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Panama ‘Barro Blanco’ Case Report

This case report is based on research conducted in the context of the project ‘ClimAccount – Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and their possible Effects on Migration (KR13AC6K11043)’ funded by the Austrian Climate and Research Fund, ACRP 6th Call, that was implemented by the Ludwig Boltzmann Institute of Human Rights (Vienna/Austria), the University of Bielefeld (Germany) and the Wuppertal Institute for Climate, Environment and Energy (Germany).

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Editorial

In 2010 the Center on Migration, Citizenship and Development of Bielefeld University started a new conference series on “Environmental Degradation, Conflict and Forced Migration” in cooperation with the European Science Foundation and the University’s Center for Interdisciplinary Research. The new series gave opportunity to conference participants to share their research with a broader audience. The engagement of the editors in the COST Action IS 1101 on Climate Change and Migration created additional opportunities to facilitate scientific exchange and cooperation on matters environmentally induced migration from various perspectives. Amongst others this included approaching it from a human rights angle, from an adaptation to climate change perspective, or to look at it as a state-led response including planned relocation.

The scientific exchange culminated in various activities and projects including joint publications with other experts in the field such as the conference proceedings of the ESF-Bielefeld University conference series, innovative consultation processes on planned relocation in the context of climate change and climate policies, and new research projects such as “Migration, Environment and Climate Change: Evidence for Policy” (MECLEP, [www.uni-bielefeld.de/\(en\)/tdrc/ag_comcad/research/MECLEP.html](http://www.uni-bielefeld.de/(en)/tdrc/ag_comcad/research/MECLEP.html)) and ClimAccount on the human rights accountability of the EU for climate policies in third countries ([www.uni-bielefeld.de/\(en\)/tdrc/ag_comcad/research/ClimAccount.html](http://www.uni-bielefeld.de/(en)/tdrc/ag_comcad/research/ClimAccount.html)). The editors take the opportunity to present some of the research outcomes within the COMCAD working paper series on environmental degradation and migration.

Bielefeld, September 2016

Jeanette Schade and Thomas Faist

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Abstract

The case study report presents the results of the Barro Blanco case study by combining and elaborating on information and data collected during a pre-study report and data and insights gathered during field research. It analyzes the case study according to international human rights standards and applicable institutional safeguards. It also investigates to which extent public owners/shareholders of development banks can be held responsible for the implementation of climate projects.

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1. Introduction

The case study report presents the results of the Barro Blanco case study by combining and elaborating on information and data collected during a pre-study report and data and insights gathered during field research. Contrary to the pre-study report, which outlined the legal and institutional as well as the policy context first and subsequently located the Barro Blanco project within this context, the case study reports followed a more focused and inductive approach by first presenting the facts of the case and afterwards wider political and legal context which are relevant for the case study. Thereby findings and data gathered throughout previous research is comprehensively presented (empirical analysis) before turning to a narrowed down application of the relevant institutional and legal framework.

In doing so, the report aims at providing important information for answering the following key research questions:

- 1) How do the EU and its members, in particular Austria, influence and take part in the international governance structure in relation to climate policies (mitigation and adaptation) in the selected case study?
 - a. In this connection, a special focus will be laid on how the EU and Austria address adverse effects of climate policies in general and human rights infringements in the context of resettlement, relocation and displacement as a result of climate policies in particular.
- 2) Which human rights obligations of the EU and its member states, in particular Austria, towards individuals and communities in third states can be identified concerning the selected climate policies, especially with regard to those having an effect on migratory movements?
- 3) What consequences do the selected climate policies have on migratory movements from a human rights perspective?
- 4) Which gaps in the international legal and institutional framework to adequately protect people adversely affected by climate policies (with a focus on people displaced, resettled or located) can be found?

- 5) Finally, a preliminary assessment should be made on which improvements should be made for the EU and Austria to better incorporate human rights principles in their climate policies.

The report is divided into three chapters (excluding bibliography). The first aims at introducing the chosen project by not only providing an overview over the factual context, but also by highlighting the project's setting in international/regional/local policies and by giving a concise overview of the stakeholder's positions.

Chapter 2 applies earlier research and analyzes it in the given context. Please note that for easier handling, parts of Chapter 1 are repeated in this section. In particular, the Chapter aims at answering the core research questions listed above and deals in detail with the alleged human rights violations.

Chapter 3 focusses on discerning gaps in the institutional and legal framework and discussing open issues. It also offers preliminary conclusions, and functions as a first step in identifying common/different aspects and forming recommendations.

1.1 Background of the chosen project – The 'Barro Blanco' case

1.1.1 *Factual background*

Since the 1970s, there have been different plans for generating electricity on the river Tabasará, a river running through parts of Western Panama. A first project (Tabasará I, 200 MW) was proposed as early as 1973, and eventually, after being met with decade-long significant resistance, was cancelled. In 1997, a new consortium was created to develop Tabasará I and II which, however, again were never constructed after the Supreme Court suspended the project in 2000 (Panama Supreme Court, 2000) in light of the project having failed to engage in consultations and obtain the assent of the affected indigenous communities (as required by Law 41 of 1998). (ACD, 2009; Purdy, 2013)

Following amendments in the law – repealing certain requirements relating to the participation and acquiescence¹ which is to be obtained from indigenous communities (International Rivers, 2013; Velásquez Runk, 2012, p. 28) –, a new concession in 2007 was awarded to

¹ See also Section 2.2.1.2.1 in more detail.

Generadora del Istmo, S.A. (GENISA) after a public tender process to develop these projects. (GENISA, 2011, p. 8)

The envisioned hydroelectric power plant, **Barro Blanco**, is being constructed and will be operated by GENISA, a company created under Panamanian law in 2006 especially for the purpose of developing, building and operating the Barro Blanco power plant (GENISA, 2011, p. 9). Honduran-owned² GENISA is part of a Central American economic group owning more than 450 MW of installed power generation capacities in the region.

As the earlier plans for Tabasará I and II, the Barro Blanco dam is located on the river Tabasará, in the immediate proximity to an Annex area to the Comarca Ngäbe-Buglé (as created by Law 10 of 1997). The project works are located in the province of Chiriquí (district of Tolé). Once finished³, it is intended to have an installed capacity of 28.84 MW (Barro Blanco PDD, 2010), which is much less than the originally suggested Tabasará I and II projects.

The estimated project costs of Barro Blanco amounting to 78,316,800 USD are financed by the Deutsche Investitions- und Entwicklungsgesellschaft GmbH (DEG), the Netherlands Development Finance Company (FMO), and the Central American Bank for Economic Integration (CABEI) (each approximately 25 million USD). (FMO/DEG Barro Blanco Complaint, 2014) The latter replaced funding originally sought through the EIB, this loan application however withdrawn by GENISA in 2010 after learning that the EIB planned to visit the affected area after a complaint registered with the EIB CM (Complaint Mechanism). (EIB Barton, 2013; EIB CM, n.d.)

GENISA is supplied *inter alia* by ANDRITZ HYDRO Spain which provides electro-mechanical equipment (Andritz, 2013, p. 30).

In June 2011, Barro Blanco was approved as a CDM project by the CDM Executive Board under the Kyoto Protocol (CDM EB, 2011). The Designated Operational Entity (DOE) for the validation report was AENOR, the Spanish Association for Standardisation and Certification. It constitutes a category 1 project ('renewable source energy industries'). In total, it is estimated that a total reduction of emissions of 1,405,622 t CO₂ will be achieved. (Barro Blanco PDD, 2010, p. 8) For more details on this, see also below Section 1.2.3.

² The chairman of company is Luis Kafie, a Hondurian investor.

³ As of June 2016, the dam is finished and is currently being test-flooded.

9 May 2008	ANAM approves the EIA by issuing resolution DIEORA IA-332-2008. Concerning the EIA, Barro Blanco is classified as a Category III project (Estudio de Impacto Ambiental Categoría III).	
13 Dec 2008	<p>GENISA signed a Memorandum of Understanding (MoU) on leasing terms of Ngäbe land, with the Cacique.</p> <p>However, the Cacique was not backed by the Ngäbe General Congress, which makes the agreement invalid.</p>	<p>(GENISA, n.d.)</p> <p>(Banktrack, n.d.)</p>
15 Feb 2011	<p>Request for immediate intervention sent to UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya.</p> <p>‘Supuesta movilización de protesta por parte de pueblos indígenas. Según la información recibida, el 10 de febrero de 2011, la Asamblea Nacional aprobó la controvertida reforma al Código de Recursos Minerales, facilitando la inversión extranjera en la explotación minera. Panamá cuenta con el segundo mayor yacimiento de cobre del planeta, ubicado en el Cerro Colorado, el cual se encuentra dentro de la Comarca Ngäbe-Buglé. Los pueblos indígenas Ngäbe-Buglé alegan no haber sido consultados sobre la reforma de la ley, y los dos pueblos no comparten una posición común con respecto a la reforma. Se han sucedido violentos enfrentamientos entre los mismos indígenas a la puerta de la Asamblea. Las movilizaciones y confrontaciones se habrían generalizado en todo el país.’</p>	UN Doc. A/HRC/18/35/Add.1
16 Feb 2011	Construction of the dam begins. It was estimated that the construction would take approximately 28 months.	(GENISA, n.d.)
27 Feb 2011	<p>Signing of the San Félix agreement to end protests (blocking various sections of the Panamericana) after the beginning of the construction of the dam. Participants and signatories of the agreement were the government (MoG Demetrio OAOADIMITRUI), the coordinating body for the defence of the natural resources and rights of the Ngäbe-Buglé and campesinos (Coordinadora por la Defensa de los Recursos Naturales y del Derecho de los Pueblos Ngäbe, bugle y Campesino) (Chief Rogelio Montezuma).</p> <p>The government promised to initiate the creation of a law prohibiting the exploration and exploitation of mining and mineral exploration within the Comarca Ngäbe-Buglé (this in response to the controversial Law 8).</p>	(Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 43)

March-May 2011	M10 (April 10 Movement for the Defense of the Tabasará) occupies the entrance to the Barro Blanco project, hindering the continuation of the building of the dam for about two months.	(International Rivers, 2013) (CMW, 2011)
April 2011	A Tripartite Dialogue Table – 1 part government, 1 part GENISA, 1 part M10 – is formed. After a meeting on 3 May 2011, however, dialogue broke down. At that point, M10 refused to continue negotiations whilst the mayor of Tolé threatened to evict them from the encampment.	(GENISA, 2011, p. 39) (Schertow & Arghiris, 2011)
4 May 2011	GENISA applies for carbon credits.	(Schertow & Arghiris, 2011)
5/6 May 2011	M10 organises a roadblock of the Panamerican highway at the bridge over the Rio Tabasará.	(International Rivers, 2013)
31 May 2011	CIAM files a claim/lawsuit against resolution DIEORA IA-332-2008 approving Barro Blanco Hydroelectric Project before the Supreme Court of Panama.	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)
June 2011	Barro Blanco is approved as a CDM project under the Kyoto Protocol (Project 3237).	(CDM EB, 2011)
28 July 2011	GENISA publishes an Environmental and Social Summary Report on the Barro Blanco Hydroelectric Project. The report introduces the main facts of the project, elaborates on the regulatory and policy context and introduces GENISA's environmental and social management system. It further reports on key social and environmental issues including social impacts and issues and impacts on the Ngäbe Buglé indigenous community. The report (p. 12) refers to the project being developed to comply with the following international standards: <ul style="list-style-type: none"> - Social and Environmental Performance Standards (PS) of the International Finance Corporation (IFC) - WB Environmental Health and Safety Guidelines 	(GENISA, 2011)

	<ul style="list-style-type: none"> - Environmental standards of the World Commission on Dams (WCD) <p>The report also states that ‘no-one will be relocated because of the project’ (p. 18) and that despite a small part (6.7 ha) of land being flooded which belongs to the indigenous Ngäbe Buglé people, compensation having been agreed on in May 2011 with the ‘new recognized leaders’ (pp. 30-31). As argued by GENISA, the land/areas which will be lost to the project (submerged by the reservoir) are areas which are not under cultivation or used for any productive use because of the topography (p. 36)</p> <p>The following mitigation measures (pp. 37-38) were envisioned by GENISA at this stage:</p> <ul style="list-style-type: none"> - provision of alternative land if requested (would be negotiated with the Comarca authorities) - technical assistance to increase agricultural productivity and assistance in improving housing - annual income to the community for development projects through rental payments - MoU with the General Cacique (p. 39) 	
<p>25 Aug 2011</p>	<p>A compensation and benefits agreement was signed between GENISA and the Board of Directors of Regional Congress of Kädriiri (Indigenous Traditional Authority).</p> <p>But this agreement is contested as the whole congress was not present at that meeting. Moreover, consent by the General Congress has never been publicly obtained.</p> <p>Financing by DEG and FMO is approved (secured project finance loan).</p>	<p>(GENISA, n.d.)</p> <p>(Banktrack, n.d.)</p> <p>(FMO/DEG IEP, 2015, para. 25)</p>
<p>Aug/Sept 2011</p>	<p>M10 and Both ENDS as well as Urgewald hold a telephone conference with FMO and DEG, who confirm that they have followed their internal rules.</p> <p>That FMO has complied with its internal due diligence rules prior to approving the loan has also been confirmed at later stages by the Dutch government.</p>	<p>(International Rivers, 2013)</p> <p>(Ministerie van Buitenlandse Zaken, 2014)</p>
<p>5 Feb 2012</p>	<p>To protest against the project, the Ngäbe indigenous communities block the Panamerican highway.</p> <p>This also because in the promised law which led to the San Félix Agreement (see above), at its first reading, the article providing for the cancellation of commercial mining concessions already in operation within the <i>comarca</i> had been removed from the text.</p> <p>Two members of the Ngäbe community died during</p>	<p>(Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 43)</p>

	these demonstrations.	
7 Feb 2012	<p>Representatives of the Panamanian government and the Cacique Silvia Carrera signed the San Lorenzo Agreement which laid down the conditions for ending a series of indigenous protests. The agreement reportedly contains the following obligations of the government (Kearns 2012):</p> <ul style="list-style-type: none"> • Terminate all judicial prosecution of Ngäbe-Buglé representatives and other protesters • Release those who had been arrested during the protests • Compensate and attend to the needs of the family of an indigenous protester who had been killed during the demonstrations • Restore cell-phone signals in the affected areas • Withdraw police from the indigenous territories and the protest site • Re-address laws concerning mining on Ngäbe-Buglé lands • Continue mediation by catholic church • Publication of agreement • Demobilisation of the protesters from the sites • Medical attention of those indigenous protesters who got wounded during demonstrations. <p>A further part of the agreement was the decision that the UNDP would function as an observer, would enable a Technical Roundtable on Barro Blanco and carry out two missions to areas near the project.</p> <p>‘As a result of the round table on the Barro Blanco dam, the parties agreed to send a joint verification mission comprised of representatives of the Government of Panama, the United Nations and the Ngobe-Bugle <i>comarca</i> to the area to carry out a preliminary study on the impact of the project’ (para. 44)</p>	<p>(Kearns, 2012)</p> <p>(Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 44)</p>
15 Mar 2012	<p>The Coordination for the Defense of Natural Resources and the Rights of the Ngäbe Buglé Community, the National Assembly, the Government and the Traditional Authority of the Comarca Ngäbe Buglé sign an agreement which stipulates that there will be a revision of the EIA report and a Mission of field verification ‘to verify in situ aspects that were not satisfactory’ (International Rivers, 2013).</p> <p>‘The purpose of the missions was to verify the impacts that had not been addressed satisfactorily in the environmental impact assessment. The Technical</p>	<p>(International Rivers, 2013)</p>

	<p>Roundtable was seeking only to make findings of fact, and not an assessment of compliance against national or international standards.’ (FMO/DEG Barro Blanco Complaint, 2014, p. 7)</p> <p>A modified version of the mining law (Law 11, 26 March 2012) is passed.</p>	
18 May 2012	<p>Occupation of project site due to disagreements between different groups (Ngäbe traditional authorities (not recognized by the government) such as the Traditional Ngäbe Congress President Celio Guerra and the Vice Cacique Mijita Andrade and local campesinos (peasants)).</p> <p>While those in support of the Cacique Silvia Carrera maintained that the Verification should ‘document’ the degree of impact, the other fraction maintained that the project must be stopped at all costs.</p> <p>This results in delays of the verification mission, while the construction continues.</p>	(International Rivers, 2013)
23-28 Sept 2012	<p>A joint verification mission was carried out visiting the construction site of the dam and the communities of Quebrada Caña, Kiad and Nuevo Palomar.</p> <p>The group consisted of three representatives of the Ngäbe-Buglé community, three of the Traditional Authority, three representatives of the company, three representatives of the government, three representatives of the UN and a representative of the catholic church.</p> <p>They recommended that an international team of experts should carry out an independent study.</p> <p>Their report is published in December 2012.</p>	(Misión de Verificación, 2012)
Jan-Mar 2013	<p>Protests and confrontations continue.</p>	(International Rivers, 2013)
June 2013	<p>Visit by Lilianne Ploumen, the Dutch Minister for Foreign Trade and Development, to Panama.</p>	(Ministerie van Buitenlandse Zaken, 2014)
14 June 2013	<p>Request to James Anaya to meet about the Barro Blanco project during July 2013 visit to Panama was sent by CIAM, M10, AIDA, CIEL, International Rivers, Marin Interfaith Task Force, Collective Voices for Peace, ASAMCHI, Carbon Market Watch, Earthjustice, Both ENDS, Salva la Selva</p>	(CIAM et al., 2013a)
19-26 July 2013	<p>Visit of James Anaya.</p>	(Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014)

<p>29 Aug 2013</p>	<p>AIDA, CIEL and EARTHJUSTICE submit an amicus brief to the Panamanian Supreme Court of Justice supporting the lawsuit filed by Félix Wing Solís (CIAM) in the name of and representing Adelaida Miranda, Ítalo Jiménez, Eugenio Carpintero and Manolo Miranda challenging the Resolución DEORA IA-332-2008 of 9 May 2008 of ANAM.</p> <p>CIEL argues that the government of Panama violated international law by approving the Barro Blanco project without sufficiently consulting the affected Ngäbe-Buglè indigenous community and violating the obligation of obtaining free, prior and informed consent and without sufficiently investigating the impacts on their lands.</p>	<p>(AIDA, CIEL, Earthjustice Amicus Curiae, 2013)</p> <p>(CIEL Press release, 2013)</p>
<p>9 Sept 2013</p>	<p>After the December 2012 report by the verification mission (Misión de Verificación, 2012), the UN conducts a second mission under its leadership in June 2013 (Peritaje Independiente – Independent Expert Assessment).</p> <p>Following this, the UNDP releases the following three reports and an executive summary:</p> <ul style="list-style-type: none"> • The Results of the Diagnóstico Rural Participativo (Castro de la Mata, 2013a), one of the three components of the international expert assessment of the hydro-electric project Barro Blanco. The objective of this report was to find out the attitude, perception and the knowledge of the population in the areas directly influenced by the Barro Blanco project. • An Analysis of Ecological and Economic Aspects (Castro de la Mata, 2013b). The aim of this report is to independently determine the ecological impacts of the Barro Blanco project and to facilitate a better understanding of economic impacts on the local Ngäbe communities concerning natural resources. • Peritaje independiente de la presa de Barro Blanco, Panamá: informe final de la component de ingeniería hidráulica (López García, 2013): The final report on the hydraulic engineering component. The objective of this report is to carry out a study on the concrete impact of potential flooding caused by the reservoir of the Barro Blanco the dam through simulations of water flow and to determine the safety limit to ensure the welfare of ancestral lands in which the dam is built. <p>The studies concluded that the project's impacts on the environment and the Ngäbe communities in question could be mitigated but that appropriate consulta-</p>	<p>(Castro de la Mata, 2013a)</p> <p>(Castro de la Mata, 2013b)</p> <p>(López García, 2013)</p>

	tions with the indigenous peoples in question had not been carried out and that the direct and indirect impacts had not been clearly explained or understood. It went on to say that the direct impacts could certainly affect the community as a whole and should be mitigated properly.	
20 Sept 2013	ASEP informs the first of the affected Ngäbe families of eviction from their land. The notification, Edicto de Notificación AOL 262-13 from 20 September 2013, was issued to Manolo Miranda. His family of approximately 50 members would face eviction. The notice determined a compensation of \$ 4,000 Balboas (\$4,000 USD) for taking this land. (Urgent Appeal, 2014, p. 5)	(Urgent Appeal, 2014)
26 Dec 2013	On Manolo Miranda's behalf, CIAM filed a lawsuit to challenge the authorization to take family Miranda's land for the construction of the Barro Blanco project (Urgent Appeal, 2014, p. 5)	(Urgent Appeal, 2014)
7 Feb 2014	ASEP informs Mr. Manolo Miranda that the company GENISA is authorized to enter his land at 10 am on 17 February 2014. On 18 February 2014, ASEP announced that it had annulled this decision (Urgent Appeal, 2014, p. 6)	(Urgent Appeal, 2014)
18 Feb 2014	On behalf of the Ngäbe Community, M10, Earthjustice, AIDA and CIEL submit an urgent appeal to the United Nations Special Rapporteurs on adequate housing, indigenous peoples, the right to food, the human to safe drinking water and sanitation, poverty and human rights, the right to education calling upon 'the State of Panama to suspend the eviction process and dam construction until it has complied with its obligations under international law' and on 'the States of Germany and the Netherlands, as well as the member States of the Central American Bank for Economic Integration (CABEI), to suspend the financing of the project until each country has taken appropriate measures to prevent their respective development banks from violating the Ngäbe's human rights.' (Urgent Appeal, 2014, pp. 1–2)	(Urgent Appeal, 2014) (CIEL Press release, 2014)
28 April 2014	The traditional authority of the Comarca Ngäbe-Buglé, Silvia Carrera Concepción, and the General President of M10, Goejeth Miranda, file a complaint with the independent complaints mechanism of the FMO and DEG. Amongst others, they claim that they have not been adequately informed and their consent has not been sufficiently obtained in the course of the EIA commissioned by GENISA and approved by ANAM. The essence of the complaint relates to the fact that the failure to ensure the project's compliance with	(Letter to FMO complaints office, 2014) (FMO/DEG Barro Blanco Complaint, 2014)

	<p>international human rights standards violated the financing institutions standards, <i>i.e.</i> IFC's performance standards, FMO's human rights policy and the OECD Guidelines on Multinational Enterprises.</p> <p>With the support of two NGOs from the Netherlands, Both ENDS and SOMO, the contribution of which was released as Annex 1: Analysis of Policies and Procedures to the complaint letter on 5 May 2014.</p> <p>The Annex contains a project description, a presentation of the environmental and human rights impact as well as of the domestic legal proceedings. It also contains a section on admissibility criteria and a discussion of how FMO's policies are violated by the project.</p> <p>The Independent Expert Panel of the banks (DEG and FMO) have declared the complaint as admissible and decided on conducting a compliance review.</p>	
3 July 2014	<p>Release of the report by Special Rapporteur James Anaya on the situation of the rights of indigenous peoples in Panama. The report contains a section on investigation projects in Panama including the Barro Blanco hydro-electric dam.</p> <p>In the conclusions, the report recommends that in the light of the experiences of inadequate consultations of indigenous communities in the course of the development of recent hydro-electric projects (Barro Blanco, Chan 75) a framework in order to regulate consultation processes in cases of hydro-electric projects and mining which have an effect on indigenous communities should be established in coordination with indigenous representatives.</p> <p>Regarding Barro Blanco the report further says that the lands of the Ngäbe people should not be flooded nor otherwise affected without prior agreement with the representative authorities of this community on the conditions of such an inundation or on other effects. Without the agreement or consent of Ngäbe people, the state could only allow to restrict the land rights of the people under a general public interest within the framework of human rights, and only to the extent that the restriction is necessary and proportionate to the public interest.</p>	(Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014)
October 2014	<p>Fact-finding mission to Panama by the FMO/DEG complaint mechanism.</p> <p>The independent expert panel consists of Maartje van Putten, Michael Windfuhr, and Steve Gibbons.</p>	(DEG, n.d.)
9 Feb 2015	<p>Project temporarily suspended by ANAM due to failures of the EIA.</p> <p>Round table negotiations initiated once again.</p>	(ANAM, 2015)

4 May 2015	<p>The international financing institutions send a letter to Isabel de Saint Malo, vice-president of Panama, to urge Panama to continue the project.</p> <p>The government announces that the construction will be resumed, however, presumably not with GENISA. New project developers might be sought.</p> <p>The government announces at the round table dialogue that it would seek loans from international banks to change developers.</p> <p>As a consequence to this announcement, the representatives of the Comarca Ngäbe Buglé once again leave the newly-initiated round table negotiations.</p>	<p>(Arghiris & Kennedy, 2015)</p> <p>(Both ENDS, 2015)</p> <p>(Bocharel, 2015)</p>
18 May 2015	FMO confirms on its website that completing the project is commendable.	(FMO, 2015b)
29 May 2015	<p>The Independent Expert Panel (IEP) issues their report on Barro Blanco.</p> <p>FMO and DEG publish a Management Response to the report at the same time.</p>	(FMO/DEG IEP, 2015)
4 June 2015	M10 presents a letter of concern to the Dutch and German embassies in Panama and blocks the entry to the construction site for several weeks.	(M10 et al., 2015)
24 June 2015	Response of DEG to ARD 'Report Mainz' of 23 June 2015	(DEG response, 2015)
19 July 2015	After blocking the construction site for more than a month, indigenous protesters are forcibly removed from their protest camped, by parts of it being flooded through the police.	https://intercontinentalcry.org/police-subdue-indigenous-protest-camp-seize-barro-blanco-hydro-plant/
28 July 2015	The Supreme Court overruled the temporary suspension, allowing the project to continue.	<p>http://www.hydroworld.com/articles/2015/07/supreme-court-ruling-allows-work-to-resume-on-panama-s-29-mw-barro-blanco-hydropower-project.html</p> <p>http://www.telesurtv.net/english/news/Panamas-Supreme-Court-Rules-in-Favor-of-Hydroelectric-Dams-20150729-0019.html</p>
10 August 2015	Government signs agreement with the leaders of the <i>comarca</i> (represented by Silvia Carrera) to create a new technical commission responsible for the Barro Blanco project.	http://www.prensa.com/in_english/Barro-Blanco_21_4274782487.html

	<p>“The agreement focused on the creation of a team to study stabilizing the project to prevent it from impacting nearby communities. It would also continue the dialogue on the viability and feasibility of the project. The indigenous authorities and the government agreed to accept the results and conclusions of the task force, and to use them as a basis for decisions on the future of the project. The government committed to not flooding the reservoir or to initiate operations of the project until a final agreement has been reached between the parties.”</p>	
24 May 2016	<p>Test flooding commences, accompanied with the forceful removal of parts of the affected communities from their lands.</p> <p>Others remain in protest camps</p>	<p>http://www.ciel.org/news/barr-o-blanco-flooding-begins-unapproved-hydro-dam-indigenous-defenders-forcefully-evicted/</p>

1.1.2 Mapping of involved actors, institutions, policies and legislative framework

Following a brief introduction into the political context of the Barro Blanco project, the sections will provide an introduction into the involved actors of the Barro Blanco process, as well as their respective involvements throughout the project’s approval and arising conflict situation. The Chapter will begin with studying the involved actors first at the national level, then turning to the international level. As the involved civil society is composed of both national and international partners, these will be addressed as a third part. Finally, the project operator, GENISA, will be shortly introduced.

1.1.2.1 National level – Political context

Panama’s territory is divided into nine provinces: Bocas del Toro, Chiriquí, Coclé, Colón, Darién, Herrera, Los Santos, Panamá, and Veraguas. Each province is headed by a governor (local authority). In addition, there are five **comarcas**, a system of demarcated indigenous regions introduced already in 1928. Since then, the *comarcas* have evolved into bodies of autonomous administration. See in more detail also below Section 1.1.3.4.

Since the early 1990s, after decades of military governments (1968-1989) Panama has been on a path towards political and institutional change aimed at stabilising democracy. (European Commission, E/2007/482, 2007)

The wide inequality gap among Panama’s population constitutes a dominating factor. According to the European Commission’s Country Strategy Paper (2007-2013), Panama suffers serious structural problems, in particular in its rural areas. In particular, there is a lack of inte-

gration of the local population, often made up by indigenous communities, into the political and economic policies of the state (European Commission, E/2007/482, 2007).

From 2009 to 2014, President Ricardo Martinelli was the head of state and head of government. He was criticized *inter alia* for undermining the independence of the judiciary (by appointment of political allies to the Supreme Court). (Sullivan, 2012) As incumbent presidents may not stand for a second consecutive term, President Martinelli did not stand for re-election. Instead, his Vice President, Juan Carlos Varela, was elected on 4 May 2014 as the new president.

A large focus of the past government's policy programme has been the increase in energy production to boost their industrial development. The sheer number of newly granted concessions to construct and operate hydroelectric plants has been met with resistance by the affected (mainly rural) population and communities. This constitutes an important factor in the assessment of the political background of the project.

1.1.2.2 National level – human rights framework

In light of the human rights focus of the current assessment, a brief overview of the generally applicable human rights framework shall be presented at this stage. Further focus on Panama's legislative framework in particular regarding the environment and indigenous peoples will be made in the respective sections.

Panama is party to the following international human rights treaties (dates are only listed for those conventions of particular relevance to this case study): Convention against Torture (and its Optional Protocol), International Covenant on Civil and Political Rights (ICCPR) (ratification on 8 March 1977, its Optional Protocol (individual complaints procedure) was also accepted on 8 March 1977), the Convention for the Protection of All Persons from Enforced Disappearance (ICED), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Elimination of All Forms of Racial Discrimination (CERD) (ratification on 16 August 1967), International Covenant on Economic, Social and Cultural Rights (ICESCR, ratification on 8 March 1977, the Optional Protocol (individual complaints procedure) has so far not been ratified), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). (OHCHR, 2015).

Panama is also party to the Organization of American States (OAS) and to the American Convention on Human Rights (ratification 22 June 1978). It recognized the jurisdiction of the

Inter-American Court of Human Rights on 9 May 1990. Panama's constitution⁴ guarantees fundamental human rights, which are generally respected. (European Commission, E/2007/482, 2007)

Panama has so far only ratified ILO Convention No. 107, however, its laws governing indigenous affairs are among the most advanced (see also Section 1.1.3.4). However, as the Committee on the Elimination of All Forms of Racial Discrimination pointed out, there has been some concern in the past with regard to the gathering of statistical data (e.g. via means of a national census⁵) regarding indigenous peoples and Afro-Panamanians, as well as of their ability to full exercise human rights on equal terms. (CERD, UN Doc. CERD/C/PAN/CO/15-20, 2010, para. 10; HRC, UN Doc. CCPR/C/PAN/CO/3, 2008, para. 19)

1.1.2.3 National level – Institutions and legislative framework

1.1.2.3.1 *La Autoridad Nacional del Ambiente (ANAM) / Ministry of Environment (since 2015)*

The National Environmental Authority (Autoridad Nacional del Ambiente – ANAM) is the relevant key actor at the national level. ANAM was created by Law 41 of 1 July 1998 (*Ley General de Ambiente* (General Law on the Environment)) which lays down the principal norms for the protection, conservation and recuperation of the environment and the promotion of the sustainable use of natural resources. It further regulates environmental management and the integration of social and economic objectives in order to achieve a sustainable development of the country (Law 41, Art. 1). ANAM is the key regulatory authority responsible for ensuring compliance with and enforcing the laws, regulations and national environmental policy. As such, ANAM is also entitled to issue fines and sanctions. Until 2015, it was not a ministry but only an environmental authority. However, Law 41 was modified in February 2015, creating ANAM as a Ministry of Environment (Act No. 25, amending Law 41 of 1998).

As ANAM's role during the period between 2008-2015 is central, its previous structure will be analyzed in greater detail. According to Art. 5 of Law 41 (in the previous version), ANAM was established as an autonomous unit of the State dealing with the area of natural resources and environment in order to ensure compliance with and implementation of environmental

⁴ For an unofficial English translation see https://www.constituteproject.org/constitution/Panama_2004.pdf.

⁵ See in this regard also Section 2.2.

laws, regulations and national policies on environment. Among its tasks are not only to formulate national environmental policies and policies with regard to natural resources according to national development plans but also to guide, supervise and implement the execution of environmental policies, strategies and programs. ANAM delivers resolutions and technical and administrative norms in order to implement national environmental policies and policies concerning renewable energy and monitors their execution in order to prevent environmental degradation. The unit is responsible for promoting and facilitating the execution of environmental projects, if required, through responsible authorities and private organisations. It is further in charge of specifying the scope, guidelines and terms of reference for the elaboration and presentation of declarations, evaluations and environmental impact studies and of evaluating the latter and issue resolution in this regard. ANAM is also entrusted with the task to enhance the participation of the population and to create and maintain accessible and up-to-date data with regard to the environment and the sustainable use of natural resources by means of studies and provide information and analysis for technical consultation and support the National Environment Council (*Consejo Nacional del Ambiente*) as well as the environmental councils of the provinces, the *comarcas* and the districts. (Art. 5, Law 41)

In addition, ANAM has established a Climate Change and Desertification Unit which is tasked to oversee Panama's commitments under the climate change regime. ANAM is therefore also Panama's Designated National Authority (DNA). (UNFCCC, 2015)

ANAM also evaluates the (mandatory) **Environmental Impact Assessments (EIAs)**. **Concerning Barro Blanco, ANAM was responsible for approving the Environmental Impact Assessment (EIA)** via resolution DIEORA IA-332-2008 in 2008.

The key piece of legislation regulating EIAs (*estudios de impacto ambiental*) is **Executive Decree No. 123 of 14 August 2009, modified by Executive Decree No. 155 of 2011**. According to its provisions, any new project, work or activity relating to the sectors of agriculture, hunting and forestry; fishing; food and drink processing; mining; textiles and leather manufacturing; wood and paper manufacturing; recycling; energy; construction; services; tourism; and waste disposal require the submission of and EIA and approval by ANAM. There are **three categories** requiring EIAs – Category I (no significant impacts, listed in Article 16); Category II (listed in Article 16, negative partial environmental impacts can be caused); Category III (listed in Article 16, can result in significant adverse environmental impacts, deeper analysis is called for).

Concerning the EIA, Barro Blanco was classified as a Category III project (*Estudio de Impacto Ambiental Categoría III*). The EIA was later contested by CIAM and the affected communi-

ties at the Supreme Court, due to lack of proper consultation process and other procedural requirements.

Generally, only one EIA is required per project. Certain activities, however, might require additional permits in addition to the EIA, e.g. concerning activities relating to the use or discharge of water. For large-scale activities, e.g. energy, mining..., a concession, issued through the relevant regulatory authority (e.g. ASEP), is necessary.

The scope of the EIA includes impacts on human health, flora, fauna, renewable and non-renewable natural resources, protected areas, landscapes, society, and anthropological, archaeological, historic, or cultural heritage.

Since 2012 there is a special legal framework (Law 11, 26 March 2012) regarding projects which affect indigenous territories (see in more detail Section 2.2.1.2.1).

In the course of the EIA, consultations with the affected public/communities must be conducted (Art. 29(2) Executive Decree No. 123).

ANAM also signed the Letter of Approval for the Barro Blanco project's registration as a CDM project on 16 November 2009.

Over the years, **ANAM was also part to roundtable processes.**

On 9 February 2015, **ANAM** suspended the project temporarily due to breaches in the EIA, *inter alia* with regard to the agreement reached with the communities and those affected, the development of the negotiation process, the absence of an archaeological management plan approved by the National Institute of Culture (INAC) to protect the petroglyphs and other archaeological findings. (ANAM, 2015)

It then organized a dialogue table with the affected communities – with the help of the UN (Carmen Rosa Villa, High Commissioner for Human Rights of the UN, Martin Santiago, Resident Coordinator) – to reach an agreement with the parties. These negotiations are currently still ongoing.

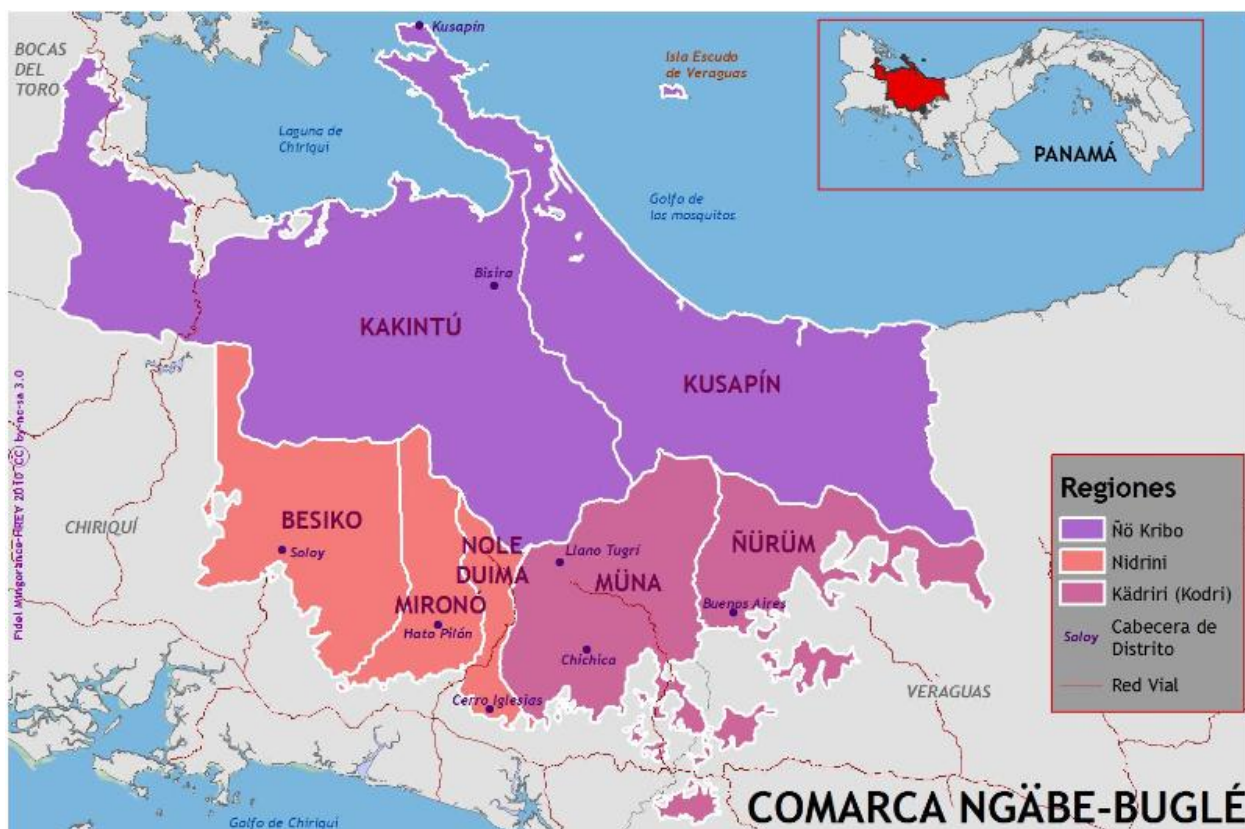
1.1.2.3.2 *Autoridad Nacional de los Servicios Públicos (National Public Services Authority – ASEP)*

ASEP was founded by Law 26 of 29 January 1996. ASEP has the competencies to regulate and control the provision of public services in the field of potable water, sewerage, telecommunication and electricity. According to Art. 19(2) of Law 26 ASEP is responsible for granting concessions, licenses and authorizations for the provision of public services in their area of

competences on behalf of the State and Art. 19(17) says that ASEP is entitled to recommend expropriations and authorize the establishment of restrictions concerning property and easements necessary for the provision of public services.

Concerning Barro Blanco, ASEP granted the concession to develop the power plant at the Tabasará river after ANAM had granted the EIA. ASEP was part of the UN dialogue which took place, which resulted in the *peritaje* verification mission.

1.1.2.4 National level - Actors from the indigenous communities and Comarca institutions



As mentioned above, Panama's territory is divided into nine provinces: Bocas del Toro, Chiriquí, Coclé, Colón, Darién, Herrera, Los Santos, Panamá, and Veraguas. Each province is headed by a governor (local authority). In addition, there are five **comarcas**, a system of demarcated indigenous regions introduced already in 1928. Detailing the Constitution, these have been established equipped with varying degrees of self-government: **Emberá-**

Wounaan⁶, **Kuna Yala**⁷ (the first *comarca*, established in 1938), **Ngäbe-Buglé**⁸, **Kuna de Madungandí**⁹ and **Kuna de Wargandí**¹⁰. (Rodríguez-Pinero Royo, 2010, pp. 331–332) The **Naso** and the **Bribri** do not have a *comarca*. Three of these *comarcas* (Emberá-Wounaan, Kuna Yala and Ngäbe-Buglé) are provincial-level territories (in addition to the nine provinces listed under Section 2.1), whereas the other two (Kuna de Madungandí and Kuna de Wargandí) are subordinated to provinces (equivalent to a municipalities).

The **Emberá-Wounaan**, **Ngäbe-Buglé**¹¹ and **Kuna de Madungandí** have their own Charters (*Cartas Orgánica Administrativa*) which were adopted by executive decree. These also form the basis for the relations of the traditional authorities with the central government and public authorities.

Since then, the *comarcas* have evolved into bodies of autonomous administration. Though Panama has not yet ratified ILO Convention No. 169 (but only the strongly assimilatory and therefore criticized ILO Convention No. 107¹²), its laws governing indigenous affairs are among the most advanced. (Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 12) The Constitution as well as the respective legal acts on the *comarcas* contain far-reaching safeguards, in particular with regard to land rights. The Constitution protects their language (Article 88), ethnic identity and culture (Article 90), education (Article 108) and land rights (Articles 124, 126 and 127). In particular, the basis of indigenous' land rights in Panama is provided by **Article 127 of the Constitution**: 'The State guarantees to indigenous communities the reservation of necessary lands and collective ownership thereof, to ensure their economic and social well-being. Procedures to be followed for obtaining this purpose, and the definition of boundaries within which private appropriation of land is prohibited, shall be regulated by law.'¹³

⁶ Law 22 of 8 November 1983, Gaceta Oficial 19976.

⁷ Law 2 of 16 September 1938, Gaceta Oficial 7873; Law 16 of 19 February 1953, Gaceta Oficial 12072; Law 99 of 23 December 1998, Gaceta Oficial 23701.

⁸ Law 10 of 7 March 1997, Gaceta Oficial 23242.

⁹ Law 24 of 12 January 1996, Gaceta Oficial 22951.

¹⁰ Law 34 of 25 July 2000, Gaceta Oficial 24106.

¹¹ Carta Orgánica Administrativa, Executive Decree No. 194, 25 August 1999, modified by Executive Decree No. 537, 2 June 2010.

¹² Indigenous and Tribal Peoples Convention (ILO Convention No. 107, 1957), in force for Panama since 4 June 1971.

¹³ El Estado garantizará a las comunidades indígenas la reserva de las tierras necesarias y la propiedad

The *Comarca* Ngäbe-Buglé, where the impacts of the Barro Blanco project are felt, was created by Law 10 of 7 March 1997. It is a provincial-level territory. The administrative structure of the *Comarca* consists of three types of authorities, as amended in 2011:

- Traditional authorities: *Cacique General*, *Cacique regional*, *Jefe Inmediato* and *Vocero* (spokesperson)
- Authorities of the *Comarca*: the presidents of the *Congreso General* (General Congress [this legal institution has the main power and makes decisions, and consists of one representative of each part/region of the *Comarca*]), *Congreso regional* (Regional Congress) and *Congreso local* (Local Congress)
- State authorities: *Gobernador Comarcal* (Governor of the *Comarca*), *Consejo de Coordinación Comarcal* (Coordinating Council of the *Comarca*), *Alcalde Comarcal* (Mayor of the *Comarca*) and *corregimientos* (municipalities) (Castro de la Mata, 2013a, p. 12)

Elections to these authorities occur through delegates. Since 2011, the *Cacique General de la Comarca* Ngäbe-Buglé is Silvia Carrera Concepción. Unlike the *Congreso General*, however, the *Cacique General* is not entitled to approve projects, but is more a traditional figure to represent the Ngäbe.¹⁴

In addition to these legally recognized institutions/authorities, there is also still a Traditional Congress (*Congreso Tradicional de Masas*), which is not recognized by the government. Elections to this Congress still occur according to ‘elections by rows’ (standing behind the candidate of choice). While the *Cacique* tried to mediate between these two Congresses at first, through political instrumentalization and disagreements on certain issues (e.g. Law 11), there have been substantial internal tensions, separating the sides.

In total, the *comarcas* amount to approximately 22% of Panama’s territory (16,634 km²). About half of the indigenous population lives within these *comarcas*. Within these regions, the respective indigenous peoples have exclusive (collective) land rights (Turner, 2011, p. 90) and a ‘certain degree of control over the use of renewable and non-renewable resources’ (Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 5). Thus, the *comarca* laws do not only regulate ownership of land but also contain provi-

colectiva de las mismas para el logro de su bienestar económico y social. La Ley regulará los procedimientos que deban seguirse para lograr esta finalidad y las delimitaciones correspondientes dentro de las cuales se prohíbe la apropiación privada de tierras.

¹⁴ As discussed also below, GENISA had the consent from the *Cacique General* Maximo Saldaña (Silvia Carrera’s predecessor) and a regional congress. However, neither of these entities had the mandate to express that consent.

sions regarding natural resources, governance, administration of justice, economic activity, culture, education and health. (Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 13) This means that the indigenous peoples retain a certain decision-making power with regard to natural resources located within the *comarcas*. The precise extent of decision-making power varies according to the respective *comarcas* legislative acts. With regard to renewable resources, this often requires the prior authorization by the affected indigenous authority. Generally less control can be exercised concerning non-renewable resources, with the prominent exception of the Ngäbe-Buglé *comarca* (and its annexes¹⁵), where a special act of legislation was implemented in 2012 (Law 11, 26 March 2012) prohibiting the issuing of mining concessions (Article 3). Moreover, Article 6 *leg.cit.* mandates the prior authorization by the '*Congreso General, Regional o Local*' with regard to hydroelectric plants. In addition, any such authorized project must transfer at least 5% of its annual revenue to the Ngäbe-Buglé community.

Despite the legal establishment of indigenous' collective land rights, concerns have been voiced by the Committee on the Elimination of Racial Discrimination with regard to expulsions and displacements affecting indigenous communities in connection with energy projects, exploitation of natural resources and tourism. (CERD, UN Doc. CERD/C/PAN/CO/15-20, 2010, para. 13) Moreover, the Committee pointed out that the consultations mandated by environmental and indigenous law (*inter alia* Article 5 of ILO Convention No. 107) concerning natural resource projects were often carried out by the private corporations carrying out these projects and not by state, and did not comply with international standards. (CERD, UN Doc. CERD/C/PAN/CO/15-20, 2010, para. 14; HRC, UN Doc. CCPR/C/PAN/CO/3, 2008, para. 21)

1.1.2.5 International level – CDM Executive Board

The Clean Development Mechanism (CDM) Executive Board is in charge to supervise the CDM. Amongst other tasks the Board is responsible for accrediting Designated Operations Entities (DOEs), registering projects (in accordance with specific procedures) and issuing Certified Emission Reduction (CER) credits earned through CDM projects.

The CDM Executive Board **approved the Barro Blanco project**. (CDM EB, 2011)

¹⁵ Article 4, Law 10 of 7 March 1997, Gaceta Oficial 23242: 'Como áreas anexas, formarán parte de la división política especial de la Comarca Ngöbe-Buglé, las comunidades ubicadas en territorio continental e insular de las provincias de Bocas del Toro, Chiriquí y Veraguas, que se describen en los límites establecidos para la Comarca.'

1.1.2.6 International level – Financing institutions

1.1.2.6.1 *Deutsche Investitions- und Entwicklungsgesellschaft GmbH (DEG)*

DEG is a wholly-owned subsidiary of the Kreditanstalt für Wiederaufbau (KfW) banking group, a promotional bank of the Federal Republic of Germany. KfW is a government-owned public entity, with 4/5th of its capital held by the federal German state and 1/5th by the Bundesländer. (eurodad, 2012) DEG was founded in 1962 and its headquarters are located in Cologne (Germany). It is managed by the three members of the Management Board, overseen by a Supervisory Board (which includes both governmental officials as well as members dispatched by private corporations and non-governmental organizations). Its equity capital amounts to € 1.9 billion. Its objective is 'to promote business initiative in developing and emerging market countries as a contribution to sustainable growth and improved living conditions of the local population' (DEG, 2015). DEG finances direct (long-term) investments with the aim to sustainably contribute to the economic development of partner countries. The bank further provides advice to companies concerning risk analysis and product development. The field of investments comprises all sectors of the economy and especially aims at enhancing access to investment financing for small and medium-sized companies. DEG almost exclusively uses own funds (DEG, 2015).

An important objective of DEG is the promotion of sustainable development. Project assessments by KfW/DEG include environmental and social impact assessments as an integral part of the appraisal process. On the one hand, this is based on the regulations/laws of the project country, and on the other hand, these provisions must be in line with international environmental, social, health, safety and labour standards. (KfW Environmental & Social Impact Assessments, 2015) To this end, DEG applies IFC Performance Standards (in the current project study, the 2006 versions are pertinent), has adopted a DEG Guideline for environmental and social sustainability (DEG Guideline for sustainability, n.d.), and applies the ILO core labour standards. The UN Guiding Principles on Business and Human Rights are also considered in its operations. (KfW DEG, 2015)

Projects are ranked into categories A, B, or C, according to their potential environmental and social risk, category A designating projects which are especially environmentally and socially sensitive. (KfW Environmental & Social Impact Assessments, 2015)

Together with the Netherlands Development Finance Company (FMO), DEG established a complaint mechanism in 2014 to provide the possibility for individuals, groups, communities or other parties to complain if they think they are or may be negatively affected by a project financed by DEG. As part of this mechanism, an Independent Expert Panel, consisting of

three international experts, was set up that decides on the admissibility of each complaints and on the proceedings afterwards (see also more information below).

DEG finances the Barro Blanco project with a loan of 25 Million USD.

1.1.2.6.2 Netherlands Development Finance Company (FMO)

The *Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V.* (Netherlands Development Finance Company – FMO) is the Dutch development bank, owned by a public-private partnership (51% of shares held by the state, 49% held by commercial banks, trade unions and other private-sector representatives). The bank was founded in 1970 and aims at financing entrepreneurs, companies, projects and financial institutions from developing countries and emerging markets. (FMO, 2015a) FMO invests in the sectors of financial institutions, energy and agribusiness, food and water.

In 2006, FMO adopted the Equator Principles and since 2000, it has been applying the IFC Performance Standards. It also has an Environmental, Social and Corporate Governance (ESG) Policy, consisting of three parts: Corporate Governance Policy; Environmental and Social Policy; and Human Rights Policy (effective as of 1 January 2013). (FMO Investment Policies, 2015)

In addition, FMO has adopted a non-legally binding, voluntary Position Statement on Hydro-power, listing the specific considerations that

- The project needs to demonstrate a significant reduction in greenhouse gas emission;
- The project must comply with the most recent IFC Performance Standards; this includes consultation with local population affected by the project;
- Specific plans needs to be available to compensate for any negative effects;
- If the adverse environmental and social impacts cannot be sufficiently mitigated, FMO will not finance the project;
- As long as FMO is involved in the project, extensive monitoring will take place by FMO and by qualified and reputable external industry experts. This monitoring includes frequent consultation with local population. (FMO Position Statement, n.d.)

Together with DEG, FMO has established an independent complaint mechanism in order to provide 'stakeholders a tool, enabling alternative and pre-emptive resolution of disputes between the latter and FMO as financier of projects involved. At the same time the Mechanism assists FMO in implementing and adhering to its own policies and procedures and as such the Mechanism is a learning-by-doing process.' (FMO, 2013) The objective of the complaints

mechanism is to ensure that ‘the costs of economic development do not fall disproportionately on those who are poor or vulnerable’ (FMO, 2013) and to acknowledge the responsibility of business to respect human rights.

FMO finances the Barro Blanco Project with a loan of USD 27.83 million.

1.1.2.6.3 Central American Bank for Economic Integration (CABEI)

The Central American Bank for Economic Integration (CABEI) is a multilateral development bank and was founded in 1960. According to CABEI’s Constitutive Agreement, the objective of the bank is ‘to promote the economic integration and the balanced economic and social development of the founding countries’ (CABEI Constitutive Agreement, 1960, Art. 2).

CABEI finances the Barro Blanco Project with USD 25 million.

1.1.2.6.4 (EIB (European Investment Bank))

The European Investment Bank (EIB), owned by the 28 member states of the European Union, *inter alia* provides financing for sustainable investment projects in Europe and beyond. Originally, financing was sought from the EIB for the Barro Blanco project. However, in 2009, a complaint was received filed by a number of stakeholders (complaint was filed by Mr. Oscar Sogandares (ASAMCI), Mr. Osvaldo Jordan (ACD) and Ms. Berediana Rodriguez (M10)), alleging non-compliance with the additionality principle of the Clean Development Mechanism, a lack of adequate consultation and assent of indigenous communities, negative environmental and social impacts of the project, and allegations concerning ANAM. (EIB SG/E/2009/11, 2009) After the EIB initiated an investigation into the project, the promoter GENISA cancelled the request for a loan before an announced visit of representatives of the EIB in order to directly meet the affected communities. (Letter to the CDM Executive Board, 2011)

1.1.2.6.5 Austrian Development Bank (Österreichische Entwicklungsbank – OeEB)

The Austrian Development Bank (OeEB) was founded in 2008 and is a wholly-owned subsidiary of *Oesterreichische Kontrollbank*. OeEB invests in developing countries and emerging markets by providing long-term investment loans, taking equity participations in companies and banks and financing advisory programmes.

There is no direct link between OeEB and the Barro Blanco project. However, OeEB finances CABEI with a long-term credit line of 30 million Euro contributing to infrastructure projects with a focus on renewable energy in Central America. (OeEB projects, n.d.)

The OeEB adheres to the ecological and social standards agreed on by the EDFI (European Development Finance Institutions). Thus, same as FMO and DEG, the IFC Performance Standards, the Environmental, Health and Safety Guidelines of the World Bank, and the core ILO Conventions. (OeEB Standards, 2015)

1.1.2.7 International level – Involved in dispute resolution

1.1.2.7.1 *United Nations Development Programme (UNDP)*

UNDP is the UN development network operating in 177 countries in order to support countries and regions to achieve human development and reach the Millennium Development Goals (MDGs). UNDP work focuses on four main fields: poverty reduction and achievement of the MDGs, democratic governance, crisis prevention and recovery, and environment and energy for sustainable development.

Concerning the Barro Blanco project, UNDP has not only chaired a Technical Roundtable to discuss possible solutions but also took part in the verification mission to the affected communities and commissioned investigations as well as subsequently published reports presenting the results of the investigations (Castro de la Mata, 2013a, 2013b; López García, 2013).

It also remains involved to a lesser degree in ongoing negotiations.

1.1.2.7.2 *Special Rapporteur on the rights of indigenous peoples*

The Special Rapporteur on the rights of indigenous peoples was introduced by the UN Commission on Human Rights in 2001. Its mandate was renewed by Human Rights Council Resolution 15/14 in 2010. Under its tasks fall, *inter alia*:

(b) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples;

(c) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the rights of indigenous peoples;

(f) To develop a regular cooperative dialogue with all relevant actors, including Governments, relevant United Nations bodies, specialized agencies and programmes, as well as indigenous peoples, national human rights institutions, non-governmental organizations and other regional or subregional international institutions, including on

possibilities for technical cooperation at the request of Governments;’ (Human Rights Council, UN Doc. A/HRC/RES/15/14, 2010, Art. 1)

Accordingly, the former Special Rapporteur on the rights of indigenous peoples, S. James Anaya, who was in office from 2008 until 2014, visited Panama in 2013 and conducted an independent investigation on the rights of indigenous peoples in Panama. He was also requested by national and international NGOs to visit the Barro Blanco site and affected communities. (CIAM et al., 2013a) In the report that was published after his visit, the Special Rapporteur not only elaborated on the effects of investment projects such as hydro plants on indigenous communities in general but also on the case of Barro Blanco in particular (Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014).

In the conclusions, the report recommended that in the light of the experiences of inadequate consultations of indigenous communities in the course of the development of recent hydro-electric projects (Barro Blanco, Chan 75) a framework in order to regulate consultation processes in cases of hydro-electric projects and mining which have an effect on indigenous communities should be established in coordination with indigenous representatives.

Regarding Barro Blanco the report further said that the lands of the Ngäbe people should not be flooded nor otherwise affected without prior agreement with the representative authorities of this community on the conditions of such an inundation or on other effects. Without the agreement or consent of Ngäbe people, the state could only allow to restrict the land rights of the people under a general public interest within the framework of human rights, and only to the extent that the restriction is necessary and proportionate to the public interest. (Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014)

1.1.2.8 Civil Society institutions/Non-Governmental Organisations

Aside from national indigenous mobilization, Barro Blanco has also been in the limelight of international civil society campaigns. The case stands exemplary for the effects that the implementation of international development and climate policies can have. In addition, the national NGOs involved have understood to raise the awareness of international NGO partners in an attempt to create international pressure on the involved international and European institutions. The following focusses on the most important NGOs involved, both at the national and international level, detailing how they have been involved in the course of the Barro Blanco campaign.

1.1.2.8.1 *Alianza para la Conservacion y el Desarrollo (ACD)*

The Alianza para la Conservacion y el Desarrollo (ACD), founded in 1999, is a non-governmental organisation and works for sustainable development and human rights. The organization works with indigenous, Afro-descendant and peasant groups throughout Panama to assist these groups with community development and environmental justice work, in addition to providing support to these groups in bringing complaints before international bodies (ACD, 2009).

With regard to Barro Blanco, ACD – through Osvaldo Jordan –, helped with mobilization and international awareness-raising. In addition, ACD *inter alia* filed comments to the CDM Executive Board and to the EIB complaint mechanism.

1.1.2.8.2 *Centro de Incidencia Ambiental – Panama (Environmental Advocacy Center (CIAM))*

The Environmental Advocacy Center Panama is a NGO with a focus on environmental and social rights. It aims at promoting the protection of the environment, enhance the participation of the citizens, amongst others by disseminating information, developing networks and drafting reports in order to influence political decisions (CIAM 2012, 4).

The NGO is committed to continue and improve the support of communities which are or might be affected by hydro energy project. It assists those communities to raise awareness among the population in general and the responsible authorities. In relation to Barro Blanco, CIAM has

- Filed a lawsuit against the resolution issued by ANAM which approved the EIA
- Filed a lawsuit to challenge the authorisation by ASEP to take land from the Ngäbe communities
- Supported the affected indigenous communities to file a complaint against FMO, the Dutch development bank, for financing the BB project. (FMO/DEG Barro Blanco Complaint, 2014)

1.1.2.8.3 *Center for International Environmental Law (CIEL)*

The Center for International Environmental Law (CIEL) is an association consisting of international attorneys. Among its tasks are giving legal counsel and advocacy, carrying out policy research and enhancing capacity building in the fields of biodiversity, chemicals, climate change, human rights and the environment, international financial institutions, law and communities and trade and sustainable development. CIEL was founded in 1989 and is based in Washington DC and Geneva.

With regard to Barro Blanco, CIEL *inter alia* filed the 2013 *amicus curiae* brief with AIDA and Earthjustice. (AIDA, CIEL, Earthjustice Amicus Curiae, 2013)

1.1.2.8.4 *Earthjustice*

Earthjustice is a non-profit environmental law organisation with headquarters in San Francisco and nine regional offices. The organisation was founded in 1971. Earthjustice works primarily with strategic litigation (about 300 cases per year), but is also active in the field of public awareness-raising, lobbying to influence policy making and legislation as well as building international partnerships. Its main objectives include preserving the wild, fighting for healthy communities and advancing clean energy and a healthy climate.

With regard to Barro Blanco, Earthjustice *inter alia* filed the 2013 *amicus curiae* brief with AIDA and CIEL. (AIDA, CIEL, Earthjustice Amicus Curiae, 2013)

1.1.2.8.5 *Asociación Interamericana para la Defensa del Ambiente (AIDA)*

AIDA is a non-profit environmental law organisation and was founded in 1998. It ‘works across international borders to defend threatened ecosystems and the human communities that depend on them.’ (AIDA, 2015) AIDA’s mission is ‘to strengthen people’s ability to guarantee their individual and collective right to a healthy environment, via the development, implementation, and effective enforcement of national and international law.’ (AIDA, 2015) To this end, AIDA works together with local groups, lawyers and scientist. The organisation is not only limited to legal work, it also launches education and alliance-building initiatives in order to enhance knowledge and raise awareness. It further drafts and distributes reports on key environmental issues, aims at influencing policy makers in international institutions and tribunals and supports other non-profit organisations working in the field of environmental issues. The following basic principles are crucial for AIDA’s work: encouraging transnational collaboration, protecting human rights, cultivating the power of international law and encouraging citizen enforcement and public participation (AIDA, 2015).

With regard to Barro Blanco, AIDA *inter alia* filed the 2013 *amicus curiae* brief with CIEL and Earthjustice. (AIDA, CIEL, Earthjustice Amicus Curiae, 2013)

1.1.2.8.6 *Movimiento 10 de abril para la defensa del Rio Tabasará (M10)*

M10 is a grassroots organisation created as a consequence of protests of the communities around the Tabasará River against a proposed hydro-electric project (Tabasará I) preceding the Barro Blanco Project. On 10 April 1999 the protests culminated in the arrest of several activists of the Ngäbe community. The project to build Tabasará 1 was abandoned. Com-

memorating these events, the movement was called *Movimiento 10 de Abril* (Arghiris, 2011). Since then, M10 has been active in all the protests against Barro Blanco not only on a local level by organising blockades and demonstrations but also on a national and international level by filing complaints and – as being composed mainly of representatives of the affected indigenous communities and, thus, directly affected by the dam – lawsuits.

Another organisation (M22 – *Movimiento 22 de Septiembre*, led by the cacica regional del área de Kodrini, Clementina Pérez) has also become involved in the protests and has organized a number of roadblocks. M22 is also opposed to return to the ongoing negotiations (June 2015). (Aizprúa, 2015)

1.1.2.8.7 *Fundación para el Desarrollo Integral, Comunitario y Conservación de los Ecosistemas en Panamá (FUNDICCEP) and La Amistad, Conservación y Desarrollo (AMISCONDE)*

FUNDICCEP is a NGO which carries out environmental programs aiming at the conservation and protection of protected areas and supports social and community action to promote sustainable development. FUNDICCEP actively and dynamically participates in different sectors of civil society, government institutions and partner organisations. Since 2007, they have been active on the topic of hydroelectric power plants.

AMISCONDE is a binational initiative (Costa Rica and Panama) in order to protect natural resources and enhance sustainable development. It is generally concerned with the hydro-project development policy of Panama, in particular in the Chiriquí province.

Regarding Barro Blanco, they have sent letters to the international financing institutions, and framed their concerns inside the national political framework, pointing out that Barro Blanco was not an isolated situation.

1.1.2.8.8 *Both ENDS*

Both ENDS is an independent NGO based in the Netherlands with the objective to work for a sustainable future. Through the coalition Counter:Balance, they became involved in the international campaign against Barro Blanco.

Both ENDS has visited the Barro Blanco project site (in 2013) and has co-written the Annex 1: Analysis of Policies and Procedures of the Barro Blanco Project submitted to the FMO complaint mechanism on 5 May 2014. (FMO/DEG Barro Blanco Complaint, 2014)

1.1.2.8.9 Center for Research on Multinational Corporations (SOMO)

The Center for Research on Multinational Corporations (SOMO) is an independent non-profit organisation focusing on doing research and network activities on social, ecological and economic issues. It carries out research on multinational corporations and the consequences of their activities for people and the environment worldwide.

SOMO has co-written the Annex 1: Analysis of Policies and Procedures of the Barro Blanco Project submitted to the FMO complaint mechanism on 5 May 2014.

1.1.2.9 Construction and supplier companies

1.1.2.9.1 Generadora del Istmo, S.A. (GENISA)

As mentioned above, GENISA is the construction company created for the implementation and operation of the Barro Blanco project. The company was founded in 2006 and 'is part of a Central American economic group that directly owns a total of 485 MW of installed power generation capacity in the region through its sister companies: Pan-Am Generating Ltd. and Luz y Fuerza de San Lorenzo S.A. de C.V.' (GENISA, 2011, p. 9) The execution of the project is carried out by an Engineering Procurement construction contractor, responsible for detailed design of the project and for the construction under the supervision of GENISA (GENISA, 2011, p. 7).

1.1.2.9.2 Andritz

The ANDRITZ GROUP is an international technology company with headquarter in Graz, Austria, and produces and globally supplies plants, equipment and services for hydropower stations (Andritz Hydro), Pulp and paper industry (Andritz Pulp & Paper), Metalforming and steel industry (Andritz Metals) and solid/liquid separation in municipal and industrial sectors (Andritz Separation).

Its subsidiary ANDRITZ HYDRO Spanien is responsible for providing the technological equipment, the engineering, production, transport as well as installation and start-up of two Kaplan turbines and generators as well as one Francis turbine, a throttle valve and a generator to the Barro Blanco project (Andritz, 2013, p. 30).

1.2 International/regional/local climate change policies

The Republic of Panama (with a population of 3.5 million people), forming the connecting point between Central and South America, is a middle-income state, with a stable economy and modern financial sector. Constituting one of the most biologically diverse countries in the world, approximately 40% of its territory is forested (FAO, 2015). In addition, more than 10%

of the population is indigenous. Its geographic and demographic features show similarities to its neighbours, making it a typical example of a middle-income nation that will have to address climate change increasingly in the years to come.

However, Panama's history, economy and politics are also unique, partly also owed to its geographic importance due to the Panama Canal. (Gordon, 2009, pp. 133–134) Though possessing one of the highest per capita incomes in Central America, it has a high percentage of poverty among its population (27,6% in 2011) (World Bank Data, 2015).

Panama is ranked 14th among states which are most exposed to multiple hazards based on land (floods, storms, droughts,...). The vulnerability of both its human and ecological systems is threatened to increase due to the effects of climate change (World Bank, 2011). Climate change not only threatens Panama's agricultural production, biological diversity and industrial economy, but through direct (e.g., rising sea levels threatens the San Blas Archipelago, forcing the Kuna people to relocate to the mainland (Minority Rights Group International, 2010)) and indirect effects (e.g., through implementation of national policies on renewable energy production (*inter alia* hydroelectric projects)) will lead to the displacement of particularly vulnerable communities.

1.2.1 UNFCCC level cooperation

The UNFCCC entered into force for Panama on 21 August 1995 (Law No. 10 of 12 April 1995). Panama is a non-Annex I party to the Convention, thus without specific emission reduction targets. The Kyoto Protocol entered into force on 16 February 2005, Panama having already ratified it on 5 March 1999. (Law No. 88 of 30 November 1998)

Panama's **focal point for the UNFCCC** is the Ministry of Environment (formerly the National Authority on the Environment (ANAM, created through Law 41 of 1 July 1998)). In 2002, ANAM established the **National Climate Change Program** with Resolution No. AG 0583-2002, consisting of four sub-programs: **mitigation, vulnerability and adaptation, fulfilment, awareness**. It has so far published two National Communications on Climate Change. According to its Second National Communication on Climate Change, one of its main foci has been to institutionalize the issue of climate change. This has laid the basis for developing national structures and policies. In 2007, the **National Policy on Climate Change** was adopted (Executive Decree No. 35 of 26 February 2007), providing a framework for the public and private sector as well as civil society activities. The National Strategy builds upon principles common to the climate change system (common but differentiated responsibility, present and future generations), recognizing that it must be mainstreamed into its national development strategy (Principle 1(4)), under participation of its citizens.

The implementation of this policy resulted in the incorporation of the National Climate Change Coordination Technical Unit (UTNCCC – Unidad Técnica Nacional de Coordinación de los temas relacionados con el Cambio Climático, Resolution No. AG-0280-2004) into ANAM. This shall function as an international link with climate change governing bodies, *inter alia* the UNFCCC, the IPCC and the Global Climate Observing System (GCOS – Sistema Global de Observación del Clima). In 2009, the National Committee on Climate Change in Panama (CONACCP) was established to support ANAM in the implementation and monitoring of the National Climate Change Policy (Executive Decree No. 1 of 9 January 2009, modified with Executive Decree No. 52 of 2013). It consists of 27 members, including several ministries, e.g., the Ministry of Agricultural Development, of members of the private sector, and from academia.

With regard to **mitigation** activities, the national policy stipulates that the implementation of development projects pertaining to a number of sectors, *inter alia* renewable energy, and which fall within the Clean Development Mechanisms shall be promoted. For this purpose, a national strategy should be developed. Moreover, there shall be efforts to promote and obtain financial resources through the foreign service of industrialized states which are committed to reduce omissions for the project establishment. Also, the strategy foresees that **regulatory procedures** are developed for the formulation, development and cycle of the CDM project.

In addition, a **Participatory Action Plan** (Plan de Acción Participativo) shall be developed and implemented, covering the public sector, civil society and academia. In particular, the national strategy stipulates that the environmental authority is responsible for ensuring the informed participation of the affected local actors (local authorities, communities, NGOs and social groups).

As of July 2015, ANAM's website lists 20 Project Design Documents (PDDs) and 40 Project Idea Notes under their CDM activities (ANAM PDD, 2015). UNFCCC's website lists 21 projects (UNFCCC CDM, 2015). Panama's stable investment climate serves as a beneficial factor in this context. (Jung, 2005) In addition, due to Panama's growing economy and modernization process, there is an increased need of energy.

There are several steps which need to be fulfilled in order to become a CDM project, *inter alia* the necessity to submit the proposal/project idea to ANAM as the Designated National Authority (DNA). Further, a Designated Operational Entity (DOE) needs to be identified, which assists in the development of the project. Then, a national letter of approval (LoA) must be requested from ANAM for the project registration with the CDM Executive Board

(Resolution AG-0155-2011 lists national requirements such as the filling out of a project idea document (PIN), including a detailed project description as well as the listing of benefits or negative consequences for affected communities). (ANAM PDD, 2015)

The project then is validated by the DOE. During the implementation of the project, the project developer is responsible for monitoring that the project is in compliance with the PDD. After the project is completed, the DOE verifies that it reduces emissions as anticipated. This validation report is issued together with a request for releasing the Certified Emission Reductions (CERs) to the CDM Executive Board, who approves the request and issues the CERs.

The majority of registered CDM projects in Panama relate to the hydroelectric power sector (ANAM PDD, 2015, Proyectos MDL por Tipo), the most important renewable energy sector in Panama. Panama's electricity production sector was privatized in the late 1990s. Since then, more than 60 hydroelectric projects have been constructed and are planned, respectively, expecting to produce approx. 1373 MW electricity. As of 2012, almost 1200 MW were being produced, amounting to more than 50% of Panama's net energy generation (EIA, 2015). Electricity production concessions are granted by the National Public Services Authority (Autoridad Nacional de los Servicios Públicos, ASEP) (Art. 9, Law No. 6 of February 3rd 1997, with amendments¹⁶, which establishes the institutional and regulatory framework for the electric utility sector in the Republic of Panama).

A third of these projects are in some stage of the CDM process. They are also part of a policy supported by fiscal incentives for renewable energy developments (in particular hydroelectric generation of energy) (Law No. 45 of 4 August 2004, modified by Law No. 57 of 2009, and regulated by Executive Decree No. 45 of 10 June 2009).¹⁷

Only recently has Panama begun implementing further legislation on energy efficiency, e.g., Executive Decree No. 36 of 1 March 2007 which implements a national policy on cleaner production.

¹⁶ For an unofficial English translation, see [http://www.energia.gob.pa/pdf_doc/MarcoLegal/D-Ingles/Law6-1997-Unified-Text\(OG26871-C\)ver111215.pdf](http://www.energia.gob.pa/pdf_doc/MarcoLegal/D-Ingles/Law6-1997-Unified-Text(OG26871-C)ver111215.pdf).

¹⁷ For example, hydroelectric power plants up to 10 MW are not subject to distribution or transmission charges when selling directly or occasionally. Projects are exempted from certain taxes, e.g. all imports of equipment, machinery, materials,... up to 500kW installed capacity. Moreover, there are further fiscal incentives for larger energy projects, equivalent up to 25% of direct investment, based on equivalent tonnes of CO₂ emission reductions per year. (Giardinella, Baumeister, & Da Silva, 2011). For an unofficial English translation, see <http://repository.unm.edu/bitstream/handle/1928/12339/Law%2045%20-%20Renewable%20Energy%20Promotion.pdf?sequence=2>.

1.2.2 Regional level climate change cooperation

Panama is a member state to regional organizations which focus on combatting climate change. In particular, Panama is party to the Central American Integration System (SICA) and to the Central American Commission on Environment and Development (CCAD). The latter is a Committee which is formed by the environmental ministries of SICA member states.

In 2010, these two bodies jointly issued a **Regional Strategy on Climate Change** (ERCC). The document goes back to the 2008 **San Pedro Sula Declaration**, which *inter alia* stated that there was a need

‘to incorporate climate change as a transversal and high-priority topic in national development plans and strategic and operational plans at institutions that form part of the governments of our countries.’

In the Regional Strategy, it is held that studies from 2007 show that the eight SICA states (Belize, Dominican Republic, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica and Panama) together only emit approximately 0.5% of all GHG emissions, but also make up one of the most vulnerable regions to climate change. Hence, ‘the region’s priority is to reduce its vulnerability by increasing adaptation and promoting voluntary initiatives to contribute to global mitigation efforts.’ (CCAD/SICA, 2010, p. 12)

The Regional Strategy has six strategic areas:

1. Vulnerability, adaptation to climate change and variability and risk management
2. Mitigation
3. Capacity building
4. Education, awareness, communication and citizen participation
5. Technology transfers
6. Negotiations and international support

Strategic area 2 (mitigation) contains a number of measures to encourage mitigation measures. The operational objective stipulates that the states shall

‘Use funds for mitigation in the context of the UNFCCC and opportunities in different carbon markets to promote programs in renewable energy, energy efficiency and energy savings; sustainable transportation; forest conservation and extension of forest lands; sustainable agriculture; and solid, liquid, industrial and agricultural waste treatment to capture methane.’

To put this into action, they shall *inter alia* review and adjust their regulatory frameworks to permit greater investments in renewable energy projects. (CCAD/SICA, 2010, pp. 64 ff.)

Panama is also one of 25 member states of the **Association of Caribbean States** (ACS). The ACS has initiated SHOCS (Strengthening Hydro-Meteorological Operations and Services in the Caribbean SIDS), which aims at helping member states to better prepare for climate change. (ACS, 2015)

Furthermore, Panama takes part in the long-standing political forum of Latin America and the Caribbean, *i.e.* the **Forum of Ministers of the Environment of Latin America and the Caribbean**, institutionalized since 1982. In March 2014, they issued the **Declaration of Los Cabos** (Forum of Ministers of Latin America and the Caribbean, 2014), reaffirming climate change as one of the priority areas and noting ‘with great concern the increasing adverse impacts of climate change on our region, given its vulnerability, that requires urgent responses by all countries respecting their common but differentiated responsibilities and respective capabilities in an effective international response, including the provision of new, additional, adequate and predictable financing by developed countries and other relevant actors, to address the responses on the need to adapt to and mitigate climate change.’

1.2.3 Barro Blanco CDM Project No. 3237

The Barro Blanco project obtained the letter of approval by ANAM for filing for registration under the CDM mechanism on 17 November 2009. (AENOR, 2011, p. 9) The Designated Operational Entity (DOE) for the validation report was AENOR, the Spanish Association for Standardisation and Certification. It constitutes a category 1 project (‘renewable source energy industries’).

According to the validation report, they verified during their visit that the ‘[l]ocal communities (Veladero, Cerro Viejo, Palacios and Bellavista) have been consulted and have demonstrated their support for the development of the Barro Blanco Hydroelectric power plant Project by signing the corresponding minutes of the meetings.’ (AENOR, 2011, p. 24) As to comments by stakeholders, the report refers to one comment submitted by Mr. Osvaldo Jordan during the first period for commenting, on behalf of ACD, which was received during this period. AENOR then stated that after speaking to the DNA of Panama and the ‘main communities involved in the area’, these had ‘agreed that the project will bring work and development to the area, and all of them supported the development of the project. No negative feedback was received.’ (AENOR, 2011, p. 24)

Due to a change in methodology, there then was another period for comments regarding a new version of the PDD, and during that period, no comments were received. (AENOR, 2011, p. 24) Thus, AENOR concluded that it could recommend the Barro Blanco project for registration. A number of NGO reports indicate, however, that comments had been sent also during the second period, and their receipt had been confirmed. Yet, no response was given on these comments by AENOR and the comments do not appear on the UNFCCC's website. (Jordan, Sogandares, & Arjona, 2011)

In June 2011, Barro Blanco was approved as a CDM project by the CDM Executive Board under the Kyoto Protocol (CDM EB, 2011). Prior to the approval, supplementary information on the additionality of the project was sought by the Executive Board (CDM Barro Blanco, 2010), not however on the stakeholder involvement or on any specific measures were taken in response to the information gathered. In total, it is estimated that a total reduction of emissions of 1,405,622 t CO₂ will be achieved. (Barro Blanco PDD, 2010, p. 8)

1.3 Stakeholders' positions

This sections presents the positions of local/regional and international stakeholders – in particular as regards alleged human rights violations (with particular focus on migration/displacement/resettlement)

This reflects *inter alia* information gathered in interviews/focal groups, but also information gathered during the pre-study report.

1.3.1 Participation/consultation/consideration in project

The majority of complaints focus on whether and how the affected indigenous communities were informed and consulted in the course of the project implementation.

According to the affected communities, they were not properly consulted before the start of the project. There are severe allegations that fundamental flaws were attached to the legally mandated public forum to be held prior to the approval of the EIA. Aside from claims that the affected indigenous communities were not actually invited to the forum (which was held in Tolé on 8 February 2008, a non-indigenous town located outside of the *comarca* and several hours away from where the communities live), the few who did acquire information about the public forum through contacts in Tolé were not allowed to enter the room. The police was called to prevent them from gaining access. Also, the public forum was held in a small venue, meaning that even once they were permitted to enter, only five persons were allowed to actually enter the room and listen. Moreover, the information dispatched did not fulfil minimum standards considering indigenous consultation procedures.

Additionally, the affected communities maintain that the consent obtained from the former Cacique General Maximo Saldaña by the project operator, GENISA, had not been authorized by the General Congress, and their consent had never been obtained. (see, *inter alia*, chiriquinatural, n.d.; FMO/DEG Barro Blanco Complaint, 2014)

According to the lending institutions as well as their governments, the necessary steps to conduct a consultation process were taken. According to the German parliamentary secretary Hans-Joachim Fuchtel (in response to a parliamentary inquiry), this has been in compliance with the applicable standards at the time. As he noted, the pertinent IFC standards (2006) at the time required for free, prior and informed consultations (and not free, prior and informed consent). As also the Dutch Minister for Foreign Trade and Development stated, stakeholders were involved in the consultation process. (Ministerie van Buitenlandse Zaken, 2014) As the project concerned a part of the annexed area of the *comarcas* Ngäbe-Bügbe, an agreement had been reached with the regional administration, which was however not accepted by three directly affected villages. (Fuchtel, 2015a) These villages felt that had not been involved in the consultation process, despite talks being facilitated by the UNDP and the Catholic Church. (Ministerie van Buitenlandse Zaken, 2014)

The DEG and FMO Management Response to the Independent Expert Panel's Compliance Review Report also acknowledged that despite an agreement which had been reached with a regional congress and the *Cacique*, the legitimacy thereof had been questioned by other representatives of the indigenous community. (DEG and FMO Management Response, 2015)

Regarding the environmental and social effects of the project, it was affirmed that the Environmental and Social Summary Report conducted by the project operator, GENISA, had been in compliance with the pertinent standards. (GENISA, 2011) Moreover, the German parliamentary secretary emphasized that the effects of the envisioned project will be locally limited, as was also confirmed by the UN *peritaje* reports. (Fuchtel, 2015a)

According to the project operator, the legally mandated public forum was held on 8 February 2008, after being advertised through newspaper, radio, fliers and posters. Fifty people attended. Also in 2008, GENISA signed an agreement with the Cacique General Maximo Saldaña for the use of the territory. After disagreements on the legitimacy of his mandate to do this, GENISA obtained consent by the Regional Congress of the communities (Kadriri) being affected in 2011. This agreement had later been ratified by the Comarca General Congress on 29 December 2011 (Swyter, 2013). Moreover, GENISA asserted that no displacement would occur due to the flooding. (GENISA, 2011)

According to independent reports by institutions, there was/is an apparent lack of information on the project. The *peritaje* report by the United Nations stated in this regard that ‘es obvio que los pobladores des estas comunidadedes no han sido consultados en forma correcta.’ (Castro de la Mata, 2013a, para. 96) Consequently, the members of the affected communities did not understand with full clarity the potential impacts of the project, and were susceptible to false rumors in this regard, creating anxiety and fear. (Castro de la Mata, 2013a, paras. 96-100)

The former Special Rapporteur on the rights of indigenous peoples, James Anaya, remarked in this regard that there was a ‘lack of an appropriate governing framework for consultations with indigenous communities’ in Panama. Thus, ‘consultations were carried out in an improvised manner’, and the processes ‘were unsatisfactory, partly because the enterprises involved undertook to carry out the consultations on their own and failed to work with the peoples concerned through their representatives.’ (Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 41)

The report by the IEP [see also in more detail under Section 1.4.3] stated in this regard that there were ‘serious questions as to whether the lenders could be satisfied that the consultations with the affected communities have been conducted in a format and intensity (good faith negotiations) that is required by IFC PS7.’ (FMO/DEG IEP, 2015, para. 14)

According to civil society, the consultation process was significantly flawed and did not correspond to national or international requirements. (CIAM et al., 2013b) This relates not only to the EIA procedure conducted by GENISA and ANAM, but also to the validation process by AENOR (Letter to the CDM Executive Board, 2011; Sogandares, 2012). In the course of the *amicus curiae* submission to the Supreme Court of Panama on the issue of the validity of the conducted EIA, AIDA, CIEL and Earthjustice detail to some extent how the procedure failed to apply the pertinent international standards as developed within the UN and also reflected in the jurisprudence of the Inter-American system. They point to three essential safeguards: the obligation to make an appropriate and participatory process that ensures the right to consultation (the consultation has to be conducted prior, in good faith and in order to reach an agreement, has to be adequate and accessible, includes an independent and objective study of the environmental and social impacts, and is informed); the obligation to carry out an EIA; and to share the benefits with the affected people. (AIDA, CIEL, Earthjustice Amicus Curiae, 2013) The *amicus curiae* submission concludes that Panama failed to comply with this, as they did not obtain the free, prior and informed consent of the Ngäbe-Buglé before ANAM has issued its resolution approving the EIA; the EIA was not complete as it did not assess all the impacts of the project; the approval procedure of the EIA

frustrated the enjoyment of the right to information of the affected communities and did not guarantee their effective participation; the authorities failed to adequately monitor the development of an appropriate EIA. (AIDA, CIEL, Earthjustice Amicus Curiae, 2013)

1.3.2 *Due diligence assessments / monitoring*

A further key issue in the present case is concerned with how the financing institutions exercised their due diligence obligations to assess potential negative environmental and social impacts and to which extent they monitored compliance with applicable standards throughout the project implementation phase.

According to the affected communities, the assessments of environmental and social impacts were never complete. The Ngäbe ‘depend on their land and natural resources for their physical, socio-economic, and cultural survival’ (FMO/DEG Barro Blanco Complaint, 2014, p. 3) With regard to the use of the river, it is used both for the provision of food and water, as well as for religious purposes (Mama Tata religion). Any agreement claimed to have been reached in advance by the project operator was not in accordance with their internal decision-making structure, thus lacking legitimacy. The challenge of the legitimacy of the consent obtained had also been sent to the lenders by the communities.

According to the lending institutions as well as their governments, the process fulfilled any prior due diligence obligations, including human rights commitments. (Ministerie van Buitenlandse Zaken, 2014) Barro Blanco is ranked as a category A project (Fuchtel, 2015a), *i.e.* being especially environmentally and socially sensitive. As is the practice in such circumstances, an international consultant¹⁸ – which included an indigenous expert as part of the monitoring team (Kopp, 2013) – was hired to monitor compliance with the applicable standards prior to financing and during the financing period. According to the parliamentary secretary, this was confirmed. (Fuchtel, 2015a) Moreover, he elaborated that while there were governmental officials on the supervisory board of DEG, due to confidentiality reasons and their personal mandate in exercising that function, they could not provide any information on what knowledge they had of the problematic issues. The government as such therefore did not have any information of violations of social or environmental standards. (Fuchtel, 2015a)

¹⁸ Hatch consultancy (the senior auditor for IFC standards in the Barro Blanco project was Mauricio Inostroza Rifo, from May 2010-January 2013).

The DEG and FMO Management Response acknowledged that they had not been fully appraised at the time of credit approval but stated that they had engaged technical advisors to support the process during due diligence and the construction period. (DEG and FMO Management Response, 2015)

According to the project operator, the suspension of the project came surprising as it was of the opinion that it had fulfilled all requirements and periodic monitoring was taking place. (GENISA, n.d.)

According to independent reports by institutions, the initial project impact assessments were not complete. This concerned in particular the initial statement by the project operator's assessment that there would be no need for any physical displacement. This was accepted by the government and lenders as such (See also Section 1.3.4).

The IEP's report emphasizes at several passages that the lenders were not fully appraised of several issues (environmental and social impacts, indigenous peoples, cultural heritage, biodiversity and ecosystem impacts) at the time of approval. However, by the time of the first disbursement of funds, this had partially been remedied. With regard to some issues (EIA process, or how the government deals internally with issues such as land or cultural heritage), the report comes to the conclusion that there was little else the lenders could have done at the early stages.

The IEP's report also comes to the conclusion – after presenting an overview of the phases of due diligence/approval/monitoring – that where the initial appraisal of the factual and legal situation is not given to the extent required by the applicable standards, a 'strong monitoring process needs to be put in place to ensure subsequently agreed actions are implemented.' (FMO/DEG IEP, 2015, para. 210) It was only after a new consultant was engaged after the initial project approval that work of sufficient quality and detail was presented to the lenders. (FMO/DEG IEP, 2015, para. 182)

As established by the UNDP verification mission, the project would in fact lead to the displacement of six houses (Misión de Verificación, 2012, para. 5; see also below 1.3.3). The *peritaje* report explains that this includes not only the loss of the land, but also the loss of crops and other assets present at that location. (Castro de la Mata, 2013b, para. 102)

Former Special Rapporteur Anaya also points to the fact that the 'environmental impact study approved by the National Environment Agency has [...] given cause for concern, since it fails to assess the project's impact on the lands and territories of the Ngobe-Bugle people.'

(Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 42)

According to civil society, the EIA process was flawed as the authorities (ANAM) did not ensure that the appropriate procedures were undertaken. For example, the public forum was not announced properly, the timeframe to receive comments from other governmental institutions such as the National Institute of Culture (INAC) was not respected, and the assessments were not complete as to the impacts Barro Blanco would have.

In addition, civil society points to the fact that the involvement by the international financing institutions was uninformed to begin with. Whereas other projects had official independent visits without the project operator, this was not the case with regard to Barro Blanco. There was a significant lack of transparency (for example, it was not disclosed at what point FMO/DEG decided to finance the project).

1.3.3 M/D/R specific

The present case study has little mention of any specific MDR requirements, *inter alia* due to the fact that the necessity that some parts of the affected community would have to be resettled was not accepted until later on. As the Environmental and Social Summary Report by the **project operator** explicitly states, the Barro Blanco project ‘will not displace any people from their homes’ (GENISA, 2011, p. 39). There is agreement that 6.7 ha of required land is located in annexed areas of the *comarca*, however disagreement over what this land has been used for. According to the project operator, this land was not used for cultivation or any other productive use due to its topography. As a mitigation measure, *inter alia* the provision of alternative land was listed.

According to the affected communities, some of the land affected by the project belongs to an Annex of the *comarca* and is therefore collective property. Their proper consent to transfer ownership was never obtained. Compensation was offered to some of them, but the affected communities are not interested in negotiating in this regard.

According to independent reports by institutions, six houses would be inundated, displacing six extended families (Castro de la Mata, 2013a). ASEP – using its authority under Law 6 of 1997 – has the power to expropriate the pertinent landowners for public purposes. The concerned land is collective land (Law 72 of 2008) and requires the government/project operator to engage through the traditional authorities of the Ngäbe-Buglé in order to obtain their free, prior and informed consent. As applicable standards, IFC PS5 and PS7 are relevant. With regard to the lenders and the obligation to ensure that all feasible alternatives had

been investigated, the Panel came to the conclusion that this had been the case. As ASEP had not been able to measure the extent of alternative land necessary, this had not been suggested to the communities yet. Nevertheless, as indicated above, the communities were not interested in relocating, also due to the cultural importance they attached to the respective piece of land.

Additionally, the Panel concluded that the initial assumption of the lenders that no displacements would be necessary was in order. However, at latest after the *peritaje* reports, the continuing protests, and the realization that the indigenous communities' position that they would not accept compensation for their collective title based on individual land titles, the lenders should have insisted to have this issue solved already earlier. (FMO/DEG IEP, 2015, para. 119) To date, there is still no resettlement plan or agreement.

The European lending institutions acknowledge that their realization of the problem occurred too late, but have not suggested any solutions on this. (DEG and FMO Management Response, 2015)

1.3.4 Access to justice/remedies

A crucial aspect relates to the possibility of the affected communities to obtain justice.

The project operator acknowledges in its Environmental and Social Summary Report that international standards require the setting up of a grievance mechanism. According to the report, the system has been installed, and should run through its legal adviser and its Legal Representative CEO.

With the help of civil society, numerous judicial and non-judicial instances have been tested. Thus, civil society has engaged in numerous court proceedings on behalf of the affected communities.

A lawsuit (Contra la Resolución DIEORA IA-332-2008) was filed against the EIA process with the Supreme Court by CIAM, which suffered several delays. The request for provisional suspension of construction during this time period was not granted, so by the time the lawsuit was completed, GENISA had almost completed construction. The *amicus curiae* was filed in the course of these proceedings, however, the final judgement did not mention its content with any word. In autumn 2014, the case was decided in favour of ANAM and the proceedings were closed.

A second lawsuit (Contra la Resolución AN. No. 6103-ELEC) was filed against the decision by ASEP to authorize the taking of land for the construction on behalf of Mr. Manolo Miranda, again by CIAM.

There were deliberations whether to proceed to the Inter-American system, however, no proceedings have been initiated so far.

Additionally, there was a mediation process, supported by the Catholic Church and UNDP, which took place in Panama City between the affected indigenous communities (represented *inter alia* by the Cacique, M10, representatives of the regions) and the government and project operator. There was no representation by the lenders.

The newly established FMO/DEG joint complaint system was accessed by the affected communities with the help of SOMO and Both ENDS. Yet, even before the final report was made public, the involved NGOs commented on the pressure exerted by FMO/DEG in their letter to the Vice President of Panama, where they warned that the suspension ‘may weigh upon future investment decisions, and harm the flow of long-term investments into Panama.’ (Arghiris & Kennedy, 2015) Moreover, even despite the Panel’s report, no specific steps have been taken by the banks to come to a solution. (Both ENDS, n.d.) Thus, as a consequence, a letter of concern by the affected communities, their representatives, SOMO, Both ENDS, and Urgewald, was handed over to the Dutch and German ambassadors in Panama in June 2015 and asked ‘the authority of the respective governments to ensure that the Dutch and German development banks respect the rights of those affected by the projects they finance’ (letter available at <http://grievancemechanisms.org/news/movimiento-10-de-abril-presents-letter-of-concern-to-dutch-and-german-embassies-in-panama>)

According to the lending institutions as well as their governments, the creation of the joint complaint mechanism in cooperation with civil society actors proved their good faith in attempting to remedy or resolve the conflict. (Ministerie van Buitenlandse Zaken, 2014)

The suspension of the construction as ordered by ANAM in February 2015 came as a surprise and the financing partners were interested in following the ongoing negotiations to find a solution for all parties. (FMO, 2015b, 2015c; Fuchtel, 2015a)

1.4 Measures put in place to address adverse (e.g. procedural, social and environmental) impacts of the project/case study

This section deals with not only national measures put in place but also international responses (e.g., the establishment of a grievance mechanism, involvement of UN actors in mediation processes etc.) which address these issues.

1.4.1 Measures put in place by the project operator

In response to the identified impacts of the project on the affected indigenous communities, the construction company GENISA listed several ‘mitigation measures’ to address the impacts on the land of the indigenous communities:

- ‘The provision of alternative land if requested. The selection of alternative land will be negotiated with the Comarca authorities. GENISA owns land that could be made available adjoining the Comarca annexes. This land is not currently occupied.
- Technical assistance to increase agricultural productivity and assistance in improving housing. The company is in the provision to provide help to the owners directly affected by the Project, either with materials or labour to achieve improved quality of life.
- Most access to the riverbank will be maintained. This includes the reservoir area – though there will not be access to the machine house area for safety and security reasons.
- Annual income to the community for development projects through rental payments; and projects under the social program agreed in the December 2008 (currently being updated in 2011 with the Regional Congress of the Ngäbe Bugle Group).
- Memorandum of Understanding (MoU) with the General Cacique of the Ngäbe Bugle Comarca.’ (GENISA, 2011, pp. 38–40)

The MoU was agreed on in August 2009. According to GENISA, it lays down that the company will rent 6.7 ha of land for 50 years paying 1,500 USD per year to the Integrated Development Corporation of the Comarca (CODIGO). ‘In addition to the annual rental that is payable to the Comarca (through its Development Corporation), GENISA has made a commitment to provide equivalent land (by size or value) to the users of the land, and compensation for the permanent concession of the land or for any agricultural produce that is growing in the flooded area, in a range between \$1500 and \$3000/ha.’ (GENISA, 2011, p. 38)

There is little evidence to be found with regard to compensation offered to individuals having to move because of the flooding of their land. The Urgent Appeal written by M10, Earthjustice, AIDA and CIEL mentions that 4,000 Balboas/USD was offered to Manolo Miranda in the eviction notice issued by ASEP (Urgent Appeal, 2014, p. 5).

As indicated above, these measures (offering of alternative land, compensation, etc.) were never put in place as the negotiations process/contact with the affected communities failed.

1.4.2 Measures put in place by international bodies

Following the protests and the blockage of the Pan-American Highway in 2012, a political dialogue and mediation process, supported by the Catholic Church and UNDP, was initiated. It took place in Panama City between the affected indigenous communities (represented *inter*

alia by the Cacique, M10, representatives of the regions) and the government and project operator. There was no representation by the lenders.

According to Ms Bolduc, UN Resident Coordinator in Panama at the time, '[t]he Church had the central mediation role, but more in terms of moral authority, while the UN facilitated the dialogue process by providing technical and methodological assistance, to both the government and the indigenous groups.' (UNDP, 2013, p. 20)

Two round tables took place simultaneously at the UN, one focussing on Law 11 of 2012¹⁹, and one on Barro Blanco. After an agreement was reached on Law 11, the second table eventually agreed to install a verification mission to visit the construction site of the dam and the communities of Quebrada Caña, Kiad and Nuevo Palomar. The group consisted of three representatives of the Ngäbe-Buglé community, three of the Traditional Authority, three representatives of the company, three representatives of the government, three representatives of the UN and a representative of the Catholic Church. They recommended that an international team of experts should carry out an independent study.

After the December 2012 report by the verification mission (Misión de Verificación, 2012), the UN conducted a second mission under its leadership in June 2013 (Peritaje Independiente – Independent Expert Assessment).

Following this, the UNDP released the following three reports and an executive summary:

- The **Results of the Diagnóstico Rural Participativo** (Castro de la Mata, 2013a), one of the three components of the international expert assessment of the hydroelectric project Barro Blanco. The objective of this report was to find out the attitude, perception and the knowledge of the population in the areas directly influenced by the Barro Blanco project.
- An **Analysis of Ecological and Economic Aspects** (Castro de la Mata, 2013b). The aim of this report was to independently determine the ecological impacts of the Barro Blanco project and to facilitate a better understanding of economic impacts on the local Ngäbe communities concerning natural resources.
- **Peritaje independiente de la presa de Barro Blanco, Panamá: informe final de la component de ingeniería hidráulica** (López García, 2013): The final report on the hydraulic engineering component. The objective of this report was to carry out a study on the concrete impact of potential flooding caused by the reservoir of the Barro Blanco the dam through simulations of water flow and to determine the safety limit to ensure the welfare of ancestral lands in which the dam is built.

¹⁹ See also Section 2.2.1.2.1.

The studies concluded that the project's impacts on the environment and the Ngäbe communities in question could be mitigated but that appropriate consultations with the indigenous peoples in question had not been carried out and that the direct and indirect impacts had not been clearly explained or understood. It went on to say that the direct impacts could certainly affect the community as a whole and should be mitigated properly.

1.4.3 Measures put in place by the project financiers

In February 2014, FMO and DEG established a joint complaint mechanism. According to their policy document, the 'mechanism provides stakeholders a tool, enabling alternative and pre-emptive resolution of disputes. At the same time the Mechanism assists DEG in implementing and adhering to its own policies and procedures and, as such, is the Mechanism a learning-by-doing process.' (KfW DEG, 2014, 1.1.2) Both institutions use the same panel, and when co-financed projects are concerned, they use a joint approach. The three experts appointed to the panel are Maartje van Putten, Michael Windfuhr, and Steve Gibbons. (KfW DEG, n.d.)

On 14 April 2014, a complaint was filed by M10 and the Cacique General Silvia Carrera at the newly established joint complaint mechanism of FMO and DEG. (Letter to FMO complaints office, 2014) As applicable standards, the complainants alleged violations by FMO/DEG of certain international human rights standards, in particular IFC's performance standards, FMO's Human Rights Policy and the OECD Guidelines on Multinational Enterprises. The complaint was found admissible on 17 June 2014.

The process was complicated by the fact, however, that the complaint mechanism was installed only in 2014, three years after the project had been approved. Hence, in order for the compliance review process to be carried out, each step had to be negotiated with GENISA, the loan recipient, especially with regard to cooperation, confidentiality obligations, and access to documents for the independent expert panel.

In October, one week prior to the project team conducting research within ClimAccount, the experts travelled to Panama and made a one-week on-site visit. In May 2015, the independent expert panel of FMO/DEG published their final report on the Barro Blanco project. Therein they emphasized the complex nature of the project, both in terms of the timing of the panel's report, but also in light of the socio-political impacts.

The scope of review was the manner in which DEG and FMO assessed and monitored the project, against those standards to which they had committed themselves at the time of

granting the financing in 2011 (para. 3) The complainants explicitly asked that the panel would not engage in dispute resolution or mediation.

Regarding the applicable standards, the panel explained that not only the IFC's performance standards (in their 2006 version) were relevant (by virtue of both FMO and DEG having committed themselves to them), but that they would also take regard of the core principles of the UN Declaration of Human Rights and the core ILO Conventions. For this purpose, the UN Guiding Principles on Business and Human Rights would be looked at in order to determine how to operationalize these principles in the private sector context. (FMO/DEG IEP, 2015, paras. 50-55)

The panel *inter alia* reached the conclusions that:

- FMO/DEG took all appropriate steps to put themselves in a position of understanding regarding the validity of the EIA;
- FMO/DEG, however, failed to be fully apprised on the issues of environmental and social risks, as well as of indigenous peoples at the time of credit approval as at the time of approval their assessment was limited and conditional on further steps, such as a future indigenous peoples report. These were made conditional for the first disbursement, though, which took place accordingly;
- In light of the lack of prior adequate assessment at the time of credit approval, a strong monitoring process would have needed to be put in place to ensure the implementation of subsequently agreed actions,
- Even if the initial conclusion of the lenders that no resettlement would need to take place was acceptable, the UNDP findings (2013) that there could be some impact on a limited group of people should have led FMO/DEG to undertake further actions to address this;
- FMO/DEG could have done more to seek clarity on the issue of land acquisition and use by seeking an expert legal opinion or more detailed information from the operator or government on this;
- The question whether the consultation process with the affected communities was conducted in a proper and good faith manner should have been examined more closely by FMO/DEG, especially in light of the resistance and challenges to the alleged agreement;
- Regarding physical or economic displacement, the panel noted the amendments to the Environmental and Social Action Plan following the 2013 *peritaje* report offering compensation to those potentially displaced were enough to put the lenders in accordance with their policy commitments on this issue;
- The question of cultural heritage was not assessed properly before the project approval. Once it became clear that this would constitute a difficult issue, the lenders hired independent consultants to review the progress, the responsibility of which, however, lies primarily with the Government of Panama (through INAC);
- The appraisal of potential biodiversity and ecosystem impacts at the time of project approval was 'severely limited'.

Hence, to which extent the financing institutions carried out an appropriate due diligence assessment of environmental and social impacts in advance was the crucial point analysed by the experts.

Following the report by the IEP, DEG and FMO issued their Management Response, emphasizing that they were ‘committed to extract **lessons learned** from the report with the purpose of improving the quality of our appraisal and monitoring process’ (DEG and FMO Management Response, 2015, emphasis in original). In addition, they acknowledge that at the time of credit approval, they were not fully aware of the project implications. However, they point to the fact that at the time of first disbursement they ‘were fully appraised regarding material issues.’ (DEG and FMO Management Response, 2015)

2 Analysis

The following analyses the Barro Blanco project on the basis of the alleged human rights violations. Please note that for easier handling, parts of the above framework are repeated in this section.

2.1 Introduction

The Barro Blanco case is symptomatic for the complex interlinkage between the often-times competing fields of resource development, environmental protection, and the rights of indigenous peoples.

Since the 1970s, there have been plans to generate electricity on the river Tabasará, running through Chiriqui province in Western Panama. A first project (Tabasará I, 200 MW) was proposed as early as 1973, and eventually, after being met with decade-long significant resistance, was cancelled. In 1997, a new consortium was created to develop Tabasará I and II which, however, again were never constructed after the Supreme Court suspended the project in 2000 (Panama Supreme Court, 2000) in light of the project having failed to engage in consultations and obtain the assent of the affected indigenous communities (as required by Law 41 of 1998). (ACD, 2009; Purdy, 2013)

Following amendments in the law – repealing certain requirements relating to the participation and acquiescence²⁰ which was to be obtained from indigenous communities (Velásquez Runk, 2012, p. 28), a new concession to construct a hydroelectric power plant on the river Tabasará, Barro Blanco (28.84 MW), was awarded to Generadora del Istmo, S.A. (GENISA)²¹ in 2007. The project, once completed, will have impacts on an Annex area to the *comarca* Ngäbe-Buglé²², as the power plant's reservoir will flood 6.7 ha of the indigenous territory, including six houses and historical artefacts. As of July 2015, construction was approximately 95% finished, once again being met with protests and blockades by the affected communities after the temporary suspension announced on 9 February 2015 was lifted.

Aside from national indigenous mobilization, Barro Blanco has also been in the limelight of international campaigns. The case stands exemplary for the effects that the implementation of international development and climate policies can have. Financed *inter alia* by two European development banks (DEG and FMO)²³, and registered as a CDM project by the CDM Executive Board under the Kyoto Protocol (CDM EB, 2011)²⁴, despite ongoing protests by the affected communities, foreign and international bodies have provided international authorization to the ongoing construction.

²⁰ See also below Section 2.2.1.2.1 in more detail.

²¹ GENISA was created under Panamanian law in 2006 especially for the purpose of developing, building and operating the Barro Blanco power plant (GENISA, 2011, p. 9). Honduran-owned GENISA is part of a Central American economic group owning more than 450 MW of installed power generation capacities in the region.

²² Created by Law 10 of 1997. *Comarcas* are indigenous administrative units of the government, where Panama's indigenous peoples enjoy varying degrees of self-government. There are five *comarcas* in Panama (**Emberá-Wounaan**, **Kuna Yala** (the first *comarca*, established in 1938), **Ngäbe-Buglé**, **Kuna de Madungandí** and **Kuna de Wargandí**). (Rodríguez-Pinero Royo, 2010, pp. 331–332) The **Naso** and the **Bribri** do not have a *comarca*. Three of these *comarcas* (Emberá-Wounaan, Kuna Yala and Ngäbe-Buglé) are provincial-level territories (in addition to the nine provinces listed under Section 2.1), whereas the other two (Kuna de Madungandí and Kuna de Wargandí) are subordinated to provinces (equivalent to a municipalities). The Emberá-Wounaan, Ngäbe-Buglé²² and Kuna de Madungandí have their own Charters (Cartas Orgánica Administrativa) which were adopted by executive decree. These also form the basis for the relations of the traditional authorities with the central government and public authorities.

²³ The estimated project costs of Barro Blanco amounting to 78,316,800 USD are financed by the Deutsche Investitions- und Entwicklungsgesellschaft GmbH (DEG), the Netherlands Development Finance Company (FMO), and the Central American Bank for Economic Integration (CABEI) (each approximately 25 million USD). (FMO/DEG Barro Blanco Complaint, 2014) The latter replaced funding originally sought through the EIB, this loan application however withdrawn by GENISA in 2010 after learning that the EIB planned to visit the affected area after a complaint registered with the EIB CM (Complaint Mechanism) (EIB Barton, 2013; EIB CM, n.d.).

²⁴ In June 2011, Barro Blanco was approved as a CDM project. The Designated Operational Entity (DOE) for the validation report was AENOR, the Spanish Association for Standardisation and Certification. It constitutes a category 1 project ('renewable source energy industries'). In total, it is estimated that a total reduction of emissions of 1,405,622 t CO₂ will be achieved. (Barro Blanco PDD, 2010, p. 8).

Conduct by multiple parties falling short of international standards and insufficient safeguards have resulted in severe human rights impacts for the local indigenous population. Yet, as will be seen, identifying accountable actors is hard to come by.

2.2 Legal Framework: Natural Resource Development v. Human Rights

As mentioned in the introduction, the construction of the dam will have a number of direct impacts on the local indigenous population living in the Annex areas of the *comarca* Ngäbe-Buglé. In particular, four communities, the Cogle (though none of their territory will be flooded), Quebrada Caña, Quiabda (Kiad) and Nuevo Palomar, will be affected. The communities – together amounting to more than 500 people²⁵ – are semi self-sustaining, relying mainly on subsistence agriculture (such as rice, beans, sugar cane, yams,...). They also own some livestock (mainly chicken and pigs).

The impacts on the communities range from impeded access to and use of resources, threats to their cultural survival (in particular in connection with their spiritual practices ('Mama Tata')), to displacement. Due to the lack of consent, forced expropriations of territory under the collective ownership of the Ngäbe-Buglé will also be a consequence.

The following analysis has grouped these concerns into three main aspects where the project's impacts on human rights has been particularly evident. Firstly, the authorization of the project without the free, prior and informed consent (FPIC) of the affected communities. Secondly, the due diligence assessments/monitoring throughout the process. And thirdly, the imminent forced displacement from indigenous territories. Issues regarding access to justice/remedies will be dealt with in Section 2.4 on accountability/responsibility.

Each section will first provide an overview of the international standard before proceeding to the applicable domestic legal framework and policies by the financing institutions. On this basis, the facts will be assessed, pointing to discrepancies identified.

²⁵ GENISA, based on the 2010 census, estimated that 538 people were spread out among the four communities. However, the 2010 census – as also recognized by Committee on the Elimination of All Forms of Racial Discrimination with regard to previous statistical data – has been said to be incomplete with regard to Panama's indigenous population. Hence, while it is not possible to arrive at a definite estimate how many will inhabitants these four villages include, the *peritaje* mission came to the conclusion that it seemed like the inhabitants were more numerous than reflected in the official census. (Castro de la Mata, 2013a, para. 4)

2.2.1 Authorization of the project without the free, prior and informed consent (FPIC) of the affected communities

2.2.1.1 International standards

A core concern of the Barro Blanco case has been the **failure** of the project operator, governmental authorities and international partners **to obtain the consent of the affected communities**. The standard against this will be measured in the present case is the principle of free, prior and informed consent (FPIC), as incorporated into a number of international instruments and recognized by international courts.

Since the early 1990s, the principle of FPIC had been evolving for the protection of the rights of indigenous peoples. Introduced into the World Bank's policies in a soft formulation in 1991, it was already stated that its requirements served the purpose of '[i]dentifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources.' (World Bank OD 4.20, 1991, para. 8) Similar developments could also be witnessed within the United Nations, and the first draft of the Declaration on the Rights of Indigenous Peoples in 1988 already contained provisions providing for the obligations of states to seek the 'free and informed consent' of indigenous peoples in relation to activities concerning the ownership and possession of lands as well as development programs regarding the exploitation or exploration of natural resources pertaining to their traditionally owned territories. (Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1988/25, 1988²⁶)

²⁶ 12. The right of ownership and possession of the lands which they have traditionally occupied. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement.

13. The right to recognition of their own land-tenure systems for the protection and promotion of the use, enjoyment and occupancy of the land.

14. The right to special measures to ensure their control over surface resources pertaining to the territories they have traditionally occupied, including flora and fauna, waters and sea ice.

16. The right to protection against any action or course of conduct which may result in the destruction, deterioration or pollution of their land, air, water, sea ice, wildlife or other resources without free and informed consent of the indigenous peoples affected. The right to just and fair compensation for any such action or course of conduct.

17. The duty of States to seek and obtain their consent, through appropriate mechanisms, before undertaking or permitting any programmes for the exploration of exploitation of mineral and other subsoil resources pertaining to their traditional territories. Just and fair compensation should be provided for any such activities undertaken.

ILO Convention No. 169 (ILO Convention No. 169, 1989), drafted in 1989, employs the term ‘free and informed consent’ in the context of forced relocation (Article 16), otherwise, however, merely relying on ‘consultations’. UNDRIP also contains several provisions explicitly referring to FPIC, ranging from the prohibition of relocation (Article 10), to factual thresholds (Article 11), the implementation of legislative and administrative measures that may affect indigenous peoples (Article 19), the storage or disposal of hazardous materials in the lands or territories of indigenous peoples (Article 29), and, in the context of determining their authority over their lands most importantly, in connection with ‘the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.’ (Article 32)

FPIC as a tool to ensure indigenous peoples a *de facto* authority over certain areas has been interpreted into other legal instruments, most prominently emphasized by the Committee on the Elimination of Racial Discrimination, which in its General Recommendation No. 23 stated that ‘5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.’ (CERD UN Doc. A/52/18, Annex V, 1997)

Also the International Finance Corporation (IFC) (the commercial lending institution of the World Bank), in its most recent revision²⁷ of its performance standards, includes a progressive understanding of FPIC: ‘There is no universally accepted definition of FPIC. For the purposes of Performance Standards 1, 7, and 8, ‘FPIC’ has the meaning described in this paragraph. FPIC builds on and expands the process of ICP described in Performance Standard 1 and will be established through good faith negotiation between the client and the affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not neces-

²⁷ As has been explained above, though, the relevant performance standards in the Barro Blanco case are the 2006 versions.

sarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.’ (IFC, 2012, para. 12)

FPIC serves to fill the substantive elements of the participatory process. It creates ‘safe spaces’ for where indigenous identity can enjoy authentic indigenous sovereignty. (Wiessner, 2008, p. 1174) The following exemplary content is assigned to free, prior and informed consent in training manuals and guidelines on its implementation. According to an International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, consent is to be obtained freely, *i.e.* absent of ‘coercion, intimidation or manipulation.’ (Permanent Forum on Indigenous Issues, UN Doc. E/C/19/2005/3, 2005, para. 46(i)) The element ‘prior’ entails that consent ‘has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes’. (Permanent Forum on Indigenous Issues, UN Doc. E/C/19/2005/3, 2005, para. 46(i)) And ‘informed’ relates to a sum of factors to be taken into consideration when information is provided to the affected indigenous community, *inter alia* covering following aspects: nature, size, pace, reversibility and scope of project/activity; reason for or purpose of the project/activity; duration; affected areas; preliminary assessment of likely economic, social, cultural and environmental impacts and potential risks (in respect of the precautionary principle); fair and equitable benefit-sharing; involved personnel; procedures that the project may entail. (Permanent Forum on Indigenous Issues, UN Doc. E/C/19/2005/3, 2005, para. 46(i)) Information delivered shall *inter alia* be accessible, clear, consistent, accurate, transparent, objective, complete, delivered in the appropriate language and manner. (UN-REDD Programme, 2013, p. 18)

One core question, however, concerns the meaning of ‘consent’ and whether this arises to a *de facto* veto power. The drafting process of Article 19 UNDRIP (originally Article 20) reflects this fine balance. Originally formulated as ‘States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures [legislative or administrative measures that may affect them]’ (Commission on Human Rights, UN Doc. E/CN.4/2006/79, 2006, p. 46; see for state criticism of the broadness of the original formulation UNGA, UN Doc. A/61/PV.107, 2007), the final version adopted reads: ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’ (Art. 19, UNDRIP, 2007)

In comparison, with regard to forced relocation, Article 10 UNDRIP expressly states that ‘[n]o relocation shall take place without the free, prior and informed consent of the indigenous

peoples concerned'. With regard to the formulation adopted in the final version of the Declaration, former Special Rapporteur James Anaya points out that it 'should not be regarded as according indigenous peoples a general 'veto power'' but that it requires a negotiation process 'towards mutually acceptable arrangements'. (HRC, UN Doc. A/HRC/12/34, 2009, para. 46) He contrasts this to mere consultation obligations which often constitute 'mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.' (HRC, UN Doc. A/HRC/12/34, 2009, para. 46) This corresponds to widespread practice and scholarly opinion (Hofbauer, 2015, p. 231ff), even if the adopted text tempts some bodies to go further.

Case-law by the Inter-American Commission and Court of Human Rights has confirmed the importance of FPIC for the protection of indigenous rights. Notably, the Commission found in *Twelve Saramaka Clans* that 'in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples, that the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law.' (Saramaka v. Suriname, 2006, para. 154). This was confirmed by the Court, which also embarked on an analysis of the limits of the right to property as contained in Article 21 of the American Convention on Human Rights (see also below Section 2.2.3 in more detail). *Inter alia* it held that 'effective participation' of affected indigenous communities was necessary in order for possible limitations to the right to property to be permissible. Hence, it found that the duty to actively consult: requires the state to both accept and disseminate information; entails constant communication; must be undertaken in good faith, through culturally appropriate procedures; must have the objective of reaching an agreement; must be undertaken at the early stages of development to provide time for internal discussion and proper feedback to the state; the communities must have been made aware of possible risks to ensure acceptance which is knowingly and voluntarily. (Saramaka v. Suriname (Ct), 2007, para. 133) As later confirmed in *Kichwa Indigenous Peoples of Sarayaku v. Ecuador*, 'the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties [...]' (Sarayaku v. Ecuador, 2012, para. 187)

2.2.1.2 Applicable domestic legal framework and institutional policies

2.2.1.2.1 Domestic legal framework

Panama's Constitution (Articles 124, 126 and 127) as well as the respective legal acts on the *comarcas* contain far-reaching safeguards, in particular with regard to land rights. The basis of indigenous' land rights in Panama is provided by **Article 127 of the Constitution**: 'The

State guarantees to indigenous communities the reservation of necessary lands and collective ownership thereof, to ensure their economic and social well-being. Procedures to be followed for obtaining this purpose, and the definition of boundaries within which private appropriation of land is prohibited, shall be regulated by law.¹²⁸ At the same time, the government ‘retains ownership of underground resources along with the right to authorize large-scale development projects such as hydroelectric dams and mining for the benefit of the whole nation’ (Cansari & Gausset, 2013, in reference to Ley 10, 1997)

With regard to the obligation to obtain FPIC of the affected communities, two domestic acts of legislation are of particular relevance. Firstly, Law 10 and its related decrees regarding the authorities of the *comarca* Ngäbe-Buglé, and secondly, Law 41 on the environment, in particular regarding the authorization process of projects having an impact on indigenous territories.

The *comarca* Ngäbe-Buglé was established by Law 10 of 7 March 1997. Its *Carta Orgánica Administrativa*, forming the basis for the relations of the traditional authorities with the central government and public authorities, was regulated in Executive Decree 194 of 1999. However, in 2010, Executive Decree 537 (2 June 2010) amended this act, changing the election procedures for the authorities and leaders of the *comarca*.

Accordingly, the administrative structure of the Comarca consists of three official recognized types of authorities:

- Traditional authorities: *Cacique General*, *Cacique regional*, *Jefe Inmediato* and *Vocero* (spokesperson)
- Authorities of the Comarca: the presidents of the *Congreso General* (General Congress [this legal institution has the main power and makes decisions, and consists of one representative of each part/region of the Comarca]), *Congreso regional* (Regional Congress) and *Congreso local* (Local Congress)
- State authorities: *Gobernador Comarcal* (Governor of the Comarca), *Consejo de Coordinación Comarcal* (Coordinating Council of the Comarca), *Alcalde Comarcal* (Mayor of the Comarca) and *corregimientos* (municipalities) (Castro de la Mata, 2013a, p. 12)

²⁸ El Estado garantizará a las comunidades indígenas la reserva de las tierras necesarias y la propiedad colectiva de las mismas para el logro de su bienestar económico y social. La Ley regulará los procedimientos que deban seguirse para lograr esta finalidad y las delimitaciones correspondientes dentro de las cuales se prohíbe la apropiación privada de tierras.

In addition to these legally recognized institutions/authorities, there is also still a Traditional Congress (*Congreso Tradicional de Masas*, or *Congreso General Ngäbe Buglé y Campesino*), which is not recognized by the government. Elections to this Congress still occur according to ‘elections by rows’ (standing behind the candidate of choice). While the Cacique tried to mediate between these two Congresses at first, through political instrumentalization and disagreements on certain issues (e.g. Law 11), there have been substantial internal tensions, separating the community internally.

Elections to the officially recognized authorities occur through delegates. Since 2011, the *Cacique General de la Comarca Ngäbe-Buglé* is Silvia Carrera Concepción (her predecessor was Maximo Saldaña). Unlike the *Congreso General*²⁹, however, the *Cacique General* is not entitled to approve projects, but is more a traditional figure to represent the Ngäbe.

Thus, any consent to a project must have been obtained by the *Congreso General*.

With regard to projects having an effect on indigenous territories, Law 41 of 1998 recognized not only the rights of indigenous peoples to use and manage the natural resources located on their lands (Article 98³⁰), but also that the seizing of their land is prohibited and that they may only be relocated after consenting thereto (Article 102³¹). However, Law 18 of 31 January 2003 – generally a law dealing with redistricting – repealed Arts. 63, 96, 98, 101 and 102 of Law 41 of 1 July 1998. (Velásquez Runk, 2012, p. 28)

Even though not applicable to the Barro Blanco case, Law 11 of 2012 shall be briefly pointed out (for a detailed description on how this Bill was at the center of heated discussions see Cansari & Gausset, 2013). This legislative act was passed in the course of the round tables

²⁹ Article 47, as amended, reads: ‘El Congreso General Ngöbe-Buglé es el máximo organismo normativo de decisión y expresión étnica y cultural del pueblo Ngöbe-Buglé, integrado por los Delegados. Sesionará 4 veces al año en la región que el Congreso acuerde previamente, alternando se sede entre las tres regiones. Cada 5 años, elige de entre sus miembros su nueva Junta Directiva, la que se reunirá con la frecuencia que lo decidan sus miembros, alternando su sede entre las tres regiones.’

³⁰ Article 98 read: Se reconoce el derecho de las comarcas y pueblos indígenas en relación al uso, manejo y aprovechamiento tradicional sostenible de los recursos naturales renovables, ubicados dentro de las comarcas y reservas indígenas creadas por ley. Estos recursos deberán utilizarse de acuerdo con los fines de protección y conservación del ambiente, establecidos en la Constitución Política, la presente Ley y las demás leyes nacionales.

³¹ Article 102 read: Las tierras comprendidas dentro de las comarcas y reservas indígenas son inembargable, imprescriptibles e inalienables. Esta limitación no afecta el sistema tradicional de transmisión de tierras en las comunidades indígenas. Las comunidades o pueblos indígenas, en general, sólo podrán ser trasladados de sus comarcas y reservas, o de las tierras que poseen, mediante su previo consentimiento. En caso de ocurrir el traslado, tendrán derecho a indemnización previa, así como a la reubicación en tierras comparables a la que ocupaban.

held at UNDP in 2012. Law 11 prohibits mining within the Ngäbe-Buglé *comarcas* (annulling any previously granted concession³²) and requires the authorization of the general, regional or local congress and a referendum in the affected district prior to the granting of any hydroelectric project affected the indigenous territory. (Special Rapporteur on Indigenous Peoples, UN Doc. A/HRC/27/52/Add.1_en, 2014, para. 15)

2.2.1.2.2 *Institutional policies*

Both DEG and FMO apply the IFC's Performance Standards (PS). As the Barro Blanco project was approved by both banks in August 2011, the 2006 version of the standards is applicable. Particularly relevant in the context of community participation are PS 1 (Social and Environmental Assessment and Management System) and PS 7 (Indigenous Peoples). (IFC, 2006)

PS 1 provides the wider framework for the required environmental and social impact assessment, which shall 'identify and assess social and environmental impacts, both adverse and beneficial, [...] [and] avoid, or where avoidance is not possible, minimize, mitigate, or compensate for adverse impacts on workers, affected communities, and the environment.' (IFC, 2006, p. 1) Moreover, the assessment should 'ensure that affected communities are appropriately engaged on issues that could potentially affect them' (IFC, 2006, p. 1). This is further detailed by stating that this engagement should include a process of consultation and 'be free of external manipulation, interference, or coercion, and intimidation, and conducted on the basis of timely, relevant, understandable and accessible information.' (IFC, 2006, p. 4, para. 19) Where affected communities are subject to risks or adverse impacts from a project, and no alternatives are feasible (IFC, 2006, p. 2, para. 9),

'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

³² This also applied to the hotly disputed Cerro Colorado mine.

arise. The consultation process will be undertaken in a manner that is inclusive and culturally appropriate. The client will tailor its consultation process to the language preferences of the affected communities, their decision-making process, and the needs of disadvantaged or vulnerable groups. 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. Informed participation involves organized and iterative consultation, leading to the client's incorporating into their decision-making process the views of the affected communities on matters that affect them directly, such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues. The client will document the process, in particular the measures taken to avoid or minimize risks to and adverse impacts on the affected communities.' (IFC, 2006, p. 5, paras. 21-22, emphasis added)

PS 7 (Indigenous Peoples) emphasizes that particular attention should be paid to the potential impacts of a project on indigenous peoples. It recalls that the free, prior and informed consultation must be sought from the affected indigenous communities, through involvement of their representative bodies. (IFC, 2006, p. 29, para. 9) In addition, it refers to a number of special requirements which apply in the context of indigenous peoples, including having a qualified and external expert involved to assist in conducting the prior assessment. (IFC, 2006, p. 30, para. 11)

2.2.1.3 Analysis

Once completed, the Barro Blanco hydroelectric dam will impact indigenous territory, protected by Panama's Constitution as well as by Law 10 of 1997 establishing the *comarca* Ngäbe-Buglé. Thus, prior to granting GENISA a concession, the government of Panama was obligated under international law to enter into good faith negotiations with the affected communities to obtain their free, prior and informed consent.

The manner in which this consultation process was to take place is regulated by Panama's domestic law. As ANAM had classified the Barro Blanco project as a project which could result in significant adverse environmental impacts, Executive Decree No. 123 on the contents of EIAs required that a public forum must be held in the course of the impact assessment. According to the Decree, it should be organized by the promoter during the evaluation and analysis of the EIA for the public in general, in order to provide information on the project and the opportunity to comment on the study.

Thus, on 8 February 2008, GENISA conducted such a public forum with regard to Barro Blanco. It was held in a small school in Tolé, located outside of the indigenous territory, was difficult to reach for the affected communities (requiring a several hour foot-march), and was poorly advertised. The few members of the community, who did gain information of the meeting being held and attempted to attend, were at first not let into the building, and then only few were allowed to enter. No further consultations in the course of the EIA proceedings took place with the affected communities at this stage.

The EIA was approved by ANAM three months later (May 2008). This was prior to any agreement reached with the communities. Rather, in 2009 – after ANAM had already approved the EIA without any further investigation, GENISA stated that they had reached an agreement with the previous Cacique General (Maximo Saldaña) for the use of the territory. After disagreements on the legitimacy of his mandate to do this, GENISA later concluded an agreement with the Regional Congress of the communities (Kadriri) being affected in 2011.

In light of these facts, the participation process of the affected indigenous communities shows a number of flaws if assessed against international standards as well as the IFCs performance standards. These relate to the overall procedure of the consultation process, in particular to be undertaken in good faith, but also to each individual elements of a standard which is essential in guaranteeing respect for indigenous sovereignty.

The primary objective of FPIC, whether measured under international law or under the IFCs 2006 Performance Standards, is to ensure mutually acceptable solutions for both sides. In the present case, this has not been reached at any stage of the process. Thus, the consultation process has erred with regard to the following aspects:

- First, as emphasized above, the requirement to obtain FPIC is a **state obligation** which cannot be delegated to third parties. In the present case, GENISA was tasked to conduct the public forum, albeit in coordination with ANAM. Nevertheless, especially in light of the **long-lasting dispute regarding resource exploitation in comarca areas in Panama**, the government missed the opportunity to engage in a meaningful consultation process from the start.
- Second, with regard to the requirement to conduct the consultation process **prior** to any project approval through the **indigenous representative bodies**, the Carta Orgánica – a publically available legislative act – lists the representative authorities who are authorized to conclude agreements. **Good faith** requires the parties interested in economic exploitation of an area which will affect indigenous lands to enquire in detail through **external experts** into the indigenous societal structure and ensure that the proper indigenous authorities are party to any agreement. From the outset there were parts of the *comarca* not only rejecting Barro Blanco but resource development in the *comarca* in general. Nevertheless, before ensuring that the agreement obtained with the authorities had the legitimate authority

under the laws of the *comarca* and without entering into any meaningful consultation with the affected communities, the project continued. This is closely also linked to a failure to ensure the *informed* participation of the communities.

- Hence, **informed** participation entails not only that the consultation process should be transparent, consistent, complete etc., but, most importantly, it means that it should be **culturally appropriate**. In the present case, neither the public forum nor the further process have adhered to these standards.
 - o The manner in which the public forum was advertised, where it was located (outside of indigenous territory) and the information presented contributed to the negative attitude of the affected communities towards the project.
 - o The EIA was incomplete as it *inter alia* did not indicate that any houses would be flooded (see also below Sections 2.2.2 and 2.2.3)
 - o The *peritaje* missions carried out in 2013 confirmed that the direct and indirect impacts had not been clearly explained to or understood by the affected communities.

Thus, on this basis, it can be concluded that the project was authorized without the free, prior and informed consent of the affected communities, an issue which in light of the historical struggle over the exploitation of natural resources in the *comarca* weighed particularly heavy on the possibility of any mutually acceptable outcome.

2.2.2 *Due diligence assessments / monitoring*

2.2.2.1 International standards

A further identified crucial point relates to the adequacy of the conducted environmental impact assessment (EIA) as well as the monitoring activities by the financing partners. More broadly, this can be summarized as an analysis of the extent to which the involved parties have complied with their due diligence obligations to prevent or minimize potential damage/harm from occurring.

In this context, the **due diligence obligation** of the involved parties stems both from human rights law (see, e.g., CESCR, UN Doc. E/1991/23, 1991; HRC, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004) and from international environmental law. In particular, it requires **states** to regulate the conduct of private parties in order to protect individuals from harmful activities and ensure that appropriate remedies are available. Hence, prior to authorizing activities which potentially could cause harm to the environment, states are under the obligation to ensure that their decision is based on an assessment of the risks involved with the project activity. (ILC Articles on Prevention (with Commentaries), 2001, Art. 7) This obligation of states to conduct an EIA to fulfil their due diligence obligation under international law has been recognized as customary international law *inter alia* by the International Court of Justice in *Pulp Mills*. (*Pulp Mills* (ICJ), 2010, pp. 82–83, para. 204) EIAs have to ‘address

the potential effects' of the proposed activities. (*Pulp Mills* (ICJ), 2010, pp. 82–83, para. 204), thus not excluding issues which would deprive it of its purpose. While the scope and content of EIAs remains for each state 'to determine in its domestic legislation or in the authorization process' (*Pulp Mills* (ICJ), 2010, p. 83, para. 205), the Court was clear in finding that 'an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.'

As to the involvement of the affected communities in EIAs, the issue is closely linked to Section 2.2.1 (see also Art. 19, UNDRIP, 2007) and the objective to ensure adequate participation of indigenous peoples in projects affecting them. Thus, jurisprudence by regional human rights bodies has consistently confirmed that the obligation to conduct a prior EIA through independent and technically capable entities constitutes an essential safeguard for the protection of property rights of indigenous and tribal peoples. (*Saramaka v. Suriname* (Ct), 2007, para. 129; *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria*, 2001, para. 53)

By inference of environmental matters into a number of human rights – reaffirming especially procedural obligations such as access to information and the obligation to conduct a prior EIA (*Sands & Peel*, 2012, p. 787ff), some cases have even gone so far to explicitly extend the obligation of prior EIAs to environmental *and social* impact assessments. (*Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 2009, paras 266-268; *Saramaka v. Suriname* (Ct), 2007)

As a number of instruments have confirmed, EIAs should also extend to an assessment of the impacts on cultural heritage. (CBD Guidelines, n.d.; Espoo Convention, 1997)

Additionally, the due diligence obligation also extends to **corporate entities** involved in the project. Exemplary are the Guiding Principles on Business and Human Rights (Report of the Special Representative of the SG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 2011), stipulating in Principle 15 that:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

As emphasized by the interpretative guide to the Guiding Principles, due diligence in this context refers to ‘such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case’. (OHCHR, 2012, p. 4) This also comprises an ongoing management process, according to the circumstances at hand, to meet their responsibility to respect human rights.

2.2.2.2 Applicable domestic legal framework and institutional policies

2.2.2.2.1 Domestic legal framework

The main piece of **environmental legislation is Law 41 of 1 July 1998** (Ley General de Ambiente (General Law on the Environment)). It contains general provisions on environmental law and establishes ANAM (Autoridad Nacional del Ambiente – National Environmental Authority). ANAM is the key regulatory authority responsible for ensuring compliance with and enforcing the laws, regulations and national environmental policy. As such, ANAM is also entitled to issue fines and sanctions.

ANAM also evaluates the (mandatory) **Environmental Impact Assessments (EIAs)**.³³ The key piece of legislation regulating EIAs (estudios de impacto ambiental) is **Executive Decree**

³³ Capítulo II **Proceso de Evaluación de Impacto Ambiental**

Artículo 23. Las actividades, obras o proyectos, públicos o privados, que por su naturaleza, características, efectos, ubicación o recursos pueden generar riesgo ambiental, requerirán de un estudio de impacto ambiental previo al inicio de su ejecución, de acuerdo con la reglamentación de la presente Ley. Estas actividades, obras o proyectos, deberán someterse a un proceso de evaluación de impacto ambiental, inclusive aquellos que se realicen en la cuenca del Canal y comarcas indígenas.

Artículo 24. El proceso de evaluación del estudio de impacto ambiental comprende las siguientes etapas:

1. La presentación, ante la Autoridad Nacional del Ambiente, de un estudio de impacto ambiental, según se trate de actividades, obras o proyectos, contenidos en la lista taxativa de la reglamentación de la presente Ley.
2. La evaluación del estudio de impacto ambiental y la aprobación, en su caso, por la Autoridad Nacional del Ambiente, del estudio presentado.
3. El seguimiento, control, fiscalización y evaluación de la ejecución del Programa de Adecuación y Manejo Ambiental (PAMA) y de la resolución de aprobación.

Artículo 25. El contenido del estudio de impacto ambiental será definido por la Autoridad Nacional del Ambiente, en coordinación con las autoridades competentes, y publicado en el manual de procedimiento respectivo.

No. 123 of 14 August 2009, modified by Executive Decree No. 155 of 2011. According to its provisions, any new project, work or activity relating to the sectors of agriculture, hunting and forestry; fishing; food and drink processing; mining; textiles and leather manufacturing; wood and paper manufacturing; recycling; energy; construction; services; tourism; and waste disposal require the submission of a EIA and approval by ANAM. There are **three categories** requiring EIAs – Category I (no significant impacts, listed in Article 16); Category II (listed in Article 16, negative partial environmental impacts can be caused); Category III (listed in Article 16, can result in significant adverse environmental impacts, deeper analysis is called for).

In the course of the EIA, consultations with the affected public/communities must be conducted (Title IV).

Generally, only one EIA is required per project. Certain activities, however, might require additional permits in addition to the EIA, e.g. concerning activities relating to the use or discharge of water. For large-scale activities, e.g. energy, mining..., a concession, issued through the relevant regulatory authority (e.g. ASEP), is necessary.

The scope of the EIA includes impacts on human health, flora, fauna, renewable and non-renewable natural resources, protected areas, landscapes, society, and anthropological, archaeological, historic, or cultural heritage.

Artículo 26. Los estudios de impacto ambiental serán elaborados por personas idóneas, naturales o jurídicas, independientes de la empresa promotora de la actividad, obra o proyecto, debidamente certificadas por la Autoridad Nacional del Ambiente.

Artículo 27. La Autoridad Nacional del Ambiente hará de conocimiento público la presentación de los estudios de impacto ambiental, para su consideración, y otorgará un plazo para los comentarios sobre la actividad, obra o proyecto propuesto, que será establecido en la reglamentación de acuerdo con la complejidad del proyecto, obra o actividad.

Artículo 28. Para toda actividad, obra o proyecto del Estado que, de acuerdo con esta Ley y sus reglamentos, requiera un estudio de impacto ambiental, la institución pública promotora estará obligada a incluir, en su presupuesto, los recursos para cumplir con la obligación de elaborarlo y asumir el costo que demande el cumplimiento del Programa de Adecuación y Manejo Ambiental.

Artículo 29. Una vez recibido el estudio de impacto ambiental, la Autoridad Nacional del Ambiente procederá a su análisis, aprobación o rechazo. El término para cumplir, ampliar y presentar los estudios de impacto ambiental, será establecido mediante reglamentación de la presente Ley.

Artículo 30. Por el incumplimiento en la presentación o ejecución del estudio de impacto ambiental, la Autoridad Nacional del Ambiente podrá paralizar las actividades del proyecto e imponer sanciones según corresponda.

Artículo 31. Contra las decisiones del Consejo Nacional del Ambiente o de la Autoridad Nacional del Ambiente, en cada caso de su competencia, se podrá interponer el recurso de reconsideración, que agota la vía gubernativa.

As mentioned above, since 2012 there is a special legal framework (Law 11, 26 March 2012) regarding projects which affect indigenous territories.

2.2.2.2.2 *Institutional policies*

Of the applicable bank policies, particularly PS 5 (Land Acquisition and Involuntary Resettlement), PS 7 (Indigenous Peoples) and PS 8 (Cultural Heritage) are relevant.

As stated in Section 2.2.2.1.2, **PS 1** provides the wider framework for the required environmental and social impact assessment, which shall 'identify and assess social and environmental impacts, both adverse and beneficial, [...] [and] avoid, or where avoidance is not possible, minimize, mitigate, or compensate for adverse impacts on workers, affected communities, and the environment.' (IFC, 2006, p. 1)

'[A]ll relevant social and environmental risks and impacts of the project [will be considered], including the issues identified in Performance Standards 2 through 8, and those who will be affected by such risks and impacts.' (IFC, 2006, p. 1, para. 4) As to the standards of assessment, these are drawn from national legislation as well as from a state's obligations under international law if implemented into national law.

The social and environmental management system should be a continuous process throughout the project's life cycle, *i.e.* in the early stages of the project development and on an ongoing basis. This management system shall also be monitored throughout the process:

'In addition to recording information to track performance and establishing relevant operational controls, the client should use dynamic mechanisms, such as inspections and audits, where relevant, to verify compliance and progress toward the desired outcomes. For projects with significant impacts that are diverse, irreversible, or unprecedented, the client will retain qualified and experienced external experts to verify its monitoring information. The extent of monitoring should be commensurate with the project's risks and impacts and with the project's compliance requirements. Monitoring should be adjusted according to performance experience and feedback. The client will document monitoring results, and identify and reflect the necessary corrective and preventive actions in the amended management program. The client will implement these corrective and preventive actions, and follow up on these actions to ensure their effectiveness.' (IFC, 2006, p. 5, para. 24)

Special requirements for the required ESIA in this case can also be deduced from **PS 7** (Indigenous Peoples) and **PS 8** (cultural heritage).

Firstly, aside from the obligation to ensure the informed participation of affected indigenous communities (see above), the assessment should pay special regard to pay attention to the impacts of the project on traditional or customary lands under use. This entails entering into good faith negotiations (with successful outcome) with the affected communities, in particular in cases where relocation will not be able to be avoided (after examining all feasible alternatives). (IFC, 2006, p. 31, paras. 13-14)

Secondly, **PS 8** aims at ‘protecting cultural heritage from the adverse impacts of project activities’. (IFC, 2006, p. 32) Cultural heritage ‘refers to tangible forms of cultural heritage, such as tangible property and sites having archaeological (prehistoric), paleontological, historical, cultural, artistic, and religious values, as well as unique natural environmental features that embody cultural values, such as sacred groves. However, for the purpose of paragraph 11 below, intangible forms of culture, such as cultural knowledge, innovations and practices of communities embodying traditional lifestyles, are also included. The requirements of this Performance Standard apply to cultural heritage regardless of whether or not it has been legally protected or previously disturbed.’ (IFC, 2006, p. 32, para. 3)

Where a project may affect cultural heritage, not only are consultations with affected communities to be entered into, but the process should also include the relevant national or local regulatory agencies that are entrusted with the protection of cultural heritage.

The removal of cultural heritage should be avoided unless the overall benefits of the project outweigh the anticipated cultural heritage loss and there are not other feasible alternatives.

2.2.2.3 Analysis

Closely related to the lack of meaningful participation of the affected indigenous communities is the question to which extent the involved parties have undertaken appropriate assessments to evaluate, prevent or minimize harm from occurring in line with their due diligence obligations. Thus, have the involved parties undertaken all reasonable efforts to inform themselves of ‘factual or legal components that relate foreseeably’ (ILC Articles on Prevention (with Commentaries), 2001, Art. 3, para. 10) to the implementation of the Barro Blanco project in order for them ‘to take appropriate measures in timely fashion, to address them.’ (ILC Articles on Prevention (with Commentaries), 2001, Art. 3, para. 10)

On the one hand, this relates to the initial EIA and the process leading to its approval in 2008 by ANAM, thus, *inter alia*, the consultation process with the affected communities, and the extent and scope of the EIA. On the other hand, as the requirement to exercise due diligence is a continuous obligation, this also is concerned with the subsequent monitoring process.

The granting of a concession to construct a hydropower dam on the Tabasará river to GENISA in 2006 followed decades of resistance by indigenous communities residing in the area and year-long law suits against previous plans to exploit the river.

As already stated above, the EIA procedure took place early 2008. Barro Blanco was classified as a category III project under Executive Decree No. 123, *i.e.* a project which can result in significant adverse environmental impacts, calling for a more detailed analysis. After a public forum was held in February 2008 by GENISA, ANAM approved the EIA three months later (May 2008, Resolution DIEORA IA-332-2008). According to domestic law, the scope of any EIA should include impacts on human health, flora, fauna, renewable and non-renewable natural resources, protected areas, landscapes, society, and anthropological, archaeological, historic, or cultural heritage.

A major concern in this context relates to the fact that the EIA **lacked completeness**. It failed:

- to indicate that any members of the affected communities would have to be resettled,
- to recognize the spiritual importance of the affected river and lands for parts of the community,
- and neglected to adequately consult with the communities on the value of the affected area.

These flaws were accepted by the authorities and project financiers, with both instances approving the project despite realizing that additional information was required. Thus, in late realization, ANAM suspended the project temporarily on 9 February 2015, *inter alia* with regard to the agreement reached with the communities and those affected, the development of the negotiation process, the absence of an archaeological management plan approved by the National Institute of Culture (INAC) to protect the petroglyphs and other archaeological findings. (ANAM, 2015)

Furthermore, as the Panel Report of the FMO/DEG complaint mechanism points out, the lenders had determined at the time of credit approval that *inter alia* the indigenous peoples report was insufficient, requiring more information (FMO/DEG IEP, 2015, para. 8), as had the question of cultural heritage not been fully assessed (FMO/DEG IEP, 2015, para. 19). Even though they required a number of additional reports (FMO/DEG IEP, 2015, paras. 75-76), the Panel Report pointed out that a conclusive analysis of indigenous peoples' rights, in the Panamanian context, was still missing at the time of first disbursement. (FMO/DEG IEP, 2015, para. 86)

Also, prior to the project's approval by the lenders, there was already a domestic lawsuit pending regarding the legitimacy of the conducted EIA. EIB – from which GENISA originally had sought financing – had already received complaints by involved NGOs, leading to its decision to wanting to visit the affected communities.³⁴ It was also known to the lenders that the legitimacy of the agreement reached with the (former) Cacique had been challenged. As the due diligence obligation is fact-dependent, the historical resistance, well known to the parties, in connection with the absence of a mutually acceptable agreement with the affected communities weighs particularly heavy.

The incompleteness should have triggered a strong and continuous **monitoring process**, proportionate and adequate to the project's risks and impacts. Even though the lenders hired expert consultants to undertake this task, the involvement of stakeholders could have been beneficial in overcoming mutual trust issues and establishing a functioning dialogue.

Furthermore, it is unfortunate that neither financing institution played a visible role in the UN-led mediation process taking place in 2012/2013. However, the recognition of legitimate concerns regarding the project's implementation did eventually result in the establishment of joint FMO/DEG complaint mechanism. Whether this will have a lasting impact on the Barro Blanco project or the approval of future projects will be telling for the evaluation of the good faith commitment of the involved banks.

2.2.3 *Forced displacement from indigenous land*

2.2.3.1 International standards

Even though so far no immediate displacements have occurred, the impacts of the dam will lead to the displacement of several members of the affected indigenous communities. So far no resettlement plan has been implemented, and the affected communities have not consented to be relocated.

Forced displacement/eviction can violate a number of civil and political as well as economic, social and cultural rights (e.g. Arts. 6, 7, 9, 17, 25, 26, 27 ICCPR, Arts. 6, 11, 12, 13 ICESCR). The indivisibility of human rights is particularly evident in this regard. (OHCHR, 2014, pp. 5–7) In particular the recognition of the right to property is an essential element in ensuring protection from displacement. (Basic Principles (Development-based Displace-

³⁴ However, as GENISA withdrew the loan application prior to the scheduled visit, the case with the complaint procedure with the EIB was closed. (EIB Barton, 2013; EIB CM, n.d.)

ment), 2007, para. 50; Guiding Principles on Internal Displacement, 1998, Principle 21) The **right to property** (protected in regional human rights treaties) also includes the recognition of traditional land tenure and collective ownership systems. This was also emphasized by the Special Rapporteur on Adequate Housing in 2013 when stating that states 'have an immediate obligation to ensure that all persons possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment and other threats' (with reference to General Comment No. 4 of the CESCR). (Special Rapporteur on Adequate Housing, 2013, para. 6)

Hence, every person has the right to be **protected against arbitrary displacement/forced evictions**. (Basic Principles (Development-based Displacement), 2007, para. 11; Guiding Principles on Internal Displacement, 1998, Principle 6) The primary duty-bearer is the state where the displacement/eviction at risk of occurring. However, as Principle 11 of the Basic Principles emphasizes, this 'does not [...] absolve other parties, including project managers and personnel, international financial and other institutions or organizations, transnational and other corporations, and individual parties, including private landlords and landowners, of all responsibility.' (see also Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1997/7, 1997, para. 5)

Moreover, Principle 12 of the Basic Principles stresses that states shall 'refrain from violating human rights domestically and extraterritorially; ensure that other parties within the State's jurisdiction and effective control do not violate the human rights of others; and take preventive and remedial steps to uphold human rights and provide assistance to those whose rights have been violated.'

The use of the qualifier '**arbitrary**' indicates conduct occurring without a legal basis, in disregard to procedural rules, containing 'elements of injustice, unpredictability and unreasonableness'. (Nowak, 2005, Article 17, para. 12) This includes displacement *inter alia* in cases of large-scale **development projects that are not justified by compelling and overriding public interests**. Hence, in line with general human rights law (in particular the right to property), displacement/evictions are allowed in certain circumstances, but this must be interpreted strictly, leave no other alternatives, and constitute an *ultima ratio*. (Guiding Principles on Internal Displacement, 1998, Principle 7; Kälin, 2000, p. 15) This process is detailed by the UN Basic Principles and Guidelines on Development-based Evictions and Displacement, stipulating that 'any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.'

(Basic Principles (Development-based Displacement), 2007, para. 21) Where displacement is found to be unavoidable, measures must be taken to minimize it and its negative consequences. (Guiding Principles on Internal Displacement, 1998, Principle 7)

To determine when there is an **overriding public interest, not only must all feasible alternatives have been explored** (see *inter alia* Art. 10, Kampala Convention, 2009, but also World Bank OP 4.12, 2013), but a **balance of interests** between the overall economic interests in the project and the protected rights of the affected communities must be struck. (Hofbauer, 2015, p. 249ff)

In this regard, the **interests of indigenous peoples** deserve special attention. The importance of land for indigenous communities has been confirmed already early in by the Inter-American Court in *Awas Tingni*, where it stated that for indigenous peoples ‘relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.’ (The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 2001, p. 75, para. 149) Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have deduced special protection rights for indigenous peoples *inter alia* from the provisions regarding the rights to life, liberty and personal security, residence and movement, the preservation of health and well-being, culture, judicial well-being, as well as the Convention’s protection of property.³⁵

Furthermore, as emphasized by the Inter-American Court in *Saramaka*, even though Article 21 of the ACHR (right to property) is not absolute, when concerned with property rights of indigenous and tribal peoples an additional factor is whether the ‘restriction amounts to a denial of their traditions and customs in way that endangers the very survival of the group and of its members.’ (*Saramaka v. Suriname (Ct)*, 2007, para. 128)

In order to safeguard their rights, the whole process, in particular the identification of possible alternatives, shall occur **in consultation** with the affected communities (see, *inter alia*, Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1997/7, 1997, para. 16; *Saramaka v. Suriname (Ct)*, 2007, para. 129). In this vein, the special value of lands and territories for indigenous peoples has also been recognized in Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples:

³⁵ *Inter alia*, Arts. 4, 7, 21, 22, 25, American Convention on Human Rights, 21 November 1969, 1144 UNTS 123.

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Where the public interest outweighs the interests of the affected communities, resettlement 'must occur in a just and equitable manner' and must include 'the right to alternative land or housing which is safe, secure, accessible, affordable and habitable.' (Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1997/7, 1997, paras. 26-27) This shall take place only once a resettlement plan has been put in place, and should *inter alia* ensure that

(c) The actor proposing and/or carrying out the resettlement shall be required by law to pay any costs associated therewith, including all resettlement costs;

[...]

(e) The affected persons, groups and communities must provide their full and informed consent as regards the relocation site. [...]

(f) Sufficient information shall be provided to affected persons, groups and communities concerning all State projects as well as the planning and implementation processes relating to the resettlement concerned, including information concerning the purpose to which the eviction dwelling or site is to be put and the persons, groups or communities who will benefit from the evicted site. Particular attention must be given to ensure that indigenous peoples, ethnic minorities, the landless, women and children are represented and included in this process;

(g) The entire resettlement process should be carried out in full consultation with and participation of the affected persons, groups and communities. States should take into account in particular all alternative plans proposed by the affected persons, groups and communities;' (Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1997/7, 1997, para. 28)

Finally, in the context of forced evictions, the right to a remedy and to judicial or other accountability mechanisms is of key importance. (OHCHR, 2014, pp. 2, 31)

2.2.3.2 Applicable domestic legal framework and institutional policies

2.2.3.2.1 Domestic legal framework

According to Article 19(17) of Law 26 of 29 January 1996, the Autoridad Nacional de los Servicios Públicos (National Public Services Authority, ASEP) is authorized to recommend expropriations and authorize the establishment of restrictions concerning property and easements necessary for the provision of public services.³⁶

Law 18 of 26 March 2013³⁷ introduced Art. 138A, creating an extraordinary eviction process in addition to the ordinary eviction process. This process can be resorted to if a project is considered a matter of urgency to meet the basic needs of the community ('carácter urgente para satisfacer necesidades básicas de la comunidad').

2.2.3.2.2 Institutional policies

With regard to the forced displacement of indigenous peoples, in particular IFC PS 5 (Land Acquisition and Involuntary Resettlement) and PS 7 (Indigenous Peoples) are relevant.

PS 5 is applicable to 'physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or access to assets that leads to loss of income sources or means of livelihood) as a result of project-related land acquisition. Resettlement is considered involuntary when affected individuals or communities do not have the right to refuse land acquisition that results in displacement. This occurs in cases of: (i) lawful expropriation or restrictions on land use based on eminent domain;² and ii) negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.' (IFC, 2006, p. 18, para. 1)

The primary objectives are, *inter alia*, to avoid or at least minimize involuntary resettlements wherever feasible; mitigate adverse social and economic impacts by providing compensation and ensure that resettlement is implemented with appropriate disclosure of information, consultation and the informed participation of those affected.

Whether or not a project will result in resettlement should be discovered already in the course of the Social and Environmental Impact Assessment, and the necessary measures should be implemented into the Social and Environmental Management system. For the resettlement planning, "the client will carry out a census with appropriate socio-economic baseline data". (IFC, 2006, p. 20, para. 11) This will include a cut-off date for eligibility.

³⁶ 'Recomendar las expropiaciones y autorizar la constitución de limitaciones de dominio y servidumbres, que sean necesarias para la prestación de los servicios públicos'.

³⁷ [http://www.energia.gob.pa/pdf_doc/MarcoLegal/B-Sector-Elctrico/Ley18-2013\(GO27254\).pdf](http://www.energia.gob.pa/pdf_doc/MarcoLegal/B-Sector-Elctrico/Ley18-2013(GO27254).pdf).

As emphasized in several passages of PS 5, consultation is a key prerequisite and should continue at all stages of implementation. Where indigenous peoples are concerned, PS 7 is of particular relevance. Para. 14 of **PS 7** states in this regard that

'The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from their communally held⁵ 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.'
(emphasis added)

2.2.3.3 Analysis

GENISA's Environmental and Social Report came to the conclusion that no people reside in the 6,7 ha area which will be inundated on the Barro Blanco project is completed. This has since then, however, been disproven by numerous reports, including the UNDP's verification mission, finding that the project would in fact lead to the displacement of families living in six houses (Misión de Verificación, 2012, para. 5).

However, even though this initial assumption has been disproven, there is no resettlement plan. There is also no valid agreement with the affected communities to purchase or lease their land (owned collectively) against adequate compensation. The lack of a resettlement plan also means that **no precise data** exists on the full range of people affected by the project and that therefore **no structured planning of compensation measures** has occurred.

With regard to the case at hand, and in light of the spiritual importance of not only the river Tabasará for their religion ('Mama Tata') but also of the land for the affected indigenous communities, a **prior agreement** between the involved parties can be seen as indispensable.

This was not reached, and there are serious doubts whether it was attempted to engage in **good faith** negotiations with the affected communities in a **transparent and consistent** manner.

Furthermore, even though GENISA argued in their Environmental and Social Report that alternative land would be available if requested, **potential resettlement sites** and **alterna-**

tives should have been discussed in respect of the **free, prior and informed consent** of the affected communities prior to authorization of the project.

There are two expropriation/eviction procedures still pending, taking place under domestic law. ASEP Resolution AN No. 6103-Elec of 22 April 2013 declared the Barro Blanco project in the 'public interest' and 'urgent'.³⁸ This would have triggered the Art. 138A extraordinary eviction procedure under Law 18 of 26 March 2013³⁹. Despite the fact that the *comarca* has been recognized as communal property, offers of compensation were only extended to one member of the community (valuing the land at approx. 4000 USD). However, an appeal was launched against this resolution, whereby the Supreme Court granted provisional measures. In the meantime, the ordinary eviction process has been appealed against as well. Final decisions are still pending.

Nevertheless, it can be concluded that to date the process so far has failed to adhere to a number of conditions for it to be in full compliance with international human rights standards, in particular as it has failed to be regulated so as to ensure full and fair compensation and rehabilitation; and has failed to take the special interests of indigenous peoples into account, in particular their spiritual attachment to the affected area.

2.2.4 Conclusions

The impacts of the Barro Blanco dam on the local indigenous population have been the focus of international and national bodies. The historical and societal complexities have contributed to a difficult political and legal environment. Against this background, three core issues can be identified which have aggravated the human rights situation of the affected communities: the project's authorization without FPIC; a lack of due diligence exercised by involved parties; and the threat of forced displacement from indigenous land.

Where natural resource development and the rights of indigenous peoples interact, a primary objective is to balance these often-times competing interests by reaching a mutually acceptable agreement on issues of land and resource use and development, land and resource ownership, potential resettlement plans, and aspects of compensation and benefit-sharing. The current case exemplifies how a lack of due diligence exercised at the initial stages of a large-scale development project and a failure to undertake culturally appropriate consulta-

³⁸ <http://www.asep.gob.pa/openpdf.php?idresol=AN%20No.6103-Elec>.

³⁹ [http://www.energia.gob.pa/pdf_doc/MarcoLegal/B-Sector-Elctrico/Ley18-2013\(GO27254\).pdf](http://www.energia.gob.pa/pdf_doc/MarcoLegal/B-Sector-Elctrico/Ley18-2013(GO27254).pdf).

tions can exacerbate existing conflicts and prevent such agreements from being reached at a later stage.

Hence, as stated above, the fact that the project was authorized without FPIC of the affected communities weighed particularly heavy in light of the historical struggle over the exploitation of natural resources in the *comarca*. Additionally, the incompleteness of the initial impact assessments, both under domestic law as well as under the lenders' policies, prevented early stage planning and led to continuous mistrust by the affected communities. As the project's implementation continues, the failure to regulate resettlement, compensation and rehabilitation within the management plan has cemented the negotiation positions, making a mutual agreement seem unreachable.

In addition, as will be discussed in more detail in Section 2.4, identifying actors accountable and obtaining justice is another difficult issue.

2.3 The legal responsibility and political accountability of European states and their institutions

The Barro Blanco project has and will continue to have severe impacts on the human rights of the local indigenous population. As has been found in numerous international reports by independent experts, the project's implementation falls short of international standards and policies applicable. Yet, it is not possible to discern an entity/state/institution which has single-handedly caused the identified human rights violations. In addition, it is difficult narrowing down an appropriate forum to attain justice for the victims.

The UNFCCC is an inter-state agreement and currently does not provide individuals with human rights protection or direct recourse.⁴⁰ This is particularly problematic in light of climate

⁴⁰ The only potential requirements are that the project must contribute to sustainable development and take account the comments made by stakeholders. In this regard, it is noteworthy that there were certain complaints made on this issue in the Barro Blanco project.

The Barro Blanco project obtained the letter of approval by ANAM for filing for registration under the CDM mechanism on 17 November 2009. (AENOR, 2011, p. 9) The Designated Operational Entity (DOE) for the validation report was AENOR, the Spanish Association for Standardisation and Certification. According to their validation report, they verified during their visit that the '[l]ocal communities (Veladero, Cerro Viejo, Palacios and Bellavista) have been consulted and have demonstrated their support for the development of the Barro Blanco Hydroelectric power plant Project by signing the corresponding minutes of the meetings.' (AENOR, 2011, p. 24) As to comments by stakeholders, the report refers to one comment submitted by Mr. Osvaldo Jordan during the first period for commenting, on behalf of ACD, which was received during this period. AENOR then stated that after speaking to the DNA of Panama and the 'main communities involved in the area', these had 'agreed that the project will bring work and development to the area, and all of them supported the development of the project. No negative feedback was received.' (AENOR, 2011, p. 24)

response measures being financed and approved in one state but implemented in another state. Thus, individuals negatively affected by such policy measures are often located in the territory of a state which has no decisive or singular role to play in the implementation thereof.

Applying the regime of extraterritoriality in this context is challenging. As elaborated below, the majority of so far existing case law on extraterritorial obligations relates to situations of armed conflict or the exercise of some factual control over territory or person. With regard to climate policies, victims of the negative effects of climate response measures are however generally not in such a control-relationship with the states / organization exercising decisive influence. (Humphreys, 2012, p. 44; Pedersen, 2011)

Yet, as Humphreys argues, '[c]limate change may yet open up new spaces for the consideration of this old theme.' (Humphreys, 2012, p. 44) As the Maastricht Principles emphasize, in particular the scope of the ICESCR shall be understood in this context as requiring states to refrain from activities which might infringe economic, social and cultural rights in other states. (Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights, 2011, Principle 9)

Nevertheless, despite the recognition that climate response measures can result in severe human rights violations – both of civil and political rights as well as economic, social and cultural rights – in light of the UNFCCC's silence on guaranteeing the respect of human rights in implementation of adaptation and mitigation projects⁴¹ (Roht-Arriaza, 2010), state support for recognizing judiciable rights is scarce. (Humphreys, 2012, p. 45) As a preliminary note, it is also important to point out that it is commonly recognized that states cannot be held responsible for their votes cast for or against the individual policies of an International Organization (Crawford, 2014, p. 412, elaborating on Art. 58 of the ILC Articles on the Responsibility of

Due to a change in methodology, there then was another period for comments regarding a new version of the PDD, and during that period, no comments were received. (AENOR, 2011, p. 24) Thus, AENOR concluded that it could recommend the Barro Blanco project for registration. A number of NGO reports indicate, however, that comments had been sent also during the second period, and their receipt had been confirmed. Yet, no response was given on these comments by AENOR and the comments do not appear on the UNFCCC's website. (Jordan, Sogandares, & Arjona, 2011)

In June 2011, Barro Blanco was approved as a CDM project by the CDM Executive Board under the Kyoto Protocol (CDM EB, 2011). Prior to the approval, supplementary information on the additionality of the project was sought by the Executive Board (CDM Barro Blanco, 2010), not however on the stakeholder involvement or on any specific measures were taken in response to the information gathered.

⁴¹ The **OHCHR Report** (OHCHR, 2009), building on the consensus among state submissions, points out that 'human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change.' (para. 71)

International Organizations)⁴². Thus, from a legal perspective, **rather than answering the question based on a macro analysis of the behavior of states in the UNFCCC framework, a micro approach in assessing the specific context of project financing must be resorted to.**

Nevertheless, for the sake of argument, a short overview of extraterritorial obligations in the context of climate policies will be provided following a more detailed analysis of the project-level applicability. Thus, the following Sections (2.3.1-2.3.3) will particularly focus on the human rights obligations of the European actors directly involved (Germany and the Netherlands through their development banks DEG and FMO, respectively). Section 2.3.4 will then shortly elaborate on further obligations in the context of the implementation of institutional policies as well as in the context of other non-state actors, where European states or only indirectly involved.

2.3.1 *Responsibility for conduct of bilateral financial institutions in the context of implementing climate policies*

The UNFCCC is guided by the principle to ‘protect the climate system for the benefit of present and future generations of mankind’. (Article 3(1) *United Nations Framework Convention on Climate Change*, 1992) To reach this goal, state parties ‘should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.’ (Article 3(3) *United Nations Framework Convention on Climate Change*,

⁴² Note that where states **transfer competences** to an IO, the ECtHR has developed the doctrine of ‘equivalent human rights protection’ when stating that ‘State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...] If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization.’ (*Bosphorus*, 2005, paras. 155-156) This presumption can be rebutted in cases where the circumstances lead to the conclusion that the protection of Convention rights was ‘manifestly deficient’. (para. 157) Thus, where member states of the EU, e.g., vote in Council decisions on the implementation of policies in violation of their human rights obligations, they can incur international responsibility in cases where no equivalent human rights protection is offered in the organization. Scholars (Nollkaemper, 2011) and the International Law Commission (International Law Commission, UN Doc. A/66/10, 2011, para. 1 to Article 48) have suggested that in the area of shared competences of the EU – as listed in Article 4 TFEU (including the internal market, social policy (for the aspects defined in the TFEU), economic, social and territorial cohesion, agriculture and fisheries (excluding the conservation of marine biological resources), environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice and the common safety concerns in public health matters, for the aspects defined in the TFEU. Moreover, in the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. And finally, in the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.) – the concept of joint responsibility should apply to the EU and its member states. However, this has so far not been explored in great depth.

1992) The Bali Action Plan of 2007 (Decision 1/CP.13) reaffirmed financing as one of the key components in the development of low-carbon energy projects and climate adaptation, *i.e.* climate financing. Most often, this is done through a framework of funding offered by **bilateral financial institutions** (BFIs).⁴³

Against this background, the financing of Barro Blanco as a CDM project deserves particular scrutiny. Thus, in August 2011, two months after the CDM Executive Board approved Barro Blanco as a CDM project, FMO (Dutch development bank) and DEG (German development bank) approved financing of the project. While the ensuing years have led to a number of intense campaigns by civil society against European states involved in Barro Blanco and similar projects, the following seeks to analyze whether states – through the conduct of their bilateral financial institutions – can be liable for human rights violations that occur as a result of the projects financed and approved.

2.3.2 *The attribution of bilateral financial institutions to states*

The position of BFIs versus their state varies on a state by state basis. This is essential in the determination to which extent the conduct of BFIs can be attributed to the state. Thus, as such institutions are commonly established with their own separate legal identity, the question particularly arises whether they operate as state organs (Art. 4, International Law Commission, 2001⁴⁴) or they are authorized to fulfill a public mandate (are “empowered by the law of that State to exercise elements of [...] governmental authority”, Art. 5, International Law Commission, 2001) and operate within that mandate in the financing of the case at hand.

While the ILC Articles on State Responsibility do not define which entities may be classified as state organs, it has been clarified that mere ownership of an entity by the state does not convert that entity into an organ of the state. (Crawford, 2014, p. 118; *Waste Management v. United States of Mexico*, 2004⁴⁵) In part, case-law has also further determined when it is

⁴³ Bilateral financial institutions (BFIs) are institutions primarily funded by or owned by one state. The funds of BFIs are usually provided by the state, but can also be supplemented by own funds of the bank and money raised on capital markets.

⁴⁴ Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

⁴⁵ The case concerned the conduct of Banobras, a development bank partly-owned and substantially controlled by Mexican government agencies. The Tribunal stated on the question of attribution that

possible to consider an entity not formally a state organ a *de facto* organ. Thus, as the International Court of Justice explained in *Bosnian Genocide*, the ‘particular great degree of State control’ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, para. 393) is essential in coming to this conclusion. Here, as explained by James Crawford, factors such as whether the state involvement exceeded the provision of financial assistance, or whether *complete* control was exercised *in fact* are decisive. (Crawford, 2014, p. 125)

As described in Section 1.1.2.6, both DEG and FMO are separate legal entities from their respective home states. Since the beginning of the 1980s, DEG has financed projects at its own risk (previously operating with funds from the Federal Ministry for Economic Cooperation). Since 2001, it has been a wholly-owned subsidiary of the Kreditanstalt für Wiederaufbau (KfW) banking group, a promotional bank of the Federal Republic of Germany. KfW is a government-owned public entity, with 4/5th of its capital held by the federal German state and 1/5th by the Bundesländer. It was founded by the 1948 ‘Gesetz über die Kreditanstalt für Wiederaufbau’⁴⁶ (as amended several times since then) and is an ‘Anstalt des öffentlichen Rechts’ [public agency]. Its Board Members serve in an independent capacity.

FMO has a mixed public-private ownership structure. The Dutch state is a shareholder owning 51% of the shares. Decisions are made through a Management Board, which is appointed by an independent Supervisory Board. The members of the Supervisory Board are elected at shareholder meetings.

Both DEG and FMO decided to finance the Barro Blanco project without any direct interference by state authorities (Fuchtel, 2015a; Ministerie van Buitenlandse Zaken, 2014) In light of this, **it therefore seems more appropriate to assess the question of attribution of both institutions under Article 5 of the ILC Articles.**

Article 5 of the ILC Articles on State Responsibility deals with the attribution of non-state organs which are empowered to exercise elements of governmental authority. Hereunder, the Commentary to said Articles lists exemplary ‘public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in

‘it is doubtful whether Banobras is an organ of the Mexican State within the meaning of Article 4 of the [Articles]. Shares in Banobras were divided between the public and private sector, with the former holding a minimum of 66%. The mere fact that a separate entity is majority-owned or substantially controlled by the state does not make it *ipso facto* an organ of the state.’ (para. 75)

⁴⁶ https://www.kfw.de/Download-Center/KfW-Gesetz-und-Satzung-sowie-Gesch%C3%A4ftsordnungen/KfW_Gesetz_D.pdf.

each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by state organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.’ (Commission, 2002, Commentary to Art. 5, para. 2)

In order to determine whether DEG and FMO exercise governmental authority, it is helpful to take their **mandate** into consideration. FMO defines as its objective to ‘contribute to the advancement of productive enterprises in developing countries, to the benefit of economic and social advancement of those countries, in accordance with the aims pursued by their governments and the policy of the Dutch Government on development cooperation’ (FMO Investment Criteria, n.d.) DEG similarly has as its objective ‘to promote business initiative in developing and emerging market countries as a contribution to sustainable growth and improved living conditions of the local population’ (DEG, 2015).

These mandates are to be considered in light of their contexts, *i.e.* private sector investments in developing states often occur against the background that these entities provide basic services such as access to water, sanitation, energy, or transport, and are therefore essential in the social advancement of the host state’s population. (Dalberg, 2010) As the positive effects of sustainable investments often are said to have long-term benefits for the home state of the bilateral financing institutions (Dalberg, 2010), they play a decisive role in the fulfilment of states’ development policies.

Additional support of perceiving the mandate of bilateral financial institutions as governmental can be found in the UN Convention on Jurisdictional Immunities of States and their Property (2004, not in force) which lists under its definition of state: the state and its various organs of government; constituent units of a federal state or political subdivisions of the state, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; and representatives of the State acting in that capacity. (Art. 2, United Nations Convention on Jurisdictional Immunities of States and their Property) It has been discussed that ‘agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State’ is wide enough to include such institutions such as central banks, sovereign wealth funds etc. (Grant, 2013)

In this vein, it would seem that a bilateral development bank would qualify as an agency or instrumentality of the state and its conduct could be attributed to the state if indeed exercising governmental authority in the pertinent case.⁴⁷ However, it must be added **that even in the case of central banks**, generally equipped with considerable autonomy from the parent state; possessing regulatory powers with regard to monetary policies, distinguishing them from commercial banks; and holding significant national reserve deposits, **the question when they are exercising governmental authority** and possessing thus the privileged status of enjoying immunity, **is difficult to determine** (Fox & Webb, 2013, p. 370).

Despite these difficulties, for the purposes of this analysis it will be assessed which human rights obligations the EU member states' have with regard to the development banks operating abroad both if their conduct is indeed attributable to them.

2.3.3 *Extraterritorial human rights obligations in the context of project approval/financing/monitoring*

Human rights have traditionally been perceived as a matter owed by states to their nationals or residents on their territory. Though the pertinent treaties are entered into at the international and regional level, implementation occurs domestically, in a vertical relationship between state and individual.

In the past years, there has been increased attention directed at the scope of application of human rights treaties. The assessment of extraterritorial human rights obligations has been accompanied by corresponding case law, international research projects and output of international organizations as well as international human rights monitoring mechanisms. At times, political difficulties in establishing binding extraterritorial obligations, e.g., with regard to corporate conduct, has 'shifted the emphasis of the debate from states' extra-territorial obligation under human rights law to states' policy rationales to protect human rights in their international relations.' (Augenstein & Kinley, 2013, p. 273)

⁴⁷ Note, however, also the difficulties the tribunal had in *Waste Management* in this regard:

'Nor is it clear that in its dealings with the City and the State in terms of the Line of Credit it was exercising governmental authority within the meaning of Article 5 of those Articles. The Organic Law of 1986 regulating Banobras' activity confers on it a variety of functions, some clearly public, others less so. A further possibility is that Banobras, though not an organ of Mexico, was acting "under the direction or control of" Guerrero or of the City in refusing to pay Acaverde under the Agreement: again, it is far from clear from the evidence that this was so. For the purposes of the present Award, however, it will be assumed that one way or another the conduct of Banobras was attributable to Mexico for NAFTA purposes.' (*Waste Management v. United States of Mexico*, 2004, para. 75)

Time warrants, however, reconsidering this approach and inquiring whether current case-law permits evolvement on the issue. Hence, the answer to the question of whether states incur responsibility for human rights violations occurring abroad in the context of the implementation of climate policies – or more specifically, in the case of climate project financing – depends on two factors:

- First, whether the relevant human rights treaty is applicable by virtue of a situation falling under its jurisdictional scope.
- Second, whether the situation causing a human rights violation is attributable to a state and constitutes a breach of its international obligation.

In determining to which extent states have extraterritorial human rights obligations in the context of project approval/financing/monitoring **case-law** by regional human rights bodies and international courts analyzing the scope of applicable human rights instruments, in particular the ECHR, ICCPR and ICESCR, is decisive. The question whether states further-reaching obligation with regard to the climate policies will be answered below in Section 2.3.4.

2.3.3.1 ETO case-law

The territorial scope of application of human rights treaties relates to the interpretation of their so-called jurisdictional clauses.⁴⁸ **The ICCPR⁴⁹ and ECHR⁵⁰ both contain such jurisdictional clauses**, limiting the applicability of the Convention to persons ‘within the jurisdiction’ or ‘within its territory and subject to [...] [the] jurisdiction’ of state parties. These clauses relate to ‘a particular kind of factual power, authority, or control that a state has over a territory, and consequently over persons in that territory’ (De Schutter et al., 2012, p. 1102; Milanovic, 2011, p. 32). The precise standard of control, power or authority, however, varies, as will be explored in the following, in particular by resorting to case law.

⁴⁸ M. Gondek calls these ‘umbrella clauses’ as they are applicable to all the rights set out in a given treaty. (Gondek, 2009, p. 12) As the use of that term is, however, strongly pre-occupied by international investment law, the term jurisdictional clause is to be preferred.

⁴⁹ Article 2(1) ICCPR defines the ICCPR’s scope of application in the following manner:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁵⁰ Article 1 ECHR states:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Yet, **not all human rights treaties contain such explicit jurisdictional clauses**, with the ICESCR⁵¹ constituting the most notable example. In the absence of a clear treaty norm, international treaty law does not provide for a default rule, *i.e.* ‘there is no presumption against extraterritoriality [...] [and] there is also no presumption in *favour* of extraterritoriality.’ (Milanovic, 2011, p. 11 [emphasis in original]) However, as will be discussed in more detail below, **certain jurisdictional links (under general international law) or other effective ties** might serve as additional indications to evaluate when a person is within the jurisdiction of a state for the purpose of applying the human rights treaty.

In light of abovementioned identified human rights violations relating to civil and political rights (*e.g.*, participatory rights of indigenous peoples as contained in Arts. 1 and 27 ICCPR) and economic, social and cultural rights (*e.g.*, right to property, right to an adequate standard of living), both categories will be discussed in the following. As the focus of this section lies on determining the threshold in a situation of project financing, attention will be laid on case-law concerning situations where a state exercises authority over territory or over persons. Arguments that the ICESCR extends further and operates beyond this typical scenario by inferring further ‘international obligations’ (‘through international assistance and co-operation’) will be investigated in Section 2.3.4 on ETOs in the context of the implementation of climate policies.

2.3.3.1.1 *Civil and political rights*

The development of extraterritorial obligations in the field of civil and political rights stems from a series of cases heard by the Human Rights Committee (HRC) as well as the European Court of Human Rights (ECtHR). The majority of cases originate from situations where one state exercises territorial control over parts of another state, *e.g.*, in the context of military occupation. The following will provide a brief overview of the evolvement in order to identify the necessary relationship between the respective state and the individual located outside a state’s territory. As will be seen, it can be broadly distinguished into two categories: a **spatial model of jurisdiction** and a **personal model of jurisdiction**. (This distinction has been made by a number of scholars, *inter alia*, Milanovic, 2011; Wilde, 2005)

⁵¹ Article 2 ICESCR states:

(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

One of the first cases and still leading on the issue of extraterritorial application of the **ICCPR** is **López Burgos** (*López Burgos*, 1981) which concerned a Uruguayan trade union activist who had fled to Argentina following a *coup d'état*. He was kidnapped there by Uruguayan security forces, mistreated for several months and then transferred back to Uruguay where he was officially arrested. The HRC, in interpreting the phrase 'individuals subject to its jurisdiction' as contained in Article 1 of the Optional Protocol to the ICCPR, found that this referred not to the place where the violation occurred but

rather to the **relationship between the individual and the state** in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. (para. 12.2 [emphasis added])

Moreover, the HRC stated that

it would be unconscionable to so interpret the responsibility under article of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory. (para. 12.3)

Hence, the **Human Rights Committee**, in **General Comment 31** (HRC, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004) interpreted Article 2(1) of the ICCPR ('within its territory and subject to its jurisdiction') to entail that state parties 'must respect and ensure the rights laid down in the Covenant to anyone within the *power or effective control* of that State Party, even if not situated within the territory of the State Party.' (para. 10, emphasis added)

This is also in line with the case law of the **International Court of Justice** which has had the opportunity to address the issue of extraterritorial application of human rights treaties at several occasions. Firstly, in its **Wall** Advisory Opinion (*Legal Consequences of the Construction of the Wall*, 2004), the International Court of Justice was concerned with the question of applicability of the ICCPR and ICESCR (see also below) in connection with **Israel's occupation of Palestinian territory** and the construction of the wall. It confirmed by referral to prior practice of the Human Rights Committee that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.' (para. 111; later reiterated and generalized⁵² in the context of military action taken by Uganda in the territory

⁵² The Court did not refer to a specific treaty but broadly stated that 'international human rights instruments are applicable "in respect of acts done by a state in the exercise of its jurisdiction outside its own territory"' (para. 216).

of the Democratic Republic of the Congo in **Armed Activities on the Territory of the Congo** (Armed Activities on the Territory of the Congo, 2005, para. 216).)

The interpretation of the jurisdictional clause contained in the **ECHR** has proven particularly complex and partly incoherent. As one of the authoritative cases on the extraterritorial application of the ECHR, the question of necessary control over territory has most prominently been discussed in **Loizidou v. Turkey** (Loizidou, 1995). The case concerned Mrs. Loizidou, a Cypriot Greek who lived in Nikosia. She owned several pieces of land in Northern Cyprus, however due to the continued occupation and control of the northern party of Cyprus by Turkish armed forces, she had been prevented on several occasions from gaining access to her home and other properties there. With regard to the discussion on whether the alleged conduct could be capable of falling within the ‘jurisdiction’ of Turkey even though they occurred outside its territory, the Court stated that

[b]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises *effective control of an area* outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. [para. 62, emphasis added]

This **standard of effective control of an area** has since been confirmed in numerous cases (see, *inter alia*, *Cyprus v. Turkey*, 2001). In **Issa and Others v. Turkey** (*Issa v. Turkey*, 2004) it was even stated that temporal effective overall control could be sufficient (para. 74).

Other cases evidence the strictness of the standard of effective control and that this does not arise in every situation where a state is in a situation to exert considerable influence over a situation (a so-called ‘cause-and-effect’ notion of jurisdiction). For example, in **Banković** (Banković, 2001) the ECtHR declined to find a jurisdictional link between the victims and the NATO coalition states with regard to the proceedings brought by six relatives of victims of a NATO air strike on a radio station in the former Federal Republic of Yugoslavia in 1999, and thus rejected that the concerned act fell ‘within the jurisdiction’ of the members of the respondent states. In its discussion, the ECtHR repeatedly emphasized the **exceptional extension of the scope of the ECHR** (paras. 59, 67, 71), referring to **four types of situations** where the extraterritorial application could be applicable, *i.e.* (effective) control over territo-

ry⁵³, non-refoulement cases (extradition and expulsion), consular or diplomatic cases/flag state jurisdiction cases, and extraterritorial effects ('acts of authorities [...] which produced effects or were performed outside their own territory') (referring to **Drozd and Janousek**, 1992, para. 91) (*Banković*, 2001, paras. 68-73). Moreover, as was later also confirmed in **Medvedyev**, dealing with law-enforcement operations at sea, the Court confirmed that 'the provisions of Article 1 did not admit of a "cause-and-effect" notion of "jurisdiction".' (*Medvedyev and Others v. France - 3394/03 [2010] ECHR 384*, 2010, para. 64)

However, the ECtHR appears to have somewhat departed from the strict spatial application and understanding of the jurisdictional clause as held in *Banković* in its further case law. (Miller, 2009, p. 1228; Ryngaert, 2012, p. 58) Leading in this regard is **Al-Skeini and others v. United Kingdom** (*Al-Skeini*, 2011). The case concerned allegations against British armed forces operating in southern Iraq (Basrah) which resulted in the deaths of six Iraqi civilians, five of which were killed by British troops, one who died after being mistreated whilst in the custody of the British Army. The ECtHR began its deliberations by stating that

'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention. (para. 130)

After referring to its previous case law, it found that

in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. [referring *inter alia* to **Öcalan v. Turkey**⁵⁴, para. 91 and *Issa and Others v. Turkey*⁵⁵] [...] It is clear that, whenever the State

⁵³ As further defined in *Banković*, this effective control is exercised "as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises **all or some of the public powers** normally to be exercised by that Government." (para. 71, emphasis added)

⁵⁴ In **Öcalan v. Turkey** (*Öcalan*, 2005) the Court found Turkey responsible for acts of Turkish officials exercising authority outside its territory. They had arrested the applicant in Kenya, physically forcing him to return to Turkey. Consequently, he was 'subject to their authority and control following his arrest and return to Turkey' (para. 93).

⁵⁵ Where the Court *inter alia* stated that:

A State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State [...]. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.' (para. 71).

through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’. (paras. 136-137)

The ECtHR concluded that the United Kingdom had assumed ‘some of the **public powers** normally to be exercised by a sovereign government’ and that, consequently, it ‘exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.’

Ilaşcu and Others v. Moldova and Russia (Ilaşcu, 2004) is a further example which has been resorted to when suggesting that the standard has slightly loosened since *Banković*. The Court applied the threshold for falling within Article 1’s jurisdictional clause to impute responsibility to the Russian Federation in a surprisingly wide manner. In particular, it found that the authorities of the ‘Moldavian Republic of Transdnistria’ remained under ‘the effective authority, or at the very least under the decisive influence of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.’ (para. 392) [emphasis added] (confirmed in *Catan and Others*, 2012, paras. 103ff).

In conclusion, the threshold of jurisdiction to extend civil and political human rights obligations beyond a state’s territory remains a strict one. Most prominently, the standard can be described as one of ‘**exercise of effective control of an area**’ through the ‘**exercise of public powers**’ (**spatial model**). There are limited indications that the scope of jurisdiction is widening throughout the Court’s case law, in particular to situations where an individual is brought under the effective control and authority of state agents operating abroad (**personal model**).

2.3.3.1.2 *Economic, social and cultural rights*

In theory, the lack of a jurisdictional clause in the ICESCR bears greater potential for extending its scope of application to extraterritorial situations. Nevertheless, difficulties arise in par-

ticular in light of lacking case-law, as the ICESCR has only recently established a complaint mechanism and has so far not issued any decisions.⁵⁶

Thus, scholarly opinion and the output of the CESCR have particular relevance in this context. Moreover, in 2011, the well-known *Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights* (Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights, 2011) were adopted by a group of international legal experts. They are based on case law, opinions by international institutions as well as scholarly literature, but are non-binding principles and are not open for signature by states. As pointed out by one of their authors (Vandenhoele, 2013, p. 817), the Principles themselves avoid assigning a legal status to the content of the principles, instead referring vaguely to the fact that they are '[d]rawn from international law.' (preambular para. 8) In any event, in an attempt to combine two diametrical positions, *i.e.* the wide application of economic and social rights in an extraterritorial context and the narrow consensus on normative content, the *Maastricht Principles* serve as an important starting point.

A number of scholars see the existence of firm extraterritorial obligations with regard to economic and social rights at best still under development. (Coomans, 2004; Sepúlveda, 2003, pp. 374–378) The programmatic formulation to achieve the protection of this category of rights through 'progressive realization', difficulties in identifying direct links between policies and violations, and scarce state practice and case law are just some of the issues mentioned. (Gondek, 2009, p. 291 ff)

Nevertheless, in an attempt to clarify the matter, Michał Gondek suggests four typical scenarios where the conduct of a state can affect the economic and social rights of persons situated outside its territory: through acts of state agents (also see above's analysis on 'effective control of an area'); through omissions (*e.g.*, failure to regulate the conduct of corporations registered in its territory); through domestic economic policies (*e.g.*, by a state subsidizing its domestic agriculture); and indirectly through activities of international organizations in whose decision-making states participate (*e.g.*, international financial institutions deciding on development projects the implementation of which may lead to deprivation of economic and social rights). (Gondek, 2009, p. 291 ff)

⁵⁶ The Optional Protocol to the ICESCR foreseeing an individual complaints procedure only came into force on 5 May 2013. As of August 2015, six cases are pending, see <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx>.

The following highlights the little case-law available on the scope of application of the ICESCR and investigates to which extent these scenarios are covered thereby.

With regard to the **ICESCR**, the most authoritative statement can be found in abovementioned *Wall Advisory Opinion (Legal Consequences of the Construction of the Wall, 2004)*. But even the few passages in this Opinion remain vague. After pointing out that the ICESCR does not contain any provision on its scope of application, the Court elaborates that this might be because the rights contained in the Convention are ‘essentially territorial.’ (para. 112) However, at the same time it emphasized with regard to the applicability of the ICESCR that ‘it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction’. (para. 112) Hence, it came to the conclusion that in light of the fact that the concerned (occupied) territories had been subject to Israel’s territorial jurisdiction for over 37 years, it was both bound by the provisions of the ICESCR and under the obligation ‘not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.’ (para. 112)

Similarly, the Maastricht Commentary cites General Comment No. 8 by the Committee on Economic, Social and Cultural Rights which confirms that:

When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social, and cultural rights of the affected population. (CESCR, UN Doc. E/C.12/1997/8, 1997, para. 13)

Hence, in situations where a state is in a position to exercise effective control over territories and populations (cf. CESCR, UN Doc. E/C12/1/Add.90, 2003, para. 31), it is bound by the provisions contained in the ICESCR in relation thereto.

While it is difficult to measure the normative value thereof in practice, the output of international institutions with regard to other human rights treaties provides some guidance in the determination of the **scope of jurisdiction**. Hence, as also stipulated in Principle 9 of the Maastricht Principles, states have the obligation to **respect, protect and fulfil** economic, social and cultural rights where they **a) exercise authority or effective control** (whether in accordance with international law or not)⁵⁷; **b) where their acts and omissions bring about fore-**

⁵⁷ See the discussion above on civil and political rights.

seeable effects on the enjoyment of economic, social and cultural rights (whether within or outside its territory)⁵⁸; and **c**) where the state, acting separately or jointly, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.⁵⁹

In conclusion, while the ICESCR is conceptualized in a broader sense and is thus more susceptible to extraterritorial application than the ICCPR, the weak normative content of many of its aspirational provisions make enforcement difficult.

2.3.3.2 ETOs in the context of financed climate projects

As can be deduced from the above, the traditional scenario of extending the scope of application of human rights treaties to territories/persons outside a state's territory relates to situations where a state exercises territorial control over parts of another state by virtue of an exercise of public powers, e.g., through military presence or through acts of a state's security forces. To date, there is no jurisprudence on human rights violations occurring in the course of a single project, such as a development project, despite numerous instances having raised international concern, accompanied with calls for action to hold the responsible actors responsible. Nevertheless, it is argued that the **spatial model of jurisdiction** bears potential with regard to financed projects.

2.3.3.2.1 Understanding effective control

While the ECtHR and HRC have extended the jurisdictional reach of the respective treaties to cases where states exercise 'effective control' over an area, the case law so far does not substantiate in great detail what 'effective control' looks like. (See also Milanovic's attempt to define 'effective' as meaning that 'the state needs to have enough power over the territory and inhabitants to broadly do as it pleases', Milanovic, 2011, pp. 137–138) Also, as Judge Bonello put it in his concurring opinion in *Al-Skeini*, "[t]he Court's case-law on Article 1 of the Convention (the jurisdiction of the Contracting Parties) has, so far, been bedevilled by an

⁵⁸ Both examples given in subpara. b) relate to situations where an individual under a state's authority is removed from a state's jurisdiction, i.e. through extradition to a non-contracting state which has 'sufficiently proximate repercussions on rights guaranteed by the Convention' (Ilaşcu, 2004, para. 317) or the handing over to another state's authorities (Mohammed Munaf, 2009). As the Human Rights Committee has explained, in such circumstances, a causal chain measured by factors of foreseeability is required ('the risk of an extra-territorial violation must be necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time', para. 14.2.). Moreover, as the Commentary emphasizes, this relates to the respective treaties and does not express the scope of obligations under general international law. (De Schutter et al., 2012, p. 1108)

⁵⁹ Subpara. c) refers to the obligation of international cooperation. On this see below on XXXX.

inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies.” (Al-Skeini, 2011, Concurring Opinion, para. 4) This varying and at times incoherent approach to the matter has made it difficult to discern clear guidance on the ECtHR’s interpretation of Art. 1.

The facts of the so far adjudicated cases relate to situations of military control, influence or authority, thus pointing towards a particularly high threshold as the authority exercised is closely aligned with core sovereign functions. Thus, extraterritorial state activities which incur the application of human rights treaties are related to the exercise of sovereign, or rather public, powers on a foreign territory.

From the case law of the ECtHR, it is clear that the Court understands effective control to be narrower than ‘effective overall control’. In *Cyprus v. Turkey*, it found that as Turkey exercised ‘effective overall control’ over Northern Cyprus, it was not necessary to hold in the specific case at hand that the exercise of control was detailed. (*Cyprus v. Turkey*, 2001, para. 77; Wilde, 2005) Thus, while there might be situations where a state exercises such influence over another state or area (see also the abovementioned *Ilaşcu and Others v. Moldova and Russia* (*Ilaşcu*, 2004)) that it can be said to have overall responsibility to ensure compliance with its human rights obligations, the general approach will be to determine a more limited but at the same time more detailed standard of control.

A similar discussion can be followed on the control standard in the sense of Article 8 ILC Articles on State Responsibility.⁶⁰ Thus, the discussion on the necessary control has shifted from effective control (*Nicaragua*), to overall control (*Tadic*), back to effective control (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007). Though relating to attribution and not to the question of jurisdictional scope of human rights treaties, the ICJ’s understanding of ‘effective control’ demonstrates the high level of involvement necessary to reach the standard of ‘effectiveness’:

‘United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or

⁶⁰ Art. 8 ILC Articles on State Responsibility:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, **would not in themselves mean**, without further evidence, **that the United States directed or enforced** the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had **effective control** of the military or paramilitary operations in the course of which the alleged violations were committed.’ (para. 115, emphasis added)

Hence, it is clear from this evolvement that in order for a situation to fall under the effective control of a state, **more than mere financing, organizing, training, supplying and equipping is required. Rather, there must be directions or enforcement of the perpetration of acts contrary to human rights.**

2.3.3.2.2 *Extent of control in the context of project financing and the exercise of public powers*

Applying above-elaborated standard in the context of climate project financing entails adopting the criteria to the given context. Two primary aspects must be considered: firstly, whether a state has ‘**effective control**’ over the project’s implementation by virtue of its approval, financing, and monitoring functions; and secondly, whether in the course thereof it is exercising ‘**public powers**’.

In the sense of the *Nicaragua* standard, it is clear that the mere financing or approval of a project does not suffice to establish effective control over a spatially-delimited project. In most circumstances, a project will be authorized, mostly even commissioned, by local host governments. The specific requirements which must be met (environmental impact assessment, acquisition of property, obtaining the necessary concessions), all fall within the competence of local authorities.

For example, in the case of Barro Blanco, the bid was awarded by ASEP to GENISA in 2006, and an EIA was conducted and approved by Panama’s environmental authority ANAM in May 2008. By June 2011, the construction had begun, the project was registered as a CDM project and the government was confronted with a series of protests and lawsuits. Only in August 2011, however, was financing through FMO and DEG secured. A series of alleged human rights violations, dealt with in more detail above, had already been committed at this point in time. Thus, even though the argument might be made that these banks – and as a consequence their respective home state – should have been aware of significant human rights deficiencies occurring in the context of the project’s implementation before they ap-

proved financing, it cannot be said that the approval and financing of the project led to the effective control of FMO or DEG over the project.

A limited amount of control resulted from the monitoring activities of the financing institutions. That is, in the financial loan agreements, there were additional requirements which the project operator was to fulfill by the time of the first disbursement of funds (FMO/DEG IEP, 2015; see also Fuchtel, 2015b) Nevertheless, as also pointed out by the report issued by the complaint mechanism, certain issues such as the cultural value of the land, were hard for the lenders to influence. (FMO/DEG IEP, 2015, para. 167) The lack of extensive influence is also evident in light of the lack of participation in continuing negotiations and mediation attempts between the government and the affected communities, under guidance of the UN and other third parties.

Finally, even if it is determined that a state's development bank exercises sufficient control and authority of a spatially-delimited project in order for it to fall within the jurisdictional scope of the ECHR or ICCPR, this still does not mean that "anything that occurs within a state's jurisdiction is attributable to it. It would still be necessary to establish that the particular act that is alleged to be a human rights violations is attributable to the state." (Milanovic, 2011, p. 52)

Hence, in this context it is particularly important to correlate the authority exercised by the project financiers to a type of **public powers**. As stated previously, this relates to those powers "normally to be exercised by a sovereign government" (*Al-Skeini*, 2011, para. 149). In *Al-Skeini*, the ECtHR referred to the fact that the United Kingdom had "assumed authority and responsibility for the maintenance of security" (*ibid.*), *i.e.* it exercised military authority through its soldiers engaged in security operations. This had been transferred on the UK on the basis of an official letter which the UK and US had sent to the President of the Security Council, announcing that they had formed a Coalition Provisional Authority (CPA). The CPA also conferred the additional powers on the CPA members, *i.e.* the exercise of legislative and executive authority as well as the administration of justice.⁶¹

While this was based on an officially declared assumption of sovereign powers, the ECtHR already emphasized in *Loizidou v. Turkey* that the lawfulness of the exercise of public powers is not a decisive determining factor (Loizidou, 1995, para. 62) Thus, similar to the functional test suggested by Judge Bonello in his concurring opinion in *Al-Skeini* (*Al-Skeini*,

⁶¹ Such powers also have been transferred in other transitional administrative arrangements by the United Nations (*e.g.* UNTAET, UNMIK) (Larsen, 2012, p. 190).

2011), a focus must be on determining when a state is in a position to ensure the observance of human rights. It does so in five ways: “firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights.” (para. 10) Hence, the issue to decide is whether a state exercises such sovereign functions that it can prevent human rights violations from occurring, punish perpetrators and offer justice to victims of human rights abuses.

In the context of project financing, there might be situations where a power vacuum in a state or the clear absence of legislation adhering to international standards shifts the burden of responsibility on the financing entity. In such a scenario, a project operator will still have to comply with the financial partner’s policies to, e.g., conduct an environmental impact assessment, negotiate to obtain the consent of the affected communication through adequate procedures etc.

Where the financing partner – and thereby its state through means of attribution – thus fulfils a public power function or exercises *de facto* regulatory/governmental powers, it can be argued that the state would assume due diligence obligations under the respective human rights treaties with regard to individuals and communities affected in the context of the implementation of a project. Hence, these would by virtue of the ‘most’ effective control exercised over the spatially-delimited project’s area fall “within the jurisdiction” of the state financing, approving and monitoring the project in the sense of the ECHR’s or ICCPR’s jurisdictional clauses.

In light of the case-law issued by the ECtHR and the HRC, the threshold is necessarily a high one.

2.3.3.3 Analysis and conclusion

Extending the scope of the jurisdictional clause contained in Art. 1 ECHR or Art. 2 of the ICCPR to include situations where a state through its agents exercises effective control over a spatially-limited project fosters the universal protection of human rights. It realizes that states should ensure the protection of human rights of those persons which are within the scope of conduct over which it can exercise considerable influence/effective control and where they assume a public purpose function. This extension should, however, only be applied under strict circumstances. Hence, while it is important to emphasize that the host state where the project is implemented is never absolved from its human rights obligations, in situations where the financial partner exercises substantial functional control over the project’s implementation and operation, especially through the exercise of *de facto* legislative or exec-

utive authority, as well as through the administration of justice, the extension of the scope of the ECtHR's or ICCPR's application would be justified. Still lacking any clear case law on the issue, however, at present this is still to be viewed with adequate caution.

2.3.4 Extraterritorial obligations in the context of policies – obligation to regulate

Despite the lack of binding case law, the **Committee on Economic, Social and Cultural Rights** has been forthcoming in recognizing and proclaiming extraterritorial obligations in its General Comments. It has repeatedly emphasized the '**international obligations**' of state parties. For example, **General Comment 12** on the Right to Food (CESCR, UN Doc. E/C.12/1999/5, 1999) calls on states to

'take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end. States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.' (paras. 36-37)

Similar passages can be found also in General Comments relating to the Right to Water⁶² and the Right to Health⁶³. Such international obligations are complemented and partly effectuated by obligations of international cooperation (Art. 2(1) ICESCR).

With regard to obligations of member states arising under the **ICESCR** – where control is absent –, general agreement on its applicability is limited to the obligation to **respect**, *i.e.* the obligation to refrain from conduct which impairs the enjoyment of economic, social and cul-

⁶² To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction. States parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water. Water should never be used as an instrument of political and economic pressure. [...] Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations Charter and applicable international law. (CESCR, UN Doc. E/C.12/2002/11, 2003 paras. 31ff)

⁶³ To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required. [...] Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions. (CESCR, UN Doc. E/C.12/2000/4, 2000, para. 39)

tural rights outside of a state's territory. Additionally, there is some consensus that aspects of the obligation to **protect** through regulating those (non)-state actors which a state is in a position to regulate are accepted, including the investigation of alleged breaches, providing redress, as well as ensuring that international organizations they participate in (or to which they have transferred competences) likewise do not interfere with economic, social and cultural rights, as far as they are in a position to control this. This consensus is generally lacking with regard to the obligation to **fulfil** (Gondek, 2009, p. 360).

The most readily available obligation to identify in this regard is therefore the **obligation to regulate**. That is, if in fact a certain proximate relationship between a state and a particular measure can be established, the state's **due diligence obligation** *inter alia* in environmental matters provides certain safeguards for the affected population (realizing the difficulties arising in this context, Humphreys, 2012). As is also elaborated in the ECtHR's case law, states are under an obligation to protect those **within their jurisdiction** from the 'immediate and known risks' (*Öneryıldız*, 2004, para. 109) to which they are exposed. In *Öneryıldız v. Turkey*, the ECtHR found that the state officials and authorities had not done everything within their power to avert risks brought to their attention, and that they therefore 'know or ought to have known that there was a real and immediate risk to a number of persons living near the [...] municipal rubbish tip.' (para. 101). Similar was also found in *Budayeva v. Russia* (*Budayeva*, 2008), concerning a series of mudslides, where the ECtHR reiterated that Article 2 ECHR lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This entails *inter alia* the obligation to install a 'legislative and administrative framework designed to provide effective deterrence against threats to the right to life', whether the threat stems from public activities or not (paras. 129-130).⁶⁴ Russia was found responsible for the

⁶⁴ The ECtHR continued detailing this obligation:

132. [S]pecial emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels (see *Öneryıldız*, cited above, §§ 89-90).

133. It has been recognised that in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8 (see *Öneryıldız*, cited above, §§ 90 and 160). Consequently, the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life.

authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk. (para. 158)

Moreover, this obligation also can be identified with regard to the conduct of corporations headquartered in a state. The question when states are in a position to regulate the conduct of TNCs or non-state actors has been subject to much debate. The obligation to protect against human rights abuses is a due diligence standard, *i.e.* an obligation of conduct and not result. (McCorquodale & Simons, 2007, p. 615) The Guiding Principles on Business and Human Rights (Report of the Special Representative of the SG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 2011) find that a state might be in such a position if some sort of jurisdictional basis exists. At the same time they stipulate that while there is **no prohibition to regulate the extraterritorial activities of businesses domiciled in a state's territory/jurisdiction, there is also no obligation to do so.**

In practice, states have approached this by sometimes drafting extraterritorial legislation, sometimes merely requiring parent companies to report on their global operations. (Report of the Special Representative of the SG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 2011, p. 4) However, corporate structures (*e.g.*, the separate legal personality of foreign subsidiaries) further complicate the matter, and hardly lend themselves to more than cases of *indirect* regulatory obligations, *i.e.* by requiring the parent to impose certain requirements/conditions on its subsidiaries. (McCorquodale & Simons, 2007, p. 616)

Applied in the context of climate measures, this would mean that states are expected to have an appropriate legislative and administrative framework in place to ensure that, *e.g.*, the climate change mitigation projects they or their corporations are involved in abroad do not endanger the protection of the rights guaranteed under the ECHR. Within the field of **project finance** often-times competing policies intersect, carrying on the one hand potential to ensure international standards by adding institutional layers which assess social and environmental risk additional to the assessments carried out by host states, but on the other hand also the risk for affected communities to be victim of human rights violations which have substantially been contributed to by entities located abroad and often not subject to domestic jurisdiction. (Leader & Ong, 2013, pp. 3–4)

The obligation to regulate in the context of project finance refers to 'the exercise of control of one actors (the regulator) over other actors through (1) the *setting of standards*, (2) the *monitoring* of actors' conduct, both to assess compliance and to determine whether changes to existing standards are necessary, and (3) *enforcement* of these standards where compliance is adequate.' (Sarro, 2012, p. 1532)

Hence, *in concreto*, states involved in the approval and financing of projects should ensure that their institutions have according policies and due diligence standards in place.

Moreover, a second subject-level of the obligation to regulate can be observed. *Id est*, these institutions must ensure that the project operators act in compliance with these standards. Where there is a failure to respect these standards, there must be some sort of consequence, be it a refusal of approval, a cancellation of the loan, and – as discussed in Section 2.4 – access to justice for affected communities. (Leader & Ong, 2013, p. 114)

Through their supervisory and administrative boards, government officials exercise indirect influence over then respective bank policies. Both FMO and DEG apply *inter alia* the IFC Performance Standards (in the current project study, the 2006 versions are pertinent). In the course of the project's implementation, a number of conditions and milestones were set by them, and an international technical advisor team was employed to monitor compliance with the standards as well as the imposed conditions. (DEG and FMO Management Response, 2015) However, in terms of measurable output, the identified failure to negotiate with the legitimate indigenous authorities was not met with any significant response. As a core issue of the concerns of the affected communities, this constitutes a clear and discernible shortcoming.

2.3.5 Analysis and conclusion

In conclusion, identifying extraterritorial human rights obligations in the context of climate policies, and in particular in the context of climate project finance, is set within the traditional debate of interpreting the jurisdictional scope of human rights treaties. Thus, as already concluded above, only in limited circumstances these policies which have an external effect result in the sufficient control-relationship between state and affected communities.

However, there are certain aspects which still play an important role, in particular the obligation to refrain from conduct which impairs the enjoyment of human rights outside of their territory and the obligation to ensure appropriate legislative and administrative regulatory frameworks. This is not only expected under the ECHR/ICCPR, but also receives additional dimensions under the ICESCR. Hence, the scope of the ICESCR is said to be broader and lays a particular focus on the 'international obligations' of state parties.

2.4 Access to justice

A further essential aspect in the course of the investigation relates to access to justice and the determination through which means a breach of obligations can be invoked. In the following, a focus will be laid both on judicial and non-judicial means of access to justice.

As the Basic Principles and Guidelines on Development-Based Evictions and Displacement emphasize, '[a]ll persons threatened with or subject to forced evictions have the right of access to timely remedy. Appropriate remedies include a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation, and should comply, as applicable, with the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.' (Basic Principles (Development-based Displacement), 2007, Principle 59)

Where financing institutions are concerned, this entails them establishing or acceding certain complaint mechanisms for such cases. (Basic Principles (Development-based Displacement), 2007, Principle 72)

So far, a number of non-judicial and judicial mechanisms have been resorted to by the affected communities. As explored in more detail in Section 1.4, the United Nations has taken up the case through a variety of bodies (UNDP, Special Rapporteur on the Right of Indigenous Peoples), as have reports been issued by further human rights monitoring bodies (in particular CERD).

A number of legal proceedings have been dealt with by Panama's Supreme Court. While the proceeding against the EIA was ultimately rejected (in October 2014), a second case against ASEP's resolution permitting the taking of the land was won. The Supreme Court also suspended the construction of the project for a period of time. While it lifted the suspension after a few months, the political dialogue on the issue has resulted in an agreement to install another technical commission to evaluate the effects of the project. In the meantime, the construction remains on hold.

With regard to the lenders, FMO and DEG established a complaint mechanism in 2014 (see Section 1.4.3 for details). Even though the Independent Expert Panel found that a number of issues remained open at the time of project approval, the Management Response of the banks has remained meagre.

Overall, the events in the case evidence how judicial and non-judicial means reinforce one another. There remain some avenues to explore for the affected communities, *e.g.*, in particular a filing of a complaint with the Inter-American Commission of Human Rights. However, in light of the usual length of proceedings (sometimes decades), this is not particularly promising.

3 Preliminary conclusions

The study of the Barro Blanco case has revealed a number of issues which are exemplary to the overall research question of the human rights impact of climate policies. The climate project financed concerns the development of natural resources through the construction of a hydroelectric power plant on the river Tabasará by a local corporation, financed by two European development banks and the Central American Bank for Economic Integration (CABEI). The project, once completed, will have impacts on an indigenous area (parts of the *comarca* Ngäbe-Buglé), and force members of the indigenous community to relocate as their houses will be flooded.

Even though the international community has been aware of the ongoing protests and the concerns of the affected indigenous community for their livelihood, their response have not had a meaningful impact for the resolution of the dispute.

The present study identified three main aspects where the project's impacts on human rights were particularly evident:

- The authorization of the project occurred without the free, prior and informed consent (FPIC) of the affected communities.
- The process of implementation occurred without adequate due diligence assessments/monitoring.
- And thirdly, there is a threat of forced displacement from indigenous land.

On this basis, a number of issues can be identified where recommendations can be made: 1) financing of projects with a long-lasting political conflict; 2) explicit human rights mandate; 3) access to justice.

Financing of projects with a long-lasting political conflict

Overall, the current case exemplifies how a lack of due diligence exercised at the initial stages of a development project and a failure to undertake culturally appropriate consultations can exacerbate existing conflicts and prevent mutually beneficial agreements from being reached at a later stage.

The duty to exercise due diligence applies in particular to financing institutions involved in the approval of the project. Here, it is necessary for them to apply an increased due diligence standard in situations where tensions and resistance by local affected communities is

brought to their attention in advance. Where the affected communities are indigenous peoples, cultural appropriateness of the overall procedure of the consultation process is a key element for a sustainable outcome.

In addition, it is imperative to base the project's implementation on a comprehensive environmental and social impact assessment. Hence, where gaps in the assessment are found to exist, the process must remain at that stage and not proceed in hope for a beneficial resolution of the issues.

Also, in situations where tensions are identified at an early stage, it would be advisable to include the affected communities in the monitoring process, which would be beneficial in overcoming mutual trust issues and establishing a functioning dialogue.

Explicit human rights mandate and access to justice

The answer to the question which actors carry which human rights obligations in the context of the project's implementation is particularly complex. While European actors have undoubtedly a political responsibility to ensure that their conduct does not infringe the human rights of persons affected thereby, the determination of justiciable rights which can be claimed in a judicial forum is harder to make.

To date, the UNFCCC fails to provide individuals with human rights protection or direct recourse. Also, the CDM Executive Board is not equipped with a human rights mandate. This is particularly problematic in light of greenhouse gas mitigation measures being financed and approved in one state but implemented in another state. Thus, individuals negatively affected by such policy measures are often located in the territory of a state which has no decisive or singular role to play in the implementation thereof.

The inclusion of human rights safeguards at the institutional level would therefore be a significant improvement. At the same time, this is closely related to the **access to justice** which constitutes a fundamental aspect in ensuring the effective protection of human rights.

Access to justice entails *inter alia* to have an effective forum for victims of human rights violation to obtain justice. In the context of climate project finance, this is an issue of concern at the national, project-level as well as international level.

In this regard, also the jurisdictional hurdle of human rights treaties plays an indirect role. Applying the regime of extraterritoriality in this context is challenging. Thus, the threshold of jurisdiction to apply civil and political human rights obligations contained in the ICCPR and ECHR beyond a state's territory remains a strict one. Most prominently, the standard can be

described as one of ‘exercise of effective control of an area’ through the ‘exercise of public powers’ (spatial model). There are limited indications that the scope of jurisdiction is widening throughout the Court’s case law, in particular to situations where an individual is brought under the effective control and authority of state agents operating abroad (personal model). In theory, the lack of a jurisdictional clause in the ICESCR bears greater potential for extending its scope of application to extraterritorial situations. Nevertheless, difficulties arise in particular in light of lacking case-law, as the ICESCR has only recently established a complaint mechanism and has so far not issued any decisions⁶⁵. In any event, even though the ICESCR is conceptualized in a broader sense and is thus more susceptible to extraterritorial application than the ICCPR, the weak normative content of many of its aspirational provisions make enforcement difficult.

However, extending the scope of the jurisdictional clause contained in Art. 1 ECHR or Art. 2 of the ICCPR to include situations where a state through its agents exercises effective control over a spatially-limited project would foster the universal protection of human rights and is thus highly recommendable. It would also be a response to the realization that states should ensure the protection of human rights of those persons which are within the scope of conduct over which it can exercise considerable influence/effective control and where they assume a public purpose function.

Overall, the events in the case evidence how judicial and non-judicial means may reinforce one another. Nevertheless, effectiveness of the remedy has been an issue of concern. This is also an aspect to which continued attention should be paid with regard to the complaint mechanism established by FMO/DEG. In particular, the question may be asked what the impact of the outcome of the complaint will be on the further implementation of the project.

⁶⁵ Parties... Austria not ratified....

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