

Barro Blanco Complaint
Annex 1: Analysis of Policies and Procedures¹
5 May 2014

This annex provides: the factual background of the project, the applicable policies that FMO has breached through its financing of the Barro Blanco hydroelectric dam project, and arguments to show that this complaint meets the admissibility criteria set out in FMO's Policy for the Independent Complaints Mechanism (ICM).

I. Factual Background on the Barro Blanco Project

A. Project description

The Barro Blanco hydroelectric dam project is a 28.84 MW dam that is under construction on the Tabasará River in the Province of Chiriquí in western Panama, adjacent to the Ngöbe-Buglé comarca (indigenous territory). The dam is being built and will be operated by Generadora del Istmo, S.A. (GENISA), a Panamanian subsidiary of a Honduran-owned corporation that was established for the purpose of building the Barro Blanco dam.² Construction began in February 2011. Despite a domestic lawsuit challenging approval of the Barro Blanco project, the dam is 64% complete (as of the end of 2013), and is projected to be fully constructed as early as May 2014.³

The total project cost is 78 million U.S. dollars (\$78,316,800 USD).⁴ FMO, DEG, and the Central American Bank for Economic Integration (CABEI) each provided a loan of 25 million U.S. dollars to GENISA. Although FMO has not publicly disclosed this information, based on conversations between FMO and Both ENDS we believe that FMO approved the loan no later than August 2011. In June 2011, Barro Blanco was

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² Generadora del Istmo, S.A., Our Company, available at <http://www.genisa.com.pa/en/our-company/> (last accessed Apr. 29, 2014).

³ Centro de Incidencia Ambiental (CIAM), Impulso Procesal, Demanda Contencioso Administrativa de Nulidad Interpuesta por Félix Wing Solís en nombre y representación de Adelaida Miranda, Ítalo Jiménez, Eugenio Carpintero, Manolo Miranda contra la Resolución DIEORA IA-332-2008 de 9 de mayo de 2008 de la Autoridad Nacional del Ambiente, Exp. 352-11, Magistrado Ponente Victor Leonel Benavides, Feb. 6, 2014, at <http://www.midiario.com/2014-01-08/interior/barro-blanco-avanza-en-64-see-also> Flor Bocharel, Barro Blanco podría iniciar operaciones en 2014, *LA PRENSA* (Apr. 11, 2013), available at <http://www.prensa.com/impreso/nacionales/barro-blanco-podria-iniciar-operaciones-2014/220416>.

⁴ CABEI, Project Description, Barro Blanco, available at <http://www.bcie.org/?prj=35&title=Generadora%20del%20Istmo.%20Proyecto%20Hidroel%20E9ctrico%20Barro%20Blanco&lang=es> (last accessed Apr. 29, 2014).

registered under the Kyoto Protocol's Clean Development Mechanism (CDM) as a greenhouse gas emissions reduction project.⁵

B. Environmental and Human Rights Impacts

As documented in UNDP reports, flooding from the Barro Blanco dam project will directly affect the Ngöbe communities of Quebrada Caña, Kiad, and Nuevo Palomar. These communities are located in the Annex areas of the Comarca of the Ngöbe-Buglé, created by Law No. 10 in 1997.⁶ Executive Decree No. 194, approved 25 August 1999, entitled *Por el Cual se Adopta la Carta Organica Administrativa de la Comarca Ngöbe-Buglé*, establishes the rules and institutions that govern the Comarca. According to this *Carta Organica*, the Ngöbe-Buglé territory is under collective ownership.⁷

Based on the 2010 census, GENISA estimated that over 400 people live in Quebrada Caña, Kiad, and Nuevo Palomar.⁸ In 2013, an UNDP expert-led assessment visited the affected communities, and observed that “the three communities ... appear to be more numerous than indicated by the 2010 census.”⁹ According to the M-10, no one in these communities was consulted prior to the decision to approve the project.

Notably, several assessments of the dam's impacts have underestimated the area affected by flooding.¹⁰ According to the 2012 UNDP Mission Verification Report, the project will flood six houses,¹¹ each of which includes large, extended families that

⁵ CDM, Project 3237: Barro Blanco Hydroelectric Power Plant Project, *available at* <https://cdm.unfccc.int/Projects/DB/AENOR1261468057.59/view>.

⁶ Annex areas are geographically isolated from the Comarca, but have the same legal status.

⁷ Por el Cual se Adopta la Carta Organica Administrativa de la Comarca Ngöbe-Buglé, Decreto Ejecutivo No. 194, artículo 17, 25 Aug. 1999, *available at* <http://www.iadb.org/Research/legislacionindigena/leyn/docs/Pan-Pan-DecretoEje-194-99-CartaOrgan-Ngobe-Bugle1081.pdf>.

⁸ GENISA, Environmental and Social Impacts Summary Report (2011), p. 37 (Quebrada Caña: 184; Kiad: 35; Nuevo Palomar: 200 (based on 2010 census figures for the Ngöbe-Buglé comarca)), *at* <http://www.genisa.com.pa/wp-content/uploads/2012/06/Resumen-Ejecutivo-de-Reporte-Socio-Ambiental-PHBB-072811.pdf> [hereinafter GENISA ESISR].

⁹ UNDP, Peritaje al proyecto Barro Blanco: Resultados del Diagnóstico Rural Participativo (Aug. 29, 2013), para. 4, *at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0276982001378499109.pdf [hereinafter UNDP Peritaje – Rural Diagnóstico Participativo].

¹⁰ UNDP, Peritaje Independiente de la presa de Barro Blanco, Panamá: informe final de la componente de ingeniería hidráulica (Sept. 5, 2013), para. 8.2.1, *at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0910718001378499234.pdf [hereinafter UNDP Peritaje – Hidráulica]; *see also* UNDP, Peritaje al Proyecto Hidroeléctrico Barro Blanco: Análisis de los Aspectos Ecológicos y Económicos (Sept. 2, 2013), para. 102, *at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0981925001378498682.pdf [hereinafter UNDP Peritaje – Ecológico y Económico].

¹¹ UNDP, Informe de la Misión de Verificación (Dec. 2012), p. 33, *at* http://www.bananamarepublic.com/informe_mision_verificacion_final_20121219.pdf [hereinafter UNDP Informe].

may total 40-50 people. However, UNDP's Expert Assessment Report in 2013 found that the flood level attributable to the dam is several meters higher than the level given in previous studies, including GENISA's 2011 Environmental and Social Summary Report and UNDP's 2012 Mission Verification Report.¹² Despite the findings of the 2013 Expert Assessment Report, GENISA and the Government of Panama have not adequately assessed the risk to the additional areas or the exact number of people affected.

In addition, the stated impacts were likely underestimated in the pre-2013 assessments because those assessments failed to consider that "[t]he community acts as a whole, and obtains resources that are present in different places there."¹³ "Given [this] cohesion, ... [t]he impact with respect to access and use of resources will affect not only the families that will suffer the flooding of their lands, but also those impacts will affect directly and indirectly all of the inhabitants of the three communities."¹⁴ This is especially significant because, as documented in the UNDP reports, the Ngöbe land, which they depend on for food, water and subsistence, is integral to their culture.¹⁵ Beyond the tangible value of the land, "[t]here is a great fondness for the land and its resources. The residents have a very simple life but perceive that they have no important necessity unsatisfied."¹⁶

Because the Ngöbe depend on their land and natural resources for their physical, socio-economic, and cultural survival, they have resisted development that threatens their traditional lands. As recognized by UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, in his end of mission report, the Barro Blanco dam project has become emblematic of such harmful development.¹⁷ Further, the project has spurred conflict between the government and indigenous peoples, including protests that have ended in violence against environmental defenders.¹⁸

C. Domestic Legal Proceedings

¹² UNDP Peritaje – Hidráulica, para. 8.2.1. This report concluded that "the area affected by the dam's reservoir should be delimited by the flood zone possible during a flood, not the zone corresponding to the reservoir's normal level of 103 meters above sea level, as had been done until now." In addition, the report recommended using the 100-year flood level as the criterion for demarcating the flood area on the margin of acceptable risk (noting that the Technical Roundtable had decided to use another level).

¹³ UNDP Peritaje – Rural Diagnóstico Participativo, para. 4.

¹⁴ UNDP Peritaje – Ecológico y Económico, para. 15.

¹⁵ UNDP Informe, pp. 18-30, 37; UNDP Peritaje – Ecológico y Económico, paras. 18, 112, 127; UNDP Peritaje – Rural Diagnóstico Participativo, paras. 4, 90-95, 99-100.

¹⁶ UNDP Peritaje – Rural Diagnóstico Participativo, para. 4.

¹⁷ James Anaya, Declaración del Relator Especial sobre los derechos de los pueblos indígenas al concluir su visita oficial a Panamá, 26 July 2013, at <http://unsr.jamesanaya.org/statements/declaracion-del-relator-especial-sobre-los-derechos-de-los-pueblos-indigenas-al-concluir-su-visita-oficial-a-panama>.

¹⁸ "Policías e indígenas se enfrentan por Barro Blanco, La Prensa (Apr. 26, 2014) at <http://www.prensa.com/uhora/locales/policias-indigenas-enfrentamientos-barro-blanco/315100>.

In 2011, the Environmental Advocacy Center of Panama (CIAM) filed a lawsuit on behalf of members of the affected Ngöbe communities, challenging the National Authority for the Environment (ANAM)'s approval of the environmental impact assessment (EIA) for the Barro Blanco project.¹⁹ Although the case is still pending before Panama's Supreme Court, construction of the dam continues. The Ngöbe fear that the dam will be fully constructed before the court decides the case, rendering the lawsuit moot and depriving the Ngöbe of their right to a remedy for violations caused by the dam. Coming before FMO's approval of the project, the lawsuit should have been part of FMO's due diligence and considered an indication that there were serious concerns with the project.

In December 2013, CIAM filed a lawsuit in Panamanian court on behalf of Mr. Manolo Miranda to challenge the decision by Panama's National Public Services Authority (ASEP) to authorize the taking of his family's land for the construction of the Barro Blanco project.²⁰ Although ASEP issued the notice to Mr. Manolo Miranda, numerous family members live on that land and thus face eviction as well.²¹ In addition to their houses, the plants and trees that support the indigenous communities' diet are located there, and will be flooded by the dam. The sole school for the Ngöbe language, religion, and culture is also located there.²² The notice assigned a value of \$4000 balboas (equivalent to \$4000 USD) in compensation for the taking of this land.²³ Mr. Miranda has asked the court to order immediate suspension of ASEP's decision,²⁴ but there is no indication of when the court will reach a decision.

On February 7, 2014, ASEP notified Mr. Manolo Miranda that the authorities would enter his land at 10:00 AM on February 17, 2014 to enable access for the company GENISA.²⁵ The notice to Mr. Miranda identified six additional individuals whose land GENISA would be authorized to enter as well.²⁶ Although ASEP annulled the February 7th notification, the communities were not informed of that decision until the

¹⁹ Demanda Contencioso Administrativa de Nulidad, con Solicitud Especial de Suspensión Provisional, Contra la Resolución DIEORA IA-332-2008 de 9 de Mayo de 2008, Proferida por la Administradora General de la Autoridad Nacional del Ambiente (ANAM).

²⁰ Demanda Contencioso Administrativa de Plena Jurisdicción, con Solicitud Especial de Suspensión Provisional, promovida por Tania Arosemena Boderó y Juan Diego Alvarado de León, en nombre y representación de Manolo Miranda, contra la Resolución AN No. 6103-ELEC de 22 de abril de 2013, proferida por la Administradora General de la Autoridad Nacional de los Servicios Públicos (ASEP) ("Demanda"), Dec. 26, 2013, section IV., para. 3 [hereinafter Demanda].

²¹ *Id.*

²² See UNDP Informe de la Misión de Verificación at 33 (noting flood area within 8 meters of the school); see also Peritaje – Hidráulica, para. 8.2.1 (noting that the flood area is higher than the previously established level of 103 meters above sea level).

²³ See ASEP, Edicto de Notificación AOL 262-13, Sept. 20, 2013, Annex A.

²⁴ See Demanda, *supra* note 20, section VI.

²⁵ Autoridad Nacional de los Servicios Públicos (ASEP), Edicto de Notificación No. OAL-09-14, Feb. 7, 2014.

²⁶ See *id.*

day after authorities were expected,²⁷ and the affected communities remain fearful that they could be forced from their land at any time.

In light of the imminent threat of eviction, on February 2, 2014, members of the affected Ngöbe communities created an encampment along the banks of the Tabasará River at the border of the Ngöbe-Buglé comarca. They planned to stay there as long as necessary to prevent machinery from entering their land. Recently, there have been reports of violent clashes between the Ngöbe and police forces.

²⁷ ASEP, Communication annulling *id.*, available at Sistema de Lecto y Escritura del Idioma Ngäbe website, <https://www.facebook.com/SistemaDeLectoYEscrituraDelIdiomaNgabe>.

II. Admissibility Criteria

The complainants meet all of the admissibility criteria in section 3.1 of the Independent Complaints Mechanism Policy.

Receipt Items

Section 3.1.2. lists a number of “Receipt Items” required for a submission, including a description of the complaint; the contact information of the complainants and their advisors; the names of FMO employees with whom the complainants had contact; and an overview of actions that have been taken to resolve the issue. The Letter and the accompanying annexes, which constitute an integral part of the complaint, include all of the information requested.

Affected Parties

As described in the letter, the Movimiento 10 de Abril (M-10) was established in 1999 by the Ngöbe and farmers to promote the protection of the environment and to ensure their rights would be respected, mainly in the view of dam and mining development in the comarca. The M-10 represents many of the community members who will be affected by the Barro Blanco dam.

FMO’s Financial Relationship

As described above, FMO provided a \$25 million loan to GENISA for the construction of the Barro Blanco dam.

Impacts

The impacts described in the Letter and this Annex are substantial and are the direct result of the project, which FMO is financing.

Actions and Consultations with Relevant Responsible Parties

FMO and the affected communities (in large part via Anouk Franck of Both ENDS and Oscar Sogandares of Chiriqui Natural) have been engaged in discussions on the Barro Blanco project since November 2010. The opposition to the dam by the communities and the fact that they have not been properly consulted were brought to FMO’s attention as a reason not to invest in this project. The problems during project implementation have been similarly raised on many occasions. See Annex 2 for a detailed overview of correspondence between FMO and the affected communities.

Identical Complaints

A number of actions have been taken in relation to the Barro Blanco project, but none constitutes an “identical complaint” for the purposes of section 3.1.5 because none of them specifically address violations of FMO’s policies or procedures. A contrary finding by the ICM would frustrate the purpose of the mechanism to hold FMO accountable to its own policies and procedures.

Two court cases in Panama are still pending:

- 1) Lawsuit filed by CIAM in 2011 on behalf of the M-10 against Panama's National Environment Authority (ANAM) to challenge the resolution approving the EIA for the Barro Blanco project. The parties in this lawsuit are different than those in the present complaint. The defendant in the lawsuit is the Panamanian authority, and not FMO, as it is here.
- 2) Lawsuit filed by CIAM in 2013 on behalf of Mr. Manolo Miranda against ASEP, challenging notice of acquisition of his land for the Barro Blanco project. Again, the parties are different than in this complaint. The defendant in the lawsuit is ASEP, and not FMO.

UNDP-led Technical Roundtable:

After protests in 2011 and 2012 in relation to the exploitation of natural resources (specifically mining and hydro-electric projects), the San Lorenzo Agreement was reached in February 2012 between the Panamanian government and the Ngöbe-Buglé authorities to address the situation.²⁸ As part of the agreement, it was decided that the UNDP would facilitate a Technical Roundtable on Barro Blanco and undertake two missions to areas near the project.²⁹ The purpose of the missions was to verify the impacts that had not been addressed satisfactorily in the environmental impact assessment. The Technical Roundtable was seeking only to make findings of fact, and not an assessment of compliance against national or international standards. FMO was not directly involved in this process.

The UNDP-led teams presented their first report in December 2012, recommending a water flow simulation to understand the impact of sudden floods as well as a participatory rural appraisal. On September 9, 2013, the United Nations released three reports related to the independent expert assessment: a water flow simulation, a participatory rural appraisal and an ecological and economic analysis conducted by two independent experts. These reports showed that the project has "real and important impacts" on the indigenous populations living in the area. Since the presentation of these reports, no steps have been taken to turn the recommendations into a concrete action plan.

We must note that, although the communities affected by the dam participated in a few meetings as observers, these communities were never considered a party to the Roundtable. For this reason, M10 representatives have stated clearly that they were not represented by Roundtable participants.

Urgent Appeal to UN Special Rapporteurs:

An Urgent Appeal was sent to UN Special Rapporteurs on 18 February 2014 regarding the imminent forced evictions of indigenous Ngöbe families due to the

²⁸ Association for Women's Rights in Development, The Ngöbe-Buglé's Community Resistance, July 13, 2012, at <http://awid.org/eng/News-Analysis/Friday-Files/The-Ngoebe-Bugle-s-Community-Resistance>.

²⁹ UNDP Informe, *supra* note 11.

Barro Blanco dam.³⁰ The appeal does touch upon the role of financiers of the project, including FMO, but it makes explicit requests only to address the human rights obligations of the states involved, including the Netherlands. Moreover, an Urgent Appeal is not a judicial mechanism. There is no pre-defined process for handling the appeal, nor the guarantee that the issues raised will be addressed.

One Year Cut Off Date for Complaints

The complainants have engaged with FMO from very early on, well before FMO decided to finance the project. The first contact was established in November 2010 and the financing decision was made, as far as can be ascertained, in early August 2011. At that time, no independent complaints mechanism was available at FMO. For that reason, we believe that the 1-year cut-off date in section 3.1.7 should not be taken as grounds to reject this complaint. Further, actions taken by GENISA in violation of FMO policies, as detailed below, are still occurring to this date.

³⁰ M-10 et al., Urgent Appeal, Imminent Forced Evictions of Indigenous Ngöbe Families due to Barro Blanco Dam in Panama, Feb. 18, 2014, at <http://earthjustice.org/sites/default/files/files/AppealForcedEvictionBarroBlancoDam14-02-18.pdf>.

III. Violations of FMO's Policies

In order to secure sustainable development outcomes, FMO has developed an Environmental, Social and Corporate Governance (ESG) policy, which comprises three parts:

- FMO's Environmental and Social Policy (ESP);
- FMO's Human Rights Policy; and
- FMO's Corporate Governance Policy.

The following sections detail the violations of those policies in the context of the Barro Blanco project.

A. FMO breached its Policies by Failing to Ensure Compliance with International Human Rights Standards

FMO's ESP policy asserts that: "All our investment clients are required to comply with national E&S law as a minimum standard, and with international standards, whichever stricter. For the latter we benchmark against the IFC Environmental and Social Performance Standards, applicable IFC Environmental Health and Social Guidelines, and the OECD Guidelines for Multinational Enterprises."³¹ Notably, the IFC's Environmental and Social Performance Standards require that, "In addition to meeting the requirements under the Performance Standards, clients must comply with applicable national laws, including those laws implementing host country obligations under international law."³²

The 2011 OECD Guidelines state that "Enterprises should: ... Respect the internationally recognized human rights of those affected by their activities." Chapter IV of the Guidelines further elaborates on this, calling on enterprises to "avoid causing or contributing to adverse human rights impacts and address such impacts when they occur... Carry out due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts."³³

FMO's Human Rights Policy states that FMO respects human rights and recognises its clients' responsibility to respect human rights, which "means to avoid infringing on the human rights of others and to address adverse impacts business may cause or contribute to." Although this policy was not in effect at the time FMO approved financing of this project, it reflects a standard that had already been articulated in the 2008 UN Framework on Business and Human Rights and 2011 UN Guiding Principles, as well as the OECD Guidelines on Multinational Enterprises. Consequently, it codifies pre-existing standards, rather than creates new obligations.

³¹ FMO, Environmental and Social Policy, p. 2 [hereinafter ESP].

³² IFC Performance Standards on Social and Environmental Sustainability, Introduction, para. 3 (2006).

³³ OECD Guidelines, Chapter IV, paras. 2, 5.

Therefore, the Human Rights Policy should be used to assess FMO's actions and guide its current decisions.

FMO's Corporate Governance Policy refers to "Principles of Good Governance or ESG principles" including: a commitment to comply with all applicable (national) laws and regulations; a commitment to comply with relevant Corporate Governance codes and Environmental and Social standards; and a commitment to an ongoing improvement of ESG practices ("a journey, not an end").³⁴ The UN Framework on Business and Human Rights and the UN Guiding Principles should be considered "relevant Corporate Governance Codes and Environmental and Social standards" for the purposes of FMO's Corporate Governance Policy. The UN Guiding Principles are reflected, in part, in the 2011 OECD Guidelines. The GPs state that businesses should respect all internationally recognized human rights, which, at a minimum, include the International Bill of Human Rights.³⁵ However, when the business activity impacts specific groups, like indigenous peoples, then the company should respect the rights elaborated in the UN instruments specific to those groups.³⁶

Accordingly, FMO should have ensured that the project respected the rights of the Ngöbe, in particular the right to free, prior, and informed consent (FPIC). FPIC is recognized under the UN Declaration on the Rights of Indigenous Peoples, which Panama voted in favor of at the UN General Assembly, and the American Convention on Human Rights, which Panama ratified in 1978. The commitment to comply with international law is enshrined in article 4 of Panama's constitution, which states: "The Republic of Panama abides by the rules of International Law."

The Inter-American Court on Human Rights is vested with the authority to interpret the Convention.³⁷ In its case law, the Court has established that the Convention not only protects the individual right to property, but also the right to hold property collectively, as with indigenous peoples.³⁸ In certain situations, it has found that the state may only infringe on that collective right to property if it has obtained the free, prior, and informed consent of the community who owns the territory.

³⁴ FMO, Corporate Governance Policy, p.1 [hereinafter CGP].

³⁵ UN GP Principle 12

³⁶ "Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples..."

³⁷ On May 9, 1990, presented at the General Secretariat of the OAS, an instrument, dated February 20, 1990, by which it declares that the Government of the Republic of Panama recognizes as binding, ipso facto, the jurisdiction of the Court on all matters relating to the interpretation or application of the American Convention on Human Rights.

³⁸ Inter-American Commission on Human Rights (IACHR), *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, at p. 22 (2010) *at* <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

FPIC is currently required under international law in the following situations: 1) prior to the relocation of indigenous peoples from their lands or territories and only “after agreement on fair and just compensation and, where possible, with the option of return;”³⁹ 2) in cases where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence;⁴⁰ or 3) the storage or disposal of hazardous materials on indigenous lands or territories.⁴¹

The first two scenarios describe the case here. As described above, the Barro Blanco project will require the forced eviction of a few hundred community members of the Ngöbe community from the land they currently use and occupy. Neither the Government of Panama nor GENISA has obtained the consent of the community to their relocation. Consent of the community would require following the procedures set forth in the Carta Organica. However, GENISA’s current efforts to negotiate compensation with the individuals to be resettled do not meet this standard (see p.15 where this is explained in more detail). Further, the negotiations are not between a willing buyer and a willing seller. Regardless of the outcome of these negotiations, the Government of Panama will proceed with the process to evict community members from their homes.

The project will also result in significant impacts on the natural resources of the Ngöbe people. That only a small percentage of their total territory will be impacted is not dispositive of whether FPIC is required. The area to be flooded contains resources upon which the whole community, not only those who will be resettled, relies and which are not found elsewhere on their territory. As the 2013 UNDP Expert Assessment Report explained, in the Ngöbe communities, the tropical forest that exists along the riverbank of the Tabasará River provides an important source of vegetation, which serves a social and economic function.⁴² With the flooding of the tropical forest along the river, known as the Bosque de Galería, “natural resources like wood, medicinal plants, and other products used by the community will be lost.”⁴³ “The Ngöbe communities use wood present in the Bosque de Galería ... as construction material for their houses, their beds, and to construct boats, as well as for other minor uses.”⁴⁴ Additionally, “the Ngöbe communities make extensive use of medicinal plants present in the Bosque de Galería ... including to cure headaches, stomachaches, fevers, and even as antidotes against venomous snakebites.”⁴⁵ “The Bosque de Galería contains other products traditionally used by the Ngöbe community, ... like different kinds of palms and other fibers used to make baskets and other

³⁹ UN Declaration on the Rights of Indigenous Peoples (UNDRIP), art. 10.

⁴⁰ IACHR, *supra* note 39, at p. 119.

⁴¹ UNDRIP art. 29.

⁴² UNDP Peritaje – Ecológico y Económico, *supra* note 10, at para. 12.

⁴³ *Id.* at para. 16

⁴⁴ *Id.* at para. 103.

⁴⁵ *Id.*

traditional, as well as artisanal, products.”⁴⁶

Significantly, the UN Special Rapporteur on the Rights of Indigenous Peoples in a declaration following his visit to Panama in July 2013 found that the inundation of the Ngöbe lands should not proceed without the prior agreement of the Ngöbe people.⁴⁷

B. FMO Failed to Ensure that the Project Complied with IFC’s Performance Standards

As part of its ESG policy, FMO assesses projects against the IFC’s Performance Standards (PS). It is important to note that the Barro Blanco project is governed by the 2006 version of the PS, which has subsequently been replaced by a new version in 2012.

FMO accepted GENISA’s Environmental and Social Summary Report BBHP 072811 as the basis upon which to ascertain compliance with the PS. We will show below that this compliance cannot be demonstrated for a number of applicable PS. For Barro Blanco the following PS are of particular relevance: PS 1, 5, 7 and 8.

1) Social and Environmental Impact Assessment was Inadequate

GENISA’s Environmental and Social Summary Report does not meet the requirements of Performance Standard 1. PS1, setting out the principles for the Social and Environmental Assessment, describes the following objectives:

- “To identify and assess social and environment impacts, both adverse and beneficial, in the project’s area of influence;
- To avoid, or where avoidance is not possible, minimize, mitigate, or compensate for adverse impacts on workers, affected communities, and the environment;
- To ensure that affected communities are appropriately engaged on issues that could potentially affect them;
- To promote improved social and environment performance of companies through the effective use of management systems.”

PS 1 also indicates that “The client will conduct a process of Social and Environmental Assessment that will consider in an integrated manner the potential social and environmental (including labor, health, and safety) risks and impacts of the project. The Assessment process will be based on current information, including *an accurate project description*, and appropriate social and environmental baseline data [emphasis added].”⁴⁸

⁴⁶ *Id.*

⁴⁷ Anaya, *supra* note 17.

⁴⁸ IFC Performance Standards on Social and Environmental Sustainability, PS1, para. 4 (2006).

The Environmental Impact Assessment for the Barro Blanco project which was approved in 2008 by ANAM did not adequately assess the project's impacts on the Ngöbe-Buglé comarca. A lawsuit in Panama seeking to annul the EIA due to numerous violations of Panamanian law, including on impact assessments, is pending.

In support of this case, three international groups – AIDA, CIEL and Earthjustice – filed an Amicus Curiae brief, submitted to the Supreme Court of Panama, in which they describe three fundamental flaws in the EIA for the Barro Blanco project. These are: the EIA did not contain complete information about the impacts of the project on indigenous territories, which are annexes to the Ngöbe-Buglé comarca; ANAM did not provide the Unidades Ambientales Sectoriales (UAS) sufficient time to present its views on all the information that was considered for approval; and the affected communities were not adequately consulted during the EIA process and, therefore, the Government of Panama did not guarantee effective participation of the affected communities.

Further, a major problem with the EIA for Barro Blanco, is that the assessment was made for a smaller dam. The EIA was made for a dam of 19.86 MW, while later GENISA indicated that the actual dam will be a 28.84 MW dam. The modification was accepted by ANAM in 2010 and by ASEP in 2011, without the requirement of doing a supplemental EIA.

2) Community Engagement and Consultation Processes were Inadequate

PS1 and PS7 require that the directly affected communities are consulted, and in the case of indigenous peoples, that the company documents the successful outcome of its good faith negotiation.

Paragraphs 19-22 of PS1 recognise the importance of identifying individuals and groups that may be differentially or disproportionately affected, as well as the need for (on-going) community engagement, disclosure and consultation. Paragraph 21 states that: “If affected communities may be subject to risks or adverse impacts from a project, the client will undertake a process of consultation in a manner that provides the affected communities with opportunities to express their views on project risks, impacts, and mitigation measures, and allows the client to consider and respond to them. Effective consultation: (i) should be based on the prior disclosure of relevant and adequate information, including draft documents and plans; (ii) should begin early in the Social and Environmental Assessment process; (iii) will focus on the social and environmental risks and adverse impacts, and the proposed measures and actions to address these; and (iv) will be carried out on an ongoing basis as risks and impacts arise”. And paragraph 22 requires that “For projects with significant adverse impacts on affected communities, the consultation process will ensure their free, prior and informed consultation and facilitate their informed participation.”

In the case of projects that affect indigenous peoples, additional measures are required. Paragraph 14 of PS7 refers to the need for a good faith negotiation in case of forced

relocation: “The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from their communally held traditional or customary lands under use. If such relocation is unavoidable, the client will not proceed with the project unless it enters into a good faith negotiation with the affected communities of Indigenous Peoples, and documents their informed participation and the successful outcome of the negotiation. Any relocation of Indigenous Peoples will be consistent with the Resettlement Planning and Implementation requirements of Performance Standard 5. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the reason for their relocation cease to exist.”

Far from documenting the support of the communities, GENISA’s Environmental and Social Summary Report, recognizes that there is opposition to the dam: “However a group within the community is wholly opposed to the project, and to date, negotiations with this group have not reached a positive outcome.” As a mitigation measure, GENISA proposes “The project will continue to engage with the indigenous community through the established structures, through community projects and direct engagement with individuals and communities. The project will continue and try and engage with the groups opposing the project.” However, GENISA claims that “A Memorandum has been [signed] between the company and the Ngöbe-Buglé community in line with the indigenous people law in place.”

Both the UN Special Rapporteur on the Rights of Indigenous Peoples and the UNDP reports found that consultation was inadequate. As the UNDP reports confirm, the level of consultation with the people at greatest risk was inadequate.⁴⁹ FMO has failed to provide any evidence of consultation with the directly affected people and continues to point to consultations that occurred with people who are not directly affected by the project. For instance, in a letter to Both ENDS, FMO refers to “four public consultations with the active participation of the M-10 Movement,”⁵⁰ but has not provided any evidence of those consultations, and the M-10 states it was not consulted. Keeping in mind that the UNDP Technical Roundtable meetings were not consultations that allowed the affected communities to participate in decisions related to the project and its impacts, but rather meetings that occurred after the government’s approval of the project and that presupposed construction of the dam, there is no reason to believe that the M-10 was actually involved in a “consultation process [that would] ensure their free, prior and informed consultation and facilitate their informed participation” as required under PS1.

FMO and GENISA claim that an agreement as “signed by the ‘Cacique General de la Comarca Ngöbe-Buglé’ in December 2008, later amended with a new agreement with the Regional Congress of Kadriri in 2011, which was approved by the majority of the delegates of the Region and ratified by the General Congress of the comarca Ngöbe-

⁴⁹ UNDP Peritaje – Rural Diagnóstico Participativo, *supra* note 9, at para. 96.

⁵⁰ See Response FMO to letter Both ENDS on Barro Blanco, received on the 25th of October 2013.

Buglé.”⁵¹ There are indications that at least some of the approvals GENISA obtained were from people or entities who lacked the authority to grant such approvals or who gave approvals without complying with the legal requirements.

According to the Carta Organica, which sets forth the functions of indigenous peoples’ representative bodies in the comarca Ngöbe-Buglé,⁵² in order to obtain the official approval of the people he/she represents, the Cacique must discuss the issue and his/her position with the Ngöbe people, and make his/her decision based on their stated interests. Instead, the former Cacique Máximo Saldaña signed an agreement with GENISA behind closed doors and without consultation. After the approval of the Cacique, approval of the General Congress is indeed needed. According to the M-10, this approval has not yet been obtained.⁵³ The Regional Congress of Kadriri did not meet in full when signing the agreement with GENISA. Consequently, the validity of that agreement is, therefore, contested.⁵⁴

FMO refers to these agreements in support of its conclusion that “[a]s part of [its] due diligence, the consultation process has been reviewed and been judged to be adequate in the context of the magnitude of the identified potential impacts and the affected area.”⁵⁵ Beyond the inconsistencies raised above, FMO’s conclusion disregards the fact that the duty to consult is triggered by major impacts such as forced land acquisition, not a certain number of hectares to be affected.

3) Involuntary Resettlement/Forced Eviction Process has been Inadequate

In addition to the specific requirements for resettlement involving indigenous peoples in PS7, Performance Standard 5 on Land Acquisition and Involuntary Resettlement sets out the general provisions with following objectives:

- To avoid or at least minimize involuntary resettlement wherever feasible by exploring alternative project designs;
- To mitigate adverse social and economic impacts from land acquisition or restrictions on affected persons’ use of land by: (i) providing compensation for loss of assets at replacement cost; and (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected
- To improve or at least restore the livelihoods and standards of living of displaced persons;

⁵¹ See Response FMO to letter Both ENDS on Barro Blanco, received on the 25th of October 2013.

⁵² Law No. 10 that established the Ngöbe-Buglé Comarca and the Decree that regulates it through the Carta Organica Administrativa de la Comarca Ngöbe-Buglé. (Executive Decree N. 194 of 1999); <http://www.iadb.org/Research/legislacionindigena/leyn/docs/Pan-Pan-DecretoEje-194-99-CartaOrgan-Ngobe-Bugle1081.pdf>

⁵³ In a letter to FMO dated 16 December 2013, Both ENDS has requested FMO to provide proof of its assertion that approval from the General Congress has been obtained, but this request was not answered.

⁵⁴ Explanation by Weni Bagama during Both ENDS field visit in November 2013.

⁵⁵ See Response FMO to letter Both ENDS on Barro Blanco, received on the 25th of October 2013.

- To improve living conditions among displaced persons through provision of adequate housing with security of tenure at resettlement sites.

GENISA’s Environmental and Social Summary Report BBHP 072811 indicates that “No people reside in the purchased land”, and that “the area to be flooded is not inhabited and does not require any resettlement of people.”

Despite FMO’s repeated assertions that GENISA conducted a thorough environmental and social assessment, which FMO reviewed, both UN assessments confirm the presence of community members in the area to be flooded and strong Ngöbe opposition to the construction of the Barro Blanco dam that was neither reported nor adequately addressed in the environmental and social assessment. Consequently, the Government of Panama has granted GENISA an easement that will result in the involuntary resettlement of families living in Kiad. The need for the use of eminent domain for GENISA’s benefit is evidence of the lack of consent of the communities.

4) Biodiversity Impacts were not Properly Assessed

Paragraph 4 of Performance Standard 6 on Biodiversity requires that the assessment of the project “take into account the differing values attached to biodiversity by specific stakeholders, as well as identify impacts on ecosystem services.”

GENISA’s Environmental and Social Summary Report states that “the project will not impact any undisturbed primary forest or undisturbed wetlands.” And further “In order to protect local biodiversity and natural habitat availability, at the earliest stages of the construction phase, flora and fauna will be rescued from the vegetation clearing area. This will allow transfer of most relevant copies to secure sites previously selected.”

The analysis of ecological and economic aspects, published as part of the 2013 UNDP Expert Assessment Report, concludes that from a global perspective the ecological impacts of the project are insignificant. However, it goes on to argue that the local ecological impacts are important and are related to the Bosque de Galería, which will be entirely inundated.⁵⁶ This forest constitutes the last remains of the natural habitat in the area, and beyond its intrinsic value, serves as a habitat for important species, including epiphyte species and medicinal plants. Moreover, these ecological impacts will translate into important impacts on the livelihoods and way of life of the Ngöbe communities of Quebrada Caña, Kiad, and Nuevo Palomar. These impacts were not taken into account in GENISA’s assessment.

5) Impacts to Cultural Heritage were not Adequately Assessed or Mitigated

Performance Standard 8 on Cultural Heritage describes the following objectives:

⁵⁶ UNDP Peritaje – Ecológico y Económico, *supra* note 10, at p. 36.

- To protect cultural heritage from the adverse impacts of project activities and support its preservation;
- To promote the equitable sharing of benefits from the use of cultural heritage in business activities.

At a minimum, PS8 requires that the company consult with affected communities about impacts on their cultural heritage.⁵⁷ PS8 also provides for a general prohibition on the alteration, damage, or removal of critical cultural heritage.⁵⁸

GENISA’s Environmental and Social Summary Report indicates that one part of the project area “reveals a possible dispersed village with cultural remains and some petroglyphs of heritage value but without discarding the possibility of finding more” and that “an Intervention Protocol will be prepared.”

The 2013 UNDP Expert Assessment Report does not provide an extensive study of the petroglyphs and their value for the local communities. However, it does conclude that “the existence of petroglyphs seems to be important to them” and that “the current habitants evidently consider them a part of their ancestral culture and in the case of Kiad they use them (or used it until very recently) for baptisms.”⁵⁹ The report further indicates that there are intangible impacts of the project related to the culture of the Ngöbe communities and their traditional way of living. The petroglyphs are mentioned in this context. There is mention of the fact that “the cumulative changes in the characteristics of and the access to natural resources described can have important consequences on the way of living and culture of the Ngöbe inhabitants of the 3 communities.”⁶⁰ As the communities directly affected were not consulted about the project in general, they were also not consulted regarding the impacts of the project on their cultural heritage.

IV. Conclusion

For the preceding reasons, the complainants expect that a compliance review will show that the project is not in compliance with FMO’s policies. As a result, the complainants ask that FMO suspend any disbursement of its loan. FMO’s continued financing of the Barro Blanco as GENISA moves forward with this construction of the dam and attendant impacts to the Ngöbe constitutes a violation of Ngöbe rights, and an inappropriate use of funds from an institution that is majority owned by the Government of the Netherlands.

⁵⁷ IFC Performance Standards on Social and Environmental Sustainability, PS 8, para. 6 (2006).

⁵⁸ *Id.* at para. 9.

⁵⁹ UNDP Peritaje – Rural Diagnóstico Participativo, *supra* note 9, at pp. 29-30; UNDP Peritaje – Ecológico y Económico, *supra* note 10, at p. 37.

⁶⁰ UNDP Peritaje – Hidráulica, Resumen ejecutivo consolidado, *supra* note 10, at p. 18.