

COMMENTARIES ON THE VALIDATION OF THE HYDROELECTRIC PROJECT BARRO BLANCO, REPUBLIC OF PANAMA

The Alliance for Conservation and Development (ACD) ratifies its position expressed in the commentaries that we sent last year in relation to the validation of the Barro Blanco project on the part of AENOR, and as much laments that the promoter of the project as the Government of Panama would seem to be abusing the validation system of the CDM when retiring and to return to present a project that already had been put previously under a validation process. This practice seems irregular and would seem to us to indicate an excessive interest of the promoter to capitalize over what should be instead an international mechanism for the reduction of greenhouse gas emissions. Also, we lamented the interest of the European Investment Bank (EIB) to finance a project that seemed not to satisfy the additionality requirement and that in addition, has been implied in the violation of human rights of the Ngöbe population and peasants of the Republic of Panama.

1. The reasons that motivated the provisional suspension of the hydroelectric project Tabasara II on the part of the Supreme Court of Justice subsist in the hydroelectric project Barro Blanco and have been agravated by the adoption of norms considered violatory to human rights on the part of international organisms of human rights.

As it were expressed in the previous commentaries, in the year 2000 the Supreme Court of Justice of the Republic of Panama among others ordered the provisional suspension of the hydroelectric project Tabasará II arguing considerations that were not taken into account **the articles 63, 99 and 102 of the General Environment Law** (Law 41 of 1998) that "bear relation to the participation and assent that is precise to obtain from the indigenous communities".¹ As it is of your knowledge, the PDD that tried to be validated the past year not even made reference to the rights of the indigenous communities affected by the project, which involves an additional and different body of regulations to which it would be used for areas noninhabited by natives. Indeed, aside from the consultations realized with the local authorities, the Law 10 of 1997 that creates the Ngöbe-Buglé Indigenous Region, demands the approval of the local authorities for the accomplishment of any project of development.

The new PDD of the project also reiterates that expressed in the previous validation of which according to the surveys around 50% of the population are against the construction of the hydroelectric. Although an explanatory note is introduced arguing that this position had varied, proofs are not submitted to sustain such affirmation that does not agree with the information that we have received over which in truth is happening in the area. Although the promotional company has obtained the decided

¹ 6th of December of 2000 Sentence.



ALIANZA PARA LA CONSERVACIÓN Y EL DESARROLLO

endorsement of important indigenous leaders that were previously opposed to the project, this does not reflect the general opinion of the population nor as much satisfies the requirements with consultation at national level as international.

The recent report of the Special Relator of the United Nations on the Situation of the Human Rights and the Fundamental Liberties of the Natives, James Anaya, who visited Panama in the month of January to evaluate the situation of the hydroelectric project Chan 75 located in the Ngöbe Territory of the Changuinola River, explains the intentions and the reaches of the processes of consultation with the indigenous people. Making reference to articles 10, 19 and 32 of the Declaration of the United Nations on the Indigenous People, Mr. Anaya maintains that:

"20. The State of Panama voted in favor of the adoption of the Declaration of the United Nations on the rights of the indigenous people, thus demonstrating its commitment with the norms of free determination, consultation and prior consent, free and informed contained in her. The consent and consultation principles aspire to promote the mutual understanding and the consensus in the decision making. The requirement of previous consultation tries to avoid the imposition of a decision that can affect in significant way the lives of persons and the indigenous people, in accordance with the right to free determination that also is protected in the own Declaration. In addition, the experience at world-wide level demonstrates that generally the evacuations or displacements of people brought about by the development projects present serious implications for an ample set of human rights. These implications are greater for the indigenous people, that generally maintain bonds of deep cultural meaning with the land where they live."

In spite of the legal precedents of Tabasara I and Chan 75, the State through the National Authority of Environment (ANAM) has reiterated in the case of Barro Blanco the unfortunate and obviously violatory principle of human rights of which **"the Promoter is responsible legal and financially of the process of negotiation, relocation and indemnization of those affected by the development of the project"** (4 Article Numeral 19)². In relation to this principle, the report of Mr. Anaya establishes that:

"35. In the scope of the international rights, the State is the one responsible to assure the effective measures necessary of settlement and mitigation, as well as to carry out the process of consultation with the affected communities to define those measures" the Special Relator observes that the delegation of the responsibility to carry out the reinstallation process to the company presents a fundamental problem, insofar as this is

² The hydroelectric project Chan 75 has been challenged at national and international level of violation of indigenous rights to the Land and free and informed prior consent. The interposed legal resources at the national level include a resource of protective guarantees (21 of December of 2007) and a lawsuit of administrative invalidity. Also, a request has appeared before the Inter-American Commission of Human Rights (CIDH), and reports of the Defensoria of the People (March of 2009) and of the Special Relator of Indigenous Peoples of the United Nations (May of 2009) confirm that violations to human rights have existed.



ALIANZA PARA LA CONSERVACIÓN Y EL DESARROLLO

one of the parts in the negotiations with lucrative interests in the results of the consultations with them and the transfer of the communities".

It is worthy to point out that the past 17th of June, the Inter-American Commission of Human Rights (CIDH) asked for the provisional suspension of the construction of the hydroelectric project Chan 75 "with the purpose to avoid irreparable damages to the right of property and the security of the indigenous Ngöbe people seated in the province of Bocas del Toro". Since it has been expressed in this writing, these same principles are valid for the hydroelectric project Barro Blanco in relation to the norms established by the State for the approval of the project and the accomplishment of the involuntary reinstatement of the indigenous population.

2. As Designated National Authority, the National Authority of Environment (ANAM) has incurred in conflicts of interests that jeopardize the independence of this institution to guarantee projects of the Clean Development Mechanism (CDM).

As we expressed in our commentaries for the previous validation of the PDD of the project Barro Blanco, the National Authority of Environment (ANAM) has concentrated the majority of the regulatory functions for the implementation of hydroelectric projects in Panama, including the granting of concessions of water, the approval of the evaluations of environmental impact (EIA), and the pursuit and control of mitigation measures. In principle, the Designated National Authority should not have to be part in these processes that also involve the collection of fines and fees for profiting of natural resources. However, in Panama the situation has been agravated even more with the de facto adoption of a scheme of payments for environmental services that lacks legal sustenance and suffers from lack of mechanisms of accountability and citizen monitoring in relation to the destination of these funds.

There does not exist legislation of any sort in the Panamanian legal order that authorizes the ANAM to administer projects of communitarian development, and much less to administer funds originating of environmental services. In addition, the institution lacks personnel described for the work of social promotion and support that is needed in indigenous and peasant communities. To occur the payments for environmental services, most probably it will be that a high percentage of these funds will end up being used in administrative expenses at the central level, and the rest will be invested in projects of development of doubtful effectiveness. Even worse, is an aberration that the DNA administers funds that come from the same projects that they guarantee for the Clean Development Mechanism (CDM). This promotes corruption in an institution that has little internal controls and mechanisms of rendering of accounts. Indeed, during the past administration (2004-2009), of inexplicable way the ANAM became the main promoter of hydroelectric projects at national level.



ALIANZA PARA LA CONSERVACIÓN Y EL DESARROLLO

3. The project Barro Blanco does not satisfy the requirement of additionality that is needed to participate in the Clean Development Mechanism (CDM).

As we stated in the process of previous validation, and like many other hydroelectric projects in Panama, Barro Blanco does not fulfill the additionality requirement. No security exists of which the most reasonable alternative to the hydroelectric project Barro Blanco is the construction of a fossil fuel plant, since the Government of Panama has been actively promoting the construction of projects of Aeolian energy that have a greater capacity of generation. In addition, the investment in hydroelectric energy is particularly profitable in Panama due to the existence of a structure of incentives that does not exist in any other country of the region. According to La Prensa of the 1st of October 2008, the net utility of AES, the main hydroelectric generator in the country, has quadrupled between the first semesters of 2007 and 2008.

In 2004, the Government of Panama passed a law that created fiscal incentives for the construction of hydroelectric projects. Besides this, the hydroelectric generators also have the possibility of selling in the occasional market at the same price that the thermoelectrical ones, this way increasing in significant way the margin of gain for an industry that has of intrinsic manner smaller costs of operation. On the basis of these facilities, in the last five years the hydroelectric generators have been looking forth to export to the Regional Electrical Market of Central America.

For all the reasons before set out, in truth we recommended that the hydroelectric project Barro Blanco not be validated for the CDM in accordance with the requirements of additionality and the national and international legislation of human rights. It would be a shame that AENOR validated and the EIB financed a project with such characteristics, and that possibly it would end stuck in legal controversies, and faced with a local population that is against the construction of dams by questions of principles.