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Beatriz Felipe Pérez, Jane A. Hofbauer, Monika Mayrhofer and Paola Villavicencio Calzadilla

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1

INTRODUCTION

One of the major threats humanity is facing in the 21st century is climate change. Its early warning signs are already visible and scientists claim that the

[w]arming of the climate system is unequivocal, and since 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished and sea level has risen.¹

The effects of climate change result in an inherently unjust phenomenon: those countries which have contributed less to the problem are the ones which suffer the most under its consequences. Moreover, as climate change impacts threaten lives and livelihoods across the world, it challenges the development of many regions, especially of the world's poorest and most vulnerable populations. Thus, the United Nations Development Programme (UNDP) argues that 'climate change is the defining human development issue of our generation'.²

The climate regime has tried to overcome these injustices by developing and implementing the principle of 'common but differentiated responsibilities', citing Principle 7 of the Rio Declaration.³ This principle acknowledges that every state has the responsibility for the protection of the environment at the local, national and international level. However, each state's different historical and present contribution to climate change should also be

taken into account when defining the international assistance which it must carry out, including financial aid and technology transfer.

Taking into account the effects of climate change and its impacts, the mobilisation of adequate, predictable and sustainable financing of measures to address climate change is undoubtedly a critical point, especially in developing countries.⁴ In this sense, after many years of negotiations, the Copenhagen Accord⁵ was adopted in 2009 at the 15th Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC). Through this Accord, developed countries committed themselves to provide USD 100 billion per year by 2020 in order to address the climate change needs of developing countries.⁶ The Cancun Agreements⁷, approved at the COP 16, as well as the Paris Agreement⁸ adopted at the COP 21, reaffirm this climate finance commitment. The latter also acknowledges that developed countries 'should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels noting the significant role of public funds'⁹ as well as that 'the provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation [...] considering the need for public and grant-based resources for adaptation'.¹⁰ It is also important to highlight that the Paris Agreement refers to the term 'mobilize' instead of 'provide' climate finance, as was originally promised. In this sense, it has been criticized that in addition to diluting the responsibilities of developed countries, the term 'mobilize' is not related to any figure in particular and can include 'a variety of

1 Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: IPCC, 2014) 2.

2 United Nations Development Programme, *Human Development Report 2007/2008. Fighting Climate Change: Human Solidarity in a Divided World* (New York: UNDP, 2007) 1.

3 See Rio Declaration on Environment and Development in UN 'Report of the United Nations Conference on Environment and Development' (Rio de Janeiro 3 - 14 June 1992) UN Doc. A/CONF.151/26 (Vol. I).

4 Organisation for Economic Co-operation and Development, *Climate Change and Development, Key Principles to Inform Climate Change Financing* (Paris: OECD, 2009).

5 UNFCCC 'Report of the Conference of the Parties on its Fifteenth Session' (Copenhagen 7 - 19 December 2009) UN Doc. FCCC/CP/2009/11/Add.1.

6 *ibid* para 8.

7 UNFCCC 'Report of the Conference of the Parties on its Sixteenth Session' (Cancun 29 November - 10 December 2010) UN Doc. FCCC/CP/2010/7/Add.1.

8 UNFCCC 'Report of the Conference of the Parties on its Twenty-First Session' (Paris 30 November - 11 December 2015) UN Doc. FCCC/CP/2015/L.9/Rev.1.

9 *ibid* art 9 (3).

10 *ibid* art 9 (4).

resources, public and private, bilateral and multilateral, including alternative sources [...] even loans and carbon markets [can] be accounted in the process of mobilization of financial resources'.¹¹

In recent years, development banks have adapted their operations to new local and global challenges and have increasingly invested in climate finance. Especially projects registered under the Kyoto Protocol's Clean Development Mechanism (CDM) have received special attention. The World Bank (WB), for instance, declared in its '2010 World Development Report' that fighting climate change was not just an environmental issue but a challenge to the future of economic development itself.¹²

Historically, development banks have assumed that the majority of the citizens will benefit through their funding activities. However, this assumption has not been proven reliable.¹³ As a result, development banks have been repeatedly accused of financing controversial projects which have resulted in environmental harm and human rights abuses.¹⁴ As the U.N. Committee on Economic, Social and Cultural Rights highlighted in its second General Comment: 'many activities in the name of development have subsequently been recognized as ill-conceived and even counter-productive in human rights terms'.¹⁵ In addition, these projects are often first and foremost driven by economic considerations instead of social or ecological principles. Coastal ecosystem destruction, deforestation, soil exhaustion, increasing use of energy resources and the displacement of local populations are some examples of negative impacts produced by such projects. Turner

points out some examples of projects funded, at least partially, by MDBs that have caused social and environmental harms: Chad-Cameroon Pipeline Project, the Baku-Tbilisi-Ceyhan Oil Pipeline Project and the Lihir Goldmine in Papua New Guinea.¹⁶

Similarly, in the context of the CDM, it has been argued that while having had important economic benefits many of the mitigation projects funded by development banks have also resulted in environmental degradation and human rights abuses.¹⁷ The heavily contested Barro Blanco CDM project in Western Panama is a good example in this context. This hydropower plant is not only the subject of a long-standing local conflict but also the centre of a quite complicated and multi-layered national and international political and legal dispute which is shaped by the complex interrelationship of climate financing, development policies, the national political and economic context and human rights issues.

The 2015 Paris Agreement under the UNFCCC does not mention the CDM but defines a new mechanism to contribute to greenhouse gases (GHG) emissions mitigation and support sustainable development.¹⁸ There is uncertainty whether the new mechanism will succeed the existing Kyoto Protocol's project based mechanisms, i.e., the CDM and the Joint Implementation, or if it will be defined as a new mechanism sit alongside either of these. However, the Paris Agreement establishes that such mechanism (informally called Sustainable Development Mechanism) should draw on the experience gained and lessons learned from the existing Protocol's project

11 Pablo Solon, 'Behind the negotiating text for the Paris Climate talks' (*Ecologise*, 22 November 2015), <www.ecologise.in/2015/11/22/pablo-solon-behind-the-negotiating-text-for-the-paris-climate-talks> accessed 28 August 2016.

12 World Bank (WB), *World Development Report 2010. Development and Climate Change* (New York: WB, 2010) 37.

13 John Updegraph III, 'Large-Scale, Capital-Intensive Development Projects in the Third World: Congressional Influence over Multilateral Development Bank Lending' (1993) 13 *Boston College Third World Law Journal* 345, 347.

14 See Tamar Gutner, *Banking on the Environment. Multilateral Development Banks and Their Environmental Performance in Central and Eastern Europe* (1st edn, MIT Press 2002).

15 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 2, International Technical Assistance Measure (Art. 22)' (1990) UN Doc. E/1990/23.

16 Stephen Turner, 'Multilateral Development Banks' in Stephen Turner (ed.), *A Substantive Environmental Right. An examination of the Legal Obligations of Decision-Makers towards the Environment* (1st ed, Kluwer Law International 2009), 151.

17 Kylie Wilson, 'Access to Justice for Victims of the International Carbon Offset Industry' (2011) 38(4) *Ecology Law Quarterly*, 967; U.N. Special Rapporteur Issues Report on Panama Dam' (Cultural Survival, 21 May 2009) <www.culturalsurvival.org/news/panama/un-special-rapporteur-issues-report-panama-dam> accessed 1 October 2016; Barbara Haya 'Failed Mechanism: How the CDM is subsidizing hydro developers and harming the Kyoto Protocol' (International Rivers, 2 December 2007) <www.internationalrivers.org/files/attached-files/failed_mechanism_3.pdf> accessed 1 October 2016.

18 UNFCCC (n 8) art 6 (4).

based mechanism.¹⁹ Although it is unclear how such a mechanism will look like, it will eventually share features of the current CDM. In addition, it is also being evaluated how the CDM scheme could fit into such cooperative mechanism.²⁰ These facts make the existing CDM shortcomings an ongoing and persistent problem that require urgent adjustments.

This paper aims at unravelling the complex interlinkages of climate finance, national and international development policies, economy and human rights. It argues that the manifold and often competing national and international legal and political layers of climate change mitigation projects, such as those under the CDM, often leave project affected people vulnerable to human rights violations without adequate safeguards and mechanism to effectively articulate their interests, protect their rights and promote access to justice. The paper firstly starts out to analyse the link between development banks and climate finance in the framework of the CDM and, secondly, elaborates on the human rights dimension of CDM projects financed by development banks. The paper discusses its findings with the example of a concrete case study, the Barro Blanco hydro-power plant in Panama, evidencing the weaknesses of the CDM system particularly from the perspective of affected persons, before it concludes in a last chapter that addressing the human rights shortcomings is especially relevant as climate finance will gain in importance in the near future.

2

EXPLORING THE LINKS BETWEEN DEVELOPMENT BANKS AND CLIMATE FINANCE THROUGH THE CLEAN DEVELOPMENT MECHANISM

Development banks are national, regional or international financial institutions created by states or regions and established to provide medium- and long-

term capital for productive investment projects and programs, often accompanied by technical assistance, that yield substantial economic, social and environmental benefits.²¹ Traditionally, development banks – especially Multilateral Development Banks (MDBs) – have fostered short-term economic growth and therefore financed (usually in the form of loans and grants) particularly ‘capital intensive development projects’²², such as industrial infrastructures ranging from the construction of hydroelectric dams, roads and port facilities to projects aimed at agricultural intensification, among others. Recently, it has also been pointed out that development banks will play an essential role for the implementation of the Sustainable Development Goals and the transition to a low-carbon energy system.²³

In addition, climate finance which ‘generally comprises public and private finance for climate change mitigation and adaptation, often understood to mean flows from developed to developing countries’²⁴ has been significantly included among multilateral and national development banks’ operations in recent years. The important role of development banks in climate finance is due to the fact that, among other things, they have a public policy and development mandate to provide long-term financing to risky sectors that commercial banks continue to shun. However, development banks, such as the WB, have been also involved in climate change mitigation projects for their own commercial benefit by choosing the most profitable projects.²⁵

21 Nicholas Bruck, ‘The Role of Development Banks in the Twenty-First Century’ (1998) 3 *Journal of Emerging Markets*, 61; Leonardo A Crippa, ‘Multilateral Development Banks and Human Rights Responsibility’ (2010) 25 *American University International Law Review* 531.

22 John Updegraph III (n 13) 349.

23 WB, *From Billions to Trillions: Transforming Development Finance. Post-2015 Financing for Development: Multilateral Development Finance* (New York: WB, 2015).

24 Lisa Ryan, Nora Selmet and André Aasrud, *Plugging the Energy Efficiency Gap with Climate Finance. The Role of International Financial Institutions (IFIs) and the Green Climate Fund to Realise the Potential of Energy Efficiency in the Developing Countries* (Paris: OECD/IEA, 2012) 10.

25 Janet Redman, *World Bank: Climate Profiteer* (Washington: Institute for Policy Studies, 2008); Axel Michaelowa and Katharina Michaelowa, ‘Climate Business for Poverty Reduction? The Role of the World Bank’ (2010) Center for Comparative and International Studies Working paper No. 59 <www.ips-dc.org/wp-content/uploads/2008/04/1207774611WPCP-SEEN-April-9-08.pdf> accessed 1 October 2016.

19 *ibid* para 38.f. See also Andrei Marcu, *Carbon Market Provisions in the Paris Agreement (Article 6)* (Brussels: CEPS, 2016).

20 UNFCCC, ‘Meeting report - CDM Executive Board eighty-eighth meeting’ (Bonn 7 - 11 March 2016) UN Doc. CDM-EB88.

Moreover, development banks, mainly National Development Banks²⁶, have a significant role in climate finance since they have extensive knowledge and experience regarding opportunities and barriers for investments, a better understanding of the necessary conditions on the ground for long-term investment, a tested track-record with the private sector, access to a variety of financial and non-financial tools, and a strong understanding of local circumstances and sectors.²⁷ In this sense, for example, the 2015 Joint Report on MDB Climate Finance²⁸ explains that MDBs play a major role in financing climate change mitigation and adaptation measures. According to this report, since 2011 the MDBs have collectively committed over USD 131 billion for what they call ‘climate action’ in developing and emerging economies. The climate finance provided by MDBs in 2015 was over USD 25 billion.²⁹

Moreover, in a joint statement released at the COP 21 several MDBs announced their different commitments to increase financing for climate change mitigation and adaptation over the next few years.³⁰ The WB, for instance, has started to outline a series of initiatives aimed at tackling climate change implications in development (even though it still also funds coal based projects).³¹ Currently the WB provides an average of USD 10.3 billion a year in direct financing for climate action.³² Similarly, since 2011, members of the International Development Finance Club (IDFC) – a network of national, subregional and international

development banks – exchange their know-how and experiences in strategic topics, including climate finance. In 2014 the members of the IDFC committed USD 85 billion for climate change mitigation and adaptation.³³

For over a decade now, investment in CDM projects in exchange for offset credits caught the attention of developed countries, their companies and financial institutions because of its potential as a cost-effective instrument for climate change mitigation in developing countries. Defined by Article 12 of the Kyoto Protocol, the CDM is an offset mechanism that allows developed countries, companies within those countries, or development banks to invest in low-cost emission-reduction projects in developing countries. CDM projects generate carbon credits, called Certified Emission Reduction (CER) credits. Each credit equals one metric ton of CO₂ – and can be used by industrialized countries or their companies to fulfill part of their GHG emission reduction commitments or to trade them on international carbon markets.

The CDM not only gives developed countries some flexibility in how they meet their emission targets, but also should help developing countries to achieve low-carbon sustainable development. In addition to developed and developing countries, the CDM project implementation also involves three important actors: (1) the Designated National Authority (DNA) which authorizes and approves participation in CDM projects and, in the case of the host country, confirm the contribution of CDM projects to sustainable development; (2) the Designated Operational Entities (DOE) that verify, validate and certify the emission reductions achieved by a specific project; and (3) the CDM Executive Board that supervises the functioning of the mechanism and is in charge of the registration of projects and the issuance of CERs. Each of these actors plays an important role during the so-called project cycle that integrates the development of the Project Design Document (PDD), the validation, the registration, the verification and the CERs issuance. It should be noted that in 2012 a first process of reviewing the rules of the CDM begun. At the time this article was written, possible changes to such rules

26 See Diana Smallridge and others, *The Role of National Development Banks in Catalyzing International Climate Finance* (Washington: Inter-American Development Bank, 2013).

27 *ibid* 2.

28 African Development Bank and others, *2015 Joint Report on Multilateral Development Banks’ Climate Finance* (Washington: MDBs, 2016).

29 *ibid* 4.

30 WB, ‘Development Banks Vow to Mobilize Collective Resources to Confront Climate Change’ (*The World Bank News*, 30 November 2015) <www.worldbank.org/en/news/press-release/2015/11/29/development-banks-vow-to-mobilize-collective-resources-to-confront-climate-change> accessed 1 October 2016.

31 Janet Redman and others, *Walking the Talk? World Bank Energy-Related Policies and Financing 2000-2004 to 2010-2014* (Washington: Brown University’s Climate and Development Lab and the Institute for Policy Studies, 2015).

32 WB, ‘Climate Finance Overview’ (WB, 30 September 2016) <www.worldbank.org/en/topic/climatefinance/overview#1> accessed 1 October 2016.

33 International Development Financial Club, *IDFC Green Finance Mapping for 2014* (Frankfurt: World Resources Institute and Ecofys, 2015) 15.

are still being analyzed by the Subsidiary Body for Implementation (SBI).³⁴

Importantly, there is no definition of sustainable development under the CDM. In this sense, the CDM procedures recognize that - as a sovereign decision - each host country has the prerogative of determining whether a CDM project contributes to its sustainable development or not. As discussed later in this article, such prerogative has led some developing countries to establish minimum sustainable development criteria or lower requirements in order to attract more projects.

Since the CDM Executive Board approved the registration of the first CDM project in 2005, more than 7700 projects have been registered in 107 developing countries (as of October 2016), which have generated about 1.7 billion CERs.³⁵ For this reason, the CDM has become the main generator of carbon offset credits worldwide.

In addition, during the first commitment period of the Kyoto Protocol (2008-2012), the CDM mobilized more than USD 400 billion in terms of investment in climate change mitigation projects. With an investment of over USD 140 billion, wind and hydro power plants are among the most capital intensive projects; together they constitute 68% of all investments in CDM projects.³⁶

After private financial institutions, development banks are the second investor group in financing CDM projects. For example, since 1999 the WB's Prototype Carbon Fund has supported CDM projects with a USD 180 million mutual fund.³⁷ Throughout the

Latin American Carbon Programme, the Development Bank of Latin America has also promoted the participation in CDM projects, becoming the first regional development bank to be the secondary CDM buyer and seller.³⁸ Since 2007, the Asia Pacific Carbon Fund of the Asian Development Bank has provided USD 151.8 million upfront co-financing to CDM projects.³⁹ Additionally, it is estimated that revenues from CDM projects resulting from activities of the African Development Bank in the framework of the African Carbon Support Programme will reach USD 150 million over the next 10 years.⁴⁰ In this respect, Schatz points out that 'the CDM has essentially turned into a money-making enterprise. Contrary to the belief that CDM transactions are motivated by a desire to comply with Kyoto, the CDM's growth is fueled in large part by profit seekers.'⁴¹

3

HUMAN RIGHTS IN THE CONTEXT OF CDM PROJECTS FUNDED BY DEVELOPMENT BANKS

When CDM projects funded by development banks affect the environment and even induce human rights violations, the applicable norms and regimes need to be explored in order to identify which gaps should be addressed to guarantee the protection of people and the environment affected by these projects. Thus, in this section, these gaps or failures are assessed under both the CDM and the banks' safeguards.

34 UNFCCC, 'Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its First Session' (Montreal 28 November - 10 December 2005) UN Doc. FCCC/KP/CMP/2005/8/Add.1; UNFCCC, 'SBI Meetings' (UNFCCC, 15 October 2016) <unfccc.int/meetings/items/6237.php> accessed 15 October 2016.

35 UNFCCC, 'Clean Development Mechanism (CDM)' (UNFCCC, 15 October 2016) <<https://cdm.unfccc.int/>> accessed 15 October 2016.

36 Grant Kirkman and others, *Benefits of the CDM up to 2012* (Bonn: UNFCCC, 2012).

37 WB, 'Carbon Finance Unit' (*Prototype Carbon Fund Project Portfolio*, 2016) <<https://wbcarbonfinance.org/Router.cfm?Page=PCF&ft=Projects>> accessed 20 January 2016.

38 Elizabeth Lokey, *Renewable Energy Project Development Under the Clean Development Mechanism: A Guide for Latin America* (1st edn, Earthscan 2009) 92.

39 Asia Development Bank (ADB), 'Asia Pacific Carbon Fund Raises More than \$150 Million' (7 August 2007) <www.adb.org/news/asia-pacific-carbon-fund-raises-more-150-million> accessed 20 January 2016.

40 African Development Bank Group, 'African Carbon Support Program' (2016) <www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-carbon-support-program/> accessed 20 January 2016.

41 Andrew Schatz, 'Discounting the Clean Development Mechanism' (2008) 20 *Georgetown International Environmental Law Review* 704.

Under the CDM rules, as stated earlier, the host country's DNA has the prerogative to confirm whether a CDM project contributes in achieving sustainable development. To fulfill this task, the DNA evaluates projects against a set of pre-defined national sustainable development criteria in order to identify the social, economic and environmental benefits of the project. However, in most countries the sustainable development criteria are vague and not stringently applied.⁴² The absence of an operational universally accepted notion of sustainable development and the lack of support to developing countries for the creation of appropriate criteria and for the development of precise evaluation procedures have led to the approval of projects with limited benefits for sustainability⁴³ as well as problematic impacts on the human rights of people affected by these projects.⁴⁴ Although concerns have been raised about a greater involvement of the CDM Executive Board in defining the project's sustainability dimensions to improve the evaluation, the resistance of some developing countries has hampered such engagement. Thus, currently, host countries continue being the only actors authorized to confirm the sustainability criteria of any CDM project.

In essence, the rules of the mechanism are almost exclusively linked to the issue of achieving a reduction or limitation of GHG emissions as the sole purpose of projects. Article 12.5 of the Kyoto Protocol specifies that emissions reductions are only to be certified if they are additional to any that would occur in the absence of the project activity. However, the additionality criterion as well as the determination of baselines, which determine the emissions that would occur if the CDM project would not be implemented, have been contentious issues for years. In fact, the CDM Executive Board has been frequently criticized for registering non-additional projects that do not reduce emissions compared to what would happen anyway, as well as for not adequately taking into account

emission increases resulting from such projects.⁴⁵ Thus, it has been noted that '[b]y failing to promote net reductions in global emissions, the CDM serves as an insufficient and neutral weapon against climate change'.⁴⁶

In this context where the current CDM system values, validates, monitors and certifies the GHG emission reductions achieved by a project, the contribution to sustainable development as well as the compliance with human rights are neither assessed nor are their failures punished. The international control organs – the CDM Executive Board and the Designated Operational Entities (DOE) – are not mandated to check or note such contribution or compliance, neither during the project design nor during its own operative stage. Thus, the CDM rules provide a monetary value to the GHG emission reductions obtained by the project, but unfortunately they do not guarantee its effective contribution to sustainable development, nor the respect with human rights.

The absence of international sustainable development and human rights standards combined with the philosophy behind the CDM to achieve cheaper emissions reduction in developing countries compared to those that can be achieved in developed countries – has allowed the efforts to mainly focus on achieving cost-efficient reductions and to maximize the generation of CERs.⁴⁷ As Schatz noted, 'the presence of cheap super-pollutant projects allows [developed countries] to satisfy a large share of their Kyoto obligations by investing in a few isolated projects'⁴⁸ that generated a large amounts of CERs. Consequently, as a cheap way to meet their commitments instead of taking domestic actions, developed countries and its industries focused their attention on developing cost-

42 Michael Gillenwater and Stephen Seres, *The Clean Development Mechanism: A Review of the First International Offset Programme* (Arlington: Pew Center on Global Climate Change, 2011).

43 Wilson (n 17) 1029 – 1031.

44 Margit Ammer and others, *Human Rights Performance in EU Climate Policy. The Role of European States in Climate Measures and Access to Justice for Affected Populations. Synthesis Report* (Vienna: Ludwig Boltzmann Institute, Universität Bielefeld, Wuppertal Institute, 2016).

45 Lambert Schneider, *Is the CDM fulfilling its environmental and sustainable development objectives? An evaluation of the CDM and options for improvement* (Berlin: Öko-Institut, 2007).

46 Schatz (n 41) 723.

47 Karen Holm Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development. A Review of the Literature' (2007) 84 *Climate Change* 59.

48 The author refers mainly to reductions by "super-pollutants" (CH₄, N₂O, HFC-23, PFCs, SF₆) gasses than CO₂, which became more popular than renewable energy projects within the CDM system. See Schatz (n 41) 741. See also Michael Wara, 'Is the Global Carbon Market Working?' (2007) 445 *Nature* 595.

efficient emission reduction projects rather than those that promote sustainability and respect for human rights.⁴⁹

As mentioned above, several CDM projects have caused significant negative impacts on the environment and local populations, affecting the enjoyment of their human rights and leaving them with negative and frustrating experiences.⁵⁰ Moreover, these projects usually affect the most vulnerable people, the poorest and those who have little political power. Besides affecting the quality of life of local communities and indigenous peoples, CDM projects have also been the direct or indirect cause of displacement, social conflicts and repressions that have resulted in human rights violations affecting, among others, the right to life, health, safety and physical and psychological integrity.⁵¹ To name just a few – aside from the Barro Blanco project discussed in more detail below – CDM projects which have resulted in particular concerns from a human rights perspective: the Kwale-Okpai gas recovery project (CDM No. 0553) in Nigeria; the Bujagali dam (CDM No. 4217) in Uganda; the Olkaria geothermal project (CDM No. 8646) in Kenya; the Santa Rita hydro project (CDM No. 9713) in Guatemala; the Sasan coal power project (CDM No. 3690) in India; the JK Papermill afforestation project (CDM No. 4531) in India.⁵²

Such human rights infringements have been confirmed by the agencies responsible for promoting and protecting human rights. For example, a report of the

Inter-American Commission on Human Rights confirmed that human rights violations occurred in the project area of the Bajo Aguán CDM Project in Honduras.⁵³ However, these facts are neither registered in the PDD drafted by the DOE - which must describe the project activity in detail, the environmental impacts as well as the monitoring plan, and summarize the submitted stakeholders' comments⁵⁴ - nor in their validation or verification reports. Even worse, in some cases the CDM Executive Board has been aware of this situation but it has so far not intervened by arguing a lack of mandate to investigate human rights abuses linked to projects. As a result, it has approved the registration of projects even where such violations were evident.⁵⁵

The lack of remedies in the CDM for people that have been or are likely to be adversely affected by a CDM project prevents those affected to request a review, block or withdrawal of approval of a registered project until the facts have been clarified. The only procedure approved by the CDM Executive Board to withdraw the approval of a CDM project leaves the final decision to the government of the host country.⁵⁶ Nevertheless, as it is evident in the case of the Barro Blanco project, even when irregularities or human rights violations are obvious such decision may not be taken by governments. Although in 2010 state parties at the UNFCCC emphasized that they should fully respect human rights in all their climate change actions,⁵⁷ little progress has been made in the operationalization of this recognition to date under the CDM. In this sense,

49 Sebastian Thomas, Paul Dargusch and Andrew Griffiths, 'The Drivers and Outcomes of the Clean Development Mechanism in China' (2011) 21 *Environmental Policy and Governance* 223.

50 Christina Voigt, 'The Deadlock of the Clean Development Mechanism: Caught between Sustainability, Environmental Integrity and Economic Efficiency' in Benjamin Richardson and others (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (1st edn, Edward Elgar Publishing 2009); Steffen Böhm and Siddhartha Dabhi (eds.), *Upsetting The Offset: The Political Economy of Carbon Markets* (Mayflybooks 2009).

51 Rosa Fernández, 'The Flexible Mechanisms to Combat Climate Change: A Critical View of Their Legitimacy' (2011) 2 *Revista Catalana de Dret Ambiental* 1; Damilola S. Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (1st edn, Cambridge University Press 2016) 9.

52 See, among others, Ammer (n 44), and report and examples cited therein.

53 Inter-American Commission on Human Rights, 'Preliminary Observations of the Inter-American Commission on Human Rights on Its Visit to Honduras' (Honduras, 15 – 18 May 2010) OEA/SerL/V/II Doc 68; See also FIDH and others, Honduras. Human Rights Violations in Bajo Aguán (Honduras, FIDH and others, 2011).

54 UNFCCC (n 34).

55 Carbon Market Watch, 'The Mandate to Protect Human Rights in the CDM' (4 July 2011) <<http://carbonmarketwatch.org/the-mandate-to-protect-human-rights-in-the-cdm-newsletter-17/>> accessed 1 February 2016.

56 CDM Executive Board, 'Procedure: Process for dealing with letters from DNAs that withdraw approval/authorization. Version 01.0' UN Doc. CDM-EB76-A12-PROC.

57 UNFCCC (n 7).

one of the most relevant outcomes of the Paris Agreement was the inclusion of human rights considerations. The preamble of the agreement states that ‘Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights’.⁵⁸ Nevertheless, the absence of specifications on concrete measures regarding the protection of human rights in climate change policies still limits the impact of such acknowledgement.⁵⁹

In relation to development banks, when assessing the environmental and socio-economic impacts of prospective CDM projects they usually apply their own safeguard policies and codes of conduct, strengthened in recent decades.⁶⁰ Nevertheless, those safeguards do not necessarily meet human rights standards and thus are insufficient to ensure that human rights are fully respected during the development and implementation of CDM projects supported by the development banks. As a result it has been claimed that the scope of human rights obligations should be extended to their conduct and that the ‘non-compliance with such obligations could generate responsibility for a breach of human rights law to their home State’.⁶¹

Although each bank develops its individual environmental and social policies and procedures, there are certain similarities between them. For instance, Turner notes that since 1989 most of the MDBs have introduced Environmental Assessments and all of them contain provisions that require public participation within their policies. However, as the author highlights, ‘operational policies and procedures providing environmental and social safeguards [...] do not necessarily lead to outcomes whereby the environment is adequately protected’.⁶² A number of national development banks, for example the Netherlands Development Finance Company (FMO) and the German Investment Corporation (DEG), apply a set of environmental and social guidelines as drafted by the 2012 International Finance Corporation (IFC) in their Environmental and Social Performance Standards⁶³ by virtue of being members of the Equator Principles framework.⁶⁴ These guidelines include an obligation to avoid negative environmental and social impacts, and when avoidance is not possible, to minimize and mitigate adverse project impacts on the environment and the affected people. Nevertheless, as discussed later in relation to the Barro Blanco CDM project, despite the existence of safeguards several CDM projects financed by development banks have resulted in adverse social and environmental impacts which pose a serious threat to or even violate the human rights of the people affected by the project.⁶⁵

Furthermore, even though most development banks now incorporate public participation into their operational standards, this has not always ensured the effective and opportune participation of stakeholders and people involved, neither during the design of the project nor during its implementation. In the case of the CDM, the mechanism’s rules require the development of public consultation processes with all relevant stakeholders at local and global levels.⁶⁶ However, these rules do not contain further specifications on how such consultations should be developed, nor ensure the active participation of

58 UNFCCC (n 8).

59 Benoit Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6 *Climate Law* 109.

60 For example: Asian Development Bank, ‘Safeguard Policy Statement’ (2009) <www.adb.org/documents/safeguard-policy-statement> accessed 29 February 2016; African Development Bank Group, ‘African Development Bank Group’s Integrated Safeguards System’ (2013) <www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System_-_Policy_Statement_and_Operational_Safeguards.pdf> accessed 29 February 2016; Inter-American Development Bank, ‘Environmental and Social Safeguards’ (2016) <www.iadb.org/en/insitutional-reforms/better-environmental-and-social-safeguards,1830.html> accessed 29 February 2016; WB, ‘Review and Update of the World Bank’s Safeguard Policies Environmental and Social Framework (Proposed Third Draft)’ (2016) <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/board_paper_for_es_framework_third_draft_for_disclosure_august_4_2016.pdf> accessed 15 October 2016.

61 Rightingfinance, ‘National Development Banks and Human Rights’ (20 August 2015) <www.rightingfinance.org/?p=1329> accessed 15 October 2016.

62 Turner (n 16) 183.

63 IFC, Performance Standards on Environmental and Social Sustainability (Washington: IFC, 2012).

64 Equator Principles Association, ‘About The Equator Principles’ (*Equator Principles*, 4 June 2013) <www.equator-principles.com> accessed 4 March 2016.

65 See Ammer (n 44) 24 – 55.

66 UNFCCC (n 34).

stakeholders in the design and implementation of projects. Experience shows that lack of clarity of the criteria for stakeholder participation defined by developing countries has led to the development of non-transparent, rudimentary, insufficient and poorly documented consultation processes.⁶⁷ As a result, those affected often do not have the opportunity to receive, analyze and understand project information and are consequently excluded from the decision-making process.⁶⁸ Thus, there is evidence that the inefficient consultation processes in the CDM have resulted in the forced displacement and marginalization of local actors and indigenous peoples, ignoring their needs or requirements and without providing them opportunities to properly discuss measures to compensate for damages caused by the projects.⁶⁹

The current CDM system does not incorporate a judicial instance of appeal or any other mechanism to register complaints against a project. People negatively affected by a CDM project, funded totally or partially by development banks, very often use independent accountability mechanisms established by the banks in order to gain access to justice. The WB's Complaints Mechanism, the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank and FMO and DEG's Joint Independent Complaint Mechanism, among others, are examples of accountability mechanisms where groups of persons or affected communities in borrowing countries can submit complaints against (potential) non-compliance with the bank's operational policies.⁷⁰ These mechanisms, however, have been criticized because of their limited effectiveness to

protect affected people, as well as for their lack of real authority. As Turner notes, 'there have been rare instances where financing has been withdrawn as a result of problems exposed, in part, through the work of these mechanisms'.⁷¹

Nanwani indicates a series of obstacles or barriers which do not allow civil society members to file complaints in bank operations. These are: (1) misinformation or lack of information on the projects affecting the peoples and information on the resources available against the bank to file their grievances; (2) impediments or restrictions in procedural matters in the presentation of claims including who can file a claim, the language of the claim, the modes of communication, the information that needs to be provided, the time bars in filing claims, and the costs involved in gathering information and presenting the claim; (3) fear of reprisals or intimidation as this is an inherent risk that claimants have when presenting their grievances before accountability mechanisms; (4) limited inclusion of claimants in the accountability procedures, being left out during the investigation process until the outcome is reached; (5) the undermining of the credibility and independence of the accountability mechanism and the panel members; (6) absence of monitoring of the outcomes resulting from the investigation of their claims; (7) inability in obtaining legal redress.⁷² Consequently, and because of the current shortcomings of such mechanisms, in many cases host countries, developers and investors are able to continue with a potentially devastating project without the necessity to address human rights risk or infringements.⁷³ Worse still, as Fox points out 'several claimants [have] to face a political backlash from their governments, including human rights violations in some cases'.⁷⁴

In this scenario, one of the categories of CDM projects heavily criticized in recent years because of its negative impacts is the hydropower sector. As Alyssa Johl and

67 Wolfgang Sterk and others, *Further Development of the Project-Based Mechanisms in a Post-2012 Regime* (Berlin: Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), 2009).

68 See for example, Carbon Market Watch, 'Campaigns: Santa Rita – Large Hydro Power Project, Guatemala' <<http://carbonmarketwatch.org/category/santa-rita-large-hydro-power-project-guatemala>> accessed 1 February 2016.

69 Wilson (n 17) 1029.

70 See Eisuke Suzuki and Suresh Nanwani, 'Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks' (2005) 27 *Michigan Journal of International Law* 177; Richard Bissell and Suresh Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges' (2009) 6 *Manchester Journal of International Economic Law* 154.

71 Turner (n 15) 171.

72 Suresh Nanwani, 'Holding Multilateral Development Banks to Account: Gateways and Barriers' (2008) 10 *International Community Law Review* 210.

73 For some examples of the World Bank's Complaints Mechanism see Dana Clark, Jonathan Fox and Kay Treacle (eds) *Demanding Accountability. Civil-Society claims and the World Bank Inspection Panel* (1st edn, Rowman & Littlefield Publishers Inc. 2003).

74 *ibid* xix.

Yves Lador argue, ‘climate finance for dams – most notably under the Clean Development Mechanism (CDM) – has failed to safeguard the rights of affected people and communities’.⁷⁵ The Barro Blanco hydroelectric dam is exemplary in this regard and illustrates how a CDM project funded by different development banks has affected the human rights of a particularly vulnerable community. This case is explained in the following section.

4 THE BARRO BLANCO CDM PROJECT: A MIRROR OF THE COMPLEX RELATIONSHIP BETWEEN CLIMATE FINANCE AND HUMAN RIGHTS?

As mentioned above, the construction of the Barro Blanco hydroelectric dam in Western Panama is symptomatic for the complex interlinkage between the often-times competing fields of resource development, environmental protection, and the rights of indigenous peoples. It is also exemplary for the development policies of a state seeking to advance on the world market and continue its economic growth. Thus, Panama’s economy has been growing consistently, resulting in an increased energy demand. In response thereto, the country’s government has heavily promoted hydroelectric projects in order to satisfy its energy needs for more than ten years,⁷⁶ with the socio-environmental impacts of such development merely constituting a second-tier priority.

The origins of the dispute surrounding the Barro Blanco project, however, reach back further. Since the 1970s there have been plans to generate electricity on

the river Tabasará, running through Chiriquí province. A first project (Tabasará I, 200 MW) was proposed as early as 1973, and eventually, after being met with decade-long significant resistance, was cancelled. In 1997, a new consortium was created to develop Tabasará I and II which, again, were never constructed after the Supreme Court of Panama suspended the project in 2000⁷⁷ in light of the project having failed to engage in consultations and obtain the assent of the affected indigenous communities.⁷⁸

It was not until a passage in the local law was amended – repealing certain requirements relating to the participation and acquiescence which was to be obtained from indigenous communities⁷⁹ – that a new concession to construct a hydroelectric power plant on the river Tabasará, Barro Blanco (28.84 MW) was awarded to Generadora del Istmo, S.A. (GENISA) in 2007. It is worth mentioning that GENISA was created under Panamanian law in 2006 especially for the purpose of developing, building and operating the Barro Blanco power plant.⁸⁰ The project, once completed, will have significant impact on an Annex area to the indigenous *comarca* Ngäbe-Buglé⁸¹ (*i.e.*

75 Alyssa Johl and Yves Lador, *Human Rights-Based Approach to Climate Finance* (Geneva: Friedrich Ebert Stiftung, 2012) 22.

76 Jennifer Kennedy, ‘Damming the Ngäbe: Aftermath of an AES Power Project in Panama’ (*CorpWatch*, 15 October 2012) <www.corpwatch.org/article.php?id=15788> accessed 6 March 2016; US Energy Information Administration, ‘Panama’s Key Energy Statistics’ (March 2016) <www.eia.gov/beta/international/country.cfm?iso=PAN> accessed 6 June 2016.

77 *Demanda Contencioso Administrativa de Nulidad, interpuesta por el Licenciado Jacinto A. Cárdenas M., en su propio nombre y representación, para que se declare nula, por ilegal, la Resolución N° A-048-2000 del primero de febrero de 2000, dictada por la Autoridad Nacional Del Ambiente, y para que se hagan otras declaraciones* Expediente 665-00 Panama Supreme Court (2000).

78 See Britnae Purdy, ‘Ignoring FPIC Leads to 30 Years of Protest, Violence, and Profit-Loss in Panama’ (First Peoples Worldwide, 2013) <<http://firstpeoples.org/wp/ignoring-fpic-leads-to-30-years-of-protest-violence-and-profit-loss-in-panama/>> accessed 6 March 2016; ACD, ‘Commentaries on the Validation of the Hydroelectric Project Barro Blanco, Republic of Panama’ (2013) <http://carbonmarketwatch.org/wp-content/uploads/2013/06/Comments_Osvaldo-Jordan_July-2009.pdf> accessed 6 June 2015.

79 Julie Velásquez Runk, ‘Indigenous Land and Environmental Conflicts in Panama: Neoliberal Multiculturalism, Changing Legislation, and Human Rights’ (2012) 11 *Journal of Latin American Geography* 21.

80 GENISA, *Project Management Report, Environmental and Social Summary Report* (Panama: GENISA, 2011) 9.

81 *Comarcas* are indigenous administrative units of the government, where Panama’s indigenous peoples enjoy varying degrees of self-government. See in more detail, Luis Rodríguez-Piñero Royo, ‘Political Participation Systems Applicable to Indigenous Peoples’ in Marc Weller and Katherine Nobbs (eds), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press 2010) 331, 332.

indigenous territory) as the power plant's reservoir will flood 6.7 ha of the territory, including houses and historical and cultural artefacts (petroglyphs). Of the four indigenous communities which are located in the project impact area (Cogle, Quebrada Caña, Quiabda (Kiad) and Nuevo Palomar), the latter three are at risk of losing parts of their land/riverbank. Though there are no precise numbers available, it is estimated that between 500 and 1000 people will be affected.⁸² The impacts on the communities range from impeded access to and use of resources, threats to their cultural survival (in particular in connection with their spiritual practices ('Mama Tata')), to displacement. Due to the lack of consent by the affected communities to the project's approval and implementation, forced expropriations of territory under the collective ownership of the Ngäbe-Buglé will also be a consequence.

The Barro Blanco project was registered as a CDM project by the CDM Executive Board under the Kyoto Protocol. In June 2011, Barro Blanco was approved as a CDM project at the CDM EB Meeting 61. The DOE for the validation report was AENOR, the Spanish Association for Standardisation and Certification. It constitutes a category 1 project ('renewable source energy industries'). In total, it is estimated that a total reduction of emissions of 1,405,622t CO₂ will be achieved.⁸³

As of March 2016, construction was approximately 95% finished, continuously being met with protests and blockades by the affected communities after the temporary suspension announced by the environmental authority on 9 February 2015 was lifted. In May 2016 it was reported that the floodgates of the dam were opened, however, two weeks later the flooding was suspended again. In August 2016 a new agreement on the project was prepared and finally signed by the authorities of the region and the government. Nevertheless, the Ngäbe-Buglé General Congress did not endorse it. In October 2016 meetings among representatives of the indigenous community and government authorities were taking place in order to elaborate a new "Barro Blanco Agreement" which

should meet the community requirements to be approved. Up to the time of writing this paper, the negotiations on the new agreements were still in progress.⁸⁴

Aside from national indigenous mobilization, Barro Blanco has also been in the limelight of international campaigns. As mentioned above, the case stands exemplary for the effects which the implementation of international development and climate policies can have. Conduct by multiple parties falling short of international standards and the insufficient application of safeguard policies have resulted in severe human rights impacts for the local indigenous population.⁸⁵

Despite ongoing protests by the affected communities multiple foreign and international actors have played a role in the authorization and financing of the project. In this sense, these protests also did not stop two European development banks (DEG and FMO) and the Central American Bank for Economic Integration (CABEI)⁸⁶ from approving the project's financing

82 Gonzalo Castro de la Mata, *Peritaje al Proyecto Hidroeléctrico Barro Blanco Resultados del Diagnóstico Rural Participativo* (PNUD, 2013), para 4.

83 See CDM – Executive Board (2010) *CDM PDD Barro Blanco Version 03*, 8.

84 CIEL, 'Flooding begins on UN approved hydro dam as indigenous defenders are forcefully removed' (25 May 2016) <<https://intercontinentalcry.org/barro-blanco-flooding-begins-un-approved-hydro-dam-indigenous-defenders-forcefully-removed/>> accessed 8 August 2016; Pierre-Jean Brasier, 'Barro Blanco: flooding suspended, international lenders pressured to act' (14 July 2016) <<https://carbonmarketwatch.org/barro-blanco-flooding-suspended-international-lenders-pressured-to-act/>> accessed 15 July 2016; Ohigginis Arcia Jaramillo 'Congress rejects Barro Blanco agreement' *La Prensa* (Panama, 18 September 2016) <www.prensa.com/in_english/Gobierno-dispuesto-dialogo_21_4578502108.html> accessed 19 October 2016; Ohigginis Arcia Jaramillo 'Reinician conversaciones sobre represa Barro Blanco' *La Prensa* (Panama, 8 October 2016) <www.prensa.com/sociedad/Reinician-conversaciones-represa-Barro-Blanco_0_4592540751.html> accessed 19 October 2016.

85 See James Anaya, *La situación de los derechos de los pueblos indígenas en Panamá* (May 2014) UN Doc. A/HRC/27/52/Add.1; Stephen Gibbons, Maartje van Putten and Michael Windfuhr, FMO-DEG Independent Complaints Mechanism, *Barro Blanco Hydroelectric Project Panama - Panel Report No. 1* (May 2015).

86 The estimated project costs of Barro Blanco amount to USD 78,316,800. See 'Barro Blanco Complaint - Annex 1: Analysis of Policies and Procedures' (5 May 2014) <<http://grievancemechanisms.org/attachments/BarroBlancocomplaintanalysisofpoliciesandprocedures.pdf>> accessed 15 July 2016.

request. The latter replaced funding originally sought through the European Investment Bank (EIB), this loan application however withdrawn by GENISA after learning that the EIB planned to visit the affected area after a complaint registered with the EIB Complaint Mechanism.⁸⁷

Precisely the authorization process – at the domestic, institutional and international level – has been at the root of the ensuing human rights concerns. Thus, a central issue in this regard has been the failure of the project operator, governmental authorities and the development banks to obtain the consent of the affected communities or ensure their adequate participation/consultation in the course of the project's approval and implementation.

Even though the manner in which this consultation process was to take place is regulated in detail by Panama's domestic law and not by banks' safeguard policies, the overall objective of the standard both under international law as well as within the applicable institutional context remains to ensure mutually acceptable solutions for both sides.⁸⁸ The standard against which this must be measured is the principle of free, prior and informed consent (FPIC), as incorporated into a number of international instruments and recognized by international courts. As it is currently accepted that consent in the context of resource/development activities does not amount to a veto power, but entails that affected indigenous peoples should be allowed to genuinely influence the decision-making process, it is argued that substantially the use of 'free, prior and informed consultation' in the 2006 version of the IFC Performance Standards amounts to the same.⁸⁹ While CABEL does not officially indicate whether it applies any policies, both

FMO and DEG apply the IFC Performance Standards, with the 2006 version being applicable to the project (which was approved in August 2011).⁹⁰

Particularly relevant in the context of community participation are Performance Standard 1 (Social and Environmental Assessment and Management System) and Performance Standard 7 (Indigenous Peoples). Performance Standard 1 states in this regard that '[i]n addition to meeting the requirements under the Performance Standards, clients must comply with applicable national laws, including those laws implementing host country obligations under international law'.⁹¹ This entails *inter alia* respecting indigenous representative structures and indigenous traditions in the consultation process, ensuring good faith negotiations, and the requirement that the consultation process occurred in a culturally appropriate manner.⁹² However, in the case at hand, the consultation process organized by the project operator early 2008 was far from culturally appropriate, *i.e.* it was conducted outside of the indigenous territory, was difficult to reach for the affected communities (requiring a several hour foot-march), and was poorly advertised. The few members of the community which did gain information of the meeting being held and attempted to attend were at first not let into the building, and then only few were allowed to enter.⁹³ No further consultations in the course of the Environmental Impact Assessment (EIA) proceedings took place with the affected communities at this stage. This consultation process was approved by Panama's environmental authority (ANAM) as part of the mandatory environmental impact assessment three months later. This was not only prior to any agreement reached with the communities but occurred without any further investigation.

87 See 'Written Questions to EIB Director Tamsyn Barton - Hearing on 21 January 2013 and EIB Complaint Mechanism, Barro Blanco Hydroelectric, Panama' (21 January 2013), <www.eib.org/about/accountability/complaints/cases/barro-blanco-hydroelectric-panama.htm> accessed March 6, 2016.

88 See James Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (HRC, 2009). U.N. Doc. A/HRC/12/34.

89 See Jane A Hofbauer, *Sovereignty in the Exercise of the Right to Self-Determination* (1st edn, Brill 2016) 257ff.

90 IFC, International Finance Corporation's Performance Standards on Social & Environmental Sustainability (Washington: IFC, 2006).

91 *ibid* para 3.

92 See *Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs)*, Inter-Am.Ct.H.R., 28 November 2007, para 133.

93 Counter Balance, *Dire Straits - EIB Investments in Panama and Their Impacts on Indigenous Communities Worker and the Environment* (Belgium: 2011); Richard Arghiris, 'In Defense of the Rio Tabasará' (*Intercontinental Cry*, 15 July 2011) <<https://intercontinentalcry.org/in-defence-of-the-rio-tabasara/>> accessed 15 October 2016.

By the time the two European development banks, FMO and DEG, approved the project in August 2011, there were numerous indications which should have prompted these institutions to refuse approval in line with their due diligence obligation to undertake appropriate assessments to evaluate, prevent or minimize harm from occurring.⁹⁴ Not only was a domestic lawsuit pending regarding the legitimacy of the conducted EIA, but EIB – from which GENISA originally had sought financing – had already received complaints by involved NGOs, leading to its decision to wanting to visit the affected communities. It was also known to the lenders that the legitimacy of the agreement reached by GENISA with the (former) Cacique and the Regional Congress had been challenged as it was in contradiction to the *comarca's* publicly available Charter.⁹⁵ Moreover, as the due diligence obligation is fact-dependent,⁹⁶ the well-reported historical resistance to natural resource development projects on the river Tabasará, in connection with the absence of a mutually acceptable agreement with the affected communities weighs particularly heavy.

The incompleteness should have triggered a strong and continuous monitoring process by the international lenders,⁹⁷ proportionate and adequate to the project's risks and impacts. The failure to ensure an adequate participation process is particularly problematic in light of the fact that the stakeholder participation process envisioned under the CDM procedure remained less than effective. However, generally, the CDM approval of the Barro Blanco project appears to have been of secondary importance to the operating partners, and little attention has been paid to ensure adequate information of the affected communities of the significance thereof. Additionally, the lack of remedies under the CDM mechanism against the approval of the Barro Blanco project by the Executive Board, which as mentioned in any event does not possess the mandate to consider human

rights allegations, left the affected communities shut out from the process and without effective means against the Board's decision which had failed to respect their rights.

Moreover, even after ANAM suspended the project in February 2015 in light of the project operator's failure to comply with the mandatory rules on EIAs (in particular with regard to the participation process), the Executive Board's response to this information by local NGOs remained limited to a letter sent to the government of Panama, mentioning the newly adopted procedure⁹⁸ allowing for the DNA to withdraw approval/authorization for the CDM project. The CDM Executive Board, however, did not engage in any separate investigation of the matter and instead pointed out that the forwarded communication 'shall in no case constitute an endorsement by the Board of the content of the communication'.⁹⁹ So far, Panama's DNA has not withdrawn its approval for the CDM project, evidencing once again the little practical consequence attached to this procedure.

In light of this, an independent and effective complaint mechanism established by the funders was quintessential to ensure the access to rights of the affected communities. However, at the time of project approval, neither of the development banks had established such a mechanism. Nevertheless, due to the surmounting pressure by local and international NGOs, the DEG and FMO banks established a joint complaint mechanism in early 2014. At that time, the project was already 90% completed and the communities lived with the constant fear that the dam would be completed and their houses flooded before the complaint had been heard and dealt with. Additionally, a number of difficulties emerged throughout the complaint process, ranging from the fact that it was only established *after* the funding agreement had been signed, thus making the procedure step-for-step dependent on the consent of the project operator¹⁰⁰, to the effect of the outcome being unknown, in particular whether the results would be publicized.

94 IFC (n 90).

95 According to the *comarca's Carta Orgánica Administrativa*, any consent to a project must have been obtained by the Congreso General, which has not been done to date. See Executive Decree 194 of 1999, as amended by Executive Decree 537 (2 June 2010).

96 See OHCHR, *The Corporate Responsibility to Respect Human Rights - An Interpretative Guide* (Geneva: OHCHR, 2012) 4.

97 Gibbons (n 85) para 210.

98 CDM Executive Board (n 56).

99 CDM EB, *Letter from CDM EB Secretariat to Mr. Emilio Sempris (ANAM)* (11 August 2015) INQ-03504.

100 Gibbons (n 85) 4.

After more than a year, the Independent Expert Panel issued a report, finding indications that FMO and DEG had failed to comply with their safeguard policies on a number of different issues.¹⁰¹ However, the outcome of the complaint mechanism has not resulted in any immediate relief for the affected communities. Both FMO and DEG have issued statements that they are eager to continue the project. Although they ‘appreciate’ the findings of the Independent Expert Panel they do not acknowledge them as fundamental issues.¹⁰² Thus, the statements are rather evasive when it comes to concrete and immediate action relating to the concerns of the affected communities. Additionally, their reluctance to reconsider the project in light of the negative human rights impacts was made quite clear in a letter to the government of Panama following the suspension of the project, reminding that such actions ‘may weigh upon future investment decisions, and harm the flow of long-term investments into Panama’.¹⁰³

Overall, the case exemplifies a number of problematic issues which are common to the implementation of CDM projects. Thus, the two crucial weak spots concerning the guarantee of human rights in the context of CDM projects funded by development banks which were outlined in chapter 3 of this article are also apparent in the Barro Blanco case.

The first one is the lacking mandate of the CDM institutions to define clear criteria for sustainable development as well as for stakeholder consultation that, ideally, should be compatible with international

human rights standards on the one hand and the lacking authority to review compliance with and to sanction failure concerning both aspects on the other hand. Although the Panamanian DNA has developed quite a multi-criteria methodology to substantiate the CDM’s sustainable development requirements which include checklists for health and environmental risks as well as socio-economic risk assessment,¹⁰⁴ and the consultation process with affected communities is regulated by Panamanian law, the actual conduct of the EIA as well as the consultation process in the context of the Barro Blanco dam showed serious deficiencies which failed to respect the rights of affected communities, such as the right to FPIC.

The second issue concerns the role of the banks involved in the project. Except for the fact that the bank’s institutional safeguards do not necessarily have to be in compliance with human rights standards – which is a problematic point in itself –, in this case the banks failed to comply with their own policies in a number of points as the Independent Expert Panel of the joint FMO/DEG complaint mechanism pointed out in its report. This particularly extends to their due diligence obligations arising in the context of the project’s approval for financing. In this sense, the Barro Blanco case exemplifies in a clear manner how a lack of due diligence exercised at the initial stages of a development project and a failure to undertake culturally appropriate consultations can exacerbate existing conflicts and prevent mutually acceptable agreements from being reached at a later stage.

Additionally, although complaint mechanisms established by the banks are important to ensure the access to justice of the affected communities, the outcome of the process is very often unclear as the findings are mostly non-binding. This is also the case for Barro Blanco. It is up to the FMO/DEG management to decide on the effects of the results of the mechanism. Until now, however, no apparent positive effects for the affected communities can be ascertained.

101 FMO/KFW-DEG (2015) ‘DEG and FMO Management Response to the Independent Expert Panel’s Compliance Review Report regarding the Complaint on the Investment in the Barro Blanco Hydroelectric Project’ <<https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/Management-response.pdf>> accessed 15 October 2016; Stellungnahme der DEG Berichterstattung “Report Mainz” am 23.06.2015 <https://www.deginvest.de/DEG-Dokumente/Die-DEG/Verantwortung/20150624_Stellungnahme_DEG_ReportMainz.pdf> accessed 15 October 2016.

102 FMO/KFW-DEG, DEG and FMO Management Response (n 101).

103 Letter signed by FMO and DEG to Isabel St. Malo de Alvarado, Vice-president and Minister of External Affairs, Republic of Panama on ‘GENISA Temporary Suspension’, 25 February 2015 [on file with the authors].

104 See Sterk and others (n 67).

5 CONCLUSIONS

This paper set out to argue that the complex national and international legal and political context of climate change projects leave people negatively affected by the project susceptible to human rights violations. The case of Barro Blanco is particularly revealing in this regard and points to several dimensions that are crucial.

The complexities of the multi-layered system that CDM projects such as Barro Blanco are embedded in exacerbates the clear assignment of responsibilities and the effective access to remedies. Besides, it requires significant knowledge to understand the obligations decisive actors, such as development banks, have in this process. Affected communities will therefore often struggle without outside assistance to identify the appropriate processes and means to protect their rights and interests.

Climate projects are implemented in a specific local political context often shaped by historical conflicts and national political and economic interests that are disadvantageous for the rights of the project affected people in the first place. Thus, international institutions (development banks, CDM Executive Board) intervene in a specific national context which is traditionally seen as a matter of domestic affairs. This enables host states to fend off criticism by classifying them as interference into domestic issues and lenders to shift the (political) responsibility for adverse human rights impacts to the government of these states.

Human rights standards are not adequately taken into account in the current climate regime. The CDM system does not provide safeguards to guarantee the protection of human rights or a (quasi-)judicial instance of appeal. Barro Blanco was registered as a CDM project despite ongoing protests by the affected communities as there were no effective means against the CDM Board's decision.

This enhances the role of multilateral and bilateral development banks when it comes to guarantee the rights of project affected people. The adoption of

safeguards and the establishment of independent grievance mechanisms are essential in this regard. However, as Barro Blanco demonstrates, the existence of safeguards and independent complaint mechanisms is not enough when it comes to effectively protecting the rights of project affected communities as it, on the one hand, still allows states to seek for alternative funds and evade banks which have adopted such standards and mechanisms such as the EIB. On the other hand, there is still room for improvement to increase the safeguards and complaint mechanism effectiveness including e.g. by making complaint mechanisms more accessible at an earlier stage in the course of projects or by creating mechanisms to enforce its conclusions giving them the capacity to adopt, at least, precautionary measures to prevent future human rights violations.

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