


DEVELOPMENTS IN THE FIELD

Mind the Governance Gaps: Harmful Corporate Strategies Leading to Avoidance of Responsibility and Civil Society Counter-Strategies

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Abstract

The 'Mind the Gap' project has created a toolkit for civil society to hold companies to account for their adverse impacts. The toolkit sets out two distinct but interlinked frameworks: harmful corporate strategies resulting in the avoidance of responsibility for adverse impacts, and civil society counter-strategies to overcome these harmful strategies. Both frameworks capture the unique experiences of the Mind the Gap project's global consortium partners and civil society actors focused on corporate accountability. The project responds to a need to close governance gaps that arise in the context of the current global economic system. It is only by identifying and understanding harmful corporate strategies that civil society can effectively advocate for corporate accountability and the closure of governance gaps.

Keywords: civil society; corporate accountability; governance gaps; remedy

1. Introduction

The former Special Representative to the UN Secretary-General on human rights and transnational corporations and other business enterprises, Professor John Ruggie, identified 'governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences', as the 'root cause' of business-related harms.¹ Governance gaps result from the current global economic system, in which transnational companies often operate in resource-rich countries with weak rule of law or inadequate oversight by national governments, and with no clear, legally binding international obligations regulating their activities.² The immense influence and impact of companies are not coupled with the ability of society to effectively sanction or remedy adverse impacts.³ Given this context, communities and workers that are particularly vulnerable to social and environmental harm have immense difficulty holding companies to account for business-related harms.⁴

¹ General Assembly, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', A/HRC/8/5 (7 April 2008), para 3.

² Mind the Gap, 'Governance Gaps', <https://www.mindthegap.ngo/governance-gaps/> (accessed 19 April 2023).

³ Ibid.

⁴ Ibid.

Closing governance gaps requires an understanding of how companies mobilize their legal, political and economic power and resources to avoid accountability for human rights harms that they cause, or otherwise contribute or are directly linked to, as well as developing the capacities of civil society organizations (CSOs), including grassroots organizations and social movements, to effectively respond to harmful corporate strategies. The 'Mind the Gap' project seeks to do just this. The project's intention is to help civil society in identifying widespread strategies used by companies leading to the avoidance of responsibility for their adverse impacts, and the negative effects of those strategies, as well as challenging their widespread acceptance. It is only by understanding these harmful strategies that civil society actors can effectively advocate for the closure of underlying governance gaps.

This article provides an overview of the toolkit developed by the Mind the Gap project, including the identified harmful corporate strategies and civil society counter-strategies, and discusses lessons learned from the project. Section II provides an overview of the project, including the methodology for the development of the frameworks, which are outlined in sections III and IV, respectively. The final section considers next steps for the project, including the importance of collaboration between CSOs in order to counter corporate power and improve understanding and dissemination of the toolkit.

II. About the Project

Mind the Gap was launched in 2018 and focuses on the impact of harmful strategies on communities and workers in four target countries, covering both emerging economies and conflict-affected countries: Brazil, the Democratic Republic of Congo (DRC), Indonesia, and the occupied Palestinian territories. Project partners include non-governmental organizations (NGOs) based in target countries, who contribute with their experiences and expertise of harmful corporate strategies, organizations in India, China and Mexico who contribute their knowledge about influential multi-nationals in their countries, and partners based in Europe who lead advocacy at European and international levels.⁵

The project was shaped by consortium partners' recognition of companies' slow implementation of internationally and multilaterally endorsed standards on corporate respect for human rights, including the UN Guiding Principles for Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), particularly in relation to remedy for business-related harms.⁶

Based on decades of research and experience, partners observed many companies deploying strategies to create, maintain and exploit governance gaps and evade responsibility for their adverse impacts. Alongside these exploitative corporate strategies, civil society responses to these corporate strategies were identified, which had occasionally resulted in remedy for victims of corporate harms, but on the whole were not perceived to be effective in counterbalancing powerful and well-resourced companies.

These insights provided an initial list of harmful strategies and civil society counter-strategies, which were subsequently reviewed by a wider set of civil society actors, including

⁵ Mind the Gap project partners are: ACIDH (DRC), Afrewatch (DRC), Al-Haq (occupied Palestinian territories), Cividep (India), Conectas (Brazil), ECCJ (Belgium), Inkrispena (Indonesia), Poder (Mexico), PremiCongo (DRC), SOMO (Netherlands) and SRI (China). Mind the Gap, 'Mind the Gap Consortium', <https://www.mindthegap.ngo/about-us/consortium/> (accessed 19 April 2023).

⁶ General Assembly, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/72/162 (18 July 2017).

activists, lawyers, academics, and other NGOs, who added their experiences and provided broad recognition of the relevance of the strategies.⁷ The aim of the consortium was to systematize individual organizations' experiences, as well as the experiences of civil society actors more broadly, to identify endemic – rather than individual, case-specific – patterns in corporate responses to their adverse impacts. The frameworks were finalized based on subsequent literature reviews and field research, and a harmful corporate strategy came to be defined as 'a series of actions taken by a company that results in avoidance of responsibility for human rights or environmental impacts'.⁸

III. Harmful Corporate Strategies

Mind the Gap identified 25 harmful strategies that can be grouped under five main types of corporate strategies leading to the avoidance of responsibility for adverse impacts (see Table 1).⁹ Most of the identified strategies are not illegal, but rather legal and widely accepted as a way to protect corporate interests. However, while legal and serving

Table 1. Harmful corporate strategies

Constructing deniability	Avoiding liability through judicial strategies	Distracting and obfuscating stakeholders	Undermining defenders and communities	Utilising state power
Hiding behind complex supply chains	Abusing judicial process	Symbolically engaging communities	Attacking human rights defenders	Exploiting preferential treatment by states
Outsourcing high-risk activities	Engaging in jurisdiction shopping	Disseminating distorted information	Filing SLAPPs	Avoiding regulations through corporate lobbying
Outsourcing recruitment and employment	Taking states to international arbitration	Engaging in fraudulent activities	Criminalizing human rights defenders	Aligning with repressive state institutions
Disengaging irresponsibly	Shielding parent companies	Manipulating scientific information	Dividing communities	Engaging state security forces
Refusing to disclose information	Settling cases	Abusing standards	Undermining unionization	
		Diverting complaints through grievance mechanisms		

⁷ Mind the Gap, <https://www.mindthegap.ngo/about-us/methodology/> (accessed 19 April 2023).

⁸ Mind the Gap, 'Defining a "Harmful Strategy"', <https://www.mindthegap.ngo/about-us/methodology/defining-a-harmful-strategy/> (accessed 19 April 2023).

⁹ Mind the Gap, 'Harmful Strategies', <https://www.mindthegap.ngo/harmful-strategies/> (accessed 19 April 2023).

business interests, these strategies often have harmful effects on society and the environment.

Constructing Deniability

Companies use different strategies to deny responsibility for their adverse impacts¹⁰, including arguing that impacts are undetectable due to the complexity of their supply chain, outsourcing high-liability activities, including recruitment or employment processes, disengaging irresponsibly from business activities, and refusing to disclose information that could tie them to impacts.¹¹

Avoiding Liability Through Judicial Strategies

Companies also use judicial strategies that are legal, but often leave those seeking judicial remedy for business-related impacts without proper remedy.¹² These strategies include using judicial processes to delay and complicate proceedings, diverting attention from the substance of the case, engaging in jurisdiction shopping, shielding parent companies from liability for harms involving entities within their corporate group, and settling cases to avoid a guilty verdict or setting a legally binding precedent.¹³ Companies also increasingly take states to international arbitration to avoid the adoption of stringent legislation that would improve human rights or environmental protections and harm their business interests.¹⁴

Distracting and Obfuscating Stakeholders

Companies can also distract or obfuscate stakeholders by engaging with impacted communities in a symbolic rather than a meaningful manner, disseminating fraudulent information or engaging in fraudulent activities, manipulating scientific research, abusing standards systems that are intended to provide product assurance, and by diverting complaints through company-controlled grievance mechanisms that only provide a visage of remedy for victims.¹⁵

¹⁰ Mind the Gap, 'Constructing Deniability', <https://www.mindthegap.ngo/harmful-strategies/constructing-deniability/> (accessed 19 April 2023).

¹¹ See generally, ACIDH, Afrewatch and PremiCongo, 'Les stratégies utilisées par l'entreprise Ruashi Mining pour éviter d'assumer ses responsabilités dans les cas de violations des droits humains', November 2021, <https://www.mindthegap.ngo/strategies-used-by-ruashi-mining-to-avoid-responsibility-for-human-rights-violations/> (accessed 19 April 2023); Martje Theuws, 'Indecent Work and Hidden Supply Chains', December 2022, <https://www.somo.nl/indecent-work-and-hidden-supply-chains/> (accessed 19 April 2023); Joseph Wilde-Ramsing et al, 'Responsible Disengagement from Coal as part of a Just Transition', June 2021, <https://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition/> (accessed 19 April 2023).

¹² Mind the Gap, 'Avoiding Liability Through Judicial Strategies', <https://www.mindthegap.ngo/harmful-strategies/avoiding-liability-through-judicial-strategies/> (accessed 19 April 2023).

¹³ Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy', 2014, <https://www.amnesty.org/en/documents/pol30/001/2014/en/> (accessed 19 April 2023); Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business', December 2013, <https://corporatejustice.org/publications/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/> (accessed 19 April 2023).

¹⁴ Roeline Knottnerus et al, *50 jaar ISDS. Een mondiaal machtsmiddel voor multinationals gecreëerd en groot gemaakt door Nederland*, 13 January 2018, <https://www.somo.nl/50-years-of-isds/> (accessed 19 April 2023).

¹⁵ Mind the Gap, 'Distracting and Obfuscating Stakeholders', <https://www.mindthegap.ngo/harmful-strategies/distracting-obfuscating-stakeholders/> (accessed 19 April 2023). See generally, ACIDH, Afrewatch and PremiCongo,

Undermining Defenders and Communities

This fourth strategy includes attacking or threatening defenders, filing abusive Strategic Lawsuits Against Public Participation (SLAPPs) to intimidate critics, pursuing criminal charges to delegitimize criticism against them, seeking to divide communities to undermine campaigns, and obstructing the collective organization of workers.¹⁶

Utilising State Power

Utilising state power is the final category of harmful strategies identified by Mind the Gap.¹⁷ Companies sometimes leverage their power with states to obtain favourable treatment, including by operating in special economic zones that benefit from weaker human rights and environmental regulations, lobbying to avoid the introduction or strengthening of laws protecting human rights and the environment, aligning with suppressive state institutions that violate human rights, and even engaging state security forces to protect their business interests – even when violations can be expected as a result.¹⁸

IV. Civil Society Counter-Strategies

Mind the Gap's counter-strategy framework outlines 11 counter-strategies that can be grouped under four main strategies for civil society to respond to harmful tactics used by companies (see Table 2).¹⁹ There is no clear, one-to-one relationship between a harmful corporate strategy and a civil society counter-strategy. Some strategies may be particularly useful to combat specific harmful strategies. Civil society actors may need to employ multiple counter-strategies in their advocacy, sometimes using several in parallel, or in a sequence, alongside broader advocacy or legal strategies.

note 11; Andrea Brock and Alexander Dunlap, 'Normalising Corporate Counterinsurgency: Engineering Consent, Managing Resistance and Greening Destruction Around the Hambach Coal Mine and Beyond' (2018) 62 *Political Geography*, 33; Alexander Dunlap, "'A Bureaucratic Trap:' Free, Prior and Informed Consent (FPIC) and Wind Energy Development in Juchitán, Mexico' (2018) 29:4 *Capitalism Nature Socialism* 88; Sara Geenen and Judith Verweijen, 'Explaining Fragmented and Fluid Mobilization in Gold Mining Concessions in Eastern Democratic Republic of Congo' (2017) 4 *The Extractives Industries and Society* 758; Romy Kraemer, Gail Whiteman and Bobby Banerjee, 'Conflict and Astroturfing in Niyamgiri: The Importance of National Advocacy Networks in Anti-Corporate Social Movements' (2013) 34:5–6 *Organization Studies* 823; Almut Schilling-Vacaflor, 'If the Company Belongs to You, How Can You Be Against It?' Limiting Participation and Taming Dissent in Neo-Extractivist Bolivia (2017) 44:3 *The Journal of Peasant Studies* 658; M Omar Faruque, 'The Politics of Extractive Industry Corporate Practices: An Anatomy of a Company-Community Conflict in Bangladesh' (2018) 5:1 *The Extractive Industries and Society* 177.

¹⁶ Mind the Gap, 'Undermining Defenders and Communities', <https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/> (accessed 19 April 2023). Y Wasi Gedepuraka, 'Mining for a Nickel and a Dime: How Worker Rights are Undermined at IMIP', November 2022, <https://www.mindthegap.ngo/mining-for-a-nickel-and-a-dime/> (accessed 19 April 2023).

¹⁷ Mind the Gap, 'Utilising State Power', <https://www.mindthegap.ngo/harmful-strategies/utilising-state-power/> (accessed 19 April 2023).

¹⁸ See generally, Wasi Gedepuraka, note 16; Brock and Dunlap, note 15; Dunlap, note 15; Brian Ganson and Achim Wennmann, 'Predatory Companies in Fragile States' (2015) 55 *Adelphi Series* 457–458; Corporate Europe Observatory (CEO), Friends of the Earth Europe and European Coalition for Corporate Justice (ECCJ), *Off the Hook? How Business Lobbies Against Liability for Human Rights and Environmental Abuses*, June 2023, <https://corporatejustice.org/wp-content/uploads/2021/06/OffThe-Hook.pdf> (accessed 19 April 2023).

¹⁹ Mind the Gap, 'Counter-Strategies', <https://www.mindthegap.ngo/counter-strategies/> (accessed 19 April 2023).

Table 2. Civil society counter-strategies

Dismantling corporate narratives	Shifting the power balance	Deploying legal counter-strategies	Advancing corporate accountability standards
Conducting rebuttal research	Putting a spotlight on the case	Bringing legal action in a company's home state	Making soft law into hard law
Reframing the issue	Using international complaints mechanisms	Using legal action to force disclosure	Mainstreaming corporate accountability into law
	Targeting actors with leverage over the company	Countering SLAPPs	
	Expanding and amplifying community activism	Coordinated strategic litigation	

Dismantling Corporate Narratives

The first set of counter-strategies aims to dismantle corporate narratives separating companies from their harmful impacts.²⁰ Companies often use legal strategies to construct deniability, such as by hiding behind complex supply chains and outsourcing high-risk activities. Civil society actors can dismantle these corporate narratives, including denials of knowledge and untrue or misleading statements, by conducting rebuttal research on the company's reasons on why it is not responsible for the harms, as well as by reframing these narratives to draw attention to what the company should have known or done in the specific case.²¹

Shifting the Power Balance

Companies' use and abuse of their powerful position *vis-à-vis* communities are features of many harmful strategies, ranging from refusing to disclose information to undermining or silencing defenders and communities. When pursuing remedy for business-related impacts, affected peoples can use the second set of counter-strategies by shifting these power imbalances, including by putting an international spotlight on the case, such as by forming coalitions with local, national, regional and international civil society actors, as well as by filing complaints to international grievance mechanisms to increase global attention to the case.²² Targeting actors with leverage over the company, such as

²⁰ Mind the Gap, 'Dismantling Corporate Narratives', <https://www.mindthegap.ngo/counter-strategies/dismantling-corporate-narratives/> (accessed 19 April 2022).

²¹ Reframing the issue can be useful when a company associated with an adverse impact has irresponsibly disengaged from its operations or business relationships. See generally, SOMO, 'Should I Stay or Should I Go? Exploring the Role of Disengagement in Human Rights Due Diligence', <https://www.somo.nl/wp-content/uploads/2016/04/Should-I-stay-or-should-I-go-4.pdf> (accessed 19 April 2022).

²² Mind the Gap, 'Shifting the Power Balance', <https://www.mindthegap.ngo/counter-strategies/shifting-the-power-balance/> (accessed 31 March 2022). See generally, FIDH, 'Corporate Accountability for Human Rights Abuses', <https://corporateaccountability.fidh.org/> (accessed 19 April 2023); Florence Palpacuer, 'Global Value Chains as Sites of Contestation: The Role of GVC-Based Campaign Networks' in Stefano Ponte, Gary Gereffi and Gale Raj-Reichert (eds.), *Handbook on Global Value Chains* (Edward Elgar Publishing, 2019) 199; Ruth Hall et al, 'Resistance, Acquiescence or Incorporation? An Introduction to Land Grabbing and Political Reactions "From

customers and shareholders, can also bring pressure on the company to change its behaviour.²³

Deploying Legal Counter-Strategies

While companies often use judicial strategies to avoid liability and accountability for adverse impacts, legal claims can also be brought by affected peoples, lawyers and NGOs to force corporate change.²⁴ Legal claims often involve close collaborations between civil society actors to bring legal action in a home state (where the company is headquartered).²⁵ Legal action can also be used to force information disclosure by the company, counter abusive SLAPPs, and frame coordinated strategic litigation.²⁶

Coordinated strategic litigation is an example of two counter-strategies in tandem: shifting the power balance and deploying legal counter-strategies. Strategic litigation is a growing strategy used by civil society to combat harmful corporate strategies.²⁷ However, judicial and non-judicial litigation is high-risk. Civil society claimants often face lack of information about legal options, as well as a lack of, or the high cost of, lawyers to support legal action, and concerns about financial and legal risks. However, collaboration between civil society actors in the Global North and South, including between affected peoples, lawyers, trade unions, and local, national, regional and international NGOs, can strengthen knowledge, expertise, and ultimately efforts to achieve justice.²⁸

An example of coordinated strategic litigation in practice is Mind the Gap consortium partner SOMO's current litigation project to close governance gaps in human and labour rights. SOMO is building coalitions of CSOs, lawyers and academics from different geographic regions to collaborate on multi-jurisdictional, multi-procedure litigation. The project is a culmination of lessons learned from both within and outside Mind the Gap. In particular, research gathered for Mind the Gap demonstrated the potential impact of combining different counter-strategies as part of a networked approach.

Advancing Corporate Accountability Standards

Civil society actors, lawyers and academics from around the world generally agree that the best counter-strategy is to change the law and norms regulating corporate behaviour – to close the governance gaps and legal loopholes that allow companies to cause harm and avoid

Below” (2015) 42:3–4 *The Journal of Peasant Studies* 467; Romy Kraemer, Gail Whiteman and Bobby Banerjee, ‘Conflict and Astrourfing in Niyamgiri: The Importance of National Advocacy Networks in Anti-Corporate Social Movements’ (2013) 34:5–6 *Organization Studies* 823; Duygu Avci and Consuelo Fernández-Salvadora, ‘Territorial Dynamics and Local Resistance: Two Mining Conflicts in Ecuador Compared’ (2016) 3 *The Extractive Industries and Society* 912.

²³ Anastasia O'Rourke, ‘A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility’ (2003) 12:4 *Business Strategy and the Environment* 227.

²⁴ Mind the Gap, ‘Deploying Legal Counter Strategies’, <https://www.mindthegap.ngo/counter-strategies/deploying-legal-counter-strategies/> (accessed 19 April 2022).

²⁵ ECCJ, ‘Suing Goliath: An Analysis of Civil Cases Against EU Companies for Overseas Human Rights and Environmental Abuses’, 28 September 2021, <https://corporatejustice.org/publications/suing-goliath/> (accessed 19 April 2023).

²⁶ Protect the Protest, <https://protecttheprotest.org/> (accessed 19 April 2023); Coalition Against SLAPPs in Europe (CASE), <https://www.the-case.eu/> (accessed 19 April 2023).

²⁷ Richard Meeran and Jahan Meeran (eds.), *Human Rights Litigation against Multinationals in Practice* (Oxford: Oxford University Press, 2021); ECCJ, note 25.

²⁸ Mind the Gap, ‘Expanding and Amplifying Community Activism’, <https://www.mindthegap.ngo/counter-strategies/shifting-the-power-balance/expanding-and-amplifying-community-activism/> (accessed 19 April 2023).

responsibility for their actions and omissions.²⁹ This includes making soft law standards on responsible business conduct into legally binding mandatory due diligence legislation, as well as mainstreaming corporate accountability into other laws affecting people and the environment, such as legislation impacting workers' rights, health and safety, disclosure, land rights, indigenous rights and the environment.³⁰

V. Conclusion

The Mind the Gap toolkit is intended to help civil society to identify and understand harmful corporate strategies to avoid responsibility for their adverse impacts and to challenge their widespread acceptance. The identified counter-strategies provide civil society with a framework to respond to widely accepted harmful corporate strategies. However, immense power imbalances between multinational companies and the people they impact requires civil society actors to collaborate to ensure widespread recognition of the harmful corporate strategies and effective implementation of these counter-strategies.

The project consortium partners are using these frameworks in their advocacy to seek to hold companies to account. However, currently the frameworks are not yet widely known or actively utilized by other CSOs seeking to address irresponsible business conduct. More collaboration between local, national, regional and international CSOs, including communities affected by harmful corporate activities, is necessary to improve understanding of the harmful strategies and counter-strategies identified by the toolkit. Through collaborative sharing of information on cases and lessons learned, and by helping to put a spotlight on accountability and governance gaps, companies can be pressured to fulfil their human rights responsibilities, and states can also be persuaded to recognize these responsibilities and strengthen them into obligations through binding legislation. Collaboration is essential to close governance gaps that allow companies to avoid accountability for their adverse human rights and environmental impacts.

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²⁹ Mind the Gap, 'Advancing Corporate Accountability Standards', <https://www.mindthegap.ngo/counter-strategies/advancing-corporate-accountability-standards/> (accessed 19 April 2023). Over 160 civil society organizations support the Justice is Everybody's Business campaign, which calls on the European Union to adopt strong legislation on human rights and environmental due diligence by companies: Justice is Everybody's Business, <https://justice-business.org/our-demands/> (accessed 19 April 2023). See generally, European Commission, Directorate-General for Justice and Consumers, Lise Smit et al, *Study on Due Diligence Requirements Through the Supply Chain* (Publications Office, 2020), part V; Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68 *Netherlands International Law Review* 455.

³⁰ See generally, Corporate Reform Collective, *Fighting Corporate Abuse: Beyond Predatory Capitalism* (Pluto Press, 2014), part II; Fiona McGaughey et al, *Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom* (2022) 7:2 *Business and Human Rights Journal* 249.