

Mr. Nanno Kleiterp
Director FMO
P.O. Box 93060
2509 AB The Hague



<i>Date:</i>	25 October 2013
<i>Re:</i>	FMO support for Barro Blanco in Panama
<i>Contact:</i>	Anouk Franck, e-mail: af@bothends.org , ☎ +31 20 5306 600

Dear Mr. Kleiterp,

I am writing with regard to FMO's investment in the Barro Blanco dam in Panama. FMO and Both ENDS have been engaged in discussions on this project since November 2010. We brought the issue concerning opposition to the dam by the indigenous Ngäbe people who are directly affected and were not being properly consulted to your attention as a reason not to invest in this project. Over the last year, independent missions have confirmed that Barro Blanco will have negative impacts on the environment and the local population, including forced relocation. These impacts have not been properly addressed as part of FMO's due diligence process, and the absence of an agreement between the Ngäbe – the people who stand to be most adversely affected by this project – and the project implementer GENISA continues to undermine the legitimacy of this project.



FMO's financing of this project runs counter to its responsibility not to infringe on human rights and many of its obligations under its own policies, including obligations clearly articulated in its Human Rights Policy, Environmental and Social Policy, and Corporate Governance Policy.

In the absence of an independent grievance mechanism to assess compliance with these policies and procedures, FMO has received and responded to complaints from civil society by consistently defending its funding decision and due diligence process. Mounting evidence, however, shows that many issues – such as inadequate impact assessment; ineffective consultation; and forced relocation without consultation, let alone consent – remain to be addressed. Presuming FMO takes its policies seriously, FMO needs to ensure that these issues are addressed before further construction activities take place.

Findings of independent missions

Two UNDP-led missions,¹ as well as a statement by UN Special Rapporteur James Anaya following his recent visit to Panama,² confirmed that Barro Blanco's dam reservoir will indeed flood lands in the Ngäbe's indigenous territory, with direct effects on the people living there. The following findings were reported:

- The affected population was not properly informed and impacts were not clearly explained, leading to a situation of fear and anxiety³;
- A number of houses (6) will be flooded⁴ at a water level of 103m, and an even larger area runs the risk of flooding when the water level rises further, as shown in the Project Design Document for the project's registration under the United Nations's Clean Development Mechanism. The Independent Expert Assessment Report indicates that a higher water level should have been used as the baseline for the calculations of the flooded area of the project⁵;
- The way of living and securing livelihoods of the Ngäbe, including their diet, will change due to the dam⁶;
- Petroglyphs and three ancestral cemeteries that have an important spiritual meaning to the Ngäbe will be flooded. This means that irreversible damage will occur that affects the Ngäbe's cultural expression and ethnic identity⁷;
- Free, prior, and informed consent was not obtained for the Barro Blanco dam⁸, contrary to Panamanian law, international law and the IFC Performance Standards.

FMO non-compliance with its own policies

In order to secure sustainable development outcomes, FMO has formulated an environmental, social and governance (ESG) policy⁹, which comprises of three parts:

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

FMO's Corporate Governance Policy refers to "Principles of Good Governance or ESG principles" including the following:

- A commitment to comply with all applicable (national) laws and regulations;
- A commitment to comply with relevant Corporate Governance codes and Environmental and Social standards; and
- A commitment to an ongoing improvement of ESG practices ("a journey, not an end").

According to the Environmental and Social Policy, the primary responsibility for sustainable development and management of E&S risks and impacts rests with FMO's clients. The Environmental and Social Policy further provides that FMO's clients are "required to comply with national [environmental and social] law as a minimum standard, and with international standards, whichever stricter. For the latter we benchmark against the IFC Environmental and Social Performance Standards, applicable

¹ Two missions took place under UNDP leadership as a result of a Roundtable process: the Verification Mission in September 2012, which issued a report in December 2012, and the Peritaje Independiente (Independent Expert Assessment) in June 2013, which issued a report in September 2013.

² James Anaya is the UN Special Rapporteur on the Rights of Indigenous Peoples. He visited Panama in July 2013 and paid specific attention to the Barro Blanco dam in his End of Visit Statement.

³ UNDP, Independent Expert Assessment Report, p.12.

⁴ UNDP, Verification Mission Report, p.33.

⁵ UNDP, Independent Expert Assessment Report, p.4.

⁶ UNDP, Verification Mission Report, p.37.

⁷ UNDP, Independent Expert Assessment, Report, p.11.

⁸ UNDP, Independent Expert Assessment Report, p.11.

⁹ <http://www.fmo.nl/esg-policy>

IFC Environmental Health and Social Guidelines, and the OECD Guidelines for Multinational Enterprises.”

Notably, FMO’s Human Rights Policy states that FMO respects human rights and recognizes its clients’ responsibility to respect human rights, which “means to avoid infringing on the human rights of others and to address adverse impacts business may cause or contribute to.” The Human Rights Policy further states that FMO’s human rights due diligence is guided by its Environmental and Social Policy, which is based on the IFC Performance Standards. It is important to note here that the IFC Performance applied to review Barro Blanco’s Environmental Impact Assessment, was the 2006 edition (which has been replaced by a new version in 2012).

In the sections below we will assess the level to which FMO complied with these policies and procedures in the case of FMO’s financial support for the Barro Blanco dam, focusing on consent, forced resettlement, environmental impact assessment and means of recourse against harm arising from its financing.

Absence of Free Prior and Informed Consent

As discussed previously, FMO’s Environmental and Social Policy states that “All our investment clients are required to comply with national [environmental and social] law as a minimum standard, and with international standards, whichever stricter.”¹⁰

In the case of free, prior, and informed consent, a number of treaties articulate the standard under international law.¹¹ Among them, the International Labour Organisation’s Convention on Indigenous and Tribal Peoples in Independent Countries - 169/1989 refers to the principle of free and informed consent in the context of relocation of indigenous peoples from their land in its article 6. In article 6, 7 and 15, the convention aims to ensure that States make every effort to fully consult with indigenous peoples in the context of development of land and resources.

An Amicus Curiae brief, submitted to the Supreme Court of Panama by AIDA, CIEL and Earthjustice, in support of the court case in Panama to nullify the Environmental Impact Assessment of the Barro Blanco dam, illustrates that the Ngäbe have not given free, prior, and informed consent for the Barro Blanco project in line with national and international law.¹² This finding is further supported by the UNDP reports and Special Rapporteur Anaya’s statement.¹³

The IFC Performance Standards (PS) in its 2006 edition referred to Free, Prior, and Informed Consultation, which is weaker than international standards, but even the norms described there, have not been met. Performance Standard 7 seeks to ensure that development projects “foster full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples”. Specifically the required commitment that “[i]n 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

¹⁰ <http://www.fmo.nl/esg-policy>

¹¹ www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc

¹² Amicus Curiae AIDA, CIEL and Earthjustice

¹³ See UNDP, Independent Expert Assessment Report, p.11 “With respect to the Barro Blanco project, there is an evident lack of information and it is clear that the community members have not been consulted in a correct way” and James Anaya, End of visit statement, on p.2 states that “it is evident that there is still strong opposition against the Barro Blanco project and that there is a lack of clarity and adequate information on the impacts of the same”.

development benefits and opportunities, and implementation issues.” has not been met by GENISA. It is clear that FMO was aware of this, as it based its funding decision on the social and environmental project review¹⁴ which states in relation to PS 7: “A Memorandum of Understanding has been [signed] between the company and the Ngöbe-Bugle community in line with the indigenous peoples’ law in place. [...] However a group within the community is wholly opposed to the project, and to date, negotiations with this group have not reached a positive outcome.” The proposed mitigation measure reads as follows: “The project will continue to engage with the indigenous community through the established structures, through community projects and direct engagement with individuals and communities. The project will continue and try and engage with the groups opposing the project.” This omission to secure free, prior, and informed consent for Barro Blanco is clearly not in line with FMO’s commitments.

Forced resettlement

Despite FMO’s repeated assertions that GENISA conducted a thorough environmental and social assessment, which FMO reviewed, both UN investigations have documented strong Ngöbe opposition to the construction of the Barro Blanco hydropower facility that was not reported in the environmental and social assessment. For this reason, two years ago the company GENISA initiated a process of forced acquisition of land in the Ngöbe community of Kiab and involuntary resettlement of families living there. Recently, this request was reformulated as an involuntary easement demonstrating that the company refuses to comply with the principle of free, prior, and informed consent. The mere existence of this legal action against the community of Kiab should be considered by FMO as a demonstration of lack of consent, and therefore FMO should suspend any disbursement of its loan. FMO’s continued financing of the Barro Blanco as GENISA moves forward with this involuntary easement constitutes a violation of Ngöbe rights, and an inappropriate use of Dutch public funds to finance an involuntary resettlement of an indigenous community in Panama.

Environmental Impact Assessment

In the case of Barro Blanco, the IFC Performance Standards were used as the basis for the social and environmental project review. Performance Standard 1¹⁵, setting out the principles for the Social and Environmental Assessment, describes the following leading objectives:

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

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

¹⁴ <http://www.genisa.com.pa>, Environmental and Social Summary Report BBHP 072811, Executive Summary, p.55

¹⁵ http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework++2006/Performance+Standards+and+Guidance+Notes/

The Amicus Curiae brief, referred to above, describes three fundamental flaws in the EIA for the Barro Blanco project.¹⁶ These are: A. The EIA did not contain complete information about the impacts of the project on indigenous territories, which are anexes to the Ngäbe-Bugle comarca; B. ANAM did not provide the Unidades Ambientales Sectoriales (UAS) the legal term to present its views on all the information that was considered for approval; and C. The EIA was not adequately consulted and did therefore not guarantee effective participation of the affected communities.

Absence of an independent grievance mechanism

FMO's Human Rights Policy specifically states that FMO commits to "creating access to an effective grievance mechanism that can facilitate early indication of, and prompt remediation of various project-related grievances."¹⁷ But in the case of Barro Blanco such a mechanism was not in place. This resulted in a situation where we were consistently being told that FMO was taking all the measures it could to resolve the problems and that it had done its due diligence according to its standards, without a possibility to get our complaints addressed through an independent and effective grievance mechanism.

FMO's responsibility

The construction and the start of operations of the Barro Blanco dam, leading to the impacts described above, is directly dependent on FMO's financial support for this project. FMO, as one of the three main financiers of Barro Blanco, therefore has a direct responsibility with regards to the human rights infringements and environmental damage the dam will cause.

FMO asserts that the UNDP Roundtable process would address the problems surrounding the Barro Blanco project. We must note that, although the communities affected by the dam participated in specific instances as observers, these communities were never considered a party to the roundtable. For this reason, M10¹⁸ representatives have stated clearly that they are not represented by roundtable participants with regard to any possible agreement that may arise from the roundtable about the cancellation or completion of the dam. FMO has referred to the roundtable to justify GENISA's continued construction activities even against the will of the people directly affected by the dam. The UNDP-led process has produced valuable information with regard to flooding levels and community perspectives about the dam. However, this process failed to address several issues of foremost importance to the Ngäbe communities such as the spiritual meaning of sacred sites along the river, and community consent for the construction of this dam. Throughout the UN-led roundtable, M10 representatives maintained their legal actions in the Panamanian Supreme Court to nullify the environmental impact assessment of the Barro Blanco dam. In addition, they have clearly stated that they were not properly consulted and did not grant their consent for this project to proceed at any moment. As a financier of the project, FMO's responsibilities reach further than the UNDP's. FMO needs to show it is taking all possible measures in its power to ensure compliance with its own policies and procedures. FMO cannot use the UN roundtable as a surrogate for its own duties.

The continued construction of the Barro Blanco project has made the situation become more and more tense. Stakes are getting higher for GENISA to ensure the dam can actually become operational, while the affected people remain insecure about their future and respect for their rights. Some are even facing forced relocation and the loss of their

¹⁶ Amicus Curiae AIDA, CIEL and Earthjustice, p18

¹⁷ <http://www.fmo.nl/esg-policy>

¹⁸ Movimiento 10 de Abril para Defensa del Rio Tabasará (M10) is a grassroots resistance movement of indigenous peoples, specifically those directly affected by the Barro Blanco dam, to protect the river Tabasará.

lives and homes. Despite the urgent need for GENISA to engage in an honest, transparent, careful and patient process with the directly affected Ngäbe, it continues to construct the dam, destroying the possibility of such an outcome.

FMO has a responsibility to ensure that every project it finances complies with its policies and procedures and does not infringe on human rights. Given the evidence that this was not the case for Barro Blanco, FMO should suspend its financing of this project until it has satisfied this precondition.

Concretely, FMO should:

- Conduct a full and independent investigation to determine whether GENISA has violated FMO's policies and procedures;
- Halt disbursement of funds to GENISA until FMO has investigated the situation and made a determination as to whether GENISA has complied with policies and procedures that apply to it as the project developer.

Given the pressure that is currently put on the Ngäbe people through the eviction process, I would very much welcome a reaction from your side within two weeks. I look forward to your kind reply.

Yours Sincerely,



Danielle Hirsch
Director Both ENDS

References (which can be obtained from Both ENDS)

- UNDP Verification mission Barro Blanco, Report, December 2012
- James Anaya, End of visit Statement, 26 June 2013
- UNDP Independent expert Assessment Report Barro Blanco, Executive Summary, 5 September 2013
- Amicus Curiae AIDA, CIEL, Earthjustice, 28 August 2013

Cc:

Mrs. Lillianne Ploumen, Minister for Foreign Trade and Development Cooperation
Mr. Jeroen Dijsselbloem, Minister of Finance