

# **FMO-DEG Independent Complaints Mechanism**

## **Panel report No. 1**

# **Barro Blanco Hydroelectric Project Panama**

This report is based on the information which has been provided to the panel by the complainants, the lenders and other relevant parties. The expressions of opinion and judgement made by the Panel are not intended to act as a finding of fact or legal assessment and cannot be relied upon as such in any court of law.

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**29 May 2015**

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## Acknowledgements

The Panel had the opportunity to consult with the Management and professional staff of both DEG and FMO that were involved in the assessment and monitoring of the Barro Blanco Hydroelectric Project (BBHP) throughout the compliance review process, including before and after the field visit to Panama, and wishes to convey its gratitude to them for their openness and provision of information and assistance.

It also wishes to thank the Complainants the Movement 10 Abril (M10) and the Cacica General Mrs Silvia Carrera, the NGOs SOMO and Both Ends in the Netherlands supporting the Complainants, and the NGO CIAM based in Panama City, who met with the Panel, those who guided them during the field trip, and not to forget the villagers that hosted the Panel during their one day visit to Nuevo Palomar and Quiabda.

The Panel also wishes to express its thanks to the Executive Vice President of BBHP in Panama City, and members of his staff, with whom they had a frank discussion about the project and who provided the Panel with valuable insights as well as logistical support in the project area.

The Panel was also able to visit Gisele Didier of the UNDP as well as the Regional UNHCHR Representative Carmen Rosa Villa and her staff and exchange important information about the present situation concerning the rights of the Indigenous Population in Panama with a particular focus on the impact of the Barro Blanco Dam. The Panel wishes to express its high appreciation for the time and information given to the Panel.

Special thanks are due to public agencies and ministries of the Panama Government, in particular the Ministry of Government, Secretary of Energy, ANAM, and ASEP.

The Panel would also like to thank the Ambassadors of Germany and the Kingdom of the Netherlands in Panama for their assistance and guidance.

Finally, the Panel would like to express its thanks to members of the Secretariat supporting the Panel both of DEG and FMO for their professional support during the compliance review and preparation of this Report.

## 1. Executive Summary

1. This complaint relates to a project that is financed by both FMO and DEG. The panel has dealt with both institutions in a single complaint process and report. The project in question is the Barro Blanco hydroelectric facility currently being developed in the district of Tolé in the Chiriquí Province of Western Panama. This project is a particularly complex and significant one, not only on account of the issues it covers, the high political visibility of the project and also certain technical aspects, but also in terms of the timing of the panel's adjudication and report.
2. The nature of the complaint put forward by the complainants was that the failure to ensure the project's compliance with international human rights standards meant that the lenders failed to comply with standards which applied to the lenders, in particular IFC's performance standards, FMO's Human Rights Policy and the OECD Guidelines on Multinational Enterprises. It is important to note that the nature of the complaint and the scope of the issues considered by the Panel are necessarily restricted to the actions of the lenders.
3. With this in mind, the focus of the Panel's activities and report in this instance was to carry out a review of the way in which DEG and FMO assessed the project and then monitored it against the standards to which they had committed themselves at the time the financing of the project was agreed to in 2011. The Panel was specifically asked by the complainants not to engage in dispute resolution or mediation.

### Methodology and particular constraints on this complaint

4. Prior to the formal commencement of the compliance review process, it is very important to point out that the Panel and both institutions had to go through a process of negotiation and discussion with the recipient of the loan Generadora del Istmo S.A. (GENISA) – the operator of the Barro Blanco Hydroelectric Project (BBHP) – in order to secure their full cooperation with the compliance review process and, in particular, to secure agreement that the existing confidentiality obligations on the lenders, so far as they related to various documents and reports which were relevant to the compliance review, could be waived. The reason for this stemmed from the fact that the loan agreement signed in 2011 did not contemplate the disclosure of such documents to the Panel, as the Panel was not in existence at the time of the agreement. We are grateful to the efforts made by DEG and FMO to secure BBHP's voluntary agreement to participate in the process and waive the confidentiality agreement and also to BBHP for this agreement. We are also grateful for the understanding and cooperation of the complainants on this issue, which has at times been a difficult one for everyone involved. This did mean however, that the Panel had to operate under the constraints of a specific agreement between the lenders and the operators of the BBHP project, which meant that the Panel required agreement by those parties in respect of the disclosure of any potentially confidential information. The Panel, while understanding that this was necessary to take this complaint forward, wishes to express its opinion that it is far from an ideal way to take a complaint forward and intends to review this issue following this complaint.
5. The panel has reviewed all relevant documents made available to it and has also carried out a series of telephone and in-person interviews with officials of FMO and DEG. In late October 2014 the panel travelled to Panama and visited BBHP, the dam site, various communities, including those directly affected by the dam and various government institutions, international organisations NGOs and other stakeholders.
6. Throughout, the key task of the Panel was to assess the action, knowledge and requirements of the two lenders – DEG and FMO – at various stages of the project and to assess the degree to which those were consistent with the policy obligations adopted by the two institutions. Anything else is outside the scope of the Panel's mandate. With this in mind, the Panel have been careful not to comment on the legality or propriety of any other actor, whether it be BBHP, the Panamanian Government or, for that matter, any organisation that is a party to the complaint. Below we set out the key findings of this compliance review.

### Adequacy of the lenders' social and environmental impact appraisal

7. Without expressing a judgment on the outcome of any ongoing litigation or other national processes, the Panel is of the opinion that the lenders took all appropriate steps to put themselves in a position of

understanding regarding the legal arguments being pursued through the Panamanian courts with regard to the validity of the EIA. The lenders could not have been expected to do anything further specifically in relation to the validity of the EIA in itself. However, this is not the end of the matter, as the lenders did not solely rely upon the EIA, but took additional steps to be appraised on social and environmental issues.

8. The Panel is of the view that, while the lenders were, by the time of the first disbursement, fully appraised of many of the issues related to indigenous peoples, they were not so appraised at the time of credit approval. While the lenders did take steps to so appraise themselves prior to approval, and were almost certainly correct to determine that the indigenous peoples report that was first commissioned and produced was insufficient for their purposes, this still had the effect that at the time of project approval their assessment was limited and conditional on a future report. In short, the lenders were not in the position that they should have been – and had identified that they should have been – at the point of project approval. The panel therefore finds that the lenders were not fully compliant with their policies as they were not fully appraised with regard to the project compliance with PS1 at the time of credit approval..
9. In retrospect, however, it was appraisal delayed, rather than appraisal denied. Requiring an indigenous peoples report and action plan derived from that report were appropriate practical steps to take in the light of the recognised limitations on, and gaps in, the knowledge they had at that time. Making this a contractual condition of first disbursement – which was fulfilled – limited the impact of deficiencies in assessment prior to approval. However, in future projects which engage indigenous peoples’ rights, the Panel would anticipate that the lenders do not approve the project until they are satisfied that they are fully appraised of all the relevant issues, as is required by PS1. With this in mind, The Panel is of the view that, given the acknowledged complexities, the lenders would have been better appraised of issues related to indigenous peoples’ rights and land if they had gone ahead to commission a formal opinion from lawyers or other experts with defined expertise in indigenous peoples’ rights and the Panamanian legal context.

### **Environmental and Social Action Plan**

10. In considering the Environmental and Social Action Plan, the Panel is once again of the view that, although the subsequent actions of the lenders may have put in place appropriate steps, actions and mitigation measures, it cannot be said that at the time of the appraisal of the project and initial agreement of financing, the lenders demonstrated that they were fully appraised of all of the risks and that appropriate actions were identified.
11. The Panel is of the view that there may be circumstances where less material issues, or issues that simply cannot be fully assessed at the time of an agreement, can properly be left for future assessment of impact, development of actions and, of course, implementation – so long as there are clear indications from lenders on the expected standards and actions, based on a risk assessment of likely impact. In such cases, a strong monitoring process needs to be put in place to ensure subsequently agreed actions are implemented. In relation to this project, while the agreement was reached prior to significant construction, significant issues related to social and environmental impact and, in particular, issues related to the rights of indigenous peoples were not completely assessed prior to the agreement. The Panel also notes that FMO’s Environmental and Social Policy provides that the ‘ESAP would normally allow clients a three year period at the maximum to reach full compliance with the requirements [of the policy]’. In this case the requirements included in the ESAP were – in terms of the timeframe anticipated – in line with this. The ESAP has been implemented to a certain degree, except for important issues highlighted in this report (i.e. land issues, indigenous peoples issues). While recognizing that the elements of an ESAP should be implemented within a defined period, and should not be unduly postponed, the breakdown of communication between the project and the affected communities and the delay as a result of the various UN supported dialogue and Reports are factors in that case that need to be taken into consideration. With this in mind, the Panel does not find non-compliance with regard to the time for implementation of the ESAP.

### **Land, resettlement and displacement**

12. With regard to physical displacement, the lenders had accepted the analysis and view that there were no people to be resettled. This is contrasted with the affected communities, who are of the view that

some houses and their inhabitants need to be relocated. The Panel concludes that the lenders were entitled to take the view that relocation and subsequent compensation questions did not seem to be a significant issue, because this would affect a limited amount of persons and alternative land would be potentially available. Based on this, the Panel is of the view that the lenders could initially be satisfied that this aspect of PS5 was complied with in this project. However, after the UNDP findings it was clear that there could be some impact on a limited group of people and the lenders should have sought further actions to address this.

13. While acknowledging that it is not a straightforward issue, the Panel is of the view that the lenders could have done more to seek a greater degree of clarification of the legal situation related to land acquisition and use. This could have been progressed through the commissioning of a formal legal opinion and seeking greater clarity from BBHP on its legal understanding. A possible approach could also have included dialogue with the Government through its client to seek clear guidance from the Government on its view on the appropriate legislation. This is not to say that the lenders did nothing, rather that given the key nature of this issue, they could have done more.
14. Regardless of the question of the formal relationship and consultation with the representative structures of the Comarca, there are 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. The panel is of the opinion the lenders have not taken the resistance of the affected communities seriously enough. This maybe, to an extent, because a legal agreement was reached between BBHP and the regional council of the Comarca and this was considered by the lenders to be sufficient to deal with the issue. Nevertheless, the indigenous peoples report clearly documented that the directly affected communities challenged the legitimacy of such agreements. This should have triggered the further steps identified in that Report.
15. The indigenous peoples report concluded that it was not aware of any plan how to relate to the Ngöbe people in the affected communities. This conclusion should have been taken more seriously by the lenders and they should have insisted in clarifying the issue faster and trying more options for consultation. The recommendations from the report became part of the Environmental and Social Action Plan (ESAP) for the project.
16. The Panel acknowledges that the question of community agreement to the project was not an easy issue on which to get progress, partly due to the fact that the Government itself was waiting for the results of a UNDP Roundtable. Nevertheless during the time since the end of this Process in 2013, up to the end of 2014, the lenders could have encouraged more and new initiatives, taking up the recommendations from the indigenous peoples report, to reconsider carefully how to better consult with the affected communities.

### **Additional land related matters**

17. In relation to the implementation of forced easements and the lenders' role, the Panel is of the view that the process of forced easement (including the decision to pursue the route of individual compensation) started on request of the company, but lies firmly within the responsibility of the Government and, as such, concludes that there is no issue to be addressed from a compliance review perspective when reviewing the lenders role.
18. Displacement, be it physical or economical, is an important issue for a project such as Barro Blanco and for the lenders. Despite the debate about the exact number of persons potentially affected by physical or economic displacement, the Panel notes that the lenders and BBHP have shown flexibility to adjust their own assessments after the UN Process was completed. This included a specific professional analysis of the outcomes of the UN Process through the monitoring of the project and recommended changes, which were adopted. BBHP has publicly announced after the Peritaje Independiente that they will compensate all those which have to be economically and potentially physically displaced up the level of 106 masl, the new maximum elevation of water level assumed by the UNDP hydrological research. Through related amendments to the ESAP, it was clear to the lenders that the results of the UN Process were reflected. With this in mind, the Panel finds that the lenders acted in accordance with their policy commitments on this issue.

## **Cultural heritage**

19. On the difficult issue of cultural heritage protection – particularly related to petroglyphs which are found in the river area to be flooded – the primary responsibility of the Government to deal with this issue through INAC makes this a difficult issue for lenders to influence. The lenders required their independent consultants to review the progress of the issue on Cultural Heritage and make recommendations on how BBHP may assist the progress of this matter. The Panel is of the view that there is little else that the lenders could have done in the circumstances and also given that the ability or willingness of the Government authorities to enter the area up to recent times is tied up with the same culture of mistrust that affects the project. However, as with a number of other issues related to indigenous peoples, the question of cultural heritage was not fully assessed during project appraisal. A proper assessment only started with the indigenous peoples report in 2012. In this sense the lenders were not in a position to properly assess whether their client was in a position to comply with the relevant standards, including PS8, the time of project approval.

## **Biodiversity and environmental issues**

20. The Panel is of the view that the lenders' appraisal of the potential biodiversity and ecosystem impacts at the time of the agreement of the project was severely limited. While there were a range of environmental actions and reports that were identified, there was an underestimate of several important aspects of biodiversity impact. This is demonstrated by the fact that these were subsequently identified in the reports from the second environmental and social consultant and also the reports produced under the UNDP process.
21. As the Panel has stated previously, the sequencing of appraisal is a difficult issue. The lenders took significant steps to improve their knowledge of the issues and develop remedial plans after the project financing had been agreed and the subsequent reports do provide – on most issues – an adequate assessment of impact and identification of remedial action. However, there is a significant issue in relation to the degree to which the assessment of cumulative ecosystem impacts has been carried out. However, this process has been affected by the challenges related to consultation with communities. Any shortcoming in this regard stems from an inability to fully consult with communities, rather than any technical issue.
22. From the material made available to it, the Panel is of the view that the subject of the (gallery) forests, its value and social economic use of the communities remains un-resolved. This is not to say that there has not been an identification of the issues at stake in a number of reports commissioned by the lenders. The Panel notes again that the initial assessment was relatively weak, but subsequently – and in the light of the UNDP reports – a better understanding of the importance of the Gallery Forest has been achieved. The inability to finalise the assessment and put in place appropriate actions in the disputed area stems from the failure to enter into healthy dialogue and consequently an inability to carry out detailed analysis and visits to the forest. This has consequences also for any process of clearance. The panel is of the view that, certainly at the time of approval, the lenders did not have sufficient information to make an assessment with regard to whether their client would be able to comply with PS6.

## **Water flow and water quality**

23. The Panel is of the view that, taking into account the fact that the assessment of water flow and flooding levels is a complex science, the lenders have ultimately come to a professionally determined and acceptable assessment of the flooding level and readjusted their plans and commitments appropriately. Nevertheless, it remains as an important subject that needs proper clarification and/or explanation for the communities involved as required by PS1 paras 19-21.
24. On the question of water quality, the Panel is of the view that the various reports commissioned have clearly identified the potential issues related to water quality and the need to take appropriate steps to ensure that a programme is in place to maintain water quality.

## 2. Background / Complaint:

### 2.1 Overview / Summary of the complaint

25. This complaint relates to a hydroelectric project which has been financed by both FMO and DEG. The Barro Blanco project is a hydroelectric facility currently being developed in the district of Tolé in the Chiriqui Province of Western Panama. The Project is being developed by Generadora del Istmo S.A. (“BBHP”), a Panamanian developer established in 2006. The project financing by the two took the form of a secured project finance loan of approximately US\$50 million and the agreement to finance was reached in August 2011. In addition to FMO and DEG, the project has also been financed by the Central American Bank for Economic Integration.
26. The Barro Blanco Hydroelectric Project is a hydroelectric plant at the foot of a dam. The project will require the flooding of an area of 258.67 hectares for the operation of the reservoir on the river Tabasará, and 5 hectares for the dam, powerhouse, and the complementary works. According to the company in charge of the project (BBHP), the installed capacity of the hydroelectric plant is estimated in 28.56 MW.
27. The project is predominantly outside the denominated Annexed lands of the Indigenous designated territories (Comarca) of the Ngöbe-Buglé. However, it is estimated that the dam area could permanently flood about 6.7 hectares of the Annexed lands of the Comarca.
28. The Project is a significant one, not in terms of the size, wide-spread environmental or social impact or the value of the financing, but rather in terms of socio-political impacts. A dispute centred on an apparently small area of land has given rise to national and international scrutiny, including a UN-mediated process of investigation and dialogue, complaints to the highest courts of Panama and visit to, and report on, the project by the United Nations Special Rapporteur on the Rights of Indigenous Peoples.
29. This is one of the first complaints that have been lodged with the newly-established Independent Complaints Mechanism of FMO and DEG and the first to be declared admissible by the Independent External Panel. The project had been the subject of significant correspondence between the lenders and various NGOs in Panama and the Netherlands over the course of a number of years.
30. The Complainants include the Movimiento 10 de Abril (M10), which is an organisation centred in the three communities that are likely to be most affected by the dam and the General Cacica of the Comarca Ngöbe-Buglé, Silvia Carrera. Both complainants are supported and represented by two international NGOs with offices in the Netherlands – SOMO and Both Ends.
31. The substance of the issues raised by the complainants is provided in Annex 1 to the Complaint. In this Annex the complainants set out some details about the project and also state their arguments why the complaint fulfils the admissibility criteria of the Independent Complaints Mechanism.
32. With regard to admissibility, the Panel declared that the complaint was admissible on 17 June 2014.
33. The nature of the complaint put forward by the complainants was that the failure to ensure the project’s compliance with international human rights standards meant that the institutions failed to comply with standards which applied to the lenders, in particular IFC’s performance standards, FMO’s Human Rights Policy and the OECD Guidelines on Multinational Enterprises. It is important to note that the nature of the complaint and the scope of the issues considered by the Panel are necessarily restricted to the actions of the lenders.
34. In both instances, it is important to note that the nature of the complaint and the scope of the issues considered by the Panel are necessarily restricted to the actions of the lenders. This is not to say that the actions of others, including recipient of the finance from the lenders, BBHP, or the national regulatory or governmental bodies, who have responsibility for ensuring that national law is implemented in accordance with international standards, do not have some relevance in understanding the context for the actions of the lenders.
35. With regard to the first issue, namely ensuring compliance with international human rights standards, the complaint notes that FMO refers in its environmental and social policy to comply with not only the IFC performance standards but also with the OECD Guidelines for Multinational Enterprises. The Panel is of the view that these Guidelines are relevant not only for FMO as a result of their specific reference in policy documentation, but also to DEG. This is because both are operating from headquarters within the OECD and carry out economic activity in non-OECD countries.



36. The complainants note that the 2011 OECD Guidelines state that enterprises should “respect the internationally recognised human rights of those affected by their activities”. Further, the complainants note that the Guidelines state that enterprises should seek to “avoid causing or contributing to adverse human rights impacts and address such an impact when they occur...[and] carry out due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.”
37. In order to implement the OECD Guidelines and also the human rights standards committed to by lenders, the complainants suggest that the lenders should have acted in a way which was consistent with the UN Framework on Business and Human Rights and the UN Guiding Principles on Business and Human Rights.
38. With this in mind, the complainants suggest that the lenders should have ensured that the project respected the rights of the Ngöbe people, in particular the right to free, prior and informed consent (FPIC). The complainants argue that the right to FPIC is recognized under the UN Declaration on the Rights of Indigenous Peoples. The complainants point out that the Inter-American Court on Human Rights has found that this instrument not only protects the right to individual property but also the right to hold property collectively.
39. The complainants argue that the requirements for FPIC is relevant in this case as neither the government of Panama nor BBHP has obtained consent from the affected communities and from the relevant traditional authorities for relocation in accordance with the Carta Orgánica of the Comarca. The complainants also argue that the impact on natural resources of the community also give rise to issues based on FPIC.
40. There are a number of relevant IFC Performance Standards which the complainants claim have not been satisfied by the lenders in relation to this project. These are the following:
- Adequacy of social and environmental impact assessment - it is argued that the social and environmental assessment based on the EIA process was not sufficient to meet the standards set out in PS1
  - Community engagement and consultation process was insufficient to meet the requirements of PS 1 and PS 7. The complaint argues that in various ways the documented meeting engagement and consultation process was not of a sufficient quality to fulfil the requirements of these two performance standards
  - Inadequate resettlement and forced eviction process. In terms of the failure to minimise resettlement, mitigate adverse impacts and improve or at least restore livelihoods of any displaced persons, the complainants argue that there have been breaches of PSs 7 and 5.
  - With regards to biodiversity, the complainants argue that the lenders failed to ensure that the impact of the project on biodiversity was properly assessed, particularly taking into account the different values attached to biodiversity by specific stakeholders, as well as impact on ecosystem services. The argument is that this not in line with paragraph 4 of PS 6.
  - Finally, the complainants argue that the lenders had not ensured that PS 8 was fully complied with in the sense that impacts on cultural heritage were not adequately assessed or mitigated.
41. The Panel has sought to deal with each of these complaints throughout the course of this report. The full text of the complaint is publicly available here in [English](#).

## 2.2 Methodology of the review

42. The focus of the Panel’s activities and report in this instance was to carry out a review of the way in which DEG and FMO assessed the project and then monitored it against the standards to which they had committed themselves at the time the financing of the project was agreed to – i.e. August 2011. The Panel was specifically asked by the complainants not to engage in dispute resolution or mediation.
43. Prior to the formal commencement of the compliance review process, the Panel and both institutions had to go through a process of negotiation and discussion with the recipient of the loan – Barro Blanco Hydroelectric Project (BBHP) – in order to secure their full cooperation with the compliance review process and, in particular, to secure agreement that the confidentiality obligations on the lenders, so far as they related to various documents and reports which were relevant to the compliance review, could be waived. The reason for this stemmed from the fact that the loan agreement did not contemplate the disclosure of such documents to the Panel, as the Panel was not in existence at the

time of the agreement. We are grateful to the efforts made by DEG and FMO to secure BBHP's voluntary agreement to participate in the process and waive the confidentiality agreement and also to BBHP for this agreement. We are also grateful for the understanding and cooperation of the complainants on this issue.

44. Prior to the formal waiver of confidentiality – which took place some months after the complaint had been lodged - the Panel carried out the following steps:
  - Review of all publicly available information
  - Teleconference with the complainants
  - Interview with specialists engaged during the UNDP process.
45. Once the agreement waiving confidentiality was in place, the Panel was able to carry out the following steps:
  - Interviews with DEG and FMO staff with responsibility for the assessment and monitoring of the project in Cologne and the Hague
  - Telephone interviews with selected consultants engaged by BBHP and the lenders
  - Teleconferences with complainants, FMO, DEG and BBHP prior to a visit to Panama
  - A one week visit to Panama in late October 2014, which included visits to BBHP, the dam site, various communities, including those directly affected by the dam and various government institutions, international organisations NGOs and other stakeholders
  - Review of all documentation disclosed to the Panel by DEG and FMO.
46. The Panel also had various calls with both the lenders and the complainants to keep both up to date with the progress of the complaint and also to seek out further information or clarify particular points.
47. The purpose of the above process was to allow the Panel to review and analyse all of the relevant material and information related to the project, and in particular the financing of the project, and to understand fully all the points of view of the various interested parties – including the complainants, the lenders, BBHP and the Panamanian Government. The Panel sought to understand all the relevant factual information related to the complaint and also to ensure that it was fully apprised of the relevant Panamanian law, as it applies to the project.
48. However, the key task of the Panel was to assess the action, knowledge and requirements of the two lenders – DEG and FMO – at various stages of the project and to assess the degree to which those were consistent with the policy obligations adopted by the two institutions. Anything else is outside the scope of the Panel's mandate. With this in mind, the Panel have been careful not to comment on the legality or propriety of any other actor, whether it be BBHP, the Panamanian Government or, for that matter, any organisation that is a party to the complaint.
49. A full list of the stakeholders consulted during the visit to Panama is set out at Appendix D.

## 2.3 Overview of applicable standards

50. The key operational standards which the Panel has determined are applicable in respect of this project are the relevant European Development Finance Institutions standards that applied in these circumstances, which both FMO and DEG had committed to and which are the following:
- (1) Require that all investee companies comply with the legal and regulatory requirements in the jurisdictions where they operate.
  - (2) Recognize that their decisions and activities may have environmental and social consequences and require investee companies to work over time towards relevant international best practice norms and standards. FMO policy states that projects should normally achieve compliance with appropriate standards within three years of the investment. This involves encouraging investee companies to promote the same standards throughout their supply chains, e.g., with their contractors. Investee companies are expected to:
    - Ensure a preventive and precautionary approach with respect to the environmental and social impacts of investee companies, giving high attention to the interests of affected people. If negative environmental or social impacts are unavoidable, they must be appropriately mitigated or compensated for.
    - Establish an open dialogue with their stakeholders on the environmental and social impacts of their business activities.
    - Commit to continuous improvements in the management of environmental and social matters. The aim is always to enhance positive effects in relation to the environment, workers and all stakeholders.
    - Provide transparent and accountable information on investment activities, while observing normal commercial confidentiality.
51. The relevant international standards applicable here are, in the view of the Panel:
- The applicable International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability at the time of the signing of the project, namely those adopted in 2006
  - Relevant principles of the UN Declaration of Human Rights, the ILO Core Conventions, in so far as they apply in the context of private sector companies, as reflected in the OECD Guidelines on Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

### IFC performance standards

52. There are a number of key principles derived from the IFC performance standards (2006) which are particularly relevant for this complaint.
- Performance Standard 1 on Social and Environmental and Management Systems
  - Performance Standard 5 on Land Acquisition and Involuntary Resettlement
  - Performance Standard 6 on Biodiversity and Sustainable Natural Resource Management
  - Performance Standard 7 on Indigenous Peoples
  - Performance standard 8 on Cultural Heritage
53. For the purposes of this report, we will focus on the key aspects of these provisions rather than setting them out in full. These are set out at the beginning of each relevant section below and a full summary of the relevant Performance Standards is set out in Annex A. All of the relevant performance standards are, however, available on the IFC's website in English and Spanish.

### International human rights standards

54. Given the broad commitment of the EDFI institutions – including FMO and DEG - to the UN Declaration of Human Rights and the ILO Core Conventions, and the complexity of directly applying these instruments to the private sector scenario, the Panel feels that it is appropriate to use the framework of the UN Guiding Principles on Business and Human Rights – which were adopted shortly before the project agreement in this case – to assess the degree to which the lenders acted to support or respect the relevant human rights principles contained in these instruments.
55. Key to the application of these principles in this instance is the degree to which the lenders carried out appropriate due diligence to understand the potential human rights issues in this project and also put

in place appropriate measures to reduce any negative human rights implications. The key steps anticipated by the UN Guiding Principles can be summarised as follows:

- Identifying and assessing human rights impacts: proactive, on-going steps to understand how existing and proposed activities may cause or contribute to human rights impacts, as well as how the business's operations may be directly linked to such impacts.
- Integrating findings: integrating findings across relevant internal functions and processes
- Taking action: the appropriate action will depend on the business's relationship to the impact. Obviously, in this case the lenders are in a financier position rather than in a direct relationship to any potential impacts. However, as lenders they should carry out appropriate due diligence and take relevant action to seek to ensure that their clients act in a way which is aligned with the UNGPs.
- Tracking effectiveness of response: monitoring and auditing processes.
- Communication: externally communicating how the business has addressed adverse impacts.

56. The Panel is of the opinion that (if properly implemented) the IFC Performance Standards are – in relation to this particular project, given its size and anticipated impacts – the appropriate and relevant standards and approach to manage most human rights, social and environmental issues that arise in relation to a project such as this, particularly land, indigenous peoples, community consultation and labour. As such, the panel feel that the lender's application of the Performance Standards was the appropriate way to seek to align project performance with both the UNGPs and the OECD guidelines. This is not to say that in other projects adherence to other international standards beyond the Performance Standards might not be necessary.

### 3. Factual review / key information

57. There are many thousands of words already written about the project and the various disputes that have taken place both in relation to the previously-planned, much larger, dam which was originally proposed for the area and the Barro Blanco project which is now under construction. The project and the disputes related to it could – and probably will – fill the pages of a substantial book. The Panel does not propose to add significantly to this information, but does wish to draw out the following key points that are necessary to understand the context around the project in assessing the lenders' compliance with their policies and the challenges and dilemmas which arise in relation to the project.
58. The site of the project is very similar to a project that was proposed in the late 1990s – the Tabasará 1 and 2 dams. This hydroelectric project was of a significantly greater size - with a reservoir area some ten times bigger - and led to the foundation of the M10 movement as an opposition to the project. The project was withdrawn after significant opposition and also a suspension of the EIA. While the Panel did not read or hear anything directly which confused the current project with the previous one, there is inevitably a significant influence stemming from the experience and conflict around that project – and the communities' feeling that they were victorious in their opposition to that project – on the discourse and Government / Community relations that was present when the project started and has continued subsequently.
59. The Barro Blanco project is not one that BBHP conceived, rather this is a project which was decided upon by the Panamanian Government and which BBHP won the right to develop in a public contest. There has never been any question raised about the propriety of this process. The role of the Government in relation to various aspects of this project – including Environmental Assessment, permitting, land issues, cultural artefacts issues and security – is a significant one and has not always been at the forefront as might have been expected.
60. The project was subject to an Environmental Impact Assessment which was carried out in accordance with Panamanian law and which, although subject to a legal challenge, has been recently held to be in accordance with Panamanian law as it stood at the time of the EIA by a majority decision of the highest court in Panama. During the Panel's final deliberations, the project was suspended by the Panamanian government on the basis of alleged non-compliances with the EIA. Subsequently, the Government established a multi- party dialogue round table –which includes the company and the M10 and other indigenous leaders [at moment of disclosing this report publicly this text will be updated to reflect actual status].
61. The project has to be seen in the context of the wider political context in the country, including the significant campaign in relation to mining and natural resource exploitation which took place during 2011-12 and led to a change in the law related to the exploitation of resources in the designated Comarca land of the Ngöbe-Buglé.
62. There are a number of more deep-rooted factors that have great relevance to this complaint, which include the following: the significant influence of the Mama Tata / Mama Chi religion in the Comarca in general and in the three communities most affected by the dam in particular, with its desire for territorial integrity; the establishment of self-governing Comarcas in Panama in the 1990s, including the Ngöbe-Buglé Comarca, which was established in 1997 – this is a crucial factual, legal and political component to be borne in mind in relation to this complaint, and; the fluidity of political and representative structures within the Comarca and the relatively recent and developing nature of these structures.

### 3.1 Overview of Phases of due diligence / approval / monitoring

In order to better understand the key reports, milestones and actions related to the complaint, specifically on the part of the lenders implementation of their policies, the table below provides a broad timeline.

Date	Report / Milestone	Comments
23/06/09 (DEG) 20/09/10 (FMO)	Clearance in Principle (CIP) document	Sets out basic issues related to Indigenous Peoples
29/11/10	Memo to FMO investment committee	Covers the following issues - possible impacts on indigenous peoples and resettlement. References existence of MoU between the company and communities. References ESAP required by lenders as CP for signing. Notes that lenders approached by NGO and suggests concerns will be addressed. No specific legal issues raised re land and approvals in the Comarca. Classifies project as A for E&S risk. However, suggests that no significant issues, but suggests that Indigenous People report should be condition of signing.
09/12/10	Investment Committee Advice and FMO Management Board decision	Suggests that an independent monitoring report – contracted by the lenders - should be in place contracting with (i) final ESRS (ii) necessary ‘comfort’ that the ‘NGO issues’ have been satisfactorily addressed and (iii) an agreed protocol between lenders to ‘address NGO concerns’.
04/1/11	Approval request (DEG)	Acknowledges issues with indigenous communities and existence of agreement with traditional authorities. Notes ESAP being carried out in response to lenders concerns. Notes requirement for additional studies – including an indigenous peoples report – as a condition precedent of signing.
19/1/11	Management Board Approval (DEG)	
18/4/11	Agreement between M10 – Government and BBHP	Agreement between the three parties to update the agreement with Cacique Maximo Saldaña. The validity of this agreement is contested by the complainants.
21/06/11	Summary of public consultations	Summary of activities of BBHP in relation to public consultations, including with the Regional Congress. Sets out note on the Extraordinary Regional Congress of Kodri.
29/06/11	First indigenous peoples report	Limited report on basic information on communities.
19/7/11	Summary of legal advice	Information to lenders from Counsel, response to NGO statements re. applicability of existing laws / draft bill.
28/7/11	Environmental and Social Summary Report by BBHP	Published by BBHP – informs the wider public about the environmental and social impact of the Barro Blanco project.
01/08/11	Note from retained counsel	Note to lenders from Counsel, focuses on the lawsuit challenging the EIA.
3/8/11	E&S memo – Final signing	Notes existence of indigenous land. Notes small proportion that is indigenous land. Notes critical stakeholder attention. Refers to various specific responses to the difficulty of the project, including: IPs report; public E&S report; Grievance mechanism and SE plan. Notes the escalation of protest in spring 2011. States that Local lawyers looked in more detail at whether project complies with

		indigenous laws in Panama - states that this is to be in the legal opinion that is CP of first disbursement. Extension of scope of Independent E&S team to cover indigenous peoples. Three reasons for approving continuation of the project: lawyer's opinion; BBHP demonstrating seriousness; Independent Engineer stating that there was no red flag. Nevertheless concludes on cautious note and requires further studies and action.
10/08/11	Signing of credit agreement	Signing of credit agreement between BBHP and the lenders.
15/08/11	Monitoring Report #1	First Independent Environmental and Social Monitoring Report by the independent E&S Advisor to DEG and FMO.
25/08/11	Signing of land use agreement	Agreement between BBHP and the Kodri Regional Congress.
2012 - 2103	Several BBHP PHBB social update reports	Information provided by BBHP to Lenders with (i) updates on Panamanian Government & Ngöbe-Bugle Discussions Regarding Mining and Hydro Project Developments and (ii) general information on social development / communication with villages.
07/04/12	First disbursement E&S memo (DEG)	Reviews situation in 6 months since signing. Notes four visits since July 2011. Notes UN Dialogue table and conflict in early 2012. Relies on Independent Engineer's failure to raise red flags as reason for continuation of the project.
11/4/12	Second Indigenous Peoples report	Significant report prepared at the lenders' request related to a number of indigenous peoples' issues. Produced by the Independent E&S Advisor. Considers power structure in indigenous communities, opinions and trends related to the project, possibility of participation in relation to the project and recommendations for improving participation and stakeholder engagement. Key issues of legal approvals on land with indigenous authorities are referenced. Clear and sensible recommendations to improve relations. Issue of the ability to approve actions in the Indigenous communities is dealt with.
9/5/12	E&S Monitoring memo	Clearly states key conflict issue - 6.7 ha overlap of project area and annex of Comarca. Sets out June 2012 ESAP, including various requirements related to indigenous peoples to be done in defined periods after conclusion of the UN process.
19/6/12	ESAP – 1 <sup>st</sup> update after signing	Significant issues raised which need following up - recommendations of the UN Round Table - Assign company stakeholder engagement specialist with ability to engage with communities in their language - proper grievance mechanism - community relations plan - stakeholder engagement plan and register.
25/6/12	Annual review (DEG)	Notes that continued negative attention on E&S issues. In particular related to indigenous peoples (and threatened species). Notes that issues are being assessed by the Independent E&S Advisor and by UN Round Table. Notes that technical table had established that inundated area will not exceed that communicated to lenders by BBHP. Notes further visits due. Notes that ESIA is not in question for UN process. Assesses the project's NGO and media strategy.
27/06/12	Monitoring Report #2	2 <sup>nd</sup> Independent Environmental and Social Monitoring Report by the Independent E&S Advisor to BBHP, DEG and FMO.
07/11/12	Monitoring Report #3	3 <sup>rd</sup> Environmental and Social Monitoring Report by the E&S Advisor to BBHP, DEG and FMO.

23/09/12 – 28/09/12	UN Verification Mission	Field visit to the communities to check <i>in situ</i> aspects that could not get satisfactory answers during the technical review of environmental impact. The delegation included representatives from the UN, the Panamanian Government, BBHP, the Ngöbe-Buglé Congress, traditional authorities and the Catholic Church.
16-19/4/13	Lenders E&S specialist on site visit	DEG and FMO undertook the site visit with the objective to get an own impression of the Project status and of the general situation in addition to the external regular monitoring site visits undertaken by the Independent E&S Advisor. Uncertainty about next steps in UNDP process and who takes on responsibility (UN not taking leading role).
12/04/13	Monitoring Report #4	4 <sup>th</sup> Environmental and Social Monitoring Report by the E&S Advisor to BBHP, DEG and FMO.
26/07/13	Monitoring Report #5	5 <sup>th</sup> Environmental and Social Monitoring Report by the E&S Advisor to BBHP, DEG and FMO.
05/09/13	Report of the Peritaje Independiente (Independent Expert Appraisal)	Based on the recommendations and findings of the UN Verification Mission, an Independent Expert Appraisal was commissioned. Aspects covered by the appraisal included: 1) Hydraulic aspects; 2) Participatory Rural Appraisal, and 3) Analysis of Ecological and Economic Aspects.
30/12/13	Annual Review (DEG)	
07/03/14	BBHP Report	Efforts of BBHP to start communication with community through group of notables.
March 14	Monitoring Report #6	6 <sup>th</sup> Environmental and Social Monitoring Report by the E&S Advisor to BBHP and DEG.
14/07/2014	ESAP – 2 <sup>nd</sup> update	Inclusion of items coming from Independent Expert Appraisal based on recommendations from Monitoring Report #7.
15/07/14	Monitoring Report #7	7 <sup>th</sup> Environmental and Social Monitoring Report by the E&S Advisor to BBHP and DEG. Summarises reports from the UN Process and the “Peritaje Independiente”. Makes proposals for revisions to the ESAP to take into account of these reports.
06/10/14	Monitoring Report #8	Environmental and Social Monitoring Report by the E&S Advisor to BBHP and DEG. Discusses the implementation of the recommendations from the UN and “Peritaje” processes.
09/02/15	Suspension of the project	Suspension of the project by the Panamanian Government for alleged breaches of the EIA. Commencement of dialogue between all parties.



## 4. Substantive Issues

### 4.1 Adequacy of the social and environmental impact assessment

63. This section covers the lenders' assessment of the social and environment impacts of the project, both prior to project approval and subsequently. It considers whether this is in line with the policy commitments of the lenders.

#### The complaint

64. In relation to the IFC Performance Standards, the complaint alleges that the social and environmental impact assessment was inadequate. In particular, attention is drawn to alleged deficiencies in the environmental impact assessment (EIA), which was approved by ANAM in 2008. In this respect, the Complainants specifically refer to the domestic legal action that has been brought to challenge the adequacy of the EIA and use the same arguments deployed in that challenge in respect of the coverage and nature of the EIA.

65. To summarise, the key points of dispute about the adequacy the EIA study relate to: its alleged failure to contain complete information about the impacts on indigenous territories, namely the annexes; an alleged failure of the environmental agency to provide sufficient time for consultation and information; and the alleged failure to adequately consult the affected communities. In addition, the Complainants raised the issue that the EIA was allegedly insufficient given that it related to a smaller dam, namely one of 19.86 MW, compared to the actual dam which will be 28.56 MW.

#### The relevant standards

66. The relevant standards by which the Panel has assessed this complaint are those contained in IFC PS1, which is set out below in Annex A. To summarise, the key components of that standard are the following:

- PS1 requires that the project should identify specific social and environmental risks and impacts and put in place appropriate responses to deal with those impacts. There should be a social and environmental management system that is appropriate to both the project and the identified level of social and environmental risks and impacts.
- At the outset there should be a social and environmental assessment. The assessment is to be carried out by qualified and experienced persons and, in projects with significant adverse impacts or where technically complex issues are involved, clients may be required to retain external experts to assist this assessment process.
- Where mitigation measures and actions are necessary, PS1 requires that the client should prepare a specific action plan. This plan is expected to reflect the outcomes of consultations. In relation to this action plan, the project is expected to establish, maintain and strengthen an appropriate organisational structure with defined roles, responsibility and authority to implement the action plan.
- PS1 provides that where the client has undertaken a Social and Environmental Risk assessment, the client should disclose the Assessment Document. Affected communities should be provided with information about the project and identified impacts and risks. In the case of risks and adverse impacts, communities should be consulted with in accordance with principles set out para 21. IN the case of significant adverse impacts, the process should seek to ensure their free, prior and informed consultation and facilitate their informed participation. The project should also have an appropriate grievance mechanism.
- The UN Guiding Principles on Business and Human Rights also suggest that businesses should carry out an assessment of the relevant human rights impacts flowing from their activities. The Panel feels that the appropriate standard for such due diligence for institutions such as the two lenders in these circumstances is IFC PS1, and therefore restrict its analysis to that standard, rather than introducing any additional standard. The Panel is of the view that this is aligned in relation to this project – but not necessarily all projects – with the due diligence requirements in both the UNGPs and OECD Guidelines on Multinational Enterprises.

67. The Panel is of the opinion that, in relation to this project, there is no provision in the lenders' policies that free, prior and informed consent (FPIC) to the project itself was required as a standard. IFC PS7, in the 2006 version that applied to this project, did not require consent to the project, but free, prior and informed consultation. There was nothing in Panamanian law which required FPIC to the design and implementation of the project as a whole and Panama still has not ratified ILO Convention 169. In relation to the international human rights standards, in particular those set out in the decisions of the Inter American Court on Human Rights, the requirement for FPIC at the time of project approval applied in respect of "large-scale development or investments projects that would have a major impact within [the community's] territory"<sup>1</sup>, which in the Panel's view was not the case in relation to this project.
68. This is not to say that the issue of free, prior and informed consent regarding specific land and cultural issues was not de facto important, and the panel also note that the operators of BBHP were under the assumption they had obtained documented consent before the agreement was signed in August 2011.

### What happened?

69. For reasons which are fully explained above, the information that was available to the Complainants in respect of this project was limited, given that there was little information disclosed – in accordance with FMO and DEG policies in existence at that time.
70. Therefore, it is, to a certain extent, no surprise that the Complainants raise the adequacy of the EIA as the sole means by which they challenge the lenders' application of PS1. From the perspective of the community-based Complainants and their advisers and supporters, this is the only publicly visible means of assessment of impact. However, the Panel had significant information made available to it, which demonstrated that additional reports and studies were relied upon by the lenders in respect of the assessment of the social and environmental impacts. In addition, the Panel points out that an Environmental and Social summary for the project, dated July 28, 2011, was made public. This report contains significant information about both the nature of the assessment of the impacts at the time of the transaction and also references other reports. However, this report was not communicated directly to the affected communities.
71. While the Environmental Impact Assessment did play a part in the due diligence of the project, additional studies and assessments were commissioned, in addition to the EIA, at the instigation of the lenders or by BBHP. These include the following – none of which were summarised nor the information contained therein communicated to the affected communities,:
- An environmental and social impact gap analysis dated 26.7.10
  - An Indigenous Peoples report for the project, dated 29.6.11
  - The Environmental and Social Action Plan (ESAP) dated 15.7.11
  - The Environmental and Social Summary Report (ESISR) dated 28.7.11 (which was publicly disclosed)
  - A further Indigenous Peoples report, produced by another independent E&S Advisor, dated 12.4.12.

### Compliance review assessment

72. In order to assess the degree to which the lenders were able to adequately assess social and environmental impacts and also determine appropriate steps with their client to deal with those potential impacts, the Panel has found it useful to split the analysis into two. The first relates to the EIA itself and the degree to which it did or did not form an important part of the lender's assessment. The second relates to the additional studies and analysis that were carried out over and above that contained in the EIA.

### EIA

73. In relation to the EIA, document review and interviews revealed that the lenders were well aware of the ongoing legal action and the alleged deficiencies in the study. Both the company and the lenders commissioned independent counsel's advice on the nature of the litigation and also sought an assessment of the validity of the arguments being put forward before the Panamanian courts. The lenders independent counsel's opinion suggested that the legal action was unlikely to be successful in

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<sup>1</sup> *Case of the Saramaka People v. Suriname* (2007), par.134.

the Panamanian courts - an assessment which was ultimately proved to be correct, as the Panamanian Supreme Court has subsequently dismissed the legal challenge, although it is still open to the Complainants to raise this case in an international forum. The Independent Lenders' Advisor has also reviewed the adequacy of the EIA as part of their mandate and scope of work, including the modified design features of the project.

74. Without expressing a judgment on the outcome of the litigation, or second guessing the Panamanian Supreme Court's views on Panamanian law, the Panel is of the opinion that the lenders took all appropriate steps to put themselves in a position of understanding regarding the legal arguments being pursued through the Panamanian courts and could not have been expected to do anything further specifically in relation to the validity of the EIA in itself. The commissioning of an independent legal advice, in addition to that provided by BBHP, demonstrated appropriate levels of due diligence in relation to understanding the issues around the validity under national law of the EIA. However, this is not the end of the matter, as the lenders did not solely rely upon the EIA.

### Over and above the EIA

75. The Panel is of the opinion that the EIA played a relatively minor initial role in the lenders' assessment of E&S risks and impacts. The lenders took a number of steps in addition to checking the validity of the EIA. Not once, but twice, they sought specific indigenous peoples reports to better understand the communities that would be impacted and also to receive recommendations in relation to the appropriate actions that the company should be encouraged to take in order to better improve their performance and understanding in relation to their communications and dialogue with those communities. They also carried out a gap analysis and other studies to determine the degree to which additional information and action were necessary to assess compliance with the suite of IFC Performance Standards.
76. The Panel notes that the project was classified as a Category A project in relation to its social and environmental impacts. The project was categorised as a Category A project because it is a greenfield project involving land-use conversion (albeit on a modest scale) in a sensitive area (presence of indigenous peoples).

### Indigenous Peoples studies

77. The first indigenous peoples study commissioned is open to criticism in terms of its coverage of the issues and assessment of the challenges in the context of IFC Performance Standards. However, the Panel does not feel it necessary to set out a detailed analysis of that report, as it notes that DEG and FMO took specific steps based on their recognition of the weakness of this study and commissioned a second indigenous peoples report. This second report, which was written by the consultants independently engaged by the lenders, who also took over the broader social and environmental support and monitoring role (see more on this below), is a solid professional report, which identifies a significant number of important issues. The team which worked on this report possessed sufficient expertise and experience on indigenous peoples' issues and carried out field work in Panama.
78. The scope of coverage of the report included the following issues:
- A detailed analysis of the economic and social situation in both the Comarca and, particularly, the three impacted communities – Nuevo Palomar, Quiabda and Quebrada Caña
  - An analysis of the political structure within the Comarca, including an overview of the legal provisions related to decision making
  - A sophisticated and professional understanding of the relationships between indigenous peoples and their physical environment and the perceived impact of the Barro Blanco project
  - A recognition of significant short-comings in the relationship between the project and the impacted communities
  - A recognition that the three affected communities question the authority of the Kodri Regional Congress for decisions taken by them.
79. The report put forward a range of specific and important recommendations, which became incorporated into the ESAP. The degree to which these recommendations and requirements in the ESAP

were put into effect and monitored is considered below in relation to the various specific elements of the complaint. However, the Panel is of the view that, as a result of the second commissioned indigenous peoples report, the lenders were properly appraised of most of the significant impacts related to the impact of the project on the relevant indigenous communities.

80. However, there is a significant issue related to timing. The second indigenous peoples report was not completed until April 2012, with field work taking place in October 2011. This was, obviously, after the agreement was signed. There is a question as to whether the project should have been agreed without this level of understanding of the issues. The Panel found this a difficult issue. The need for a specific indigenous peoples report was clearly anticipated in the assessment of the project and was specifically identified in the Environmental and Social Review Summary (ESRS) dated 5 December 2010 as something which should be done (to the lender's satisfaction) as a condition precedent to signing the contract. Such a report was commissioned, and was delivered in June 2011. To their credit, DEG and FMO recognised that this first report was not sufficient to address the real complexity of the issues in question.
81. The need to have a deeper understanding of the indigenous people's issues was clearly understood at the time of the signing of the agreement between the lenders and BBHP in August 2011. BBHP tried many initiatives during June to August 2011 to finalise a land use agreement before the signing of the agreement with the lenders. This is evidenced by the fact that, given the deficiencies in the first commissioned report, the conclusion of the second indigenous peoples report and the incorporation of its recommendations was a contractual condition precedent to the first disbursement of funds.
82. To summarise, the lenders did understand the complexity of the issues in question and the need to go deeper in the analysis and response to the issues at the time of the signing of the project, but were not in a position that could be said to be fully appraised of all the issues until before first disbursement of funds. This is even though the ESRS identified a satisfactory report as something that needed to be done prior to contracting. This also meant that there was no effective disclosure of the key information related to the impact of the project or consultation with the affected communities before this time.

83. The Panel is of the view that while the lenders were, by the time of the first disbursement, fully appraised of many of the issues related to indigenous peoples, they were not so appraised at the time of project approval. While the lenders did take appropriate steps to so appraise themselves prior to approval, and were almost certainly correct to determine the first indigenous peoples report as insufficient, this still had the effect that at the time of project approval their assessment was limited and conditional to a future report. In short, the lenders were not in the position that should have been – and had identified that they should have been – at the point of project approval.
84. In retrospect, however, it was appraisal delayed, rather than appraisal denied. Requiring an indigenous peoples report and action plan derived from that report were appropriate practical steps to take in the light of the recognised limitations on and gaps in the knowledge they had at that time. Making this a contractual condition of first disbursement – which was fulfilled – limited the impact of deficiencies in assessment prior to approval. In future projects which engage indigenous peoples' rights, the Panel would anticipate that the lenders do not approve the project until they are satisfied that they are fully appraised of all the relevant issues, as is defined by PS1. Prior to financing contract being agreed for the project's financing in August 2011 BBHP had reached an agreement with the Cacique in position at that time and the regional council of the Ngöbe-Buglé. The Panel is of the opinion that, while the lenders took this as amounting to an appropriate agreement, they were aware as of August 2011 that the legitimacy of that agreement was challenged by the affected communities. Therefore, the Panel is of the view that the lenders should have sought greater clarity on whether there was consent to the project from the appropriate indigenous authorities prior to project approval.

### Legal assessment

85. On the specific issue of the legal issues around indigenous people's governance and decision making – a core issue for this complaint – a DEG internal memo specifically states that it was planned to incorporate the analysis of the applicability of indigenous regulations into the legal opinion which was a condition precedent of first disbursement. This memo also notes that the scope of E&S specialists has been extended to include an indigenous peoples' specialist in the future. While the second indigenous peoples report dealt in some detail with this issue, there was never a specific report on the legal issues around consent, land and other important issues for this project produced as a condition of first

disbursement. The legal opinions related to the EIA were solely based on the challenge to the validity of that study. The Panel did have sight of a very short (undated and unsigned) 'legal memo' that appears to have been produced prior to project approval. While this opinion does address some of the relevant issues, it is not sufficient, in the Panel's opinion, to provide clear legal analysis that the lenders should have sought. Similarly, the Panel have had sight of an email from lawyer to client dated 20 May 2011, in response to emails from DEG/FMO to local counsel which were triggered, in part, by a clear flagging of the need to properly address the indigenous peoples land issue by FMO/DEG's retained lawyers based in New York, USA. The email dated 20 May 2011 covers a number of issues, but from a legal perspective focuses on ILO Convention 169, which has not been ratified by Panama, so has no direct relevance. The email does not set out fully or advise on the relevant Panamanian laws either at a State or Comarca level.

86. The Panel is concerned that the first disbursement legal opinion appears either to have not been commissioned or simply comprise of a combination of notes and emails from lawyers – most issued prior to disbursement – that have been taken to constitute the required legal opinion. The Panel is of the view that, given the acknowledged complexities, the lenders would have been better appraised of issues related to indigenous peoples' rights and land if they had gone ahead to commission a formal opinion from lawyers or other experts with defined expertise in indigenous peoples' rights and the Panamanian legal context. This means that the lenders had failed to be fully appraised on the risks and issues in accordance with the requirements of the IFC Performance Standards and their own Environmental and Social policies at the time of project approval.

#### **Additional E&S assessment – gap analysis between the EIA and IFC Performance Standards**

87. In addition to the specific recognition of the indigenous peoples' issue, and the commissioning of two reports with subsequent inclusion in the ESAP and monitoring programme, the Panel feels it is important to also take note, first, of the Environmental and Social Impact Gap Analysis Report, which was commissioned in 2010. This report considers the scope of coverage of the EIA and carries out a degree of additional research, field work and analysis. The report identified a number of important additional issues that needed to be dealt with over and above the findings and recommendations of the EIA. These included the following:

- The report noted that, in order to comply with PS8, an additional archaeological report that would comprise the Archaeological Management Plan needed to be prepared and implemented.
- The report noted that a comprehensive Social Management that corresponds to identified impacts, existing commitments and an overall Environmental Management Plan was not contained in the EIA. The report recommended that an adequate Social Management Plan needed to be prepared in which all these actions could be formalized and organized with objectives, indicators, follow-up mechanisms, schedule, budget and an organisation responsible for its implementation.
- Specifically with regard to PS1, this report identified that "Both the EIA and Environmental Management Plan contain several gaps regarding the full application of PS1". However, the consultants sought to identify a range of improvements and recommendations to bring the project into line with PS1. In particular, the report suggests that: "The Management Plan needs to formalize and include certain environmental and social issues that are important to the Project, in particular related to complementary studies of fish fauna, local flora, a local flora and fauna rescue plan in order to preserve local biodiversity, labor and working conditions, an Archaeological Management Plan and a Community Relations Program. The Community Relations Program needs to include a permanent Communication Plan, a Local Development Program (divided into smaller local development plans in which former affected landowners should be engaged), a Construction Camp Management Plan and a Monitoring and Reporting Plan."

88. The Panel is of the view that this report clearly and correctly set out initial concerns and suggested additional reports and studies to plug the gaps between the limited coverage of the EIA and the requirements of PS1. The question for determination thereafter is the extent to which those gaps were actually plugged. These issues are dealt with below under the specific issues that were subject to a complaint – indigenous peoples, stakeholder engagement, cultural heritage, environment and biodiversity.

## ESAP

89. The final relevant report and process for identification of potential impacts and devising an action plan within the context of PS1 which the Panel feels is relevant to this complaint is the Environmental and Social Action Plan (ESAP) which was agreed between the lenders and BBHP. This is, as would be expected under PS1, a crucial operational documentation and guide to identify and check on progress of actions. As would be expected, this ESAP was updated and changes were agreed upon at various points throughout the project. However, substance of the information contained in these documents and changes were not publicly disclosed in accordance with PS1.
90. The ESAP dated 15 July 2011 that was agreed at the time of contracting was, in the Panel’s opinion, lacking in any detail or agreed action. The ESAP was, in essence, dependent on various other action and studies which were yet to take place – including the second indigenous peoples study. This ESAP, which is appended to the credit agreement, contains no provision on land acquisition and resettlement and nothing on biodiversity and natural resources management. Neither does it contain any reference to issues related to cultural heritage.
91. Compared to the subsequent ESAPs – for example that agreed in mid-2012 – there is not a sufficient level of detail or clear expectations to drive specific actions. Also, it should be noted that a number of specific issues – including land – that are not covered in the original ESAP are covered to some degree in subsequent commitments, even if it includes contingent future action based on information coming out of other processes – for example the UNDP process.
92. Once again, the Panel is of the view that, while the subsequent actions of the lenders and their client – based on subsequent assessment and analysis - may have put in place appropriate steps, actions and mitigation measures, it cannot be said that at the time of the appraisal of the project and initial agreement of financing, the lenders demonstrated that they were fully appraised of all of the risks and that appropriate actions were identified as were required by PS1.

## The question of deferred assessments and action plans

93. The Panel wishes to reiterate that the key issues here are related to questions of sequencing and timing. There are often project assessment scenarios where it is impossible to carry out an identification of issues or determine final actions at the time of financing and a prudent lender would put in place preliminary steps or actions which could leave subsequent actions able to respond to changing circumstances.
94. Later actions agreed between the lenders and the company – including some that were so clearly anticipated as issues that they were made a contractual condition precedent of first disbursement – addressed the kinds of issues that a lender is required to address under PS1. However, the Panel is of the view that there are limitations on the degree to which such an approach is aligned with PS1.

95. The Panel is of the view that there may be circumstances where less material issues, or issues that simply cannot be fully assessed at the time of an agreement, can properly be left for future assessment of impact, development of actions and, of course, implementation – so long as there are clear indications from lenders on the expected standards and actions, based on a risk assessment of likely impact. PS2 issues on greenfield projects is a perfect example of this. The likely contractors, sources of labour and structure of employment may not be clear at the time of financing. In such cases, a strong monitoring process needs to be put in place to ensure subsequently agreed actions are implemented.
96. In relation to this project, while the agreement was reached prior to significant construction, significant issues related to social and environmental impact and, in particular, issues related to the rights of indigenous peoples were not completely assessed prior to the agreement. As such, the lenders were not fully compliant with their policies at the time of the project approval.

## 4.2 Land and Indigenous Peoples' issues, stakeholder engagement and consultation

97. This chapter is focusing on two of the core issues in the complaint: the indigenous land issue related to the Comarca land of the Ngöbe-Buglé and whether there was an adequate information, communication and participation process for the three affected communities living in the Annexed areas of the Comarca.
98. The chapter starts with a summary of the key complaints made to FMO and to DEG concerning land, consultation and participation issues. It then presents the findings of the Panel related to the two issues with the respective conclusions of the Panel. In the third part it considers additional issues (see 3-6 below) related to land and indigenous peoples raised in the complaint.

### Summary of the arguments of the complainants

99. The complaint's arguments in relation to indigenous land and participation issues can be summarized in six points:
- (1) **Land transfer:** The project affects some land that belongs to the Annex of the Comarca of the Ngöbe-Buglé community. The land is, in the understanding of the indigenous peoples, legally protected as common property that cannot be used without the consent of the affected communities. This consent has never been achieved.
  - (2) **Participation and consultation:** The affected communities argue that they were never adequately contacted and informed about the project. Adequate procedures were not taken to inform and enter into dialogue with them. Moreover, the forms of participation made available to the indigenous communities and their representatives were inadequate and involved the wrong institutions.
  - (3) **Project enlargement.** The project design was enlarged in 2010, as understood by the complainants, with an increase of the height of the dam and the water level of the reservoir. The environmental agency or lenders should have insisted on a new EIA, which did not happen. The complainants claim that subsequent UN reports indicate that the consequences of this enlargement are underestimated.
  - (4) The complainants argue that the start of the procedure of forced adjudication and **threat of eviction** at the beginning of February 2014 were out of line with the lenders' policies.
  - (5) The complainants argue that the **affected communities have been overlooked** from the beginning of the project. The EIA and subsequent studies have not referred to them adequately. The number of people living in the Annexed areas and the number of people to be resettled were underestimated during the process. BBHP were not planning for adequate compensation and resettlement plans are inadequate.
  - (6) Finally, the complainants claim that there are a number of **cultural heritage** issues related to the project that have not been properly addressed.

### Issue 1: Land transfer

100. According to the Environmental and Social Summary Report (ESISR 2011), the project requires 198 ha of land, of which 188 ha is for the dam reservoir and other facilities and 10 ha for the transmission line. By May 2011, all land had been purchased, except for some 11 ha. Around 6.7 ha of the land not purchased belong to the affected indigenous communities in the Annexed areas that are part of the Comarca Ngöbe-Buglé.
101. The majority of the land has been acquired by BBHP as a result of a willing buyer willing seller relationship. BBHP is entitled to acquire the land under the general compulsory purchase provisions also applicable to the project. The largest landowner in the project area is the Ngöbe-Buglé Comarca with 424 ha of land in its Annexed areas, of which 6.7 ha (2.6% of the reservoir area) is required by the project.
102. The land-transfer process is assisted - where needed - by ASEP (Autoridad Nacional de los Servicios Públicos), the regulator authority. ASEP has the option to use the powers granted by law 6 of 1997,<sup>2</sup>

<sup>2</sup> Ley No. 6, Ente regulador de los Servicios Públicos, (3 de febrero de 1997)



which allows ASEP to expropriate landowners for rights-of-way and right of land required for public electricity generation, transmission and distribution projects in Panama in case that the land owners do not sell the land under a compulsory purchase provision. With the exception of the affected Annexes of the Comarca land, two other land owners have refused to transfer their land. ASEP has started the expropriation (forced easement) of the portion of the land that will be flooded by the project with these two other land owners in 2014.<sup>3</sup> Concerning the land in the Annexed areas of the Comarca, ASEP has also restarted in 2014 the process of valuation of land, without any result to date.

103. The provision for gaining access and user rights for the land in the Annexed areas is different from most other land in Panama because it is subject to the provisions of Law 10 of 1997, which is the law that constitutes the Comarca of the Ngöbe-Buglé.<sup>4</sup>

104. The application of the relevant legislation is not completely straightforward, but is crucial to this case and, as such, the Panel feels that it is important to set its understanding of the situation in some detail. This is provided in Annex A.

105. In summary, the key provisions of the national law are the following:

- Law 10 from 1997, as amended by law 15 from 2001 requires that specific consultation requirements apply to projects which are located entirely within the Comarca
- Law 72 of 2008 declares that indigenous land outside the Comarca also has the status of collective land and requires from government authorities and private actors to coordinate with the traditional authorities of the indigenous peoples in order to obtain a free, prior and informed consent to use the land.

## The relevant standards

106. The Panel is of the opinion that, in relation to this project, there is no provision in the lenders' policies that free, prior and informed consent (FPIC) to the project itself was required as a standard. IFC PS7, in the 2006 version that applied to this project, did not require consent to the project. There was nothing in Panamanian law which required FPIC to the design and implementation of the project as a whole and Panama still has not ratified ILO Convention 169. In relation to the international human rights standards, in particular those set out in the decisions of the Inter American Court on Human Rights, the requirement for FPIC at the time of project approval applied in respect of "large-scale development or investments projects that would have a major impact within [the community's] territory"<sup>5</sup>, which in the Panel's view was not the case in relation to this project.

107. This is not to say that the issue of free, prior and informed consent regarding specific land and cultural issues was not de facto important, and the panel also note that the operators of BBHP were under the assumption they had obtained documented consent before the agreement was signed in August 2011.

108. The relevant applicable standards for the lenders, against which this compliance review is carried out, are the IFC Performance Standards (PS) from 2006, which were the appropriate standards when the project was developed and signed (see chapter on Standards). Relevant to this issue are PS5 and PS7. PS5 is related to Land Acquisition and Involuntary Resettlement and refers both to physical and economic displacements. PS7 focuses on Indigenous Peoples. Both belong together due to the fact that indigenous land rights have a special protection status in most States – as in Panama, and the transfer of land rights or rental agreement with indigenous peoples requires a particular form of consultation and participation. In addition, PS7 covers a range of cultural and other issues related to Indigenous Peoples.

109. PS5 is the relevant standard to judge the land acquisition issue, given that it applies "to land rights for a private sector project acquired through expropriation or other compulsory procedures" (IFC PS5, p 22) or when other processes of negotiated settlements fail and compulsory measures are the last choice. In the case of Barro Blanco, BBHP was able to acquire, as documented, most of the land through negotiated settlements with property owners, but in the case of the Comarca land the affected communities did not want to rent or lease out the land and the formal process of land transfer has not happened so far. PS5 has four key objectives which are assessed in this compliance review:

<sup>3</sup> The External E&S consultants' monitoring report #6, March 2014.

<sup>4</sup> The Comarcas of Panama have been established between 1938 and 2000. The Comarca of the Ngöbe-Buglé was created by Law 10 from 1997. Ley No. 10 de 7 de marzo de 1997, "por la cual se crea la Comarca Ngöbe-Buglé y se toman otras medidas", Gaceta Oficial No. 23,242 (11 de marzo de 1997).

<sup>5</sup> *Case of the Saramaka People v. Suriname* (2007), par.134.

- (1) Involuntary resettlements should be avoided or at least minimized wherever feasible by exploring alternative project designs.
- (2) The project should seek to mitigate potential adverse social and economic impacts from land acquisition or restrictions on affected persons' use of land by (i) providing compensation for loss or assets at replacement costs; and (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected.
- (3) There should be steps to ensure improvement or at least restoration of livelihoods and standards of living for the displaced persons.
- (4) The project should provide adequate housing with security of tenure for those being physically displaced.

110. In relation to compensation for economically displaced persons where communities of indigenous peoples are affected, PS5 requires that the client needs to meet the applicable requirements of PS7. Paragraph 12 of PS7 refers to the fact that indigenous peoples are often closely tied to their traditional or customary land and natural resources on their land, in the sense that it may be important for their livelihoods or for cultural, ceremonial, or spiritual purposes that define their identity and community. Paragraphs 13 and 14 specify the requirements that the project should follow when traditional or customary lands are under use in a manner that could cause adverse impact on the land.<sup>6</sup>

111. While the size of the affected land within the Comarca is comparatively small, the affected communities claim such value of the affected land for their identity and community. This is documented in the Indigenous Peoples report produced by the Independent E&S Advisor in 2012. At various points through the assessment of the project by the lenders, the land question has been addressed in the formal process through the lens of achieving an agreement on land use related to individual titles or through an analysis of how the company might obtain broad community support for acquisition or use of the land for the purposes of the project through an agreement. In addition, there has been a consistent reliance on the agreement that was reached between the company and the Cacique General in 2008.

## Findings on compliance review

112. The way in which the lenders assessed and dealt with the issue of land was, in many ways, tied up with the question of consultation and overall stakeholder engagement, but there are a number of specific land questions that were addressed through significant efforts. However, from the outset the lenders took the view that there was likely to be no resettlement – physical or economic - and this meant that various requirements of the Performance Standards were not triggered.

113. In relation to the question of whether there were alternatives which would not require any use of the disputed land, BBHP had commissioned a study to see if it could avoid flooding the 6.7 ha Comarca land. The study found that the height of the dam would have to be reduced from an elevation of 103 masl to 86masl to avoid flooding, with the consequence of reducing the installed power for the facility from 28.56 MW to app. 9 MW, without a matching reduction in costs. With such a change, the project would not have been economically viable. Therefore, alternative options are technically not available.

114. The Panel also took into account the fact that BBHP had applied for the project in a public bid process and that, as a result, the location of the dam site and other design factors were already fixed. With this in mind, the Panel is of the view that FMO and DEG had taken all appropriate steps to ensure that their client had considered feasible alternative project designs to avoid or at least minimise physical or economic displacement, while balancing environmental, social, and financial costs and benefits.

115. With regard to mitigation and compensation, FMO and DEG took into account information provided by BBHP that that all compensation costs will be covered and also that alternative land is available in the region. The lenders were informed by BBHP that suitable land is available in the area, which could be provided to affected families if they need to be resettled. Given the overall size of the affected areas, that confirmation was something that the lenders could reasonably rely upon. However, such findings were (a) not communicated to the affected communities and (b) the communities did not agree with the idea of being resettled. The panel also notes that the compensation in relation to the rest of the flooded areas has already been transferred. The amount of alternative land needed in relation to the

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<sup>6</sup> The issue is discussed below under issue 6.

three communities has not yet been calculated due to the fact that the affected land areas have not been assessed by ASEP.

116. The inability of ASEP to carry out consultations with the affected indigenous peoples has meant that no thorough assessment was carried out with these communities regarding possible compensation measures for the economic displacement from land which seem to be traditionally important to these communities and which seem to have a high cultural value to them.
117. The Panel notes that a consequence of the delay in the assessment of the communities and implementation of a number of recommendations from the Independent E&S Advisor Indigenous Peoples' Report during the period which the UNDP process took place was that the reports produced under the UNDP process, rightly, played an important part in the lenders' ongoing assessment of the project. The lenders, in light of the conclusion of the UNDP process, specifically commissioned a report to assess the degree to which the ESAP or other plans needed to be revised to take the findings of the UNDP process into account.
118. Importantly, the Peritaje independiente found that most impacts of the project are mitigatable, and that BBHP has shown in the agreements with the regional congress of the Comarca that it is willing in principle to cover the cost of mitigation. This is also documented in the Environmental and Social Action Plan.

119. With regard to physical displacement, the lenders accepted the analysis and view – based on the ESISR and the topographic study from 2011 - that no persons need to be resettled. The affected communities are of the view that some houses need to be relocated. The Panel concludes that the lenders were entitled to take the view that relocation and subsequent compensation questions did not seem to be a significant issue, because this would affect a limited amount of persons and alternative land would be potentially available. A census of individual land holdings was done by ASEP based on land titles prior to 1997, the date of the establishment of the Comarca. The available studies indicated that few, if any, families needed to be resettled. This underestimated the fact that the affected communities and individual families now consider that land as collective land and refuse a compensation and resettlement based on individual land titles. The detailed assessment of who needs to be resettled was not done and still remains to be done, because of the breakdown of communication with the affected communities. The Panel is of the view that the lenders should have insisted earlier that this problem needed to be tackled adequately.
120. Based on this, the Panel is of the view that the lenders could not be fully satisfied that this aspect of PS5 and PS7 was complied with in this project.

121. However, the Panel is of the view that there are questions regarding whether any potential resettlement or compensation has been carried out in accordance with the requirements that “the client will consult with and facilitate the informed participation of affected persons and communities, including host communities, in decision making processes related to resettlement. Consultation will continue during the implementation, monitoring, and evaluation of compensation payment and resettlement to achieve outcomes that are consistent with the objectives of [PS5]”. This is covered in the consideration of the adequacy of consultation below under Issue 2.
122. Beyond the question of alternatives and compensation, the central land issue is whether the appropriate steps have been taken to obtain the appropriate consents to use the land in question within the Comarca.
123. The Panel noted that the lenders were aware that for many years, BBHP was trying to get approval for the project, including the use of the disputed land, from the relevant traditional authorities. The lenders relied on the fact that BBHP signed agreements with the General Cacique and the Kodri Regional Council. This is documented on several occasions, including in the June 2011 report on consultations with the indigenous communities. This report stresses the importance of consultation, stating that ‘even though the flooding did not impact on ‘human settlements, houses, or other indigenous edifices’, BBHP considered it important to ‘address the issue directly with the traditional indigenous authorities’. As a consequence, numerous meetings were held with the Cacique General Maximo Saldaña and two agreements were reached. Further, these agreements were taken to the Kodri Congress, which agreed to update or ‘revise and verify’ the agreement reached with the Cacique.
124. However, it has been an outstanding question for some time who was the appropriate authority to agree to such a project. The affected communities and the current Cacica General question the legitimacy of the agreements. The Panel is of the view that, given the complexity of the case, the lenders

would have been better appraised of issues related to land transfer, indigenous peoples' rights and consultation requirements if they had commissioned a formal legal opinion from lawyers with defined expertise in indigenous people's rights in the Panamanian context. This was recognized early in the project – as is explained above (see 4.1) – but was never formally commissioned or produced.

125. Since the Indigenous Peoples report produced by the Independent E&S Advisor in 2012, it was clear to DEG and FMO that the land issue was a significant issue related to the application of the Performance Standards to the project.
126. In the view of the Panel the implementation of the recommendations from the Independent E&S Advisor IP report (see issue 2) have unnecessarily been postponed or not been taken up. The Panel is of the view that at least after the closing of the UN processes the commissioning of a legal advice on the land and indigenous issues would have been advisable, given the number of open issues that remained unsolved or not adequately dealt with at this time.
127. While the lenders assessed and took into account the forced easement process in relation to individual land titles, this does not address the affected communities' view that the land is collective property. The Panel recognises the clear steps that have been – and continue to be – taken to seek a resolution of the land issue. This includes the fact that BBHP has applied for a fast track process for forced easement with ASEP. One problem linked to that approach, however, is that it is only based on individual land titles and does not resolve the question of how to address the small, but emblematic and problematic, area of land within the Comarca Annex.

128. The Panel is well aware that this is not a straightforward issue, but is of the view that the lenders could have done more to seek a greater degree of clarification of the legal situation related to land acquisition and use through the commissioning of a formal legal opinion and seeking greater clarity from BBHP on its legal understanding. A possible approach could also have included dialogue with the Government through its client to seek clear guidance from the Government on its view on the appropriate legislation. This is not to say that the lenders did nothing, rather that given the key nature of this issue, they could have done more. This failure meant that the lenders were not in compliance with their policies at the time of project approval, or subsequently.

## Issue 2: Participation and Consultation

### What happened?

129. The process of consultation and communication with the affected communities, and indeed the wider community of the Comarca, is a complex issue. For these reasons, the Panel feels that it is useful to set out in some detail the various stages of contact with communities, community leaders and others made by the company and assessed by the lenders. This is set out at Appendix C.
130. The Panel observed that the issue of which institution is valid for the approval of a land use agreement in the case of projects such as the Barro Blanco project is under debate. While BBHP, consultants including the independent E&S Advisor engaged by the lenders and, as a consequence, the lenders assume that a regional congress is the appropriate forum (the formulation of Art. 34 of Law 10 is open), the M10, the current Cacica General of the Comarca, Silvia Carrera, and some voices in the government believe that the General Congress needs to approve such a project. It is beyond the scope of this report to answer such a question, beyond stating the issue is sufficiently complex that the lenders should have done more to determine the position.
131. What is within the scope of this report is to determine the degree to which the lenders had sufficient information to allow them to make an assessment of the degree to which the appropriate levels of consultation had been carried out both in terms of the governance of the Comarca, but also more generally in terms of the consultation with affected communities required by the Performance Standards. In relation to both of these issues, a central question is with whom consultation should have taken place.
132. However, the panel is of the opinion that it is important to note that the Indigenous Peoples report expressed the view that the internal functioning of authority in the Comarca is not absolutely clear. It also noted that the authority of the regional congress to approve the project was challenged by the

affected communities. The report stated: “In the case of the communities we observed an attitude of respect for the standing provisions of the law, but not necessarily for those who exercise the authority...” (Indigenous Peoples Report, p 22). The affected communities believe that the authorities presiding over the regional congress (Kodri) do not represent their interest. They also reject the action of the Cacique General Maximo Saldaña and its agreements with BBHP.

133. The Independent E&S Advisor notes that in the communities visited, parallel to the formal power and governance structure established pursuant to the law, informal structures exist, “which exercise power, whose beliefs and principles appear to emanate from the Mama Tata religious framework” that converted into a social movement. The movement based on this religious framework has a strategy of rejection of all elements foreign to its culture. Additionally, these informal structures were able to collaborate with local, national and international NGOs - some of them working in the Comarca to support the capacity for community development, many of them with clearly defined attitudes regarding the issue of hydroelectric power development and indigenous peoples. The Independent E&S Advisor does not find that these NGOs influence the M10 movement, but rather that the NGOs have “contributed in disseminating the position of the Ngöbe regarding mega mining and hydroelectric projects, including Barro Blanco”.
134. The Independent E&S Advisor set out in its Indigenous Peoples report that, at the same time, the regional leaders of the community are fully aware that the inhabitants of the populated areas affected by the project are against the construction of the project. This was also made public in the meetings with government representatives during 2011.
135. To sum up: The Indigenous Peoples report from the Independent E&S Advisor documents in detail the atmosphere among the affected communities and tries to identify reasons for the resistance of the communities, which are clustered in two areas: (1) the “social capital aspects”, which is the own understanding of those affected communities and the perception of the affected population regarding the impact of the project and (2) the internal functioning of the authorities, particularly in relation to the decision making process in the Comarca. The affected communities do not respect the decisions taken by the regional cacique and the regional council of the Comarca, the Kodri Council, because they argue that these are not the relevant institutions to take the decision and that the group that negotiated the land use agreement was not representative at all (see above).
136. The resistance against the project by the affected communities in the annexed areas has been clearly known since many years. Surprisingly, the first Indigenous Peoples report only mentioned these three communities in the list of all affected communities, without mentioning the specific resistance and role of those communities.
137. However, as is discussed above, the lenders were aware of the shortcomings with this report and must be credited for commissioning a second Indigenous Peoples report as a condition precedent of the first disbursement. The second Indigenous Peoples report fully detailed the continuous resistance of the communities in Nuevo Palomar, Quiabda and Quebrada Caña against the project and classified it as a core issue for the whole project. The report was written after the several protests that started in 2011 with a blockade of the Inter-American highway in front of the project areas.
138. The panel also took note of the Diagnóstico Rural Participativo (DRP)<sup>7</sup>, which was part of the Peritaje Independiente and was produced in August 2013 by an expert from UNDP. In short, the study concluded that the impact caused by the project with respect to hydrology, environment and economy are basically manageable (mitigatable). There is a general lack of information on the direct impact of the project in the affected communities, while the available knowledge varies considerably among different persons. Therefore there are many rumours circulating, which does not contribute to a debate on actual facts. Concerning participation, the study concluded that given the low level of information in the villages there was no adequate consultation done with the affected communities and that the direct and indirect impacts of the project were not properly explained to the communities. The consultation process was therefore judged to have been inadequate and this has created or contributed to a climate of fear and mistrust. As a result, a very antagonistic situation has been created which needs to be treated with care, patience and an honest and transparent spirit in future communications with the communities. The UN Special Rapporteur for Indigenous Peoples, James Anaya, supported in his report the conclusion that there was no adequate consultation<sup>8</sup> of the affected communities. The people affected need to know clearly about the direct and indirect project consequences in order to make informed decisions. The

<sup>7</sup> UNDP: Peritaje al proyecto hidroeléctrico Barro Blanco: resultados del Diagnostico rural Participativo, August, 29<sup>th</sup>, 2013.

<sup>8</sup> UN-Doc: A/HRC/27/52/Add.1 para 42-45.

Special Rapporteur concluded that there should be no inundation without a prior agreement with the affected communities.

139. The Independent E&S Advisor 6<sup>th</sup> Monitoring report concluded that BBHP should continue to engage prior to project completion, but highlights that the project was declared of national interest and that BBHP at that time had the legal right to implement the project and to inundate. But the report also indicates that the community issues with the Ngöbe-Buglé remain the highest risk of the project. This assessment has not changed up to the most recent Monitoring Report, which concludes: “...but that the acquisition or leasing of land to be flooded in the Annex Land Communities is now on the critical path and to complete the process direct engagement with community members and Traditional Authorities at all levels needs to take place.”<sup>9</sup>

## The relevant standards

140. IFC PS7 is the relevant benchmark for EDFI standards related to indigenous peoples.<sup>10</sup> The IFC PS7 requires a free, prior and informed consultation with the affected communities. The Law 72 from 2008 is at the same time already asking for free, prior and informed consent. The key to determining the issue of consultation for PS7 or consent for the Panamanian law – and the relevant International standards – is the question as to which entities or authorities inside the Comarca of Ngöbe-Buglé need to approve or agree to the use of collective land in these circumstances. The IFC PS7 contains the following provisions as objectives:

- (1) “to ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples”.
- (2) Adverse impacts of projects on communities of indigenous peoples shall be avoided, or when avoidance is not feasible, should be minimized and compensated.
- (3) Relationships with indigenous peoples affected by a project should be established and maintained throughout the life of the project.
- (4) Foster good faith negotiations with and informed participation of indigenous peoples when projects are to be located on traditional or customary lands under use by the Indigenous Peoples
- (5) To respect and preserve the culture, knowledge and practices of indigenous peoples.

141. In relation to the specific issues of consultation and information, PS7 paragraph 9 provides that: *“The client will establish an ongoing relationship with the affected communities of Indigenous peoples from as early as possible in the project planning and throughout the life of the project. In projects with adverse impacts on affected communities of Indigenous Peoples, the consultation process will ensure their free, prior, and informed consultation and facilitate their informed participation on matters that affect them directly, such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues. The process of community engagement will be culturally appropriate and commensurate with the risks and potential impacts to the Indigenous Peoples. In particular, the process will include the following steps:*

- *Involve Indigenous Peoples’ representative bodies (for example, councils of elders or village councils, among others)*
- *Be inclusive of both women and men and of various age groups in a culturally appropriate manner*
- *Provide sufficient time for Indigenous Peoples’ collective decision-making processes*
- *Enter into good faith negotiation with the affected communities of Indigenous Peoples and document their informed participation and the successful outcome of the negotiation*
- *Facilitate the Indigenous Peoples’ expression of their views, concerns, and proposals in the language of their choice, without external manipulation, interference, or coercion, and without intimidation*
- *Ensure that the grievance mechanism established for the project, as described in Performance Standard 1, paragraph 23, is culturally appropriate and accessible for Indigenous Peoples.”*

142. The project framework was developed by the government. BBHP applied in a public bid procedure and the designed project outline was approved. BBHP has done a lot since 2007 to communicate with the traditional authorities of the Comarca and has developed an agreement for the use of the affected 6.7 ha with the relevant regional authority, i.e. the Kodri regional council. The project is confronted with

<sup>9</sup> External Environmental and Social Monitoring Report 8, October 2014

<sup>10</sup> EDFI Principles for Responsible Financing, May 7th 2009.

the problem that the directly affected communities in three villages are strongly opposed to the project implementation. Additionally, they challenge the legitimacy of the agreements reached with the General Cacique and the regional council of Kodri. The Independent E&S Advisor summarises that BBHP has done what is legally required (Monitoring Report #6). At the same time, the Independent E&S Advisor identifies the resistance of the affected communities as a core risk of the project.

143. Paragraph 10 of PS7 requires that clients should “seek to identify, through the process of free, prior, and informed consultation with and the informed participation of the affected communities of Indigenous Peoples, opportunities for culturally appropriate development benefits. Such opportunities should be commensurate with the degree of project impacts, with the aim of improving their standard of living and livelihoods in a culturally appropriate manner, and to fostering the long-term sustainability of the natural resource on which they depend.” Where relocation is required, paragraph 14 states that “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”. The Panel was informed directly by the affected communities that they feel that they have not been adequately informed at all about the project – this is also something which the Peritaje Independiente of UNDP has summarised. While many negotiations with parts of the traditional authorities of the Comarca have taken place, consultation with the directly affected communities did not take place. The panel note that this is partly due to the resistance of the communities and the M10 to the project and their stated unwillingness to participate in dialogue.
144. The issue of consultation with indigenous communities and the provision of information to them if further dealt with in para 13 of PS7, which states that:
145. “If the client proposes to locate the project on, or commercially develop natural resources located within, traditional or customary lands under use, and adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual use that define the identity and community of the Indigenous Peoples, the client will respect their use by taking the following steps:
- *The client will document its efforts to avoid or at least minimize the size of land proposed for the project*
  - *The Indigenous Peoples’ land use will be documented by experts in collaboration with the affected communities of Indigenous Peoples without prejudicing any Indigenous Peoples’ land claim*
  - *The affected communities of Indigenous People will be informed of their rights with respect to these lands under national laws, including any national law recognizing customary rights or use*
  - *The client will offer affected communities of Indigenous Peoples at least compensation and due process available to those with full legal title to land in the case of commercial development of their land under national laws, together with culturally appropriate development opportunities; land-based compensation or compensation-in-kind will be offered in lieu of cash compensation where feasible*
  - *The client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and the successful outcome of the negotiation”*

## **Conclusions and observations of the Panel on compliance review**

146. As part of its compliance review, based on the information made available and analysis of that information, the Panel has come to the conclusion that:
- The issue of the importance of appropriate consultation with communities was identified by the lenders early in the due diligence process and was a crucial factor in the lenders requiring the Indigenous Peoples report as a condition of the agreement. To this extent, they took significant steps to better understand and assess the situation.
  - The lenders and BBHP have taken substantial steps to try to determine who the appropriate individuals or representatives are and with whom they should consult, in terms of the formal decision making structure of the Comarca. As is pointed out above, this is not a straightforward exercise and it is something which is also subject to political change within the Comarca – which can lead to the selection of representatives who are less supportive of a project than their predecessors.
  - As is discussed above, the Panel is of the view that the lenders should have devoted more resources to obtaining a formal legal / political analysis from experts on who the appropriate representatives of the Comarca to agree the project are and to better understand the legal effect of the agreement with Cacique Saldaña and the agreement with the regional council to update the agreement.
  - Regardless of the question of the formal relationship and consultation with the representative

structures of the Comarca, there are 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 PS7, paragraph 13. The panel is of the opinion the lenders have not taken the resistance of the affected communities has not been taken seriously enough. This maybe, to an extent, because a legal agreement was reached between BBHP and the regional council of the Comarca and this was considered by the lenders to be sufficient to deal with the issue. Nevertheless, the Indigenous Peoples report clearly documented that the directly affected communities challenged the legitimacy of such agreements. This should have triggered the further steps identified in the IP Report.

- The lenders were aware of, and agreed to, the recommendations of the Indigenous Peoples report on four different strategic recommendations to overcome that impasse in the negotiations with the affected communities and the recommendations became part of the ESAP:
  - (1) To improve the interculturality of the companies spokesmen / representatives by looking for and hiring an individual with local knowledge, cultural and linguistic skills who is from the Ngöbe community and who could have access to the area.
  - (2) The introduction of instruments for creating a climate of confidence, e.g. to perform a common survey on foot to establish the whereabouts of the geo-referenced points for the communities.
  - (3) Change in the CSR actions of the company, for example by identifying less traditional ways of contributing to the collective development of the affected communities. For example, triangulation in the provision of benefits to the community without the company acting as direct participant, in order to avoid that the inhabitants do not feel they have “sold out” to the project, could be an option. One NGO has sent to the region but was not accepted and has not been seen as capable of carrying out third party engagement by the community
  - (4) The development of mechanisms for the social participation of the communities in the development of the project.
- Taking into account that efforts have been made by the company to implement the recommendations, the Panel is of the view that these recommendations were both practical, clearly communicated and should have received much more systematic and continued attention by the lenders.

147. The Indigenous Peoples Report concluded that it was not aware of any plan how to relate to the Ngöbe people in the affected communities. This conclusion should have been taken more seriously by the lenders and they should have insisted in clarifying the issue faster and trying more options for consultation.

148. The Panel does take note that the question of community agreement to the project was not an easy issue on which to get progress, partly due to the fact that the Government itself was waiting for the results of the UN Process. Nevertheless, in the time since the end of the UN Process, the lenders could have encouraged more and new initiatives, taking up the recommendations from the Indigenous Peoples report to support how to better consult with the affected communities.

149. While the UN Process took close to two years, a time period during which the construction of the dam progressed as it was agreed with the UN, but in fact the time window for a dialogue to potentially overcome the situation with the affected communities was moved to the end of the construction period.<sup>11</sup>

### Issue 3: New situation due to enlargement of dam?

150. The project design was enlarged in 2010 from a smaller 19.86 MW to a larger project with 28.56 MW. This was done with technical design optimisation studies, as requested by ASEP. While the reservoir level was kept to 103 masl, the elevation of the power house was increased. BBHP informed ANAM of the design changes in May 2009. The environmental consultants engaged by the lenders stated that these design modification did not change the Project’s baseline or cause incremental adverse

<sup>11</sup> ASEP has just prolonged the starting day up to March 1<sup>st</sup>, 2015.



environmental impacts. ANAM admitted on January 25, 2010 (resolution AG-0101-2010) the design changes into the previous EIA approval.

151. The Complainants argue that the consequences of this enlargement are underestimated and that therefore the environmental agency should have insisted on a new EIA, which did not happen at that time. The Environmental Law Centre of Panama (CIAM) filed in 2011 a lawsuit on behalf of the affected Ngöbe communities challenging the adequacy of the existing EIA. The Panamanian Supreme Court has recently dismissed the legal challenge and found the EIA to be adequate (see chapter 4.1).
152. As a result of the UN verification mission carried out in 2012, an independent investigation of three aspects of the project has been commissioned to follow the arguments made also in the complaint: (a) a Diagnostico Rural Participativo (see above paras on participation), (b) a study on environmental and social impacts (discussed in chapter 4.3 below) and (c) a hydrological study. The hydrological study was using different methods to calculate the maximum inundation that might happen in the area after termination of the project. It concludes that in times of maximum elevation the water level might go up to 106 (in downstream villages) or 107 (in Nuevo Palomar) masl. This would be 3-4 meter higher than the normal operating level planned at 103 masl. In consequence BBHP has decided to compensate land owners for the affected land area up to 106 masl, as reported in the Independent E&S Advisor's 6<sup>th</sup> monitoring report. This report was written after the termination of the Peritaje Independiente and takes into consideration the impact of the three studies undertaken. The ESAP plan was amended accordingly, taking up the commitment that BBHP will pay compensation up to the 106 masl.
153. The Panel observed during its visit to the affected communities that there is no clarity in the villages about the potential water level of the dam and the maximum area potentially flooded. One of the largest problems in that respect is that the expected direct impact of the project is not fully clear to the affected communities and was never communicated systematically. With regard to the results of the hydrological study, the Panel is of the view that the consequences were reflected adequately in the revised ESAP in January 2014.

154. The Panel is of the view that, while there is uncertainty in the communities about the likely levels of flooding, this stems from a breakdown in communication, rather than a failure to comply with the requirements of the Performance Standards. The lenders have supported the project in re-evaluating the likely flood levels. However, there was no ongoing communication with the affected communities about project construction, planned adjustment measures and the results of a changed ESAP. While noting the difficulty to do so, given the fact that the affected communities were not open to any information exchange, the Panel is of the view that the lack of communication on this issue was out of line with that anticipated by PS1.

#### **Issue 4: Forced easement process - Potential of forced evictions?**

155. In 2013 ASEP, Panama's National Public Service Authority, decided to start a process of forced easement to take the land of the original seven land owners which were owning the 6.7 ha of Annexed Land before the Comarca was created in 1997. The normal process requires that land valuation experts from ASEP enter the place and decide about the amount of compensation required to be paid by the company in order to obtain the land. On February 7<sup>th</sup> 2014 ASEP issued notifications that they will access the land ten days later. The notification was withdrawn later, but the affected communities were not informed of this change. The complainants perceived that announcement as a threat for eviction. ASEP has informed the Panel that the February notification was meant to inform the land owners that their expert would come to survey and value their properties and portions of their land.
156. Because ASEP, as of the end of 2014, had not entered the three communities, they tried a fast track process for speeding up the land transfer. The Environmental Advocacy Centre of Panama (CIAM) filed a lawsuit in the Panamanian courts in order to challenge that decision and the approach taken by ASEP. As a consequence, the fast track procedure is currently suspended by a court order.

157. At the end of 2014, the land transfer process for the 6.7 ha is not finalized. At the same time the slot for completion of the project is limited by ASEP.<sup>12</sup> The core conflict between ASEP and the indigenous communities is that ASEP wants to compensate the seven land owners, who were owning the land before the Comarca was created in 1997. The land owners who belong to the Ngöbe-Buglé people do not want to negotiate individual compensation, as they see the land as collective property.

158. The Panel is of the view that the process of forced easement lies firmly within the responsibility of the Government and, as such, there is no issue to be addressed from a compliance review perspective.

## Issue 5: Number of persons affected

159. The Complainants argue that both in the EIA as well as in the Environmental and Social Impact Summary Report (ESISR) the number of affected persons in the Annexed Land is underestimated<sup>13</sup>. The 2013 Peritaje Independiente of UNDP visited the affected communities, and concluded that “the three communities (...) appear to be more numerous than indicated by the 2010 census.”<sup>14</sup> While the ESISR, the topographic study as well as the first indigenous report concluded that nobody needs to be resettled with respect to housing because no structures were to be found below 103 masl, the UN 2012 Verification Mission Report concludes that the project will potentially affect six houses, each of which includes large, extended families and may total 40-50 people<sup>15</sup>.

160. The Panel was unable to confirm such figures during its visit to the communities. The Panel was able to identify the low level of information in the affected villages about the direct impact of the lake and the geographic locations of the potential water level of the lake. There has never been a clear indication and demonstrations of what a 103 and a 106 masl mean to the communities (see above issue 2 on consultation and participation), who will be affected and who will not.

161. Displacement, be it physical or economical, is an important standard for a project such as Barro Blanco and for the lenders. This issue (see above) is covered by IFC PS5. Despite the debate about the exact number of persons potentially affected by physical or economic displacement, the Panel notes that the lenders and BBHP have shown flexibility to adjust their own assessments after the UN Process was completed. This included a specific professional analysis of the outcomes of the UN Process through the monitoring of the project and recommended changes, which were adopted. BBHP has publicly announced after the Peritaje Independiente that they will compensate all those which have to be economically and potentially physically displaced up the level of 106 masl, the new maximum elevation of water level assumed by the UNDP hydrological research. The Environmental and Social Action Plan in January 2014 accordingly integrated the findings of the UN Peritaje Independiente. With the amendments of the ESAP, it was supported by and visible to the lenders that the results of the UN Process were reflected. The later change of the ESAP concerning resettlement does not indicate that the amount of affected land was underestimated. It was done in order to reflect the new water level for extreme situations as calculated by the UNDP Peritaje Independiente. With this in mind, the Panel finds that the lenders acted in accordance with their policy commitments on this issue.

<sup>12</sup> The prolongation of the termination of the project has been granted on the November, 11, 2014 (Resolución AN No.8028-Elec.

<sup>13</sup> The total number calculated in BBHPs Environmental and Social Impacts Summary Report is 400 (Quebrada Caña: 184; Quiaba 35; Nuevo Palomar: 200 (based on 2010 census figures for the Ngöbe-Buglé comarca), (2011), p. 37.

<sup>14</sup> UNDP, Peritaje al proyecto Barro Blanco: Resultados del Diagnóstico Rural Participativo (Aug. 29, 2013), para. 4.

<sup>15</sup> UN (2012): Informe de la Misión de Verificación (Dec. 2012), p. 33.

## Issue 6: Cultural value of the land:

162. The complainants argue that the impact on culturally valuable assets – in particular petroglyphs in the river – were not properly assessed or subject to consultation with the communities.
163. The UN investigation (2013 Peritaje Independiente) suggested that the cultural heritage issues are a second key problem for the project, albeit one which is closely linked to the unsolved land issue. The existence of petroglyphs seems to be very important to the community.<sup>16</sup> Additionally to the petroglyphs is the general relationship of the indigenous communities with their area and the environment. The Indigenous Peoples report summarised this in the following way: “From the standpoint of culture related to environmental matters, it is known that this population scarcely transforms its natural environment, resulting in an adaptation of its inhabitants to the essence of its environment. The real or potential alterations of this environment tend to represent factors of uncertainty or threat to its socio-cultural functioning.”<sup>17</sup>
164. The cultural issues linked to indigenous peoples are clearly referenced in PS7 “to respect and preserve the culture, knowledge and practices of indigenous peoples”. PS7 refers to cultural groups possessing of the following nature: “collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories.” (Paragraph 5). In PS8 on “cultural heritage”, the key objective is “to protect cultural heritage from the adverse impacts of project activities and support to its preservation”. Cultural heritage in the PS8 “refers to tangible forms of cultural heritage, such as tangible property and sites have in archaeological, paleontological, historical, cultural, artistic, and religious values (...).”
165. The ESAP has clearly recognized the importance of dealing with cultural issues (chapter 6.3.6.) and referenced the fact that a study was commissioned from INAC and the Heritage Office. The UN-verification mission in 2012 mentioned the existence of petroglyphs in the river and near the shoreline being affected by the reservoir inundation. BBHP has formally asked the National Institute of Culture (INAC) for advice. INAC went to the site and made an assessment of the petroglyphs and has recommended different options on how to deal with the problem.<sup>18</sup> The lenders specifically asked the Independent E&S consultant to review the status of these recommendations.
166. The INAC report has been sent to the Regional Kodri Congress, who has acknowledged receipt and responded that they are in agreement with the recommendation made, including the option to fabricate reproductions of the petroglyphs to be located in the communities. The Panel is of the view that a core problem here is that the affected communities are not aware of such research and that the recommendations are not discussed with the affected communities. The lenders’ Independent E&S consultant strongly recommended that BBHP encourage INAC to contact directly the three affected communities. These communities have not yet been presented the findings and also their last letter to INAC was without response. The issue remains therefore unsolved and is contributing to the continuous resistance of the affected communities.
167. The primary responsibility of the Government to deal with this issue through INAC makes this a difficult issue for lenders to influence. The lenders required their independent consultants to review the progress of the issue on Cultural Heritage and make recommendations on how BBHP may assist the progress of this matter. The Panel is of the view that there is little else that the lenders could have done in the circumstances and also given that the ability of the Government authorities to enter the area is tied up with the same culture of mistrust that affects the project.

<sup>16</sup> Para 93 of the Diagnostico Rural Participativo del PNUD, 2013.

<sup>17</sup> Indigenous Peoples Report (2012), p 14

<sup>18</sup> Documented in the lenders’ External E&S consultant’s 5<sup>th</sup> monitoring report 2013.

### 4.3 Environmental Impacts and Compliance

168. The main focus of this chapter is to consider the complaints related to environmental impacts. In order to do so, the Panel first set out what issues are raised by the complainants, what information was sought and action taken by the two lenders and their consultants in relation to the issues in question and, finally, make an assessment of the degree to which the lenders' actions were in line with their stated policy commitments.
169. The complainants' arguments in relation to environmental impacts deal with the following three topics:
- (i) Biodiversity and ecosystem services
  - (ii) The last remaining primary forest
  - (iii) Water levels and water quality

#### Issue 1: Biodiversity and ecosystem services

##### The Complaint:

170. In relation to biodiversity, the Complainants allege that the lenders have failed to ensure the project "take into account the differing values attached to biodiversity by specific stakeholders, as well as identify impacts on ecosystem services" in line with the requirement in para 4 of PS6.
171. The Complainants claim that the rights and interests of the Ngöbe people living in the affected area and their environment will be significantly impacted. They note that "the area to be flooded contains resources upon which the whole community, not only those who will be resettled, relies and which are not found elsewhere on their territory".
172. The core of the complaint relates to the assessment set out in the Environmental and Social Summary Report (ESISR) that "the project will not impact any undisturbed primary forest or undisturbed wetlands." The Complainants also point out that the Report states that: "in order to protect local biodiversity and natural habitat availability, at the earliest stages of the construction phase, flora and fauna will be rescued from the vegetation clearing area. This will allow transfer of most relevant copies to secure sites previously selected."
173. The Complainants point to the statements in the UNDP Expert Report in 2013 which state that the local ecological impacts are important in relation to the Bosque de Galeria (Gallery Forest), which will be totally inundated. The Complainants claim that this area of forest constitutes the last remains of the natural habitat in the area, and are "beyond its intrinsic value", in that it "serves as a habitat for important species, including epiphyte species and medicinal plants". The Complainants state that these ecological impacts will translate into important impacts on the livelihoods and way of life of the Ngöbe communities of Quebrada Caña, Quiabda and Nuevo Palomar.
174. The complainants go further by alleging that there had been "fundamental defect" in assessment, i.e. in relation to the impact of the project on the watershed, upstream and downstream of the dam site and the neighbouring district. The Complaint<sup>19</sup> alleges that "the watershed is not clearly incorporated in all completed studies and actions".

##### The relevant standards

175. The Panel is of the view that, in relation to impact on biodiversity there is more at stake than the question whether some rare endangered species exist and could disappear as a consequence of the project. PS6 requires that an assessment should go beyond protected or endangered species and also assess the importance of the use of the eco-system services by the specific stakeholders, in this case the Ngöbe people. PS 6 Paragraph 3 includes the maintenance of the benefits of eco-system services and Paragraph 4 states: "In order to avoid or minimize adverse impacts to biodiversity in the project's area of influence, the client will assess the significance of project impacts on all levels of biodiversity as an integral part of the Social and Environmental Assessment process. The Assessment will take into account the differing values attached to biodiversity by specific stakeholders, as well as identify impacts on ecosystem services. The Assessment will focus on the major threats to biodiversity, which include habitat destruction and invasive alien species".

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<sup>19</sup> In the Complaint of the Cacica General, Mrs Silvia Carrera Concepcion, to DEG on April 3 2014.

176. In order to assess the degree to which the lenders acted in accordance with the requirements of the Performance Standard, the Panel reviewed external and internal documents and reports that relate to the issue of environment and biodiversity and also carried out interviews with relevant officials and other stakeholders.

### Compliance review assessment

177. Concerns have been expressed by the affected communities and international NGO's<sup>20</sup> since November 2010. The written notes provided to the Panel showing that the concern was 'registered' by Management before the contract was signed, involved two emails of management in December 2010<sup>21</sup>.
178. The first consultant involved as an advisor on environmental and social issues prior to the signing of the contract dealt with several environmental issues in its report. However, this consultant did not raise significant issues related to biodiversity or address the issue of or eco system services. On flora, fauna and biodiversity it is noted that *"[...] the way that wild flora, fauna and biodiversity will be affected by the flooding of the area won't be a problem for this work... and... Additionally, the vegetation in the project area is highly degraded due to human action (livestock and farming) and the project location is far from protected areas. The project does not interfere with protected areas and does not compromise local biodiversity."*<sup>22</sup>
179. That consultant, while advising the potential lenders about the degree of adjustment required in order to bring about compliance with the Environmental and Social Standards, concludes by advising that there would not be any significant problems concerning the loss of biodiversity in the project area.
180. Nevertheless, the same consultant did identify a range of studies and measures that are necessary, including a program to clean up the vegetation in the reservoir, a program to manage water while the reservoir is being filled, a program to implement water quality, a detailed study of the local flora "in order to identify, characterize, and locate on a cartographic map the main bodies of vegetation in the project's area of influence."<sup>23</sup> In relation to the plan for the rescue and relocation of flora, the consultant set out criticisms of the ANAM approved Plan for the rescue of the flora. It is noted, amongst other things, that there was no procedure that should be followed to rescue valuable flora the appropriate way, nor does it mention the scope of the rescue effort that should be made. The report also recommends that the rescue of flora and the rescue of fauna should be carried out simultaneously and also points out that there was not yet an experienced specialized team, including a zoologist specialized in the rescue of wildlife, selected for this task.
181. The Environmental and Social Action Plan (ESAP) which was annexed to the finance agreement did not have any corrective actions or measures related to biodiversity and natural resources management, but rather suggested that recommendations which would be made by the Independent Expert would be included in the future. This is consistent with the downplaying of these issues in the consultant's reports. Therefore the Panel concludes that the lenders were not in a position to properly assess compliance with PS6 at the time of approval of the project.
182. For various reasons, related to the capacity of the contracted consultants to carry out work of a sufficient quality to meet the lenders expectations and to deal with social, environmental and technical issues (including the question of indigenous peoples) in an integrated manner, a new consultant was contracted for on-going monitoring of the project.
183. Subsequent monitoring reports from the second E&S consultant provided much more specific information about the requirements of the Fauna Rescue and Relocation Plan, including requirements for consideration of the outcomes from the UNDP round table. Their second monitoring report from June 2012 goes into some detail about the kinds of issues that need to be covered in a revised plan and makes it clear what is required of BBHP in this regard. There was also on-going monitoring of aquatic fauna from 2012 onwards. This led to an amendment of the ESAP to include a requirement to integrate recommendations on fauna and flora.

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<sup>20</sup> See Annex 2 of complaint: On 9 November 2010 a first contact was made between M10 and FMO, followed by many contacts made since then.

<sup>21</sup> Email: IMR Advice on FF FP, 7 December 2010

<sup>22</sup> MWH Panama S.A. External Engineer Report Page 19

<sup>23</sup> Idem Page 20-21

184. The process of environmental and social assessment and implementation of the ESAP was significantly affected by the UNDP process. The issues raised by the complainants were included in the issues to be covered by the round table. The company was specifically asked to stay away from the affected communities and the lenders and the company requested that the consultants respect the process. It is noted that the lenders also specifically requested consultants and the company to analyse the outcomes of the UNDP process and amend the ESAP in the light of the reports.
185. In their review of the outcomes of the UNDP process, the consultants specifically referenced the issue of aquatic species and the Gallery Forest. The forest issue is considered below, but in respect of aquatic species, the consultants note that on-going aquatic monitoring demonstrated that the “abundance of fish is limited and that most captured fish in these reaches are small and juveniles”. The report also references another report, carried out by international consultants in 2012, which found that the construction of an additional structure allowing the passage of fish will not be necessary for the species that are present in the area.
186. The consultant went on with some monitoring of the actions taken both during and after the UNDP process, such as constant monitoring of the water quality, on-going fieldwork and aquatic monitoring, capture and relocation of flora and fauna. However, the consultants in their regular reporting are consistent and in autumn of 2014 there are recommendations that still need to be addressed.
187. For example, in its Report of July 2014 the consultant states that, in relation to environmental and community cumulative impacts, “This item remains pending as on-going fieldwork (aquatic monitoring, capture and relocation of flora and fauna).” The consultant concludes that while many environmental issues have been taken care of, the remaining issue of the **environmental cumulative impacts** is outstanding. An issue that only can be solved with proper communication with the impacted communities in the Annexed land of the Comarca.
188. The members of the Independent FMO-DEG Complain Mechanism were informed directly by people in the affected communities that they were dependent on the natural resources at the lower river-side.

189. The Panel is of the view that the assessment of the potential biodiversity and ecosystem impacts at the time of the agreement of the project was severely limited. While there were a range of environmental actions and reports that were identified, there was an underestimate of several important aspects of biodiversity impact. This is demonstrated by the fact that these were subsequently identified in the reports from the second E&S consultant and also the reports produced under the UNDP process. The lenders were therefore not in compliance with the relevant parts of their own policies.
190. As the Panel has stated previously, this is a difficult issue. The lenders and their client took significant steps to improve their knowledge of the issues and develop remedial plans after the project financing had been agreed and the subsequent reports do provide – on most issues – an adequate assessment of impact and identification of remedial action. However, there is a significant issue in relation to the degree to which the assessment of cumulative assessment of ecosystem impacts has been carried out. However, this process has been affected by the challenges related to consultation with communities, which are detailed elsewhere. Any shortcoming in this regard stems from an inability to fully consult with communities, rather than any technical issue.
191. The Panel noticed attention for the risk of erosion and the entry of sediment into the river and actions taken to address these issues. The Panel however could not locate any attention such as studies about the impact on the watershed in the entire county of the project area and adjacent districts that are depending on the water of the river running through the districts.

## Issue 2: The last remaining gallery forest

192. In relation to the specific issue of the Gallery Forest, the complainants note that this forest “constitutes the last remains of the natural habitat in the area and beyond its intrinsic value, serves as a habitat for important species, including epiphyte species and medical plants.”
193. The forest inventory was carried out for the EIA of 2008 and approved by ANAM. In the same year it was specified that 20,000 trees have to be removed prior to flooding of the 234 hectares covered by the dam reservoir. The approved EIA included a plan for the Rescue and Relocation of Flora, a Plan for the

Reforestation and Re-vegetation of Degraded Areas. ANAM approved a forest management plan for a 181 ha site in what reforestation with 200,000 trees is foreseen to compensate for the removed trees. A Plan for rescue and relocation was made in 2009. The planting was to be carried out on the banks of the river. Here it is important to note that some of the land for reforestation will fall within the Comarca and therefore implies dialogue and agreement with the Comarca authorities.

194. The first external consultant/engineer involved was rather critical about the Plan for the Rescue and Relocation of Flora. It notes for example that; 1) there were no procedures to be followed to rescue valuable flora the correct way; 2) there was no mentioning if epiphytes will be rescued in order to be relocated or only to reproduce them in nurseries; 3) the plan did not specify identified safe sites or how this task is going to be accomplished. With regard to the specific issue of the Gallery Forest, the first consultant stated that most of the vegetation in the project area is already highly degraded due to human action (livestock, etc.), this significantly underestimated the importance of the forest.
195. The second independent consultant regularly reviewed/monitored the on-going actions and implementation of required measures and checked on compliance with the IFC Performance Standards and Equator Principles. As part of this process, and in the light of the review of the UNDP reports, the consultant noted that the UNDP report made significant findings about the importance of the forest and the need to re-establish the shoreline, but did not make any recommendations. The consultant made a number of recommendations, including the notion that “environmental and community cumulative impacts remains pending” and that the clearance of the forest and its re-establishment on the new shoreline should be integrated into BBHP’s community relations plan and engagement strategy.
196. In 2012 a greenhouse for rehabilitation of flora was built and a year later the greenhouse contained a variety of plants and trees including fruit trees.
197. On forest the following remarkable statement can still be found in the external consultant report produced for the UNDP on September 5<sup>th</sup>, 2013: “The Gallery Forests are important plant formations occurring all along the rivers, and are the only remaining natural habitats maintained within the study area. In the reservoir area, they have an intrinsic importance both for its value as habitat for local flora and fauna, as for economic and social functions that meet for Ngöbe population according to the determination of the Participatory Rural Appraisal. During visits to the communities of Quebrada Caña, Quiabda, and Nuevo Palomar, we observed that the Gallery Forest exhibits continuity along the river, and in many sections very large tree species remains and probably of several decades old. This forest is an important habitat for many plant species, especially epiphytes including numerous species of orchids bromeliads. In addition, it was determined that the forest serves as habitat for numerous medicinal plants that Ngöbe communities often know and use. Finally, the Gallery Forest is the last remaining forest in the area so it contains timber species that communities use wood as a source of timber.”

198. From the material made available to it, the Panel is of the view that the subject of the (gallery) forests, its value and social economic use of the communities remains un-resolved. However, the lenders were not in compliance with PS 6 at the time of project approval. This is not to say that there has not been a complete identification of the issue in a number of reports. The Panel notes again that the initial assessment was relatively weak, but subsequently – and in the light of the UNDP reports – a better understanding of the importance of the Gallery Forest has been achieved. The inability to finalise the assessment and put in place appropriate actions in the disputed area stems from the failure to enter into healthy dialogue and consequently an inability to carry out detailed analysis and visits to the forest. This has consequences also for any process of forest clearance. The Panel were informed also that the gallery forest needs to be cut prior to flooding in order to secure carbon credit under the CDM mechanism.

### Issue 3: Water levels and water quality

199. Regarding the subject of water there are two issues to be mentioned, in addition to the earlier mentioned issue of the watershed. First, the complainants have a (specific technical) complaint on the recorded **water level** attributed to the dam and the final flooded situation. They claim that the operational water level, after flooding is completed, will be several meters higher than that first

identified in BBHP's Environmental and Social Summary Report (ESISR) of 2011 and to the UNDP 2013 expert mission. This issue has been dealt with in detail in section 4.2 – issue 3 - above

200. The consultants' reports carried out analysing the UNDP reports went in to specific details to assess the appropriateness of the methodology used in the UNDP study to assess the level of flooding and recommended that that compensation should be payable for lands up to 106 -107 masl. BBHP have subsequently committed to this and this was confirmed by the Panel.

201. The Panel is of the view that, taking into account the fact that the assessment of water flow and flooding levels is a complex science, the lenders and their client have ultimately come to a professionally determined and acceptable assessment of the flooding level and readjusted their plans and commitments appropriately. Nevertheless, it remains as an important subject that needs proper clarification and/or explanation for the communities involved.

202. A second subject related to water is the water quality. It is clear that the communities that live at the riverside in the area that will be flooded, depend partially on the water of the river. The first external consultant notes that "According to the information available in the EIA, the Tabasará river hydrological characteristics, the Project's characteristics and the site visit results, it is perceived that water quality will not pose a problem for this project. The expected changes in water quality will be minimal (...) The relationship between water volumes indicate that the totality of the dam could renovate entirely once a week and that throughout the year the Dam can renovate its water almost 50 times."

203. In subsequent reports, the need to implement a Program to manage water while the reservoir is being filled is identified. This program was expected to be implemented during the construction phase; specifically from the moment that impoundment of the river begins until the normal operational level is reached. The stated objective of the program should be "achieving appropriate clean-up of the reservoir of both rooted vegetation and vegetable refuse produced by the clean-up operation (branches, trunks)." It also is noted that "A program to Monitor Water Quality needs to be implemented [...] during the construction phase, before the impounding operation begins."

204. The Panel is of the view that the various reports commissioned have clearly identified the potential issues related to water quality and the need to take appropriate steps to ensure that a programme is in place to maintain water quality.



## 5. Conclusions

### Assessment of Environmental and Social Impacts

205. The Panel is of the opinion that the lenders took all appropriate steps to put themselves in a position of understanding regarding the legal arguments being pursued through the Panamanian courts and could not have been expected to do anything further specifically in relation to the validity of the EIA in itself. The commissioning of an independent legal advice, in addition to that provided by BBHP, demonstrated appropriate levels of due diligence in relation to understanding the issues around the validity under national law of the EIA. However, this is not the end of the matter, as the lenders did not solely rely upon the EIA.
206. The Panel is of the view that while the lenders were, by the time of the first disbursement, fully appraised of many of the issues related to indigenous peoples, they were not so appraised at the time of project approval. While the lenders did take appropriate steps to so appraise themselves prior to approval, and were almost certainly correct to determine the first indigenous peoples report as insufficient, this still had the effect that at the time of project approval their assessment was limited and conditional to a future report. In short, the lenders were not in the position that should have been – and had identified that they should have been – at the point of project approval.
207. This did not mean that the lenders were never appropriately appraised. Requiring an indigenous peoples report and action plan derived from that report were appropriate practical steps to take in the light of the recognised limitations on and gaps in the knowledge they had at the time of project approval. Making this a contractual condition of first disbursement – which was fulfilled – limited the impact of deficiencies in assessment prior to approval. In future projects which engage indigenous peoples' rights, however, the Panel would anticipate that the lenders do not approve the project until they are satisfied that they are fully appraised of all the relevant issues, as is required by PS1.
208. The Panel is of the view that, given the acknowledged complexities, the lenders would have been better appraised of issues related to indigenous peoples' rights and land if they had gone ahead to commission a formal opinion from lawyers or other experts with defined expertise in indigenous peoples' rights and the Panamanian legal context.
209. The Panel is of the view that, while the subsequent actions of the lenders and their client – based on subsequent assessment and analysis – may have put in place appropriate steps, actions and mitigation measures, it cannot be said that at the time of the appraisal of the project and agreement of financing, the lenders demonstrated that they were fully appraised of all of the risks and that appropriate actions were identified as were required by PS1.
210. The Panel is of the view that there may be circumstances where less material issues, or issues that simply cannot be fully assessed at the time of an agreement, can properly be left for future assessment of impact, development of actions and, of course, implementation – so long as there are clear indications from lenders on the expected standards and actions, based on a risk assessment of likely impact. In such cases, a strong monitoring process needs to be put in place to ensure subsequently agreed actions are implemented.
211. In relation to this project, while the agreement was reached prior to significant construction, significant issues related to social and environmental impact and, in particular, issues related to the rights of indigenous peoples were not completely assessed prior to the agreement, even if they were subsequently identified and included in the ESAP. Furthermore, the nature of the company's assessment of these issues and the subsequent changes in the ESAP were not properly disclosed to the communities.

### Land issues and consultation with the communities

212. With regard to physical displacement, the lenders accepted the analysis and view – based on the ESISR and the topographic study from of 2011 – that no persons need to be resettled. The affected communities are of the view that some houses need to be relocated. Nevertheless, the Panel is of the view that the lenders were entitled to take the view that the compensation issues did not seem to be a significant issue, because this would affect a limited amount of persons and alternative land would be potentially available. Based on this, the Panel is of the view that the lenders could be satisfied that this aspect of PS5 was complied with in this project.

213. The Panel is well aware that it is not a straightforward issue, but is of the view that the lenders could have done more to seek a greater degree of clarification of the legal situation in relation to land acquisition and use through the commissioning of a formal legal opinion and seeking greater clarity from BBHP on its legal understanding. A possible approach could also have included dialogue with the Government through its client to seek clear guidance from the Government on its view on the appropriate legislation. This is not to say that the lenders did nothing, rather that given the key nature of this issue, they could have done more.
214. The Panel does take note that the question of community agreement to the project was not an easy issue on which to get progress, partly due to the fact that the Government itself was waiting for the results of the UN Process. Nevertheless, in the time since the end of the UN Process, the lenders could have encouraged more and new initiatives to take up the recommendations from the Indigenous Peoples report and to reconsider how to better consult with the affected communities.
215. The Panel is of the view that, while there is uncertainty in the communities about the likely levels of flooding, this stems from a breakdown in communication, rather than a failure to comply with the requirements of the Performance Standards.
216. The Panel is of the view that the process of forced easement lies firmly within the responsibility of the Government and, as such, there is no issue to be addressed from a compliance review perspective.
217. Displacement, be it physical or economical, is an important standard for a project such as Barro Blanco and for the lenders. The Panel notes that the lenders and BBHP have shown flexibility to adjust their own assessments after the UN Process was completed. This included a specific professional analysis of the outcomes of the UN Process. The Environmental and Social Action Plan in January 2014 accordingly integrated the findings of the UN Peritaje Independiente and was accepted by the BBHP. With this in mind, the Panel finds that the lenders acted in accordance with their policy commitments on this issue, with the exception of the failure to properly disclose the ESAP.
218. Regardless of the question of the formal relationship and consultation with the representative structures of the Comarca, there are 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 PS7, paragraph 13. The panel is of the opinion the lenders have not taken the resistance of the affected communities has not been taken seriously enough. This maybe, to an extent, because a legal agreement was reached between BBHP and the regional council of the Comarca and this was considered by the lenders to be sufficient to deal with the issue. Nevertheless, the Indigenous Peoples report clearly documented that the directly affected communities challenged the legitimacy of such agreements. This should have triggered the further steps identified in the IP Report.
219. The Indigenous Peoples Report concluded that it was not aware of any plan how to relate to the Ngöbe people in the affected communities. This conclusion should have been taken more seriously by the lenders and they should have insisted in clarifying the issue faster and trying more options for consultation. The recommendations became part of the ESAP for the project.
220. The primary responsibility of the Government to deal with the issue of cultural heritage through INAC makes this a difficult issue for lenders to influence. The lenders required their external consultants to review the progress of the issue on cultural heritage and make recommendations on how BBHP may assist the progress of this matter. The Panel is of the view that there is little else that the lenders could have done in the circumstances and also given that the ability of the Government authorities to enter the area is tied up with the same culture of mistrust that affects the whole project.

## **Environment and biodiversity**

221. The Panel is of the view that the assessment of the potential biodiversity and ecosystem impacts at the time of the agreement of the project was severely limited, but still following the EIA requirements. While there were a range of environmental actions and reports that were identified, there was an underestimate of several important aspects of biodiversity impact. This is demonstrated by the fact that these were subsequently identified in the reports from the Independent E&S consultant.
222. As the Panel has stated above. The lenders and their client took significant steps to improve their knowledge of the issues and develop remedial plans after the project financing had been agreed and the subsequent reports do provide – on most issues – an adequate assessment of impact and identification of remedial action. However, there is a significant issue in relation to the degree to which the assessment of cumulative assessment of ecosystem impacts has been carried out. However, this

- process has been affected by the challenges related to consultation with communities. Any shortcoming in this regard stems from an inability to fully consult with communities, rather than any technical issue.
223. From the material made available to the Panel such as the studies of external consultants, the Panel is of the view that the subject of the gallery forests, its value and social economic use by the communities remains un-resolved. This is not to say that there has not been a complete identification of the issue in a number of reports. The Panel notes again that the initial assessment was relatively weak, but subsequently – and in the light of the UNDP reports – a better understanding of the importance of the Gallery Forest has been achieved. The inability to finalise the assessment and put in place appropriate actions in the disputed area stems from the inability to enter into healthy dialogue and consequently an inability to carry out detailed analysis and visits to the forest. This has consequences also for any process of forest clearance.
224. The Panel is of the view that, taking into account the fact that the assessment of water flow and flooding levels is a complex science, the lenders and their client have ultimately come to a professionally determined and acceptable assessment of the flooding level and readjusted their plans and commitments appropriately. Nevertheless, it remains as an important subject that needs proper clarification and/or explanation to the communities involved.
225. The Panel is of the view that the various reports commissioned by BBHP and the lenders have clearly identified the potential issues related to water quality and the need to take appropriate steps to ensure that a programme is in place to maintain water quality.

## 6. Annexes

### Annex A: Overview of situation related to land

The Panel notes that the use of resources in Comarca land is covered by the articles 48 and 50 of the Ley 10 de 1997. Article 48 determines that “the exploration and exploitation of natural resources, salt, lands, mines, waters, pits and mineral deposits of all kind that are within the Comarca Ngöbe-Buglé, may be conducted in execution of the plans and development projects in the industrial, agricultural, tourism, mining and energy, road and communication and other sectors that benefit the country to the extent provided for by national legislation”. In that sense, the use of resources is possible according to respective national laws. Article 50 requires ANAM, with effective participation of the Comarca authorities, to ensure the conservation and rational use of renewable resources, including underground and surface waters within the Comarca.

The application of Law 10 from 1997 was amended by Law 15 from February 7<sup>th</sup> of 2001.<sup>24</sup> Law 15 of 2001 adds in Art. 11 one paragraph to article 48 and provides that the provisions will be applicable to projects that “are located entirely within the Comarca’s territory”. It also adds an amendment to article 50 stating that it is applicable only to energy or hydroelectric development projects “located entirely within the Comarca’s territory” (“*se encuentran en su totalidad dentro de la Comarca*”).

Based on these latter provisions and information provided to BBHP and other advisors, and known by the lenders, the view was that there is no special form of consultation or agreement required by law under Law 10. Due to the fact that the project is not located entirely in the Comarca, there is essentially no need to participation beyond the normal scope required for land acquisition for an investment of a public purpose, even when it involves Comarca land. Nevertheless, since 2007 BBHP has been seeking formal agreements with the Comarca authorities to rent the 6.7 ha of Annexed land to be flooded by the reservoir.

The Comarca legislation was amended in 2008 by a law which provides for the recognition of indigenous peoples’ land outside the Comarca as collective property of the indigenous peoples, i.e. Ley 72 de 2008<sup>25</sup>. This law declares that indigenous land outside the Comarca also has the status of collective land and requires from government authorities and private actors to coordinate with the traditional authorities of the indigenous peoples in order to obtain a free, prior and informed consent to use the land.

This provision does appear to potentially conflict with the amendments to Law 10 introduced by Law 15 from 2001. The Panel heard during its visit to Panama various opinions from different governmental authorities – ASEP and the Vice Minister of Indigenous Affairs – regarding the nature of consultation that is required with indigenous peoples in this case and the manner in which consent has to be given regarding the use of the land, even in cases of land used for a public purpose.

What’s more, there are different opinions regarding how the land could potentially be transferred by way of a forced easement process. ASEP has identified the land owners before the establishment of the Comarca in 1997 with all its annexes and prepared a forced easement process related to those individual families. At the same time, the affected communities consider their land as collective land that can only be transferred with the consent of the traditional authorities of the Comarca, in conformity with Law 72 of 2008.

The Law 11 from 2012<sup>26</sup> was not in force in 2011, when the agreement was signed between DEG / FMO and BBHP. However, the Law 72 from 2008 on annexed land existed at least, which means that annexed land is

<sup>24</sup> Ley No 15 de 7 de febrero de 2001: “Que establece las normas para subsidiar el consumo básico o de subsistencia de los clientes del servicio público de electricidad y dicta otras disposiciones”.

<sup>25</sup> Ley 72 de 23 de diciembre de 2008: “Que establece el procedimiento especial para la adjudicación de la propiedad colectiva de tierras de los pueblos indígenas que no están dentro de las comarcas”.

<sup>26</sup> While it can be said that non-renewable and renewable resources are not strongly protected in the Comarca laws of Panama, the Comarca Ngöbe-Buglé has somewhat been of an exception, at least in recent years. After protests in 2011 (see below in Annex B), the Government established a special regime in March 2012 in order to protect the mineral, water and environmental resources in that Comarca. It limits the granting of concessions to exploit mineral resources to very few specific circumstances and also allows for the withdrawal of existing concessions. With regard to hydroelectric projects, it regulates that future projects need to be approved by the plenum of the General Council, the regional or the local council of the Comarca, depending on the necessary size of the installation. This is valid for projects located totally in the Comarca, but

also to be seen as collective land that is “*imprescriptible, intransferible, imembargable e inalienable*” (Art. 9), indicating that the agreement of the relevant traditional authorities is core for any project using Comarca land.

The panel noted that there were a number of agreements reached with various authorities, including the Acuerdo de Cooperacion signed with the Cacique General Comarca Ngöbe-Buglé on the 13<sup>th</sup> of December 2008 in representation of the traditional authorities. In addition on August 25, 2011 BBHP signed an “Acuerdo de Cooperacion y Compensacion” with the Congreso Regional Kodri de la Comarca Ngöbe-Buglé. This was signed by Reicilia Mendoza, the President of the Regional Kodri Congress of the Comarca Ngöbe-Buglé.

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also for projects that are only partially situated in the Comarca or in annexed areas. This new law can be seen as a substantive provision to allow the indigenous community a clear say about any resource related project, both for those situated entirely inside the Comarca, but also for projects where Comarca or annexed land is only partially affected, as for the Barro Blanco project. This reflects an observable trend towards the gradual strengthening of the indigenous say about the use of resources from Comarca land in Panama during recent years.

## Annex B: Summary of consultation with communities

The process of achieving an easement to use the land from the Comarca and to negotiate access with the affected population of the three villages of Nuevo Palomar, Quiabda and Quebrada Caña has not come to a resolution yet. Negotiations have been ongoing since 2007, when BBHP first approached the General Cacique of the Comarca, Maximo Saldaña. This decision was taken by BBHP due to the fact that the General Cacique has responsibility for the administration of collective lands.<sup>27</sup>

With regard to the legal framework in Panama, Art 34 of Law 10 from 1997 prescribes that the responsibility for managing projects that affect the use and the exploitation of resources shall be approved by the national, regional and local congresses of the Comarca.<sup>28</sup> According to Art. 34 it is mandatory “for project sponsors to establish relationships with the Comarca’s regional and local authorities”. The Comarca Ngöbe-Buglé, which was established in 1997 by that Law 10 has his own political, electoral and administrative system.<sup>29</sup> The community is led by the elected Cacique General. Each of the three regions inside the Comarca has a regional Cacique, and each district has a local Cacique. Below the local Cacique is an additional structure of ‘corregimientos’. The overall community of the Comarca has a general council with a president and three regional councils with presidents. The Annexed areas belong to the Kodri region.

On December 13<sup>th</sup> 2008 the Cacique General and BBHP signed a first Memorandum of Understanding, which was followed on August 28<sup>th</sup> 2009 by a signed rental contract (50 years) with the General Cacique of the Comarca, Maximo Saldaña, without any prejudice of the possessory rights, individual or collective of the owner of the land. Beside the payment, BBHP made a commitment to provide equivalent land (by size or value) to the users of the land and that compensation will be paid for the permanent concession.

From the beginning of 2011, the project faced increased resistance when M10 blocked the entrance of the dam site. In the following negotiations with the government (ANAM) no agreement with M10 could be reached. In the following period (before the signature of the loan agreements with the Banks), BBHP concentrated its efforts on negotiation with the regional authorities of the indigenous peoples from the Kodri Region in order to get a backing from the regional structure of the Comarca to the memorandums of understanding achieved with the former Cacique General, Maximo Saldaña, and finally to achieve a land use agreement. In May 2011 the first Regional Extraordinary Congress of the Kodri Region was held in Cerro Venado. Here the president of the regional council distributed the agreement between General Cacique Saldana and BBHP. The Delegates finally approved that agreement. It was agreed to hold a round of three negotiations in order to obtain a land use agreement. The three rounds of negotiation took place on July 30, August 6<sup>th</sup> and August 13<sup>th</sup> 2011 between a team from BBHP and a negotiation committee of 8 delegates nominated by the president of the Kodri Regional Congress. This process ended with the signature of the Land Use Agreement between the Regional Congress and BBHP, agreed on August 25<sup>th</sup> in 2011.<sup>30</sup>

The 2011 protests led to the agreement of San Felix of 27 of February 2011 between the Government and the “Coordinadora por la Defensa de los Recursos Naturales y del Derecho de los Pueblos Ngöbe, Buglé y Campesino”: (1) the Government promised to develop a law prohibiting the exploration and exploitation of mining activities in the Comarca Ngöbe-Buglé. During the parliamentary debate of that law, the paragraph asking for the cancelation of all existing mining projects in the Comarca was dropped, which led to a new wave of protests in February 2012, during which two people lost their lives. Following these protests, the agreement of San Lorenzo was reached in February 2012 with the support and mediation of the Catholic Church and the participation of the United Nations Mission in Panama, with the installation of two roundtables, one on the mining law and the other on the Barro Blanco case.

<sup>27</sup> According to Law 10 from 1997, articles 9,12,14, 15 25 and 27.

<sup>28</sup> Art. 34: Due to the concept of collective property and its special regime, the assignment of lots for the execution of public or private works of a social nature, or any other nature, shall be approved by the national congress, and the regional and local congresses, depending on the classification of the space necessary for installing the works...” Translation in Indigenous Peoples report 2012, p. 20.

<sup>29</sup> The governance issues are regulated in Chapter III of Law 10, 1997.

<sup>30</sup> The process of consultations is described in detail in the Project Management Report of BBHP from September 2011 (INF-GEN-141-11) a report from BBHP to document the “successful negotiation that ensued between BBHP and the Traditional Authorities of the Comarca” (p 6).

The roundtable on the mining law led to changes in the draft and the final approval of that Law 11 in December 2012. In the second roundtable the parties agreed to send a common verification mission to the region, with representatives of the Government, the United Nations, the Comarca Ngöbe-Buglé and the company BBHP in order to study the impact of the project in detail. In the final outcome document from September 2012, the verification mission recommended an independent investigation on the issues of hydrology, ecology and economy of the project and to implement a rural participation diagnostic (research).