, the regulation to accelerate the deployment of renewable energies or the REPowerEU plan - that further reduce the environmental social and fiscal control measures for large corporations. The European Commission is even considering creating unregulated spaces for rapid experimentation in energy and digital innovation. In this context, due diligence appears to be the main regulatory instrument, although it is a legal technicality that, however much the contrary is insisted, does not imply the creation of new direct obligations of an extraterritorial nature.

Why do many NGOs and trade unions support it?

The directive on due diligence, as well as some legislative developments at the national level that are being advanced —in Spain, for example, a proposal for a similar law has been stranded before reaching the council of ministers— it is undeniable that it contemplates some advances. Without going any further, in terms of transparency, it is important to count on detailed information from all actors in the value chain, as well as the obligation for companies and public institutions to have public mechanisms to receive complaints from interested individuals, communities and organisations. The timeframes and procedures for handling complaints are specified to be reasonable, accessible, predictable, equitable and culturally and gender sensitive. The dialogue between companies and those affected by their operations must take place in a framework in which there are no obstacles or reprisals. However, it is the state that will ensure this. There are no precise provisions to regulate these situations.

The aspects of the directive relating to supervision by public authorities, sanctions and civil liability in offshore operations, although only linked to the enterprise risk plan, are equally significant. The need for state authorities to have powers and resources to conduct investigations and hearings is indicated, just as it is stated that affected parties can go to court to review the legality of the acts and omissions of public institutions. However, if we broaden the focus and recall what the demands of international networks against corporate power have been for more than two decades, all of this falls far short of what one would have expected.

> *In the context of the capitalist offensive and the intensification of the war regime to guarantee the profits of the big owners, the degradation of the international human rights system is deepening: expropriation, expulsion, destruction and violence are becoming the constituent elements of an increasingly generalised necro-capitalism.*

Inequality has also become part of the core of the system of domination, institutionalising inequalities of class, gender, ethnicity/race and nationality. A permanent state of exception is thus being established, where the weakness of social organisations and movements limits the possibilities of confrontation to put the logic of concertation in place.

The need for successful lobbying means that proposals are inevitably moderated. Pragmatism in negotiations leads to the red lines moving more and more towards the centre of the chessboard. The technologisation of the debate ends up expelling social organisations and groups affected by transnationals from the process. The socio-ecological impacts that are at the root of corporate profits are put aside to prioritise the strategy of negotiation. And then comes a succession of resignations, given the asymmetries of power and the absence of a solid social muscle. All this, in a strategic debate that neither begins nor ends with due diligence, results in the triumph of possibilism and this-is-what-it-is.

What are the alternatives?

With regard to due diligence rules, it is not wrong to have risk plans based on prevention; the central problem is that they are the only tool for (pseudo) control of business operations. Due diligence measures could be accepted without too many problems if embedded in a framework law including other elements: direct obligations, joint and several liability, effective mechanisms, and public-social control instruments.

These are all issues that have been worked on in the framework of the global campaign Dismantling Corporate Power, also at the European and national level, and with the proposals of the Basque and Catalan centres on business and human rights. But the fact is that, in the end, due diligence has ended up becoming the only mandatory reference for large corporations. And the rest of the possible regulatory frameworks have been left in a drawer.

Of course, other types of regulation could be put in place if we live in the times of permanent re-regulation. When corporate profits, energy supply or banks' liquidity needs have been at stake, all the rules that needed to be changed to redress the situation have been changed. When it wanted to, the US banned imports from China of goods manufactured under forced labour conditions (in theory, to protect the ethnic Uighurs; in practice, because of economic warfare between imperial powers). For the right to protest, there is no hesitation in reforming criminal

codes and enacting citizen security laws; for the right to profit, however, codes of conduct, "social responsibility" programmes and due diligence standards are promoted.

No one is saying that it will be easy to take on the big economic-financial powers. But what is clear is that it is not a question of legal technique but of political will and social mobilisation.

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