

To: Melissa Blue Sky, *Project Attorney*, People, Land & Resources Program Center for International Environmental Law

From: Neda Movahed, *Junior Attorney*, People, Land & Resources Program: Center for International Environmental Law

Re: Legality of Barro Blanco Dam in Panama

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Question Presented

Did the Panamanian government violate international law by approving the Barro Blanco hydroelectric dam project? Had the proper steps been taken before allowing construction begin? If necessary, how did the government account for any potential impacts on the Ngöbe-Buglé indigenous peoples who live near the dam?

Brief Answer

Yes, the Panamanian government did violate international law by approving the Barro Blanco dam. The proper steps for prior consent from indigenous groups had not been taken before allowing construction to begin, which is mandated by international law. Additionally, since Barro Blanco is a registered Clean Development Mechanism project, it must involve all stakeholders in the decision making process. The developers of this project failed to properly consult and gain consent from the Ngöbe-Buglé indigenous communities whose livelihoods will be devastated by the project. The government did not adequately account for the impacts on the Ngöbe-Buglé in the Environmental Impact study done on Barro Blanco. The Panamanian government should not have approved the project without proper consent from the Ngöbe-Buglé as it violates their basic rights to self-determination. Moreover, Indigenous groups are given special attention within Panama's Constitution and the approval of Barro Blanco fails to respect the stated protections.

Background/Statement of the Facts

Due to the little prospect for tapping natural gas or geothermal energy, Panama has turned to hydroelectric dams as a new source of energy.¹ Most notably is the Barro Blanco dam which has been under construction since 2012 in western Panama.¹ The Panamanian company, Generadora del Istmo S.A., known as GENISA, is operating Barro Blanco and has presented it as an opportunity to bring electricity and development to a rural area of Panama.¹ Barro Blanco will be a roller-compacted concrete gravity dam which will have a maximum height of 44.91 m and a maximum reservoir surface of 2.58 km², but included is 0.69km² hectares are currently occupied by the Tabasara River and 1.89 km² would be inundated.² If the dam is built as planned, the installed capacity will be 28.84 megawatts.² The reservoir which the dam will create extends into a *cormarca* indigenous territory of the Ngöbe-Buglé people.³ A *comarca* is a large Indigenous territory protected by Panamanian law. The Ngöbe-Buglé number around 285,000 people and constitute 69% of all Indigenous people in Panama, comprising 12% of the country's total population.⁴ The Ngöbe-Buglé remain the poorest of the poor in Panama despite substantial economic progress and various governmental programs attempting to improve their livelihoods.⁴

The UN Development Programme (UNDP) conducted an assessment report on the impacts of Barro Blanco, confirming that the dam will “flood homes and religious, historical and cultural sites in the Ngöbe-Buglé territory”⁶. The report documented both the social and environmental impacts of the project, including that the dam will convert the flowing Tabasará

¹ Nick Swyter, *Panama: Dam Promises or Dam Lies?*, Pulitzer Center on Crisis Reporting, <http://pulitzercenter.org/reporting/central-america-panama-ng%C3%A4be-bugl%C3%A9-indigenous-tribe-hydroelectric-dam-tabasar%C3%A1-river-company-genisa-barro-blanco>

² Barro Blanco, Genisa, Technical Data, <http://www.genisa.com.pa/en/barro-blanco/>

³ Nick Swyter, *The Ngäbe Buglé: Panama's Vocal Minority*, Pulitzer Center on Crisis Reporting, <http://pulitzercenter.org/projects/central-america-panama-ng%C3%A4be-bugl%C3%A9-barro-blanco-hydroelectric-dam-tabasar%C3%A1-river-infrastructure-sustainable>

⁴ Rogelio Cansari & Quentin Gausset, *Along the Road: The Ngäbe-Buglé Struggle to Protect Environmental Resources in Panama*, 4 The International Indigenous Policy Journal (2013).

River into a stagnant lake ecosystem, affecting the Ngöbe-Buglé diet and means of subsistence.⁶ These projected impacts on the Ngöbe-Buglé have caused the dam to become controversial, leading to a strong resistance movement. Last year, the Ngöbe-Buglé obstructed the main roadway in Peru in protest of the hydroelectric project and mining occurring in their territory.³ These protests were somewhat successful as they stopped the traffic for a week; however the Panamanian authorities retaliated violently leading to the deaths of three protestors and over one hundred wounded.³ Protests stemmed from the refusal of Panamanian legislators to include Article 5 of the proposed Law 415, which had previously been agreed upon. This law would prohibit all mining and hydroelectric concessions within the region of the Ngöbe-Buglé.⁵

Since the protests, the government and the Ngöbe-Buglé have undergone peace negotiations. A compromise agreement between the two parties has resulted in the passing of Special Law 11, which has been in force since April 2012. The new law has been a partial success for the indigenous community as it cancels mining concessions and prohibits future mining. The law states that for future hydroelectric projects planned in the region, indigenous authorities must approve and it must pass a referendum by the area's residents.⁵ In order to attempt to pay for environmental and social impacts, the Ngöbe-Buglé people will receive 5% of any future projects' annual billing.⁵ However, the law allows the contentious Barro Blanco dam to continue and does not place any restrictions on it.⁵

The Ngöbe-Buglé have also taken their case to the global level, seeking recognition from international bodies designated to hear complaints. In March 2012, a petition was brought to the Inter-American Commission on Human Rights (IACHR), demanding that the Panamanian government recognize the right of Panama's Indigenous peoples to collective ownership of

⁵ *Barro Blanco- Large Hydro Project, Panama*, Carbon Market Watch, <http://carbonmarketwatch.org/campaigns-issues/barro-blanco-large-hydro-project-panama/>

ancestral lands.⁶ The petitioners included indigenous representatives and non-governmental organizations. They demonstrated the state's failure to ensure the protection of their property ownership rights by pointing out illegal logging, the operation of Barro Blanco, and the settlement of private citizens on their *comarcas*.⁶ Additionally, the petitioners argued that the state failed to ensure prior and informed consent to indigenous communities before titling their lands to private parties.

In June 2013, civil society organizations urged James Anaya, the United Nations Special Rapporteur on the Rights of Indigenous Peoples, to conduct a formal investigation of potential human rights impacts of Barro Blanco.⁷ This project has been especially contentious since it is registered under the Clean Development Mechanism (CDM), a carbon offsetting scheme established under the Kyoto Protocol.⁷ To this day, Barro Blanco remains a contentious issue as it does not have local support from the indigenous communities but is under construction.

Applicable Statutes or Regulations

United Nations Declaration on the Rights of Indigenous Peoples- Resolution 61/295⁸

Article 3: Indigenous peoples have the right to self-determination...

Article 8- 2): States shall provide effective mechanisms for prevention of, and redress for...

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation...

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights...

Article 29- 1): Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources...

⁶ Rachel Curtis, *Right of Indigenous Peoples in Panama to Collective Ownership of Land*, The Center for Human Rights and Humanitarian Law, <http://hrbrief.org/2012/03/right-of-indigenous-peoples-in-panama-to-collective-ownership-of-lands/>

⁷ *UN Asked to Investigate Human Rights Violations Caused by Panama's Barro Blanco Dam*, EarthJustice- Press Release, <http://earthjustice.org/news/press/2013/un-asked-to-investigate-human-rights-violations-caused-by-panama-s-barro-blanco-dam>.

⁸ *UN Declaration on the Rights on Indigenous Peoples, Resolution 61/295*, United Nations, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Article 32- 1): Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

American Convention on Human Rights- "Pact of San Jose, Costa Rica" (B-32)⁹

Article 7- 1): Every person has the right to personal liberty and security.

Article 15- 1): The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society

Article 21- 1): Everyone has the right to the use and enjoyment of his property... 2) No one shall be deprived of his property except upon payment of just compensation...

Article 24- All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Clean Development Mechanism- Rules, Practice & Procedures¹⁰

Stakeholders: Stakeholders must be consulted with during the planning of a CDM project activity. This is a requirement for validation.

"Stakeholders" means the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity (3/CMP.1, Annex, paragraph 1(e)).

Convention on Biological Diversity¹¹

Article 8(j): Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities

International Labour Organisation, Convention No. 169¹²

Article 4- 1) Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Article 7- 1) The peoples concerned shall have the right to decide their own priorities for the process of development...they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly...;3) Governments shall...assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be

⁹ *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)*, Organization of American States, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

¹⁰ *Stakeholders*, Clean Development Mechanism Rules, Practices, and Procedures, <http://cdmrulebook.org/72>

¹¹ *Article 8(j) - Traditional Knowledge Innovations and Practices*, Convention on Biological Diversity, <http://www.cbd.int/traditional/http://www.cbd.int/traditional/>

¹² *C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, International Labour Organization, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169

considered as fundamental criteria for the implementation of these activities; 4) Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 14- 1) The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized.

Article 15- 1) The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

Article 16- 2) Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.

Constitution of the Republic of Panama¹³

Article 124: The State shall give special attention to rural and indigenous communities in order to promote their economic, social and political aspects of national life.

Article 127: The State shall guarantee indigenous communities the necessary land and collective ownership rights to achieve their economic and social welfare. The law shall regulate the routines to be followed to achieve this purpose and appropriate boundaries within which private ownership of land is prohibited.

Analysis and Discussion

Yes, Panama violated international law when approving the Barro Blanco Dam. This is due to its violation of the UN Declaration on the Rights of Indigenous Peoples, the American Convention on Human Rights, Clean Development Mechanism Rules, Practices, and Procedures, the Convention on Biological Diversity, and the International Labour Organization Convention No. 169. These international legal mechanisms promote the respect of human rights and indigenous self-determination. Although the UN Declaration is non-binding and that Panama has not ratified Convention No. 169, these remain viable international legal norms which Barro Blanco breaches. This next section analyzes the arguments of both the proponents and opponents of the dam.

I. Proponents' Argument:

The proponents of the Barro Blanco dam have namely been the project developer,

¹³ *Constitution of the Republic of Panama*, World Intellectual Property Organization, <http://www.wipo.int/wipolex/en/details.jsp?id=3404>

GENISA and the banks that have loaned money for the project. Two European state-owned banks, the German Investment Corporation (DEG) and the Netherlands Development Finance Company (FMO), along with the Central American Bank for Economic Integration (CBIE) have provided the loans, totaling to 78.3 million US dollars.¹⁴ Their arguments in support of the dam have been focused on the need for development in Panama. GENISA is owned by Panamanian businessmen who support rapid growth in the country in order to raise Panama's development status. Those in favor of the dam emphasize the need for alternative sources of energy, highlighting hydropower as a renewable energy source. GENISA spokesperson, Julio C. Lasso Vaccaro, publically claimed that Barro Blanco will save the nation \$22 million dollars per month in savings for fuel purchases.¹⁵ Additionally, GENISA claims that the dam is in district of Tole and is "100% outside of those protected areas" that the indigenous communities legally own.¹⁵ In order to support development in the areas near the dam, Vaccaro notes that GENISA will give 1% of their profits to the office for rural electrification which can provide electric service to local residents.¹⁵

GENISA is working to promote development within Panama and strives to improve the standard of living for the public, prioritizing growth. This in itself is an argument in favor of building Barro Blanco since development is central for a non-industrial country. In terms of their legal argument, GENISA can argue that the UN Declaration on the Rights of Indigenous Peoples is not a binding mechanism and does not force action by the Panamanian government to get free, prior, informed consent (FPIC) from potentially affected communities. Additionally, proponents can highlight the fact that Panama has not ratified Convention No. 169 under the International

¹⁴ *Generating the Isthmus. Barro Blanco Hydroelectric Project*, Central American Bank for Economic Integration, <http://www.bcie.org/?prj=35&title=Generadora%20del%20Istmo.%20Proyecto%20Hidroel%E9ctrico%20Barro%20Blanco&lang=es>

¹⁵ Don Winner, *Barro Blanco Would Save \$22 Million Per Month On Fuel Expenditure*, Panama Guide, <http://www.panama-guide.com/article.php/20120224162642482> (2012).

Labour Organization (ILO), and are therefore not required to abide by the principles which demand respect for indigenous peoples impacted by projects such as large hydroelectric dams. Consequently, proponents argue that the Barro Blanco dam did not violate international law by failing to obtain proper consent from the Ngöbe-Buglé since they are not legally bound to do so. They also argue that Panama retains ownership of underground resources, even in *comarcas*, and has the the right to authorize large-scale development projects such as hydroelectric dams and mining for the benefit of the whole nation.⁴

The proponents of the dam have a valid argument in saying that the UN Declaration is non-binding as it is only meant to provide recommendations to countries. Additionally, Panama has not ratified ILO Convention No. 169 and is not obligated to act according to its principles. However, the proponents of the dam have ignored the other international legal mechanisms which Panama has signed and the text within Panama's Constitution which demands the respect of indigenous communities. The American Convention on Human Rights, also known as the "Pact of San Jose, Costa Rica", mandates equal protection of individual security, property rights, and other basic human rights of all, including indigenous communities.⁹ Panama has ratified this convention and is therefore responsible for obliging by its guidelines. Additionally, since Barro Blanco is a registered CDM project, it is obligated to follow the "Rules, Practice & Procedures" outlined by the CDM which requires that stakeholders be involved in the decision-making process.¹⁰ The Ngöbe-Buglé are clearly a stakeholder, yet were not incorporated in the process of approving Barro Blanco. Also, Panama is a party to the Convention on Biological Diversity which states that nations must respect and preserve indigenous knowledge and lifestyles.¹¹ Lastly, the Panamanian Constitution guarantees collective land rights to indigenous communities, known as *comarcas* and encourages that "special attention" is paid to them;

however Barro Blanco will greatly devastate the livelihood of the Ngöbe-Buglé.¹³ For these reasons, the argument of the proponents is not fully sound.

II. Opponents' Argument

The opponents of Barro Blanco are mainly the Ngöbe-Buglé indigenous community, local and international human rights and environmental non-governmental organizations. They focus on the lack of respect paid to the Ngöbe-Buglé who will be greatly impacted by the construction and operation of the dam. The Legal Director of the Environmental Advocacy Center of Panama (CIAM) claims that “the public forum where the project was discussed was held as a community meeting without a clear notification of its true objective, and there was no representation from affected indigenous communities.”⁶ They argue that this lack of consent or consultation does not comply with the national or international legal standards. Opponents highlight the fact that Barro Blanco is being built on the communal land of the Ngöbe-Buglé which the Panamanian government legally recognizes and protects. While accepting that the UN Declaration on the Rights of Indigenous Peoples is non-binding, opponents argue that it is a well respected international mechanism attempting to guide the behavior of states toward respecting the human rights of indigenous peoples. For this reason, Panama can still be seen as having obligations toward complying with this “soft law” mechanism.

However, other international legal mechanisms protecting indigenous rights are binding. Mostly notably, the American Convention on Human Rights mandates the protection of the human rights of all individuals, which clearly includes indigenous peoples.⁹ The dam would displace members of the Ngöbe-Buglé and would threaten their livelihood, clearly interfering with the fulfillment of their human rights. Also, the Convention on Biological Diversity emphasizes the importance of protecting indigenous knowledge and lifestyles, and the dam would directly interfere with this.¹¹ Because Barro Blanco is a registered CDM project, it must

oblige by the requirements in the “Rules, Practice & Procedures” which ensures the involvement of all stakeholders.¹⁰ In this case, the Ngöbe-Buglé are a key stakeholder and were not included, therefore making the project illegal under international CDM code. Finally, Panama’s own Constitution guarantees the collective land rights of the *comarcas* and gives special attention to the economic, political, and social aspects of indigenous peoples.¹³

Conclusion

The Barro Blanco dam does violate international law as it goes against environmental and human rights international legal mechanisms as well as Panama’s own Constitution.

Unfortunately, within many developing countries, there has been a clear trend of development overriding the needs of minority groups, especially indigenous peoples. However, it is important that non-industrial countries are given the opportunities to further their development.

Nonetheless, this should not come at the expense of the rights and safety of a portion of the country’s population. Hydroelectric dams are common development projects because they are seen as environmentally sustainable. Yet in actuality, hydroelectric dams can have a net greenhouse gas impact, especially in tropical areas.¹⁶ Dams create reservoirs which consequently release methane, a more powerful greenhouse gas than carbon dioxide. The reservoirs become “methane factories” as vegetation on the flooded land decomposes under the anaerobic conditions at the bottom of the reservoir.¹⁷ As the planet is increasingly threatened by climate change, is important to fully consider the environmental impacts in addition to social impacts of a development project.

¹⁶ Patrick McCully, *Tropical Hydropower is a Significant Source of Greenhouse Gas Emissions: A Response to the International Hydropower Association*, International Rivers Network, <http://www.internationalrivers.org/files/attached-files/tropicalhydro.12.08.04.pdf> (2004).

¹⁷ Philip M. Fearnside, *Greenhouse gas emissions from hydroelectric dams: Controversies provide a springboard for rethinking a supposedly ‘clean’ energy source*, 66 *Climate Change* (2004).